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# The Rise of the Regulatory State of the South

## Infrastructure and Development in Emerging Economies

Edited by Navroz K. Dubash and Bronwen Morgan

OXFORD

# THE RISE OF THE REGULATORY STATE OF THE SOUTH

# LAW AND GLOBAL GOVERNANCE SERIES

*Editors:*
Andrew Hurrell, Benedict Kingsbury, and Richard B. Stewart

Global governance involves the exercise of power, beyond a single state, to influence behaviour, to generate resources, or to allocate authority. Regulatory structures, and law of all kinds, increasingly shape the nature, use, and effects of such power. These dynamic processes of ordering and governance blend the extra-national with the national, the public with the private, the political and economic with the social and cultural. Issues of effectiveness, justice, voice, and inequality in these processes are growing in importance. This series features exceptional works of original research and theory—both sector-specific and conceptual—that carry forward the serious understanding and evaluation of these processes of global governance and the role of law and institutions within them. Contributions from all disciplines are welcomed. The series aims especially to deepen scholarship and thinking in international law, international politics, comparative law and politics, and public and private global regulation. A major goal is to study governance globally, and to enrich the literature on law and the nature and effects of global governance beyond the North Atlantic region.

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# The Rise of the Regulatory State of the South

*Infrastructure and Development in Emerging Economies*

Edited by
NAVROZ K. DUBASH
and
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# *Preface*

This seeds of this project go back as far as 2006 to discussions between us around a sense that debates on regulation in the developing world were often looking in the wrong place. We shared a common frustration with the perpetual emphasis on seeking independence for regulatory agencies, a preoccupation with technocratic formulations, and presumptions of uniformity of circumstance and context. All of these features rested on both a desire for 'politics to go away' and an optimism that it would. We share neither that desire nor that optimism. A substantial motivation for this book is to explain the reasons why, and to encourage scholarship, and indeed the design and practice of regulation in the South (and beyond) to be built on a more sophisticated understanding of the politics of regulatory governance.

Our early thinking on how to respond to this circumscribed debate was rooted in engagement with comparative regulatory politics and the literature on the developmental state. In 2009, we had the opportunity to develop the ideas more comprehensively–both substantively and in terms of an institutional vehicle–through conversation with the Global Administrative Law Project originally based at NYU. This larger project taking forward the ideas of Global Administrative Law in a range of developing country contexts was funded in an open, inclusive and forward-thinking way by the International Development Research Centre (IDRC). In particular, IDRC support enabled us to hold an extremely productive workshop with country study authors and a sub-set of the commentary writers represented in this volume in New Delhi in January 2011. The workshop participants were later complemented with other scholars and the contributors to this book include lawyers, political scientists, economists, planners, sociologists and interdisciplinary scholars who straddle these boundaries. Through close discussion of each others' work, and collective reflection on larger patterns, the workshop and subsequent conversations through email were an important reminder of the gains truly interdisciplinary dialogue can make to a topic such as the role of regulation in economic governance.

A common thread through all the papers prepared by participants at the workshop, and indeed through the larger Global Administrative Law project, was close attention to empirical detail of regulation in the developing world. Attention to empirical details showed that context and local politics did matter hugely, but how? On this question, there was lively discussion and debate, with some arguing for delineation of larger patterns, and others arguing against seeking a positive theory of regulation in the South. We have attempted to capture some of the flavour of these discussions in our concluding chapter and signal ways through this binary opposition.

Finally, as the title of this volume suggests, we were motivated by an observation that the primary concerns of regulatory scholarship in the North were, if not incidental, then certainly often tangential to the questions thrown up by empirical

details of the regulatory state in Southern contexts. Many of those we have engaged with in the course of this project, including some participants in this volume, have pushed back against a crude distinction between 'North' and 'South', particularly at this historical moment, when boundaries between all such categories appear particularly fuzzy. While we accept, and do not intend reified categorization of countries, we still argue, particularly in the conclusion, that the trajectories of many developing countries do, indeed, demonstrate empirical features that particularly bring into focus the need to engage with the political context for regulation. The South, we suggest, continues to be a useful category, albeit one to be used with care and nuance.

What started as a somewhat perplexed conversation between the two of us has been dramatically enriched by interaction with many fellow travellers and guides. As the moving spirit behind the Global Administrative Law project, Benedict Kingsbury provided both intellectual feedback and strategic guidance; and as important, continuous and unabated enthusiasm. Mariana Prado was instrumental in shaping the contours of this project at its inception, and has since contributed a strong chapter to the volume. In addition to participating in our workshop and writing a commentary for this volume, David Levi-Faur encouraged us to put together a special issue of *Regulation and Governance* in which earlier versions of some of the papers in this volume were published, and shepherded us through that process. At the Centre for Policy Research, Pratap Bhanu Mehta not only provided full institutional support, but also lent his keen analytical edge at key moments with comments and feedback. Most of all, we are grateful to our fellow contributors to this volume—country study authors and commentary writers both—many of whom have had to painfully work through repeated versions of their papers in response to multiple rounds of comments, in some cases over a three year period.

A number of people have worked extremely hard behind the scenes, making this collaboration possible. Primary among these is Carlo Bonura, who managed the second half of this project, serving as researcher, proof-reader, coordinator and indexer rolled into one. He was a thoughtful sounding board for the ideas expressed here, and we wish him well-deserved success in his career going forward. For much of this project, Katha Kartiki juggled workshop arrangements, project finances, and proof-reading, all with finely honed social skills that kept all project contributors in good humour. Carlo and Katha were joined at various stages by Shibani Ghosh and Shilpi Srivastava, who also contributed to managing the project. In addition to doing her PhD and contributing a co-authored commentary to this volume, Megan Donaldson served as our able interface with the larger Global Administrative Law project. Mr L. Ravi and his team at the Centre for Policy Research smoothly managed the project administration. We owe enormous thanks to them all.

Through this entire process, IDRC has been an exceptional funder, allowing us space and time to craft the project to our satisfaction. We have been fortunate to engage with an exceptional set of individuals at IDRC. David Malone, despite his numerous responsibilities as President of IDRC, was consistently encouraging. Stephen McGurk initially managed this project with an active interest even as he ran IDRC's India office, including finding time to sit through much of our workshop.

We have been very pleased to work with an extremely efficient and cooperative team at Oxford University Press (OUP). We are grateful to Natasha Flemming and Catherine Cragg at OUP and to Subramaniam Vengatakrishnan and his team at SPi Global for the pre-publication process. Each of our partners, Rinku Murgai and Jim Conley, gave us a sufficiently long leash to see this project through, and particularly at crunch moments single-handedly kept family life functioning happily. Our children did what they do best: tear us away from writing about regulation, interrupt our Skype calls, and demand to play. We would want it no other way. Finally, we are glad that what has turned into a multi-year collaboration has strengthened not only our intellectual engagement but also our personal friendship. Given the tensions of what became a cross-continental collaboration with multiple actors and institutions, this, no less than the completion of this project, is to be celebrated.

Navroz K. Dubash and
Bronwen Morgan

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**Understanding the Rise of the Regulatory State in the South**
Navroz K. Dubash and Bronwen Morgan

**Judiciaries as Crucial Actors in Southern Regulatory Systems: A Case Study of Indian Telecom Regulation**
Arun Thiruvengadam and Piyush Joshi

**Regulatory Mobilization and Service Delivery at the Edge of the Regulatory State**
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**Implementing Independent Regulatory Agencies in Brazil: The Contrasting Experiences in the Electricity and Telecommunications Sectors**
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**Civil Society and the Regulatory State of the South: A commentary**
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# *Contents*

# *List of Abbreviations*

| | |
|---|---|
| ADB | Asian Development Bank |
| ALBA | Bolivarian Alliance for the Americas |
| ANA | Agência Nacional de Águas |
| ANATEL | Agência Nacional de Telecomunicações |
| ANCINE | Agência Nacional do Cinema |
| ANEEL | Agência Nacional de Energia Elétrica |
| ANP | Agência Nacional do Petróleo |
| ANS | Agência Nacional de Saúde Suplementar |
| ANTAQ | Agência Nacional de Transportes Aquaviários |
| ANTT | Agência Nacional de Transportes Terrestres |
| ANVISA | Agência Nacional de Vigilância Sanitária |
| AP | Andhra Pradesh |
| APERC | Andhra Pradesh Electricity Regulatory Commission |
| ARENTO | Arab Republic of Egypt National Telecommunications Organization |
| AWCP | Associative Water Center Philippines |
| BITs | bilateral investment treaties |
| BJP | Bhartiya Janata Party |
| BOOT | Build Own Operate Transfer |
| BOT | Build Operate Transfer |
| BTA | Basic Telecommunications Agreement |
| CAA | Compañía de Aguas del Aconquija S.A. |
| CBI | Central Bureau of Investigation |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CESCR | Committee on Economic, Social and Cultural Rights |
| COAI | Cellular Operators Association of India |
| CPC | Certificate of Public Convenience |
| CPE | Centre for Popular Empowerment |
| CRA | Commission for Drinking Water and Sanitation |
| DERC | Delhi Electricity Regulatory Commission |
| DoT | Department of Telecommunications |
| EEC | European Economic Community |
| EU | European Union |
| FDC | Freedom from Debt Coalition |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| GDP | gross domestic product |
| GMOs | genetically modified organisms |
| GOT-IT | Group on Telecom and IT |
| GWG | global water governance |
| GSM | Global System for Mobile |
| ICC | Interstate Commerce Commission |
| ICSID | International Centre for Settlement of Investment Disputes |

| | |
|---|---|
| IDRC | International Development Research Centre |
| IEL | international economic law |
| IMF | International Monetary Fund |
| IPD | Institute for Popular Democracy |
| IPO | Initial Public Offering |
| IRAs | independent regulatory agencies |
| IR | independent regulation |
| IRs | independent regulators |
| ISI | import substitution industrialization |
| ITA | Declaration on Information Technology of the WTO |
| KERC | Karnataka Electricity Regulatory Commission |
| MCIT | Ministry of Communications and Information Technology |
| MERALCO | Manila Electric Rail and Light Company |
| MWSS | Metropolitan Waterworks and Sewerage System |
| NDA | National Democratic Alliance |
| NGO | non-governmental organization |
| NRW | non-revenue (producing) water |
| NTP 94 | National Telecom Policy of 1994 |
| NTP 99 | National Telecom Policy of 1999 |
| NTRA | National Telecommunication Regulatory Authority |
| NWRB | National Water Resources Board |
| OECD | Organization for Economic Cooperation and Development |
| PIL | public interest litigation |
| POs | peoples' organizations |
| RIA | Regulatory Impact Assessment |
| RWAs | Resident Welfare Associations |
| SOEs | state-owned enterprises |
| SSWPs | small-scale water providers |
| TDSAT | Telecom Disputes Settlement and Appellate Tribunal |
| TE | Telecom Egypt |
| TPSB | *Tubig Para Sa Barangay* ('Water for the Community' programme) |
| TRA | Telecommunication Regulatory Authority |
| TRAI | Telecom Regulatory Authority of India |
| UAS | Unified Access Service |
| UNDP | United Nations Development Programme |
| WB | World Bank |
| WLL | within the local loop |
| WTO | World Trade Organization |
| WWTA | Wired and Wireless Telecommunications Authority |

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# 1

# The Rise of the Regulatory State of the South[1]

*Navroz K. Dubash and Bronwen Morgan*

This book chronicles a somewhat paradoxical moment in the institutional contours of the global political economy. As the ongoing reverberations of the 2008 global financial crisis continue to be keenly felt in the North, scholars have begun to question whether we are seeing a collapse of the regulatory state paradigm and an emergence of a greater focus on more direct political intervention, and increased political responsibility (Lodge and Wegrich 2010; Vonk 2008). Yet in the global South, the 1990s and early 2000s established a legacy of energetic institution-building around the contours of that very regulatory state (Henisz et al. 2005). In both sites, arguments for and against a regulatory state often rest on a dichotomy between regulation and politics that reflects one of the three major assumptions of the field of regulation as recently chronicled by Moran (2011): its strong ties to approaches influenced by economic theories. As will become clear, this book argues broadly in favour of a reorientation of regulatory theory to *accommodate* the 'turn to politics' that is now so evident in the North. It does so by taking up Moran's call to challenge all three major assumptions of the field: not only the primacy of economic theory perspective but also the influence of nation-state assumptions and Anglo-American experience.

Rather than seeing a 'turn to politics' as undercutting the rise of the regulatory state, we would suggest that it reveals dynamics that are an inevitable—and not necessarily malign—dimension of the regulatory state. Viewed from the perspective of inductive generalization from a select number of case studies of infrastructure reform in the global South, the integration of political dynamics into understandings of the regulatory state is crucial for moving the field forward in productive ways. For as Henisz et al. (2005) document, the rapid growth of formal separation

[1] This work was carried out with the aid of a grant from the International Development Research Centre (IDRC), Ottawa, Canada. We are grateful to the IDRC for its support. We are also particularly grateful to Carlo Bonura who has gone beyond research assistance to provide valuable substantive input, as also have Katha Kartiki, Shibani Ghosh, and Shilpi Srivastava who worked on this project at various points in its life.

of regulatory authority from the executive branch is typically *not* accompanied by de facto regulatory depoliticization. This is a finding that we explore in detail in this book. We link it in the opening chapter to three shared contexts that we would contend unite an otherwise deeply disparate 'Southern' experience with the regulatory state: highly salient transnational pressures on the state; comparatively intense redistributive politics; and limited state capacity.

In Part One of this book we present seven country-based case studies of regulatory reform, followed by eight commentaries on this material from diverse theoretical perspectives in Part Two. Drawing together the lessons from this material in the Conclusion, we develop an analytical framework centred on an embedded regulatory state positioned on a spectrum between 'rules and deals', and shaped by a modified and expanded range of contextual factors. The conceptual framework for both introductory and concluding chapters is particularly influenced by scholarship on the developmental state and public law-influenced regulatory scholarship.

This book expands on arguments first advanced in a special issue of the journal *Regulation and Governance*, which published a subset of our case studies and one of the cross-cutting commentaries in 2012. This introductory chapter echoes many of the points made in introducing that special issue and reflects the intellectual starting point we had for framing research on the rise of the regulatory state of the South. The more extended journey enabled through a larger number of case studies and the wide-ranging and diverse commentaries collected here is integrated into the Conclusion, which complicates and deepens this starting point, as well as providing some direction for coping with key legitimacy issues thrown up by integrating politics more closely into our understanding of the regulatory state.

In the remainder of this introductory chapter, we clarify the scope and assumptions of the broader project, present a literature review of extant scholarship on the regulatory state of the South, and articulate the three shared contexts that we contend unite the otherwise disparate contexts 'of the South'. Locating a research agenda 'in the South', of course, is a broad-brush statement, and we say more below about what we do and do not mean by 'the regulatory state of the South'. But first we clarify the other important component of the title phrase: the regulatory state.

The concept of the regulatory state at its broadest (Yeung 2010) connotes greater reliance on institutions operating at arm's length from government, insulated from daily political pressures and embedding their decisions in technical expertise. In Phillips' words: 'the emergence of the regulatory state . . . is characterised by an increasingly rule-based, technocratic and juridical approach to economic governance, in which there is a greater emphasis on institutional self-regulation' (Phillips 2006, p. 24).

We considered using the term 'regulatory governance' in place of 'regulatory state', since the former is obtaining growing currency and better reflects our own attention to how regulatory institutions interact with other institutions in shaping patterns of governance. However, the more cogent, albeit narrower term 'regulatory state' has three advantages. First, it allows us to more effectively trace the empirical material in this volume to the import of ideas about the regulatory state from the

North. Second, it allows us to capture the notion that regulatory modes of government can be as much about enhancing the positive role of public administration as about limiting and constraining the state. In its history, the notion of the regulatory state has encompassed a full spectrum between these differing interpretations (Morgan 2007; Levi-Faur 2008), but the core idea of arm's-length, politically insulated expertise is common to both ends of the spectrum. Finally, making the regulatory state central to our discussion better facilitates a consideration of its important relationship to ideas of the developmental state. Indeed, our subtitle implicitly references a relationship between these three points: infrastructure is not only the empirical focus of our research (as we discuss further below) but the regulatory state itself might also be seen as part of the 'infrastructure of development'. Seen as such, we would emphasize the *enabling* character of regulatory institutions for fostering *development*, in contrast to much of the more mainstream regulatory literature's focus on regulation as a *state-constraining* dimension of *market* infrastructure. As this contrast implies, we seek to redirect the content of flow of ideas from North to South in this respect.

While these are the 'big' questions that animate our inquiry, 'infrastructure', of course, also has a narrower meaning relevant to the somewhat narrow *empirical* focus around which the research for this book was organized. That focus selects out a particular dimension of the regulatory state, and particular policy sectors for the inquiry. As for the first dimension, we focused on the emergence of law-backed specialized agencies operating through administrative means to support the unitary goal of economic efficiency: what Anglo-American scholarship often refers to as 'independent regulatory agencies'. We were especially interested in the manner in which these agencies interact with related governmental and civil society institutions that constitute the broader regulator space. Second, we narrowed that focus further by exploring the introduction of regulatory agencies in the context of essential infrastructure sectors: water, telecommunications, and electricity. This was for two reasons. First, vital infrastructure industries were typically crucibles for the initial introduction of regulatory agencies in many parts of the industrialized North, with the exception of the US, which has a much longer history of reliance on regulatory agencies in a much broader array of sectors. But in the UK, Canada, Australia, and New Zealand as well as (more recently) a range of continental European countries, the institutional reform of infrastructure sectors in the 1980s was a precursor to parallel developments in the South starting in the 1990s, and the experiences of this sector have in many ways been exemplary in terms of influencing patterns of institutional transplant in the South. Second, these are policy areas directly affecting consumers in the provision of essential services, which gives them a very high social salience. The high social salience of essential infrastructure intensifies the implications of what we argue are distinctively Southern shared contexts for the development of the regulatory state.

This brings us to the question of what we intend to convey by attaching the descriptor 'the South' to the general notion of the regulatory state. We use the term to invoke a set of shared histories of many countries in the geographic South—from

colonialism, to widespread poverty, and a predominant policy concern with the process of 'development' over the past few decades. This is not to claim that the regulatory state manifests in similar ways in contexts as diverse as sub-Saharan Africa, Latin America, and rapidly industrializing states in Asia. But it is to suggest that similar past histories create a shared context that is relevant to how we characterize the rise of the regulatory state of the South. Here, we focus on three such contextual elements and suggest that these three contexts taken together may (the question is deliberately left open) require a recharacterization of some of the theoretical assumptions underpinning the literature on the regulatory state.

The first shared context is the presence of powerful external pressures, especially from international financial institutions, to adopt particular policy transplants, particularly the institutional innovation of regulatory agencies in infrastructure sectors. These pressures reflect the dominance of the Washington Consensus in many policy environments in developing countries in the 1980s and 1990s (Williamson 1990). During this period, the process of integrating national and regional economies into the global economy combined with conditions placed on international loans (especially relating to the liberalization of utilities sectors) and the widespread use of international consultants using developed country regulatory reform templates to support the implementation of such loans. The enduring influence of such external pressures can be seen in the World Bank publication, *Handbook for Evaluating Infrastructure Regulatory Systems*, which takes a relatively autonomous independent regulatory agency as the starting point for institutional design in the utilities sector (Brown et al. 2006). The first part of our chapter addresses this theme in more detail.

The second shared context for a broad range of countries of the South is the greater intensity of redistributive politics in settings where infrastructure services are of extremely poor quality and often non-existent. Transformative sector reform processes aimed at revitalizing or remaking institutional arrangements for infrastructure services inevitably create winners and losers, and regulatory decisions are often determinants of who wins and who loses. The resultant politics of distribution inevitably draw in other actors, such as civil society and the courts; regulation is seen as too important to be left to regulators: a broadened focus we explore in the second part of our chapter.

The third part of our essay develops our third and final shared context for the South as a whole: the question of limited state capacity—this has both a 'thin' and a 'thick' dimension. The 'thin' dimension relates to whether the budget and personnel constraints in the South are sufficiently powerful to generate a distinctive trajectory of institutional reform. The 'thick' dimension concerns questions of whether, in the context of limited state capacity, a different type of state altogether emerges to address the relevant policy challenges: in particular, the notion—recently on the rise again—of a development state.

In exploring these shared Southern contexts, we aim to take seriously the historical legacy of the idea of a North/South divide while also acknowledging the limits to this purported divide caused by increased economic integration between North and South, and increased differentiation within the South. The

diversity of the South is represented by seven case studies: these explore the water sector in the Philippines, Argentina, and Colombia; the electricity sector in India and Brazil; and the telecommunications sector in India, Brazil, and Egypt. Two of the chapters include a sectoral comparison, comparing water and electricity in Argentina, and electricity and telecommunications in Brazil. This array of cases does not represent a systematic selection of possible national varieties within the South: rather, they are intended to act as empirical springboards for an inductive exploration of our core question.

The commentaries in Part Two begin the process of that inductive exploration. Five commentators articulate views from particular theoretical perspectives, including political economy (one with a more transnational focus, the other more comparative-national), the history of the administrative state, development economics, and developmental state literature. Two commentators focus thematically on the role of law and the role of civil society in the rise of the regulatory state. One commentator concentrates on what the story of the rise of the regulatory state looks like through the lens of what is happening in China—a notable absence in our array of case studies. We do not have any case studies or commentary from Africa, an important absence to which we hope further research will respond.

Our core question, then, for exploring the three shared contexts for otherwise quite different countries in the South, is this: are there distinctive features of the contemporary 'regulatory state' of the South? To contextualize our response to that question, we first review existing literature on the rise of the regulatory state in what Moran refers to as 'the world beyond the North Atlantic basin'.

## I. Literature review

As mentioned at the outset, much of the extant body of work on the regulatory state focuses on the US or Europe (Moran 2011). More recently, however, a growing body of work that incorporates or focuses more specifically on the South has emerged. One important strand of this is what one might call a 'policy literature', which tends to evince, along with empirical analysis, a concurrent normative impulse to 'correct' distinctively 'Southern' features, such as weak state capacity in the service of the 'best-practice' model being imported. This policy literature is underpinned by two particularly influential strands of academic argument on the regulatory state, both explanatory in orientation, with a tendency to assume relatively homogenous pathways of development and modernization globally. Spiller's work (Spiller and Tommasi 2003, 2005; Levy and Spiller 1994) as well as that of Majone (1997, 2001) prioritized functional arguments for the transplant of independent regulatory agencies, viewing them primarily as agents of depoliticization that diffuse across countries in a process of institutional isomorphism.

Each of these two approaches in a different way highlights a theoretical framework of sustaining 'credible commitments' in the context of delegation to non-majoritarian institutions. For Majone (2006), the legitimacy of 'non-majoritarian'

bodies is obtained through expertise, consistency, and other such technocratic virtues. However, this solution rests on being able to draw a clear line between efficiency objectives, for which legitimacy can be obtained through expertise, and redistribution, for which political accountability is necessary. Our second shared context, the prominence of redistributive politics in developing countries, enables us to explore what happens when this clear line is challenged and blurred. For Spiller, the problem of government opportunism is central; regulation provides a possible solution, if a complex and contingent one, by providing credible commitments from the perspectives of investors. But in focusing on governmental opportunism as a deterrent to investors, concerns of regulatory legitimacy in the eyes of others, notably the public, get little attention. These broader concerns are particularly salient to our critical focus on state capacity and the relevance of competing state 'types', especially that of the developmental state.

As the third section of this chapter will elaborate, moving beyond the government–investor relationship in characterizing regulatory developments potentially draws in literature from political sociology that explores the developmental state as an institutional trajectory distinctive of the non-Organization for Economic Cooperation and Development (OECD) world (Trubek 2008; Evans 1995). The developmental state literature emphasizes different configurations of state and civil society, and different patterns of engagement between them compared with regulatory state literature, but linkages between the two are gradually emerging (Jordana 2011; Sinha 2003), especially in the context exploring the redistributive functions of state policy (Riesco 2007).

Focusing for the moment more specifically upon the regulatory state literature, there seems to be an encouraging swell of interest in exploring the rise of the regulatory state in the context of the South. These take two broad forms: studies of regional trends, and single-country (or even single-sector within a country) case studies. We build on this work, even while noting that the broader studies often generalize in ways which tend to re-embed the (depoliticized) conceptual sway of the developed country literature, while those that focus on country-specific particularities can find that their general import is somewhat lost.

Broad pictures of regional trends in the South have been documented, both in Latin America (Jordana and Levi-Faur 2006) and also in Asia (Ginsburg and Chen 2009; Jayasuriya 2001, 2004; Cheun 2005; Jarvis 2010). Regional-trend approaches necessarily operate at a relatively high level of generalization and often focus upon the common reproduction of descriptively institutional features, and the causes of such diffusion, whether from a long-view historical and geographical perspective (Levi-Faur 2003; Jordana et al. 2011) or working inductively from a range of case studies in Southern countries (e.g. Eberhard 2005; Minogue and Carino (2006); Cook and Mosedale (2007)). Often, the intertwined nature of politics and regulation is acknowledged at the case-study level, but this does not easily translate back to the theoretical level.

Thus, for example, both Eberhard (2005) and Cook and Mosedale (2007) take seriously the institutional and resource constraints faced by developing countries,

and the greater dominance of poverty as an urgent policy issue in these countries. Yet, in both cases, they develop responses that prioritize a functional account of relatively depoliticized institutional design issues. Eberhard stresses the importance of hybrid and transitional regulatory models incorporating varying degrees of regulatory discretion, giving priority to institutional and organizational change rather than political reform (e.g. the use of regulatory contracts, expert panels, mandated periodic reviews of regulators or partial-risk guarantees and the like). The contributions to Cook and Mosedale (2007) also foreground a perspective that places competition at the conceptual heart of the regulatory state, integrates institutional specificity of developing countries in terms of technical capacity-building, and addresses poverty as a relatively apolitical function of the welfare and distributional effects of regulation and competition.

Complementing these regional approaches, and emerging in large part somewhat more recently, are single-country case studies, in particular of China (Hsueh 2011; Pearson 2005; Lu 2000) and India (Rudolph and Rudolph 2001); as well as of particular sectors within countries (Raghavan 2007; Mukherji 2009; Dubash and Rao 2007; see also Peci and Sobral 2011). Single-country and single-sector case studies often emphasize the specificity of local variations of the regulatory state, an approach which resonates well with the stress on micropolitical sensitivity that this chapter will develop in the main body. For example, Kayaalp's (2012) ethnographic exploration of regulatory reform in Turkey's tobacco industry emphasizes the multiplicity of actors that bear upon the trajectory of regulatory politics around a single agency, and the contingency and unpredictability of the process of institutional transplant. Interestingly, some very recent work on regulatory agencies in Turkey has taken the additional step of making a more general argument that in more illiberal national settings (referring briefly to Hungary, Russia, and Venezuela but focusing largely on Turkey), even where the regulatory state took hold temporarily, a process of 'de-delegation' is now occurring that sees a return of centralization, executive discretion, and politicization of bureaucracy (Ozel 2012). While the case studies in this special issue do not draw on notably illiberal polities, they demonstrate many instances of micropolitics that could be regarded as broadly consistent with the empirical observations underpinning 'de-delegation'. We would view these micropolitics, however, as both open to important variation and also as potentially constructive in responding to the distinctive challenges of the three shared contexts of the South we have identified above. Thus, we hope in this special issue to move inductively from our empirical case-study countries towards a clarification of fruitful future research directions that flesh out these three shared contexts, contexts that link disparate Southern trajectories of the regulatory state.

The remainder of this chapter proceeds in three sections to explore those contexts, focusing, first, on the way in which regulatory agencies in infrastructure sectors emerged largely as a result of the imposition of external pressures, second, on the politics of redistribution and how they shape the broader regulatory space, and third, on larger questions of state capacity.

## II. Transplanting institutions

Regulatory agencies were established across the developing world in the 1990s during a period when linked agendas of privatization and liberalization were dominant. As part of the so-called 'Washington Consensus', regulatory agencies reflected these agendas. They provided a means for decision-making insulated from day-to-day political direction and were staffed by professional expertise. In the electricity sector, for example, the World Bank, which played an important role crystallizing these ideas into transplantable 'best practice', established a policy that made its lending for electric power contingent on a slew of reforms, including establishment of transparent and independent regulation (World Bank 1993). These requirements were followed by a slew of scorecards (Bacon 1999) and other such metrics to assess and encourage progress towards the conventional wisdom of the day. In the water sector, earlier versions of World Bank policy promoted private sector participation in service delivery and commercialization of service structures without extensive attention paid to regulatory institutions (World Bank 1997). After a decade of experience with such reforms, however, the Bank's second edition of its toolkit for private-sector participation in water supply put a much greater emphasis on robust regulation, as well as on consultation and consensus-building with stakeholders (World Bank 2006; Bakker 2010, p. 100).

In many cases, the establishment of regulatory agencies in the developing world as part of loan conditions by multilateral development banks (Dubash 2006) included an element of what DiMaggio and Powell (1991) call 'coercive isomorphism'. However, equally important was the mechanism of 'normative isomorphism' through the spread of professional networks, often including consultants who propagated an institutional solution to apolitical and technocratic regulatory decision-making to accompany the privatization and liberalization of utilities.

The key question raised by the high salience of external influence on the trajectory of the regulatory state of the South is: when institutional change is driven by external pressures and influences, how does the theoretical account of the regulatory state change? In comparison with the adoption of regulatory agencies in the North, we suggest one important distinction lies in this: the process of filtering institutional purpose, design, and practice through national political processes is attenuated or even dispensed with entirely. As a result, the institutional form of the independent regulatory agency is transplanted, but without common understandings across political actors of its purpose, and the viability of implementation. Metaphorically, regulatory agencies of the South are more likely to begin as relatively hollow institutional shells, which are populated by expectations, norms of institutional practice, and operational rules and cultures over time.

For instance, the original motivation for the creation of regulatory agencies among their designers is often uniformly on 'credible commitments' to ensure stability and predictability for private investors. However, as Dubash's case study on India suggests, national political processes may well force consideration of a parallel concern with credible commitments to local consumers. These dual efforts

at credible commitments are almost inevitably in tension with each other, in a manner that forces political contestation early in the process, thereby undercutting the very rationale of apolitical and independent regulators.

The challenge of regulatory transplant is further exacerbated by the common use of international consultants, who bring cross-country experience but a lack of appreciation of local context. The dissonance between regulatory conception and political realities is startlingly evoked in a self-reflective article by seasoned regulatory consultants, who bemoan the 'inconsistency of the objectives among international agencies and host governments, . . . the lack of understanding about the implications of the models adopted, and, . . . incompatible conditions' within which implementation is expected to occur (Rosenzweig et al. 2004). While *ex post* adjustment is a feature of adoption of any new institutional form, in this case, the failure to pass regulatory design through the test of national politics suggests the possibility of considerable institutional confusion. Just as a culture of the rule of law can only become embedded in a different political and cultural setting over many decades (Méndez et al. 1999), so too the culture of institutional autonomy of regulatory agencies cannot be imposed as a 'quick fix' from external sources.

The research agenda implied here is the need to pay adequate attention to the moment of regulatory transplant, and to understand the ways in which the objectives and design of regulatory institutions internalize local political and institutional context, and the manner in which they are subsequently shaped through the process of embedding. Each of Badran, Dubash, and Urueña's chapters pay close attention to the moment of regulatory transplant. Badran's exploration of telecommunications reform in (pre-revolution) Egypt notes the inapplicability of core assumptions of mainstream regulatory theory to authoritarian regimes, while Urueña emphasizes the dual nature of global water governance discourses as they operate in Colombia, sourced from both human rights and from international economic law. Dubash, meanwhile, in his comparison of different Indian states' regulatory reform pathways in electricity, integrates right from the start the importance of varying political coalitions at the domestic level interacting with transnational pressures to introduce regulatory agencies. All three chapters then track a process of embedding these external pressures into national contexts, though different actors are highlighted as critical by each chapter—consumer groups play an unexpectedly interesting role in some Indian states, ministerial influence is important in Egypt, and the courts play a significant role in Colombia. The importance of this wider conception of 'regulatory society' beyond the regulatory agency is a continuing theme in the shared contexts we continue to explore.

## III. Redistributive politics and regulatory society

We have suggested above that when institutional change is driven by external pressures and influences, regulatory agencies at their inception are relatively hollow institutional shells, but are populated by expectations, norms of institutional practice, and operational rules and cultures over time. The default initial construction of

the regulatory state in the South, however, is that of Majone's influential account of the rise of the regulatory state in Europe: when efficiency goals are paramount, legitimacy is accorded to depoliticized expert knowledge. This presupposes, however, a neat distinction between efficiency and redistribution. In other words, while Majone acknowledges that redistributive politics may be both ineradicable and legitimate in the context of a modern regulatory state, his solution is to impose a division of labour in response to such politics in which independent regulatory agencies make policy decisions only in accordance with efficiency criteria, while the political branches respond to calls for redistribution with separate policies. However, as Haber has argued, this frequently has not held true even within the North, where the interaction between redistributive and regulatory politics in the context of economic liberalization of essential services has led to the rise of 'regulatory welfare regimes' that effectively smuggle social goals via the back door into the regulatory regime (Haber 2010).

Experience from the South suggests that this division between efficiency and redistribution is even less plausible for at least three reasons. First, the context for service delivery in the South is one of low levels of access to services. The simple fact of greater and widespread poverty in developing countries can affect the nature of the regulatory task by increasing the challenge of spreading the costs of regulatory reform. For example, the oft-repeated principle of cost recovery espoused by multilateral agencies carries far greater political and welfare implications in poorer nations where increasing costs can, in practice, mean exclusion from basic services. Moreover, the existing portion of the population lacking any essential services is typically far greater than in the North, making coverage extension targets for infrastructure projects much harder to reach by means of regulatory techniques typically exerted in the North.

Second, service delivery sectors in the South are often financially, technically, and institutionally dysfunctional, a condition that prompts reform to begin with. Poorly functioning sectors often place newly formed regulatory agencies in the politically difficult position of allocating the costs of transition across social classes ill-equipped to bear them. Redistributive politics are embedded in the very contexts that give rise to regulatory agencies.

Third, and closely related to the first two, regulators in the South emerge in a context of weak legitimacy of the executive, which is perceived as having failed to deliver basic services, and scepticism of the legislature, which has failed to reverse this situation. This is somewhat *contra* narratives in the North, where regulatory agencies are perceived as having a political legitimacy problem as compared with more directly accountable arms of government (Vibert 2007; Shapiro 1988). The resulting vacuum can lead to an activist judiciary and/or an active civil society, catalysing extensive dialogue between regulatory agencies, non-state actors, and political branches. While not an important theme in this volume, it is relevant to note that other Southern contexts represent the opposite extreme, in having to deal with past or even present authoritarian legacies (Moustafa 2007; Badran 2012; Ozel 2012). In these cases, the messiness of multiple actors disappears, but so also does any notion of regulatory independence.

Despite these empirical realities, the conceptual hold of an underlying distinction between efficiency and redistribution is certainly present in work on the South, such as Jayasuriya's early writing on East Asia. Focusing on institutional architecture, Jayasuriya in earlier stages of his work linked the rise of the regulatory state to negative coordination—institutional autonomy and non-interference across administrative units—while the developmental state is associated with positive coordination—coordination and bargaining for the purpose of reaching a superior set of outcomes (Jayasuriya 2001). His argument depends on a Majone-like distinction between using negative coordination to ensure 'credibility and commitment to market order' and, presumably, the promotion of efficiency, and the use of 'compensating mechanisms' through positive coordination to address distributional concerns (Jayasuriya 2001).

For at least two reasons, Jayasuriya's argument can, however, be reconciled with our claim about the difficulty of separating efficiency and distribution. First, Jayasuriya writes in the context of management of monetary policy and independent central banks in particular. The populist politics that often drive service delivery sectors, with which we are concerned, are notably absent in this context (except perhaps at crisis times as the eurozone crisis suggests). Second, and more theoretically interesting, Jayasuriya's argument hinges on a shift from a focus on outcomes associated with positive integration to a preoccupation with process, and particularly with monitoring processes that determine institutional objectives, in the context of negative integration. As he argues, developmental states in East Asia are now more focused on procedure-based economic management in contrast to an earlier focus on bargaining over outcomes; this shift has a depoliticizing effect (Jayasuriya 2001).

While the depoliticizing effects of proceduralization may have been contingently true in the early 2000s (at the time of writing and particularly in the context of central banks) in the context of basic services, more recent developments suggest alternative potentialities of proceduralization, some of which Jayasuriya responds to in his new commentary for this book. Under certain conditions, procedural changes ushered in through the creation of regulatory agencies, such as transparency provisions and hearings, can create opportunity structures within regulatory agencies that foster their status as new democratic spaces (Dubash 2006; Morgan 2004, 2006; Prosser 2000). Indeed, regulatory agencies can even serve as an important facilitator of broader political mobilization, in ways quite unanticipated by designers' intent on providing safeguards to investors. In this sense, proceduralization can lead to a broadening of political activity beyond the preoccupation of Jayasuriya's earlier work with inter-agency bargaining.

This resolution invokes the metaphor we sketch earlier in this chapter of regulatory agencies as relatively hollow shells, fleshed out through inter-institutional competition and collaboration in locally specific ways. If verified through a broader range of empirical studies, this process of local specificity-driven regulatory forms may well call into question the generalizability of *outcome*: the sheer diversity of potential outcomes goes beyond even efforts to develop typologies of varieties of regulatory capitalism (Levi-Faur 2011b; Murillo 2009; Post 2009;

Martínez et al. 2009). Instead, it may be more fruitful to generalize ways in which the *process* of regulatory development unfolds. For example, provisions ensuring transparency may become viewed as general preconditions for regulatory dialogue, while hearings and requirements for reasoning and redress provide and amplify voice.

The important point here for a research agenda is the need to explore the micropolitics through which the regulatory state emerges and is filled out. In addition, research should be focused on an expanded array of relevant actors. The role of active civil society and an activist judiciary are particularly ripe for analysis. The most policy-influential extant literature, building on Levy and Spiller, and Majone, tends to sideline these actors and instances of micropolitics while focusing more on macropolitics and prioritizing a technical-functional analysis. If the micropolitics of the regulatory state are taken seriously, the implication is that macropolitics will play a more fluid and less functionalist role in broader theorizing about the regulatory state. Kernels of such an approach are visible in some of the very recent literature mentioned in the literature review, exploring, for example, the diffusion of transnational regulatory norms (Buthe and Mattli 2011; van Zwanenberg et al. 2011) or regulatory impact assessment (Peci and Sobral 2011). These authors insist, much as we do, on the insufficiency of organizational capacities and the importance of political variables.

These themes are developed further in the chapters in this issue. As Chng's chapter on water services regulatory reform in the Philippines strongly suggests, and other chapters such as Dubash's on India indirectly support, the distinctive nature of regulatory tasks in the South mean that regulation is inherently more politically fraught and likely to generate mobilization of some kind. Haber's research, mentioned earlier, demonstrates that developed countries with strong social spending programmes do not experience pressures to develop regulatory welfare regimes. In the South, in the absence of strong social programmes, the political pressure for redistribution typically catalyses, at the very least, ministerial intervention into the content of regulation (Morgan 2008), and in some cases active social mobilization that may be either contentious and adversarial (Morgan 2011) or supplementary to the core regulatory process by constructing non-state social welfare alternatives (Cammett and Maclean 2011; see also Gough and Wood 2006).

Sometimes, contentious adversarialism can in the process construct non-state social welfare, as Chng shows in his chapter. He argues that regulatory mobilization is a crucial dimension of the regulatory state in the South, defining it as contentious collective action by organized citizens in the identification, subversion, and occasional creation of rules over the provision of basic goods and services. Focusing on the actions of informal water providers in the Philippines, he shows how 'brokering' non-governmental organizations (NGOs) institutionalize previously weakly connected sites of local resistance into a sustainable network with regulatory clout, assist local informal operators in securing formal cooperative status, and support dialogues that influence macropolicy issues in favour of the local cooperative operators. In this way, regulatory mobilization augments or activates the regulatory capacity of the state, even while it is also adversarial in nature.

A different implication of adversarial politics pressuring regulatory agency is taken up in Post and Murillo's chapter comparing electricity and water reforms in Argentina in the context of the 2000 currency crisis. In the wake of this crisis, which catalysed very powerful redistributive pressures on elected officials, there was extensive renegotiation of many long-term infrastructure contracts. Post and Murillo find that the direct negotiation between investor and the state displaces the salience of the regulatory agency at such times, suggesting an extreme example of the pervasiveness of politics that we are pointing to in many other settings. They also find that the type of private investor involved makes a significant difference to the outcome of renegotiations, with domestic investors who have a diverse range of holdings in the country much more likely to renegotiate rather than exit.

Moving from civil society and private investors, a third implication of the combination of powerful redistributive politics and the proceduralization introduced by the regulatory state is increased judicialization. Theorizations of the rise of the regulatory state along the lines of Majone and Spiller have not typically made the judiciary central, but the World Bank in the 1990s did focus a significant amount of resources and reform energy on reform of judiciaries in developing countries. It did so for reasons closely related to assumptions underpinning a vision of the regulatory state that prioritizes efficiency and credible commitments (Faundez 2009; Maru 2010; World Bank 2011). In essence, courts were viewed as institutions that monitor contract and property rights, and thereby police the boundaries of regulatory frameworks so as to limit state action and curb discretion (Trubek 2008). But emerging research suggests that the judiciary in the South may well be important in rather different ways: ones that resonate more with the broader state–society relations this project considers important. Ginsberg and Chen (2009) track a significant expansion of judicial power in the making of public policy in 11 different Asian jurisdictions, linking it to a diverse array of causal influences ranging from democratic reforms to the fragmentation of political power. Sometimes, an increased role of judicial power may occur in tandem with the contentious political mobilization highlighted above, as when relatively informal, quasi-judicial procedures at local levels play an important role in channelling direct protest into sustained and more routine political leverage. This occurs because legal and quasi-legal dispute resolution particularizes and makes concrete very general rules, thereby allowing small sequential wins and losses for otherwise polarized forces (Morgan 2011).

In the context of this project, the roles that emerge for courts from some of the case studies certainly seem to reference a broader notion of regulatory society rather than a bolstering of the boundaries of the regulatory state. Thiruvengadam and Joshi, for example, argue that the Indian judiciary has played an important role in mediating conflicts arising from telecommunications regulatory reform in the 1990s. Their research illuminates how judiciaries sometimes play unconventional supporting roles to meet the special challenges that are thrown up in the context of the South, in particular by fostering communication and interaction among the diverse institutions in the regulatory space, and by adopting a pedagogical role towards empowering newly constituted regulatory institutions. Similarly, Urueña's

chapter shows how the Colombian Constitutional Court mediated conflicts between neo-liberals and neo-conservatives over the structure of water regulation, upholding the policy of privatization through independent regulatory authorities, but requiring them to establish a notice-and-comment procedure to enhance public participation.

In general, then, the shared context of powerful redistributive politics in the South suggests a strong need for research to focus on a range of different actors in addition to quasi-independent regulatory agencies. The case studies included here highlight three types in particular: courts, civil society, and private business actors. Diverse dynamics of inter-institutional competition and cooperation among these plural actors and the government are more important than a narrow focus on state-embedded agencies, presaging a shift from a 'regulatory state' focus to a 'regulatory society' focus (Braithwaite 2006; Levi-Faur 2011b). These dynamics are forms of accommodation to weak institutional environments, and as such recognize the necessity (and even virtue) of viewing the regulatory state as a political rather than technical enterprise. But the substantive resolution of these political dynamics is often country-specific, as we will see from the diversity of the narratives emerging in the case studies. The common thread between them is that they point to different implications as compared with the more policy-influential accounts of the rise of the regulatory state. We develop this point in more detail in the final section of this chapter.

## IV. State capacity: through thin and thick to the developmental state

The 'commonsense' political consensus of the late 1980s and 1990s within the South has shifted since the moment of transplant inception discussed earlier. In a decentring of the focus on attracting foreign investment that characterized the 1990s, many countries now aggressively promote 'national champions' in infrastructure sectors, such as power sectors (Victor and Heller 2007), and the single-largest new sources of investment are state-owned Chinese corporations. To some extent, the transnational epistemic consensus has also shifted: scholars now speak of a 'post-Washington Consensus' that pays more attention to institutional prerequisites of development and broadens the objective to include concerns of poverty (Stiglitz 1998). But the post-Washington Consensus still treats such concerns as technocratic objectives towards which intervention is to be managed, rather than as a basis for recentring political conceptions of state–society relations. The themes explored in relation to the second shared context, redistribution and multistakeholder politics, are much more central to the trajectories of the regulatory state than the promoters of regulatory transplant would have imagined or wished.

John Braithwaite's perspective on the need to focus more on a 'regulatory society' engages directly with this empirical trend (Braithwaite 2006). He stresses the importance of NGOs and local social pressure groups as an avenue for developing

a 'regulatory society' model that might bypass the regulatory state, and in so doing, avoid problems caused by weak institutional capacity at the state level. He elaborates in ways that bring democratic theory to the forefront of the analysis:

> If we believe that democracy is fundamentally an attribute of states, when we live in . . . a state with limited effective capacity to govern, we are disabled from building democracy . . . and waste our breath demanding state responses that it does not have the capacity to provide. But when our vision of democracy is messy – of circles of deliberative circles, there are many kinds of circles we can join that . . . actually matter in building democracy. (Braithwaite 2006, p. 886)

As we saw earlier in the chapter, the expansion of the concerns of a regulatory agency to 'circles of deliberative circles' often takes place through a form of proceduralization. Similarly, Prosser (2010) has argued that two different visions of regulation contest for space in regulatory debates—one emphasizing regulation as an infringement of autonomy and the other stressing its collaborative nature. Building on this, one could argue that, while procedural safeguards are *useful* for the preservation of an autonomy-based view of regulation, they are *essential* for regulation understood as collaboration. In the limit, as Prosser (1999) suggested quite some time ago, regulation tends towards 'government in miniature', bringing the study of regulation directly into conversation with larger questions of governance. We take up this conversation more directly in the conclusion, arguing that proceduralization is necessary yet not sufficient for coping with the challenges of a regulatory state that integrates rather than rejects political dynamics.

This more expansive view of the regulatory process also modulates policy-dominant views on the nature of a successful regulatory state. State capacity has tended to be defined in thin terms—institutional design criteria, such as autonomy, financial independence, staffing, and so on (Cubbin and Stern 2005; Montoya and Trillas 2009). Prado's chapter, comparing privatization and the establishment of regulatory agencies in Brazilian electricity and telecommunication sectors, points towards the need to engage with a 'thicker' concept of state capacity in her focus on different levels of bureaucratic resistance in the two sectors. These different levels of bureaucratic resistance, partly related to external factors and in particular the greater internationalization of the telecommunications sector, are key factors shaping regulatory outcomes. By paying attention to the detail of the resources, expertise, and traditions of national state officials, her chapter shows how seemingly similar moments of transplant can nonetheless catalyse quite different policy trajectories.

More broadly, 'thicker' forms of state capacity will be necessary if the ability to engage regulatory society is at the core of a well-functioning regulatory state. The state will need to be capable of simultaneously engaging interested state and non-state actors (or stakeholders), while maintaining procedural correctness and the assurances of independence and reasoning that underpin these procedures. This distinction between 'thin' and 'thick' state capacity suggests a conundrum for a research agenda in this area: does an emphasis upon 'regulatory society' sidestep the effects of flawed institutional contexts (as Braithwaite's analysis implies) or does it place even more stringent demands upon it (as Prosser's analysis implies)? We will

see evidence of both of these implications in the case-study chapters, and the commentators divide on this point too. This is perhaps not surprising as general trends pull in interestingly opposite directions. On the one hand, weak institutional environments risk infecting regulatory agencies. At the same time, in weak institutional environments there are arguably more opportunities for building credible relationships with a broader spectrum of domestic actors than is typically done by regulatory agencies in the North, because public faith in executive, legislature, and judiciary are already limited.

Our conclusion deals with these ambiguities by developing the notion of a spectrum between 'rules and deals' on which any particular regulatory state is located. This spectrum is developed from a conversation between regulatory state literature and developmental state literature that we gesture towards here, and which is taken up in detail too in Levi-Faur's commentary and then integrated as an important dimension of our concluding chapter. The tensions catalysed by the interplay of thin and thick state capacity discussed above are connected to the twin tasks of maintaining embeddedness and autonomy simultaneously. This is, of course, the central burden of the literature on the developmental state (Evans 1995), a literature that hitherto has scarcely been in conversation with debates on the regulatory state. But, we suggest, there is much to learn from such a conversation. While early articulations of the developmental state literature were focused on linkages between state and (typically large) capital in the context of East Asian societies (Johnson 1982; Wade 1990; Amsden 1992; Leftwich 1995), more recent articulations have explored whether the developmental state is sufficiently flexible to engage and mediate social pressures for redistribution as well (Evans 1997; Trubek 2008; Evans and Heller (forthcoming)).

If, as argued for above, the broader dimensions of a 'regulatory society' are fully taken into account, theorizing about the rise of the regulatory state of the South and linking these dimensions back to important issues of state capacity will lead directly to considerations of whether a new kind of state is emerging—one perhaps no longer well captured by the epithet 'regulatory' at all. While developmental state scholars have explored over the last decade the need for the state to work pressures for redistribution into their analytic frame, regulatory scholars have been much slower to do so. The thrust of the earlier section of this chapter has been to stress how necessary this effort is. The most recent scholarship on the re-emergence of the developmental state explicitly suggests that state capacity must be linked to broader state-society ties more than ever before, to respond adequately to the pressures of redistributive politics. As Evans argues:

> Viewing shifts in the historical character of economic growth through the lens of modern development theory suggests that state capacity will have an even greater role to play in societal success in the coming century than it did in the last century. It also suggests that the specific kind of 'embeddedness' or 'state-society synergy' that was crucial to twentieth century industrial transformation – dense networks of ties connecting the state to industrial elites – will have to be replaced by a much broader, much more 'bottom up' set of state-society ties to secure developmental success in the current century. (Evans 2011, p. 3)

In other work on this theme, Marsh explores how changing state forms in the context of 'developmentalism' affect capabilities for citizen participation and integration across nine Asian states (Marsh 2005, p. 75). Similarly, Trubek asks what the consequences for law might be of the rise of a new developmental state. He hypothesizes:

> It seems to me that there will be less interest in fixed, specific rules of general application and more in open-ended standards, individualized contracts, flexible legal regimes, and revisable partnerships . . . with the full participation and consent of all actors. There will be less attention to courts, and more to agencies, regulation, state development banks as venture capitalists, conditional grants and loans, administrative law, and the creation of a problem-solving orientation in the bar. (Trubek 2008, p. 34)

Developmental state scholars, then, helpfully highlight the importance of exploring the ways in which pressures for redistribution are mediated with greater or less success through economic institutions. But as the quotation from Trubek arguably implies, regulatory state scholars are particularly well placed to enrich this perspective with their knowledge of an institutional form that is growing in importance and by its very construct is designed to be insulated from these pressures—the regulatory agency.

We suggest, then, that more dialogue between developmental state and regulatory state scholars is a productive way forward. Since those focused on developmental considerations typically not only give more conceptual space for redistributive policy than regulatory state scholars but also stress a more robust role for the state in steering the economy, interesting tensions seem empirically likely in Southern states that adopted neo-liberal ideas about regulation in the 1990s but are now taking a turn towards the 'new developmental' state. In Brazil, a particularly notable instance of such a trend, scholars disagree on the impacts of this overlay. Some argue the return of a developmental trend has increased the politicization of regulatory agencies (Prado 2008, pp. 456–60, focusing on the use of presidential decrees to shape the content of regulatory decisions in electricity and telecommunications), while others stress that regulatory agencies were subject to significant political control even prior to the 'return' of the developmental state (Amann and Baer 2005). Moreover, recent empirical evidence suggests that, even in states which were less overtly 'developmental', the specific content of policies developed by the regulatory state is shaped by the ideology of governing incumbents (Martinez-Gallardo and Murillo 2011).

It is clear, then, in that in the context of the South, forms of the regulatory state are open to accommodating politically salient variation. As Jordana's recent broad survey of Latin American regulatory states emphasizes, a broad range of objectives are served by the introduction of autonomous regulatory institutions, ranging from the renovation of bureaucracies to the opening of regulatory policymaking to more democratic procedures (Jordana 2011). As regulatory agencies occupy an increasingly large share of economic decision-making space, they come under pressure to mediate the three shared contexts of Southern regulatory states we have highlighted

in this chapter. The further development of a conversation between developmental and regulatory state scholars would enrich our understanding of how regulatory agencies relate to the larger ecosystem of interactions around them.

## V. Conclusion

The case studies presented in this book, along with the commentaries that follow, on the whole raise more questions than they answer. They elaborate the contingent complexities flowing from the three shared contexts facing the regulatory state in the South: highly salient transnational pressures on the state, comparatively intense redistributive politics, and limited state capacity. They do so in ways that inform what we will present in the Conclusion as a more nuanced analytical template through which to carry out further research in this area. For now, it is perhaps instructive to reflect that in the context of the extended global fiscal crisis that began in 2008, what Dowdle (2011) calls the conditions of 'peripherality' are increasingly appearing, even within the core nations of the industrial North. The implication of this book is that such conditions have always formed the basic context within which the regulatory state has emerged in the South. Thus, it may well be that the implications of our agenda could in time reorient our understanding of the regulatory state in the North as well as in the South. That would be for exploration elsewhere, however. At this preliminary stage of the project of refocusing the gaze of the regulatory state to 'the world beyond the North Atlantic basin', the overarching question we hope to provoke is this: can regulatory theory provide a basis for engaging the particular puzzles of regulation in the South, in ways that integrate politics at both micro and macro levels?

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# PART I

# CASE STUDIES

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# 2

# Global Water Governance and the Rise of the Constitutional Regulatory State in Colombia

*René Urueña*

This chapter interprets the regulatory state in Colombia as the result of a dialectic process between global governance institutions, transnational knowledge, and domestic politics, all of which influence, transform, and inspire each other. It focuses on urban water supply regulation in Colombia and proposes four core ideas. First, there is a regulatory space, called 'global water governance' (GWG), constituted by the interaction between the competing languages of human rights and international economic law. Second, water regulation is a transnational process, which draws from global networks of knowledge to solve local needs. However, despite its transnational nature, GWG is not a top-down process, whereby powerful corporations, multilateral financial institutions, and arbitration tribunals force certain water regulation on weak states. While there is much arm-twisting involved, GWG is also hinged upon domestic institutions that transform and adapt global regulatory practices for domestic purposes. An exploration of this process in Colombia leads to the third core idea of this chapter: the *constitutional* regulatory state. Indeed, in contrast with most traditional accounts of the regulatory state, where regulation is adopted by independent agencies seeking to correct market failures (Majone 1997), the constitutional variant of such a state attempts to implement redistributive policies through regulation. While framed in the mindset of efficiency-based regulation, the rise of the regulatory state in Colombia features a counterbalance to the unchecked expansion of such policies, in the form of a second variant of transnational knowledge: neo-constitutionalism. Thus, while the regulatory mindset finds in the independent agency its institutional embodiment, this countervailing discourse has its champion in the activist judge. Hence, the fourth idea of this paper: courts are a crucial variable to understand the regulatory state in Colombia, as they directly influence economic regulation by adopting the language of human rights.

The Colombian experience reinforces the case for some rethinking of the premises underlying the theory of the regulatory state. In line with the three factors proposed in the introductory chapter to this volume (transplants, distributive

issues, and state capacity), the rise of the constitutional regulatory state in Colombia confirms that contexts where infrastructure services are of poor quality (such as Colombia) seem to be more susceptible to feature regulatory processes that are heavily influenced by redistributive politics, as complement to the more traditional discourses based on efficiency. This process, in turn, underscores the role of courts as key players in the regulatory state in the South, and focuses on their distributive effects, beyond the restricted view that courts are relevant in regulation only as enforcers of contract and property rights. Moreover, the Colombian case shows that transplanting regulatory institutions requires, as suggested by Dubash and Morgan in the Introduction to this volume, a keen awareness of the ways in which their objectives internalize local political contexts, and the manner in which they are shaped through the process of embedding. In Colombia, the adoption of independent regulatory agencies may be read as a process of appropriating the global language of neo-liberal reform, to address concerns that were already salient in domestic political debates, and was in fact an important part of the more general constitutional framework.

Ultimately, the regulatory state in Colombia is a palimpsest. It is a composite image of human rights written on a canvas of neo-liberalism, which is interpreted by both domestic regulatory agencies and courts, which in turn rewrite each other's texts. To give some context to this process, this chapter presents first a glimpse of the political and institutional landscape in Colombia. The second section explores the emergence of water supply as a global issue, and explains the central traits of GWG. The chapter then turns to the specific mechanisms through which GWG is implemented in Colombia, factoring in the notion of the 'constitutional regulatory state', where the mindset of efficiency-based regulation is balanced by a human rights discourse, represented in this country by the Constitutional Court. Finally, two specific instances of the practice of the constitutional regulatory state are explored. First, the Constitutional Court's interpretation of 'efficiency' is used to analyse the role of the regulatory mindset in the Court's reasoning. Second, the debate on the human right to water is used to explore the impact of neo-constitutionalism on the regulator. Some conclusions are featured at the end.

## I. Water, guns, and constitutions

Water regulation in Colombia cannot be understood except in reference to a wider public law framework. Much in the same way as Prado's contribution to this volume shows that wider institutional and macroeconomic contexts are necessary to understand regulatory practices in Brazil, this article argues that three central paradoxes are useful to confidently navigate the transformations of water regulation in Colombia: (a) the perennial Colombian paradox of violence and elections; (b) the opposition between democracy and technocracy; and, finally, (c) a more nuanced paradox of administrative decentralization being wholly dependent on centralism. Simplistic as they are, these paradoxes allow us to confidently navigate

the transformations of the Colombian regulatory state, as influenced by the dynamics of global governance.

Colombia has now experienced more than 50 years of armed conflict that opposes a left-leaning guerrilla with governmental forces and paramilitary groups. Fuelling the conflict is a well-organized and highly profitable illicit drug trade, which supplies never-ending cash for all parties, and has also managed to corrupt some politicians, civil servants, and judges. In general, corruption (be it drug-related or otherwise) is perceived to be an endemic problem. Exercises of public power are thus immersed in a context marked by either fear of violence, the threat thereof, or distrust provoked by suspicions of corruption.

Despite this grim landscape, the country is exceptional in its long-held tradition of electoral democracy. Unlike most countries in Latin America, Colombia did not suffer military dictatorships in the 1970s and 1980s, and has held relatively credible elections since 1957 (Palacios 2006). Moreover, in the midst of the worst wave of drug-related violence, when Pablo Escobar and the Medellín Cartel waged their 'war against the State', the country adopted a new, progressive constitution. The result of an ambitious agreement among several competing political forces (including one demobilized guerrilla group), the 1991 Constitution became the symbol of hope (and success) for a new generation of young activists, whose visible heads often went to private law schools in the capital, carried on to earn postgraduate education in the US, and have since then built distinguished careers in government, the judiciary, and international organizations (Lemaitre Ripoll 2009).

The new constitutional order was no window dressing, as it truly intended to change the structure of public power in the country. For our purposes here, two objectives are of special interest. First, the new Constitution was seen as the cornerstone in the fight against clientelism and corruption (Duhamel and Cepeda Espinosa 1997); and, second, the Constitution was to spark a 'revolution of rights', based on its generous bill of rights, a new simplified judicial mechanism to enforce it (the '*tutela*'), and an independent Constitutional Court (Cepeda Espinosa 2005). Thus, while the inspiration of the Constitution was certainly democratic, there was a generalized feeling that the desired change could not be left to the 'politicians' (most eminently represented by members of Congress).

The result was a system that sought to complement popular representation in a (widely perceived as) corrupt Congress with three different mechanisms: (a) 'participatory' democracy (in the form of, e.g., referendums); (b) a constellation of independent regulatory agencies, where non-political experts would make hard choices bases on non-electoral reasons; and (c) a strong Constitutional Court, which played a counter-majoritarian role, in that it enforced human rights outside electoral rationale and would, eventually, step in to push policy change that would otherwise remain dormant in Congress.

The expected role of the Constitutional Court can be hardly overstated. Its activism would transform the regulatory state in Colombia by bringing the language of constitutionalism into the efficiency-dominated rhetoric of regulation. Moreover, the Court would become the ideal domestic setting for deploying transnational human rights arguments, thus counterbalancing the economic law

aspects of the GWG—which would, in turn, find their domestic home in independent regulatory agencies. Through such moves, the Court's activism would end up constituting a veritable *constitutional* regulatory state in the country.

Important as they were, these transformations dealt only with one part of the country's power base. Congress was also the place where interests different from those of the urban centres were voiced, and actually heard by the central government. Regional power (i.e., power outside the central government) had also an important stake in the new constitutional arrangement. Enter thus the institutional layout generally called 'decentralization' (Falleti 2010). Under it, Colombia would remain a unitary (i.e., non-federal) state; and yet, each territorial division (municipalities, departments, etc.) would be legally independent from the central government, and therefore in charge of independently funding certain services (e.g., primary education and, most relevant for us, urban water supply).

The constitutional changes of the early 1990s would provide the domestic public law basis for the emergence of the regulatory state in Colombia. The framework, though, is not complete with merely looking at domestic politics. It is necessary to broaden such a perspective, and understand that a powerful discursive transformation was occurring at the same time at the global level. This transformation constitutes a regulatory space called here GWG, which complements the 1991 constitutional reform in framing the rise of the water regulatory state in Colombia. The next section elaborates on the notion of GWG, to discuss, later on, its interaction with Colombian regulation.

## II. Global water governance

Governance of urban water supply became a global concern in relatively recent times. Until the 1980s, water was perceived to be a domestic matter that only exceptionally required international regulation. Water resources belonged to states as a matter of sovereignty. Regulation of the resource was an attribution of the sovereign, which could only be limited by the rights of *other* sovereigns (Langford 2005). Until then, water was generally perceived to be either a public good or a public service, whose economic value was not central for policymaking—rather, at the time, universal provision was the central concern (Bakker 2010).

All this changed in the early 1990s. On one hand, massive privatization worldwide made water's economic value the cornerstone of the global common sense in water regulation (Bakker 2007). Water was not a public service to be provided to citizens, but a scarce good to be acquired by clients. This action triggered its own reaction, and the view focused on the economic value of water was met by a countervailing emphasis on water as a human right (Couret Branco and Damião Henriques 2010). Regulation, this second view proposed, should be a platform to realize human rights, and not merely an instrument for achieving efficiency and cost recovery in water supply.

Now, the sharp contrast between these two views must not be exaggerated. It is true that mobilization for a human right to water emerged from previous efforts

against the privatization of water supply (Bakker 2007). However, this opposition is far from being clear-cut. The human right to water is inspired in a mindset that is, in fact, quite similar to that of privatization—a mindset in which the national and international legal systems give individuals or corporations a set of rights (including the right to water and the right to property) that can be invoked against a state before a (national or international) court of law. Such a common mindset, that is present in much of contemporary human right discourses (Urueña 2008), leads to unintended instances where the human right to water ends up complementing (rather that opposing) the agenda of privatization. Thus, for instance, it is possible to argue that privatization is actually instrumental to protect the human right to water, as it would allow for the recovery of the costs involved in providing the service, thus protecting the right to water. Tellingly, Article 24 of the Committee on Economic, Social and Cultural Rights (CESCR) General Comment 15 on the Human Right to Water considers the possibility of private supply of the service (CESCR 2002). Moreover, framing water policy as a human rights issue begs the same questions as other human rights-based approaches to development (Kennedy 2002; Seppänen 2005). First, it does not exclude, by itself, the possibility of the most extreme forms of water privatization (e.g., the right to property over the actual water resource, and not only over the infrastructure to supply it); and, second, human rights could undermine the anti-privatization agenda, as the right to property of those owning water would be, after all, also a human right worthy of protection.

Despite these commonalities, it is useful to read the human right to water as analytically distinct from the view that places the economic value of water at the centre of the discussion. The following sections explore the differences between these two views, and discuss how their expression in international law (in the form of international economic law and international human right law) constitute the building blocks of the regulatory space called here GWG.

## A. International economic law

The generalized recognition of water's economic value made international economic law (IEL) the language of choice for expressing water policy, thus creating a lock-in between it and water policy. Water is an IEL issue in at least three senses. First, it is a commodity that is internationally traded in the form of bulk water transfers that fall under the World Trade Organization (WTO) General Agreement on Tariffs and Trade (GATT 1994) (Bernasconi-Osterwalder and BrownWeiss 2005). Second, water supply is also as a service that, if provided by a foreigner, falls under the WTO General Agreement on Trade in Services (GATS) (European Commission 2000). Finally, foreign capital is an important force behind the privatization of water supply, making protection of foreign investment (under the form of bilateral investment treaties—BITs) an important link between water and IEL (Bernasconi-Osterwalder and BrownWeiss 2005).

This link may, in turn, become an important driving force behind domestic water regulation (Ducrey and Pannatier 2005). Argentina is a case in point. The

Province of Tucumán (the Republic of Argentina is a federation) awarded in 1995 a 30 years' concession of water supply to the Compañía de Aguas del Aconquija S.A. (CAA), an Argentinean company mostly owned by French multinational, Vivendi (ICSID 2007). The concession failed. The CAA delivered turbid water on at least two occasions, and government officials pressured the CAA to reduce tariffs. After several failed negotiations, the CAA terminated the contract in August 1997, and was required by provincial authorities to provide the service until October 1998 (ICSID 2000). The whole project ended in 1997 before an investment tribunal constituted under the effigy of the International Center for Settlement of Disputes (ICSID), as the investor claimed that Argentina had failed to fulfil its obligations under the 1991 BIT with France. The Tribunal agreed, and awarded USD$105 million to the investor (ICSID 2007).

It is beyond the scope of this article to discuss the details of the litigation, which included two awards (ICSID 2000, 2007), two annulment procedures (ICSID 2002, 2010), and has been widely analysed by investment law scholars (Shany 2005; Khamsi and Alvarez 2009). More relevant for our purposes here, though, is the impact of such arbitration in the Argentinean regulatory state. As a reaction to arbitration, political mobilization was triggered (Morgan 2008), and a new constitutional framework affecting regulation was designed (Gordillo 2009).

However, one needs to be wary when drawing lessons from the Argentinean experience for the Latin American region. While investment law standards could have an impact on water regulation, this potentiality has not always come to a realization. Ecuador, for example, has had tortuous experiences with investment arbitration, and the international investment regime has, indeed, become a variable for water regulation there. It makes sense, then, that it denounced the Convention and withdrew from the ICSID (Minister of Foreign Affairs of the Republic of Ecuador 2007). But this view is far from uniform; even the members of the Bolivarian Alliance for the Americas (ALBA) (BBC News 2006), who pledged in 2007 to withdraw with Ecuador, have not done so (Malamud 2007). Argentina, for all its *via dolorosa* in the ICSID, has not yet withdrawn from the ICSID either, nor has it seriously threatened to do so.

Today, all Latin American states have at least one BIT in force; however, the difference among them tells a more complex story. While Argentina has 52 BITs in force, Colombia has only three—with Spain, Switzerland, and Peru (UNCTAD 2011). Thus, while it has become common sense to say that investment arbitration exerts a chilling effect on domestic regulatory agencies in Latin America, a closer look reveals a less uniform picture. Even though investment arbitration is an important element of the IEL aspect of GWG, its impact in domestic water regulation varies from one place to another. In Argentina, investment arbitration has influenced regulation; in Colombia, that is not the case. Due to the few BITs in force, and to the lack of international litigation concerning public utilities, investment law has not been a force driving regulation in Colombia. Therefore, to better understand the rise of the regulatory state in Colombia, it is necessary to turn to the second aspect of GWG, namely, human rights law.

## B. Human rights

The redefinition of water as a matter of IEL is only paralleled in its effects with its reframing as a matter of human rights. This move is best understood in the framework of the human rights-based approach to development, which originated as a reaction to neo-liberal development policies (Seppänen 2005). The idea, in essence, was to introduce a 'human face' to development, by tying aid to human rights as a normative value. Development goals could be thus framed in legal language, and be judicially adjudicated.

The move to human rights is performed both directly and indirectly. Indirectly, the argument refers to water scarcity and underscores its importance to fulfil the human rights that are expressly recognized in the law, such as the right to life or health (Salman and McInerney-Lankford 2004). The direct argument suggests the existence of an independent human right to water (Hardberger 2005). Such a right is based on two elements: first, three international human rights provisions featuring express mentions to water[1]; and second, CESCR's General Comment 15 on the Covenant on Social, Economic and Cultural Rights (CESCR 2002).

As a human rights issue, water policy also becomes a matter of political participation. Good water governance involves bestowing all parties with the right to be heard, to participate in the decision-making process, and to question certain decisions involved with service provision. Water supply becomes an issue of transparency, accountability, and even independent judicial review, which are to be exercised not only vis-à-vis states, but also in relation to consumers with private parties that provide the service in a privatized context (Morgan 2006).

## C. Interaction and global water governance

The interaction between these two competing languages constitutes what this chapter calls global water governance (GWG). GWG is a not a regulatory undertaking in itself, but a space: a space where regulation occurs. In GWG, human rights interact with IEL, through a complex system of national governments, international organization, and regulatory networks (Slaughter and Zaring 2006). These actors, though, have no rigid hierarchical structure: depending on the issue, they reorganize and, not without conflict, impose over or yield to each other's influence. GWG is a framework where power over water resources is exercised; an exercise that is far from being coherent or structured. GWG is, thus, closely related to what Kingsbury, Krisch, and Stewart have called the global administrative space: 'a space, distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each' (Kingsbury, Stewart, and Krisch 2005).

[1] Article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women, Article 24(2c) of the Convention of the Rights of the Child and Article 14(2c) of the African Charter of the Rights and Welfare of the Child.

GWG is not a distinctively *international* undertaking. Instead, it is inspired in recent legal scholarship that describes a 'regulatory turn' in the international legal system, in which international law now directly affects individuals, influences domestic regulatory practices, and complements domestic administrative law (Katz Cogan 2011; Kingsbury 2005). While international law is certainly the language of choice in GWG, international regulation does not simply replace domestic regulation (Cassese 2005). As the focus on sovereignty is abandoned, domestic regulatory agencies become crucial actors in GWG. Recent scholarship has also underscored the importance of domestic actors in the expansion of global governance (Simmons 2009)—and water is not the exception (Morgan 2008). Indeed, GWG is also hinged upon domestic groups and institutions that are instrumental to reproduce, resist, and also influence global regulatory practices. Hence, the two dimensions to GWG: on the one hand, the interaction among international legal languages (IEL and human rights); and on the other, the domestic diffusion of such interaction, which occurs regardless of the national/international divide. Despite its international legal appearance, GWG's effects go beyond mere international legality, and overcome the limitations that are hardwired into the very legal language that serve as its vehicle. Thus, even though the CESCR's commentaries on the human rights to water are definitely soft law (Boyle and Chinkin 2007), they still frame the discussion in both domestic and international regulation. Similarly, international investment tribunals have no jurisdiction to decide the validity of domestic regulation (Dolzer and Schreuer 2008), and yet they are able to effectively influence the regulatory process of states that host foreign investment.

Now, one crucial aspect of GWG is its drive to depoliticize; that is, to deploy discourses and institutional reforms with the objective of sheltering certain decisions from an electoral/clientelist rationale, instead bringing them to a technocratic, law-based forum. Indeed, both IEL and human rights law are instrumental for the legalization of international politics (Abbott et al. 2000), which can be read as an effort to shelter decisions from the changing waves of electoral politics or, more common in international relations, from the dangerous impulses of radicalized leaders (Koskenniemi 2001)—a logic that can be gleaned from both human rights (Kennedy 2002) and IEL (Weiler 2001). Moreover, beyond the ever-growing role of law in international politics, it is possible to observe in many contexts of global governance a move away from diplomacy towards technocratic expertise, thus inspiring recent scholarly concern with the politics of 'expertise' (Kennedy 2005).

Such a drive to depoliticize was closely mirrored in Colombia. It was an expression of the general zeitgeist that inspired the constitutional change in 1991, which was intimately linked to fear of corruption. This very local collective anxiety was at the root of the new regulatory state in the early 1990s, as an expression of the general public law framework discussed earlier. Decentralization, independent regulatory agencies, and an active Constitutional Court became the crucial variables in the rise of the water regulatory state in Colombia. These reforms can be plausibly read as a move away from the electoral politics of Congress towards a technocratic

model where either judges or bureaucrats at independent agencies would make the major decisions of the country.

## III. Global water governance and the constitutional regulatory state in Colombia

Closely mirroring GWG, Colombian elites adopted the two competing languages of IEL and human rights. There is, thus, an interesting symmetry between global dynamics and the national landscape. The language of IEL was adopted by Colombian economists, who pushed for the establishment of independent agencies to regulate water supply. In turn, the human rights discourse was adopted by an active Constitutional Court, which influenced the water regulatory process to such a degree that it now becomes plausible to speak of a *constitutional* regulatory state. This section will discuss the rise of such a variant of the regulatory state in Colombia. First, it explores its rise as an expression of the domestic drive to depoliticize and the implementation of a global neo-liberal agenda; and second, it will discuss the reaction to the neo-liberal agenda, in the form of an expanded role of the Constitutional Court in water regulation. Finally, it will explore how the constitutional regulatory state differs from other forms of regulatory governance.

### A. The drive to depoliticize I: local anxieties and global neo-liberalism

In tune with global common sense (Bakker 2010), until the early 1990s urban water supply was understood in Colombia as a public good. However, mirroring similar developments in most of Latin America (Foster 2005), the 1991 Constitution abolished public monopoly over urban water supply, thus opening the possibility of privatization of the service. Free enterprise was the name of the game, and the state was called to regulate public and private suppliers alike. In 1994, further legal developments created the corresponding institutional structure, composed of: (a) the regulatory Commission for Drinking Water and Sanitation (CRA), a semi-independent, law-backed administrative agency whose main goal was to adopt tariff methodologies that would enhance efficiency in water supply; and (b) the Superintendence of Public Utilities, an administrative agency directly controlled by the president, whose task was to enforce the regulatory regime.

The underlying logic of this institutional structure was that politicians (especially those in the municipalities) could not be trusted with taking water tariff decisions. Surely, or so it was thought, they would reduce tariffs or expand subsidies just before local elections, thus threatening the financial stability of the system (CRA 2001). Moreover, there was a clear incentive not to reinvest in water network sustainability; after all, mayors do not get elected by investing in sunk costs, but by providing new services to potential voters. And this was within the confines of legality. Fear of corruption was always looming large. The solution was to create a

technocratic non-electoral institution that would set tariffs on the basis of sustainability of investments and, to a lesser extent, the redistributive effects of price structures (Foster 2005).

If compared with reforms undertaken in the rest of Latin America around the same time, there is little particularity in Colombia's regulatory framework (Foster 2005). The mantra of cost-recovery regulation, and the advantages of private (or, at the very least, corporatized private-like) suppliers were central to the process. Water reform in Colombia was the result of a specific set of ideas about the economy and the role of institutions (Williamson 1990), which is often referred to as neo-liberalism (Harvey 2005). The neo-liberal mindset of water regulation is closely related to the view of IEL, as they both place the economic value of water at the centre of the discussion. This approach became dominant in GWG in the 1990s, and saw its domestic implementation in Colombia through the first water regulatory framework, adopted in 1997 by the CRA (Centro de Estudios de Transporte e Infraestructura S.A.—Deloitte Touche Tohmatsu International 1998). In turn, the adoption of this global common-sense approach led to an apparent decoupling of the economic aspects of water regulation from its social implications—a phenomenon akin to that occurring in Europe, where the effects of integration and supranational policy on the welfare state are discussed extensively (Majone 1997; Haber 2011).

How is the connection between GWG and domestic regulation made? The key moment is the redefinition of water supply as an issue of the global development agenda (Stockholm International Water Institute and World Health Organization 2005). The World Bank played an important role in this move. Although it had been lending for water projects before, it was only in 1993 that the Board endorsed the Water Resources Management Policy Paper, which changed the Bank's approach to water supply (World Bank 1993). Under the new policy, the Bank's involvement in water projects had at its core the treatment of water as an economic good, combined with decentralized management and delivery structures, greater reliance on pricing, and fuller participation by consumers—all central traits of the IEL view of water. This meant that water supply was a problem of management (World Bank 2004). Water policy thus became, primarily, a matter of modelling incentives and efficient institution design (World Bank 2004).

All these goals could be attained through the appropriate domestic regulation, adopted by independent agencies, such as the CRA in Colombia, drawing on the expertise of institutions such as the World Bank (Foster 2005). To be sure, this is part of the 'structural adjustments' that need not be explored here once again (Assies 2003). However, there is a caveat. Even though neo-liberal reform was inspired and pushed by US-trained reforming elites (often economists) who became part of the inner circle of power in the early 1990s (Rodríguez-Garavito 2011), water supply regulation in Colombia is not just a story of top-down imposition of the Washington Consensus via conditionality. The notion of regulation in the neo-liberal mindset was a perfect match with the drive to depoliticize that characterized constitutional change in Colombia at that time. Neo-liberalism views regulation from a transactional perspective, in the sense that it involves 'the state moving away

from earlier welfare economics notions of pre-emptively correcting market failures that might harm vulnerable consumers' (Morgan 2008), adopting rather 'a more Spartan role of facilitating transactional frameworks' (Morgan 2008). This transactional view of regulation was strongly promoted by multilateral financial institutions (Morgan 2011) and, in Colombia, it suggested that (transactional) regulation would be a solution to the problem of clientelism in water supply, also responding to the concern of the Colombian population, vehemently expressed in the Constitution.

This experience confirms the argument made in the introductory piece to this volume: when transplanting regulatory institutions, it is necessary to understand the ways in which their objectives and design end up internalizing local political contexts, and the manner in which they are shaped through the process of embedding. In Colombia, the adoption of independent regulatory agencies may be read as a process of appropriating the global language of neo-liberal reform, to address concerns that were already salient in domestic political debates, and was in fact an important part of the more general Constitutional framework.

## B. The drive to depoliticize II: the rise of the constitutional regulatory state

Neo-liberalism is only half of the story. The view focused on the economic value of water was met by a countervailing emphasis on water as a human right (Couret Branco and Damião Henriques 2010). Regulation, this second view proposed, should be a platform to realize human rights, and not merely an instrument for achieving efficiency. In the context, the Colombian experience shows a counterbalance to the unchecked expansion of the neo-liberal policies in water regulation, in the form of a second variant of transnational knowledge: the transnational expansion of neo-constitutionalism.

To better grasp the relevance of this second angle, it seems useful to note that the Washington Consensus had its very own view of constitutionalism: in essence, a constitution that would be effective in (a) limiting the power of the state, thus limiting also its ability to intervene in the economy; and (b) protecting civil rights (e.g., property, or liberty), yet being shy in adopting positive measures to protect social and economic rights (Kennedy 2006). This was, in general terms, the idea of a 'good' constitution that informed the agenda of the neo-liberal reformers.

However, as US-trained economists led the way in the design and implementation of the water regulatory machinery, a similar group of US-trained lawyers were returning to the country (Rodríguez-Garavito 2011), excited by the possibilities of the interpretative turn in jurisprudence, going beyond mere legal formalism, understanding law as integrity, and empowering courts to force structural changes in society. Their view of the Constitution was different from that of the economists. Following like-minded Latin American scholars and activists, this group of reformers believed that the Constitution was there to serve as a platform for a massive effort of social transformation, which would use the language of rights to solve distributive problems (Uprimny Yepes 2006).

These lawyers thought of themselves as bringing a new law to the debate: a 'neo-constitutionalism' of sorts—a notion used here to describe the legal consciousness (Kennedy 2006a, 2006b) that characterized much of constitutional thinking in Latin America in the 1990s. The label was first used retrospectively by the Genoa School (Comanducci 2003; Comanducci, González Lagier, and Ahumada 2009) and described 'the assumption [that] the notion of law together with its forms of identification, application and cognition (i.e., in its ontological, phenomenological, and epistemological dimension) requires to be radically revisited because of the prominent role and pervasive influence fundamental rights have been acquiring since the conclusion of the Second World War both in the domestic law of an ever increasing number of countries, and in international law. In other words, the assumption is [. . .] that fundamental rights have been so deeply affecting law in all its major aspects, as to justify the need and to urge the claim for a new understanding of its notion' (Mazzarese 2002). While loosely inspired by the work of some American scholars (most prominently, Ronald Dworkin), this new approach to law gained little traction in the US or in the UK. In contrast, it spread over Latin America like wildfire during the 1990s. The idea that fundamental rights and activist courts could transform the difficult economic situation of the region appealed to scholars and judges in Argentina (Santiago 2008), Brazil (Pozzolo and Duarte 2006; Quaresma et al. 2009), Ecuador (Zavala Egas 2010), and Mexico (Carbonell and García Jaramillo 2010).

To be sure, speaking of neo-constitutionalism in Latin America at the time of writing (2012) may sound a bit naïve. If anything, the label sounds slightly pejorative. To Argentinean legal scholar Roberto Gargarella, for instance, neo-constitutionalism is to constitutionalism what so-called 'new tango' is to tango: something well intentioned, perhaps, but mostly a remake of what has been repeatedly done in the last 50 years (Gargarella 2011). For the purpose of this article, though, the label does hold analytical value, as it allows us to distinguish traditional liberal constitutionalism, mainly focused on checks and balances, and the protection of civil liberties, from the ideas that took hold of the region in the 1990s, as discussed above.

In Colombia, at the early stages of this transformation, the interest of these reformist lawyers was far from water supply regulation. The children of an era of political exclusion, they were mostly concerned with the high-politics problems of constitutional reform: Congress representation, judicial review, and the like. The basic traits of the regulatory state in Colombia were dictated by economists, heavily influenced by work produced at the World Bank (Foster 2005). In the early 1990s, there was really no collision between the constitutional view of the neo-liberal reformers and that of the neo-constitutionalists (Rodríguez-Garavito 2011). What is more, during these first years, this group of lawyers was as closely connected to power as the economists were; a pattern similar to the events in other countries of the region (Dezalay and Garth 2002).

When disputes emerged, they were solved by appealing to two discursive tools: first, while non-compromising in their ideas about efficiency and a reduction of bureaucracies, economists did agree that basic civil rights should be constitutionally

protected, and that those rights should be an effective limit to executive power. That was, after all, their idea of a 'good' constitution. These were no Chilean Chicago Boys (Valdés 1995), and therefore found in this a common ground with the lawyers. Second, the very social background of both these elites implied a shared sense of a common goal in constitutional design. Both the economists and the lawyers perceived themselves as technocrats in their particular area of knowledge. They found their identity in contrast to the traditional power structures of the country, which were perceived as inefficient and too political (hence the drive to depoliticize). Both were on the same side against a common enemy: corrupt politicians, commonly rooted in the rural periphery and with scarce connection to the elites in the main cities, who were not doing policy but mere politics. Of course, this common enemy was more easily spotted in Congress. Thus, while economists believed in the power of the independent regulatory agency, neo-constitutional lawyers believed in the virtues of a strong Constitutional Court, and both believed that Congress was better avoided.

Given the differences between these two transnational projects, such a meeting of minds was bound to be short-lived. In the late 1990s and early 2000s, the first conflicts started to emerge, most prominently in the area of economic regulation (Rodríguez-Garavito 2011). The Constitutional Court adopted decisions with deep economic impact, which were perceived by economists as an unjustified, and even undemocratic, intervention in the free market (Hofstetter 2005). For example, the Court's legitimacy was questioned on the occasion of Decision C-700 of 1999, where it decided that the mortgage and housing financing system in force was contrary to the Constitution. Ultimately, adherents of the neo-liberal mindset had succeeded in creating an institutional structure that reflected their most deeply held beliefs. However, it was soon opposed by the growing momentum of the neo-constitutionalist project, in the form of an active and popular Constitutional Court that adopted far-reaching decisions (Landau 2010), thus becoming a parallel force shaping the emerging regulatory state.

Of course, neither the Court nor all lawyers were monolithic in their support of the Court's activisms: dissenting votes were cast in some of the most ambitious decisions. In Decision C-700 of 1999, mentioned above, three out of nine Justices dissented (Cifuentes, Naranjo, and Tafur), while two deemed it necessary to explain their vote (Beltrán and Hernández). Moreover, some legal scholars (García Villegas and Uprimny Yepes 2004) were also critical of the Court's strategies for implementing its decisions. However, by far the most biting critique came from the economists (Kalmanovitz 2001; Clavijo 2001), for whom the Court's decisions seriously hindered what they thought should be the appropriate dynamics of markets.

## C. The constitutional regulatory state

Where the economists prescribed efficiency-seeking regulation by independent agencies, the neo-constitutionalists retorted with an ambitious bill of rights and an activist Constitutional Court. These two parallel projects created a frame of

controversy that was not fully dominated by either of them. Such is the space called in this chapter the 'constitutional regulatory state', which defined itself with popular support as technocratic and foreign to the allegedly corrupt ways of traditional politicians. This regulatory state is thus a middle point between efficiency-based regulation adopted by independent regulatory agencies, and the activist adjudication of rights that is dear to neo-constitutionalists. Indeed, as GWG is a regulatory space where human rights and IEL interact, the constitutional regulatory state is a new regulatory space where the language of rights comes through the back door of the regulatory machinery. It is the interaction between these two transnational mindsets that defined the basic traits of the regulatory state in Colombia.

The constitutional regulatory state is distinct from the most traditional forms of regulatory governance. Majone has suggested that the regulatory state is characterized by its emphasis on correcting market failures, rather than on attempting redistribution or macroeconomic stabilization. It implies a shift from taxing (or borrowing) and spending to rulemaking by independent agencies, and from a discretionary policy style to one that is rule-bound and legalistic, which in turn implies a shift from direct to indirect political accountability (Majone 1997). The constitutional regulatory state, in contrast, consists not only of regulation adopted by independent agencies seeking to correct market failures, but also of attempts to implement redistributive policies through such regulation—the latter attempt led by the Constitutional Court. Thus, while it can still be appropriately called 'regulatory' (as it relies primarily on rulemaking as its technique of governance), the constitutional regulatory state uses regulation to promote a wider programme of social transformation and redistribution that seem foreign to the traditional regulatory state, and seems closer instead to Majone's positive state (Majone 1997). The introductory chapter to this volume suggests that the sharp division between efficiency and redistribution is difficult in the South. Such is the case of the Colombian constitutional regulatory state, where the line between regulation and redistribution becomes particularly blurry, as each of these goals merges into the other, and courts force independent agencies to consider redistribution when adopting regulation originally intended to address market failures.

In this sense, the constitutional regulatory state is close to the 'regulatory welfare regime' that Haber observed in Israel, the UK, and Sweden (Haber 2011), yet differs from the latter in that its redistributive programme is not carried out solely in the context of independent regulatory agencies, but through the interaction between such agencies with courts. This difference, finally, entails a more pronounced reliance on more direct forms of political accountability, such as participation before regulatory agencies, which will be the focus of one of the Constitutional Court's decisions discussed below. Building on such differences, three further aspects that define the constitutional regulatory state can be mentioned:

a. **What is *constitutional* about the constitutional regulatory state?** Traditionally, scholarship on regulation has not been preoccupied with the Constitution. If any reference is made, regulation scholars seem to presume that all regulatory states are 'constitutional', in the sense that they are all based on the rule of law, where

regulatory agencies are subject to legal norms (Scott 2010). This view, though, reveals an understanding of the role of the Constitution that represents precisely what the Latin American neo-constitutionalists rebelled against. Against the view that a constitution is the mere framework for actual regulation, the constitutional regulatory state implies that the Constitution *is* regulation, and that independent regulatory agencies are instrumental in implementing such constitutional regulatory mandates. This view can be accurately thought of, at the very least, as distinctively Latin American, because it builds upon an understanding of the Constitution that never really took hold in the US or the UK.

b. **The role of courts.** In their introductory study to this volume, Dubash and Morgan posit that courts in the global South seem to have a more active role in the design and implementation of the regulatory state, as opposed to courts in the global North, where they find themselves in the shadow of either strong social welfare programmes that empower the executive branch, or by self-imposed judicial deference to the technical expertise held by independent regulators. The Colombian case is a clear example of these dynamics. By understanding the Constitution as part of the regulation, the Constitutional Court has adopted an active role in its interaction with independent regulatory agencies. Thus, instead of adopting the independent regulatory agency as its analytical unit (as traditional regulation scholarship is sometimes inclined to do), the constitutional regulatory state uses the interaction between those agencies and courts as its starting point to understand the regulatory state in Colombia.

c. **The constitutional regulatory state as a *space*.** The latter element implies that the constitutional regulatory state is not regulation in itself, but a space where regulation occurs. Just as GWG, and inspired as well by the notion of the global administrative space, the constitutional regulatory state is also a space where the language of rights interacts with the language of efficiency-based regulation. Beyond merely integrating rights to regulation, or economics to adjudication, this clash and dialogue established a novel regulatory space, composed of both the standard discourse of regulation and neo-constitutionalism.

## IV. The constitutional regulatory state in practice

The final section of this paper will look at two illustrations of the constitutional regulatory state in Colombia. These two examples are not intended to provide a full account of the Constitutional Court's approach to water policy in the country, which is not the point of this article, and may be explored elsewhere (Oeding et al. 2003). Instead, they explore two instances where the threads of this article interact. The first case provides a rare glimpse of the way in which the efficiency-based view of regulation is expressly pondered by the Constitutional Court. The second is an interesting example where constitutional reasoning had a specific impact in water supply regulation through the debate on the human right to water.

## A. Regulatory influence in the constitutional mindset: the experience of Decision C-150 of 2003

In the first case, a citizen filed suit against several articles of Law 142 of 1994, the central piece of legislation concerning public utilities in Colombia, all of them touching upon independent regulatory agencies. The claimant, Humberto Lonjas, is not connected to any civil society organization and is rather well known for filing suit against dozens of Acts of Congress. Be that as it may, the Court jumped at the opportunity, and adopted Decision C-150 of 2003 (Corte Constitucional Colombia 2003), a mammoth 240-page Decision where it expressed its views on the rationale and goals of the regulatory process in Colombia, as undertaken by independent agencies. By doing so, it set forth a good example of the way in which the regulatory language influences constitutional reasoning, thereby creating what this paper calls constitutional regulatory state.

The Court starts off by asking questions of special relevance for our purposes here: (a) is the legislative choice of establishing economic efficiency as the guiding principle of regulation of public utilities in accordance with the Constitution; and (b) does the tariff-setting process within independent regulatory agencies provide sufficient possibilities for protecting the rights of consumers (Sect. 3.1)? With these two questions, the Court proceeds to paint of neo-constitutionalism a landscape sketched by efficiency-based regulation.

The Tribunal first ponders the role of regulation in a constitutional democracy (Sect. 4), and argues that there is no global model of independent regulatory agencies (Sect. 4.1.2.1). To do so, it looks at the US, the UK, France, Germany, and even Sweden, yet fails to consider any Southern state, or to mention a multilateral financial institution (Sect. 4.1.2.2). Ultimately, this comparative law excursion shows a court that conceives its task as unearthing the constitutional framework for regulation in the particular context of Colombia. And what is that framework? For the Court, the whole point is that, while regulatory practices may have an inner economic rationale (Sect. 4.3.2), the goal of regulation is to guarantee the effectiveness of the social state grounded on the rule of law *(Estado Social de Derecho)*. In the Court's words:

> Regulatory agencies have to exercise their competences aiming to achieve the goals that justify their existence in a market within a democratic and social state grounded on the rule of law (*Estado Social de Derecho*). These goals can be grouped in two categories, despite their variety and specificity. The first category covers social goals, which the market cannot achieve by itself [. . . ]. The second category covers the economic goals which seek to ensure the appropriate operation of the market in benefit of everyone, and not just of those who occupy positions of power [. . . ]
>
> Regulation, as a mechanism of State intervention, seeks to guarantee the effectiveness of social principles and the adequate operation of the market.[2]

[2] Corte Constitucional Colombia, Sentencia C-150 of 2003, Sect. 4.3 (Corte Constitucional Colombia 2003)(79)(Corte Constitucional Colombia).

In this way, the Court tries to square the circle, finding a common ground between the efficiency-based rhetoric and its very own neo-constitutional interests. Once this framework has been put in place, the Court has no problem in accepting a quite orthodox market failure justification for regulation (Sect. 4.3.2). The economic orthodoxy of efficiency-based regulation is useful to the Court, as long as the ultimate test is one designed by neo-constitutionalists.

Based on this reasoning, the Court considers the role of efficiency as the guiding principle of regulation of public utilities. At this point, the Court's methodology is predictable. It starts by recognizing the importance of the efficient provision of services (Sect. 4.5.2.2.6), and the importance of a competitive rate of return established by regulation (Sect. 4.5.2.3.2), to create incentives for participation of private capital in the provision of public goods (Sect. 4.5.2.3.2). The Court finds that, in a social state grounded on the rule of law (*Estado Social de Derecho*), citizens are entitled to have access to public utilities. However, in the specific context of the Colombian regulatory framework, such entitlement is fulfilled through private means (Sect. 4.3.2). Therefore, adopting efficiency as the guiding principle of regulation is not in contradiction with neo-constitutional values but, quite on the contrary, it is a way of solidifying the entitlements of a generous bill of social and economic rights. For the Court:

> [. . .] Efficiency and financial sufficiency are not necessarily incompatible with solidarity. [. . .]
>
> The criterion of solidarity entails the full application of the constitutional mandate according to which the State must ensure the efficient supply of public services for all inhabitants of the national territory. This criterion allows the fixing of a variable tariff scale, in accordance with the economic conditions of different users, which facilitates access for persons of low income and demands a greater burden of persons with higher income, a burden that is equitable under these conditions, without conflicting with the principles of efficiency and financial sufficiency.[3]

In this decision, the Court also ponders the second question; namely, whether the decision-making process at independent regulatory agencies guarantees consumers' rights (Sect. 4.4). Adopting the standard neo-liberal reasoning, the Court finds that the main risk to regulation is the intervention of undue 'political interests' in the regulator's work (Sect. 4.4.1). The Court thus defends the importance of independent regulatory agencies, and invokes independent central banks as the prime example of its reasoning (Sect. 4.4.1.2). Enter once again the Court's constitutional reasoning. Though independent, agencies need to take into account the views and opinions of utilities' users (4.4.2). To that effect, then, the Court orders that independent regulatory agencies establish a notice-and-comment procedure, where all interested parties are able to participate in the process towards the adoption of new regulation (Ninth Holding).

What are the impacts of this line of reasoning? First, and most evidently, the notice-and-comment procedure established by the Court has become the default

[3] Corte Constitucional Colombia, Sentencia C-150 of 2003, Sect. 4.5.2.4.1.

approach to regulatory decision-making in Colombia, and became mandatory for all utilities' independent regulatory agencies under Decree 2696 of 2004 (*Diario Oficial* 45651, 25 August 2004). It is now common that independent agencies publish in their websites the draft of the regulation to be adopted. This process has, though, not meant the democratization of water supply regulation. Despite the counterbalancing role played by the Constitutional Court, and in contrast to the finding of Chng's study on informal water providers in the Philippines included in this volume, Colombian grass-roots organizations are still mostly absent from the regulatory process. Much more common is that water service providers hire law firms to comment on such drafts, trying to influence the outcome of the participatory process. More important, perhaps, is the fact that the Court does not reject the neo-liberal mindset of efficiency. Rather, it embraces it, but reinterprets it from a constitutional perspective. The result, then, is a regulatory state that is not quite that neo-liberal—but it is not purely constitutional. It is a veritable *constitutional* regulatory state.

## B. Constitutional influence in regulation: the human right to water

While Decision C-150 of 2003 is an example of the way in which economic efficiency arguments permeate the Court's reasoning, Decision T-546 of 2009 (Corte Constitucional Colombia 2009) provides a glimpse of a complementary process, whereby the Court's decisions permeates decision-making processes in regulatory agencies.

The case concerned a woman who lived with her partner and their two children (aged 11 and 5) in an area of extreme poverty in a mid-size Colombian city. She failed to pay her water bills, and the service was cut off by the city-owned company that supplied it (Sect. I.1). The company, though, was doing nothing illegal: service suspension is authorized by regulation, which considers lack of payment as breach of a standard bilateral commercial contract (Sect. I.2). Following multiple appeals, the case ended in the docket of the Constitutional Court. As per the claim, the Court had to answer whether cutting off the water supply of a family such as the claimant's was a violation of the 'constitutional right to water supply' (Sect. II.2). Ultimately, the Court found that it did (Sect. II.5): for the Tribunal, the right to water becomes liable of constitutional protection if lack of the service threatens other rights enshrined in the Constitution (such as the right to life or the right to health) (Sect. II.3.1). Cutting off the service was in violation of that right, and the water company was under the constitutional duty to reconnect (Sect. II.5.2).[4]

Decision T-546 is remarkable in two senses. First, it is a good example of the way in which GWG is deployed at the domestic level. The decision follows the script of

[4] In this particular case, though, the claimant had illegally reconnected the pipe by herself. For the Court, this meant that she had precluded all forms of redress for the wrongful act implied in the suspension of the service. Consequently, despite agreeing with the claimant's argument in principle, the Court stopped short of ordering the effective reconnection.

the human rights discourse to the last detail, yet stops short of making the direct argument of an independent human right to water. It begins by making the indirect argument of water as a necessary condition for the protection of human rights under the Colombian Constitution and international law (Sect. II.3.1). The Court merely restates its prior case law: the right to water is not an independent right, but acquires such status only if it is connected to the protection of other fundamental rights (e.g., the right to life)—that is, it is a fundamental right '*por conexidad*' (Osuna 2007). While some general reference is made to Article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 24(2c) of the Convention of the Rights of the Child, and then General Comment 15 of the CESCR (Sects. 3.2 and 3.3), the Court ultimately adopts the indirect argument for a human right to water, as presented in international human rights reasoning.

That situation points to the second interesting aspect of Decision T-546, as it shows how human rights reasoning influences the work of regulatory agencies. Once the Court had adopted the decision in August 2009, the question became: how will such an express recognition of a human right to water affect regulation? Indeed, Decision T-546 was particularly relevant for regulators and water companies, as it was the first time it was made clear by the Court that a human right to water meant that water companies could not cut off the service, even if the user failed to pay her bills.

The first strategy was to wait: there was no evident reaction to the decision for some time. Maybe the Court would just drop the notion of a human right to water, and never use it again in another decision. In all truth, this expectation was not off-mark, as the Court has been known to recant progressive ideas when they prove too controversial for their time (CIJUS 1996). Yet, in this case, the Court stayed on course: some months after the first decision, it built on its precedent with Decision T-418 of 2010 (Corte Constitucional Colombia 2010b), which further elaborated on the human rights dimension of water regulation. Unlike Decision T-546, Decision T-418 of 2010 did not deal with the water service being cut off, but was concerned with more general situations where the service was not provided to begin with (Sect. 1). The Court had to ponder whether a general lack of infrastructure was also in violation of the fundamental right to water. The Court found that it did. It went beyond the standard indirect human rights argument, and resorted to the United Nations Development Programme (UNDP) 2006 Human Development Report (UNDP 2006), as well as to opinions by the Human Rights Committee (Sect. 3.2.3). For the Court: 'The right to water enshrined in the Constitution, read in the light of the International Charter of Human Rights and the bodies authorized to interpret them, includes the right of every person to have her access to water of quality respected, protected and ensured' (Corte Constitucional Colombia 2010a). Unlike the prior decisions, in this case the Court went ahead and argued that these international sources established an independent human right to water—and that such right does not need to be necessarily connected

to other rights (e.g., life or health) in order to be constitutionally protected (Sect. 3.7).[5]

This conclusion stirred some controversy: Judge María Victoria Calle, who had in fact drafted Decision T-546, felt compelled to explain her vote. While she agreed with the final outcome of the decision, Judge Calle rejected the idea of an independent right to water: 'it cannot be understood that the right to water is an autonomous fundamental right; on the contrary, it is in its connection to fundamental rights that the right to water becomes liable to special protection on behalf of the constitutional judge (*juez de tutela*)' (Calle 2010). This line of reasoning restates the indirect argument used in international human rights law. The majority decision of the Court, though, had adopted a different view: there is an independent right to water, which derives from international human rights law. Some months later, the Court confirmed that reasoning in Decision T-616 of 2010 (Corte Constitucional Colombia 2010a): once again, the Tribunal placed the onus of its reasoning on General Comment 15 of the CESCR (Sects. 2.4–2.7 and 3.2.2) and the UNDP's 2006 Human Development Report (Sect. 3.2.3), and confirmed the outcome of Decision T-418.

The regulator had to react, and the private sector did as well. The regulator created a special task force charged with developing the new regulatory mechanisms required to implement the Court's decision, especially by exploring its impacts in the tariff methodology (CRA 2010). This change is notable as, until the Court's decision, the regulator had been of the opinion that cost recovery should have primacy over universal access (CRA 2001). Water companies, in turn, figured that the way to implement the decision was for the regulator to create a publicly funded trust that would subsidize the costs (ANDESCO 2010). The Superintendence of Public Utilities, in turn, started enforcing the Court's decision in a particular way: it kept its view focused on the economic value of water, and decided that service cuts to families in extreme poverty should be understood as a breach of the bilateral commercial contract, this time, though, on behalf of the water company (Superintendencia de Servicios Públicos Domiciliarios 2009).

## V. Conclusion

The rise of the regulatory state in Colombia is a process of cross-fertilization between global and domestic institutions, on the basis of transnational networks of knowledge. Twenty years after the Washington Consensus, this process seems less a coherent agenda of structural adjustment, and more a dialectic coat of many colours. This is not to say that power held by multilateral financial institutions,

[5] The Court's argument is made more significant by the fact that, even though the International Covenant on Economic, Social and Cultural Rights is enshrined as part of the Colombian Constitution (Article 93), the Committee's General Comments are not part of the Colombian legal system (see Uprimny 2001) and are not, as a matter of general public international law, binding upon states. This means that the Court was not legally mandated to recognize an independent human right to water, and yet decided to do so.

transnational corporations, and local elites is irrelevant. However, the Colombian experience shows that transnational languages of regulation become locally influential when they are appropriated by local actors, and not the other way around.

The Colombian case shows that the notion of 'regulation' is incomplete without other variables being considered in the most orthodox definitions of the term. Human rights, for one, seem to be a factor as relevant for the regulatory process as, say, cost recovery. This brings also to the fore the role of courts in regulation. In the Colombian case, the Constitutional Court is a variable that is as relevant as the independent agency to understand the rise of the regulatory state in that country. Specifically, the Court plays a double role in this context. First, it is a vehicle for the human rights discourse that balances the efficiency-dominated landscape of water supply regulation in Colombia, represented by the independent agency. Yet, the Court is not only a vehicle, but also a forum where the languages of GWG interact. Neo-liberal and neo-constitutional arguments collide in the Court's reasoning.

Following up on these findings seems to require an agenda that explores at least two parallel venues: on one hand, the global aspects of regulation, which seem to be much more than the mere imposition of regulatory know-how on Southern states by the global North, or multilateral institutions. At the same time, as is also observed in the introductory chapter to this volume and in Prado's contribution on Brazil, there is a need to draw reliable maps of domestic regulatory practices in Colombia that go beyond the mere presumption of dysfunctionality. Could the constitutional angle of the Colombian experience lead us to distil a common trait of regulatory experiences in the Latin American region? Is the balancing of neo-liberal rhetoric with neo-constitutional values present in other places? Are courts as prominent elsewhere? Is the crucial role played by human rights-based institutions (such as the Constitutional Court, an Ombudsman, or a similar institution) a common characteristic worth exploring?

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# 3

# Understanding the Egyptian Regulatory State: Independent Regulators in Theory and Practice

*Ahmed Badran*

## I. Introduction

Regulation has become one of the major functions of the state in contemporary society. Many scholars argue that, we live in the 'golden age' of the regulatory state (Majone 1997; Loughlin and Scott 1997; Jacobs 2000). The role of the state in economic and social life has dramatically changed from being the main provider of social and economic services to being a rulemaker and regulator. The new mode of the state with its structures and relationships is characterized by an increase in the regulatory functions and responsibilities. These changes have paved the way to the emergence of a state increasingly defined by the volume, diversity, and complexity of its regulatory institutions. This state is known as the regulatory state.

Contrary to what was expected, liberalization and privatization during the 1980s and 1990s have led to a vast growth in the state's regulatory obligations. Many academic terms have been coined to describe the shift in the role of the state, but the term 'regulatory state' was first used by Majone (1994). Majone describes what he saw as the fundamental shift from a positive, activist state associated with Keynesian demand management, public ownership of utilities and major industries, and direct labour market intervention, to a regulatory state in which rulemaking (usually by disaggregated, specialist agencies) has become the dominant means of achieving desirable social, economic, and environmental outcomes.

One of the major manifestations of the regulatory state is the creation and diffusion of Independent Regulators (IRs). This process has been a topic of speculation for many scholars in Europe (see e.g. Spiller 1993; Majone 2001; Gilardi 2005). However, compared with what has already been produced in the West on this topic, there is a gap in the literature with regard to how these institutions were created and diffused in the context of the global South in general and in the Arab world in particular. Many important questions regarding regulatory designs and institutional guarantees for effective regulations are left without answers in the context of the developing countries. One of the major issues is

different degrees and levels of democracy that these countries enjoy and how this affects the practice of IRs. In other words, under authoritarian and semi-authoritarian regimes which lack political competitions and where powers and authorities are concentrated in the hands of few individuals, should we expect to find IRs behaving in the same way as is the case in liberal democracies?

This chapter attempts to fill the above-mentioned gap by examining the regulatory state in Egypt. The chapter is organized in five sections plus an introduction and a conclusion. The first section sheds light on the origins and the development of the regulatory state as reflected in the Western literature. The second section, the rationale behind the creation of IRs in the Egyptian telecoms sector, is explained by considering the political uncertainty and policy credibility hypothesis. The third section covers the diffusion of the IR model in the global South as a matter of introduction to discuss diffusion mechanisms in Egypt in the fourth section. The fifth section focuses on IRs in practice in an attempt to show how this model works in a divergent environment. The chapter concludes with some reflections on the theory and the practice of the regulatory state in Egypt.

## II. The rise of the regulatory state model: delegation theory and the creation of IRs

In explaining the rise of the regulatory state model, Majone (1994) argues that some new emergent issues during the 1970s and 1980s have pushed the state towards changing its strategies and structures in response (see Figure 3.1).

Accordingly, Majone concludes that the positive state has been displaced by the regulatory state. A shift has taken place from the positive interventionist role of the state, characterized by a taxing and spending regime, a unified civil service, large nationalized enterprises, and expansive bureaucracies to the regulatory role of the state represented in a rulemaking regime, characterized by flexible, highly specialized organizations with autonomous decision-making authority. The notion of the regulatory state then suggests that modern states are placing more emphasis on the use of authority, rules, and standards setting, partially displacing an earlier emphasis on public ownership and subsidies, and direct services provision (Hood et al. 1999, p. 1).

The widespread diffusion of IRs in both developed and developing countries raises many questions about their nature and why they are widely used instead of

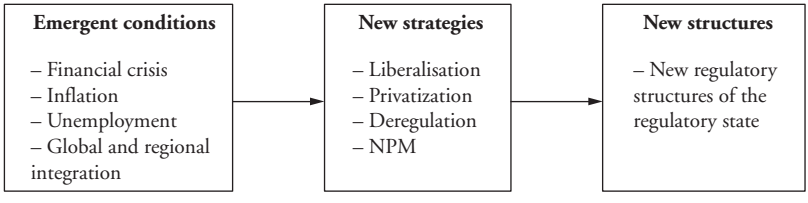


**Figure 3.1** The rise of the regulatory state

other governance structures. In practice, IR is a fuzzy concept that is not well defined. For example, the WTO (1997) interprets the term as referring to a regulator which makes decisions independently, without outside interference. In the EU, the term IR is used to describe a regulatory agency which is supposed to be independent of the licensees and the government. Smith (1997) has defined regulatory independence as consisting of an arm's-length relationship with regulatees, consumers and other private interests, and political authorities. Concentrating on the independence of decision-making, Melody (1997) has defined this in terms of autonomy to implement policy without undue interference from politicians or industry lobbyists.

Departing from the fact that this type of organization has become an institutional feature of the regulatory state, some scholars have raised the question about why governments are willing to delegate regulatory competencies to specialized institutions that they can only partially control (Gilardi 2003; Moe 1995). For them, it seems surprising that (politicians) would be willing to delegate so often to IRs, since in principle the same tasks could be accomplished by other bureaucratic forms, such as ministries and secretariats that are easier to control. Clearly, there must be some advantages to politicians in using autonomous agencies instead. What is it that a regulatory agency can deliver that an executive agency cannot?

In searching for an answer to this question, a wide range of reasons ranging from delivering private benefits to favoured constituencies to avoiding making unpopular choices can be identified. From a functional point of view, the creation of IRs particularly in utility sectors is claimed to have several advantages (see Jacobs 2001). At the theoretical level, different explanations have been provided, including blame sifting, expertise, policy credibility, and political uncertainty.

The policy credibility hypothesis explains delegation to IRs by the desirability of governments making credible long-term policy commitments. As Majone (2001) argues, credibility is a valuable asset for politicians when they carry out regulatory policy. For the success of any regulatory policy the response of the targeted group (s), namely the investors, should be considered. To guarantee a positive response from private parties, governments should send them signals of credibility via delegating their own competencies to IRs. IRs will be responsible in such cases for applying the policy and monitoring the regulated sectors instead of governmental units, which may be subject to the influence of politics.

While credibility is one of the most popular explanations justifying the delegation to IRs, the neglected side of the story as Moe (1990) describes is political uncertainty. The core of the political uncertainty hypothesis is that governments delegate to IRs so as to prevent future majorities undoing their policy choices (Gilardi 2003, p.1). Because political property rights in the political arena are not guaranteed forever, and because politicians come to office for a specific term, they always tend to try to insulate their policies from the possibility of being changed by the successors.

While presented as two separate explanations for the creation of IRs, political uncertainty and policy credibility are somehow connected. In other words, where political competition is the norm, as is the case with democratic countries, the

probability of making long-term policy commitments would be low because of the political turnover. In such a context, creating independent agencies which work at arm's length from parent organizations can help to secure and insulate such commitments. At the same time, authoritarian regimes are more capable of making these policy commitments; however, because of the distrust from the side of the private capital in such regimes, they also need to behave in the same manner as democracies and delegate for IRs. In this sense, we can see two different political regimes behaving in the same manner but for totally different reasons. This point will be clarified more in the following discussion of the Egyptian case.

## III. The rationale behind the delegation to the IRs in Egypt's telecoms sector

The delegation to IRs in the case of the Egyptian telecoms sector has been purely instrumental in the sense that it has been driven by practical and functional factors, rather than democratic governance. Before discussing this claim, it might be helpful to shed some light on the legal and regulatory framework in Egypt for contextualization purposes.

### A. Egypt's legal and regulatory framework: contextualizing the case

The Arab Republic of Egypt is located in north-east Africa, with an area of one million sq. km. Situated between Europe and the Middle East, Africa, and the Mediterranean, Egypt represents the crossroads where East meets West. It is the meeting point for three continents: Europe, Africa, and Asia. With a total geographic area of 1,001,450 sq. km and an estimated population of more than 80,471,869 in July 2010, Egypt is the most populated country in the Arab region. It has also the largest single market of telecoms in the Middle East. The strategic geographical location qualifies Egypt to become the region's telecom and information technology hub (World Factbook 2011).

The process of liberalization and privatization in Egypt has led to a widespread reform at the legal and regulatory levels. Different laws have been issued to create an encouraging environment for the participation of the private sector. At the outset, property rights are secured by the Egyptian constitution and guaranteed by law. In addition to this, the overall legal framework of the structural economic reform programme in Egypt consists of the following laws (Shehadi 2002):

- Capital Market Law 95/1992 rehabilitates and reorganizes the Egyptian capital markets;
- Law 3/1997 encourages private sector participation in large projects; and
- Investment Law 8/1997 provides guarantees and allowances to facilitate investment.

In addition to these general economic legislations, and bearing in mind the fact that there is no specific law for privatization, the following laws have been issued to enhance the privatization process:

- Public Sector Law 203/1991 establishes holding and affiliated companies;
- Company Law 159/1981 establishes basic corporate law; and
- Law 1471/1991 establishes the technical office of the Minister of Public Enterprise.

## B. The Egyptian telecommunications sector

Over the past several years, the telecommunications sector has made a strong showing in Egypt. The provision of infrastructure services in general, and telecommunications in particular, had been confined for a long time to the state and its bodies. However, the last two decades witnessed a major change in understanding the role of the state and those of other stakeholders in relation to providing such services. The Egyptian government has encouraged private-sector participation in order to apply more efficient and less costly techniques for providing telecommunications services. To this end, many measures have been taken to separate ownership from regulatory functions. Furthermore, a number of independent regulatory bodies have been instituted to facilitate and deliver the intended policy goals in this vital sector.

Compared with other economic sectors, the telecommunications sector has a relatively long history in Egypt. As noted by Beshir (2005), Egypt was one of the pioneer countries to use telephony. Despite the absence of reliable documentation and statistics on the years before 1889, it has been established that telegraphic communication between Cairo, Alexandria, and Suez existed as early as 1856 (Rachty 1999). With the entry of Britain into Egypt in 1882, the telecommunications sector witnessed a rapid expansion of the cable network used to link Egypt and Syria. The Railway Authority owned the first telegraph and telephone lines. Trunk lines were also government-owned and leased to the telephone company in return for a 70% share of the company's income (El-Said 1994).

The ownership of almost all telephone and telegraph lines had been transferred to private ownership by 1918 when investment increased significantly, reaching 2 million Egyptian pounds in 1930. The developments of telecommunications at that time and the modernization of communication technologies encouraged the expansion of commerce and industry, as well as government business and private investment. Developments in the telecommunications sector continued during the 1950s and the 1960s with an interventionist role of the Egyptian government, which created the Wired and Wireless Telecommunications Authority (WWTA) (1957) to be the first regulator of the sector.

By the 1970s, the sector had grown as a result of the liberalization of the economy under what was named the 'open door' policy that encouraged foreign capital and foreign investors to enter the Egyptian market. The Arab Republic of Egypt National Telecommunications Organization (ARENTO) was established in

1982 by Law No. 153 as an autonomous public utility organization under the direct supervision of the Ministry of Transport, Communications, and Civil Aviation to replace the WWTA. The legislation defined ARENTO's regulatory authority and role, and allowed it to enter into joint ventures with other parties for the promotion of telecommunications.

## C. Regulatory reforms and the creation of IRs

Driven by the deterioration in the quality of services in the 1970s and the 1980s, the process of liberalization and regulatory reform started in Egypt's telecommunications market. The milestones of this process cover many measures that have been taken by the successive governments of Egypt at different levels, including liberalization and privatization, legal and regulatory, besides institutional and organizational measures. The question now is why IR?

While it seems attractive and, at first sight, valid to justify and explain the delegation to IRs in the context of many Western and European democratic countries, the hypothesis of political uncertainty is not the same in the case of many developing countries, including Egypt. Recalling the Egyptian experience, the hypothesis of political uncertainty does not look very plausible to explain why the Egyptian government in sectors such as telecommunications has chosen to delegate some of its power to an IR. The reason for this is that Egypt used to have a dominant ruling party, which had been in power since 1981. That means whatever government was in power, it would implement the policies of the ruling party in economic and social areas. In this context, there is no room to speak about differences at the level of party policies that may make politicians inclined to insulate their decisions from the successors. In other words, today's government was tomorrow's governments as they all worked to deliver policies for the same party.

Having said that, the question becomes how can we explain delegation to the IRs in the Egyptian context? To answer this question the hypothesis of making credible policy commitments makes a great deal of sense in the Egyptian context. Focusing again on the telecommunications sector as an example, opening up this sector to the participation of the private sector after a long history of state monopoly was not an easy decision for policymakers. The predicament was that on the one hand the government wanted to encourage the participation of the private sector in service provision but without harming the interests of the incumbent, which acted for years as the service provider and the regulator of the sector at the same time. In this context, a gradual approach to market liberalization appeared to be the best option, as it would allow a limited number of private actors to enter the market while giving a transitional period to the previous incumbent to adjust its position to be able to compete on an equal footing with the private sector.

Tracing the process of liberalization, which started in 1997, evidence can be seen that sending signals of credibility to the private investors to encourage them locally and internationally to participate in service provision was a major strategy for Egypt. These credibility signals included market liberalization, the creation of a

new regulatory framework, signing international agreements, privatization of the previous incumbent, and the creation of a specialized ministry for ICT.

In 1997, the liberalization process started with so-called non-basic services. Initial steps had been taken to open the market up for the first time to competition. Two concessions to operate public payphone services were awarded to private companies. To create a more encouraging environment for private-sector participation, a new regulatory framework was set up in 1998. Important steps were taken towards the separation of operation and regulatory activities. The main elements of the new regulatory framework were embodied in law 19/1998 and Presidential Decree 101/1998. Accordingly, an independent regulatory authority named Telecommunication Regulatory Authority (TRA), and an operator and service provider in the form of a joint stock company controlled by the state named Telecom Egypt (TE) have been instituted.

In 1999, the Ministry of Communications and Information Technology (MCIT) was established to replace the Ministry of Transport and Telecommunications in managing and supervising the telecommunication sector. As noted by El-Sherif (2001), the creation of the MCIT was particularly noteworthy following years of having the sector lumped in with land and air transportation, maritime transport, and the postal service. In an attempt to reform the legislative framework, and to update the archaic laws and rules that regulated the sector, the MCIT invited members of the private sector and civil society organizations to participate in the drafting of a Unified Telecommunications Act in 2001. The draft was scheduled to be introduced to the Egyptian parliament for ratification during its 2001/2002 session.

In 2002, Egypt asserted its commitments regarding the liberalization of telecommunications services by signing the WTO General Agreement on Trade in Services (GATS), the Basic Telecommunications Agreement (BTA), and the Declaration on Information Technology of the WTO (ITA). 2003 was marked by the formulation of Egypt's Information Society Initiative. This initiative represented a road map for the development of the sector. The issuance of the unified telecommunication Law No. 10 represented another remarkable event in 2003. The new law identified the pillars of the regulatory system and determined the roles and duties of each player in the market. It created and empowered the independent National Telecommunication Regulatory Authority (NTRA).

Telecom Egypt, the previous incumbent, became the focal point for all market players in 2004 and 2005 as it was prepared for privatization. The company went through a process of financial reconstruction in 2004, ended by a floatation of 20% of its shares. The $785 million Initial Public Offering (IPO) of 340 million Telecom Egypt shares was divided into two parts; 10% was offered in the form of shares for small investors in the capital market, while another 10% was sold to institutional and high-profile investors. Officials set the minimum price at $2.31 per share. The IPO closed on 7 December 2005, and the trade in the company's shares started on 14 December 2005. Some of the shares were listed in London as global depositary receipts.

All these liberalization and regulatory reform steps affirm the fact that the liberalization decision was a strategic choice made by the government on practical and pragmatic bases, with no place given to the notion of political uncertainty. The major concern was how to attract and to encourage private investors to invest in this sector. The answer was by creating a regulatory system that assures them that they can invest and perform in an environment that will enable them to get a return on their investment without any discrimination between private and incumbent parties.

Added to this, a quick look at the ministerial speeches and other policy documents published by the MCIT clearly illustrate the functional and instrumental underpinnings of the public policy in this domain. In these documents the high frequency of words and phrases such as 'partnership', 'attracting investments', 'developing the sector', 'encouraging the private sector', 'creating suitable environment for business', and others show that the policy agenda was formulated and policy decisions taken in response to external factors, most probably pressures from the surrounding regional and global environments. This issue will be further illustrated in the following section.

## IV. The diffusion of IRs in the global South

IRs have become prevalent institutional features of regulatory policies in Western Europe (Gilardi 2003; Thatcher and Sweet 2002). With such a topic having been fully investigated by many scholars, the focus of this section will be on the diffusion of IRs in the global South. It would be helpful at this stage to indicate that, although it is possible to talk about different experiences in the global South, the term is used in this chapter to refer to developing countries, namely in Latin America and the Arab world.

In explaining the regulatory reforms in general and the diffusion of IRs in Latin America and the Arab world in particular, Levi-Faur (2004) has identified three approaches: top-down, bottom-up, and horizontal. Focusing on the channels through which institutions can be transferred, Jordana et al. (2009) have identified four transfer channels: sectoral, national, intergovernmental, and supranational transfer. Sectoral transfer occurs when institutions are transferred across the same sectors in different countries. National transfer refers to the transfer of institutions across different sectors but within the same country. Transferring institutions from other major countries is referred to as intergovernmental, while supranational transfer denotes the diffusion of agencies across sectors that work at the supranational level.

The Arab world is seen by some as an example par excellence for the failure of IRs diffusion (Levi-Faur 2004). Because of the very slow pace of regulatory reforms in this region compared with other parts of the global South, such as Latin America, it has been argued that diffusion processes do not work well in this part of the world. Nonetheless, a quick look at recent regulatory reforms in many Arab countries indicates that most of them have already embarked on reform projects and

developed IRs as a means for delivering policy goals in different areas. For instance, countries such as Egypt, Jordan, Morocco, Saudi Arabia, Syria, and Yemen have all put in place regulatory initiatives and identified regulatory targets (Doing Business in the Arab World 2010). The success of regulatory reforms in some of these countries, such as Egypt, has inspired the rest to go down the same route. Therefore, the contagious effect of success argued by (Jordana and Levi-Faur 2005a) can be clearly seen in the experiences of these countries.

The diffusion literature shows that different mechanisms, including policy transfer and lessons learned, the role of globalization as a facilitating factor, and institutional isomorphism come into play when we try to explain the spread of IRs in developing countries. Over the last two decades, the increasing globalization of economic sectors and activities has spilled over into telecommunications sectors in many developed and developing countries (OECD 1995; Noll and Shirley 2003). The movement towards the globalization of telecoms was accompanied by a diffusion of IRs as suitable regulatory mechanisms to govern these economic sectors and to limit some social risks associated with the transformation phase. The widespread adaptation of IRs in the liberalized telecoms markets raises a fundamental question about the relationship between globalization and the diffusion of these models.

A general assumption among policy scholars is that globalization has facilitated and accelerated diffusion processes from developed to developing countries (Gilardi et al. 2006; Bulmer and Humphreys 2007). With respect to utility sectors, including telecommunications, one can argue that there is a global model for reforming these sectors that encompasses three main phases: market liberalization (opening markets up for competition); market regulation (economic, social, and environmental); and the privatization of the previous incumbent. As can be seen, regulation is an integrated part of this package. From this angle, the creations of IRs in telecoms sectors can be viewed as a manifestation of the change in governance (see Jordana et al. 2003; Jordana and Levi-Faur 2005a; Jordana and Levi-Faur 2005b).

The fundamental question in the policy transfer literature is that to what extent the adoption of regulatory models in the context of developing countries reflects a process of policy learning or policy transfer. As noted by Minogue (2001), this approach is not new, as policies have been transferred between national systems for a long time. However, the notion of policy transfer has been given new impetus recently through the use of conditionality by lateral and multilateral aid donors to impose policy and institutional changes upon the governments of transitional and developing economies.

Institutional accounts focus on the situation when policymakers have no other choice but to adopt certain models. In most of these cases, developing countries found themselves obliged to adopt a certain type of institutional arrangement such as IRs because of the pressures exerted by the international financial institutions or by donor states. In such situations, the notion of isomorphism, particularly 'coercive isomorphism' as presented by DiMaggio and Powell (1983, 1991), appears more plausible for explaining the diffusion of IRs. According to them, isomorphic pressures can be direct or indirect (see Henisz et al. 2005). At the same time,

developing countries may 'symbolically imitate' certain models to maintain and enhance their credibility and competitiveness, as well as to legitimatize other decisions, such as liberalization and privatization (see Giraldi 2005).

## V. The diffusion of IRs in Egypt

Since regulatory reforms recently introduced in Egypt are broadly tailored on developed countries' experiences, a valid question in this regard would be how such reform initiatives and the accompanied regulatory models have been diffused in the Egyptian context? In other words, what were the mechanisms that facilitated the diffusion process? Before engaging with this question it is worth mentioning that the rationale behind the adoption of the Independent Regulatory Agency (IRA) model in the telecoms sector in Egypt and the diffusions mechanisms are both interlinked. As the above discussion in the third section indicated, the adoption was more or less an instrumental choice based on rational calculations and functional logics. This in itself can be a sound reason to justify the adoptions process. However, as we will see in the following discussion, policymakers were not completely free in their choices, as evidence for coercive isomorphic pressures can be seen in the Egyptian case. This suggests that, at the diffusion level, policymakers might be forced to adopt certain regulatory models; however, for these models to be successfully embedded in the domestic regulatory environments, a functional justification might be needed for legitimacy purposes.

Based on the above discussion in the first and second sections, and following on from conclusions made in the third section, the role of three diffusion mechanisms (globalization, policy transfer, and coercive isomorphism) will be considered in this section. Focusing on one explanatory factor and ignoring the others carries the danger of oversimplification. Therefore, it should be admitted that elements of the three mechanisms can be seen in the case of the telecoms sector in Egypt. However, given the complexity of this issue and acknowledging the interplay dynamics between the three explanatory factors, clear-cut answers to these questions would not be possible.

At first glance, postulations about the role of globalization in facilitating the diffusion of IRs in the Egyptian context seem convincible. With Egypt joining the WTO and signing the BTA, the global and international dimensions of the diffusions cannot be denied. However, the extent to which globalization *alone* facilitates or obstructs the process of IRs diffusion in Egypt remains an empirical question and thus calls for a reflexive research agenda that closely analyses and demonstrates the effects of increased globalization on the diffusion of IRs.

Regarding policy transfer and lessons learned, of course, under globalization Egyptian policymakers have been exposed to different reform programmes and they recall these experiences when making decisions about regulatory reforms and how to design regulatory systems. Nonetheless, given the fundamental differences in the political and economic structures between Egypt and the West, an assumption about policy transfer and policy learning might be rendered inaccurate. At the

political level, despite the multiparty political system, the country was ruled by a dominant party since 1981. Economically speaking, the emerging Egyptian economy is still struggling to overcome problems such as the high-level of poverty and internal and external debts. As noted by Nawar (2007), 40.5% of the Egyptian population is in the range of extreme poor to near poor. The gross external debt of Egypt, according to the statistics of the Ministry of Finance, was estimated at US $29,898 million at the end of financial year for 2007. The net government domestic debt reached 65.4% in 2007 compared with 54.3% of GDP in 2001.

Many elements of coercive isomorphism can be seen in the Egyptian case, as the reform process has been associated from the very beginning with the deteriorating economic conditions and the intervention of the international monetary institutions to structurally reform the Egyptian economy. As noted by Vignal (2010), the first step to reform the Egyptian economy was taken by the former president, Sadat, who initiated the 'open doors' policy (*Infitah*) in 1974. This policy gave some fresh impetus to the private sector; however, in terms of economic development it remained far too modest in scope and ambition to make any real difference. Because of the huge debt of the Egyptian government at the end of the 1980s, Egypt had to adapt a Structural Adjustment Plan in 1991 following negotiations with the International Monetary Fund (IMF) and the World Bank (WB). At the top of their recommendations, these two international financial institutions have emphasized the primacy of market forces and privatization, and ordered the retreat of the state from many economic and social fields. Hence, from the very beginning, the choice of the economic reform model has been dictated by the WB and the IMF, which indicates the role of coercive isomorphic pressures. These pressures have been consolidated later by the need for economic development, which made the successive Egyptian governments prone to the conditionality of the donors.

In this context, another explanatory factor behind the recent regulatory reforms in Egypt, and more precisely the adoption of the IR model, could be the close relationship between Egypt and the European Union (EU) since the signature of a Cooperation Agreement with the European Economic Community (EEC) in 1976. A multilayered set of legal frameworks, political agreements, cooperation, and aid programmes has been developed since 2000 and linked Egypt with the EU at the economic and political levels. The EU is Egypt's first trade partner and its second foreign investor, as well as aid donor (Vignal, p. 3).

In the field of cooperation, there are many projects between Egypt and the EU which aim, among other things, to improve Egypt's market and regulatory frameworks by focusing on the following elements (Vignal, p. 14): ongoing implementation of the strategy for regulatory reforms and administrative simplification; establishment of a one-stop-shop to carry out all licences required for establishment and operations; ongoing implementation of the financial sector reform programme (foreign exchange market, monetary policy framework, banking and non-banking financial sectors); amendments to the 20005 Competition Law in order to strengthen powers of the Competition Authority; and implementation of the Euro-Mediterranean Charter for Enterprise. Although establishing a casual relationship between cooperation and aid programmes between Egypt and the EU

requires more in-depth analysis, one should not ignore the various possibilities that these channels work as diffusion mechanisms through which the IR model has been transferred and diffused in Egypt.

## VI. Towards an authoritarian regulatory state model: IRs in practice

The above discussion of the rise of the regulatory state in Egypt illustrates that we are looking at a different model compared with the regulatory state of the West. On the one hand, the rationale behind the delegation process differs as well as the diffusion mechanisms. While one can see elements of democratic governance and voluntary diffusions in Western countries based on lessons learned and policy transfer, the functional logic and coercive mechanism are dominant in the Egyptian case.

The authoritarian regulatory state model suggests some sort of separation between political, economic, and regulatory reforms. While political property rights were an exclusive domain of the previously ruling party and the associated elite, the consecutive governments have tried to achieve different reforms and to reach different goals at the economic level. In this context, the presence of the state and it apparatus in the economic sphere can be easily noticed. All state institutions work towards a specific vision developed by the political leadership.

The question that springs to mind now is how IRs survive under authoritarian regimes? Over the next two sections this question will be discussed to show that the experience of the regulatory reform in the Egyptian telecoms market shows that IRs can survive under authoritarian regimes. The focus will be on the institutional guarantees of regulatory effectiveness in terms of regulatory independence, accountability, transparency, and due processes.

### A. Regulatory independence: different meanings in different contexts

Regulatory independence is one of the hot issues in the debate over the institutional design of regulatory systems. In the context of this study, the notion of regulatory independence is used in the broader sense to refer not only to the legal or formal independence of utility regulators, but also to the independence of human and financial resources, in addition to the ability to decide on what to do and how to do it without interference from parent organizations. With this definition of regulatory independence in mind, I asked respondents to reflect on the level of independence between the NTRA and the MCIT on the one hand, and between the NTRA and the regulated industry on the other.

The answers to my question varied according to the respondents' understanding of the meaning of 'independence'. The term was not intentionally defined for them at the beginning in order to give them the opportunity to reflect on the different aspects of this concept. From the responses in the interviews it can be noticed that,

when it comes to the relationship between the NTRA and the MCIT, there is an overall agreement from the viewpoint of the regulated companies that the NTRA is *not* independent of the MCIT. However, it is worth mentioning in this regard that informants' opinions regarding the degree of dependency from the NTRA on the MCIT vary. Another group of respondents have seen the NTRA as *partially* independent in its relationship with the MCIT. This group regards regulatory independence as non-interference by the MCIT in the way that the NTRA regulates the sector. From this perspective, the majority of interviewees have confirmed that, when it comes to technical and regulatory issues, the Ministry gives the NTRA enough authority to make and enforce its own decisions.

Following on from the above discussion it can be concluded that, regarding the relationship between the NTRA and the MCIT, the regulated industry considers the authority as either dependent on the Ministry or partially independent based on their interpretation and understanding of the notion of independence. The question that needs to be answered now concerns the independence of the NTRA from the regulated companies. With reference to the interviewees' responses, apparent agreement on the independence of the NTRA from the regulated companies can be inferred. In spite of the agreement of the regulated industry representatives that the NTRA is independent to a great extent in its relationship with private companies, they also highlighted the fact that this is not the story with other state actors such as TE.

The discussion so far reflects what the regulated companies think about the independence of the regulator from the parent organization and from the regulated industry. To complete the picture, input from the NTRA and the MCIT in this regard is required. From the analysis of the responses of the interviewees from these two bodies, it can be gleaned that both the NTRA and the MCIT share a conception of regulatory independence closer to that adopted by group two of interviewees from the regulated industry (partial independence). First, they admit that there is no total or complete independence for the regulatory agency. Some statements made by the regulator when asked to reflect on the relationship between the NTRA and the MCIT can clarify this issue. In this regard, and as has been mentioned before, he described such a relationship as 'organic', which means both bodies are part and parcel of the overall governmental machinery. In addition to this, he commented on the notion of independence by saying that 'there is not 100% independence between regulators and parent organizations anywhere in the world'.

Second, based on the mutual respect of jurisdictions and of spheres of actions as one of the ground rules that governs the relationship between all actors involved in regulatory process, representatives from the NTRA and the MCIT have confirmed that the NTRA enjoys a high level of independence with regard to making and enforcing regulations and regulatory decisions.

Despite such an agreement on the partial independence of the NTRA, the interpretation of the NTRA and the MCIT of regulatory independence is broader in nature than that adopted by the regulated companies. In this sense, to be independent is to work at arm's length from the parent organization and the

regulated industry at the same time (compare Smith 1997). Accepting this notion in principle, the following question will be how long is that arm that separates the NTRA and the MCIT? Is it long enough to enable the NTRA to perform its regulatory duties? If so, what about the minister and his presidency of the board of directors of the NTRA? The answers to these questions may clarify the issue of regulatory independence and reduce the level of confusion regarding what is meant by independence.

Generally speaking, it can be concluded from the answers of the interviewed staff in both the NTRA and the MCIT that the length of the arm that separates the two parties is enough for the former to perform its regulatory duties in an effective way without any kind of unwanted intervention from the MCIT. Added to this, most of the interviewees do not see any problem with the Minister of Telecommunications as the head of the authority board of directors. Furthermore, some of the staff at the NTRA sees the presidency of the Minister of Telecommunications of the board of directors of the authority as a necessity for reporting, coordination, and functional purposes. It is worth mentioning in this context that the above expressed viewpoint regarding the benefits of the existence of the Minister of Telecommunications as the head of the NTRA board of directors represents not only the opinion of the state actors but also the view of some of the regulated industry.

The same point has been emphasized by the regulator himself when he referred to the mutual understanding between himself and the minister because they have the same technical and educational background (both are telecoms engineers) so that they can both speak the same 'language' and can understand the nature of the problems that face the sector, and in turn develop a common vision with regard to how these problems should be dealt with.

Following on from the above discussion it can be concluded that, from an institutional point of view, regulatory independence is necessary for guaranteeing the effectiveness of the regulatory system. However, the examination of the regulatory process in the Egyptian telecoms sector has revealed the fact that regulatory independence is a necessary but not a sufficient factor to guarantee the effectiveness of the regulatory system. From the perspective of the regulated companies, the existence of an accountable regulatory system that ensures transparent and clear ground rules which are applied for all players on an equal footing can be more important than independence. Having concluded this, the focus of the next section will be on how accountable and transparent the regulatory system in the Egyptian telecommunications market is according to the viewpoints of the actors involved in the regulatory process.

## B. Accountability, transparency, and due process

Accountability is defined in the context of this work in accordance with Lodge (2002) as the obligation to account for regulatory or any other type of activity to another body or person. In order to measure the accountability and the transparency of the regulatory system in Egypt, the typology presented by Hood (1983) has been used as a guideline. In other words, these two institutional foundations are

checked against the following criteria: the accountability and transparency of the decision-making process; the transparency of rules to be followed; the accountability and transparency of activities of regulated actors; the accountability and transparency of controls exercised on those operating within set rules; and the accountability and transparency of feedback processes.

Starting with the first criterion, it can be observed that, with regard to the NTRA, the executive president of the authority is required to explain and to bear the consequences of the manner in which duties have been discharged, functions fulfilled and resources utilized before the board of directors. With the Minister of Telecommunications as the head of the board of directors, the NTRA can also be considered as accountable to the Ministry.

Focusing on the regulated companies, different forms and levels of accountability can also be mentioned. First, the CEOs of these companies are responsible for their companies' respective performance before their board of directors. They are also held accountable to their stakeholders. At the same time, regulated companies are accountable for their actions and practices before the NTRA. In this regard, the latter have the right to object to any decision made by any regulated company if this decision contradicts the sector regulations, the licence provisions, or if this decision carries any potential harm to any other party.

Moving now to the transparency aspect of the decision-making process it can be noticed that the regulatory staff working at the NTRA have emphasized that, in all its practices and decisions, the authority does its best to be as transparent as possible. The diagram in Figure 3.2, presented by a senior advisory staff member

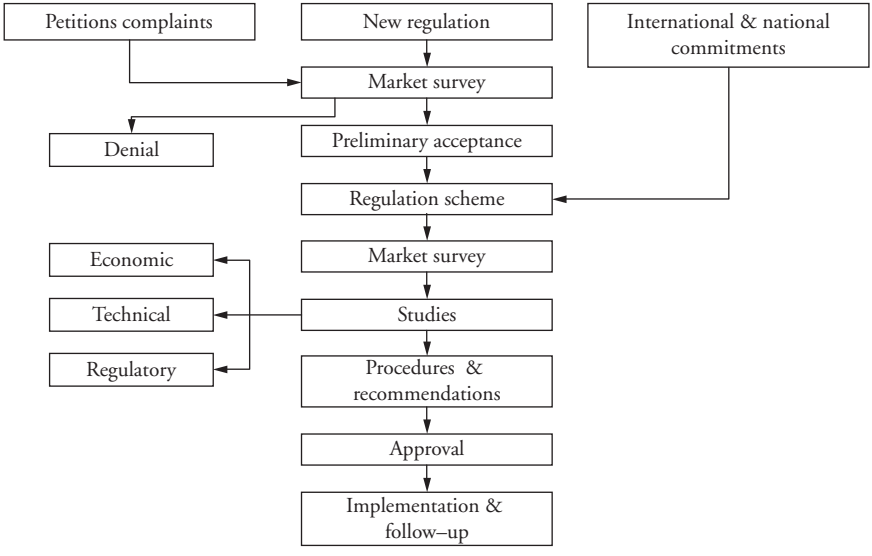


**Figure 3.2** The decision-making process

*Source*: Guinena (2005)

at the NTRA, summarizes the way in which decisions are made by the authority and reflects how transparent this process is.

Moving to the second criterion, the transparency of rules to be followed, it can be mentioned that telecommunications Law No. 10/2003 has identified in its general provisions, Art. 2, four rules as guidelines for providing telecommunications services in Egypt. Most of the interviewees from the regulated companies agreed that there are transparent and clear rules which regulate the conduct of the actors involved in the process of service provision.

With regard to the accountability and transparency of activities of regulated actors, 'All entities and companies working in the telecommunications field shall provide the NTRA with whatever requested of reports, statistics or information related to its activities except for matters related to National Security' (Law10/2003, Art. 19). Based on this broad discretion, all regulated companies are required to report on regular bases to the NTRA. Added to this, some companies publish their performance and financial reports on their websites on a regular basis.

Regarding the final criterion of measuring accountability and transparency of regulatory systems which is related to the accountability and transparency of feedback processes, the majority of actors involved in the regulatory process have confirmed the existence of a feedback mechanism and many of them have referred in particular to this mechanism as a part of the consultation processes conducted by the NTRA. The consultation process on a draft regulatory framework for broadband wireless access networks is a good example of this process.

## VII. Concluding remarks: the Egyptian Revolution and the regulatory state of Egypt

This chapter has investigated the rise of the regulatory state in Egypt by looking at the rationale behind the creation and diffusion of IRs in the telecoms sector and the way this model works in practice. The discussion of these issues has indicated that, because of the contextual differences between developed and developing countries, some explanations and hypotheses about the creation and the diffusion of the IR models and the way they work need to be reconsidered and re-examined. For instance, the political uncertainty hypothesis can be a sound justification for why today's government delegates to IRs in democratic countries. However, when today's government is tomorrow's government, as is the case in Egypt because all governments apply the policies of the ruling party, the explanatory power of this hypothesis becomes very limited. Some other explanations, such as making a long-term credible policy commitment, appear to be more appropriate for rationalizing the creation and diffusion of IRs. Egypt, among other developing countries, is engaged in a race to get more aid, financial assistance, and foreign investments to help its economic development. To this end, it needs to send signals to the international organizations and private investors that build the legitimacy and the creditability of their emerging regulatory regimes.

The second part of the discussion has focused on the mechanisms through which IRs have been diffused in Egypt. Three diffusion mechanisms have been considered: policy transfer and policy learning; globalization and the change in the mode of governance; and institutional isomorphism. Each of these mechanisms has its own enabling and obstructing elements, which makes it difficult to attribute the diffusion of IRs in Egypt to one mechanism. With globalization spilling over into all aspects of economic activities and changing the global governance and dynamics between actors involved in these sectors, one can see an element of learning as policymakers in Egypt are now more exposed to the experiences of other countries. This is not to say all ideas and institutions are transferred via learning processes on a voluntary basis. The other side of the picture shows the coercive element of the story where policymakers find themselves obliged to adopt certain regulatory reforms under the pressures of donors or for fear that they might be left behind if they do not join the international wave of reforms. Therefore, the learned lesson is that with great aid comes great conditionality and less freedom for the developing countries to develop their own models.

In conclusion, the study of the Egyptian regulatory state has indicated the ability of the IR model to survive and work in a different environment, which lacks most of the enabling factors that helped in the success of this model in the West. With limited margins of democracy, relatively poor economic performance, and a weak institutional framework, the regulatory system in the Egyptian telecommunications sector has reflected an acceptable level of independence, transparency, accountability, and functionality. However, given the recent events in Egypt and the revolt of the Egyptian people for democracy, the question becomes: what would be the impact of this transformation on the Egyptian regulatory state?

It is fully understood that it might be too soon to speculate and to predict the future shape of the Egyptian regulatory state. I also do not want to jump to conclusions reading the current situation in Egypt; however, it would helpful at this stage to look at some possible scenarios of what might take place in the short and long term. The first proposed scenario is for the new political system in Egypt to continue doing 'business as usual' in terms of adopting the same regulatory structure and regulatory framework without undertaking profound changes to the nature or the functions of the existing regulatory regime. There is some evidence to support the possible occurrence of this scenario. Considering the highly technical nature of the telecommunications sector, and taking into account the limited aptitude of the near future Egyptian government(s) to undo policies and institutions built over the last 30 years, it expected, at least in the short term, that the main features of the Egyptian regulatory state will remain.

As this chapter has indicated, telecommunications sector reform in Egypt has been a relative success story and the adopted regulatory model has proven to be functional and productive. For this reason, it is most likely that the new political institutions will retain the existing independent regulator so as not to change nor interrupt the current arrangements with private investors. Altering the current arrangements with the private sector in a dramatic fashion would give a negative impression of the emerging democratic state in Egypt, which in turn would affect the

credibility of the regulatory regime. Added to this, since the beginning of the revolt against the previous political regime, Egypt has incurred many social and economic losses. Therefore, dealing with the pressing social and economic demands is expected to become the preoccupation of the new institutions for the next 5–10 years.

In the long term, however, the story could be different. One should not forget that inequality and economic hardships were as important as the call for democracy in mobilizing and moving the Egyptian people against the regime of Mubarak. Different forms of inequalities are associated in the minds and hearts of the Egyptians with the privatization of public enterprises and the whole package of the neo-liberal reforms agenda. According to their point of view, very few businessmen have benefited from the selling of state assets while the rest of the Egyptian population has been left to suffer from the negative social and economic consequence of the neo-liberal reforms. The rich have become richer and the poor have become poorer. For these reasons, the second proposed scenario is for the newly emerging political regime to gradually change the focus of the regulatory system from economic efficiency towards equality and wealth redistribution among society. Would this mean a shift from the regulatory state to the welfare state model? This is an interesting question for future investigation and research.

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# 4

# Bureaucratic Resistance to Regulatory Reforms: Contrasting Experiences in Electricity and Telecommunications in Brazil

*Mariana Mota Prado**

## I. Introduction

In the 1990s, many governments undertaking privatization and regulatory reforms created independent regulatory agencies (IRAs) for the privatized sectors. Brazil is no exception: between 1996 and 2002, Brazil established IRAs for electricity, telecommunications, oil, gas, transportation, and other infrastructure and non-infrastructure sectors.[1] The agencies for the telecommunications and electricity sectors in particular were implemented as part of a very ambitious privatization programme aimed at attracting foreign private investors to purchase state-owned companies. Following generally accepted international standards, both agencies provide fixed terms of office for commissioners, require congressional approval of presidential nominations, and have guarantees of financial autonomy. However, these formal institutional guarantees of independence are stronger in the IRA for telecommunications (Prado 2008).

This chapter asks why do the Brazilian IRAs in the telecommunications and electricity sectors have different institutional guarantees of independence, despite both having ambitious privatizations. The Brazilian literature has suggested that the Brazilian government implemented agencies to create credible commitment to

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

the privatization and liberalization reforms (Melo 2001; Mueller and Pereira 2002; Pacheco 2005). However, the 'credible commitment' hypothesis fails to provide an explanation for the different guarantees of independence in the electricity and telecommunications sectors in Brazil. The literature on Latin America, in turn, has formulated the 'political bias' hypothesis (Murillo 2002), which challenges the idea that political actors are rational agents that respond purely to incentives in creating regulatory agencies. It claims, instead, that political bias influences the way in which politicians implement privatization and regulatory reforms. In the particular case of regulatory agencies in Latin America, the political bias is influenced by pre-existing beliefs in the state's role in a market economy. The central question of this chapter is whether the 'political bias' hypothesis could explain cross-sector differences in Brazil.

The nub of my argument is that the Brazilian case does not squarely fit with the 'political bias' hypothesis, requiring a new formulation that does not so much reject the hypothesis altogether as reformulate it with more specificity. The reason why it does not fit squarely with this hypothesis is the fact that there is evidence that the Brazilian bureaucracy has influenced the different design of IRAs in the telecommunications and electricity sectors. More specifically, bureaucratic resistance to reforms in the electricity sector may explain these cross-sector variations in Brazil. Political preferences and biases of bureaucrats are used (Vogel 1996; Thatcher 1999; Bartle 2002; Levi-Faur 2004a) to explain these cross-country and cross-sector variations in industrialized countries. Similarly to the 'political bias' hypothesis, these studies suggest that ideology and pre-existing beliefs and preferences influence the outcome of reforms. However, they focus on the ideology of the technical bureaucracy, not the politicians. This may suggest that bureaucratic resistance based on 'political biases' may explain different regulatory outcomes in different sectors within the same country. However, some authors (Martinez-Gallardo and Murillo 2011) do not believe this explanation is generally applicable to the Latin American context, as the bureaucracy is politically appointed and rather unskilled in the region. The literature, however, suggests that Brazil may be an exception, as one of the only Latin American countries with a relatively strong bureaucracy despite having politically appointed bureaucrats. Based on this literature, I formulate the following hypothesis:

> H: the Brazilian bureaucrats may not have influenced the reform process *ex ante* (at the design level) as they did in Europe, but instead they have influenced the process *ex post*, once the government had decided to implement IRAs and delegated to the bureaucracies the task of designing these bodies.

This is a variation of the 'political bias' hypothesis trying to account for the role of bureaucratic resistance in the Brazilian case, suggesting that it was distinct from industrialized nations. In particular, I argue that the 'political bias' hypothesis could incorporate a distinction between macro-level institutional choices and micro-level regulatory design decisions.

By proposing a variation of the 'political bias' hypothesis, this paper suggests ways of refining and making more specific the discussion in Dubash and Morgan's introductory chapter of three South-specific variables in the trajectory of the regulatory state (Dubash and Morgan, this volume). The first variable, pressures

from external institutions, is relevant mainly to the macrodesign of reforms, while the third variable, 'weak state' needs to be unpacked more in the manner described in this chapter, with detailed attention to the variety of impacts on the microdesign of reforms that can occur. In particular, a range of key actors appears here, from the bureaucracy, as in this paper, to the judiciary (Thiruvengadam; Urueña, this volume) and civil society (Chng, this volume). Some of these actors may respond more specifically to redistributive factors, Dubash and Morgan's second variable, than others; the Brazilian case does not reflect a strong influence of this variable.

Methodologically, the analysis developed in this chapter is based on data about Brazil presented in studies previously published by the author and other scholars. The general relevance of this kind of inter-sector comparison within the same country has been already articulated in detail (Levi-Faur 2004b). Data sources include information gathered while conducting interviews in Brazil for the author's doctoral dissertation, as policymakers involved in the reform process suggested that there were impacts of bureaucratic resistance on policy choices. However, the purpose is not to present new empirical evidence to support the claim that there was bureaucratic resistance in Brazil. Instead, the paper reorganizes the data collected in previously published studies to suggest that bureaucratic resistance to reforms may be a relevant variable to explain at least one of the regulatory outcomes of reforms in Brazil (cross-sectoral variations in formal institutional guarantees of independence in IRAs). Brazil's uniquely strong bureaucratic tradition presents the opportunity to explore the role of bureaucratic resistance in influencing institutional choices during the reform process in a developing country. While this may suggest that the insights gained through the examination of this case study are specific to Brazil, accounting for a particular country's implementation and design of regulatory agencies raises a series of interesting questions for future comparative analyses.

## II. Telecommunications and electricity: different levels of regulatory independence

The existing literature generally offers similar descriptions of the Brazilian telecommunications and electricity regulatory agencies. Jordana and Levi-Faur (2006), for instance, state that '[t]he first agency to be set up, the telecommunication authority ANATEL, was specifically designed by an international consultancy group engaged by the communications minister, and then served as a model for the subsequent agencies that were established very quickly in that period, all with identical formal characteristics irrespective of their adaptation to the requirements of each sector' (p. 349) Then they add, 'Brazilian and Argentinean agencies are typically designed according to the standards of best practice that are propagated by the World Bank. Appointment processes, board composition rules, budgetary sources, and other details display relatively minor variation across sectors' (p. 350).

In the case of telecommunications and electricity, what Jordana and Levi-Faur (2006) describe as *minor* variations Prado (2008) points as variations that could potentially translate into significant differences in the level of political influence

over these agencies. More specifically, the variations between the telecommunications- and electricity-sector agencies in Brazil could suggest that these two agencies have different levels of independence. Most of the analyses cited so far focused on nominal independence, which is normally measured by the existence of certain institutional guarantees of political insulation, such as fixed terms in office, congressional approval of presidential nominations, and independent source of funding (financial autonomy). The absence of such features will, indeed, strongly indicate that a certain agency lacks independence. However, in addition to questioning *whether* an agency has a certain mechanism to guarantee its independence, one can also ask *how* this mechanism was designed (Prado 2008). The design of the features may influence the different levels of independence among regulatory agencies. To be sure, the broader institutional environment will also impact on an agency's ultimate level of de facto independence (Prado 2008), but this does not negate the fact that some *minor* variations in design can potentially have a significant impact in the independence of regulatory agencies.

For instance, a basic assumption to secure independence of regulatory agencies is that it is easier for the president to influence an agency headed by one sole director than an agency headed by a commission. Going one step further, the number of directors in a commission with a majority vote structure is another important measure of the institutional guarantee of independence. When there are fewer directors, the president needs fewer nominations to constitute the commissions' majority. Both agencies in Brazil have five directors, which would suggest potentially the same level of independence. Agency independence, however, is affected not only by the existence of a commission that makes collective decisions and the number of directors, but also by the structure of this commission. In light of this, three aspects seem to be particularly relevant: the length of the directors' terms of office, the existence of staggered terms, and the interval between each nomination. I will analyse each of these in turn.[2]

It is assumed that the longer the directors' terms of office, the more independence the agency is likely to have. ANATEL (the telecommunications agency) is the only Brazilian agency that has a five-year term of office. Thus, ANATEL not only has the longest terms of office among Brazilian IRAs, but also the directors' terms of office are longer than the president's (presidents of Brazil are elected to serve a four-year term of office with the possibility of being re-elected for one additional term). As a result, at least one ANATEL director is in office longer than the presidential mandate. This term structure is one safeguard against the total domination of the agency by the nominees of a single president. Consequently, the four-year term of ANEEL (the electricity agency) is less effective in guaranteeing independence than the five-year term adopted by ANATEL.

In addition to the length of the term, another important feature is the interval between nominations. Nominations may coincide or be staggered. Staggered nominations mean that within one agency the terms of office of directors will not

[2] This analysis is largely based on Prado (2008).

overlap. A system of staggered terms guarantees a higher degree of independence if it reduces or eliminates overlapping nominations. For this purpose, intervals should distribute the nominations along the period of the presidential mandate in such a way that the beginning of one director's term will not coincide with the beginning of another director's; as a consequence, the end of their respective terms will not overlap. These intervals will also define the distribution of nominations within the presidential term of office. This is especially important in agencies without a partisan balance requirement, such as those in Brazil, because if all directors are nominated by the president at the beginning of the presidential mandate, it is more likely that the agency will follow the presidential orientation than if it were composed of appointees of the opposing political coalition or previous administrations. Thus, a system of staggered terms for directors addresses this concern, allowing for a pluralistic composition. Within this system, the president has to negotiate with an agency that is headed (at least partially) by nominees of previous administrations. This is another significant difference: ANEEL has overlapping nominations, while ANATEL does not. In ANATEL, the president nominates one director per year, so that each president can nominate four ANATEL directors during each term. Since, as noted above, ANATEL has a commission with five directors, each appointed to a five-year term, if all directors complete their terms of office regularly, the president will never be able to make all five appointments at ANATEL in a single executive term. In contrast, ANEEL has the highest number of overlapping nominations among all the agencies in Brazil (which all have at least one overlapping nomination, with the exception of ANATEL). Out of five directors (each appointed for a period of four years), three are nominated in the first year of the presidential mandate, and the other two in the following year. Therefore, by the second year of the presidential mandate, the agency's directors will all be the president's nominees. As a result, ANEEL's system of staggered appointments may not provide a secure guarantee of independence.

However, in the case of a president's re-election, all Brazilian agencies would be equally vulnerable to presidential influence. As of the first year of the second presidential mandate, the president would have only his appointees in both ANATEL and ANEEL. Therefore, if we consider the possibility of re-election, even the ANATEL system (five-year mandate for agency directors with terms staggered each year) is not ideal. In addition, even if re-election does not occur, independence may be impaired if a candidate of the same party is elected. Thus, without partisan balance, the length of the directors' mandates might not be an effective guarantee of independence, even with a five-year mandate.

It is important to note that this analysis does not assume that nominal guarantees of independence will necessarily correspond with de facto independence. Moreover, it is beyond the scope of this paper to determine if the Brazilian telecommunications agency is in reality more independent than the electricity agency. Instead, the question raised in the next section is how can we explain the differences in the institutional design of mechanisms to guarantee independence of agencies in Brazil.

## III. Explaining cross-sector variations in Brazil

Why do the telecommunications and electricity regulators implemented by the same government have different guarantees of independence such as the ones described above? Brazilian authors have argued that the Brazilian government implemented IRAs to secure its credible commitment to the privatization and liberalization reforms (Melo 2001; Mueller and Pereira 2002; Pacheco 2005). This 'credible commitment' hypothesis is grounded on theoretical work that suggests that by establishing a strong regulatory framework—including an IRA—to govern the newly privatized firms, governments were reducing the risks to investors and signalling their commitment to a professional and depoliticized economic environment (Levy and Spiller 1994; Berg 2001). It was also assumed that such a regulatory framework and IRAs, if created before selling state-owned enterprises (SOEs) to private investors, could alleviate concerns about the potential risks of investing in developing countries, which are generally considered to provide fewer constraints on arbitrary governmental action. The government's delegation of regulatory authority was considered particularly important in infrastructure sectors (telecommunications, electricity, roads, etc.), which are not fully competitive and are thus vulnerable to market failures (Spiller and Martorell 1996). In these cases, a potential benefit of proper regulation is that it can also increase the expected benefits from privatization by further decreasing tariffs and generating other benefits to consumers, especially when combined with competition in the privatized sector (Parker and Kirkpatrick 2005).

One of the central assumptions of the 'credible commitment' hypothesis is that IRAs were a rational option to governments that wanted to attract private investment and derive broader political benefits from privatization and liberalization reforms. As a consequence, one could hypothesize that most (if not all) elected politicians would have a strong incentive to favour IRAs, especially in developing countries. The increase in the total number of IRAs around the world since the 1990s could be used in an attempt to corroborate this hypothesis. However, the 'credible commitment' hypothesis fails to explain distinct regulatory outcomes in different countries and different regions. For instance, a cross-country and a cross-sector comparison of telecommunications and electricity sectors in Europe and Latin America confirms that despite the cross-sector similarities (telecommunications sectors are pacesetters while electricity sectors are foot-draggers), there are significant differences in the liberalization process (an expression that refers to both privatizations and regulatory reforms) in Europe and Latin America (Levi-Faur 2003). The comparison shows that the differences between this particular group of developed and developing countries manifest themselves in two dimensions of the liberalization reforms: creation of regulatory agencies and privatization. While Latin America had more full privatizations, it ended up with fewer IRAs: Latin American countries had 13 independent regulators compared with 25 in European countries in 2000 (Levi-Faur 2003).

Levi-Faur (2003) claims that the differences in the number of independent agencies in Europe and Latin America can be ascribed to the institutional weakness of Latin American states, measured in relative regional terms as compared with European states.[3] In weak states, public officials are less inclined to delegate power to IRAs because arbitrary use of power is less effectively checked by societal pressure and institutional safeguards than in strong states. Moreover, delegation of power to independent agencies reduces potential sources of patronage, which could harm political survival prospects in weak states. This may explain why certain Latin American states have actually implemented regulatory agencies, but failed to make them independent of political influence. Indeed, the total number of agencies implemented in both regions was 27 in Latin America and 29 in Europe, but in Latin America less than half of them have nominal guarantees of independence (13), whereas in Europe the vast majority can be classified as independent (25). In sum, this 'weak state' hypothesis provides a more nuanced explanation than credible commitment theories about the political incentives to create IRAs.[4]

This 'weak state' hypothesis also raises an important question about what made some of these 'weak states' actually implement IRAs. This question is beyond the scope of Levi-Faur's (2003) analysis, which comprises a cross-country quantitative analysis that assesses general trends in both regions (instead of focusing on particular cases). Nevertheless, it is still a relevant question, as the answer can further our understanding of the dynamics of regulatory reforms vis-à-vis the particularities of different regions and countries. Some of the reasons for 'weak states' to create IRAs seem to be associated with pressures from international organizations, such as the World Bank and the International Monetary Fund (Henisz, Zelner, and Guillén 2005). But this still does not seem to offer a full explanation for the central question of this paper: Brazil conducted massive privatization and introduced regulatory reforms in infrastructure sectors from 1995 to 2002. During this period, IRAs were established in the country for the first time. The agency for the electricity sector (ANEEL) was established in 1996 and the agency for the telecommunications sector (ANATEL) in 1997. If the Brazilian government was under international pressure to transplant IRAs, what explains the fact that there are different levels of independence between the Brazilian telecommunications and the electricity agencies?

As discussed in the previous section, these differences are relevant because the effectiveness of regulatory measures depends also on the institutions of regulatory governance, which includes the organizational structure and the degree of independence of the regulator from political influence (Levy and Spiller 1994; Stern and Cubbin 2005; Brown et al. 2006). With the caution that actual functioning of

[3] Levi-Faur has also acknowledged that diffusion is the prominent explanation for the overall decisions to emulate regulatory reforms and in some cases for the decision to establish a regulatory framework with an agency (Jordana and Levi-Faur 2006; Jordana, Levi-Faur and Fernandez 2011). Institutional weaknesses and the 'weak state' hypothesis become relevant in the actual implementation process, especially in deciding whether to guarantee the independence of these agencies.

[4] I have critically analysed the possibility of applying this 'weak state' hypothesis to Brazil in Prado (2012).

a regulatory agency is by no means entirely determined by its formal structures (Murillo and Levitsky 2009), the institutional structure of regulatory agencies should be, in theory, a pressing concern for those governments focused on the success of privatization reforms. What then could explain that in the same country one agency would have a higher level of independence (in terms not just of formal autonomy but also of the possession of appropriate powers) than the other?

## A. The 'political bias' hypothesis

In one of the few studies with a comparative analysis of the process of implementation of regulatory agencies in Latin America, Murillo (2002) analyses Argentina, Chile, and Mexico (telecommunications and electricity for the first two, and only telecommunications for Mexico). In contrast to Levi-Faur (2003), she is not comparing Latin America and Europe but rather trying to understand the cross-national variations within Latin America. Her analysis shows that countries that favour higher levels of state interventionism (Argentina and Mexico) tend to create industry-specific regulatory agencies, often with higher levels of independence from incumbents (Murillo 2002, p. 471). These five cases (two sectors in two countries and one in another) support her argument that political bias influences the way in which politicians implement privatization and regulatory reforms. More specifically, countries that prefer high state intervention are more likely to create industry-specific autonomous regulators (Murillo 2002, p. 474). In the particular case of regulatory agencies' independence, the political bias is influenced by beliefs in the state's role in a market economy, as confirmed by the evidence from the three cases analysed:

a) Chile: low preference for state intervention, with no independent industry-specific regulatory agencies for telecommunications or electricity (p. 481).
b) Mexico: high level of preference for state intervention, with an industry-specific regulatory agency for telecommunications created in 1995 with restricted legal autonomy (p. 484).
c) Argentina: high level of preference for state intervention, with independent industry-specific regulatory agencies for telecommunications and electricity (p. 485).

The connection between preference for state intervention and implementation of independent industry-specific regulatory agencies may seem counter-intuitive at a first glance. Murillo (2009, 102) articulates the connection as follows: '. . . the state uses its regulatory power and its creation and expansion of bureaucracies to impose prices and resolve intraindustry conflicts; these become crucial mechanisms by which it shapes market outcomes. In creating regulatory authorities, moreover, the decision to establish a larger bureaucratic structure, personnel, and budget, reflects an institutional preference that originates in prior reliance on and trust in state development agencies.' In turn, low preference for state-interventionism

would impose strict limits to regulatory discretion and little power to regulators, and will resist establishing them as independent industry-specific entities.

This hypothesis explains why there is a high level of diversity in what a superficial analysis would perceive and describe as policy convergence in regulatory and privatization reforms in Latin America. Murillo shows that there is convergence in the sense that most countries have privatized and liberalized their markets, but these reforms have been conducted in significantly different ways. These differences in implementation can be explained by the fact that politicians who are implementing reforms are not only guided by the need to build coalitions but they are also guided by their own beliefs. This combination of constituencies and beliefs creates what Murillo (2002) calls 'political bias'.

The question is whether this hypothesis could explain the creation of regulatory agencies in Brazil. As originally formulated, the 'political bias' hypothesis suggests that if the Brazilian government favoured higher levels of state interventionism, as Argentina and Mexico did, it would have implemented regulatory agencies with some degree of autonomy (Murillo 2002, p. 471). In a more recent study, Martinez-Gallardo and Murillo (2011) classified the Brazilian government as one that had a strong belief in state intervention in the economy. If this classification is accurate, it could explain why the Brazilian government created separate industry-specific regulatory agencies, in support of development goals identified at the time of privatization. Moreover, it accounts for the consensus-building process that has been highlighted by recent literature on economic reforms in Latin America in general (Schneider 2004) and in Brazil in particular (Bresser-Pereira 2003; Kingstone and Power 2000; Melo 2002). This seems to suggest that the independent variable (the biases of the Brazilian government) can be accounted for. However, one may ask how to determine the political preferences of the government at the time of the reforms and collects evidence to prove it. It seems that what may classify, as 'preference for state interventionism' in one country may not be comparable to another country. Moreover, the policy indicators used by Murillo (2002) to assess preferences regarding state intervention—creation of state-owned enterprises, the extension of state bureaucracy, and the regulation of labour markets—may be a result of path dependence (i.e., lack of ability to chance the policies implemented by previous governments), rather than a manifestation of a government's political preferences (Gomes and Prado 2011). This creates the challenge of determining evidence selection in a way that is not influenced by the result (the creation of IRAs) in a country.

Assuming that such difficulties in determining the independent variable (the biases of the Brazilian government) can be overcome, one may ask how to assess the dependent variable. Here, the task becomes rather complex. In an older article, Murillo (2002) has extensively referred to institutional guarantees of independence, such as the lack of a clear process for appointing commissioners with fixed tenure in Mexico (p. 484) or the competitive appointments for fixed terms and the budgetary autonomy of Argentinean regulatory agencies (p. 485). These are exactly the variables that this paper is concerned with. However, in her most recent writing, Murillo (2009; Murillo and Levitsky 2009) has abandoned such variables, arguing

that formal guarantees of independence are not as effective in Latin America as they are in Europe. Instead, she emphasizes how much power and discretion has been given to regulators, as opposed to their degree of independence of autonomy from political interest (Murillo 2009; Martinez-Gallardo and Murillo 2011). This recent shift in the dependent variable makes it hard to test the application of the hypothesis for the purposes of the investigation conducted here.

Despite this difficulty, the influence of political and cultural biases has been recognized in the process of actual implementation (also known as transplantation) of regulatory reforms in developing countries (Jordana and Levi-Faur 2006; Jordana, Levi-Faur and Fernandez 2011). Moreover, a recent case study on the adoption of Regulatory Impact Assessment (RIA) in Brazil has shown that strong organizational capacities are not a sufficient factor for successful diffusion of RIA, because political variables can influence divergence among agencies in future RIA practices (Peci and Sobral 2011). These studies suggest that the 'political bias' hypothesis may also explain detailed implementation of regulatory reforms. In sum, the 'political bias' hypothesis explains variations in policy implementation across countries in Latin America and perhaps could potentially explain why Brazil adopted IRAs while some of the other Latin American countries did not. The question is whether this hypothesis can also explain cross-sector variations in the design of regulatory agencies within the same country.

There are at least two ways in which the 'political bias' hypothesis could explain cross-sector variations in the design of agencies. First, these variations are determined at the design level, not at the implementation level. The 'political bias' hypothesis argues that politicians implement reforms that are designed by technocrats. Technocrats generate ideas for policy innovation and, if politicians are receptive to these ideas, they will provide the technocrats the leadership and supporting coalitions (normally of political parties) necessary to effect the policy change (Murillo 2002, p. 468). Thus, the design process could generate some of the observable sectoral differences in regulatory outcomes. For instance, technological differences between the telecommunications and electricity sectors could make technocrats more favourable to liberalization (privatization and regulation) in one sector than in the other.

So, one hypothesis that could be generated to explain cross-sector variations in Brazil is to assume that the technocrats in the telecommunications and electricity sectors have provided different levels of support to the implementation of IRAs in their respective sectors. Further comparative research could show whether this happened only in Brazil, or in other Latin American countries. Either way, the challenge here is to explain the complex interactions between policy design and policy implementation as a potential cause for cross-sector variations within the same country. For instance, if the politician implementing the reform had a strong preference for state intervention, why wouldn't this politician push for agencies with the same design and similar institutional guarantees of independence in both sectors, despite conflicting advice from technocrats?

A second hypothesis is that the implementation process, rather than the design process, determines such differences. Indeed, the central insight of the 'political

bias' hypothesis is that politicians are not a blank piece of paper that readily accept technocrats' proposed technological innovations. In adopting the ideas offered by technocrats, politicians are guided by their own pre-existing beliefs and constrained by constituencies (the coalitions that support the reforms in exchange for benefits). Thus, it is possible that politicians have distinct political biases in different sectors based on distinct pre-existing beliefs.

A third hypothesis is that these different outcomes may be due to the coalition-building in the implementation process. Liberalization reforms in different sectors offer different levels of political and/or economic benefits, which may impact the coalition-building process. As I indicated above, both the 'political bias' hypothesis and some of the most influential explanations of economic reforms in Latin America today are based on the idea of coalition-building. Thus, another possible explanation for cross-sector variations in the design of IRAs within the same country is the fact that different coalitions influenced the process in different sectors. There is evidence that coalition-building was relevant for the implementation of liberalization reforms in general and privatization in particular in Brazil (Almeida 1997, 2001). However, there are still no studies of whether and how such coalitions may have affected the actual design of IRAs. In addition to supporting this hypothesis, a careful study could determine whether these were the same coalitions supporting privatization and liberalization, or whether these were different ones. It would also be interesting to investigate whether bureaucrats were involved in these processes. Finally, this hypothesis would require investigating whether there were different coalitions for each sector, or if the coalition was the same but had different preferences in each case.

While there does not seem to be enough evidence to determine which of these three possibilities apply to the Brazilian case, there seems to be some evidence to support the idea that there was bureaucratic influence in the design of these agencies. This is what I turn to next.

## B. Evidence of bureaucratic resistance in the electricity sector

The different designs of these regulatory agencies in the Brazilian telecommunications and electricity sectors can be attributed to differing views within the bureaucracies in these sectors regarding the importance of regulatory independence (Ribeiro, Peixoto, and Burlamarqui 2006). Despite being created by congressional statutes, bureaucrats had an important role in these reforms as they drafted the bills that were submitted for congressional approval (Nunes et al. 2007). By deciding what went into the bills, these bureaucrats had the ability to influence the outcome of reforms by determining the detail of the institutional design. The different safeguards of independence in the bills submitted to Congress could be ascribed to the fact that bureaucrats in the telecommunications sector fully supported the idea of an independent regulatory agency, whereas those in the electricity sector did not (Prado 2008, p. 465).

The resistance among bureaucrats in the electricity sector started quite early on, in 1995, and it was related both to the liberalization and privatization reforms, as

well as the creation of an independent regulator (Nunes et al. 2007, 61 and 71–9; Oliveira 2007). Before it was submitted to Congress, bureaucrats affiliated with the Minister of Energy lobbied for changes in the bill that would significantly reduce the autonomy of the regulatory agency for the sector (Nunes et al. 2007, pp. 92–6). Once the bill was submitted to Congress, it was subjected to a heated discussion and significant revisions. This was a result of a political battle in which different groups within the executive branch (those in favour and against the reform) had to seek support from congressional representatives for their demands. The statute that was finally enacted was therefore a compromise among these groups (Nunes et al. 2007, p. 133). This is not to say that there was no resistance to privatization and regulatory reforms in the telecommunications sector, but these were mostly from congressional representatives and did not change the outcome of the reforms significantly (Almeida 1997, 2001). Indeed, congressional modifications of the legislation establishing the regulatory agency in telecommunications were much less intrusive than those proposed for other sectors (Ribeiro Peixoto and Burlamarqui 2006, p. 23).

The possible reasons for a greater level of resistance in the electricity sector are threefold. First, moves to a more competitive, private sector-oriented system had encountered more problems worldwide than in the telecommunications sector, making bureaucrats less confident in the outcomes of liberalization reforms in general, including privatization, regulation, and the creation of an independent regulatory agency. This could be related to the technological differences between these sectors, as important technological developments reduced the importance of regulation in the telecommunications sectors. Second, the Brazilian electricity sector is hydro-based, and many bureaucrats perceived that to be an impediment to competition in this particular sector. The idea was that an independent regulator would disrupt the cooperative nature of the current system, where all the companies and the government were able to coordinate their actions (Prado 2008 (unpublished)). Finally, in the pre-privatization period, the regulatory bodies in the electricity sector were dominated by bureaucrats who alternated between periods in government offices and tenures in state-owned companies. The lack of clarity about the purpose of the agency and the role it would play in the sector caused many bureaucrats to believe that privatization and independent agencies would cause them to lose power and influence in the sector (Prado 2008, p. 465).

## C. Accounting for bureaucratic resistance in the 'political bias' hypothesis

Some of the literature on regulatory reforms in developed countries identifies bureaucratic influence as a key explanatory variable to interpret policy divergence across countries (Vogel 1996; Thatcher 1999; Bartle 2002; Levi-Faur 2004a). Similarly to the 'political bias' hypothesis, these studies suggest that ideology and pre-existing beliefs and preferences influence the outcome of reforms. However, they focus on the ideology of the technical bureaucracy, not the politicians. For

instance, in analysing liberalization and deregulation of the telecommunications and financial markets in the UK and Japan, Vogel (1996) argues, 'state institutions best explain the essential variations in national approaches to regulatory reforms' (Vogel 1996, p. 19). Vogel indicates that ideas and ideology can influence the orientation of state institutions, and these are not necessarily associated with party ideologies. Indeed, he indicates that changes in power may not change the general orientation of state institution, if such orientation is embedded in the bureaucracy.

Martinez-Gallardo and Murillo (2011, p. 352) and Murillo (2009, pp. 36 and 101), however, present a strong argument against using this framework in Latin America. They argue that this hypothesis assumes a strong civil service, but that Latin American countries lacked effective bureaucracies at the time of reforms. Technical experts were political appointees who had incentives to adopt the preferences of reforming presidents. It is important to note that Murillo's argument does not negate the strong influence of bureaucrats in economic reforms in Latin America, which has been documented in the literature (Centeno and Silva 1998). For instance, Schneider (1992) ascribes the failed privatization in Brazil in the early 1990s, under Collor's government, at least in part, to the lack of a technocracy in Collor's economic staff that would push for such reforms, as they did in Mexico. The difference between Murillo and these scholars who analyse bureaucratic influence in Latin America is that the latter are trying to explain whether privatization happened or not. In contrast, Murillo—similarly to Vogel—is trying to explain cross-country variations in regulatory outcomes among the cases in which privatization took place. Ultimately, the fact that these bureaucrats are politically appointed suggests that they would not have different preferences from the politicians, and therefore they would not push for different reforms. Murillo (2009, p. 36) calls them 'allied experts'. Thus, this appointed bureaucracy and the associated absence of a strong civil service undermine the idea that technocrats in Latin America may have influenced the details of regulatory reforms (such as the creation of regulatory agencies). In sum, in Latin America the bureaucracy is not strong enough to make politicians' preferences secondary in the process. In contrast, this seems to be what happened in industrialized countries.

The question is: although the bureaucracy may not explain cross-national variations in Latin America, could it potentially explain cross-sector variations within Brazil? Could Brazil have an effective bureaucracy that explains the different levels of independence of agencies in Brazil? The comparative literature seems to suggest that there are reasons to believe that Brazil has historically implemented reforms to insulate its bureaucracy and create a strong civil service, in contrast to its Latin American counterparts. *The Politician's Dilemma*, the very same book that Levi-Faur (2003) cites as the basis for the 'weak state' hypothesis, claims that 'levels of competence, efficiency, and honesty have varied widely within the Brazilian bureaucracy, but some sectors at some times have been as capable as virtually any in the world [between 1930 and 1964]' (Geddes 1996, p. 20). In this book, Geddes shows that the Brazilian bureaucratic performance operated at a high level, especially in agencies formulating economic policy, due to their political insulation. She then concludes that 'the type of autonomy state policymakers need in order to

implement policies effectively may not be autonomy from class-based pressures, but rather autonomy from the tide of particularistic demands that has risen as an unintended consequence of certain kinds of representative institutions' (Geddes 1996, p. 21).

While Geddes focuses on a few agencies that seem more insulated than others, Schneider (1992) argues that the effectiveness of the Brazilian bureaucracy can explain why Brazil was one of the most successful examples of state-led industrialization post-1945. Despite not challenging the claim that the Brazilian bureaucracy was informed by politics and patronage, Schneider (1992) shows that in the Brazilian case these practices were implemented in a way that created a system of incentives that favoured successful economic policies. Despite providing an analysis of the Brazilian bureaucracy before privatization, Schneider (1992, pp. 7–8) argues that we cannot assume that all bureaucrats are influenced by the political preferences of their appointees based on the fact that all positions in the high levels of Brazilian bureaucracy are political appointments. Indeed, among those appointed to such positions, he identifies four social types: (i) the politician, who is primarily guided by electoral gains; (ii) the military officer, whose decisions are mostly informed by concerns over national security; (iii) the *técnicos* who adhere to efficiency analysis and push for technical rationality; and (iv) political *técnicos* who may either favour political concerns or technical ones, depending on the context. The existence of these four types is combined with rapid bureaucratic circulation, which ends up weakening organizational loyalties and favouring personal ties. The end result is that despite organizational fragmentation of the bureaucracy and political appointments, the system generates incentives for key bureaucrats to implement effective policies in order to advance their careers in the system, contrary to the assumption of Murillo.

These historical analyses suggest that there could be a case for arguing that the Brazilian bureaucracy may be different from other bureaucracies in Latin America and perhaps in other weak states. This would, however, raise the question of how this bureaucracy may have possibly influenced regulatory reforms and, if so, how. The answer lies in an analysis of the role that this bureaucracy plays both in policy design and policy implementation. As Martinez-Gallardo (2011, p. 120) shows, '. . . in practice, individual ministers or groups of ministers do play important roles in the policymaking process. Together with the bureaucracies they head, ministers have a near-monopoly in the design of policy, with occasional input from political parties and/or interest groups. They are also important in the legislative phase of policymaking, where they typically have the task of pushing the executive's proposal through congress.'

Obviously, the politicians (i.e., the president and his or her ministers) and their preferences will take centre stage in the process if the bureaucracy is highly politicized and characterized by low technical qualifications. According to Murillo, this seems to describe the dynamics of reform in most Latin American countries. However, in the Brazilian case, there seems to be reason to believe that there has been a strong bureaucracy and, despite being politically appointed, they have not been guided simply by the political interests of their appointers (Schneider 1992).

Therefore, it may be the case that in Brazil the bureaucratic influence on the policymaking and/or implementation process ended up affecting the outcome of regulatory reforms. In line with this hypothesis, there seems to be evidence that the regulatory agency for the electricity sector has weaker guarantees of independence due to the bureaucratic resistance to regulatory reforms (Section III., B.).[5] More specifically, there was strong bureaucratic resistance to liberalization (privatization and regulatory) reforms in the electricity sector, while there was very little bureaucratic resistance in the telecommunications sector.

By bureaucracy, I am referring to the influential groups of experts—most of them politically appointed—occupying key decision-making or advisory roles in public and private organizations in the Brazilian system, not the amorphous group of SOE employees or other workers in the industry. Although these workers and their unions did often resist reforms, their resistance in the electricity sector was not nearly as significant as the resistance from the so-called 'power experts' (Oliveira 2007). Unlike the 'power experts', who had connections with ministers, governors, congressional representatives, and influential business people, employees of SOEs were too politically isolated to have had any measurable impact on the process. In Brazil, this is especially true for the electricity sector, where, in contrast to the experts, workers' resistance was disorganized and easily overcome with salary increases and the promise of participation in the privatized companies (Treisman 2003, p. 102). In the cases where the resistance was fiercer, such as the oil sector, President Cardoso sent the army to repress protests and fired union leaders, calling them 'enemies of the people' (Treisman 2003).

What kind of hypothesis could capture the possibility that bureaucratic resistance may explain sectoral differences in the design of IRAs in Brazil? As mentioned earlier, the 'political bias' hypothesis as formulated by Murillo is expressly opposed to the 'bureaucratic influence' hypothesis à la Vogel. Both discuss how the dynamics of the implementation processes in different countries resulted in distinct outcomes. While those analysing developed countries suggest that this seems to be related to the bureaucratic influence in the process (which seems to prevail over political preferences), Murillo's studies of Latin America draw our attention to political influences, which seem to prevail over bureaucratic preferences. As I have indicated in Section III., A., the 'political bias' hypothesis could potentially offer a convincing account of why Brazil, along with other Latin American countries, has adopted independent regulators in infrastructure sectors.

The question, then, is whether we can integrate the 'political bias' hypothesis (regarding the decision to create IRAs) with the idea that the Brazilian bureaucracy may have influenced the outcome of the reforms by determining the details of the institutional guarantees of independence of regulatory agencies. I believe the answer

[5] This group of bureaucrats includes what most of the literature defines as technocrats: 'individuals with a high level of specialized training which serve as a principal criterion on the basis of which they are selected to occupy key decision-making or advisory roles in large complex organizations—both public and private' (Collier 1979, 403). It does not include, however, what Dominguez defines as 'technopols', that is, those technocrats that are political leaders (Dominguez 1997, 6).

is yes. First, we need to consider which level of the reform we are analysing. Murillo makes a clear distinction between design (dominated by technocrats) and implementation (dominated by political actors). She is primarily focused on implementation at the level of political actors. In this aspect, the Brazilian 'bureaucratic resistance' hypothesis shares Murillo's assumptions: it is clear that the bureaucracy within the Brazilian ministries had received orders, from the president, to create independent regulators.

The difference is in the focus of the analysis. The 'bureaucratic resistance' hypothesis, as applicable to the Brazilian case, does not refer to the macrodesign of reforms, which happened predominantly in international institutions and circles, and was in turn filtered by political actors in Latin America at the time of implementation. Instead, this analysis focuses on the microdesign of reforms, that is, the moment after which a president—for reasons identified by Murillo in the 'political bias' hypothesis—decides to implement an independent regulator (or not). The Brazilian 'bureaucratic resistance' hypothesis asks what happens once the president delegates the task of designing this regulator, and drafting the bill that will be submitted to Congress, to someone else. It is very clear that the microdesign process in Brazil (which can still be conceived as part of the implementation process, but one step after the one analysed by Murillo) was led by bureaucrats. Further, it is at this level that agencies ended up with different institutional guarantees of independence in the telecommunications and electricity sectors.

Recent studies of IRAs in Turkey and cross-sector and cross-time variations in their levels of independence suggest that this hypothesis may also capture the role that bureaucrats have played in regulatory reforms in other developing countries (Ozel (2012); Kayaalp (2012)). Other pieces in this volume, in turn, suggest that in Colombia and in India the relevant actor in this microdesign process has been the judiciary not the bureaucracy (Urueña; Thiruvengadam, this volume). In contrast, Chng (this volume) shows how civil society may be the relevant actor in this process. This suggests that further comparative work could expand the 'political bias meets bureaucratic resistance' hypothesis to identify which other actors could be directly or indirectly affecting the microdesign of IRAs and regulatory outcomes.

## IV. An agenda for future research

This chapter does not offer a fully articulated version of this 'political bias meets bureaucratic resistance' hypothesis. To develop such a refinement of the 'political bias' hypothesis would require detailed analysis of what potentially influences the preferences of these bureaucrats. For instance, one could ask if they are subjected to the same influences that political actors are: initial design by technocrats at the international level, ideologies, and the coalition-building process.

As to technocratic design, one could investigate how Brazilian bureaucrats interacted with the technocrats at the international level, mostly in international financial institutions, who were influencing political actors. Were the Brazilian bureaucrats part of the groups designing the international models and standards for

these reforms, or were they mere recipients of the 'international consensus' around the need for independent regulators? Is it possible that bureaucrats from the telecommunications and electricity sectors had different levels of involvement with the design of reforms at the international level? If so, why was this the case? If there was such involvement at international level, was there a self-reinforcing mechanism or feedback effect between the macro- and microdesign processes? If so, could this feedback effect, or even the role of national bureaucrats in the macrodesign process, be potentially more intensive in one sector than in the other? Could different levels of involvement have influenced different levels of bureaucratic resistance?

As to the ideology of bureaucrats, one could ask if Brazilian bureaucrats were operating based on pre-existing preferences or beliefs. If so, how and when were they formed? Have these preferences always been distinct, or have they changed over time, evolutions that resulted in one group resisting and the other supporting the liberalization reforms? If they have changed, under which conditions have they done so? If they have not changed, how did such distinct preferences form at the time in which these two sectors were equally controlled by the government?

Finally, regarding the coalition-building process, one can ask how the Brazilian bureaucrats gathered support in Congress for the bill they had drafted on behalf of the president. Bureaucrats were preparing the bills that were submitted to Congress and negotiating their approval with congressional representatives. Thus, it is reasonable to question whether an analysis of the outcomes of reforms needs to account for this interaction between bureaucrats and congressional representatives, and other political coalitions. Was the presidential coalition supporting privatization the same one supporting the design proposed by bureaucrats, or were these coalitions different? Is it possible that there was some sort of conflict between these two coalitions? Or was the president unwilling to risk undermining the entire liberalization process to fight for minor institutional details in the regulator? Could it be the case that the bureaucrats from the electricity sector were forced to implement some level of independence, lest face the risk of not having the bill approved by the congressional coalition? Did most of the negotiation and coalition-building happen during the drafting of the bills, or after their submission to Congress?

In sum, these are all unanswered questions that deserve further investigation about the design and implementation of Brazilian IRAs. Some of these questions have already been answered in a case study of Turkey (Ozel, 2012), suggesting that this paper's argument supporting a refined version of the 'political bias' hypothesis also raises a series of interesting questions for future comparative analyses:

> Are there other developing countries in which the levels of regulatory independence in these two sectors vary?
>
> If the answer is yes, could this be ascribed to bureaucratic resistance, or to resistance/influence of some other group or institution?
>
> If not, is this in spite of bureaucratic resistance in particular, and political resistance in general, or due to its irrelevance/inexistence?

These are all important matters that should be explored in future research.

## V. Conclusion

This chapter asked what could explain the fact that while Brazil has established IRAs in its telecommunications and electricity sectors, it has granted different institutional guarantees of independence to these bodies. The chapter starts by indicating the problems in taking for granted the 'credible commitment' hypothesis and asks if there are alternative explanations. Focusing primarily on the 'political bias' hypothesis, the paper asks if it could offer a satisfactory answer for this question. The answer is maybe. The 'political bias' hypothesis explains a different outcome: the implementation of independent regulators. The question is whether it could be extended to explain the differences in the details of institutional design that can potentially make IRAs more or less independent. I argue that a refined version of the 'political bias' hypothesis, with an additional layer of analysis, could offer an explanation for this regulatory outcome in Brazil.

The proposed refined version of the 'political bias' hypothesis would operate under the premise that the implementation decision is a twofold process. First, there is the decision of political actors, which is followed by decisions of the players who are in charge of implementing this political decision, which I called the microdesign of the reform. In other words, whereas the president may decide whether or not to implement an independent regulator, the task of designing the institutional guarantees of independence will be delegated to someone else. This refined version of the 'political bias' hypothesis—and, to a lesser extent, the other hypotheses suggested in the paper—call attention to the importance of looking at microdesign (i.e., levels of independence) and not just macro variables (independent or not).

In the Brazilian case, the bureaucracy was in charge of designing the regulator (in other countries it may be some other group). The fact that there was bureaucratic resistance to liberalization reforms in the electricity sector but not in the telecommunications sector may explain why the regulator in the former has weaker institutional guarantees of independence than the latter, despite the fact that both sectors ended up with independent regulators. The refined version of the 'political bias' hypothesis helps by articulating how this type of bureaucratic resistance to reforms in Brazil was distinct from industrialized nations.

The purpose of this chapter, as stated at the outset, was to develop and sharpen hypotheses rather than testing them rigorously. Once this refined version of the 'political bias' hypothesis is fully articulated in the Brazilian case, it could raise a series of interesting questions to be explored in future comparative studies. I hope this hypothesis will prove to be a fruitful avenue of future academic inquiry.

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# 5

# Regulating Through the Back Door: Understanding the Implications of Institutional Transfer

*Navroz K. Dubash*

## I. Introduction[1]

Independent regulatory agencies have entered India through the back door, little remarked upon and even less understood. Strongly promoted by international donor agencies, regulators have been viewed primarily as a mechanism to insulate decision-making from politics. Drawing on subnational case studies of electricity regulation, I suggest the Indian experience sheds new light on how we understand theories of regulatory diffusion and transplant. Specifically, I suggest that a more complete understanding of how regulatory agencies are transplanted and subsequently operate in the developing world requires attention to the specifics of the transplant process and of the local institutional context. Examined from this perspective, regulators can operate less as agents of depoliticization and more as agents of repoliticization through a different institutional avenue.

There is now a substantial literature on the process of regulatory diffusion and transplant, some of which has particularly focused on developing-country contexts. The early emphasis on rational design—notably Levy and Spiller's (1994) foundational story of the rational construction of regulatory institutions as a functional solution to the problem of signalling credible commitments—has increasingly been complemented by a rather more sociological understanding. Thatcher and Stone Sweet (2002), for example, find that to fully explain the adoption of regulatory agencies in Western Europe requires complementing a principal-agent analysis with ideas of isomorphism from sociological institutionalism. More recently, work by Levi-Faur and Jordana has taken further the sociological roots of the diffusion of the regulatory state, and explored the empirical record outside Western Europe, and

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particularly in Latin America (Levi-Faur and Jordana 2005; Levi-Faur 2005; Jordana and Faur 2006).

However, existing approaches leave important elements of the story untold. For example, Jordana, Levi-Faur, and Marin (2011) focus on identifying channels of regulatory diffusion across and within sectors and countries in a self-declared emphasis on the diffusion process itself. They do this by focusing on macrovariables, such as the proportion of regulators in a given sector in all countries, or a given country across all sectors, as explanatory variables for further diffusion of the model. This approach provides a framework for exploration of multiple pathways of diffusion and interaction across those pathways. But it largely fails to engage with the microdetail of regulatory diffusion, to ask whether beyond coarse indicators such as existence and timing of creation of regulators, details of regulatory context matter.

Of course, that local context matters to the viability of a regulatory institution is an old, if often underplayed, theme in the literature. Indeed, Levy and Spiller's (1994) nuanced approach to identifying necessary conditions for regulation to be undertaken by regulatory agencies (as opposed to by contract or executive action) have been all but forgotten in the subsequent rush to enshrine regulatory agencies as international best practice. A few recent papers have returned to and developed this theme. Pollitt and Stern (2011), for example, review the dismal state of human resources, and argue this is a serious obstacle to effective regulatory institutions in electricity. Jarvis (2009) draws on a case study of Thailand's electricity regulator to suggest that the diffusion model, as most clearly spelt out by Jordana et al. (2011), neglects institutional capacity and assumes institutions are 'simply transplanted, capacity and all'. He suggests that the thin capacity of the institutional substrate in developing countries makes this a highly problematic assumption, an argument that the Indian evidence presented here supports.

While the rediscovery of local context is welcome, the exploration of diffusion can and should be taken much further than it is by either the channels of diffusion approach or by those emphasizing shortfalls in local institutional capacity. While there may be multiple pathways of diffusion and multiple obstacles to that diffusion, the literature suggests that the same institutional outcome results, albeit with greater or less degrees of success.

By contrast, here I explore whether and how the manner of diffusion and process of embedding regulatory agencies into national political economies can also shape the nature of the institutional outcome itself. I suggest that it can, and that the role newly transplanted regulatory agencies play in domestic political economies—as agents of depoliticization or as institutional sites for the re-articulation of political interests in locally specific ways—is likely to vary across contexts. Consequently, I argue that there are limits to both the microdetails of diffusion process and the manner in which diffusion carries implications for the subsequent embedding of regulators within national contexts.

Attention to the dynamics of adoption, including the role of intermediating agencies that act as vectors for the various channels of diffusion, and to the process of embedding, is particularly important to understanding institutional outcomes.

To stretch a metaphor, if regulatory bodies are not adopted whole cloth, then attention to both the nature of the fabric and the tailoring process are required.

I develop this argument with reference to a single case—Indian electricity regulation and its variants at the state level—to inductively build a picture of how the role of transplanted regulations institutions is shaped by the process of transplant and the microcontext within which transplant occurs. This leads me to argue for limits to a positive political theory of regulatory diffusion.

Drawing on the Indian case, I also make a more direct claim about aspects of the diffusion process that are particularly noteworthy. In developing-country contexts such as India, intermediary organizations such as the World Bank play an important role as vectors of global best practice (Henisz, Zelner, and Guillen 2005) acting through a mixture of coercive and normative isomorphism (Christensen and Laegreid 2007; DiMaggio and Powell 1991). I use the metaphor of the 'back door' to suggest that, in such cases, there is less *ex ante* domestic engagement with the idea of regulation and internalization of its definitional attributes, and rather more *ex post* justification of regulation and adjustment to the transplant of regulatory institutions. This process of attenuated *ex ante* engagement and extended *ex post* justification limits the ability of regulatory agencies to act according to the classic Majone (1994) understanding of efficiency-enhancing regulatory decisions drawing on a legitimacy founded in technical expertise, in part because the distinction between efficiency and redistribution is not discussed, debated, internalized, and operationalized. Drawing a page from the development literature, the transplant of regulatory agencies suffers from the problem of a lack of 'ownership' over transplanted policies and institutions. This is not, of course, to suggest that there is no impact of the introduction of regulatory agencies, but rather to buttress the idea of treating regulatory institutions as a 'policy irritant' (Levi-Faur and Jordana 2005) that can lead to surprising and unpredictable outcomes that diverge even across different subnational regulators within the same country.

In this paper I develop this argument inductively with reference to the introduction of regulatory agencies in the Indian electricity sector. The section that follows provides relevant context on the Indian electricity sector and the introduction of regulatory agencies. I then examine in more detail the process of regulatory transplant, with attention to the role of intermediary agencies and develop the implications of a 'back door' route for regulatory agencies. The following section explores two particular implications of this form of diffusion for the subsequent process of embedding electricity regulators within Indian political context with reference to the cases of three state-level regulators—in Andhra Pradesh, Delhi, and Karnataka.

## II. Regulatory transplant through the back door

Electricity regulatory agencies, I suggest, entered India through the back door as an accompaniment to a larger process of restructuring Indian electricity in keeping

with the accepted reform prescription of the time.[2] An important motivation for reform was a quest for private, especially foreign, investment into the sector, and a consequent need to depoliticize decisions in the sector. As a result of this 'back door' entry, there was relatively little domestic discussion about the implications of creating regulatory agencies, nor of the role they would play in governance of India's electricity sector. Below, I provide a potted history of the introduction of regulatory agencies to provide relevant context for the discussion that follows, and also to begin drawing out the implications of regulation through the back door.

By the 1990s, India's electricity sector was sliding into deep crisis. The roots of the crisis need not bother us here, but it is relevant to note that opposing and balancing political interest groups were instrumental in creating and reinforcing an unsustainable financial situation in the sector. In brief, the interaction between farmers hanging on to politically inspired electricity subsidies, industrialists rebelling against higher tariffs needed to support those subsidies, and affluent and increasingly mobilized urban consumers chafing against the poor service that resulted from a bankrupt sector locked Indian electricity into a downward spiral. Reform required political, and not just technical, and institutional resolution.

Financial pressures to act coincided with the rise of a seismic shift in the global conventional wisdom on organizing the electricity sector. Electricity 'restructuring'—'unbundling' publicly owned and managed monopoly electricity utilities, privatizing, and introducing competition between the newly created entities—coalesced into a standard prescription for electricity-sector reform.[3] Emerging at a time of a larger global ideological shift towards the virtues of private investment, electricity restructuring became the accepted precondition for attracting foreign investment. Independent regulatory agencies are a key part of this prescription. In functional terms, regulators are intended to regulate the residual monopoly segment of the 'unbundled' electricity sector (the wires), establish and enforce the rules of market functioning, and set tariffs in the lead-up to competitive markets. Most significantly, however, they are intended to excise politically motivated and therefore arbitrary decision processes, and to replace them with technocratic and hence predictable decisions.

Through its ability to leverage public investment in the power sector, the World Bank served as the dominant vector for transmission of 'electricity restructuring' to India. An internal 1993 World Bank policy document makes explicit the objective of depoliticizing decision-making through creation of regulatory agencies: '. . . the Bank will require countries to set up transparent regulatory processes that are clearly independent of power suppliers and that avoid government interference in day-to-day power company operations' (World Bank 1993, p. 14).[4]

[2] This section draws on Dubash and Rajan (2000), which reviews the recent political economy of India's electricity sector.

[3] Patterson (1999) provides a very readable introduction to the topic. Dubash and Singh (2005) critically review these ideas and locate the debate in an Indian context.

[4] The other conditions—commercialization and corporatization, importation of services, and encouragement of private investment—would soon become intertwined with the emergent model of competitive electricity markets emanating from the UK, to become a standard model of electricity restructuring applied to the developing world (Williams and Dubash 2004).

In the same year the policy was issued, the World Bank explicitly invited Indian states to take up the bargain in a meeting with state chief ministers.[5] Five states initiated discussion, but only one state, Orissa, saw the process through (World Bank 1996). The Orissa loan document from the World Bank clearly articulated the role of the regulator: '. . . to ensure the sustainability of tariff reform . . . inter alia to attract sufficient private investment and protect the interests of consumers' (World Bank 1996, p. 7). A key contribution of the regulator to achieving these goals was '. . . to insulate Orissa's power sector from the government and ensure its . . . autonomy' (World Bank 1996 Annex 5.3, p. 2). In other words, the fundamental purpose of electricity regulation was to create an apolitical space for electricity decision, in large part to send a signal of credibility to investors.[6]

Within Orissa, there was substantial support for a thorough reform of the electricity sector from the political leadership and elements of the bureaucracy. This support for a broad reform agenda did not translate, however, to clarity on the role of regulatory agencies within a reform agenda, nor to debate and discussion on their role as part of the larger reform process. In the opinion of an Indian consultant involved in the process, many officials saw regulatory agencies as a necessary hurdle imposed by funding institutions, or as a relatively costless diversionary tactic to signal seriousness about reform (Dubash and Chella Rajan 2000). The creation of regulatory agencies was, therefore, a somewhat formulaic appendage to a larger sector-reform process, one focused on financial restructuring, attracting private investment, and putting in place depoliticized decision structures. The regulatory agency was the key mechanism intended to achieve this last objective, but with little critical reflection on whether and how it would do so.

In practice, unsurprisingly, the Orissa regulatory experiment was well short of being a success in its early years, particularly with respect to its ability to actually depoliticize decision-making. Contrary to the expectation of the domestic reformers and the World Bank, who sought rapid tariff increases, the Orissa Electricity Regulatory Commission decided that the public should not bear the burden of past mismanagement and limited tariffs to moderate increases. In other words, far from depoliticizing the sector, the Orissa regulator actively internalized political sentiments in its decision-making.

Despite these deviations from design, at least with regard to the regulator's ability to depoliticize and thereby signal credibility to investors, the Orissa approach to regulation has rapidly spread to other states. To avoid a proliferation of state acts, the central (i.e., federal) government passed a Central Electricity Regulatory Commissions Act (1998) to provide an alternative legal basis for state regulators. This was followed by an omnibus Electricity Act (2003) that enshrined in law the

[5] Electricity is a 'concurrent' subject under the Indian constitution, which means it is jointly governed by the federal level and the states. The electricity sector is historically, however, organized around state-level electricity boards, the dominant operational entity for utility provision.

[6] The goal of insulation from political process led to interesting design debates. According to Indian consultants, foreign consultants were naïve about how to achieve this outcome. For example, it was at the insistence of Indian consultants that the Orissa reform act explicitly prohibited elected officials from ever assuming office as a regulator.

restructuring and regulation formula. Despite the Orissa experience to the contrary, the underlying presumption that it is indeed feasible to create an apolitical regulatory sphere simply by legislating one was retained more or less intact.

In a repeat performance of the Orissa experience, throughout this sequence of events extending the reach and scope of electricity regulators, there was remarkably little national discussion of whether and how regulators would in fact be able to play their expected role within the larger framework of electricity governance. Only in 2006 (leading to publication in 2008), almost a decade after the Orissa experiment, did India's Planning Commission initiate a discussion around regulatory agencies that explored institutional design and capacity issues, questions of accountability, and mechanisms to safeguard independence (Planning Commission 2008).

The process through which electricity regulatory agencies entered India was remarkably devoid of reflection on whether and how these bodies would be able to achieve their core design objective of depoliticizing decision-making in the sector. The model has been widely propagated despite early experience in Orissa demonstrating that entrenched political interests and path dependencies are obstacles to depoliticization. While regulators entered through the back door, assisted by donor agencies, local reformers were certainly willing to hold open the door, in the interests of achieving their larger objectives of attracting investment. However, this willingness to embrace regulatory agencies was not arrived at after deliberation or consideration of the suitability of the model, but rather as a taken-for-granted appendage to the reform agenda. Instead of an intentional and considered response to the problem of credible commitment, regulatory agencies took on the nature of what Meyer and Rowan (1991) call a 'rationalising myth' that had become central to signalling credibility to foreign investors.

## III. Regulatory practice: the fallacy of depoliticization illustrated by the case of tariff setting[7]

As the discussion above suggests, the mechanism through which the independent regulatory agency model was adopted in India did not prioritize reflection on the role regulators could and should play in governing Indian electricity. Nor was there a subsequent process at the state or national level of generating shared expectations, and building the institutional conditions to realize these objectives. Instead, the context of privatization-oriented reform encouraged by the World Bank and supported by domestic reformers assumed uncritically the viability of regulatory agencies as agents of depoliticization, based on a shallow process of institutional transplant.

Depoliticizing decision-making through creation of regulators was always going to be a challenging construct. The Indian electricity sector was deeply enmeshed in

[7] This section draws on a compilation of empirical material in Dubash and Rao (2007).

a crisis of governance. Consumers from all categories had little patience for tariff increases without credible promises of improved service quality and reliability. Improved services were unlikely to materialize unless the financial health of the sector also improved. Regulators were ill placed to cut through this Gordian knot, since doing so would inevitably have created winners or losers. Instead, state governments had to take the lead in balancing the interests of different groups and often, in doing so, encroaching on terrain that had been delegated to regulators. For their part, regulators struggled to maintain a façade of apolitical decision-making based on technocratic criteria, even while finding themselves constrained in various ways, explicit and subtle. Creating the appearance of depoliticization while allowing for active consideration of political stakes in the decision-making process is a useful example of *ex post* adjustment when regulatory agencies enter through the back door.

The cases below represent a range of political contexts for regulatory functioning: strong political support for reform and the regulator in Andhra Pradesh; efforts to politically marginalize the regulator in Delhi; and active efforts to undercut the regulator in Karnataka. In all cases, however, the outcome was similar: a swing back to politically controlled tariff setting. These cases suggest that tariff-setting outcomes are overdetermined by the underlying political context, and insertion of a regulator, whatever the relationship between the regulator and the executive, is inadequate to change this dynamic.

*Andhra Pradesh*. The state of Andhra Pradesh (AP) in the south of India represents the strongest case of deep commitment to a reform agenda. While electricity reform was supported by a World Bank loan, as in Orissa, the reform effort was strongly owned and driven by the then chief minister of the state, Chandrababu Naidu. By contrast to the Orissa case, where the government created the immediate conditions, but subsequently stepped back, the AP government remained in the driving seat. Naidu personally supervised weekly meetings with the top management of utilities, at which bread-and-butter management reforms were hammered out, such as re-aligning staff incentives around performance, and striking a wage-for-results deal with labour. The result was an impressive turn-around in several key outcome indicators.

Despite political support at the highest levels in the state for the reform template, pressures for political accommodation on the issue of tariff reform began to infuse the process, with these pressures centred on the newly created regulator. To ensure the commercial viability of the utilities, a necessary step before unbundling and privatizing, the World Bank loan document specified that utilities were required to file regular requests for tariff increases and the regulator should then issue the regulator relevant tariff orders (Dubash and Rao 2007, p. 49, fn. 7). The overarching purpose of the regulator was to 'reduce the interference of the state government, minimize the politicization of key sector decisions . . . and balance the interests of various stakeholders' (Dubash and Rao 2007, p. 49, fn. 8).

The regulator began by setting tariffs by the book—based on a calculation of revenue requirement of the utilities given allowing prudential costs and a prescribed rate of return—leading to a steep 15% tariff hike in its first tariff order. This

announcement was met with substantial street protests, and reportedly with nervousness within the political leadership, who announced a countervailing public subsidy to mitigate the effect of the tariff increase. This outcome marked an improvement from earlier practice, in that the state government provided an explicit budgetary subsidy, instead of simply placing the burden on the utility, resulting in the accumulation of losses on its books.

However, in subsequent years, the regulator was more circumspect and resorted to some sleight of hand, leading to an outcome reminiscent of pre-reform times. To keep tariff hikes in check the regulator took to setting an efficiency-based 'performance target' for the utilities to meet, which, for several years subsequent to the first tariff order, was set at levels that obviated the need for a tariff increase. In essence, this measure placed the burden of under-recovery of tariffs back on the utility, risking undercutting its commercial viability, much as in the pre-reform era. This approach brought obvious political benefits to the government, which avoided public anger at tariff increases. But, it also forced the tariff review process back within political constraints, albeit disguised within a thin technocratic veneer. The AP regulator maintained a thin façade of independence from political pressure, but only by creating a technocratic construction that allowed it to reinterpret predetermined tariff outcomes within the given regulatory rules of the game.

*Delhi*. Delhi's reform context was a high-stakes effort to privatize right from the start. After Orissa, the pressure was enormous; failure in Delhi would have signalled that privatization of Indian electricity was a lost cause, and cause investors to be even more wary of entering the country's electricity sector. As with other states, the central objective was to increase sector efficiency, in particular by limiting commercial and non-commercial losses, and thereby nurse the sector back to financial health. As in other cases, tariff setting was critical to ensure the confidence of private investors.

By contrast to both Orissa and AP, Delhi's effort was home-grown, albeit drawing on the global reform model, but did not explicitly involve the World Bank. The Delhi government established an independent regulator in 1999 and privatized the utilities in 2002, but during the process sought to severely constrain regulatory jurisdiction through a government directive that established a form of regulation by contract for an initial five-year period. During the period, the regulator did not have the ability to set performance targets for loss levels or adjust the rate of return. While the regulator did have control over year-by-year tariff setting, the privatization template included a set of assumptions about the sequence of tariff increases, which aggregated to a 44% increase over the initial five-year period, amounting to a form of indirect pressure on the regulator.

Due to this circumscribing of regulatory power, the early relationship between regulator and executive was fraught. Yet, in its exercise of tariff setting, the regulator was curiously conciliatory; perceptions among regulatory consultants, utility staff, and within government was that regulatory tariff decisions were influenced by communication with government. Whether true or not, these perceptions suggest the existence of a credibility problem.

In terms of actual decisions, the regulator uniformly sets tariffs well below the trajectory of tariff hikes assumed by government at the time of privatization. While state-owned utilities, such as in AP, might have been willing to bear the loss-making associated with inadequate tariff increases, it was harder to persuade private utilities to do so. In reaction to utility protests, the regulator proposed two accounting mechanisms to help square the circle. First, the regulator argued that collection of past arrears, which the privatization agreement had earmarked to pay down past liabilities in order to avoid imposing these costs on taxpayers, should be retained within the sector and used to lower the revenue requirement, thereby requiring lower tariff increases. In essence, this measure shifted the burden of adjustment back onto taxpayers instead of ratepayers. The government resisted this sleight of hand, but since it also had an interest in limiting tariff hikes, chose not to rein in the practice entirely. As one former bureaucrat put it, they chose to protest at the bureaucratic level, but not at the political level.

Second, the regulator found a way to sidestep approving a massive 30% tariff increase requested by utilities by creating a 'regulatory asset' that allowed the tariff hike to be spread over future years. A hike of this scale would have been politically ruinous, particularly given a public perception that some of the private companies were failing to deliver on promises of service improvements. While the utilities were unhappy with the concept, and successfully appealed this decision in the Appellate Tribunal for Electricity, by the time the case had been disposed of the purpose of postponing a difficult regulatory decision had already been accomplished.

While the Delhi government clearly had a strong interest in a successful reform outcome, and put in place regulation by contract that severely limited the discretion of the regulator, it nonetheless tacitly allowed the regulator to put in place measures that effectively limited tariff increases. Ownership over reform was no guarantee of tariff-setting decisions stipulated by the reform template.

*Karnataka*. The Karnataka experience illustrates most explicitly the tensions between a regulator charged with being independent and an executive that has largely failed to internalize the logic of the model it has institutionalized. The Karnataka government and its regulator were at loggerheads for the first few years after inception. As with Delhi, the Karnataka executive sought to limit the ability of the Karnataka regulator to complicate efforts at privatization, in particular by limiting the profit-making opportunities in the sector. Following the establishment of the state electricity regulator in 1999, the Karnataka government designed a privatization strategy that would have allowed future utility owners of newly privatized utilities to essentially by-pass the regulator in the tariff-setting process. This was the first salvo in a long sequence of hostile interactions during which the utility challenged the regulator's orders in court repeatedly. The executive continued efforts to undercut the regulator, effectively putting in place a parallel regulation by contract structure as part of a 'Financial Restructuring Plan' for the state that included operational targets for the utilities (Dubash and Rao 2007, p.103). These actions prompted the chair of the regulatory agency to write a sarcastic letter recommending that the regulator be '. . . placed in a state of

suspended animation . . . to avoid unnecessary expenditure . . . on its maintenance and upkeep' (Dubash and Rao 2007, p.103).

In the tariff setting that the regulator did have control over, it engaged in a now-familiar process of following technical tariff-setting methods while remaining within political limits. After popular opposition to an initial set of two tariff increases of 16% on average, in subsequent years the regulator managed to keep increases limited by deferring rises to subsequent years.

As with AP, the privatization process was never concluded and utilities stayed in state hands. Once the objective of privatization faded, the executive completely changed its approach, undercutting regulatory authority with the objective of explicitly pandering to political pressures, rather than preparing the sector for privatization. In one case, the government simply instructed the utility not to follow regulatory orders to increase tariffs to subsidized customers (Dubash and Rao 2007, p. 123), a tariff direction the regulator was charged with implementing under the Electricity Act. As the first chair of the regulatory agency declared, 'the regulatory system is an unwanted child' (Dubash and Rao 2007, p. 105).

These three state cases, representing different levels and forms of commitment to the independent regulator model, illustrate the challenges, in practice, of depoliticizing tariff setting. The AP case suggests that, new regulatory institution and reformist leadership notwithstanding, political pressures to accommodate contending interests are not easily sidelined. The Delhi case, perhaps even more than the AP case, suggests a process of creative accommodation in tariff setting. Regulatory decisions are often cast in the technocratic constructs the regulator is intended to be guided by, but the outcome remains accommodationist politics around tariff setting. In Karnataka, the government often did not even bother with supporting the perception of regulatory independence, but instead ruthlessly undercut the regulator—sometimes seeking to suppress populist tariff setting, at other times encouraging it. In the context of shallow transplant, these examples suggest, when political constraints bump against regulatory independence (and this happens frequently), governments and regulators tend to find creative workarounds, with lesser or greater degrees of nuance, and preserve the myth of regulatory autonomy and technocracy, even while allowing for accommodation of political pressures. The focus is on practical adjustment to a situation where the stated intent *ex ante* of introducing regulatory agencies—depoliticizing the sector—is out of reach.

## IV. From transplant to irritant: creating space for a new regulatory politics

The above discussion has suggested that a mechanistic transplant of the institution of the independent regulator is insufficient, at least in the context of Indian electricity, to achieve the intended goals of depoliticizing the sector. But it also shows that this transplant does not leave the decision-making processes and the rationale behind decisions untouched. Instead, while tariff decisions are only

affected marginally, the argumentation behind them, and the forms and locations of negotiation over these decisions, does change.

The idea of regulatory transplant as a change that subsequently induces a set of reactions and responses, many of which are unexpected, is nicely captured in the metaphor of regulation as an 'irritant' (Levi-Faur and Jordana 2005). In this section, I propose that one response to the irritant of regulatory transplant in India is the creation of embryonic new sites for democratic politics around service delivery.

The vehicle for creation of these sites is the introduction of procedural safeguards as part of the regulatory design, a theme that on which there is a rich tradition of work. As far back as Majone (1994), procedures have been viewed as critical to building the legitimacy of the regulatory state. In his work, Prosser (1999) reflects critically on whether procedural safeguards automatically deepen legitimacy and calls for a form of reflexive proceduralism that examines the conditions under which participation in regulatory process does provide necessary safeguards and regulatory legitimacy.

The introduction of electricity regulators in India was accompanied by detailed procedural safeguards included in the regulatory acts. For example, the Orissa Act's procedures on participation specifies notice and comment procedures for licensing and passing of orders, specifying details such as time limits for notice in the Act itself. The Conduct of Business Regulations (1996) further detail procedures that guide hearings. Notably, a 1998 Amendment to the Conduct of Business Regulations extended these procedures to additional significant decisions, notably tariff setting, approval of power procurement, and approval of power purchase agreements.[8] Other state acts are similarly detailed.

Curiously, the explicit articulation of administrative procedures in legislation is a significant departure from past precedent in Indian administrative law. As Baxi (2008) forcefully states, the 'central reality' of Indian administrative law is that it is 'wholly judge-made' and lacks an overarching legislative codification. One interpretation for this departure is simply to view procedural safeguards as part and parcel of a larger, somewhat uncritical process of transplant. If regulators are imported institutions, then the administrative procedures have also been directly imported, with international consultants serving as the vector of transport into Indian law. Administrative procedures could then be understood to be functional to the larger aims of importing regulation, and particularly to providing investors a defence against arbitrary administrative action. Participants in the process of framing the Orissa law suggest a more deliberate process through which these procedures were put in place that sought to unearth and make more 'explicit' principles of natural justice that were already enshrined in Indian case law.[9]

Procedural safeguards, therefore, were introduced into regulatory processes through some combination of isomorphism and local adaptation. However, the

[8] Government of Orissa, Orissa Electricity Regulatory Commission (Conduct of Business) Regulations, 1996, available at <http://www.oriec.org>.

[9] Telephone interview with M. G. Ramachandran, lawyer and legal consultant, 30 December 2007.

transplant story does not suggest any hint of deliberate creation of a new political space through which contending interests could seek to represent, and participate in the governance of the sector. Yet, as the cases below illustrate, this is exactly what has happened.

*Andhra Pradesh*. In AP, the regulator has established a procedural framework enabling access to information about the sector, a required process of public hearings in particular for tariff orders, and a mechanism for filing petitions and pleadings. For example, the Andhra Pradesh Electricity Regulatory Commission (APERC) has a well-functioning and useful website, diligently holds hearings that are well attended, including in locations outside the capital city, has translated regulatory materials into the local language, and has established an advisory committee, including labour, agricultural, and consumer representatives.

There remain, of course, some substantial holes in full implementation of the spirit of these procedures. For example, in one case the APERC convened a hearing on an issue only after substantial external pressure, and once it did so, issued a 60-page order the very next day, which clearly could not have incorporated insights from the hearing process (Electricity Governance Initiative—India, 2006). In addition, there remain grey areas on information disclosure, such as on investment plans, where the APERC has no clear policy and procedure, and by default withholds access to these materials.[10] Hesitation and confusion on such matters has a great deal to do with the newness of the institution and its staffing by individuals who bring parochial and paternalistic attitudes characterized by former monopoly state utilities. There is little doubt, however, that under external pressure, the institutional space for regulatory governance is slowly but certainly becoming more open.

Regulatory procedures on information and participation have expanded the regulatory space in AP, to include labour groups, political parties, consumer groups, individual consumers, industry associations, farmers, and other public bodies such as municipalities. A scan of the tariff order for 2006–07 suggests that these opportunities are, in fact, utilized. A total of 46 different individuals or institutions filed a total of 330 objections to the tariff orders of the three distribution companies in the state.[11] Of these, 302 were 'substantive' pertaining to issues that had to do with details of the tariff process, as compared with 28 'grievances' that were related to more narrow concerns that affected only the complainant or contained little or no substantive argumentation. Not surprisingly, the largest number of objections, 106, were by individual consumers, but substantial numbers of comments, in each case between 25 and 70, were filed by political parties (42), public entities (28), industry (36), unions (68), and consumer organizations (43).

[10] This observation is based on a personal visit, during which the authors were allowed to open and view files on investment plans on the premises, but only after initial denial followed by a personal appeal to the chair.

[11] Based on analysis conducted by the authors using data from tariff orders supplemented with information from APERC. This analysis excludes local language petitions.

Interestingly, industrial buyers and others with deep pockets are not disproportionately represented in these comments.

The flurry of public engagement stimulated by creation of the APERC has begun to reshape regulatory politics at three levels. First, consumer groups have actively worked to broaden and deepen the procedural rules. For example, they have demanded hearings at district levels, requested and won local language translation of orders, and forced a broader and more transparent review of power purchase agreements.

Second, they have somewhat disrupted and injected themselves into the triangular negotiation between APERC, the government, and the utility. The main avenue for doing so is forcing release of information, and forcing public, documented, responses to raised objections, thereby limiting the extent to which adjustments in key parameters can be made behind the scenes. For example, farmer and consumer groups sought the release of the agricultural census to measure rural power use conducted by the APERC. They have also sought and obtained public disclosure of the dispatch order of generating plants to ensure that one generator is not unfairly favoured over another.

Finally, they have achieved some substantive gains, most significantly in the area of power purchase and approval of new generating plant investment, which accounts for the majority of total electricity cost.[12] Significantly, this is truly a public interest issue, as savings in power cost accrue to all consumers, and cannot be captured by any single group. Gains in power purchase were achieved by forcing open the issue for debate before the regulator. In addition to arguments made by consumer groups, the resultant opportunities allow powerful actors, such as the utility (for whom lower costs mean healthier finances), to pursue the issue to a greater extent than they otherwise would have. Indeed, in one case the process has led to strange bedfellows, with a petition jointly filed by the utility, an NGO called the Peoples Monitoring Group on Electricity Regulation, and a journalist with Communist Party affiliation acting in his individual capacity. The expanded scope of regulatory governance has created new strategic opportunities for diverse actors in the sector.

*Delhi*. In Delhi too, the statutory requirements for hearings, access to information, and mechanisms of recourse have created an important new space for regulatory governance. However, the weaknesses in the practical application of these procedural requirements are also considerable. For example, the Delhi Electricity Regulatory Commission (DERC) website is incomplete and poorly organized, which along with the lack of an effective library or an organized index of documents makes accessing documents extremely difficult in practice. The hearings are not open to the public, but only to those who have submitted comments. This said, the wide availability of detailed tariff orders to the public, and the ability of consumers and interested parties of all sorts to present their views before the DERC, and obtain an answer from the distribution companies, represents an entirely new institutional space for public deliberation.

[12] Interview with senior management of APTransco, 19 May 2006.

In 2004–5, the DERC received 212 objections to its tariff orders from 69 different objectors.[13] Consumer groups or individuals accounted for about 40 of these, while there were about 20 objectors from within industrial user groups. Of the total concerns expressed, by far the majority (625 out of 683) were substantive complaints as compared with more narrow grievances.

By contrast to AP, however, no small core of competent and knowledge interveners had appeared to win the respect of the regulators. For example, the DERC staff say they do not find public submissions helpful in improving the quality of tariff orders. Indeed, the capacity base of interveners is thin. Thus, the apex body of Delhi's Resident Welfare Associations (RWAs), which includes the wide spectrum of neighbourhoods, including well-to-do areas, files petitions based on patched-together pieces of information, without deploying any resources to obtain specialized knowledge or skills.[14] Similarly, the Chamber of Commerce hires a single consultant to write its comments, with little involvement or feedback from the staff, or mechanism of either quality control or ensuring that comments truly represent member interests.[15]

However, Delhi consumers are extremely active and skilled in the broader political arena around electricity. The apex body of RWAs skilfully uses the media to directly critique the companies and the DERC, and to force engagement and consideration of its appeals at the highest political levels. While it is an effective tactic in the context of any particular skirmish, this approach has the effect of devaluing and delegitimizing the DERC as a forum for reconciling competing interests.

A political mapping of consumer voices in Delhi is also instructive and helps to explain the emphasis on organized politics rather than on the DERC. The most vocal subgroup, the RWAs, speak for a distinct subsection of Delhi's consumers self-identified as 'middle class', but who include the top end of Delhi's income strata. They place themselves in opposition to small-scale and illegal industry owned by local politicians and to slum dwellings that house substantial vote banks. Both of these categories of consumers, they argue, receive free power at their expense. From this perspective, the DERC is relatively helpless; the problem and the solution, lies in the political process.

As a result of the dominance of the RWAs in the public discourse around electricity, the issues that have attained the highest profile in the DERC are questions of metering, billing, and other consumer grievance issues, after an initial period when the DERC was seen to be unresponsive. Some of the upstream and more technically detailed matters also before the regulator, notably investment scrutiny, have tended to be ignored. Another important consequence is that voices of lower-income groups and especially slum dwellers are seldom heard within the DERC process.

*Karnataka*. The Karnataka regulatory experience is characterized by two unusual factors, as compared with the other two states. First, the Karnataka Electricity

[13] Based on analysis conducted by the authors using data in DERC tariff orders.
[14] Interview with consumer representative, 20 January 2006.
[15] Interview with Chamber of Commerce representative, 31 January 2006.

Regulatory Commission (KERC) is the only regulator to have established an office of consumer advocacy, which serves as a conduit for stakeholder participation in the regulatory process. Second, farmers are particularly active in the regulatory process. For example, in 2002, 8000 objections were filed, of which 99% were from irrigation pumpset owners (Dubash and Rao 2007, pp. 129–30). Yet the vast majority of these were duplicate submissions, indicating an organized effort to mobilize farmers to send submissions.

Regulatory staff members are frequently dismissive of public submissions, but identify a few key participants in hearings processes with whom they engage. In addition, the KERC has established an advisory committee with representatives of key constituencies, and attributes to this group some important reform measures, such as a differential tariff for urban and rural areas. In addition, there are indications that the KERC strategically uses consumer input on occasion to explain or defend its decisions. Taken collectively, Karnataka demonstrates considerable organization and engagement, particularly by farmers, but, as yet, little evidence of direct impact.

In all three states, a new arena for political engagement around provision of basic electricity service has emerged with the creation of the electricity regulator. However, the manner in which the arena has been used, and the interests that have mobilized in each case are quite different. In AP, while the results are by no means uniformly positive, a curious assortment of actors have formed into a loose coalition to address issues that have the potential, at least, to positively benefit a large cross section of the consuming public. In some cases, they have been partially successful, and in others the procedural safeguards have simply been sidelined. In Delhi, however, the most effectively mobilized groups represent the interests of relatively affluent consumers and have single-mindedly advocated their agenda. In this case, the establishment of the regulator has tipped the scales disproportionately towards providing a voice to middle-class residents, rather than slum dwellers or small-scale industry. In Karnataka, mass mobilization of farmers has not translated into impacts on regulatory decisions. Interestingly, in none of the cases have large commercial interests, who might be assumed to have deep pockets, dominated the regulatory process.

The broadening of regulatory space to include consumers of all sorts, public interest groups, and media may yet be the most far-reaching change brought about by independent regulation. The creation of new political spaces, these examples suggest, can lead to highly contingent outcomes. The specificity of local micropolitics determines whose interests are served by the establishment of regulatory agencies and associated procedures.

## V. Conclusion

Understanding regulatory transplant is not just a matter of ensuring adequate capacity in the host environment, nor simply drawing out the process of transplant, in order to gradually get it ‘right’. Instead, transplanting the institution of the

independent regulator can lead to unexpected outcomes, which shape the very role of the regulatory agency in governance of the sector.

In India, the cases here suggest, introduction of the regulator introduced a language of technocracy and rational decision-making to the sector, but actual decisions on key issues such as tariff setting changed little. Instead, a process of accommodation between the executive and the regulator, through explicit and implicit understandings, allowed populist pressures to continue playing a substantial role in moderating tariff hikes.

The shift to a discourse of reason-giving and technical justification, however, when added to a set of procedural safeguards that were quite new in the Indian context, also provided an opening for existing political actors to shape sector decisions. While in the past, various interest groups could only mobilize around large and blunt demands, the new regulatory political arena allowed them to mobilize around smaller-scale decisions—approvals of particular plants, categorization schema for tariffs—with larger implications for distribution of costs and benefits.

In some cases, this resulted in a relatively healthy process of injecting a democratic element into managing trade-offs that are often falsely construed as entirely technical. In other cases, as in Delhi, it gave a disproportionate voice to some better-off actors. The outcome of the political opportunity created by new regulatory agencies, this evidence suggests, is heavily contingent on local political patterns and mobilization. It also suggests that the ability of different interests to engage with newly created political spaces is an important variable in understanding regulatory outcomes.

The cases discussed here suggest substantial obstacles to developing a positive political theory of regulatory type and outcome. The overdetermined nature of Indian electricity politics led to similar tariff-setting outcomes, despite very different relations between executive and regulator across states. But when it came to regulators as an arena for deliberative politics, regulatory patterns have diverged across states in India, driven by local particularities. This is not to say there are no gains to a comparative study of regulatory diffusion. But it is to suggest that tracing through the process by which regulatory institutions are embedded, the extent to which deliberative processes lead to shared expectations, and the case-specific nature of political mobilization all help to understand not only the success of regulatory transplant, but also the role the regulator can play in domestic political economies.

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# 6

# The Regulatory State Under Stress: Economic Shocks and Regulatory Bargaining in the Argentine Electricity and Water Sectors

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Over the past decade, scholars have chronicled the rise of the 'regulatory state' or 'regulatory capitalism' in Europe and other parts of the industrialized world (Majone 1994, 1997; Moran 2002; Levi-Faur 2005). According to this literature, the government delegation of services typically provided by the state to private or non-profit actors, alongside the establishment of formally independent regulatory agencies, represents a shift to rule-based policymaking relatively sheltered from electoral pressures (Vogel 1996; Majone 1997; Scott 2000; Thatcher 2002a, 2002b). Recently, attention has turned to the rise of the 'regulatory state' in the developing world. This shift in focus is natural given that reforms adopted under the 'Washington Consensus' involved not only large-scale privatization efforts, but also the establishment of myriad new regulatory agencies following the experience of industrialized countries. Indeed, Jordana and Levi-Faur (2005) and Henisz et al. (2005) have documented the rapid diffusion of utilities privatization and the establishment of regulatory agencies throughout the developing world.

Regulatory agencies may in fact operate at a distance from everyday politics in Europe, as the 'regulatory state' literature suggests. We concur with other contributors to this volume, however, in stressing that regulatory processes are inherently political in the developing world. A number of factors ensure that regulation is intrinsically political in low- and middle-income countries. First, countries formed regulatory agencies at the strong encouragement of financial institutions and donor agencies; as new institutions, they have had little time to develop roots and reputations of legitimacy. Second, states undergoing privatization processes often incorporated significant public interest goals into privatization contracts. Given the fact that contracts are inevitably incomplete, government officials remain involved in not only enforcing original contractual conditions, but also reformulating them when unexpected situations arise. Third, as Levy and Spiller (1994, 1996) stressed, much of the developing world lacks strong systems of checks and balances that constrain politicians from intervening in functions formally delegated to regulatory agencies. Finally, developing countries experience high rates of economic volatility

(Ardanaz 2010; Gavin 1997; Wibbels 2006a), which aggravates problems of contractual incompleteness, especially given the long-term nature of infrastructure contracts (Guasch 2004; Post 2008; Zelner et al. 2009). Economic crises in particular place regulatory arrangements under enormous stress. They often make existing contracts either financially or politically unworkable, and bring urgent redistributive questions to the fore, such as who will bear the costs of adjustment.

This chapter examines a cogent example of the political character of regulation in the developing world: processes of contract renegotiation between Argentina's provincial governments and private investors holding concession contracts in the country's electricity distribution and water sectors following the country's 2001–02 crisis. The crisis eroded consumers' ability and willingness to pay for basic services. At the same time, the national government's decision to devaluate the currency and subsequently freeze utility rates created economic difficulties for providers. Contract renegotiations dealt with the thorny question of who should shoulder the burden of the crisis: consumers, firms, or some combination of the two? Because the provincial governments—rather than regulatory agencies—originally granted the privatization contracts and politicians felt the need to be seen taking concrete actions to address fallout from the crisis, these negotiations took place directly between provincial governments and investors. Government ministers completely sidelined regulatory agencies. As some contract renegotiation processes continue to drag on a full ten years after the crisis, *regulation via negotiation* between ministers and firms became the everyday form of regulation.

We examine two aspects of post-crisis contract renegotiations in the Argentine electricity and water sectors. First, we examine the circumstances under which firms and host governments are able to conclude contract renegotiations, thereby reaching an agreement about how consumer rates, firm investment plans, and other contractual provisions would be adjusted to post-crisis realities. We then examine factors associated with investor exit from their concession contracts. Contract renegotiation and investor exit decisions were, of course, linked. Concluding contract renegotiations generally improved firms' financial situations, giving them greater certainty and policy concessions, and thus provided them with incentives to remain in the market.

Focusing on contract renegotiation processes and investor exit decisions in two sectors in a single country, Argentina, offers important analytic opportunities. A number of factors are held relatively constant in the Argentine case. First, one can hold national-level political institutions and other cultural factors constant. In addition, while national privatization programmes often differed dramatically from one another in terms of degrees of control retained by the state and the types of contractual models adopted, privatizations in the electricity distribution and water sectors in Argentina exhibited a number of common features, including similar contractual and regulatory institution design.[1] Finally, the fact

[1] See Murillo (2009) for a study of the diverging features of national privatization programmes. See Azpiazu et al. (2008) for a review of regulatory agency and contractual features for provincial privatizations in both sectors in Argentina.

that Argentina privatized relatively early allows for the comparison of a large number of cases within a single context over an extended time frame. Taken together, these various factors suggest that a study of post-crisis contract trajectories in Argentina promises to provide important insights into the regulatory state in the developing world, particularly given the prevalence of economic crises in emerging markets and the long-term nature of infrastructure and utilities contracts.

Our aggregate analysis of the 30 contracts in place after the crisis in these two sectors suggests that rates of contract renegotiation and market exit vary considerably with investor characteristics. Moreover, dynamics vary by sector. Investors that possess diverse holdings in their contract jurisdiction conclude contract renegotiations at a higher rate. Investors whose reputations would suffer were they to exit their Argentine contracts, however, often chose to stay on in Argentina even in the absence of revised contractual agreements. This tendency was particularly strong in the electricity sector. The higher level of patience we observe among electricity investors can at least in part be explained by higher revenues and lower investment obligations in the electricity sector.

This chapter will proceed as follows. The next section describes regulation in the Argentine water and electricity sectors prior to the economic crisis. It establishes that even prior to the crisis, utilities regulation was hardly an apolitical affair. The third section outlines the main effects of the Argentine crisis upon regulated sectors and the issues at stake during the post-crisis renegotiation processes. A fourth section examines variation in the ability of investors possessing different characteristics to conclude contract renegotiations and in their decisions regarding market exit in the water and sanitation and electricity distribution sectors. A final section highlights the main theoretical contributions of the chapter.

## I. Utilities regulation in Argentina prior to the crisis

Argentina was one of the first developing countries to privatize extensively in its utilities sector.[2] As it did so during the 1990s, it adopted a particularly 'interventionist' approach to regulation that charged regulatory agencies with not only pursuing efficiency objectives, but also ensuring investors complied with important investment obligations designed to ensure that the reach and quality of services improved. In the years following privatization, this section will show, regulation was certainly not an apolitical affair. Regulators, responding to political pressures, catered to consumer interests during competitive political periods and when serious service problems drew attention to the sectors. On numerous occasions, government ministers also sidelined regulatory agencies during contract renegotiations regarding burden sharing between low- and middle-income consumers.

President Carlos Menem launched Argentina's utility privatizations as part of a far-reaching economic reform programme following the country's 1989

[2] See PPIAF-World Bank (<http://ppi.worldbank.org>) for a nearly comprehensive data set of infrastructure privatizations in low- and middle-income countries since 1990.

macroeconomic crisis. The president and his ministers aimed to reduce state subsidies for utilities and infrastructure, as well as encourage foreign investment in system upgrades and expansion, in sectors such as telecommunications, transportation, power, and water and sanitation. During the early 1990s, most provincial governments possessed administrative responsibility for electricity distribution and urban water and sanitation systems within their borders.[3] Alongside its national-level reform effort, the Menem administration also pushed the country's provincial governments to privatize the electricity and water systems under their control. Menem's economy minister viewed these privatizations as a means of reducing provincial deficits, which contributed directly to the country's macroeconomic difficulties. The Menem administration launched a set of negotiations with the provinces to revise revenue-sharing arrangements that culminated in two new fiscal pacts, reached in 1992 and 1993. Menem required provinces signing the Fiscal Pact of 1993 to privatize many public services administered at the provincial level, including provincial banks, electricity distribution systems, and water and sanitation services.[4]

Of Argentina's 24 provinces, 14 privatized their electricity distribution systems and 13 privatized their urban water and sanitation systems between 1990 and 2000. The privatization format chosen by the provinces provided for important forms of government intervention following privatization, consistent with the country's approach to privatization at the national level as observed by Murillo (2002, 2009). Provinces followed a common policy template promulgated by the international financial institutions and national government technocrats: the *concession contract* model, which kept infrastructure assets in state hands while assigning investment and operational responsibilities to private-sector operators.[5] In all cases, privatization contracts for both electricity distribution and water and sanitation systems were designed as geographical monopolies because of the important economies of scale associated with network development. Just like the national government, the provinces set up formally independent regulatory agencies to monitor concessionaires' compliance with their contractual goals.[6] Regulatory agencies, in other words, were charged with ensuring that important state social objectives—such as extending water and sewerage services to poor portions of the population and avoiding electricity blackouts—were achieved in practice. Regulatory agencies were also charged with ensuring that companies be allowed to introduce measures outlined in their contracts designed to help utilities recoup

[3] A few provinces had previously decentralized responsibility for one or both services to the municipal level.

[4] See article 9 of the Pacto Federal para el Empleo, la Producción y el Crecimiento, signed 12 August 1993. Eaton (2004, pp. 147–50) and Wibbels (2004, 2006b) describe these negotiations.

[5] In both the water and electricity sectors, consultants adapted standard contract templates promulgated by the national government to local socio-economic conditions. Contracts bear striking similarities, including common formats, obligations for firms and governments, sanctioning regimes, and so on.

[6] Of the 32 concession contracts granted by the national or provincial governments in the two sectors, only two were regulated by agencies that were formally dependent upon the provincial administration: the electricity concessions in San Luis and San Juan.

their costs, such as updates to consumer databases and service cut-offs designed to improve payment rates.

Given the political sensitivity of issues like service access and blackouts, regulation was destined to be a political process even in the absence of major economic turbulence. A variety of actors, including ombudsmen, government ministers, citizens' organizations, and state senators and congressmen, attempted to influence, or override, regulatory agency decisions. Regulatory agency directors, conscious of the concerns of the politicians that appointed them, often delayed rate increases justified according to contractual formulae until after elections.[7] Sector-specific crises, such as electricity blackouts and algae blooms affecting water quality, also spurred elected officials to champion consumer concerns.[8] Their efforts to champion consumer interests were often spurred by civil society non-payment campaigns and public protests among network insiders receiving services. This made regulation a very visible affair, and ultimately ensured that regulators would need to consider the political viability of any decisions they might make.

While these sorts of political debates about regulatory policy revolved around the costs that should be borne by companies and existing consumers, another type of distributive politics occurred in the water sector. On several prominent occasions, clear conflicts arose between the advocates of network insider and network outsiders. For example, contract renegotiations between the concessionaires in Metropolitan Buenos Aires and the province of Santa Fe and the responsible ministers in each jurisdiction focused on who should shoulder the burden of connection fees for new users.[9] While the original contracts had stipulated that the new users on the urban fringe should finance the cost of their connections to the system, concessionaires found it very difficult to collect charges for this comparatively less affluent set of consumers. They proposed having existing users, which were generally more affluent, cross-subsidize the cost of new connections through a per-user fee. Consumer associations based in more affluent sections of each metropolitan area mobilized against the measure, but the firms and government ministers decided to move forward with the contractual changes. Regulatory agencies, importantly, were sidelined during these politically sensitive negotiations.

[7] Murillo (2009) provides a theoretical framework for thinking about the effects of electoral competition: regulators will face incentives to redistribute from firms to consumers during periods of electoral competition. Post (2008) makes an analogous argument and documents the many instances in which this occurred in Argentina's provincial water and sanitation concessions prior to the 2001 crisis.

[8] Murillo (2009) makes the theoretical point that regulatory policy will tend to favour consumers when utilities are salient in the minds of voters. Sector-specific crises such as those mentioned above constitute obvious instances during which such salience would increase. Murillo (2009) describes concrete instances of blackouts affecting sector policy in Argentina, and Post (2008) analyses the cases of Azurix and Tucumán, in which algae blooms created episodes of 'brown water', which made it impossible for elected officials to defend concessionaires. Both concessions were subsequently revoked. Morgan (2011) also analyses the Tucumán case.

[9] See Post (2008) for detailed documentation of these negotiation processes.

## II. The Argentine crisis as prompt for contract renegotiation

Concession contracts in the electricity distribution and water sectors experienced a common shock with the onset of the Argentine crisis in 2001 and 2002. Privatized companies, regulatory institutions, and associated policies (such as contract conditions and prices) became a focal point for citizens and politicians questioning the neo-liberal reforms of the 1990s as gross domestic product (GDP) dropped by 12% in 2002, the middle class saw their savings accounts frozen, unemployment jumped to 25%, poverty levels reached 50% of the population, and inflation skyrocketed. Interim President Eduardo Duhalde moved quickly to freeze consumer utility rates within the context of the January 2002 Law 25,561, which ended the currency peg to the dollar, nullified contractual provisions allowing utility companies to charge customers in dollars (article 8), and granted the federal government temporary price regulation powers (article 13). The same law stipulated that concession contracts with private providers would need to be renegotiated. Provincial governments quickly issued laws and decrees confirming their adherence to the national law.[10]

Duhalde's decision to suspend existing privatization contracts and call for contract renegotiations ushered in a new period characterized by a very different style of state regulation. Prior to the crisis, as the previous section stressed, regulatory agencies played an important—though admittedly circumscribed—role. Concessionaire requests for rate increases would be made to regulatory agencies, which would decide whether or not input cost increases justified price hikes for consumers based on specific formulae included in contract appendices. Agencies would monitor firms' compliance with the service quality and coverage targets included in the concession contracts as well, and determine which category of fine should be applied if firms failed to meet them. Because the regulator's role was defined in terms of monitoring contractual compliance, it became marginal when contracts themselves were suspended. Provincial government ministers, as representatives of the '*concedente*', or contract grantor, began to negotiate directly with the concessionaires regarding not only contractual amendments that would help adjust concessions to new, post-crisis political and economic realities, but also regarding consumer rates and investment targets for the interim. As contract renegotiation processes dragged on, *regulation via direct negotiation* became the new modus operandi. Regulation during this period, in other words, could not be viewed as anything other than political.

Key distributive issues were at stake in these negotiations. The devaluation and subsequent tariff freeze reduced concessionaire income by approximately two-thirds, when measured in foreign currency. Meanwhile, the costs of imported inputs increased dramatically. High rates of domestic inflation raised the costs of domestic inputs. Should existing consumers shoulder some or even all of the costs

[10] Note that three electricity concessions and one water and sanitation concession were regulated by the national government or a regulatory agency partially controlled by the national government. See Appendix I.

of these changes to concessionaires' income and costs? Or should investors shoulder some or all of the burdens through not only decreased profits, but also outright losses? Should network outsiders—those who did not yet receive or pay for service, but who were slated to receive services under concessionaire investment programmes—instead pay for some of the costs through forfeiting new connections so that rate increases would be less urgent?[11]

Provincial governments, as a general rule, possessed the upper hand in contract renegotiations with concessionaires. Government negotiating power increased following the crisis for two main reasons. First, public opinion swung against private-sector service providers following the crisis, constraining the sorts of policy concessions governments could make to private firms when facing electoral competition. Even though the national government moved quickly to freeze utility rates and inflation eroded their real value starting in 2002, surveys show that perceptions about the unfairness of tariffs increased over time. The percentage of the population perceiving consumer rates as too expensive rose from 57% in September 2003 to 73% in November 2005—despite a decline in their real value (Murillo 2009, p. 204). In response to this swing in public opinion, the political discourse shifted from attracting investment to blaming utilities for the crisis: in February 2002, 81% of the population opposed providers' demands to 'adapt' public service prices to the new cost structure created by the devaluation. A similar percentage perceived that private providers had previously abused weak state regulation prior to the crisis. Indeed, 97% of the public supported contract renegotiation (Murillo 2009, p. 203). Second, the Argentine federal government's budgetary situation improved dramatically following the crisis, particularly once the country benefited from taxes on swelling commodity exports. This allowed the government to fund infrastructure on its own rather than rely upon private-sector investors for financing (Post 2008).[12]

While investors did not possess the upper hand during contract renegotiations, they nevertheless viewed the successful conclusion of accords as an improvement upon the status quo. After failing to convince governments to allow them to continue charging tariffs in dollars, private service providers sought other changes to their contracts that would help them to cope with post-crisis realities. The cost of imported inputs had increased between three- and fourfold as a result of the 2002 currency devaluation, which had decreased the value of the peso by more than 70%. For foreign investors, the value of repatriated profits fell dramatically as well following the devaluation. In addition, inflation triggered rises in the costs of key inputs such as labour, while customers experienced an income shock that reduced their ability to pay for services. A third of residential electricity consumers stopped paying their bills in 2002. Finally, concluding a contract renegotiation—including obtaining legal sanction for the new contract with the provincial legislature—

[11] This latter consideration was more prominent in the water and sanitation sector, given higher coverage deficits.

[12] Argentina's federal government devoted significant resources to funding infrastructure projects in the provinces in the decade after the crisis.

promised to provide concessionaires with a more stable set of rules and regulations regarding their investment and service quality obligations.

While some concessionaires in the electricity and water sectors concluded contract renegotiations successfully, other negotiation processes failed outright or continue on to this day. Table 6.1 presents the strong association between the successful conclusion of renegotiations and rates of investor exit following the crisis for the full set of provincial and national concession contracts in the electricity distribution and water and sanitation sectors. As Table 6.1 shows, investors chose to stay in the market following the successful conclusion of a renegotiation at higher rates. While 72% of the investors exited their projects after failing to secure a full accord, only 30% of the investors achieving accords left the market.

Stepping back, one can draw a few conclusions about the character of regulation during the post-crisis period in these two sectors. The Argentine crisis prompted a major shift in the predominant mode of regulation. Whereas regulatory agencies had played an important, albeit circumscribed, role prior to the crisis, they ceased to be central actors following the crisis. Negotiations regarding revised contracts as well as ongoing terms of operation occurred directly between government ministers and investors. The basic rules of the game and contentious redistributive issues were at stake, after all. Our data on the rate at which negotiations were concluded successfully and investors' exit decisions suggests that the ability to reach accords with provincial governments was crucial. Investors that failed to achieve accords exited the Argentine market at far higher rates.

## III. Explaining differential rates of contract renegotiation and investor exit

As Table 6.1 demonstrates, while some investors concluded contract renegotiations and retained their contracts between the Argentine crisis and 2009, others failed to secure agreements and/or exited the market through state takeover or sales of equity

**Table 6.1** Conclusion of contract renegotiations and rates of investor exit in post-crisis Argentina, 2003–9 (electricity distribution and water & sanitation sector)

| | Investor exits |
|---|---|
| Full formal or informal accord | 30% (3/10) |
| No full formal or informal accord | 72% (23/32) |

*Notes*: A one-way analysis of variance was conducted to examine the association between concluding a full accord on investor exit. There was a significant relationship at the $p < 0.01$ level for the two conditions [$F(1, 47) = 7.33$, $p = 0.01$]. This suggests that failing to reach a full accord serves as a statistically significant predictor of investor exit. Observations were weighted by 0.5 when ownership was split 50/50 between two investors. (This reduces the total number of investors in this table from 49 to 42.) See the Appendix for the coding criteria used to identify instances of investor exit and the achievement of full accords. Note that these results are suggestive only, as cases are not independent of one another and other factors may contribute to investor exit decisions.

stakes to new owners. How do we explain these varied post-crisis trajectories? This section analyses aggregate data for the full set of 30 provincial and national contracts in the electricity distribution and water and sanitation sectors still in place by 2003. In doing so, it highlights the investor characteristics associated with higher rates of contract renegotiation and lower rates of investor exit.

The strong observed association between the successful conclusion of contract renegotiations and low rates of investor exit prompt one to ask what factors contribute to high rates of contract renegotiation. Based on field research focusing on specific cases, we hypothesized that certain types of investors may negotiate more effectively than others. In particular, we suggest that investors that possessed diverse operations in the jurisdiction of their contract would be more patient and have access to a wider set of negotiating strategies—including the possibility of linking negotiations in regulated sectors to their other activities—than investors without significant local holdings. While not all domestic investors possess diverse local operations in the Argentine cases we study, they do so with greater frequency than multinationals, particularly those based in the developed world. Second, investors from developing countries, and particularly domestic investors, should be better positioned to enter informal negotiations than multinationals from the developed world. Third, firms that are privately owned—and as a result, exempt from the sorts of reporting requirements and pressures for short-term returns placed upon publicly traded firms—should enjoy greater flexibility in negotiations. Private ownership is also a feature more commonly observed among developing-country investors in infrastructure sectors, although private investment funds based in OECD countries are increasingly entering infrastructure sectors. In this section we provide aggregate data showing the extent to which these characteristics are associated with higher rates of contract renegotiation. In the following section, we use case studies in both sectors to illustrate how these factors work.

To provide an initial assessment of our argument, we compiled information regarding the ownership history of each of the 30 concession contracts and obtained basic information regarding the 49 sets of lead investors participating in these contracts (that is, the largest shareholder in each concession).[13] Drawing on this original data set, we compared the respective ability of investors that did and did not possess each characteristic to successfully conclude a full contract renegotiation. As shown in Table 6.2, investors possessing these characteristics secured contract renegotiations at a higher rate than those without. In particular, investors possessing diverse holdings in their contract jurisdiction successfully concluded contract renegotiations at the highest rate—though even they were not able to do so in half of the cases.

As Table 6.1 showed, however, not all investors that failed to conclude full contract renegotiations exited the market: nine lead investors (28%) chose to stay despite failing to secure a full agreement. How can one explain these investors'

[13] Documentation of our coding decisions for our dependent variables, contract renegotiation, and investor exit, and the investor characteristics we consider important explanatory factors is included in the chapter Appendix.

**Table 6.2** Lead investor characteristics and conclusion of contract renegotiations 2003–9 (electricity and water)

| | | Full formal or informal accord |
|---|---|---|
| Investor origin | Developing country (LDC) | 48% |
| | Developed country | 8% |
| Investor diversified in contract jurisdiction? | Diversified | 61%* |
| | Not diversified | 14% |
| Listed on Stock Exchange? | Privately owned | 44% |
| | Publicly traded | 12% |

*Notes*: In all cases, difference in means tests suggest that the cited investor characteristics are associated with higher rates of concluding full accords, which are statistically significantly different from the rates achieved by investors without such characteristics. Note that these results are suggestive only, as cases are not independent of one another and other factors may contribute to the ability to reach accords. *This percentage is buoyed by the electricity concessions in the Buenos Aires Metropolitan Area.

choice to remain in the market under such circumstances? We first split our sample by sector to see whether these cases of persistence in the absence of an agreement fell within the electricity or water and sanitation sector, hypothesizing that improvements in the Argentine economy following the crisis would lead to greater revenue increases in electricity distribution where the elasticity of demand is higher than in the water and sanitation sector (where demand is less elastic), thereby making electricity distribution concessions comparatively more profitable.[14] Higher levels of profitability during the post-crisis period would, in turn, make investors in the electricity sector more patient during negotiations with host governments, ceteris paribus. According to this line of reasoning, if one were to disaggregate Table 6.1 by sector, one would expect the majority of cases of investor persistence in the absence of successful contract renegotiation to occur within the electricity distribution sector. Table 6.3 compares the rates of contract renegotiation and investor exit by sector and shows that the majority of the cases of persistence in the absence of an agreement indeed fall within the electricity distribution sector.

Among electricity investors, what are the conditions that make them more likely to stay even when no agreement has been reached? Interviews conducted for case studies in the electricity sector suggested that firms anticipating that exit from their contracts would negatively affect their market reputations would be inclined to exhibit greater patience in negotiations with host governments before pulling out.

[14] The post-crisis economic recovery fuelled industrial demand for electricity. Increasing revenues from industrial users cross-subsidized services for residential customers, whose rates had been frozen following the devaluation. The national and provincial governments allowed concessionaires to raise rates charged to large users in more cases than rates for residential consumers. Also, exchange rate appreciation since 2007 should have improved their relative position.

**Table 6.3** Contract renegotiation and rates of exit 2003–9 by sector

| Sector | Contract renegotiated? | Investor exits |
|---|---|---|
| Water and sanitation | Full formal or informal accord | 25% (1/4) |
| | No full formal or informal accord | 89% (8.5/9.5) |
| Electricity distribution | Full formal or informal accord | 33% (2/6) |
| | No full formal or informal accord | 64% (14.5/22.5) |

For the water sector, a one-way analysis of variance was conducted to examine the association between concluding a full accord and investor. There was a significant effect at the $p < 0.01$ level for the two conditions [$F(1, 15) = 10.67$, $p = 0.005$]. For the electricity sector, the same analysis yields a significant association at the $p < 0.05$ level for the two conditions [$F(1, 30) = 5.79$, $p = 0.02$]. In other words, failing to reach a full accord serves as a statistically significant predictor of investor exit for both sectors. Observations were weighted by 0.5 when ownership was split 50/50 between two investors. See the Appendix for the coding criteria used to identify instances of investor exit and the achievement of full accords. Note that these results are suggestive only, as cases are not independent of one another and other factors may contribute to investor exit decisions.

Firms with a significant number of operations in Argentina, for whom these Argentine holdings represented a large share of their total assets, firms which possess other holdings in the same sectors (thus under the jurisdiction of the same regulators), and which possessed a strong brand name in the sector would be particularly concerned about the reputational costs of exit.[15] According to this line of argument, we would be likely to observe lower rates of exit before 2009 among such investors. Indeed, neither of the two electricity companies with high reputational exit costs that achieved a full accord exited the market; yet rates of exit were also very low among those with high reputation exit costs that *did not* achieve accords: only one out of eight investors, or 13%, chose to pull out of their projects. By contrast, among those with low reputational exit costs, the rate of exit without agreement was 88%—that is, all but two of the 12 investors of this type exited the market.[16]

These differential rates of investor exit between sectors in the absence of a contract renegotiation had major implications for the continuing viability of private-sector service provision. Table 6.4 compares the extent to which concession contracts in place following the Argentine crisis survived until 2009. It highlights the stark difference between electricity distribution and water and sanitation. Investors pushed very hard to conclude contract renegotiations in the water and sanitation sector because of their concessions' very poor financial situation in the years immediately following the crisis. Many investors who were unable to secure a renegotiation agreement ushering in major tariff increases by the middle of the

[15] The reputational costs of exit are analytically distinct from investor diversification in the *contract jurisdiction*, which refers to an investor's holdings in the province or other governmental unit holding the concession contract.

[16] These investor totals are unweighted. In the preceding analyses, investors that hold only 50% of the shares in a concession through a joint venture with another investor that controls the other 50% are weighted by 0.5.

**Table 6.4** Contract survival by sector

| Sector | Number of national and provincial contracts in 2001 | Number of contracts in 2009 |
|---|---|---|
| Electricity distribution | 18 | 16 |
| Water and sanitation | 13 | 4 |

decade, however, decided to pull out. Governments searched for alternative investors to purchase their shares, but were in most cases unsuccessful.[17] This left them with no other choice than to take over services. In other cases, renegotiation agreements shifted investment obligations to the provincial governments, which increased the political vulnerability of privatized service provision.[18] The end result was the same: a return to state provision. In contrast, investors choosing to exit the electricity sector were usually able to find buyers. As stressed before, investors with high reputational exit costs were willing to stay on longer in the absence of a renegotiation agreement. The end result is that regulated, private provision has endured in the electricity sector in the medium run, whereas private water and sanitation provision persists in only a small set of provinces.

In summary, our analysis of 49 lead investors in 30 concession contracts in the Argentine electricity and water and sanitation sectors suggests that different types of investors are better placed than others to navigate the contentious regulatory politics animating utilities sectors following major economic shocks. Investors with diverse holdings in their contract jurisdiction, that originate in developing countries, and that are not listed on stock exchanges conclude contract renegotiations more often than their peers. Investors that successfully conclude renegotiations are more likely to stay in their contracts than those that fail to secure agreements. This being said, investors in the water and sanitation sector were more likely to pull out, either of their own accord or at the insistence of host governments, when negotiations broke down than investors in the electricity distribution sector. Electricity investors that faced important reputational costs in the event of exit comprised a large portion of those investors remaining in the absence of an agreement.

## IV. Discussion and conclusion

This chapter has analysed the cases of privatized electricity and water distribution in Argentina following the country's 2001–2 economic crisis. Regulation in the

[17] It was impossible to find a replacement investor willing to accept the government's terms for the Buenos Aires Metropolitan Area, Santa Fe, Mendoza, and Catamarca concessions. Post (2008) provides extensive documentation of these cases.

[18] This was the case in Salta and La Rioja province.

aftermath of crises, this study suggests, is an inherently political process. Rather than leaving regulation to formally independent regulators, government ministers negotiated directly with investors regarding ongoing terms of operation and eventual revisions to their concession contracts. These negotiations dealt with distributive issues of major importance and salience, the most important of which was who would bear the costs of the country's economic crisis. Moreover, if successful, negotiations could lay the groundwork for the continuing viability of regulated, private-sector provision. If parties were unable to reach a post-crisis accord, this accelerated a transfer back to state provision, especially in the water and sanitation sector.

What types of firms were able to negotiate effectively with the state in this eminently political regulatory environment? Which were able to secure contractual revisions that made them willing to continue in the market? Our analysis of the 30 national- and provincial-level concession contracts in Argentina, which draws on an original data set, suggests that investors with diverse holdings in their contract jurisdiction are better able to conclude contract renegotiations that helped them cope with the effects of the crisis. These renegotiation agreements have generally provided for consumer rate increases that help to partially compensate for the effects of the devaluation and subsequent, high rates of inflation. In the water sector especially, renegotiation agreements have typically adjusted contractual investment commitments to reflect concessionaires' lower revenues in the post-crisis period. In many cases, the state has taken over funding a portion of the investment programme.

Investor decisions regarding whether or not to stay in the market were associated with an additional investor characteristic: the reputational costs that investors would incur through exit. Investors that possessed a significant presence in the country and sector in question, had strong brand names in the sector, or for whom Argentine holdings constituted a large fraction of their assets were less likely to exit. Importantly, they were also more likely to stay on in the Argentine market even in the absence of concluding a renegotiation agreement. This association was particularly strong in the electricity distribution sector. Our intuition, which draws on informal interviews with investors working in both sectors, is that electricity distributors' greater patience stems from the higher revenues they earned during the country's economic upturn in years following the crisis, and investors' lower investment requirements. Water and sanitation concessions, in contrast, benefited less from increasing consumption in the post-crisis period because of a lower-income elasticity of demand and the fact that firms' original, pre-crisis contracts required more substantial investments. Because exiting water investors were less able to find buyers willing to purchase shares in their concessions, provincial governments founds themselves needing to take over infrastructure management more often. Private-sector provision in the post-crisis period has remained more viable in electricity distribution as a result, at least during the first decade following the crisis.

Our findings contribute to the broader literature on regulation in the developing world, which has traditionally relied on two approaches to analysing the variation in

regulatory politics and outcomes. The first body of work, written primarily by regulatory economists, examines the effects of agency and policy design upon regulatory outcomes such as the pro-company or pro-consumer bias of policies (Laffont and Tirole 1993) and the probability of contract renegotiation (Estache et al. 2003), and investment and quality levels (Andrés et al. 2008). A second literature, drawing on the insights of positive political economy, suggests that it is important not only to look at regulatory design but also to examine enforcement. Governments will interfere less with regulatory agency enforcement of specific rules included in contracts and regulatory laws, this literature suggests, when strong 'veto players' place constraints upon the discretion of the political executive (Levy and Spiller 1994, 1996).[19] A body of relatively recent work (Shirley and Ménard 2002; Krause 2009) combines these two perspectives. Importantly, these perspectives focus on the enforcement of regulatory rules as originally defined in contracts or enabling laws.

By contrast, we focus on weak institutional environments, or environments in which rules change frequently or are often not enforced (Levitsky and Murillo 2009), to analyse the conditions that shape the interaction between governments and private providers after they face a shock to the original contractual conditions. The Latin American experience suggests that weak institutional contexts tend to heighten political and economic volatility. As Latin American party systems are less institutionalized and electoral volatility is high (Mainwaring and Scully 1995; Roberts and Wibbels 1999; Kitschelt et al. 2010), the preferences of host governments are likely to change more frequently than might be the case in the industrialized world; moreover, new governments face less resistance to efforts to change regulatory policy than they might in more institutionalized political systems with more entrenched veto players. Additionally, economic volatility gives both governments and investors reason to desire major changes in regulatory policies and incentives for contract renegotiation. Macroeconomic crises provide a particularly powerful prompt to contract renegotiation, as providers face unstable input prices and demand for their services, while consumers face eroding real incomes. In the context of such volatility, it is very difficult for new regulatory agencies, which constitute institutional transplants, to take root (Weyland 2002; Henisz and Zelner 2005). Overall, then, in the context of high levels of political and economic volatility, politicians and investors often face strong incentives to renegotiate privatization contracts and amend the legislation providing a legal foundation for regulator activity (Post 2008). In weak institutional environments, there will be few barriers to such negotiations. Empirical studies of the prevalence of contract renegotiation in Latin America document the importance of these tendencies (Guasch 2004; Basañes and Willig 2002).

Our paper contributes to this emerging literature by providing a cross-sector analysis of the conditions that shape interactions between host governments and

[19] Levy and Spiller (1994, 1996) also argue that certain types of institutional environments will provide better 'matches' with particular regulatory framework designs. For example, contract-based regulation is more likely to work effectively in countries with independent and respected judiciaries.

private service providers after major macroeconomic shocks. In so doing, we emphasize the redistributive content of those interactions as discussed in the introductory chapter by Dubash and Morgan. While Murillo (2009) examined politicians' incentives to back regulatory decisions benefiting different sets of firms and consumers, we build here on earlier contributions by Post (2008) emphasizing how investor characteristics affect regulatory outcomes. In emphasizing the importance of investors' characteristics, we depart from the literature on varieties of capitalism (Hall and Soskice 2001) by moving beyond investor origin to consider investor organizational structure. We focus on corporations' approaches to risk diversification—across sectors, countries, or jurisdictions—and how these shape firms' subsequent access to bargaining strategies and their incentives to exit particular projects. In contrast to the varieties of capitalism literature, we emphasize how these factors can vary between firms from the same countries and the incentives they generate for firms in their negotiations with politicians.

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## Appendix 1: National and Provincial Concession Contracts in the Argentine Electricity Distribution and Water & Sanitation Sectors

| Sector | Grantee (jurisdiction) | Concessionaire | Year awarded |
|---|---|---|---|
| Electricity distribution | National Government for Buenos Aires Metropolitan Area | Edenor | 1992 |
| Electricity distribution | National Government for Buenos Aires Metropolitan Area | Edesur | 1992 |
| Electricity distribution | National Government for La Plata Metropolitan Area | Edelap | 1992 |
| Electricity distribution | San Luis Province | Edesal | 1993 |
| Electricity distribution | Formosa Province | Edefor | 1995 |
| Electricity distribution | La Rioja Province | Edelar | 1995 |
| Electricity distribution | Santiago del Estero Province | Edese | 1995 |

(*Continued*)

| Sector | Grantee (jurisdiction) | Concessionaire | Year awarded |
|---|---|---|---|
| Electricity distribution | Tucumán Province | Edet | 1995 |
| Electricity distribution | Catamarca Province | Edecat | 1996 |
| Electricity distribution | San Juan Province | ESJ | 1996 |
| Electricity distribution | Entre Rios Province | Edeersa | 1996 |
| Electricity distribution | Salta Province | Edesa | 1996 |
| Electricity distribution | Rio Negro Province | Edersa | 1996 |
| Electricity distribution | Jujuy Province | Ejesa | 1996 |
| Electricity distribution | Buenos Aires Province | Edes | 1997 |
| Electricity distribution | Buenos Aires Province | Edea | 1997 |
| Electricity distribution | Buenos Aires Province | Eden | 1997 |
| Electricity distribution | Mendoza Province | Edemsa | 1998 |
| Water & sanitation | Corrientes Province | Aguas de Corrientes | 1991 |
| Water & sanitation | National Government for Metropolitan Buenos Aires | Aguas Argentinas | 1993 |
| Water & sanitation | Formosa Province | Aguas de Formosa | 1995 |
| Water & sanitation | Tucumán Province | Aguas del Aconquija | 1995 |
| Water & sanitation | Santa Fe Province | Aguas Provinciales de Santa Fe | 1995 |
| Water | Córdoba Province | Aguas Cordobesas | 1997 |
| Water & sanitation | Santiago del Estero Province | Aguas de Santiago | 1997 |
| Water & sanitation | Mendoza Province | Obras Sanitarias de Mendoza | 1998 |
| Water & sanitation | Salta Province | Aguas de Salta | 1998 |
| Water & sanitation | Buenos Aires Province | Azurix | 1999 |
| Water & sanitation | Misiones Province | SAMSA | 1999 |
| Water & sanitation | La Rioja Province | Aguas de la Rioja | 1999* |
| Water & sanitation | Buenos Aires Province | AGBA | 2000 |
| Water & sanitation | Catamarca Province | Aguas del Valle | 2000 |

* This contract was granted originally as a management contract in 1999. It was converted to a concession contract in 2002.
*Sources*: Concession legal documentation and press coverage. Cross-checked with Azpiazu et al. (2008).

## Appendix II: Coding of the Main Variables Utilized in the Analysis

### Dependent variables

#### *Contract renegotiation concluded successfully*

This is coded as a dichotomous variable. We examine whether comprehensive contract renegotiations have been concluded during the relevant time frame (either 2003–09 or under the tenure of a specific set of owners), ratified by the legislature (if applicable), and

implemented. In this analysis, we create a composite score for periods during which ownership is split 50/50 between two investors. This reflects the fact that contract renegotiations are achieved jointly by the set of two investors. On the basis of regulatory documentation, case histories constructed from the local press, and interviews, we code each contract renegotiation process as falling in one of the following categories: (a) formal or informal renegotiations concluded and implemented; or (b) comprehensive formal or informal renegotiation not concluded and implemented. The latter category incorporates partial renegotiations that are concluded and implemented, full renegotiations that are concluded but not implemented, and cases in which no progress is made towards renegotiation.

### *Investor exit*

Investor exit can take two different forms: exit via a sale of the firm's equity stakes in a concession (a change that requires the permission of political authorities) or contract cancellation by the host government, investor, or both parties following allegations of contract noncompliance.[20] We draw on a range of country-level sources to code each instance of exit by the 'lead investor', or the investor holding at least 50% of the concession's share, during the 2003–9 period. For cases in which ownership was split 50/50 between two primary investors, both sets of investors are included and are weighted by 50%. This approach makes sense because exit decisions are not always made jointly. More specifically:

#### a) Exit via share sale

In such cases, private provision continues under new owners. Exits via sale are only registered if at least 50% of the shares held by private investors change hands. (If a private investor holding exactly 50% of the shares leaves, we create two observations, which are each weighted by 0.5. One observation will register the exit, while the other observation will register the fact that the other lead investor is staying.) When a different holding company acquires an investor that owns the majority of the shares in a concession, this acquisition is not considered to be an exit. However, when a holding company sells the company that holds shares in a concession, this is considered an instance of exit, presuming that the company holding the shares is a smaller entity. Sales of large multinationals with sector expertise to new owners that leave concession contracts in the hands of the same sector company would not constitute an exit. (E.g., the sale of the Argentine holding company Emdersa—which holds three electricity distribution companies in the country—to another holding company would constitute an exit. The sale of the French multinational SAUR from Bouygues to PAI partners, however, would not be registered as an exit from a particular Argentine concession contract.) Coded based on regulatory documentation, case histories constructed from local press coverage, and interviews.

#### b) Exit via contract cancellation and nationalization

Note that this mode of cancellation can actually occur at the instigation of the investor as well as at the behest of the host government. When the government 'intervenes' or passes a

[20] Concession contracts in Argentina provided for the premature termination of contracts by one or both parties in the event of severe levels of non-compliance.

decree or law allowing it to take over management of the contract, this is treated as the onset of a nationalization process. (All cases in our data set of intervention later culminate in formal nationalizations.) Coded based on regulatory documentation, case histories constructed from local press coverage, and interviews.

## Independent variables: investor characteristics

### *Reputational cost of exit*

This measure refers to the lead investor's non-financial cost of exit, or the expected reputational and political consequences of exit for the investor's remaining holdings in the country and region. The non-financial impact of exit was coded as *Low*, *Medium*, or *High* based on the importance of Argentine assets within the investor's overall portfolio, whether or not it works in other regulated industries or projects (particularly in the same jurisdiction), and if exit is likely to affect the firm's reputation due to its brand name in the electricity or water sector. Cases are coded as *High* if the concession in Argentina represented a large share of the international holdings of the corporation AND they have other companies in Argentina that may be affected by exit from the project in question OR if they have a strong brand name in electricity or water. Cases are coded as *Medium* if the concession in Argentina represented a large share of the international holdings of the corporation OR the company has other companies in Argentina that may be affected by the exit from the particular project OR has a strong brand name in the sector they are interested in maintaining in the region. Cases are coded as *Low* if the concession in Argentina did not represent a large share of the company's international holdings AND the investor did not possess other important operations in Argentina AND especially if the investor has no brand name in the sector.

### *Lead investor diversified in the contract jurisdiction? (0/1)*

Investors possessing diverse holdings are coded as 1. As with exit costs, coding is based on the characteristics of the lead investor (investor controlling the largest fraction of the shares held by private investors) in the concession. If private shares are split 50/50 between two investors, separate scores are created for each investor and the observations are weighted by 0.5. Lead investors are coded as having a diversified local presence if they possess multiple operations in a variety of sectors in the contract jurisdiction.

How does one define 'investor' for the purposes of this analysis? We refer to the Argentine division of a particular firm. For an Argentine business group, we would consider any operations owned by the group to count towards a diversification score. For a foreign entity, we look to whether or not the firm has multiple, separately administered companies in a country or operates out of a single head office. We only count an investor as diversified if the country-specific office that manages the firm's participation in the concession also holds additional operations in the jurisdiction. For example, the Suez group, a French group, has a number of companies in Argentina, including Suez Environnement, Degremont, Cliba, and so on. There is little managerial coordination between these separate companies, and they often operate in competition with one another. We therefore measure diversification with respect to Suez Environnement's holdings. However, AES had one Argentine affiliate that oversaw all of its work in the country in the electricity sector. In this case, multiple holdings

by AES in a single jurisdiction would be coded as a diversified presence in the contract jurisdiction.

### *Lead investor privately-owned? (0/1)*

Investors that are privately owned are coded as a 1.

### *LDC investor*

Investors based in an emerging market are coded as 1.

# 7

# Judiciaries as Crucial Actors in Regulatory Systems of the Global South: The Indian Judiciary and Telecom Regulation (1991–2012)

*Arun K. Thiruvengadam and Piyush Joshi**

## I. Introduction

This chapter addresses regulatory reforms in the Indian telecommunications sector—a process which began in the mid-1980s and is still unfolding—and emphasizes the role of the Indian judiciary, which has continuously played an important role in mediating the inevitable conflicts that arose as a result of this transformative process. By describing and analysing this issue in some depth, we seek to highlight what may be a distinctive feature of the regulatory state in the global South given that judiciaries have not traditionally played an important role in the development of the regulatory state in the global North. We also seek to focus on the factors within regulatory systems in the global South that may require judiciaries—and other institutional actors—to play unconventional supporting roles in order to meet the special challenges that are thrown up in such contexts.

Our claim is that when confronted with a series of disputes relating to the nascent telecom regulatory landscape, the Supreme Court of India sought to make a

* This is an expanded and substantially revised version of an earlier version that was published in *Regulation and Governance*, Vol. VI, Issue 3 (September 2012). This version has an entirely new section on the *2G spectrum* case (Section III.C.2). In addition, the central argument has been modified and revised, which is particularly reflected in the introduction and conclusion. Our analysis here covers events up to September 2012. We thank the editors of the special issue of the journal and this volume, Bronwen Morgan and Navroz Dubash, for inviting us to the original conference, and for their continuous engagement with our ideas. We also thank Alison Post, Mariana Prado, David Levi-Faur, and four anonymous referees of the journal for critical but constructive comments. Finally, we thank Carlo Bonura for substantive and editorial inputs that allowed us to sharpen the argument of the chapter and avoid errors. This work benefited from a grant from the International Development Research Centre, Ottawa, Canada.

constructive contribution to both the actual disputes as well as the overall regulatory framework. The Court did so partly by fostering communication and interaction among the diverse institutions in the regulatory space, and partly by adopting a pedagogical role towards empowering newly constituted regulatory institutions. More recently, the Court has stepped in to intervene in cases where norms and processes were blatantly violated to facilitate acts of corruption which have been endemic since the process of liberalization of Indian telecom began in the 1980s.

There is by now a considerable literature on the 'regulatory state' that asserts that the final decades of the 20th century have witnessed a transformation in the conception of the state. Scholars writing about this new 'regulatory state' assert that during this period the 'interventionist' Keynesian state which was globally prevalent in the second half of the 20th century and was characterized by extensive bureaucracies and command-and-control modes of governance, has been replaced by governance models of a different stripe (Majone 1999; Hood et al. 1999). While a number of causal factors are asserted, the outcomes have been ubiquitous: an expanded role for markets, greater private-sector participation in all facets of societies, and the withdrawal of the state from the direct provision of services and as the dominant employer. In their introduction to this volume, Dubash and Morgan define their understanding of the 'regulatory state' as connoting 'greater reliance on institutions operating at arm's length from government, insulated from daily political pressures and embedding their decisions in technical expertise' (Dubash and Morgan, this volume, p. 2). This definition fits well with the sixfold characterization of the regulatory state offered earlier by Levi-Faur (Levi-Faur 2005), and will be the conception taken as the basis for analysis in this chapter. What is interesting about this understanding is its focus on government bureaucracies and agencies that have changed from service providers to service regulators, and other executive and legislative departments that play pivotal roles in this transformation.

The evolution of the regulatory state in the global North has been characterized by a low or negligible role for judiciaries. As Ginsburg explains, at least over the past quarter century, the understanding in the US has been that regulatory decisions should be made by expert administrators, and other legal actors including judges should be kept away from making fundamental policy changes in the regulatory sphere (Ginsburg 2008, pp. 20–1). Although the evolution of UK regulatory policy on telecommunications has had a different trajectory, even in that jurisdiction (and in Europe more generally), courts are discouraged from intervening in decisions made by regulators.

We seek to show that the overall arc of telecom regulation in India has diverged quite significantly from this trajectory, even as judges in India insist that they too adopt a 'hands-off' approach to administrative and regulatory issues. Our chapter demonstrates that the Indian judiciary has in fact adopted a fairly interventionist role in molding telecom regulatory policy in India since the early 1990s. To do this, we focus on an analysis of select decisions that emanated from the near-constant litigation between private actors, the government, and the regulator before the courts. This narrative shows the difficulties involved in establishing a regulatory

system and culture, especially in countries of the global South where state capacity is weak and the need to address intractable problems such as deep and persistent poverty have to be constantly borne in mind by policymakers. Our focus is equally on the challenges faced by newly established regulators, who often struggle to establish authority, not just over the private sector, but also over other arms of government which continue to provide services, and are accustomed to having overwhelming control over regulatory decisions. We contend that the Supreme Court of India sought to empower the new telecom regulatory institutions to face these challenges by adopting a series of strategies that were essentially constructive in nature, and had the effect of legitimizing the regulatory process and the institutions involved.

An incidental aim of our study is to analyse the judiciary's actions in these cases. Expansive judicial action has generally invited strident criticism in the academic literature on courts in India and elsewhere. There is a tendency in some of the economic literature on judicial behaviour to emphasize the role of judges as 'rational, self-interested utility maximizers' (Posner 2008, p. 35; Baum 1998, pp. 131–5) who act in ways that serve to expand their own authority (Mehta 2005). In some other quarters, judges are seen as driven by nobler motivations of upholding the public interest and fostering a culture of constitutionalism, including the values of 'regulatory transparency, consultation, accountability and openness in general' (Faundez 2005; Prosser 2010, p. 17).

We seek to show that in the cases from the arena of telecom regulation that we examine, the Indian judiciary attempted to mediate competing considerations and interests thrown up in complex disputes between private telecom service providers, the designated regulator, and government departments. Its interventions in these cases appear to have been motivated more by a desire to make a constructive contribution to the development of a sound regulatory culture than towards expanding its own authority and power. Additionally, and most recently, the judiciary has sought to intervene in response to allegations of corruption in the decision-making process, which have been a distressingly consistent part of the story of telecom regulation over the past two decades in India. Here, its role has been to uphold the rule of law and associated values.

The chapter is divided into the following sections. Following this introductory section, the second section of the paper provides some background context about the Indian judiciary, focusing on historical trends of judiciary–executive–legislature relations in India. The third section contains an overview of the details of the process of regulatory reform in Indian telecommunications. While describing the overall arc of events, we pay particular attention to the cases through which the judiciary affected and guided the evolution of the regulatory authorities and the regulatory culture for Indian telecom. In the fourth section, we subject the cases examined in the third section to closer scrutiny, focusing on causal explanations and speculating on the implications of such conduct for other Southern contexts.

## II. The Indian judiciary: context, historical trends, and institutional facts

> '[T]he Supreme Court of India is a *politically* significant institution. There is not a single important issue of political life in India that has not been, by accident or design, profoundly shaped by its interventions. The Court itself can be regarded as a powerful actor in Indian politics. Far from being a neutral and distant participant, the courts participate and collaborate in governing India.' (Mehta 2005, p. 168)

Our claim about the expansive approach of the Indian judiciary even in an area where judiciaries are not traditionally expected to play much of a role will not come as a surprise to those who have followed the evolution of the Indian polity in its post-independence phase. As set out in the quotation from the work of the influential scholar, Pratap Mehta, the Indian judiciary has historically played a pivotal role in shaping national issues. Writing in 2000, Lloyd and Susanne Rudolph described the changes in India's political economy in ways that fit well with the general trends identified by regulatory state scholars. They asserted that with the launch of economic reforms in 1991, 'a centralized, tutelary, interventionist state whose political and administrative elites were committed to the notion that they knew best and could do best was challenged by an increasingly decentralized regulatory state and market economy whose politicians and entrepreneurs turned to voters, consumers and investors for ideas and actions' (Rudolph and Rudolph 2000). The Rudolphs focused in particular on the shifting of the balance of power from parliament, the prime minister, and cabinet to the president, the Election Commission and especially to the Supreme Court. We seek to develop this focus by analysing the evolution of India's new telecom regulatory environment in some detail. However, before dealing with this in the third section, we focus here on providing the background context necessary to understand the role of the Indian judiciary.

India's judiciary has been termed 'the world's most powerful judiciary' (Godbole 2008). Yet, although vested with substantial powers of judicial review by the framers of the independence constitution of India, it is clear that the framers did not intend to create the dominant institution that the Indian judiciary has become. The initial intention appears to have been to create a hybrid institution that joined the parliamentary sovereignty of the British model with judicial review taken from the US model. In the first four decades of India's history, the underlying tensions in this hybrid model became clear as the parliament and the executive clashed repeatedly with the courts over contentious issues such as parliament's right to implement land reforms in the face of the constitutionally guaranteed right to property. Over time, this transformed into a battle over which institution had the final say over interpreting and amending the foundational constitutional document. Although Nehru was more restrained in combating the courts, electing to use democratic means in the 1950s and early 1960s, these tensions reached a flashpoint

in the 1970s when the Indira Gandhi government launched a full-scale offensive against the judiciary. The institutional power and reputation of the Indian Supreme Court reached its lowest point during the national emergency proclaimed and enforced by the Indira Gandhi government between 1975 and 1977. Immediately prior to and during the emergency, Indira Gandhi's government took aggressive steps to dilute the independence of the judiciary, and engaged in blatant supersession of judges who ruled against the government (Rudolph and Rudolph 2001; Neuborne 2003; Rajamani and Sengupta 2010).

For the purposes of our chapter, the strategies and methods by which the Indian judiciary reclaimed its power and prestige are significant. Starting in the late 1970s and early 1980s, the judiciary began entertaining public interest litigation (PIL) that enabled the court to eventually exercise a robust and all-encompassing form of judicial review (Baxi 1988). The judiciary's espousal of the rights of the poor and marginalized sections of Indian society in the initial phases of PIL suited the populist policies of the Indira Gandhi (1980–4) and Rajiv Gandhi (1984–9) governments. In a series of cases decided during the 1980s and early 1990s, the Supreme Court broke new ground by interpreting constitutional provisions that were explicitly articulated to be non-enforceable in order to judicially create rights to livelihood and housing, health, and education for Indians and issued orders designed to implement these socio-economic rights (Thiruvengadam 2007).

From the early 1990s, the character of the PIL jurisdiction of the judiciary began to change, with a renewed focus on issues of governance. This was a period of significant economic change as well as great political instability. In contrast to relative electoral stability between 1951 and 1989, India experienced five general elections from 1989 to 2004, resulting in what one leading scholar of Indian politics describes as 'precarious governments dependent upon fragile and often obstructive coalitions' (Khilnani 2009). The judiciary had much more room to flex its muscles from the beginning of the 1990s than it did during the era of Congress dominance. By the mid- to the late 1990s, the Court's agenda included tackling cases of corruption at the highest political levels, resolving the chaotic traffic and pollution levels in the city of Delhi, cleaning up the Taj Mahal and its surrounding area, regulating the disposal of hazardous wastes, supervising the manufacture and sale of pesticides, and addressing issues of sexual harassment and female foeticide (Muralidhar 1998). Since there was a perception that the introduction of economic reforms in the early 1990s let loose unprecedented opportunities for corruption among the political classes, the judiciary's campaign against political corruption gained much public support. By incorporating into its agenda core governance issues, the Court was clearly going beyond the boundaries of accepted norms of judicial adjudication.

An area where the Court was particularly audacious in taking advantage of the weakened political executive was that of its own institutional independence. As noted earlier, Indira Gandhi's government cut down the power of the judiciary in part by controlling appointments and by superseding judges who took hostile positions against the ruling government. Issues of judicial independence and control over appointments to the higher judiciary were core issues in one of the

early PIL cases, *SP Gupta v. Union of India*, decided in 1982 during the heyday of the Congress Party. Although the Supreme Court used the opportunity to expand its jurisdiction in PIL cases, it refused an invitation to wrest control over the appointments process, conceding that the final say in these matters rested with the political executive. When the same issue was brought up a mere decade later, the political landscape of India had been fragmented and radically altered. Taking advantage of this, in the case of *SCAORA v. Union of India* decided in 1993, the Supreme Court audaciously held that the power to appoint and transfer High Court and Supreme Court judges lay, not in the cabinet, but in the chief justice of the Supreme Court, acting in consultation with a small collegium of his fellow judges. As several critics noted, the Supreme Court's decision was hard to justify in the face of evidence that both the text of the constitution and the expressed intention of the framers went against its reasoning and final outcome. Yet, the Supreme Court prevailed and was also able to gain public support for its stance (Mehta 2005; Rajamani and Sengupta 2010). The closed and self-contained nature of the judicial appointments process has resulted in the Indian judiciary enjoying a degree of independence that is globally unprecedented. In recent years, as the Indian judiciary has attracted charges of being unaccountable, this sphere of the Court's functioning has also drawn heightened controversy. As we shall see, however, in the sphere of regulatory affairs, the judiciary acted in a relatively disinterested manner, reining in a tendency to over-reach on its own part while seeking to promote accountability and independence in regulatory institutions.

## III. Reforms and the introduction of an 'independent' regulator for Indian telecom

There is, by now, a sizable literature that sets out the convoluted story of the liberalization of Indian telecommunications, which began slowly in the 1980s, picked up considerable speed in the 1990s, and continues to evolve (Desai 2006; Joshi 2003; Mukherji 2005; Raghavan 2006; Sen-Suraj 2009). In this section, we provide a brief overview of the overall narrative, to set the stage for our analysis and argument. This narrative is significant because the liberalization of the telecom sector is generally regarded as a success story in India, although, as we shall demonstrate, the full picture is more complex.

The concepts of regulation and 'independent regulators' were not unknown in India prior to the 1990s. An important economic regulator, the Reserve Bank of India, was established in pre-independence India in 1935 as a functionally autonomous regulator of fiscal and monetary policy. Similarly, a number of sector-specific regulators were established in different areas. However, in the post-independence period, following a global consensus that was especially prevalent in a number of countries of the global South, India adopted a 'command-and-control' model of economic development where the emphasis was on the government being the primary—if not exclusive—service provider and decision-maker on matters of

economic policy. During this period, the government itself, or a body under governmental control, was charged with regulatory duties. The core idea of ultimate governmental control was manifest in the structure of the statute governing telecom regulation. The Indian Telegraph Act of 1885 enabled the Department of Telecommunications (DoT), located within the government of India, to simultaneously and exclusively perform the functions of policymaker, service provider, and licensor.

Policies of liberalization introduced in India in the early 1990s brought radical changes in this regulatory framework because of an emphasis on *independent regulatory authorities.* As Prado explains, such authorities initially evolved in the specific context of the US, but later became part of a worldwide trend as a result of being actively promoted by institutions such as the World Bank and the Organization for Economic Cooperation and Development (OECD). Within the span of a little over two decades (1980–2000), independent regulatory authorities had been established across Latin America, Europe, and several parts of Asia (Prado 2008, p. 439). The essential idea was to ensure a level playing field between the government, which would continue to be a player in the market, and private investors.

The telecom sector in India is somewhat unusual in that it started experiencing moves towards liberalization prior to the 1990s whereas liberalization in other sectors typically commenced in the early 1990s (Joshi 2003, Chapter 7). As Mukherji explains, a number of policy initiatives were taken by the governments of Prime Minister Indira Gandhi and Rajiv Gandhi in the early to mid-1980s that sought to increase private-sector involvement, corporatize the DoT (by hiving off certain functions to newly created public-sector corporations that had administrative and financial autonomy), and liberalize basic services (Mukherji 2004, pp. 281–2). Nevertheless, at the start of the 1990s, after four decades of governmental monopoly, the Indian telecom sector was performing well below comparable international standards. The DoT fit the standard profile of monopolistic government-controlled telecom providers across developing countries characterized by low teledensity and telecom penetration, poor service quality, and financially strapped incumbent operators (Buckingham and Williams 2009, p. 829).

The process of liberalization implemented since the early 1980s has had both positive and negative effects. It led to dramatic increases in telephone connections (from 14.9 million in 1998 to 420 million in 2009: Desai 2006; TRAI Annual report 2009), significantly lower tariffs, and widespread availability of cellular service. However, rural India still lags far behind in the spread of telecom services. Although the stranglehold of the DoT has been considerably reduced in the wake of selective corporatization, critics note that the predatory behaviour of the private sector is equally dangerous for consumers. Commentators emphasize the creation of barriers to competition by private operators, as a result of which the overall telecom system is in danger of disintegrating into a number of isolated systems with less and less traffic moving between them (Desai 2006, pp. 20–1). More worryingly, the process of liberalization of the telecom sector has been accompanied by corruption at unprecedented levels. Since the early 1990s, the sector has been dogged by scams and scandals involving huge sums of money that seem to rise

exponentially from one to the next. The office of the Comptroller and Auditor General, a constitutional body charged with performing audits on all governmental expenditure and bodies, has issued reports from time to time drawing attention to the loss to the exchequer as a result of policies that favoured private-sector companies. In a report issued in March 1999, the Comptroller and Auditor General asserted that the decision taken by the erstwhile government to allow private actors to migrate from a licence-fee to a revenue-based system would cause the exchequer a loss equivalent to several million US dollars. In a report issued more than a decade later in relation to the *2G spectrum* case (which we analyse in some detail later), the same institution estimated the loss to the exchequer to be a sum equivalent to US $31.97 billion. The correctness of these figures has been debated, but they do provide some sense of the vast sums of money involved. Investigations into the most blatant acts of corruption have led to convictions of high-profile politicians (including several cabinet ministers who handled the communications portfolio over the past two decades) and senior bureaucrats involved in this process. This in turn has given rise to a crisis of credibility in the overall regulatory system. Since the telecom sector was one of the first to be liberalized, and became somewhat of a model for other sectors, this has implications for the national regulatory culture as a whole.

To analyse the process of liberalization of Indian telecom relevant for our purpose, we focus on three specific time periods. We then concentrate upon pivotal court decisions within each time period, which show how the judiciary tried to moderate and guide the process of liberalization of telecom services in India. Particularly in the first phase, before the formal regulator was institutionalized, the onus was heavier on the judiciary since there was no other institution that could act as a referee between the competing interests of the private sector, the DoT, and the forces within government that favoured economic liberalization.

## A. Phase I: regulatory reforms from 1991 to 1997

As noted earlier, at the start of the 1990s, the DoT was very much the dominant actor in the Indian telecom sector, being the principal policymaker and service provider. There was considerable opposition within its ranks to the ideas of economic liberalization being pushed across other parts of the Indian government. Arguments that the bureaucrats within the DoT had become entrenched and accustomed to wielding absolute power with correlative benefits, including opportunities for corruption (Swaminathan 1997), may at least in part explain why the process of liberalization stalled repeatedly in the initial phase.

The National Telecom Policy of 1994 (NTP 94) declared that the principal motivation of liberalization was to bridge the resource gap required to meet the objectives of broader telecom access across India. The NTP 94 emphasized that providing greater access to telecom services of a high quality was beyond the financial capacity of government, and this shortfall in resources would be made up by inviting private investment. Although the NTP 94 explicitly recognized a role for the private sector in providing telecom services, it did not set out the

institutional framework for achieving this. Any mention of an independent regulator was conspicuously absent, leaving the DoT with ample leeway to further its own interests as the process proceeded. Our focus in this section is on events by which the judiciary was forced to intervene at regular intervals to address problems that arose as a result of the process being led by the incumbent state operator, which sought to direct policy to its own advantage and by means that affirmed its own dominant position. In each case, the Court crafted outcomes designed to limit the control of state agencies while simultaneously establishing its own legitimacy to regulate the issues that arose.

### *1. The Tata Cellular case (1994)*

The first limb of the story of liberalization of Indian telecom—and of the judicial role in it—begins in 1992, when the DoT decided to issue eight licences for mobile services for the cities of Bombay, Delhi, Calcutta, and Madras (two for each metropolitan area). The procedure for selecting the winners, who were announced in October 1992, was ambiguous. Four of the unsuccessful bidders challenged the bidding process in litigation that ended in the Supreme Court in *Tata Cellular v. Union of India* (1994). The *Tata Cellular* decision emphasized the need for judges to adopt a very restrained approach towards reviewing the bidding process initiated by the DoT. Yet in the process of emphasizing judicial reluctance to intervene, the Court considered in detail each of the arguments raised against the governmental policy, and found several of the complaints to be without basis, thereby imparting credibility to the DoT's decision-making process. At the same time, although the Court upheld most of the actions of the DoT, it also struck down its actions in two cases, thus signalling that the DoT had to conform to principles of legality in conducting its actions. In short, the power of the judiciary to intervene selectively in the regulatory process was demonstrated, but in a way that imparted legitimacy to the overall process of liberalization. As a result of the Court's decision, the first cellular services in the four metropolitan areas became operational in August 1995.

### *2. The Delhi Science Forum case (1996)*

Once the formal policy document for privatization and reform of Indian telecom (NTP 94) was announced, the DoT went on to the next stage of liberalization, and invited bids for cellular licences in 21 'circles' (most of which corresponded with state boundaries, but excluded the four metropolitan areas granted licences in the 1992 process). Some within government urged the creation of a separate regulatory body prior to the bidding process, as it was felt that this would lend greater credibility to the bidding process. Indeed, this was consonant with standard international practice, as the bidding process would have greater credibility given that the incumbent government operator was a player. However, this was resisted by the DoT, which proceeded on its own to stipulate conditions for the bids and announced the invitation for bids in January 1995. Even before it announced the winners of the bids in August 1995, a fresh round of litigation had been initiated,

both by parties who were part of the bidding process, and by NGOs who opposed policies of liberalization in principle.

Eager to avoid the delay that beset the earlier bidding process (and caused great financial distress to the parties involved), the Supreme Court transferred the petitions pending before various High Courts to itself, expedited the hearings, and issued a rapid decision in February 1996, in the case known as *Delhi Science Forum v. Union of India* (1996). This case, like the *Tata Cellular* case, illustrates an interesting mix of judicial deference to government policy and a strategic shaping of the institutional environment for liberalization. The main petitioner in the case, an NGO, raised fundamental challenges to the NTP 94 and the process of liberalization by contending that privatizing telecom services was unconstitutional, as this violated national security and the economic interests of the country. Firmly rejecting such claims, and citing precedent that counselled judges against intervening in economic policymaking, the Court noted that the NTP 94, having been tabled in parliament, was 'deemed' to have been approved by it and could not be challenged.

However, while legitimating the principal direction of the government's economic policy, the Court made it clear that this legitimation depended on the presence of an independent regulatory authority 'to supervise the functioning of the new telecom policy in the country' (*Delhi Science Forum*, paras. 25–9). To justify this move, the Court quoted comparative law showing that in every other country resorting to privatization, the process had been preceded by the creation of a regulatory authority (*Delhi Science Forum*, para. 27). Interestingly, the Court had vigorously questioned government lawyers during oral argument about government plans to establish an independent regulatory agency. Although such plans had not materialized hitherto, soon after the conclusion of the hearings before the Supreme Court, but *before* the Court had pronounced its verdict, the federal government announced its intention to establish the Telecom Regulatory Authority of India (TRAI), and an Ordinance was hurriedly drafted and approved by the president on 27 January 1996. The judgment of the Supreme Court in the *Delhi Science Forum* case was delivered on 2 February 1996, soon after the promulgation of the TRAI Ordinance.

We do not claim that the very idea for setting up the TRAI came from the Supreme Court. There had already been deliberations within government about the need for setting up a regulatory authority. Yet, the DoT was clearly against this idea, which is why no steps had been initiated until that point. However, when it became clear that this was going to be a crucial factor in the Supreme Court's decision to repel the challenge to the bidding process, the forces within government which supported the idea of a regulatory authority acted quickly, thereby enabling the Court to find justification for its final decision dismissing the challenge to the NTP 94 and the bidding process (Mukherji 2005, p. 10). In short, the endorsement given by the judiciary to government telecom liberalization was premised on its capacity to condition the institutional environment in powerful and important ways. Apparent deference masked strategic but subtle intervention.

The Court, in effect, sided with the advocates of privatization of telecom services and ensured that they would prevail. It did so by accepting the premise that the introduction of independent regulatory authorities would lead to improvement in governance and instil a better regulatory culture. Apparently convinced of the normative vision underlying a regulatory model characterized by independent regulatory authorities, the Court urged the government and the new regulators to conduct themselves as 'active trustees for the public good' (*Delhi Science Forum*, para. 30).

The Indian Supreme Court's decision in the *Delhi Science Forum* case can be viewed as upholding the governmental policy decision, while adding a new requirement (of setting up the TRAI) to meet the standards of legality imposed by the Court. Although the Supreme Court decision in the *Delhi Science Forum* case played a pivotal role in the creation of the TRAI, the Court did not seem to appreciate that the initial structure and powers of the institution were quite inadequate for it to play the role of an 'active trustee for the public good' that the Court envisaged for it. This became clearer in the next phase of the evolution of the TRAI.

## B. Phase II: clashes between the TRAI and the DoT, and their resolution (1997–2000)

The TRAI Ordinance that was hurriedly pushed through in January 1996, and was eventually replaced by the TRAI Act in March 1997, created a body that had limited powers. Although the Supreme Court, in emphasizing the need for an independent regulatory authority, referred to existing authorities in the US, the UK, and Canada among others, the authority conceived of in India had substantially reduced powers and functions in comparison to those other institutions (Thiruvengadam 2001; Mukherji 2005).

The weakness of the originally constituted TRAI becomes evident upon a close scrutiny of the legal provisions governing its structure and functions. In its original form, the TRAI was vested with both administrative and judicial functions, along the lines of regulatory authorities in the US. However, its adjudicatory powers were considerably limited. Conspicuously absent from the latter was the power to resolve disputes between the DoT and private service providers. The TRAI Act of 1997 also did not, unlike its British and American counterparts, enable the TRAI to intervene in the DoT's exclusive capacity to issue and cancel licences or to allocate radio spectrum. The TRAI could only provide *recommendations* on the most significant aspects of telecom regulation, but the federal government was not bound to implement the TRAI's directives, guidelines, or recommendations. This legitimately raised doubts about the TRAI's capacity to be an independent regulator since, typically, it is the regulator whose decisions are binding upon all service providers, including the government.

The weak structure and powers of the newly constituted TRAI gave rise to fears that it would become overly deferential to the DoT. At least in the initial phase,

these fears proved to be unfounded. The first chair of the TRAI was Justice S. S. Sodhi, a former Chief Justice of the High Court of Punjab and Haryana. This was an unconventional choice, since judges typically do not have the required expertise to be regulators. But, given the tortured history of telecom regulation in the years leading up to the creation of the TRAI, those behind the decision may have decided that what was needed most urgently was the appearance of strength, and the ability to take on the might of the DoT.

Under Justice Sodhi's stewardship, the TRAI made liberal use of its limited powers, and quite predictably attracted the ire of the DoT. As Raghavan describes it, Justice Sodhi forcefully demanded a role for the TRAI in major policy decisions relating to the telecom sector. The DoT was particularly miffed by Sodhi's attempt to curb the department's abusive and anti-competitive treatment of new entrants by engaging in predatory pricing and demanding substantial rents for the use of its networks. Aggrieved by what it perceived as the TRAI's unwarranted activism under Justice Sodhi's leadership, the department filed several cases before the Delhi High Court challenging the legality of the TRAI's actions (Raghavan 2006, p. 78). In addition, in every case where the TRAI sought to exercise adjudicatory functions, the DoT submitted a preliminary objection to the TRAI's competence to adjudicate. Some of these actions did succeed in diluting the authority and power of the TRAI. This included the 1998 Delhi High Court case of *Bharti Cellular*, which declared that the government did not need to seek recommendations from the TRAI before exercising its licensing powers, and that such recommendations of the TRAI did not having binding effect. Cases like this, which delivered a body blow to the TRAI's attempts to exercise real power over the DoT, adopted an approach that adhered strictly to the text of the TRAI Act whereas many of Justice Sodhi's interpretations of the TRAI's powers relied on appeals to the 'spirit' behind the enactment of the TRAI Act.

In March 1999, another significant policy document called the National Telecom Policy of 1999 (NTP 99) was announced, which considerably modified the original policy vision articulated in NTP 94. Significantly, this document was crafted and announced by the National Democratic Alliance (NDA) coalition government in power from 1999 to 2004. The NDA government was historically the first non-Congress government to complete five years in power. Dominated by the right-leaning Bhartiya Janata Party (BJP), the NDA coalition government, after initially opposing the process of economic reforms, became an ardent champion of liberalization once in power with a special focus on telecom regulation. Notably, when the NDA was replaced in 2004 by the Congress-dominated United Progressive Alliance, it continued with the basic thrust of the NTP 99. This is a further reflection of the consensus among the leading national parties (and their respective coalitions) on the need for liberalization in economic policies in general and in telecom regulation in particular.

In many ways, NTP 99 reflected a change in the mindset of policymakers in government. While NTP 94 viewed the DoT as the main service provider, it perceived private operators as playing a supplemental role. NTP 99 clarified that the DoT would be one among many service providers. Similarly, while NTP 94

vested in the DoT a multitude of functions, NTP 99 stated its intention to restructure the DoT to separate the policymaking function from the licensing and operating functions, as well as the need to separate the licensing, policymaking and service-provider elements of the incumbent government entity.

From a regulatory point of view, these proposed changes were of great import, as were the contents of NTP 99 relating to the powers of the regulator. The NTP 99 specifically stated the government's commitment to a 'strong and independent regulator with comprehensive powers and clear authority to effectively perform its functions' (Ministry of Communications, New Telecom Policy 1999, 26 March 1999, para. 7). The NTP 99, in contrast to the Delhi High Court decision in *Bharti Cellular* mentioned above, bolstered the overall power and authority of the TRAI, endorsing its capacity to issue directions to the government in its capacity of service provider, to adjudicate disputes between the government and other service providers, and to make advance recommendations to the government on the number and timing of new licences.

The broad elements of the NTP 99 were incorporated into the TRAI Amendment Act of 2000. This amendment brought fundamental changes within the structure of the TRAI. It divided the TRAI into two bodies: one to regulate, and the other to adjudicate. The regulatory body would continue to be called the TRAI and would be headed by a person having special knowledge of telecom, industry, finance, and so on, while the adjudicatory body would be called the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) and would be headed by a sitting or former judge of the Supreme Court or the Chief Justice of a High Court. The TDSAT was to be a quasi-judicial body, and its chair and members were to be appointed in consultation with the Chief Justice of the Supreme Court of India. Its jurisdiction was also widened, and it was empowered to decide all disputes including those where the governmental service provider was involved.

The immediate effect of this new measure was that it led to the disbanding of the original TRAI headed by Justice Sodhi. His removal was probably caused by a combination of factors: the DoT's hostility to his perceived 'activism' on behalf of private operators, which in turn had given rise to concerns that Justice Sodhi and his team may have veered too far in the direction of private players to be able to maintain their neutrality. A new TRAI was constituted in late March 2000, with M. S. Verma, former chair of a nationalized, government-owned bank, as its chair. The TDSAT was constituted soon thereafter and came to be headed typically by a retired judge of the Supreme Court of India. The effect of these changes (even if not the motivation) was to dilute the challenge to the DoT's incumbent power in the industry that Justice Sodhi and his team had provided, as discussed above. More broadly, the contents of the NTP 99 reflected a shift in power away from the DoT and towards cellular phone and other private operators, especially lobby groups for the private operators, such as the Association of Basic Telecom Operators and the Cellular Operators Association of India (COAI).

## C. Phase III: regulatory disputes and culture under the reconstituted TRAI and the TDSAT (2000–12)

For this period, we have chosen to focus on two cases that we believe were pivotal in establishing the relationship between the newly created regulator and the Supreme Court. As we explain below, the first case demonstrates the challenges of evolving a regulatory culture in a jurisdiction that is not accustomed to having multiple layers of players providing inputs into the regulatory process. In this case, the Supreme Court saw its role as educating the other actors on their proper functions and roles in the changed scenario. Very soon after the TRAI was reconstituted, and the TDSAT was set up, the revamped regulatory system was severely tested by having to adjudicate upon a dispute around wireless services within the local loop (WLL). The case that arose from the litigation around this issue exposed the general confusion—even in the minds of regulators—about the extent of powers enjoyed by various parts of the system. The second case, relating to the allocation of 2G spectrum through the awarding of 122 telecom licences, is a more recent controversy that is still playing out at the time of writing of this chapter. Nevertheless, it is clear that this is an extremely significant case and marks a turning point in the evolving regulatory culture of telecom in India.

### *1. The COAI case (Supreme Court 2002)*

The WLL dispute, which involved not only the DoT and the TRAI but also competing private operators, is an illustration of how developments in technology can make regulatory and legal categories redundant. The WLL facility allowed the fixed service operators (i.e., 'basic' telecom licence holders) to provide cell phone type services within a defined area. This technology was a competitor to the Global System for Mobile (GSM) communications platform on which the mobile telephony licences had been issued. WLL effectively allowed entities with licences for 'fixed' or 'basic' telecom licences to also offer 'mobile' services and at much cheaper rates.

The issue of allowing WLL technology first arose in March 1998. Initially, both the DoT and the TRAI were reluctant to allow the use of WLL technology. However, their stance changed, especially after the prime minister constituted a high-level committee called the Group on Telecom and IT (GOT-IT) in 2000. Acting on the GOT-IT's recommendation, in October 2000, the DoT and the TRAI reversed their opposition to WLL and approved its use by fixed line operators. The policy reversal generated adverse media commentary because the direct beneficiary of allowing fixed line operators to use WLL technology was Reliance Communications, the telecommunication company of the Reliance Industries group and India's largest private-sector company.

The COAI, being the official association of the cellular operators who were most adversely affected by this decision, approached the recently constituted TDSAT in January 2001, when it was still chaired by the founding chair, Justice S. C. Sen, a

retired Supreme Court judge. In March 2002, more than a full year after the case had been instituted, the TDSAT dismissed the petition filed by the COAI through a ten-page order (COAI, TDSAT 2002). The main reason given was that the decision to allow WLL technology was a policy decision of the government, and the TDSAT, sitting as a court or tribunal, could not interfere with this policy decision. The TDSAT emphasized that the membership of the GOT-IT was extraordinary in that it consisted of senior cabinet ministers, members of parliament, eminent lawyers, economists, and others. The judgment suggested that the very eminence of this government-appointed committee acted as a barrier for the TDSAT to review it substantively, and cited Supreme Court precedents (including, interestingly enough, the *Tata Cellular* case examined earlier) as authority for the proposition that courts cannot review policy decisions (COAI, TDSAT, paras. 17–22).

The COAI appealed successfully against this to the Supreme Court, which decided the case by issuing two separate judgments (*COAI v. Union of India*: COAI SC 2002). The main judgment, delivered by Chief Justice Pattanaik for two members of the Court, overruled the TDSAT's judgment and held that 'the tribunal has unfettered jurisdiction to adjudicate the dispute raised as well as to decide the legality of an order of the Central Government, or even the opinion of TRAI or any other expert body (*COAI v. Union of India*, SC, paragraph 6)'. Chief Justice Pattanaik's judgment set aside the TDSAT's order and remitted the case to the tribunal 'for reconsideration with special emphasis on the question of level playing field (*COAI v. Union of India*, SC, paragraph 10)'. The separate concurring judgment by Justice S. B. Sinha adopted an explicitly pedagogical, at times blunt, tone asserting that '[the TDSAT] posed a wrong question and gave a wrong answer', scolding the TDSAT for being overawed by the eminence of the GOT-IT, and reminding it of the scheme of the TRAI Act which required it to act decisively by exercising its jurisdiction (COAI SC Sinha J., paras. 31–4). The judgment concludes by directing the TDSAT to consider the entire case afresh. Interestingly, when invited by one of the parties to decide the substantive issues at stake in the case, the Court responded that this would be inappropriate. This is significant, because, quite often, the Supreme Court has in fact decided a case on merits when remitting a case would entail considerable delay. By refraining to do so, the Supreme Court seemed to be conscious of the need to empower the TDSAT and to guide its regulatory authority in relation to state agencies and other policy-making bodies.

The case had a further afterlife once it went back to the TDSAT, but was ultimately settled between the parties. This was also as a result of the decision to adopt a Unified Access Service (UAS) licence regime, which erased differences in the existing types of licence; telecom companies would no longer offer exclusively basic or mobile services. As we shall see later, that gave rise to a different set of problems in the case that has become known as the *2G spectrum* case (2G is a reference to 'second generation' services which are technologically superior to the first-generation services thrown open in the 1990s). Nevertheless, the *COAI* case remains significant for the tutorial offered by the Supreme Court to the TDSAT on how it was to envision its own powers and functions more generally. Since the

*COAI* case was decided, the TDSAT has been less deferential to policymaking authorities in discharging its functions (Prasad 2011).

## *2. The 2G spectrum case (Supreme Court 2012)*

The events surrounding the *2G spectrum* case have significance beyond the realm of telecom policy, and are causing an upheaval in the contemporary Indian political landscape. As noted earlier, the telecom sector was one of the first sectors of the Indian economy to be liberalized. It has also been one of the most corruption-ridden sectors because of the vastness of the consumer market for telecom services in India, the large sums of money involved, and the scope for corruption provided by the discretionary powers vested in the DoT in general, and the minister for communications in particular. Though discussions of corruption in telecom have been a constant feature of news reports in India since the early 1990s, such talk has more recently been bolstered by criminal convictions of high-profile individuals. Sukh Ram, who was the minister for communications during the Congress government of the early 1990s when many of the pivotal decisions that led to liberalization occurred, was sentenced first in 2002 and then again in 2011 to a five-year jail term for his role in a telecom scam in the mid-1990s. Promod Mahajan, who was the minister for communications during the NDA government in 2001–03, was frequently criticized for favouring telecom companies owned by Reliance Industries during his tenure. Although he died in 2006, Mahajan was recently named in a charge sheet filed by the Central Bureau of Investigation (CBI) against individuals who were being pursued for corrupt practices during his tenure as minister. The trend has recently continued with A. Raja, who was the minister for communications in 2007–10 under the Congress-led United Peoples Alliance coalition government. In February 2011, Raja was arrested for his role in the awarding of 122 UAS licences relating to 2G spectrum in 2008. It was alleged that the entire transaction was characterized by highly irregular practices that were designed to favour particular companies. Raja was finally let out on bail in May 2012, after 15 months in jail. His trial on the charges is, at the time of writing, ongoing before a special court.

All these episodes—and Raja's case in particular—have highlighted the issue of political corruption in the telecom sector, while also drawing attention to the ways in which the Indian regulatory landscape is still prone to being manipulated despite the presence of expert regulators. The Indian judiciary and the Supreme Court in particular have played a significant role in bringing such irregularities to light and in seeking to mitigate their impact. These events—and the *2G spectrum* case in particular—are also leading to a robust debate over the role of the judiciary in economic policymaking and the balance that is to be maintained in adhering to the separation of powers set out in the Indian constitutional scheme. Before analysing these broader issues, and the content and reasoning of the Supreme Court in the judgment issued, it is important to get a sense of the factual background of these events.

As noted earlier, one of the factors that played a role in the resolution of the *COAI* case was the decision taken to move to a unified licensing regime, which dispensed with the different types of telecom licences. This decision was first recommended by the TRAI in its report issued in October 2003. Once this decision was reaffirmed by the Union Cabinet later that same month, it was brought into force soon thereafter. Pursuant to these decisions, the DoT awarded 51 new UAS licences on a *first come, first served* basis at an entry fee determined in 2001 during the period 2004–07. The procedures followed to award these licences were unusual, and became the subject of controversy then and later. A. Raja was appointed minister for communications and information technology in May 2007, and remained so until his resignation in May 2010. During his tenure, he continued some of the controversial policies in respect of awarding of UAS licences and also formulated other controversial policy decisions of his own.

The controversy in the *2G spectrum* case (its official title being *Centre for Public Interest Litigation v. Union of India*) decided by the Supreme Court in February 2012 revolves around the 122 UAS licences that were awarded under Raja's tenure as minister for communications in January 2008. Much of the controversy relates to the commodity known as 'spectrum' which refers to 'a collection of various types of electromagnetic radiations of different wavelengths that is the medium of transmission of data' (Swamy 2012, p. 38). Although inexhaustible in theory, spectrum 'is nevertheless finite and is currently scarce' due to the 'burgeoning of mobile telecommunications networks in India' (Thakurta and Ghatak 2012). Spectrum has always been part of the debate around telecom licences because spectrum allocation was typically bundled with the allocation of licences. However, it became salient during this particular controversy because its scarcity is now being felt acutely as a result of the maturing of the Indian telecom sector over the past two decades.

On 10 January 2008, the DoT issued 122 UAS licences and awarded spectrum to certain telecom companies. A number of private companies that had lost out in the process, as well as NGOs and individuals voiced complaints about the irregularities and breaches of procedure. These included charges that: the *first come, first served* policy was flawed and a departure from the auction process that was used to award 3G licences; that the licences were granted at a price set in 2001 which was about one-tenth of the competitive price in 2008 in order to favour particular companies; that the cut-off date was advanced arbitrarily to favour the same companies; and that the DoT brushed off concerns expressed by the TRAI and officials from the finance and law ministries (Swamy 2012, pp. 47–125). This issue spilled over into the public domain and was the subject of debates in parliament: it was debated in the Lok Sabha (the lower House of Parliament) and later in the Rajya Sabha (the upper House) in December 2008. Partly as a result of the public uproar, by mid-2009, the CBI had begun its investigations into the overall process. However, the investigations gained momentum only after the Supreme Court began hearing the case around mid-July 2010 and urged investigative authorities to pursue the issue rigorously. It is important to emphasize that the case was brought to the Supreme Court by committed activists and politicians, who had

independently been drawn to the controversy over the awarding of licences by Minister Raja and the associated charges of corruption, and had pursued other options before approaching the judiciary. The main petitioner in the case was the Centre for Public Interest Litigation (which is an established NGO that has a long history of litigating public interest issues). Subramaniam Swamy, a veteran opposition politician and former cabinet minister, had also filed a separate petition which was taken up by the Supreme Court and made part of the main case.

While the Supreme Court was hearing the case and issuing directions designed to aid investigations, two significant actors weighed in on the issue. The first such institution was the Comptroller and Auditor General of India. A constitutional body designed to conduct audits on government expenditure and the functioning of public bodies, its report issued in November 2010 on the awarding of telecom licences in January 2008 highlighted several discrepancies and departures from established norms and procedures. The report of the Comptroller and Auditor General concluded that several of the problems identified in relation to the irregularities of procedure had a strong factual basis. The report also commented on the systematic undermining and diminution of the regulator, observing that the role of the TRAI had 'been reduced to that of a hapless spectator as its recommendations were either ignored or applied selectively'. The report concluded that 'the entire process of allocation of 2G spectrum raises serious concern about the systems of governance' within the DoT 'which need to be thoroughly reviewed and revamped' (Report of the Comptroller and Auditor General, November 2010, pp. 58–9).

The second actor was the one-person committee set up by the minister for communications who succeeded A. Raja after his resignation, Kapil Sibal. In order to respond to the great controversy surrounding the allocation of licences by Raja in 2008, Sibal set up the committee, headed by a former judge of the Supreme Court, in November 2010 to review the procedures followed by the DoT in issuing licences and allocating spectrum during the entire period 2001–9. The Shivraj Patil Committee, in its report delivered to the minister for communications in January 2011, concluded that the awarding of licences in 2008 suffered from several infirmities. It noted that in formulating the procedures for this round of licences, the DoT had ignored and changed the policy recommendations of the TRAI, and deviated from norms followed earlier. The committee also found that these deviations resulted in unfairness and a lack of transparency in the overall process. In its recommendations for reformulating procedures, the committee stressed the importance of giving weight to the recommendations of expert bodies such as the TRAI and the Telecom Commission (Report of the Shivraj Patil Committee, pp. 90–105).

The Supreme Court delivered its judgment on the *2G spectrum* case on 2 February 2012. The judgment was delivered by a two-judge bench in the case formally known as *Centre for Public Interest Litigation and others v. Union of India and others* (CPIL, SC). The judgment cancelled the 122 licences awarded in January 2008 under Minister Raja's tenure on the reasoning that the procedure followed was arbitrary, illegal, and unconstitutional. The Court directed the TRAI to make fresh recommendations for the grant of licences and the necessary allocation of spectrum

through a process of auctions instead of the *first come, first served* policy that was followed by the DoT in 2008. It held that the DoT and the government would have to consider the TRAI's recommendations and take a decision to issue fresh licences within four months from its decision. The Court named the companies that had benefited from the illegal dispensation of state resources, and levied heavy fines on them as they had 'benefited by the wholly arbitrary and unconstitutional' acts of the DoT (CPIL, SC, para. 81).

The judgment of the Supreme Court rested primarily on the basis that spectrum was a scarce natural resource, and while the state was empowered to distribute it to private parties, it had to do so through a process that was guided by constitutional principles (CPIL, SC, paras. 63–72). The Court held that the TRAI's decision to allocate 2G spectrum in 2008 on the basis of a price set in 2001 was against the decision taken by the Union Cabinet in 2003, and was illogical, unreasonable, and unjustifiable (CPIL, SC, paras. 73–5). It further held that the *first come, first served* policy was flawed in fundamental respects and the method that should have been preferred was that of holding an auction, which is also the method that the DoT had used for other licences (CPIL, SC, para. 76). The Court detailed the procedural infirmities which led it to conclude that the process resulting in the awarding of contracts in January 2008 was 'wholly arbitrary, capricious and contrary to public interest' while also being in violation of the doctrine of equality guaranteed under Article 14 of the Constitution of India (CPIL, SC, para. 77).

In response to the argument of several counsel for the telecom companies that the power of judicial review should be exercised with restraint in the context of governmental policy decisions in the realm of financial issues, the Court acknowledged that its own precedents (including the *Delhi Science Forum* case) counselled against expansive judicial action. The Court argued, however, that 'when it is clearly demonstrated that the policy framed by the State or its agency' is 'contrary to public interest' or violates constitutional principles, 'it is the duty of the Court to exercise its jurisdiction in [the] larger public interest and reject the stock plea of the State that the scope of judicial review should not be exceeded beyond recognized parameters' (CPIL, SC, para. 79). The Court emphasized the fact that the case was brought before it by public-spirited citizens. It asserted that its actions were driven towards ensuring that 'institutional integrity is not compromised by those in whom the people have reposed trust and who have taken oath[s] to discharge duties in accordance with the Constitution and the law' (CPIL, SC, para. 79).

The Supreme Court's judgment in the *2G spectrum* case created a great stir when it was announced. While it received support among public interest groups and civil society generally for its strong stance on governmental corruption, the business community openly questioned the messages that would be sent to the commercial community and the foreign investor community in particular. Several commentators expressed concern about the intervention of the judiciary in matters of economic policymaking and pointed to problematic statements in the judgment, such as one asserting that 'while transferring or alienating natural resources, the State is duty bound to adopt the method of auction'. The exact processes to be adopted are, the critics suggest, matters of detail and essentially of a policymaking

nature. They note that auctions may not be suitable for allocating some natural resources, and the effect of the judgment is to make this a blanket rule. There were also concerns expressed on the impact of the judgment on licences awarded prior to 2008, such as the UAS licences awarded in 2004–7 that were also determined on a *first come, first served* basis. These concerns were made the subject of a Presidential Reference under Article 143 of the Constitution, and the matter came to be heard before a Constitution Bench comprising five judges of the Supreme Court. Pursuant to a public outcry, the government gave an undertaking before the Constitution Bench making clear that the reference was not meant to be a disguised appeal from the judgment in the *2G spectrum* case, which it had accepted as binding upon it. In September 2012, the Constitution Bench of the Supreme Court delivered its judgment in the case titled *Special Reference no. 1 of 2012*. Although the Constitution Bench cast doubt on the reasoning of the two-judge bench which decided the *2G spectrum* case, it ultimately relied upon the aforesaid undertaking by the government to hold that the conclusions reached by the two-judge bench which decided the *2G spectrum* case were good law. This paradoxical stance of the Court in two judgments delivered within a space of eight months has drawn withering criticism from commentators (Krishnaswamy 2013), and is a problematic aspect that we will critique in our own analysis of the case in the conclusion of this section.

In the aftermath of the *2G spectrum* judgment, a chastened TRAI sought to rebuild its credibility and acted promptly towards implementing the judgment. It issued a report in April 2012 in relation to the release of spectrum. Although the Supreme Court had initially provided a four-month timeline to implement its decision, this was later extended until the end of August 2012. Some commentators have noted that the entire Indian telecom sector is in 'a mess' thanks to the 'legacy of the recent past' and have described the situation as one where '[o]perators had winked, turned a blind eye or actively colluded with a bunch of corrupt bureaucrats and politicians as the regulator displayed great reluctance to do its job, that is, to regulate' (Thakurta and Ghatak 2012, p. 57). While things do look bleak for the immediate future, there is some consolation in the fact that those who sought to manipulate the law and institutional processes to procure unfair advantage have been frustrated and fined, that some of the instigators have been exposed and are the subject of criminal proceedings, and that the level of scrutiny over these momentous transactions has escalated. Together, they will hopefully ensure that as the telecom sector matures, better norms of regulatory governance will be evolved.

We now turn to our analysis of the *2G spectrum* case, and set out how it fits with our broader argument in the chapter. At first glance, the Supreme Court's judgment in the *2G spectrum* case flies in the face of our claim that the Indian judiciary has sought to play a supportive and constructive role in relation to the nascent regulatory landscape of Indian telecom. This is because the judgment castigated the TRAI and upbraided it for adopting wrong policies in relation to the licences issued by Raja's ministry and the DoT in 2008. However, as our narrative shows, the TRAI's decisions that were the subject of scrutiny in this case have to be understood against the backdrop of a domineering minister who was manipulating his office to

devise policies that would favour particular entities and reach predetermined results. Given that the DoT under the guidance of Minister Raja was thwarting the more powerful offices of the ministries of law, finance, and the prime minister's office, it is not surprising that the DoT felt able to override the TRAI's recommendations. Although the *2G spectrum* case judgment does not refer to them, as our analysis has shown, the reports of the Comptroller and Auditor General and the Shivraj Patil Committee make clear that the DoT was cherry-picking recommendations of the TRAI that suited its needs, and that the process followed to grant the licences was flawed in material respects. The Supreme Court's indictment of the TRAI's actions have to be understood against this background. What is of significance is the formulation of the Court's directives, which are aimed at strengthening the TRAI's weakened position. In its directives, the Court expressly emphasized that the recommendations for the new policies would come in the first instance from the TRAI (thereby underscoring its expertise and capacity). In our reading, the judgment in the *2G spectrum* case, even as it criticized the TRAI, can be seen as seeking to bolster its institutional legitimacy by reminding the regulator of the importance of approaching issues in a non-partisan manner, and without being overly influenced by the varied interests of the other actors in the regulatory space, including the DoT. At the same time, the Court also sought to remind other actors in the telecom regulatory landscape of the importance of respecting the special position and policymaking role enjoyed by expert regulators such as the TRAI and the Telecom Commission. Krishnaswamy has argued that the reasoning of the 2G spectrum judgment is deficient, somewhat extravagantly terming it as 'the boldest judgment of the Supreme Court to have no substantive reasons' (Krishnaswamy 2013). While we have sympathy for this critique, we would nevertheless draw attention to the impact of the ruling on the broader telecom regulatory landscape, which despite its deficiency in reasoning, is broadly positive. In our view, allowing the machinations of Raja to stand (which would be the logical effect of Krishnaswamy's critique since he argues that the Court should have shown deference to the executive's policy choices) would be a far worse consequence. We may be accused of adhering too rigidly to the legal realist credo, but we believe that it is better to reach the right conclusion, albeit through poor reasoning, than to reach the wrong conclusion by adopting impeccable legal reasoning. To have allowed Raja's demonstrably corrupt decisions to stand, in our view, would have done violence not just to the regulatory landscape of Indian telecom but also to the broader legitimacy of the Indian legal system as a whole.

## IV. Conclusion: understanding the actions of the Indian judiciary and its implications for the global South

Our analysis has important implications for understanding the role of the Indian judiciary within the domestic regulatory context, and for comparative purposes,

especially as it relates to the literature on the rise of the regulatory state in the global South.

We begin with the local context. In criticizing the Indian judiciary, Pratap Mehta has, in line with some of the literature on economic theories of judicial behaviour, argued that it has often adopted an instrumental, overreaching and self-interested approach in dealing with contentious issues. Citing several examples drawn from the vast body of Indian constitutional law decisions, Mehta has argued that the Indian judiciary is primarily concerned with expanding its own authority and has often read political tea leaves to reach optimal conclusions that would further this end (Mehta 2005). Although Mehta's analysis does not cover the telecom disputes we have focused on, it would be interesting to apply his analysis to these cases. On the other hand, Ashok Desai has been specifically critical of the intervention of the courts in matters involving telecom. He emphasizes the 'lack of coherence between the regulator and the judicial system' and argues that a trend that was evident from the beginning was that 'a higher court was more likely to dismiss than confirm the decisions of the regulator'. He contends that this tendency gave rise to the culture of litigiousness that has been so evident in the regulatory landscape of Indian telecom (Desai 2006, p. 136).

Our analysis shows that while there is some basis for the criticism offered by Mehta and Desai, their critique fails in appreciating the full import of the judiciary's actions in these telecom cases in important respects. While we agree with Mehta that the Court's decisions in *Tata Cellular* and *Delhi Science Forum* can be seen as giving the Court a final say in matters, even in these cases, the Court was less expansive than it could have been, and reined in its own powers to impart legitimacy and power to the other agencies involved. We have argued that in each of its interventions in the cases we have focused on, the Indian judiciary was trying to advance some ideal or value that it felt was part of a healthy regulatory system. In the *Tata Cellular* and *Delhi Science Forum* cases, the Court was arguably trying to bolster the foundation of the process of liberalization of telecom services initiated by the government. The Court did not hesitate to point out what it perceived as flaws, although it upheld the substance of the challenged governmental policies. The *COAI* case in particular gives us pause in accepting Mehta's characterization of a self-interested, self-aggrandizing institution. In that case, the Court took great pains to educate the newly created TDSAT on the proper ambit of its powers, while also exercising restraint on its own part. In other areas of the law, the Supreme Court of India has been extremely aggressive in claiming the final word on legal and constitutional matters. However, as should be clear from our analysis, especially of the *COAI* case, in the sphere of telecom, the Supreme Court has been less interested in stamping its own authority on issues, and has instead sought to bolster the authority and legitimacy of the telecom regulatory institutions. We interpret the Court as being motivated by the public interest in having an overall regulatory and legal system that upholds 'rule of law' values. We do not read these decisions as showing that the Court is nothing more than a self-interested actor. One can be self-interested and yet act with altruistic motives, especially when acting in the larger interest of the legal system has clear benefits for the judicial system as a

whole. In this respect, our analysis is closer to that offered by Sathe who is appreciative of the role of the Indian judiciary in defending the overall project of constitutionalism across a half-century despite having a record that is marred by imperfections and follies (Sathe 2006). We offer a similar analysis in respect of the *2G spectrum* case, even though, as we noted, the Court in this case was expressly critical of the actions of the TRAI and overturned them. We read the judgment as the Supreme Court upbraiding the TRAI for not performing its functions as diligently and rigorously as it should have, and for allowing itself to be undermined by the DoT and the errant minister. One of the most criticized aspects of the case was the Supreme Court's suggestion that the state should use auctions in all forms of distribution of natural resources. This statement has been perceived by commentators and the government as an unjustifiable incursion into the arena of policymaking, and would seem to provide evidence for Mehta's characterization of a self-aggrandizing judiciary. However, we believe that the Supreme Court's statement should be read in the context of the final directions issued by it, which were only addressed to the distribution of spectrum and telecom licences and not to natural resources in general. Using well-established canons for determining the operative part of the Court's holding, it can be argued that only those assertions of the Court's judgment are relevant which find resonance in the Court's actual holding in the facts of the case before it. Thus construed, the Court's judgment could and should apply only in relation to the allocation of spectrum in telecom licences. It should also be recalled that the Supreme Court had endorsed the process of auction also because the DoT had already used this mode to award 3G licences. Having found the *first come, first served* method to be flawed, the Supreme Court turned to another method followed by the DoT in the past that it found relevant and applicable, and was not using its own judgment as to the best process to be followed. In any event, since the Constitution Bench's judgment in the *Special Reference* case clarified that the observations in respect of auctions in the *2G spectrum* case would not have future effect, their effect has already been mitigated. Arguably, the judgment of the Constitution Bench also makes clear that the judiciary will generally respect the policy choices made by the executive in matters of economic policymaking.

Desai's criticism is also overstated, given that in *Tata Cellular* and *Delhi Science Forum*, the litigation initiated by private parties ultimately resulted in the regulatory system gaining greater legitimacy and power through the direct intervention of the Court and the imparting of institutional credibility by the courts to the regulators. What the criticism leaves out is the manner in which the Court's interventions project specific visions of society, of the modernity of institutions, and of the necessity of particular forms of regulation. Instead of focusing on the interests of the Court as an institution, our attempt has been to focus instead on the legal reasoning behind the vision of regulation that the Court sought to initiate through its interventions. While understanding how a court operates as an institution is important, what is equally significant is understanding how judges seek to cultivate a particular vision of society through their judgments. In the *2G spectrum* case, the Court expressly invoked the need to maintain institutional integrity as one of its

justifications for intervention. We believe that by acting as expansively as it did in that case, the Court sent out a message that the old ways of manipulating governmental processes to favour particular companies would not be tolerated in the new regulatory environment. Looking back at the litigation in relation to the *2G spectrum* case, it is clear that but for the litigation, the actions adopted by the DoT under the controlling influence of Minister Raja may well have held the field. In this situation then, litigation, rather than being a deconstructive force, turned out to be an avenue for retrieving the credibility of the regulatory system that governs telecom policy.

Whether the judiciary has succeeded in achieving the goal of a well-functioning regulatory system for telecom is an entirely separate matter. As we noted, recent events surrounding the *2G spectrum* case and its aftermath indicate that goal is far from being attained. In our view, these events go to show that the terrain of Indian telecom regulation is far from settled, and that more established actors such as the Indian judiciary may have to continue to play a role in its future evolution.

Our study has implications for the comparative study of the regulatory state, especially for nations within the global South. Dubash and Morgan argue that 'regulatory agencies in the South are more likely to begin as relatively hollow institutional shells, which are populated by expectations, norms of institutional practice, and operational rules and culture over time' (Dubash and Morgan 2012, p. 7). They emphasize the importance of exploring 'the micropolitics through with the regulatory state emerges and is filled out' and the need for research to be focused on 'an expanded array of relevant actors'. Drawing upon case studies that focus upon the regulatory state in the Philippines, India, Columbia, and Indonesia, Dubash and Morgan contend that 'the role of active civil society and an activist judiciary are particularly ripe for analysis' (Dubash and Morgan 2012, p. 9). Our analysis of the Indian judiciary's actions in the sphere of telecom regulation fits well with this narrative. As we have demonstrated, the regulatory institutions in Indian telecom owe their creation in part to the judiciary, which sought to 'fill out' over a period of time, the 'norms of institutional practice and operational rules and culture' in relation to the regulation of Indian telecom. This process is continuing at the present time, and going by the evidence of the manner in which the Indian judiciary has handled the ongoing *2G spectrum* licences case, it will continue to play such a role for the foreseeable future.

We should, however, note that the Indian experience may be somewhat exceptional in that most judiciaries cannot be expected to have the level and degree of institutional independence that the courts in India currently enjoy, which is unusual even within its own history. Moreover, the ability of the Indian courts to intervene in the arena of telecom may be somewhat exceptional even in relation to other sectors of the Indian economy, given some particular features of the telecom sector. These include the fact that regulation in the telecom sector is centralized because of the nature of Indian federalism, which allows the parliament to legislate unequivocally on this sector. Court interventions would potentially be far more problematic in the electricity sector, where powers of regulation are divided between the central and state governments, and the courts would have less expectations of a

uniform and centralized response to their interventions. Likewise, when equity markets were liberalized, the ensuing litigation was directed towards the appeal process provided within a special regime, and did not extend to the ordinary courts.

That being said, the Indian judiciary's role should remind us of the grave challenges that confront states within the global South as they seek to create a regulatory culture steeped in progressive and democratic values. Given these difficulties, it is perhaps understandable that more established institutions seek to lend their credibility to the new regulatory institutions and leverage for them their greater experience with navigating difficult political waters. This is at least one plausible interpretation of the way the Indian judiciary intervened in the *Delhi Science Forum* case. As the *2G spectrum* case shows, courts may also have to step in when carefully coordinated attempts are made to manipulate the evolving regulatory set-up to facilitate corruption. At the same time, we acknowledge the merit of Krishnaswamy's critique of the recent judgments of the Supreme Court for the poor reasoning on display. We believe that it is incumbent upon courts to focus upon the process of justification, as this is what gives their interventions legitimacy and credibility.

In our view, therefore, as scholars focus on the rise of the regulatory state in the global South, they should focus in particular on the role of judiciaries (especially in jurisdictions where judicial systems have established some institutional credibility and independence) and on other institutions that could play a supportive or facilitative role similar to that which we have described.

We do not, however, want to be seen as uncritical champions of judicial intervention in issues of regulation, which has had some troubling repercussions such as the tendency of courts to issue broad directives that are at times beyond the scope of the issue presented before them. We are also aware of the disadvantages of a system where players find it easier to resort to litigation and the adversarial attitudes that accompany it, rather than seeking to adopt a constructive and non-combative approach to the many intractable issues posed by the advances of technology and the rapidly changing environment in the telecom sector. Instead, what we seek to draw attention to, as a descriptive matter, is the crucial role played by the judiciary in imparting legitimacy to the institutions that now regulate telecom in India.

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# 8

# Regulatory Mobilization and Service Delivery at the Edge of the Regulatory State

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## I. Introduction

This article explores the dynamics of mobilization by the informal sector, non-governmental organizations (NGOs), and local organized communities at the 'edge' of the regulatory state. More than a decade into the privatization of the Metropolitan Waterworks and Sewerage System (MWSS) in Metro Manila, access to water remains a problem for the urban poor in the Philippine capital. The difficulties faced by water utilities in providing direct service connections to the urban poor have reaffirmed the importance of the informal sector in small-scale water provisioning. Most of these providers operate outside the formal regulatory framework. Meanwhile, NGOs, who are also without formal roles in the privatized sector, have kept the plight of 'waterless' communities on the agenda by lobbying legislators and regulators, appealing to the public via the media, and mobilizing local communities in sporadic, and what appear to be largely ineffectual, protests.

Informal water vendors, NGOs, and local groups attend to the subsistence needs of the poor. These non-state actors exist within a fragmented regulatory space that is both informally and formally regulated and locally legitimized. They straddle the boundaries of the law. In much of the developing world, they contend with economic and political elites privileged by formal regulatory structures and institutionalized clientelism. In the shadow of an oligarchic patrimonial state in the Philippines, collective action by these actors has been concerned with water as a subsistence right. Rooted in local politics, these forms of what I term here 'regulatory mobilization' appear to be parochial, episodic, and largely peripheral to the regulatory framework as a whole. Regulatory mobilization is collective action by a group of actors to influence or obtain control over rules, modes of state intervention, and mechanisms of social control in a given regulatory space. Depending on how local and sectoral politics are conflated, episodes of regulatory mobilization may sometimes secure subsistence goods ordinarily denied, project countervailing power in the policy sector, and influence the 'rules of the game' in surprising ways.

In this first section of the chapter, I develop the concept of regulatory mobilization to confer a more appropriate treatment of agency by organized citizens and

consumers in politics of regulation. Regulatory mobilization describes contentious collective action by citizens and consumers that is neither fully transgressive (e.g., protests), nor entirely co-opted (e.g., lobbying). This helps us to understand and frame the hybrid service orientation and rule-changing intention of such collective action. I then show that this should be understood in the context of the relationship between the informal water sector and the urban poor in developing countries. The second section of the chapter introduces the background to water privatization in the Philippines. I describe the relationship between an oligarchic patrimonial state and a clientelistic water sector, followed by a discussion of Metro Manila's post-privatization regulatory landscape in terms of the urban poor and the informal water sector. Collectively, they reveal how water provisioning is dominated by local and sectoral, political, and economic elites.

Countervailing mobilization is rare but the third section of this chapter deals with a case study of community-based water service providers, and a discussion of how organized citizens and consumers, emanating from the informal sector, unexpectedly influenced local politics and the formal regulatory framework. Based on almost two years of ethnographic fieldwork in the city of Taguig in Metro Manila, the study shows how community organizations for bringing water to the people acted as the contractors of the private utility. Effectively self-regulating by employing locally legitimate norms and networks, these community-managed water providers were initially successful in providing direct connection where others (i.e., municipal and private utilities) had failed. However, they soon ran foul of the local government and the utility companies. With the help of NGOs from outside the community, they interpreted and manipulated formal rules in the contract for the privatization concession to their advantage. Compared with other forms of collective action in response to water privatization, regulatory mobilization is distinctive in that it engages in both non-institutionalized and institutionalized politics without fully becoming either. The paper concludes with some ideas for policy and collective action which policymakers, regulators, and community organizers should consider.

## A. Regulatory mobilization

The interaction of social regulation and economic regulation in network utilities is an area that the regulation literature is only now beginning to address. Much of this scholarship is state-centric and based on cases from the global North. For example, Haber (2010) examined social policy in the electricity sector in Israel, the UK, and Sweden. He explained variance in levels of social protection via the concept of the 'regulatory welfare regime'. This is where the state increasingly undertakes measures (directly or otherwise) in a sector to achieve welfare goals. For some, this amounts to the 'regulatory rescue of the welfare state' whereby social policy is reconstituted in the regulatory state as a technical domain of efficiency-enhancing policy yet insulated from politics and partisanship (Mabbett 2011). For others, the rise of social policy points to the emergence of a new type of regulatory state altogether (Leisering 2011).

In the developing world, state formation has evolved in different trajectories that make the distinction between social and economic regulation much more ambiguous. Rather than debate the nature of the state, it may be more useful to consider situations such as that which Phillips (2006, p. 19) refers to as 'regulation without a regulatory state' or as the editors of this special issue suggest, the 'process of regulatory development'. The research focus here then, is on the micropolitics and the 'expanded array of relevant actors'. In developing countries, much regulatory governance is performed by non-state actors. Many have social issues on their agenda. 'Regulatory mobilization' is collective action by a group of actors to influence or obtain control over rules, modes of state intervention, and mechanisms of social control[1] in a given regulatory space.[2] This has occurred against a backdrop of institutional reform (privatization) where the rules governing the provision of essential goods and services, like water, are openly debated and contested. The actors—NGOs, local community groups, and their networks—are typically groups that do not have any formal power in the regulatory environment. To eke out an existence, the urban poor participate in the informal economy and seek out patrons in the community. Due to their default exclusion from power and basic services, acts of subsistence involving mobilization are inevitably seen as contentious by the dominant elites as they challenge formal authorities, legally sanctioned sources of power, and regulatory programmes.

In the Philippines, regulatory mobilization of NGOs and local groups involves the subversion and, on rare occasions, the creation of rules governing the provision of basic goods and services. It may also include the enforcement and observation of established rules in ways that are advantageous to these groups. Such forms of reactive and rule-based contention have occurred in the context of regulatory reforms, market liberalization, and the privatization of state sectors (especially in network utilities) in the Philippines since the overthrow of the Marcos dictatorship in 1986.[3] Regulatory mobilization is a viable tactic when the structural political opportunity for collective action is perceived as favourable. Privatization of the urban water sector in Metro Manila laid bare the 'archipelagic' regulatory environment where water provision suffered from low network penetration given the spatially heterogeneous intervention of the state in the social fabric (Bakker 2003). State regulation is seldom politically or socially neutral and the Philippines proves no exception. Elites have been overcompensated in the form of rent extraction when market spaces were created and protected by regulation. Under the guise of administrative neutrality, this dominant formal/legal market system has masked

[1] The definition of regulation here is taken from Baldwin et al. (1998).

[2] The regulatory space of any given area is available for occupation and is, therefore, contested. Although organizations are makers and shapers of regulation, and citizens are 'takers' of regulation, occasionally, 'private citizens may succeed in mounting a successful legal challenge to a regulatory programme, but sustained or permanent participation is precluded' (Hancher and Moran 1989, p. 286).

[3] This also takes place against a global backdrop where politics of access increasingly become regulatory politics as utilities 'operate more and more at arm's length from traditional representative politics and under the supervision of some kind of regulatory body' (Morgan 2011, p. 9).

highly political outcomes of interest groups involved in defining 'inappropriate' activity within the regulatory space and 'appropriate' levels of enforcement. These kinds of contests exclude large groups of people who then seek to avoid or subvert the dominant regulatory system and market. Such politics of contention and regulation can be said to occur at the 'edge' of the regulatory state where the informal sector resides (Fernández-Kelly and Shefner 2006).

Regulatory mobilizers are not interested in overturning privatization. Rather, they seek to make use of rules to secure access to basic goods and services necessary for subsistence by claimants. A second goal is to reconfigure the means by which the constituents may gain access. This may be seen as a form of resistance in the Philippines that emerged from a defensive countermovement against the commodification of water (Chng 2011). Such forms of mobilization are not necessarily set against the state and may involve penetrating the state to 'augment or activate its regulatory capacity' as seen in Latin America (Roberts 2008, p. 331). Regulatory mobilization makes extensive use of the law, and a wide range of norms that may have regulatory influence (e.g., local norms of reciprocity) that shape behaviour. In this way, regulatory mobilization can be said to be boundary-spanning in that while collective action is not entirely transgressive, neither is it fully co-opted into accepted regulatory processes.[4]

Regulatory mobilization is thus possible because of the fragmented regulatory space in which it takes place. The introduction of powerful concessionaires whose activities are primarily governed by a business contract, and the creation of a weak regulatory agency following privatization, only serve to complicate power relations in the regulatory space. Mobilization in response to subsistence issues is thus shaped by the heterogeneous opportunity structure for collective action.[5] Mobilization over water is usually localized, small-scale, and episodic. With regulatory mobilization, two different scales (local and sectoral) of collective action are brought together, transposing ideas, issues, networks, and a variety of forms of collective action to a potentially new, that is, national, level without ignoring the conflicts and claims at the local level that gave rise to them.[6]

## B. The informal water sector and the urban poor

Following the disappointing performance of large-scale water privatization projects, the informal water sector was 'rediscovered' in the late 1990s (Gerlach 2008, p. 40).[7] As already discussed, many of these small-scale water providers (SSWPs) constitute the informal water sector because they operate outside the formal

[4] The term 'boundary-spanning contention' was coined by O'Brien (2002). See also O'Brien and Li (2006).

[5] The stability of elite alignments, the presence of elite allies, the relative openness or closure of the institutionalized political system, as well as the state's capacity and propensity for repression, all play a critical role in influencing the political opportunities from which social movements emerge (McAdam et al. 1996).

[6] This is a process known as 'scale-shifting' in the contentious politics literature. See Tarrow (2005).

[7] See, for example, Solo (1999).

regulatory environment (Moretto 2006). The informal sector includes vendors running water kiosks where they sell water from a shallow well, a borehole, a commercial water connection, or from a household connected to the formal piped network. Consumers may carry the water to their homes themselves. Mobile vendors also collect water from these kiosks. They typically carry water in containers loaded on bicycles, hand-pushed, animal-drawn, or motorized carts, and distribute them to households and small businesses. On a larger scale, and sometimes serving higher-income customers, there are water tankers that carry greater quantities. Different kinds of vendors serve different kinds of customers, and many households have multiple sources of water. Informal water vending thus provides a parallel system of service delivery, and also serves as an important source of employment (Kjellén and Mcgranahan 2006, pp. 1, 4–6). Aside from the varying organizational forms of the informal water sector, its informality can also be understood in terms of norms and networks. The precariousness of the life of the urban poor generates a strong body of associational life. This ranges from informal neighbourly and kinship ties to more formalized associations and organizations that have been observed in the Philippines (Berner 1997; Jocano 2002; Shatkin 2007) and beyond (Lomnitz 1977). These are the bases from which the urban poor may 'defend a place in the city' (Berner 1997). The struggle for subsistence in the city rests upon overlapping and consolidating networks of trust and solidarity that emerge from the shared experience of everyday life in the locality. In the Philippines, these norms include *utang na loob* (a debt of gratitude) and *malasakit* (compassion or empathy). Relevant horizontal and vertical networks are those of kinship, *compadrazgo* (ritual or fictive kinship), *suki*[8] (privileged market relationship between a buyer and seller), neighbours, friends, and patron–client bonds. These norms and networks dominate the informal sector to a greater degree than regular formal water markets. Such informal practices in the water sector are, however, at best overlooked, and, at worst, resisted by the regulations, policies, and practices that guide and support the formal system (Allen et al. 2006).

Regulatory arrangements for the water sector in developing countries are typically considered only after privatization has taken place (Gerlach 2008, p. 43). Regulation of the water sector is dominated by contracts with a strong centralized utility bias. For example, this is evidenced in the exclusivity clauses that are often granted to large private water utilities even when there is no service to large sections of the population. Economic regulation of informal vendors rarely goes further than registration and licensing. Authorities usually choose not to sanction them as an acknowledgement of the failure of the central water utility in providing the service needed. Mobile vendors are difficult to regulate and tax, due to their massive numbers, mobility, and low earnings. The quality of water sold—usually advertised as 'clean' or 'pure' water—also varies (Kjellén and Mcgranahan 2006, p. 12).

The urban poor have limited access to potable water mainly due to the nature and location of their settlements. Some of these places are among the most

[8] *Suki* relationships are based on repeated and regular interactions, personal trust, loyalty, and reciprocal obligations (Jocano 2002, pp. 50–1).

dangerous areas in the city, such as steep riverbanks, floodplains, hillsides, garbage dumps, and along railroad tracks. Due to the illegality of land tenure, authorities have been reticent in extending water services for fear of legitimizing such insecure property rights. These places also lack adequate space for laying down reticulation and road networks necessary for the functioning of a modern water distribution system. Tampering with water meters, setting up illegal connections to water mains, stealing water from fire hydrants, and threatening water inspectors are common anti-social activities. The urban poor generally have difficulty in meeting regular payments for water and sanitation charges (Ehrhardt 2003, pp. 182–3). Such unpredictable revenue streams and existing tenure and right-of-way issues impede access to water for the urban poor, regardless of the nature of ownership of the water sector. This paper thus highlights the dynamics of exclusion and mobilization that define the relationship between the urban poor and the state in many developing countries, as reflected in their limited access to basic goods and services in the formal economy.

## II. Water privatization in the Philippines: oligarchic patrimonial state, clientelistic water service

In what was the world's biggest water privatization in 1997, the MWSS, which served Metro Manila's 11 million residents, was turned over to the private sector. The city was carved into two concession zones. The east zone was awarded to Manila Water (Manila Water Corporation, Incorporated) while the west zone went to Maynilad (Maynilad Water Services, Incorporated). Like many countries, there was an urgent need for new investment in the water sector. In 1995, the MWSS was one of the worst performing water services in Asia. Service coverage was 67% and water was available for an average of 17 hours per day. Only half of all MWSS customers had full 24-hour supply. Due to rampant illegalities, pilfering, leakages, and metering errors, non-revenue (producing) water (NRW)[9] amounted to 58% (McIntosh 1997). In 1996 the debt of the MWSS amounted to US$880 million, much of it incurred through foreign loans (Capistrano and Gutierrez 2003, p. 30). These indicators suggest that the MWSS suffered from poor governance (McIntosh 2003, p. 101). More than just 'technical difficulties' and 'institutional weakness', however, it was the logic of rent-seeking and patronage underlying the failure of urban elites to expand water services (Bakker 2003, p. 332) in cities like Metro Manila. The World Bank (Devarajan 2003, p. 162) thus described the MWSS as a typical example of a 'clientelist' service delivery.[10]

[9] Non-revenue water can be defined as the difference between system input volume and billed authorized consumption. It consists of unbilled authorized consumption (e.g. water for fire fighting), apparent losses (e.g., unauthorized consumption and metering inaccuracies from malfunctioning equipment), and real losses (e.g., leakage from transmission or distributions mains).

[10] It should be noted that MFIs like the World Bank were hardly innocent bystanders in the evolution of the MWSS as a clientelistic institution. Fifty to 70% of major investments by MWSS were financed by foreign loans from multilateral lending institutions and donor agencies. By the end of

State-owned utilities are treated as part of the political apparatus instead of public service providers. Service providers are then dependent on politically motivated budgets for survival, which results in poor accountability, as the distinction between policymaking and service providing is lost. Politicians exert control over access to water in two ways. This is through the power to appoint and dismiss company directors, and by the legislation of public subsidies (to finance investments and support ailing enterprises). Water companies reciprocate through political favours such as over-employment, artificially depressed tariffs, discretionary selection of new investments, and distribution of contracts based on non-economic criteria (Devarajan 2003, p. 162). In the Philippines, as in many other countries, this has led to increasingly costly water, low service quality, and abysmal state finances. This leaves the target population lacking a critical resource, driving them to a range of alternative sources (Foster 2005, pp. 1–2). McIntosh observed that:

> Some [water] is illegally sold to SSWPs. The profit to those with vested interests (some elected officials, utility staff, utility owners, and local authorities) is considerable, which explains the desire to maintain a status quo that keeps the urban poor paying 25 times the unit rate the rich pay for water. This is also probably why visible leakage is maintained (to mask illegal use). (2003, p. 101)

In the words of the historian Alfred McCoy, the Philippines has experienced its own form of privatization for decades, whereby the 'privatization of public resources [has] strengthen[ed] a few fortunate families while weakening the state's resources and its bureaucratic apparatus' (McCoy 2009, p. 10). Dominating the Philippines is a powerful oligarchy. A small segment of society has long been able to use its control over the state and its resources to forward its own particular interests, as well as those of its broader class. These oligarchs have been efficiently organized into enduring political families and economic conglomerates. State power has been used in a discretionary fashion by and for the oligarchy and its proxies. State expenditure on public goods and services has been limited and unevenly distributed. The Philippine state is thus a complex set of predatory mechanisms for the private exploitation and accumulation of resources at different levels of governance. At the subnational and local levels, Philippine politics are characterized by the prevalence of local power brokers who achieved sustained monopolistic control over both coercive and economic resources within given territorial jurisdictions or bailiwicks (Sidel 1999). At the sectoral (industry) and national levels, development objectives to promote economic growth are 'continually choked out' by the particularistic demands made by this predatory oligarchy (Hutchcroft 1998, p. 7). Hence, while the state may be subjected to oligarchic plunder, it is also predatory.

The water sector in Metro Manila needs to be understood in this context. Formed in 1971, the MWSS was responsible for providing potable water and

1985, MWSS owed US$112.6 million to the Asian Development Bank and US$112.9 million to the World Bank. It also owed Php54.0 million to the Philippine National Bank (Fellizar 1994). Much of this was incurred during the rule of Marcos. See Bello et al. (1982).

sewerage systems in Metro Manila and its surrounding areas. It was created during a unique period of Philippine history. This was the era (1965–86) when Ferdinand Marcos was the president and ruled by decree, after declaring martial law in 1972. It was a time of unprecedented economic modernization due to heavy state intervention with the support of foreign capital. Not unlike the oligarchs Marcos pledged to eliminate, he used state power to undermine his opponents, while accumulating private gain for himself and a small select group of cronies. In 1972, Presidential Decree 40 was passed which abolished the Public Service Commission. Its regulatory oversight in water, power, and other public services was removed. The same Decree also nationalized the Manila Electric Rail and Light Company (MERALCO), which was owned by the Lopez family who were political opponents of Marcos. Just as in the power sector, regulatory control over strategic state sectors like telecommunications, transportation, banking, construction, food processing, media, gambling, and ports was parcelled out to Marcos's close circle of family members and cronies (Sidel 1999, p. 144).

Five years after the formation of the MWSS, Rew (1977, p. 3) observed 'a pattern of institutionally induced and maintained scarcity' in the water sector. From poor urban areas in Tondo, and nearby resort towns in Tagaytay, to the industries servicing Manila's ships in its ports and harbours, water service was inadequate. The highly visible and deliberate water leakages through the MWSS piping system were the result of a clientelist water service delivery model that served the interests of the oligarchy. It was from the time of the establishment of the MWSS that most of the water produced and delivered by the public utility became NRW. From 1973 to 1987, NRW averaged more than 52% (Fellizar 1994, p. 90). While much of the increase in NRW was due to increased production and delivery to cope with increased water demand stemming from urbanization and population growth in the Metropolitan area, it was the institutional set-up of the water sector during the Marcos era that set the context for privatization and post-privatization politics.

## A. Manila's post-privatization landscape

There are more than 30 different government agencies that deal with various aspects of water in the Philippines. The sheer number of departments involved, coupled with their vaguely defined scopes, has led to a fragmented water management system that is plagued by overlapping activity, poor data collection, and an incoherent water resources plan (Lavado 2001, p. 18). The two concessionaires were regulated by contracts typically designed for a single large-scale system focusing on production. Although the contract was silent on the urban poor and informal water vendors, Rosenthal argued that since both concessionaires were expected to serve an ever-increasing proportion of Manila's residents via 'new connections' according to a detailed set of targets, this in effect required the concessionaires to invest in rich and poor parts of the city (Rosenthal 2001, 2002). The contract provided flexibility to experiment with new approaches to service provision in poor communities, as well as catering to third-party provision.

Flexibility in the type of services that may be offered allowed for the installation of public standpipes, for example in 'depressed service areas'. This counted towards meeting coverage targets. Although exclusive rights to serve customers in their respective service areas were granted to the concessionaires by the contracts, third-party provision was allowed as long as 'the activity is properly licensed and the concessionaire consents' (Rosenthal 2001, p. 4). It is this grey regulatory area, however, that became the source of contestation when Manila Water encouraged the formation of organizations for the communal management of water through the *Tubig Para Sa Barangay* (TPSB) or 'Water for the Community' programme. This programme was set up in 1998 to serve poor urban customers. Normal documentary requirements (especially land titles) were eased and costly connection fees were reduced. (See the case study below.)

Regulation of the two concessionaires is performed by the MWSS-RO, the new water regulator. Its functions include contract monitoring and enforcement, including contract alteration, and undertaking rate rebasing reviews. It can also handle customer complaints. There has been a general consensus that the MWSS-RO is not independent and lacks expertise. Due to the haste in privatizing the MWSS, there was no time to set up a proper regulatory framework for the water sector. As an agency created by the concession agreement, it has no legislative mandate, and therefore no legal statutory independence. Its operating budget comes from the concession fee paid by the concessionaires. Furthermore, decisions made by the MWSS-RO are reviewed by the MWSS board of trustees (Cariño 2005, p. 16), which is staffed with political appointees.[11] In 2001,with the support of the concessionaires, the MWSS board sacked two deputy regulators known to oppose a petition for water rate hikes. Disputes between the concessionaires and the MWSS-RO have also exposed the weakness of the regulator. For example, when Manila Water challenged the regulator's rejection of its tariff increments in 2001, then-President Gloria Arroyo had to intervene personally, thus undermining the regulator. For Fabella (2006, p. 25) the regulatory outcome was unsurprising: 'MWSS morphed by virtue of the CA [Concession Agreement] from a water and sewerage service provider to a regulator. It failed badly in the first; how could it succeed in the second?' The lack of an independent regulator and overall lack of regulatory sanction signify that there is considerable discretion in the regulatory framework, thus undermining water regulation as a whole. This includes local politicians engaged in pork-barrel clientelism in poor communities. It also includes mobilization of countervailing power—whether in the form of alternative regulatory mechanisms or more overt political challenges to power elites—by the urban poor against a compromised and weak regulatory system. Such collective action takes place in the informal sector.

As seen earlier, SSWPs in the informal sector come in many forms. Although they are increasingly recognized by regulators such as the National Water Resources

[11] Departing President Gloria Arroyo appointed her former political adviser to head the board on 5 March 2010 despite his lack of relevant qualifications. This was also after she appointed her manicurist and gardener to other administrative positions.

Board (NWRB), the MWSS-RO, as well as financing institutions, such as rural and commercial banks, there is an absence of institutional and legal frameworks concerning their participation in water service provision. The NWRB is the economic regulator of public water supply utilities—including water vendors—outside the jurisdiction of the MWSS. The NWRB's regulatory role is to ensure that only qualified persons or entities are granted a licence to operate and maintain water supply services or be called a public utility. Operators of water are required to acquire a Certificate of Public Convenience (CPC) and are bound by their licence to provide their customers with safe, adequate, continuous, and dependable water supply services at all times and at reasonable rates. The NWRB regulates CPC grantees in terms of tariff setting where rate adjustments are limited to a return of investment of not more than 12%. Hence, most SSWPs do not operate with a CPC (only 223 CPCs were issued by June 2000) (Van den Berg, C., RADIAN Technology, Inc., and Coffey Philippines, Inc. 2002, p. 8). Water quality is consciously monitored by SSWPs since customer satisfaction is critical to their business. Many SSWPs are registered with the local government as business entities in the area in which they operate. Another body, the Cooperative Development Authority, regulates cooperatives, although its rules do not pertain specifically to water service provision.

Mobile water truckers/water haulers rely largely on neighbourhood networks for business expansion and do not advertise their services beyond printing a name and contact number on the side or back of their vehicles. Through *suki* relationships, regular customers and their referrals are sometimes able to obtain discounted rates (Van den Berg, C., RADIAN Technology, Inc., and Coffey Philippines, Inc. 2002, pp. 14–15). *Suki* describes many of the relationships between various informal water vendors and their customers (UTCE Ltd and Japan PFI Association 2003). In the wake of privatization in the Philippines, many community-based peoples' organizations (POs) have been formed in poor urban areas to undertake water service delivery. From fighting for land tenure and obtaining basic services like electricity and water, to organizing fiestas, and resolving conflicts, POs in poor urban communities in the Philippines help to make life in the community more bearable (Velasco 2006, pp. 110–17). POs are what Velasco also refers to as 'primary organisations' that engage in 'subsistence mobilisation' that aims to fulfil basic material needs, and are not targeted towards overturning dominant, oppressive power relations. These are also basically membership-based organizations that can take many interest-specific forms like farmer's, women's, and community organizations, as well as cooperatives and trade unions, to promote the interest of their members (Putzel 1998, p. 78). Collectively, many of these POs and various small-scale providers operate at the periphery of formal legal frameworks. The background of an oligarchic state and a clientelistic water sector in the Philippines is crucial to understanding post-privatization politics in Metro Manila. Beyond the regulators and private utilities, the politics of water also implicate various organized social groups and machine politicians. Our attention will now turn to the role of these diverse forces in shaping the regulatory and contentious politics of water provision.

## III. Regulatory mobilization in Taguig

Formed in late 2003, Community Water was the first of 12 POs to be formed for delivering water in the community of Sitio Imelda in Barangay Upper Bicutan in Taguig.[12] Together with three other POs in Sitio Imelda, they were formed after consultation with various representatives of Manila Water, facilitated by Barangay officials.[13] Through Manila Water's TPSB programme, the POs paid Manila Water a connection fee to set up the main pipeline on the major roads in each community and for the installation of mother meters. The POs were responsible for the water connection from each household to the mother meter. By 2008, Community Water had around 125 member households, serving almost 2,000 individual residents in Sitio Imelda. Crucially, it is the POs, and not Manila Water, that collect payment from residents using their service. Effectively self-regulated, the internal organization and service delivery activity of each PO varied, since their activities were not covered by the concession agreement. The distinctions between officers, members, and customers of the POs were not clear. For example, Neighborhood Water claimed to have 20 members serving some 86 customers, while Sitio Imelda Water was run by four 'member-officers'. These officers made day-to-day decisions, while major decisions were made at general assemblies of all members (customers). Such variation in management and membership suggested that the internal organization of POs was a function of existing social networks in the locality. Locally embedded networks and norms partly explain why officers were willing to work for the POs not as formal employees but as active members of communities. They may not have been paid in money (although many were, especially initial investors) but they did earn standing in terms of reinforcing their own status as members of the collective.

The redistributive element of the urban poor's moral economy was demonstrated by the use of income earned from the highly profitable water business of the POs. In addition to meeting expenses, earnings were used for community projects, such as street lighting, paving of footpaths, and pursuing the legal requirements needed to secure formal ownership of the land on which the community is located. Investors in the POs were also given dividends (Ferrer 2006). Officers of the organizations performed the function of meter reading and bill collection twice a month, in addition to handling administrative functions such as record- and bookkeeping, and liaisons with the local government and Manila Water. The POs' 'flexibility' in payment thus helped revenue collection. Runners who collected payments lived in the same community as their 'customers'. Hence, they were able to collect more frequently. Relationships between POs and their customers were therefore not purely economic. As one officer claimed, people in the community reported water leakages even if they were not affecting their own water

[12] The names of some organizations and individuals in this section have been changed.

[13] The Barangay is the smallest administrative division in the Philippines (equivalent to village, district, or ward). A Sitio is a territorial enclave inside a Barangay, especially in rural areas.

network, because of *malasakit* (Chng 2011, p. 165). Community Water exercised much latitude in allowing members a range of payment means without resorting to cut-offs. Additionally, payment balances were treated as interest-free loans in various forms of *suki* relationships. Social pressure thus helped to prevent default to a certain extent. This community-managed approach in service delivery also helped address the problem of NRW. Community Water officers regularly monitored pipes and hoses, and were able to respond quickly to damage. Hence, in place of individually binding service contracts, the bond between customer households and the water PO was constituted by existing interdependent networks of reciprocity and redistribution.

By 2004, there were almost 80 POs delivering water in Taguig. Manila Water had recovered from the Asian economic crisis and had raised sufficient capital for a new round of infrastructure investment. More importantly, it had learnt from the POs in Taguig how to service poor urban communities. It was now ready to provide water directly and bypass local subcontractors. Many of the POs had by this time become successful service providers with local economic and political clout. Several individuals and organizations had also engaged in corrupt practices as others began to charge higher rates. By 2008, many of these POs had broken even and recovered their initial investments. However, some were running up losses due to payment delinquency when Manila Water began to directly connect households to Manila Water pipes with the encouragement of the local government in 2006. Many of these households, which were also members of water POs, stopped paying, while continuing to use water from the POs. They now had two sets of pipes: one from Manila Water and one from the POs.

The POs were now no longer dependent on the political patronage of Taguig City Mayor Sigfrido 'Freddie' R. Tiñga. With local elections looming in 2007, Tiñga, the leader of a prominent local political clan of politicians that had dominated politics in Taguig since the late 1980s, could no longer be certain of their political loyalty. On 18 October 2006, the Taguig Sangguniang Panlungsod[14] (city advisory council), the legislative body of the city local government, passed a resolution condemning the POs for overcharging customers for their water service. They were accused of charging exorbitant tariffs of Php 30–5 compared with Php 10–12 for a direct connection with Manila Water. The POs were also said to be responsible for 'sub-standard pipes submerged in dirty, clogged and muddy drainage canals'. Resolution 172 called for 'direct individual water connections with Manila Water'. A few months earlier, on 17 July, Tiñga had written passionately in the *Manila Standard*. He accused the POs of greed and going against the wishes of the 'vast majority of... constituents [who] are clamouring for a direct connection that would free them from the control of these oppressive syndicates'. These were the same POs who delivered water to their communities for the first time, something Tiñga had failed to do during his five years in power. Threatened with closure, the POs approached NGOs from outside the community, such as the

[14] This is the local legislative branch of city governments in the Philippines. The Local Government Code of 1991 defines its powers. It has legislative and quasi-judicial powers and functions.

Institute for Popular Democracy (IPD), a leftist think tank, and the Freedom from Debt Coalition (FDC), a coalition of leftist NGOs and POs.[15]

The issue of water privatization by these NGOs initially revolved around broad issues like legitimacy, regulatory and utility performance, and tariff setting. They were also more overtly anti-privatization mobilizations. Gradually, these NGOs began to explore practical alternatives and sought out POs and cooperatives in 'waterless' communities across Metro Manila. In so doing, NGOs like the FDC and the IPD tapped into a long legacy of progressive mobilization dating back to the era of the Marcos dictatorship. In addition to intervening in local politics, they represented the grievances of POs to the regulators. These regulatory mobilizers brought together collective action at two different political levels at the local and the sectoral. This scale-shifting changed the character of society's response to privatization as a whole. Regulatory mobilization emerged from existing mobilizations by the water POs, cooperatives, and prior associational networks of water subsistence based on local politics. The NGOs linked up previously unconnected local struggles against the concessionaires' expansion by forming networks and coalitions. Both NGOs and political movements engaged in regulatory mobilization sought communities that could be mobilized.

For example, the IPD performed this through brokering previously unconnected or weakly connected sites of local resistance. In the formation of networks, the IPD attempted to institutionalize the connections into a sustainable network with regulatory clout. The Associative Water Center Philippines (AWCP) was formed in 2008 by the IPD to share technical and policy inputs on alternatives to the privatization framework by supporting smaller, community-owned and managed 'associative water systems' and saw itself as evolving into a network of organized consumers. In Taguig, the IPD attempted to strengthen the legal position of the remaining water POs (which still serve around 5,000 households) by converting them into cooperatives. Together with the IPD and the AWCP, a distinctive pattern of regulatory mobilization emerged in their joint pursuit of local and policy advocacies that could strengthen and sustain the mobilization.

By monitoring the concession agreement between the MWSS and the two private concessionaires, particularly on tariff setting and in meeting the water needs of the urban poor, aggressive mobilization in the water sector also took place at the policy level. By engaging the regulators and the water concessionaires on these grounds, regulatory mobilizers challenged barriers to entry in the

[15] The IPD was founded in 1986, the year the Marcos dictatorship fell. A think tank with close links with the Left, it works on advocacy and piloting small projects based on its own research to promote development and democracy initiatives in the Philippines. The FDC has emerged as one of the most vociferous critics of water privatization in the years immediately following privatization and it launched a sustained anti-water privatization campaign. The FDC is a network of NGOs, POs, and various political groups on the emergent Left. Its main platform has been a form of economic nationalism based on critics of MFIs such as the World Bank and the IMF for interfering with Philippine's economic affairs. Like the IPD, it was formed after the People Power Revolution of 1986 that toppled the administration of Ferdinand Marcos in that it exists to present a broad united front for mobilization by the numerous but small groups on the Left.

regulatory space. NGOs attempted to increase their certification in the regulatory space by making use of intra-elite conflicts and uncertainties in the water regulatory space. For example, another NGO, the Centre for Popular Empowerment (CPE), successfully opened up an additional avenue of regulatory enforcement through the NWRB over Maynilad's rate increase in 2005. This was an important case because when the MWSS and Maynilad attempted to dismiss the complaint, the NWRB asserted its heretofore unexercised regulatory power to receive consumer complaints in Metro Manila. The NWRB had been accommodating to NGOs as it asserted its institutional clout under the leadership of its young and dynamic director, 'water champion' Ramon Alikpala (Asian Development Bank 2005).

The IPD also helped the POs and water cooperatives to engage with the MWSS-RO directly on issues like bulk tariffs, exclusivity, reticulation standards, and compensation for assets. These were the rules that the IPD identified as being essential to preserve the collective economic interests of the POs and cooperatives. In the case of Taguig, for example, the IPD mediated in disputes between the water POs, Manila Water, and the water regulator. The strategy that the IPD took in these disputes was to interpret and formulate regulatory rules and guidelines in favour of the POs. On the issue of 'exclusivity', both the POs and the IPD argued that since Manila Water had engaged the POs as their contractors, the exclusivity of the POs' service area should be protected from infringement in much the same way that Manila Water operated exclusively in its east-zone concession.

The institutionalization of networks, transformation of POs into cooperatives, and dialogue emanating from the informal sector in the regulatory space were strategies pursued alongside ongoing filing of countercharges against Manila Water, including complaints of overcharging and charging for non-existent services, such as sanitation charges. These have also been accompanied by occasional public demonstrations. This maintained the local resistance of communities even if they have now been brought into the sectoral level of the regulatory space. The IPD:

- assisted local organizations in accessing networks for their technical, training, and financing needs;
- advocated new alternative rules to encourage citizens to show initiative and take risks in providing water for their communities; and
- persuaded local and national authorities and elites to adjust their budget priorities to support community initiatives.

To address the organizing and expansion of water services to more waterless communities, the water POs in Taguig proposed the creation of a revolving fund for investment. The IPD has been networking sources of financing, ranging from NGOs and financial cooperatives to private investors.

Thus, struggles about water privatization and local subsistence have undergone scale-shifting in the regulatory space. Through the conversion of previously existing non-political groups and networks into political actors, and the attribution of similarity among communities, regulatory mobilization connected local and sectoral scales of collective action together by coordinating collective action at a

different level than where it began, without ignoring the conflicts and claims at the local level. To relate local struggles to water privatization, regulatory mobilizers linked up different communities to allow them to relate directly to these issues simultaneously. Gradually, they cohered into a constituency of water users that could be mobilized across localities and directed against more general policies. The examples and lessons of these specific struggles have been diffused and brokered to other sites of local resistance in Metro Manila. All of these contributed to the diffusion and emulation of collective action (e.g., the MWSS publication of socialized rates) across the city and country. At the same time, this has not led to widespread contention. Through scale-shifting, regulatory mobilization entrenched a form of contention that was neither entirely co-opted into formal institutions, nor entirely transgressive. It was a form of resistance that had the potential to project regulatory clout episodically, but its source of power resided in the informal sector, not the formal regulatory framework from which civil society and informal water vendors are excluded.

Compared with other mobilizations, regulatory mobilization was boundary-spanning. For example, there are groups that remained overtly opposed to privatization. These NGOs have not worked with community groups like POs and cooperatives in Metro Manila, either on technical issues of direct service delivery and local politics, or with NGOs like the IPD on policy issues of regulation at the same time. Public demonstrations and more traditional forms of transgressive protests were the norm. Regulatory mobilization was also unlike the kind of collective action that has, for example, brought about a national alliance of SSWPs and industry-supported NGOs that have agitated for greater access to credit from banks and MFIs. For example, the NGO Streams of Knowledge and the network, the Philippine Water Partnership, formed a national network of SSWPs: the National Water and Sanitation Association of the Philippines. Its collective action has remained within accepted boundaries of lobbying and policy advocacy.

## IV. Conclusion

By 2011, with more than 6 million people served by Manila Water, 1.7 million customers received water via the TPSB programme for the urban poor (Manila Water 2011). While Manila Water can take credit for extending water services to poor communities by being innovative, this also depended on the collective action of civil society. The regulatory mobilization of local communities and NGOs in the water sector in Metro Manila suggests that the collective action of informal actors constitutes regulatory governance in the Philippines. This article has shown that they mediate the tension between social and economic priorities in the absence of a strong state. Through their collective action, civil society groups thus augment or activate the regulatory capacity of the state. As such, the regulatory mobilization of civil society and the informal sector are constitutive components of regulatory development in the Philippines. Studies that credit Manila Water with its relative

success in serving the urban poor must also pay attention to the role of social mobilization at the local and sectoral levels of the urban water sector.[16]

Given the agnostic nature of regulatory mobilization to power, it is too easy to simply conclude that rules and institutions supporting the participation of non-state actors in regulation should be provided. After all, regulatory mobilizers are only too willing to challenge and undermine institutions as part of their repertoire of collective action. On the one hand, the innovative and risky initiatives by local groups to provide water to their own communities should be supported. Here, rules concerning appropriate levels of tariffs and preferential bulk rates for community-managed SSWPs, as well as easier access to more flexible forms of credit, for example, should be considered. On the other hand, urban poor groups can also be mobilized to undermine regulation and service delivery where their treatment by the water utilities is perceived to be unjust. This is a potential threat that was repeated several times in my interviews with local community organizers. Well-performing SSWPs are therefore highly dependent on local politics, in addition to the local market. Consideration for local contexts must be balanced with an awareness of the deeply embedded asymmetrical power relationships that communities mask. Bakker's (2008) critique of community-based water governance is worth considering here. In the context of clientelism, POs may not necessarily be more accountable or democratic just because they are based in the community. The role of the state remains crucial, not only in the institutionalization of an equitable urban water sector, but also in addressing the long-term economic and political needs of the urban poor. In the meantime, utilities like Manila Water will be dependent on the regulatory mobilization of the informal sector, NGOs, and local organized communities that lie at the 'edge' of the state in the global South.

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[16] See, for example, Beshouri (2006) and Matous (2007).

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# PART II

# COMMENTARIES

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# 9

# Regulatory State with Dirigiste Characteristics: Variegated Pathways of Regulatory Governance

*Kanishka Jayasuriya*

## I. Introduction

The strength of the introductory chapter by Dubash and Morgan is their clarion call to understand the specificities of the regulatory state in the global South (see also Dubash and Morgan 2011). They ask us to give serious consideration to the notion that the regulatory state in the global South confronts issues, problems, and pathways of development which are different from those apparent in the Eurocentric literature on the regulatory state where it is portrayed almost as a triumph of a European mode of governance. From this point of view, this chapter and the various case studies represent a much-needed corrective to this geographical bias. In fact, it represents more than the addition of the experience of the global South; it presents a much more complex and variegated view of the regulatory states than that suggested by the mainstream analyses. In this paper, I want to build on this insight, but also suggest that case studies in the volume implicitly point to an altogether different methodological understanding the regulatory state through the analysis of the process of regulatory state-building rather than through identifying the exceptional attributes of regulatory governance in the global South.

Such a process-oriented perspective to regulatory state-building throws into relief the problematic identification of regulatory types forcing us to more rigorously consider the primary set of processes that produce varieties of regulatory states in the global North and South. In this respect, the introductory chapter raised a nagging concern that the references to the global South should not fall into a modernization problematic where the emerging regulatory state is seen as a response to a particular set of developmental constraints and patterns of regulatory governance, which are then benchmarked against the modal regulatory state in the global North. A thrust of this brief paper is that we move away from such ideal types, and focus more on the process of state and market formation by looking at regulatory governance and politics as an ongoing process of state-building within systems of transnational markets and rulemaking.

Of course, in making this criticism, I do not exempt my own work (see e.g., Jayasuriya 2005) which tended to obscure the emerging varieties of regulatory state. Taking this tack of analysing the production of variation allows us to sail much more confidently into the murky seas of the relationship between neo-liberalism or market-making and the regulatory state. Market-making and state-building projects have gone hand in hand, and for this reason their distinctive patterns in the global North as well as the global South require further analysis. From such a perspective, variations and experimentations of regulatory state structures and institutions are central to the process of market reform—or neo-liberalism—in both the global North and South.

The introductory chapter and the various case studies by and large stay clear of notions of neo-liberalism, or if you prefer, programmes of market reform. Yet, at the root of the development of regulatory forms is the attempt to constitute or enhance programmes of marketization. In fact, this is a thread that runs through the various case studies, ranging from water services in Columbia to telecommunication regulation in India. In these chapters we see clearly that market-building is at the core of the project of regulatory state-building. These two dimensions are irreparably bound. This is well exemplified—if not highlighted—in many of the case studies where the relationship between the politics of neo-liberalism and regulatory state-building remains obscured. Hence, what is overlooked in the various case studies is the fact that the processes of market reform—or neo-liberalism—do not simply emerge from 'nowhere', but are contingent products of specific localized political and economic contexts. If market-making is about state-building, it follows that the nature of this relationship is shaped by the previous patterns of institution-building and its privileged elites.

In the section below we explore these processes of regulatory state-building and its variegated character by exploring three key areas: first, the embedding of patterns of market reform within previously dominant statist economic regimes that is the path dependence of the regulation; second, the extent to which this path dependence is modified by the transnationalization of the state through mechanisms of multilevel governance; and finally how this multilevel governance results in a process of juridification of the regulatory state that in turn shapes a distinctive form of politics.

## II. Embedded neo-liberalism, path dependence, and regulatory state

The logic of the argument that I make here—as opposed to identifying attributes of the regulatory state—is about production of new forms of state power that help to shape new relationships between market reform and regulatory institutions. In turn, these new constellations of market and state power rest on specific social and political foundations. Consequently, the new practices and forms of regulatory governance emerging within the global South identified by the authors in this

volume need to be seen in the context of the broader social and political relationships in which these are rooted. As Harrington and Turem (2006) argue in a related context of new forms of accountability argue, new modes of governance need to be 'in concrete sites and contexts, and allows us to see the relationship between distinct accountability discourses and broader social, political, economic, and legal relations they are part of' (Harrington and Turem 2006, p. 201). The value of this perspective is that it provides a lens to view new forms of governance in terms of the wider political and legal context which has led to the restructuring of markets in both the global North and South.

At issue here, then, is how we understand market reform or neo-liberalism. Neo-liberalism is used in a very imprecise and politically loaded way, which is counter-productive to rigorous analysis. As a starting point, we define neo-liberalism as a set of governance strategies 'always in favour of recreating the widest possible conditions for markets to flourish, which means removing as many restrictions on competition as possible, and empowering market agents' (Gamble 2001, p. 132).

In one way or another, it is clear that all the regulatory forms examined in this volume seek to constitute new regulatory spaces through which market disciplines and discourses are imposed on individuals and firms. Regulatory institutions become the mechanisms through which market reform is institutionally embedded. It echoes the ordo-liberal emphasis that the construction of the economic order cannot be left to the spontaneous actions of the market; it needs to be created through consistent policy actions of the state (Jayasuriya 2001). In other words, it is not the market or state that is important, but the way in which the market is constituted through a variety of political and policy instruments. In short, it is about statecraft as much as it is about the market.

There is useful literature that conceives of neo-liberalism not as a set of particular programmes but as a set of underlying processes to constitute—albeit unevenly—market regulatory spaces of governance (e.g., Brenner, Peck and Theodore 2010). From this standpoint, neo-liberalization or process of market reform is centrally focused on creating and constituting a new institutional architecture of market regulation. The driving force for this restructuring can be multiple: the impact of global rules, the need for international legitimacy, the pressure from capital, and efforts to create new forms of markets. Whatever be the initial driving force, once established, these new regulatory architectures develop their own institutional and political logic that then provides the basis for further reform and experimentation. However, the crucial point made is that the process of neo-liberalization is distinguished by an 'unevenly developed pattern of restructuring that has been produced through a succession of path-dependent collisions between emergent, market-disciplinary regulatory projects and inherited institutional landscapes across places, territories, and scales' (Brenner, Peck and Theodore 2010, p. 340). This is a good analytical starting point for the analysis of the regulatory state in the global South.

Regulatory states are products of a hybrid combination of pre-existing institutional patterns of governance and associated interests that in turn help to constitute and shape markets. Of course, it is possible that new patterns of regulation are merely a façade that hides an altogether different set of dirigiste

instruments of state power. But the case studies show that most of the regulatory cases or areas have significantly reshaped—not diminished—the scope of state power. This confirms the point that most of the chapters in this collection—though it may not be framed in this way—are mainly concerned with how developing regulatory patterns have been displaced or layered on dirigiste patterns, which then provide the complex regulatory field on which actors operate. This layering process is not only crucial in examining the contours of the regulatory state in the diverse global South, but also tends to produce variegated pathways of regulation.

In this vein, the kind of institutional experimentation identified by Brenner, Peck and Theodore (2010) is even more important in the states of the global South. In fact, the case studies attest to the wider degree of experimentation within regulation in the global South. This experimentation is not an aberration from some 'ideal type' but a very product of the unevenness of neo-liberalism. Perhaps—on a more speculative note—this regulatory experimentation has echoes to Gerschenkron's (1976) classic work on the politics of late industrialization, which created the possibility of new pathways of industrial development that allowed a combination of 'economic backwardness' and advanced development patterns, as well as created new patterns or forms of political coalition to underpin these distinctive patterns of industrial growth. In this sense, the regulatory state in the global South may well be able to leapfrog in variegated ways the regulatory state of the global North. Along similar lines, it is possible to argue that the uneven effect of neo-liberalism in areas of the global South produces precisely this form of combined and hybrid regulatory development.

It is this fundamental layering process of regulatory governance that is suggestively underlined in the introductory concept chapter where it ruminates on the difficulty of 'depoliticizing' regulation. It refers to the fact that regulation through the market whereby the market is made to appear to be above politics or depoliticized is only ever partially successful because of the overhang of previous dirigiste instruments of public policy. In this sense, the rather tenuous nature of depoliticization suggested in the introductory chapter is in part due to a continuing accommodation and tension between different governmental regimes within new regulatory institutions. However, having made this point, it needs to be noted that even though depoliticization strategies may fail, it is possible that these hybrid regulatory patterns give rise to forms of regulatory politics—albeit unintended—at the point of regulatory initiation that may be politically self-sustaining, and in that sense sustainable forms of governance.

If there is a distinctive pattern in the global South it is that these pre-existing patterns of governance reflect the dominance of earlier statist patterns of development, and in this context, there is a more direct link to Gerschenkron's (1976) views on late industrialization. These pre-established patterns have entrenched ideologies and interests that are not inevitably aligned with programmes of market reform. Of course, this late industrialization can take different forms—producing a diverse range of hybrids—but the shape of statist patterns have left a deeper impression on the regulatory state in the global South. Regulatory patterns are

reflected in the ideological dominance of notions of economic nationalism in states such as India and China. Indeed, even as institutional forms have shifted towards a more regulatory turn, these developmentalist ideas—as for example, in the approach taken by Chinese policy makers to the governance of strategic economic sectors (Pearson 2005)—have underpinned the way in which regulatory ideas have become legitimized.

More decisively, the impact of statist patterns of development can be seen in the close relationship between private and state firms within particular sectors—mainly in the case of utilities examined in this volume—and the broader state and political apparatus. Admittedly, this has taken various guises—the government linked corporations such as in Singapore, the so-called 'licence Raj' of India, and the state socialism in China. Developmental states in East Asia remain the paradigmatic example of this close relationship between state and market. The developmental state has to be understood in terms of three main features: first, an insulated and autonomous set of economic agencies with a strong capacity to implement economic policies and programmes; second, an activist industry policy that developed competitive export-oriented global industries; and third, an understanding of governance that places strong emphasis on the role of the state in securing economic development and security (Johnson 1982).

As I have argued elsewhere (Jayasuriya 2005), over a period of time these developmental modes of governance have given way to more regulatory modes. These patterns—as the introductory chapter clearly shows—have been replicated with different patterns of dirigiste policies in a number of other states. In India, for example, there has been a gradual liberalization of the telecommunication sector (Desai 2006), an element emphasized in the chapter by Thiruvengadam and Joshi (this volume), though as Thiruvengadam and Joshi imply, a striking feature of these emerging patterns has been the way in which corporate entities within the old regimes are jostling for positions of power and influence within the new regulatory framework.[1] Hence, despite an emerging regulatory framework, old actors within dirigiste frameworks have continued to play a key role within new governance structures in India (Desai 2006). In Singapore, the operation of a more liberal telecommunication market has strengthened the hand of a major government-led Singapore telecommunication company, but at the same, it has transformed this corporate entity into a transnational corporate player (Painter and Wong 2007). The chapter by Badran (this volume) on governance of telecommunication in Egypt underscores these arguments by noting the development of sustainable regulatory governance in the context of—prior to the Arab Spring—patrimonial and authoritarian structures. It is precisely the close connection of corporate players with the key political elements that has enabled this regulatory system to survive. In other words, the point is not whether regimes have been effective but that their operations need to be viewed in terms of what we call their hybrid character and the political coalitions that sustain them—more echoes here of regulatory late development.

[1] This is a pervasive phenomenon; for example, see the work of Moran (2001) on the British regulatory state.

## III. Social foundations of the regulatory state: multilevel governance and transnationalization

We need to focus much more on regulatory institutions in the global South and North and the way these institutions hep to constitute new transnational market arenas. One of the distinctive facets of regulatory state-building is the way it shapes transnational markets, which are in turn embedded in larger transnational systems of rulemaking. It leads, as I argue below, to a system of multilevel governance that transnationalizes the regulatory state, but at the same time internalizes its local or national particularities. The next stage in the agenda on the regulatory state in the global South is to consider it as an outcome of a set of processes which are constantly making and remaking state power and the market within the context of transnational regimes.

It would be a mistake to assume that the path dependence described above only occurred at the national level. In more transnational global economies, path dependence is also shaped and mediated by transnational markets and rule regimes. In this sense, we are looking at divergence—a divergence shaped by continuing processes of transnationalization of both markets and rules regimes. In essence, the process of regulatory state-building helps to constitute and shape new social and economic interests operating within transnational markets. At the same time, the old dirigiste entities have used these regulatory frameworks to develop new transnational linkages and alliances, which have transformed both their interests and role within the 'national' economy. In studies of regulation in the global South, I think we need to pay more attention to the players as well as to the new regulatory playing fields. This perspective allows us to explore research questions such as: how under the impact of transnational markets and regimes, regulatory states lead to varied patterns of class formation. Such transnational regulation not only gives rise to new interests but also helps to protect existing patterns of interests and power within new configurations of regulation. In short, it allows us to explore the social foundations of the regulatory state.

Having made this point about the hybrid and variegated character of the regulatory state in the global South, we should not confuse this with the argument that dirigiste policies are pursued through regulatory frameworks. These emerging forms of regulation are different and distinct from dirigiste models: they embody market competitive objectives and are articulated with transnational regulatory norms and regimes. This transnationalization of the regulatory state—albeit with organic connections to old dirigiste institutions and ideologies—is a thread that runs through the disparate regulatory state institutions of the global South.

These regulatory norms and practices are increasingly global, in the sense that these are required by private or public transnational rules or standard-setting regimes. The point here is to not see these transnational rules as constituting a set of external pressures but to understand the way in which the spaces of national regulatory governance are in effect transnationalized or increasingly enmeshed

within governance at various territorial scales—transnational, regional, and subnational—of governance. For example, new patterns of which I have defined as 'regulatory regionalism' (Jayasuriya 2009) will modify trajectories of national path dependence. To give one example in the Asian context, the Asian Development Bank (ADB) has also played an important role in regional financial initiatives. As Dent (2008) points out, the ADB has relied on 'proactive integration of policy co-operation, co-ordination and harmonization rather than the passive integration of economic liberalization and deregulation' (Dent 2008, p. 781). It is not simply rules that are important but broader global standards and practices that shape ostensibly national regulatory governance. This is strikingly illustrated in the paper on the Colombian water regulation (Urueña 2012). This multilevel regulatory governance modifies and transforms national patterns of path dependence. These developments challenge the implicit methodological nationalism of the regulatory state literature in both the global North and the South.

Multilevel governance should not be somehow seen as a reduction or constraint on state action. It reflects a transformation of statehood that recalibrates the transnational or the regional and the national. It is this articulation of the national level—rather than its diminution within both transnational (and subnational)—that is crucial to the emerging regulatory state. Such a perspective allows us to see regulatory governance as a mode of governing the relationship between scales. In this sense, multilevel governance, rather than leading to policy convergence as some would have it, actually enables the reproduction—albeit not without conflict—of distinctive patterns of economic and political arrangements now operating within a transnational context. Hence, for example, the party capitalist enterprises in China now compete in transnational markets regulated by varied transnational rulemaking regimes, such as the World Trade Organization. These new forms of multilevel governance are crucial to the consolidation of transnational economic elites with ties to previous dirigiste economic and political regimes.

While such transnational rulemaking and associated multilevel governance is the central mechanism of transnational influence, it is by no means the only means through which regulatory governance shape domestic regulatory politics. Regulatory politics is also shaped by the global circulation of ideas and practices of regulatory reform, which then mesh with domestic debates on regulatory reform. It is precisely such a global circulation of ideas, thereby enabling domestic debates on regulatory reform that provides the broader context for regulatory politics. For example, in Colombia, 'the adoption of independent regulatory agencies may be read as a process of appropriating the global language of neo-liberal reform, in order to address concerns that were already salient in domestic political debates, and was, in fact, an important part of the more general Constitutional framework' (Urueña 2012, p. 286). He goes on to argue that these practices then find expression in juridified regulatory regimes.

In terms of this argument, patterns of multilevel governance are central to the constitution of regulatory states in the global North and South. But what is distinctive in the South is that because of the dominance of the previously dirigiste and national developmental strategies here, the re-articulation of the national

within transnational and regional rules regimes is central to understanding the politics of regulatory conflict. It may well be that some of the most interesting developments in multilevel governance may be occurring within the global South—particularly in the so-called rising powers such as China, India, and Brazil rather than in the EU, which is typically identified as the innovator in multilevel governance. It is these complex patterns of multilevel governance that shape the political arenas in which groups and interests compete for political influence. In particular, the curious combination of an uneven spread of neo-liberalism, and its relationship with multilevel regulatory regimes provide pathways for different patterns of regulatory state formation in the global South. Indeed, this is a conclusion that chimes with Prado's (2012) analysis of the differing patterns of regulatory independence in the electricity and telecommunication industry in Brazil.

## IV. Juridification and regulatory politics

One key dimension of this shift towards new forms of regulatory governance is the emergence of juridified regimes in key regulated sectors. The importance of this process of juridification can be seen in the chapter by Thiruvengadam and Joshi (2012). In my view, the rules and the institutions that make up these juridical structures represent not just new forms of state power, but also fuse to create novel kinds of relational capacity between markets and the state. The process of juridification[2] means that regulatory governance has become increasingly focused on the implementation of rules—often with a legal basis—which govern economic policy. These rules are legalized to the extent that they stipulate more specifically the principles or standards to be applied, making the observance of these standards or rules mandatory, and delegate their enforcement to an independent agency or dispute resolution mechanism. But, of course, the twist here is that this legalization amounts to the subordination of regulatory rulemaking to economic imperatives, and what matters are not the specific rules as such, but the justification of policy decisions framed in terms of economic criteria (Morgan 2003).

There is a rich agenda here for future work suggested in some of chapters, but more to the point, it highlights how path dependence may shape the nature of judicial actors involved (the Supreme Court in India or independent regulatory agency as in Singapore), as well as the relationship between these agencies and various market and consumer groups. In the Indian case, for example, the excellent chapter by Thiruvengadam and Joshi (this volume and 2012) points to how regulation conferred new forms of regulatory powers on the Indian Supreme Court, but also that these powers were then configured to create new forms of relationships and linkages between state and market, acting in some ways as a meta-governance actor by 'by fostering communication and interaction among the

[2] For an overview of the process of juridification, see Teubner (1987).

diverse institutions in the regulatory space, and partly by adopting a pedagogical role towards empowering newly constituted regulatory institutions' (Thiruvengadam and Joshi (2012, p. 328). While public and private actors allied with the old state apparatus may be influential in the new regulatory system, they now need to operate and jostle for power within new frameworks. It is the capacity of agencies to provide a meta-governance framework that is central to new regulatory fields. Much of this analysis ties in very well with the work of Rudolph and Rudolph (2001) on the transformation of the state in India, and their argument that emerging regulatory frameworks provide more room for political agents to construct innovative regulatory experiments.

This fits in well with what I have called the role of the regulatory state as a meta-governance institution configuring different forms of links between market and state agents out of which emerge new notions of relational capacity (Jayasuriya 2004). But the crucial point here is the form in which this meta-governance is shaped and determined by prior political pathways, and in the case of India the role of the Indian Supreme Court as a meta-governance actor. In this sense, governance becomes the very project of the agencies and institutions as it attempts to shape new spaces of fields of governance. But what determines the nature of this meta-governance? In the Indian case, the role of the Supreme Court is 'the manner in which the Court's interventions project specific visions of society, of the modernity of institutions, and of the necessity of particular forms of regulation' (Thiruvengadam and Joshi (2012, p. 340). Any future agenda needs much more work on how the process of new state-building—shaped as it is by previous patterns of interests and ideologies—create linkages and relationships between markets and state power, rather than simply reducing the power of either markets or states.[3]

In this process, agencies and institutions such as Supreme Court or a core executive play a meta-governance role in shaping the nature and mix of policy instruments and managing in a way in which these new markets are incorporated into transnational rule frameworks.

Another key issue here, and the one that the introductory chapter deals with, is the question of depoliticization and the capacity to pursue redistributive politics. The editors make the powerful case—which I agree with—that redistributive politics will continue to play a crucial role in the global South. This argument—as the editors point out—goes against the grain of my own earlier argument on regulatory governance as a strategy of depoliticization. It is certainly the case that since I wrote nearly a decade ago on the emerging regulatory state, there has emerged a form of regulatory politics or 'mobilization' to use Chng's (2012) illuminating term. This is clearly an important aspect of the regulatory state and one with particular resonance in the global South. Having conceded this point, the broader argument I made was that emerging forms of regulatory governance shifted the form of politics away from contentious class or collective action towards a more technocratic and juridical form that served to disorganize the capacity for collective

[3] See Painter and Wong (2007) for a similar argument in relation to telecommunications reform in East Asia.

action. Similarly, the focus is not primarily on redistribution of wealth so much as one of ensuring institutional access for individual and group consumers of utilities (see Dubash 2006; and Dubash (this volume)).

While regulatory mobilization takes place—as Chng (this volume and 2012) and Urueña (this volume and 2012) note in their respective case studies—it occurs within the context of dominant projects of market reform or neo-liberalism. To the extent that redistributive politics takes place it occurs in a form different from the previous social democratic or developmentalist politics that defined the post-war period. So perhaps, we are much better placed framing this argument in terms of the emergence of a new form of regulatory politics rather than a process of depoliticization. Again, while the very pressures for institutional access that define this regulatory politics is similar in the global North, it is likely to be much more pronounced in the global South. It is the form of politics that is at issue here rather than depoliticization.

The notion of regulatory mobilization provided by Chng (this volume) is extremely useful. It is a framework that helps us to understand the nature and form of contention within new regulatory spaces. This regulatory mobilization comprises 'collective action by a group of actors to influence or obtain control over rules, modes of state intervention, and mechanisms of social control in a given regulatory space' (Chng 2012, p. 345). I would add that the three key dimensions to this regulatory mobilization are: (i) the way in which regulatory politics itself produces a sectorally defined group of consumers rather than citizens, hence, their relationship to regulatory agencies or judicial institutions define contending groups or individuals—a form of consumer politics; (ii) the way the juridification of the regulatory process forces claim-making into certain distinctively legalized forms and processes; and (iii) the way complex and overlapping multilevel governance enables the organization of regulatory contention across jurisdictional boundaries. For example, it is the interaction of global health governance and trade rules that allows groups and consumers to move between one set of rulemaking regimes and another. It is the complex relationship between neo-liberalism, consumer politics, and rights—ably identified by both editors and the individual case study authors—that will form the basis of future work on regulatory mobilization.

## V. Conclusion: future research agenda on the regulatory state

I want to conclude this piece by suggesting some future lines for research in expanding and consolidating this project on the regulatory state in the global South. First, I want to endorse the editors' comments that we need to pay more attention to the micropolitics of regulatory institutions. I would also go further and note that we need to pay more attention to the social foundations of regulatory governance. The question, as I have suggested, is how old elites in dirigiste frameworks have jostled and attempted to secure their interests within new state institutions and frameworks. To be sure, this is a contested process: new actors—consumers, private business—emerge within these frameworks to contest the privileges of old elites. At the same time, interests and ideas of previous dominant

elites are transformed by their increasing transnational scale of operation facilitated by their operation within new forms of regulatory governance.

The second key issue for any agenda on regulatory governance in the global South is that more attention should be directed towards the underlying processes that produced new patterns and forms of state power and markets. The point here is that new systems of regulatory governance may well be intimately linked to the emergence of new forms of state power that shape the constitution of markets. For this reason, it is as much about the process of state 'construction as it is about destruction' (Harrington and Turem 2006, p. 205). After all, what is distinctive about the emergence of new forms of regulation is the transformation of the relationship between citizen and state, or in effect what Nettl (1968) termed 'stateness'. In this formulation stateness is not a static property, but a dynamic process. Let me underline the provisional nature of this: to shift conceptions of stateness by modifying the various structures or frameworks through which public authority is exercised will always be a continuous political project that will be contested. The benefit of this formulation is that it allows us to focus on the process of state transformation and state-building—especially the transnationalization of the state—and the processes through which new notions of stateness are created. But—and this is the nub of the argument—the nature of this state formation will be shaped by prior constellations of dirigiste institutions. Future research on the regulatory state should pay more attention to the underlying process of state-building and less to the identification of ideal typical attributes of the regulatory state.

At the core of this state-building is the transnationalization of the regulatory state in both the global North and South through the mechanism of multilevel governance. Multilevel governance does not mean the diminution of the national, but rather its re-articulation with subnational, regional, and transnational scales of governance. From this perspective the variegated regulatory architectures between, as well as across, the global North and South are produced through uneven collision, accommodation, and tension between established institutional patterns and new programmes of regulatory governance at various scales—national, regional, global. Simply put, regulatory state-building is about the articulation of national regulatory norms and practices within complex multilevel governance regimes. Analysing the nature of the transtionalization of the regulatory state is an essential task for regulatory theorists, and here the global South may well prove to be a fertile and innovative area for study.

Finally, I think an important process to which we need to pay attention is the role of juridification of regulation and its associated politics. In particular, we need to focus more sharply on the interplay of law and politics in shaping patterns of regulatory politics and mobilization. I want to stress that it is the interplay of law and politics (rather than one side of this dualism) that should be central to our research agenda. We need to focus on the kinds of interests, actors, and policies favoured by juridified regulatory playing fields. The macropolitics noted above will be crucially influenced by the nature of these juridical institutions. The experience with juridification in the countries of the global South offers us a particularly rich

insight into the development of the regulatory state in both the global North and South. The regulatory politics in parts of the global South may well suggest the putative future of regulatory politics in the global North. This is an exciting research agenda.

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# 10

# Institutional Challenges to the Regulatory State in the Developing World

*Jacint Jordana*

## I. Introduction

Do the politics of regulation work differently in the South? As discussed by the authors of the introductory chapter of this volume, three contextual factors have to be taken into account in answering this question. First, t hat external globalization and dependence pressures create a playing field for most developing countries, which is different from the one in developed countries. Second, that the articulation of private interests has a different logic, in which conventional policy processes and organizational dynamics do not apply to most cases. Finally, a third factor is the institutional dimension, allowing for the fact that newly established regulatory agencies in developing countries may act independently, although this cannot be taken for granted.

Despite these differences, I will argue that no fundamental discrepancies should exist at the theoretical level, which would preclude making sense of regulatory developments in developed or developing countries alike. Also, theoretical dilemmas about how to interpret regulation in the South probably would become more salient as we analyse major differences in more detail. In any case, this means that, compared with conventional analysis, we ought to make our theoretical frameworks concerning the politics of regulation more flexible, to account for a range of policy processes that take place in a larger variety of settings. Obviously there are different outcomes if the intervening variables and initial assumptions have different values. For example, it is possible to make a general statement that globalization has strongly affected the politics of regulation in developing countries, although the intensity of different mechanisms that transmit its impact can vary within each country. Further, the political economy of regulatory governance can diverge widely across the levels of development, but the analytical lenses of collective action models we employ to identify the existing dilemmas and tensions may remain similar for most of the cases. It depends to what extent we can adapt them and make them more flexible. Likewise, the role that regulatory institutions play in decision-making processes can vary according to the political and economic characteristics of each country, but our analysis of these situations makes use of common indicators and concepts (Gilardi 2002; Jordana and Levi-Faur 2006).

An intriguing question about the contextual factors suggested by the authors—that follows from this discussion—is whether they are complementary or in fact represent, to some extent, alternative explanations of the difficulties of regulatory governance in developing countries. As the collection of papers in this volume exemplifies, all these factors identify some distinctive patterns of regulatory governance in developing countries, patterns that are not very common in most developed countries. Nevertheless, it is not easy to elucidate whether they are really complementary in explaining the observed differences, since they take different theoretical perspectives as their departure points: external constraints, actors' behaviour, or institutional profiles. While these contextual perspectives illuminate different problems of regulatory governance in the developing world, we might expect that they do not compete directly as alternative explanations. In some way, they should be able to interact to provide more complex explanations about the particular cases under scrutiny. However, we do not have conclusive evidence about this, and it might happen that at some point in the comparative analysis, a particular factor emerges as more relevant in its explanatory capabilities than the others, or that some conceptual confrontation regarding the role of the explanatory variables emerges. Structural, actor-centred, and institutional approaches constitute the background of these interpretations, which in turn are clearly related to persistent conceptual and theoretical debates in the social sciences. In the end, we might conclude that discussing and identifying those theories calibrates better the regulatory governance dilemmas in the South, and their differences compared with the North, although still more comparative research such as that initiated in this volume would be needed to answer the question in detail. It therefore remains open to future research.

In this short paper, I plan to explore in detail to what extent regulatory agencies in the developing world can be considered a relevant institutional innovation for the politics of regulation in these countries. In doing this, I discuss how the aforementioned contextual factors are involved, and how conventional theoretical approaches to regulatory governance are useful in explaining the agencies' role. The first section concentrates on the political economy of agency creation beyond the occasional reasons that contributed to its formal establishment in many developing countries, particularly during the nineties, due to coercive, isomorphic, or symbolic mechanisms of diffusion. A second section considers the much discussed issue of the independence of regulatory agencies, but only in the context of the developing world, reflecting the contributions to this volume and also previous research on this topic. A final section concludes with a few remarks on the challenges of studying the regulatory state in the South.

## II. Regulatory agencies in developing countries: more than a fashionable implant?

The establishment of regulatory agencies in many different sectors in developing countries has been a frequent case of institutional change in recent decades, which

may be explained by the logic of policy diffusion in its all-encompassing significance (Gilardi et al. 2007; Jordana et al. 2011). However, this does not undermine the fact that a particular institutional adoption and adaptation occurred in most countries when agencies were created. To examine these processes is pertinent since local political variations contribute to a better understanding of the limits and opportunities for institutional change in the developing world. Also, it contributes to the discussion of how these institutional perspectives may explain the range of variations that are being observed.

The basic institutional context may account for a large part of the existing variations. In the developing world, autonomous regulatory agencies were established mainly in countries having democratic regimes, or in those countries experiencing a transition to democracy. For example, in the Mexican transition during the late 1990s, among other factors, there was the aim of tying the hands of future governments (Jordana 2010). Authoritarian regimes usually did not support the establishment of independent regulatory agencies. They represent separate formal authorities that could contradict most hierarchical principles of a dictatorship; however, authoritarian rulers might also consider the possibility of creating a regulatory agency, nudged by external channels of diffusion, without formal independence rules. This could be introduced, for example, by a dictator aiming to overcome a state's traditional bureaucracy and expecting more direct support for a policy change by means of creating a separate agency. Badran's paper on the telecommunications regulatory agency in Egypt (this volume) clearly illustrates the situation as a variation from previous cases. In this instance, the minister of telecommunications was also the president of the agency board, assuring hierarchical coordination and preventing divergence between the agency and the ministry.

Two chapters in this volume concentrate particularly on traditional dilemmas between bureaucracy and politics in analysing the establishment of regulatory agencies. They are Mota's work on the establishment of telecommunications and electricity regulatory agencies in Brazil and Dubash's paper on Indian electricity regulatory agencies at the subnational level. In the latter case, it is argued that technocratic arguments were the main drivers behind the introduction of electricity agencies, in which naïve foreign consultants and advisors from international organizations together with top-level politicians expected benefits from depoliticizing the policy process in the regulated sector in India, particularly when a major reform was being implemented. This meant a step forward towards bureaucratization of the policy sector at the state level. In contrast, the Brazilian case introduces the role of the state bureaucracy to explain the greater resistance to granting more autonomy to the electricity regulatory agency, compared with the telecommunications one. The strength of the central state bureaucracy in Brazil, particularly for some specific sectors, emerges as a differential factor that pre-empted the coalition between top-level politicians and foreign preceptors to create politically isolated regulatory institutions, at least de jure. The interaction between bureaucrats and politicians regarding the institutional design of regulatory agencies as they were being created has also been carefully examined for the Mexican case by Ballinas (2011). He confirms that the significant variation in the character of newly created

agencies was strongly related to the bureaucratic struggles and negotiations within the state apparatus.

From these observations, it appears that strong bureaucratic states in developing countries were reluctant to introduce independent regulatory agencies, and for some cases, top-level politicians were obliged to reach an arrangement with bureaucratic sectors as to the characteristics of the agency they aimed to establish, sometimes involving the inclusion of traditional state bureaucrats in the new agency. Apparently, only in particular cases, like dictatorships, was this unnecessary. More often, in democracies, top-level political leaders agreed to negotiate provided they were involved in promoting policy change (i.e., privatizations, market opening, etc.) and considered the establishment of regulatory agencies as the opportunity to implement their reforms in a more direct and active way than relying on traditional ministries.

These arrangements, however, are not something particularly unusual. Indeed, when observing under what conditions many regulatory agencies were created in Europe during the 1990s, we also find multiple cases in which state bureaucrats had a relevant role in defining the institutional outcome, including the transfer of functionaries from the ministries to the new agencies. From this point of view, it appears that for highly bureaucratized states the introduction of agencies became an irritant for the administrative state, and not an alternative to the traditional Weberian model. However, this case was probably more intense in countries having presidential regimes than in parliamentary ones, as for example Latin American countries. Presidential leadership in conducting policy reforms created more salient confrontations with the bureaucracy, which remained less protected by parliamentary coalitions. On the contrary, in states with weak and/or small bureaucracies, the adoption of agencies was seen as an opportunity to depoliticize the state apparatus—often populated by intensive clientele practices—and also to improve the capability of top-level politicians to drive specific policy sectors. Whether or not this was in fact an institutional mirage, it represents a different issue, related to the effective introduction of the agencies as institutional implants in countries often having unstable polities and intricate policy processes.

We can also follow in more detail this institutional logic once regulatory agencies have been established. Agencies in large bureaucratic states in the developing world, particularly those with presidential regimes, also continued to readjust their role within the administrative constellation after the original reformist impetus was over. This is well exemplified by the evolution of ANATEL, the regulatory agency for telecommunications in Brazil, created in 1996. This case represents an illustration of the institutional tensions that regulatory agencies in developing countries confronted after their creation, particularly during the 2000s. Often, once the top politicians that had created them disappeared from the political scene, other political leaders not involved in the previous arrangement did not share the same views about the role of the agency; and the bureaucratic apparatus of the state also managed to rearrange the distribution of administrative power.

During the 1990s, Brazilian President F. H. Cardoso challenged the traditional developmental state apparatus in his country by introducing various institutional

innovations focusing on the development of the regulatory state vis-à-vis the introduction of significant privatization initiatives in different key economic sectors. One of the most important was the privatization of Telebras, and the creation of the telecommunications regulatory agency ANATEL. Coinciding with similar innovations in the region, this agency was expected to be an independent actor capable of guiding policymaking and conducting regulatory policy in the sector. In fact, during the initial years, until 2003, ANATEL acted as an autonomous actor and led the implementation of telecommunications markets in Brazil. The agency head during this period had a very close relationship with President Cardoso, who supervised the whole policy change and protected the agency from bureaucratic interference and traditional clientele politics. After Brazil's presidential change in 2003, when Lula do Santos came to power, such personal ties disappeared, and a number of tensions progressively emerged between the regulatory agency head and the government, in particular the ministry. The new government and the central state apparatus started to have a more active role in defining policymaking in the sector, and ANATEL in most cases was not able to maintain its central role in defining sector policy, as it had done during the previous period. Several political conflicts arose in the first years of Lula's presidency, ending with the resignation of the agency head and an adjustment of agency policy preferences to follow government priorities. President Lula took this opportunity to appoint representatives of different parties from his executive coalition to the board of the agency; at the same time policy initiative in the sector was firmly located in the presidency, reserving for the agency only supervisory tasks.

A few years afterwards, the Brazilian situation stabilized and a new pattern of regulatory governance emerged in which the agency role was clearly secondary to the policymaking sector. Thus, since the late 2000s, the government has established a new telecommunications policy framework that involved regulation and market competition, but also the creation of a new public firm and direct public investment in the sector. In fact, this appeared to be a partial reintroduction of some developmental policy instruments in the sector, although market regulation was still the key instrument. While the agency remained in charge of the microregulation of the sector, the main policy objectives and coordination of policy instruments were clearly in the hands of the executive government, either the presidency or the communications ministry. The evolution of the ANATEL case reveals the significance of the president's political leadership for the agency's involvement in policy change until 2003 but its resettlement afterwards within the Brazilian administrative space was due to bureaucratic pressures and the new president's lack of interest. Thus, it appears that in developing countries, initial negotiations by top-level politicians with reluctant strong bureaucracies did not assure a permanent status for the newly created agencies, but only a provisional status quo, which could be revised after a political change. Similarly, we also might expect that, for agencies in weak bureaucratic states, an agency's consolidation as an emerging bureaucratic body requires the continuous support of political leadership across different mandates, at least for an initial period.

## III. Autonomy and political intervention in regulatory agencies

Having analysed the influence of countries' institutional contexts on the development of regulatory agencies in developing countries we now move to the agencies' own institutional characteristics and their impact on its consolidation. With respect to developing countries and compared with developed ones, political intervention in regulatory agencies is much more recurrent. A very common claim when observing them is the fact that they are not de facto independent, in spite of often having formal rules defining de jure autonomy. In other cases there is no decoupling between de jure and de facto rules as far as they allow the direct participation of political appointees in the key decision-making procedures of the agency, despite their lack of relevant qualifications for these posts. Similar observations are described in several of the chapters included in the volume, as for example the case of the MWSS-RO, the water regulator in the Philippines, which shows its lack of expertise and non-independence (Rui Chng). Post and Murillo (this volume) also point out that 'the most important decisions regarding regulatory policy tend not to be made by regulatory agency officials', and they exemplify this fact in their study of electricity regulation in the Argentinian provinces.

In spite of the different problems related to the autonomy of regulatory agencies in developing countries, we believe they cannot be considered strict failures, except when compared with the rhetoric of international organizations like the World Bank and local technocrats, whose expectations are probably too high. First it should be noted that even in developed countries, regulatory agencies are not usually fully independent, neither are they responsible for all the decisions in the policy sector. This is something of an exaggeration; political intervention, including the possibility of reframing the agency, is a tangible possibility for most countries. Even in developed countries there is some agency adjustment to the political preferences of the executive or the legislature in most cases (Thatcher 2005). Being flexible about political preferences should not be considered a failure, but an asset that demonstrates the organizational ability of the agency to create more consistent and technically grounded policies. In addition to this, it is worth noting that problems relating to policy coordination and shared responsibilities between various agencies, the judiciary and other departments within the executive, are very common in most countries in the world, not only in the South (Jordana and Sancho 2004). The key issues are how to deal with them; which mechanisms can be activated to disentangle regulatory gridlocks and how to improve the area of governance in which coordination problems persist. Neither in the North, nor the South, is a healthy system of regulatory governance in a country the one that concentrates most of the authority in a powerful regulatory agency, but the one most capable of solving regulatory disputes in an effective way, without creating persistent losers in the distributive struggles related to policymaking.

A different matter for agency identity is the fulfilment of formal rules constituting regulatory agencies, in particular those regarding independence, or in other words those rules making delegation to the agency a credible commitment.

As formal rules have often been used as a proxy for measuring agency independence, when comparing levels of independence among regulatory agencies, there is the expectation that these rules are being strictly implemented. However, this is only an indicator, not a confirmation. Having strong rules about delegation is not a guarantee of full independence, in the sense that agency preference formation occurs completely separately from its political context. Indeed, the number of players with a veto in a country may account better for the effective autonomy of an agency than the stringency of its formal rules (Spiller and Tommasi 2005). Nevertheless, rules for delegation involve some stability and predictability about the decision-making processes of an agency, and this creates the feeling that not fully complying with formal rules reduces an agency's autonomy. This is not completely appropriate in all cases, although it does refer to an important component of an agency's institutional performance.

In this respect it appears that some persistent differences emerge between developed and developing countries regarding the attitude to rules about delegating. While most developed countries tend to adhere to the rules, this is not always the case for developing countries. In particular, formal rules concerning the naming of the agency head and board members are more often disregarded in developing than in developed countries. Evidence of this has been confirmed by empirical research on the political vulnerability of some agencies in Latin America, although there is significant variation across sectors and countries as to the degree of compliance with formal rules defining the characteristics of the agency (Jordana and Ramió 2010; Montoya and Trillas 2009). The political vulnerability index permits estimating the stability of agency heads through political changes in a country and, with some caveats, can be used as a proxy for the de facto autonomy of the regulatory agency.

It is worth recalling that the first independence indexes were created by Cukierman to measure the degree of governments' formal political delegation to central banks (1992). His main purpose was to identify the impact of delegation on the management of inflation by central banks. He found that inflation and legal independence were negatively related, but only for industrial economies, not for developing countries. To understand such differences, he looked for a procedure to identify how political delegation works in practice, suggesting the index of political vulnerability (Cukierman and Webb 1995). This was based on measuring the turnover of central bank governors as opposed to observing their legal mandate. The aim of this de facto index was to indicate the degree of effective control exercised by politicians over the direction of the central bank, above and beyond the existing formal rules on appointing governors. Only when he counted governors' turnover, did Cukierman find a negative relationship with inflation in developing countries as well (2008, p. 727).

Clearly, measuring de facto regulatory autonomy was directly inspired by Cukierman's work two decades ago. Surviving political changes is no doubt a sign of agency stability and the fulfilment of its formal rules. In any case, measuring de facto autonomy rather than just considering formal rules seems a more adequate way of judging the independence of regulatory agencies in many developing

countries. However, the key question here is how to explain the differences observed so systematically between the two measures, due to the lower de facto autonomy in developing countries, which also provide some hints about the ability of the agency to adjust to the new political power (Maggetti 2007). A possible explanation might start by identifying a failure of the initial agency design due to not considering carefully the wider institutional context—as we discussed in the previous section. Although 'best-practices' were introduced, these often originated in developed countries with strong democratic traditions and stable bureaucracies and continued with the existence of less agency flexibility towards political changes in many developing countries, due to weakness of a state's bureaucracy and the stronger relevance of political leadership in supporting the continuity of the agency's role in the policymaking.

Yet, this is also a partial and limited approach to the status of agencies and their capabilities of being relevant actors in regulatory governance. In this respect we should start to transcend the independence perspective, both in its rhetoric and in its measurement, and move towards a more multidimensional analysis of the capabilities of regulatory agencies in complex political settings, such as those of most developing countries. Agency autonomy is a relevant component in our analysis, but not the only one (Hanretty and Koop 2012). Some of the chapters in this volume already address this demand and open new perspectives on the question. For example, the analysis of Thiruvengadam and Joshi on the role of the Supreme Court of India in providing support to the telecommunications regulatory agency in that country is intriguing. This is a case in which a non-majoritarian institution, the Supreme Court, helps to consolidate another non-majoritarian institution, while at the same time declining to be involved in decisions related to telecommunications' issues. The Colombian case, as illustrated by Urueña's chapter (this volume), also shows similar support by the Constitutional Court of the independence of the regulatory agency for water, but in this case the judges' decision also introduced some considerations about the procedures the agency should pursue. The Court made sure that the views and opinions of all stakeholders, including the utilities' customers, had to be taken into account before issuing new regulations.

Thus, we observe in these two cases how the interrelations between different institutions sharing responsibilities in a policy area can contribute to a more balanced one, putting the regulatory agency in a better position to improve both technical capabilities in the public realm and probably welfare with respect to the consequences of the distributive policy. In this sense Dubash's chapter is relevant, as well as Rui Chng's to some extent, in that they show how, in the midst of tremendous difficulties in moving towards regulatory change, policymaking processes have improved and become more inclusive. This was not because of the agencies' claim for independence, but thanks to the role played by newly established regulatory agencies that, in spite of their technocratic nature, introduced or were eventually forced to establish more transparent processes and participative procedures, compared with traditional clientele and oligarchic policy styles (or also with the opaque procedures of the traditional bureaucracies). As a policy irritant, and transcending their original ideal of political isolation, regulatory agencies

facilitated institutional change by opening the door to different stakeholders, and in this way improved regulatory development through more balanced distributive policies.

## IV. Concluding remarks

The presence of an independent agency is not a trigger for immediate improvement in the regulatory framework, neither in developing nor developed countries, but it represents an opportunity for transforming the policy process. Newly created regulatory agencies did not find an idyllic political and social environment in which they could develop all possible regulatory instruments to make markets work properly. In fact, in many cases, agencies were created immediately before or after governments had privatized particular sectors, amid serious economic crises, and were expected to manage speedily the regulatory problems that emerged, while promoting policy change. In most cases, however, nothing close to competitive markets had existed before. Private actors entering the market expected protection, but those previously monopolizing it also expected to retain their special status through the regulatory agency. A privileged clientele aimed to keep the benefits of distributive policies that it had controlled previously. In addition it was not easy for many agencies to introduce a set of newly designed instruments without previous regulatory experience and with scarce sector-based knowledge.

For these and similar reasons, soon after creation, regulatory agencies often fall rapidly under strong economic and political pressures related to the opening up of the market, while at the same time becoming involved in policy disputes of a distributive nature under the influence of different stakeholders. Indeed, new regulatory agencies become a fresh target for social sectors aiming at a revision of distributive and welfare policies in the region (Draibe and Riesco 2007). In addition to this, it is important to have in mind that there are many ways politicians could influence the behaviour of regulatory agencies either by changing their institutional design or by constraining their organizational capacities through cutting budgets, interfering in human resource management, and so forth. Also, regulated firms may try to provoke confrontation between the regulatory agency and the government in order to weaken the agency's capabilities (Jordana 2012).

All these complications, however, did not prevent many cases of reshaping some of the preferences involved in the policy sector. Regulatory governance comprises a broader range of features, focusing on how actors interact in the regulatory domain (Levi-Faur 2005; Jordana and Sancho 2004; Brown 2004). Actors' policy preferences are very important, and regulatory agencies may contribute in a significant way to conforming to them, insofar as they occupy a very visible role in policymaking. More scientifically grounded knowledge, more accountability, and more formal policymaking procedures were some of the key contributions regulatory agencies made that contributed to improving preference formation among stakeholders. As some of the papers in this volume illustrate, regulatory agencies often did not transform policy, but contributed to new policy areas by providing

institutional settings more visible and procedurally inclusive than traditional policymaking in their countries. Here is located the main institutional challenge to the regulatory state in developing countries: how to legitimize non-majoritarian institutions, not by outcomes eventually achieved, but by procedures introduced to permit improved policymaking (Jordana, 2011). Outcomes are important in demonstrating legitimacy, but it is not easy for agencies having a low political profile to claim credit for the benefits of the policies they sustain. In addition to agencies shaping actors' preferences, they may be relevant through their own preferences in the policy process. When this occurs, however, either they have strong support from the political power and act on its behalf, or have a strong professional reputation, obtained over many years, which allows them to insert their own strategic thoughts into the sector and obtain more space to manoeuvre. If not, most probably they will refrain from being closely involved in policy change, or will limit themselves to a narrow regulatory responsibility, to minimize the risk of political intervention.

In fact, these final considerations about the challenges of regulatory agencies in the South are also largely relevant for discussing the cases in the North. Maybe some aspects are more pronounced in developing countries, and variations are larger, but nothing contradicts the general trends observed. Agencies in developed countries are also sensitive to political intervention, and it depends on the strength of the bureaucracy in the country, and the character of its political institutions, how the agency behaves and how resistant it will be. This comprehensive perspective is what we argued at the beginning of this chapter: that no fundamental differences would exist at the theoretical level to explain regulatory developments either in developed or developing countries. What we have are different institutional contexts, different problems about articulating interests, and different roles within the globalization processes. To address all the differences in the politics of regulation, from a wide variety of countries, requires a large effort. Here we tried only to delineate how a different political context, including the role of the bureaucracy, can be extremely influential in determining agency behaviour. The research agenda to extend the explanatory capability of our theoretical frameworks to a much more diverse set of circumstances, such as those in the developing world, is a major challenge and requires further study. This volume has already begun a serious attempt to do it.

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# 11

# The Peripheral Regulatory State

*Michael W. Dowdle*

## I. Introduction

The regulatory state has effectively become a regulatory best practice insofar as the international development community is concerned. It is characterized by the use of independent regulatory agencies (IRAs) to regulate the diverse regulatory environments of that state. The logic behind this is that in developing states, in particular, development is often impeded by an overactive political environment, in which political interests divert the workings of regulation to serve their own private and partisan ends, rather than those of the state as a whole. Isolating regulatory decision-making into a centralized, technocratic, and independent body, one that operates both institutionally and epistemically beyond the reach of politics, frees regulators to use their superior training in and understanding of the dynamics and needs of that particular regulatory environment to direct their regulatory decisions to pursuit the public good, with as little compromise as possible from the corrupting interference from factional political pressures.

But this particular model of the IRA assumes a state that resembles the already industrialized state in which the IRA first emerged at the end of the 19th century—namely that of the US. More particularly, it assumes a regulatory environment that is standardized and stable enough to both be visible to remote regulators and to respond predictable and uniformly to rule-based regulation. It assumes that both the regulatory apparatus of the state and/or its surrounding society have the resources necessary to train these highly skilled and professionalized regulators in their specialized pursuits. It assumes that the state has sufficient resources to retain them in the face of competition from the private sector. And it assumes that the private sector itself has the ancillary personnel necessary to convert what is often highly technical regulation into industrial action; and perhaps a civil society with sufficient training and expertise to monitor and interact with these regulators so as to ensure some minimal level of regulatory accountability (Dowdle 2006; Braithwaite 2006; Rubin 1997).

But many, perhaps most, of the regulatory environments characteristic of the 'global South' are not industrialized to such an extent. Southern regulatory environments tend to be more volatile, more fragmented, and have less wealth than their

Northern counterparts (Schwartz 2007; see also Dowdle 2013). Insofar as governmental capacity is concerned, as noted in the framing chapter, these impediments are further exasperated by the government's greater innate difficulty in collecting taxes. Resource constraints mean that Southern regulatory environments also have greater innate difficulty sustaining the public/private divide that is critical for IRA 'independence' (Maher 2013).

What does this suggest for the effectiveness of the IRA model in such environments? One's preliminary implication might be to suspect that given all its divergences from the presumptions that inform the IRA model, the IRA has little hope of contributing to effective regulation in such environments. This chapter will argue, however, that it is more complicated than that. These complications run along two dimensions. First, as shall be explored in the next section, there is evidence to suggest that the IRA model, when transplanted to Southern environments, sometimes develop important regulatory functionalities that are different from those associated with the orthodox (US) IRA model, but still contribute meaningfully to regulatory effectiveness. Ironically, in Southern environments, the IRA's 'independence' can allow them to serve, not so much as important sites for technocratic decision-making, but as important sites for democratic deliberation—that is, instead of removing regulatory decision-making from politics, they expose it to an improved quality of the politics.

The other dimension that effects how IRAs might operate in Southern environments involves the relationship between the ideological strength of the regulatory epistemology and the web of relevant local social meanings found in that particular environment. Simply put, some areas of regulation, competition law, for example, are informed by a much stronger and more coherent regulatory ideology than other areas (such as welfare safety nets). And in any particular society, some kinds of regulated activity will have a much stronger and more robust web of social meanings attached to it (such as access to water or electricity) than others (such as access to mobile telephony). The interaction between these two lines of variables also effects how the IRA will tend to interact with and affect its environment, and sometimes facilitate positive effectiveness despite the failed presumptions of the model.

## II. The IRA in the periphery (I)—functional perspectives

### A. The predicates and limits of technocratic discourse

Perhaps the critical component to the effectiveness of the Northern model of the IRA is its capacity to engage in what is often called technocratic decision-making. Technocratic decision-making is a relatively positivist form of decision-making through which appropriate regulatory responses are ideally to be deduced from larger and relatively objective principles that inform in the regulatory environment. This ability to deduce appropriate regulatory response from objective principle provides an epistemic shield that protects the regulator from political demands that

work, perhaps often inadvertently, to benefit some at the expense of the whole. This more than anything else is the critical component of the IRA's regulatory 'independence'. (See, e.g., Miranti 1990; Oakes and Miranti 1996; cf. Powers 2003.)

Notice, however, that as implicated in the Introduction to this chapter, this requires a very particular kind of regulatory environment. It requires one in which practices and perceptions and social dynamics are already standardized and stable enough to take the shape of objective (actually 'supersubjective' but the distinction is not relevant here) principles that allow for meaningful deduction. Consider, along these lines, the early experience of the US Interstate Commerce Commission (ICC), generally considered the world's first 'independent regulatory agency' of the present-day, orthodox model. For the first 25 years of its existence, the ICC had little regulatory independence or autonomy, as demanded by today's orthodox understanding of IRAs. It was certainly not technocratic in its decision-making, and it was vitally dependent on the cooperation of the industry that it was charged with regulating (Sklar 1988).

The key to the ICC developing regulatory independence and autonomy in the modern sense came from its ability to take specialized accounting practices and principles that had developed in the industry over the past 40 years and adapt them to serve and justify its regulatory actions. But these principles were themselves the product of 40 years of industrial development, which saw accounting progress from being simply a convenient practice facilitating internal monitoring of an extended firm into being an elite academic and professional discipline whose foundational principles were considered universal to all (industrial) firms, and representative of superior economic truths (Miranti 1990). In other words, the ICC was only able to gain its independence and authority (again in the modern-day meaning of those terms) because the industry it regulated had itself experienced almost half a century of distinctly industrialized development, and within a very wealthy, increasingly stable, and relatively educated society. This allowed it to become standardized enough to feature patterns of behaviour that were stabilized, standardized, and conceptually and academically theorized enough to function as objective principles (Dowdle 2006; see also Oakes and Miranti 1996).

But not every regulatory environment is going to exhibit such characteristics. And when they do not, it is the experience of the early ICC of the late 19th century, not that later 'independent' ICC of the second decade of the 20th century, that is most informative as a comparative referent. This is particularly likely to be the case with many of the regulatory environments in the lesser industrially developed South.

The earlier ICC was not ineffective, but it was effective in a way that is significantly different from that the modern, orthodox model seeks to advance. It was effective not by being politically independent, but by being, to borrow from the vocabulary famously associated with Peter Evans (1995), politically 'embedded'. It gathered and disseminated information about the industry, thus promoting its standardization and development; helped stabilize the industry and its routines; negotiated resolutions to disputes between railroad companies; regularized the

terms of market competition; and served as a convenient forum in which the different social interests affected by railroads—namely the railroads themselves, shipper, passengers, and even railroad workers—could talk to one another and begin developing a common vocabulary (Covaleski, Dirsmith and Samuel 1995; Jones 1966.)

In sum, the early ICC served the needs of industrialization; it served the needs of regulation, by structuring a particular form of politics that in turn made its regulation possible. For this, it could not rely upon some superior claim to technocratic expertise of the kind that vitally informs today's orthodox model. It had to rely upon the very politics that today's model seeks to shield it from (Covaleski, Dirsmith and Samuel 1995; see also Skowronek 1982). But not just any politics, but that of a particular deliberative structure that is perhaps best captured by Cohen and Sabel (1997) in their notion of deliberative polyarchy.

## B. From technocratic to 'polyarchic' deliberation

As noted above, in Southern regulatory environments, IRAs will have significantly greater difficulty translating political policy goals into rationalized and objectivized regulatory structures simply by application of a seemingly objective technocratic knowledge of the regulatory environment. Peripheral regulatory environments are likely to be significantly more fragmented, more volatile, and less rationalized (Hesse 2009; Rodrik 1999; see also Schwartz 2007; Gavin 1997). This means that it will be much harder to integrate such environments into the larger political-regulatory regimes simply through the construction and manipulation of the distinctly abstracted knowledge systems that drive technocratic decision-making. (See, e.g., Phongpaichit and Baker 2000, pp. 35–82.)

As suggested above, a somewhat more helpful way of conceptualizing regulatory 'independence' in the context of developing countries is that famously developed by Evans (1995) and which he termed 'embedded autonomy'. Technically, embedded autonomy describes a condition of mutual, relational interdependence between the regulator and some outside party. This relational interdependence can give the regulator considerably more policy autonomy than a political-economy mapping of bureaucratic or clientistic architectures would otherwise reveal—exactly the kind of situation the early ICC was able to exploit. Unfortunately, Evans' description of how embedded autonomy actually works remains unclear: 'embedded autonomy' describes a condition of being, not a pattern of behaviour; he gives little explanation of how this condition becomes manifested in actual practice. Along these lines, Evans' description is also particularly problematic in the context of global South, because that description as he develops it is heavily premised on a stark divide between state and society. The stark state-society divide is in part a product of industrialization (Horowitz 1982; cf. Polanyi 2001), and is often not as indicative of the lesser-industrialized countries of the global South (Banerjee and Duflo 2011). Indeed, in that context, embedded autonomy, generally regarded as a good thing, seems to become *structurally* indistinguishable from neo-patrimonialism, generally regarded as a dysfunctional thing (albeit maybe not

always as dysfunctional as scholars of development are wont to presume) (Kelsall et al. 2010; cf. Granovetter 2007).

We examined above, however, how the real functionality of the early ICC seems to lie in its capacity to bring together structurally and epistemically separated social-political communities and discourses into a single constitutional-political forum, rather than in its capacity to shield regulatory decision-making from [a non-technocratic] 'politics' per se. This functionality recalls Burt's (1995) notion of a 'structural hole'. A structural hole is a gap in the social-communications network of a political society that prevents two or more interdependent segments of that society from communicating effectively with each another. Such holes are frequently bridged by third-party intermediaries. What Burt and others have shown is that institutional actors that bridge structural holes—that is, actors who are able to provide conduits that allow relatively direct communication between otherwise separated entities—enjoy a competitive advantage in shaping the opinions and norms of the larger institutional environment (see also Burt 1999).

Seen in this light, one way to think of IRAs is as intermediary institutions that bridge the structural holes that separate everyday democracy (constituent power) from complex forms of social or productive activity. In more stable, standardized, and educated environments, they can do this by constructing a distinct technocratic vocabulary that translates political concerns into industrial discourses and industrial concerns into political discourses (see, e.g., Morgan 2003, 215–36; cf. Teubner 1982–3). This particular kind of bridging has additional advantages of providing transparency and facilitating economies of regulatory scale. But as we have seen, technocratic regulation can be difficult to sustain in the lesser-industrialized regions of the global South. Here, IRAs have to find other ways of bridging the structural holes that separate the everyday political from the complex industrial.

One such way is by serving as a 'code-switcher' that is able to communicate one side's concerns into some other side's vocabulary—an ombudsman might be thought of as an example of this (see Gellhorn 1966). Or alternatively, it can provide a unique forum through which otherwise socially isolated parties can talk to one another directly about particular matters of mutual concern, as is the theory behind the US practice of 'negotiated regulation' (see, e.g., Freeman and Langbein 2000). Because there is no common vocabulary in use in these kinds of cases, and because communication here is intimate and discussions tend to be case-specific, such regulatory activities are less transparent. But it still allows the agency to take advantage of its unique position, bridging a structural hole and thereby establishing some degree of regulatory independence and some degree of policy effectiveness (by influencing global social or soft-law norms). This particular form of agency intermediation resembles what Cohen and Sabel (1997) have termed 'directly deliberative polyarchy'. Indeed, Cohen and Sabel developed this notion of directly deliberative polyarchy to explain how regulation works (or can be made to work) in a regulatory environments that not amenable to traditional Weberian regulation, that of the emergent and distinctly pluralist transnational regulatory environment of the EU.

This form of structural intermediation is well perceived in the early operations of the ICC. The early ICC operated by working on a case-by-case basis, meeting directly with parties to resolve disputes or address particular problems that had arisen. Its ability to address disputes and problems faced by the industry gave it a particular status that it could then exploit to begin shaping industrial practices (this is particularly evident in its success introducing worker safety concerns into industrial practices) (Covaleski, Dirsmith and Samuel 1995). In this way, its regulatory style strongly resembled the 'experimentalist courts' that Dorf (2006) documented in the early 2000s. This resemblance is not completely coincidental: the first chair of the ICC was Thomas Cooley, a famous jurist and judge on the Supreme Court of Michigan. In many ways, Cooley ran the Commission like a court—but a 19th-century court, which was much more regulatory and experimental—as Dorf uses that term—that the more juridified courts that arose in the US towards the end of the 19th century (Jones 1966; cf. Skowronek 1982).

We see this same dynamic at play in at least some of the studies found in this volume. It is perhaps most obvious in Dubash's study of IRAs in India's electricity sector (Dubash, this volume). Dubash notes that these IRAs are in fact paradoxically 'democratic' in their operations, and that this is a key component of their effectiveness. Dubash then locates this effectiveness in what he calls, tellingly, the 'new politics' that has been triggered by that regulation:

> The de-coupling of regulatory structure from [its technocratic moorings] opens interesting and creative new spaces for politics around electricity. With the presumption of one, correct, technocratic answer to regulatory decisions set aside, the door is left open for independent regulatory agencies to become new sites of politics around electricity.

This regulatory space includes active participation by 'labour groups, political parties, consumer groups, individual consumers, industry associations, farmers, and other public bodies such as municipalities, . . . injecting [them] into the triangular negotiation between the IRA, the government and the utility'.

As described by Dubash, the IRA's operations much more strongly comport with a model of deliberative polyarchy than with the orthodox model of the IRA as a source of technocratic expertise. The paradoxically democratic nature of these IRAs parallels the distinctly deliberative-democratic character of deliberative polyarchy. And the 'new politics' it enables is exactly what deliberative polyarchy seeks to bring about. In fact, there's really nothing 'new' in this new politics: as described above, this same 'new politics' dynamics can be seen in the early operations of the US ICC some 130 years ago.

## III. The IRA in the periphery (II)—structural perspectives: agencification and transplants—towards a systems perspective

Up to this point, our analysis has been unabashedly functionalist. But particularly insofar as peripheral countries are concerned, there is an added dimension to agencification that this functional approach does not address, and that is the fact

that much of peripheral agencification is in the form of structures that have been copied from external models—that is, transplants. This is in contrast to, for example, the ICC, and in general to the IRA as it operates in the US, which was an indigenous development. How might the fact that most peripheral IRAs are foreign transplants affect their functioning?

Before addressing this question directly, however, we should note that the countries of the global South are not the only polities to which the US IRA model has been 'transplanted'. Few have been troubled, for example, by the fact that the IRA is also a transplant—and a somewhat imposed transplant at that—in the context of Western Europe (see Majone 1994). Therefore, to the extent that the transplanted character of the IRA is of some special significance with regards to the countries of the global South, this is likely due to the interplay between the regulatory logic embedded in the IRA model and the sometimes different regulatory logics that operate in the less industrialized regulatory environments of the global South.

## A. Of IRAs, transplants, and the possibility of 'regulatory trilemmas'

Such an interplay can be mapped, at least preliminarily, using Teubner's (1986) notion of the 'regulatory trilemma'. The idea of the regulatory trilemma starts from the observation that every autonomous regulatory system encodes within its institutional and epistemic structure a correspondingly autonomous understanding of the social environment it is seeking to regulate. But at the same time, that social environment is itself continually evolving, and at some point this evolution will cause the social environment to deviate significantly from the expectations encoded into the regulatory system.

When this occurs, a systemic crisis results, to which there are three possible responses. One is where the new social environment colonizes the regulatory system, but at a cost to that system's autonomy. Paraphrasing Teubner, we can call this response one of 'socialization' (Teubner (1986) himself refers to it as 'over-socialization'). Alternatively, the regulatory system can take control of the social environment's evolution, forcing it to conform to regulatory understandings, but at a cost to the vitality and viability of the social environment itself. We can call this response one of legalization (what Habermas (2004, pp. 356–73) famously coined 'juridification'). Finally, the social environment and the regulatory structure could simply become irrelevant to one another, a response we might call for the purposes of this article 'decoupling' (see also Meyer and Rowan 1977).

Regulatory transplantation always threatens to provoke a regulatory crisis of the kind described by Teubner. As described above, the regulatory model of the IRA encodes particular presumptions about the regulatory logic of its environment. These can include, for example, presumptions about environmental stability and standardization or about that environment's capacity to develop and sustain technocratic knowledge. As we saw, not all regulatory environments conform to these presumptions. This is particularly likely to be the case in the less-industrialized global South. When the IRA model is transplanted into such

non-conforming regulatory environments, it is more likely to provoke a regulatory trilemma of the kind Teubner identified.

## B. Mapping the trilemmic trajectories of IRA transplants

As noted above, when the IRA is transplanted into a regulatory environment that does not conform to the presumptions inherent in the IRA, it is likely to trigger a regulatory trilemma. There are three possible outcomes to this trilemma: legalization, in which the new model reshapes the regulatory environment; socialization, in which the regulatory environment colonizes the regulatory model, causing the regulating agency to operate in ways different from those envisioned by the model; and decoupling, in which the agency becomes irrelevant to the actual dynamics of the sector it is supposed to be regulating.

Which of these three directions a conflicting transplant might take is likely to depend on the relative strengths of the 'regulatory epistemologies' that inform the transplantation on the one hand and the indigenous social structure that regulation is trying to effect on the other. A 'regulatory epistemology' in this context refers to the social meanings that attach and give conceptual shape to the regulatory framework. A regulatory epistemology is 'strong'—or persistent—when these social meanings are relatively stable against other social epistemologies operating in the regulatory environment. Such strength can come from two sources. One is simple epistemic closure: that is, the social meaning that informs the regulation is internally comprehensive (it has an answer for all regulatory questions posed to it) and therefore does not refer to other epistemic systems—it is, in Teubner's (1993, pp. 32–4) famous terminology, 'normatively closed'. The other source of epistemic strength is robust embeddedness with other socio-epistemic systems, meaning that its foundational social meanings are shared by a wide diversity of other social-epistemic systems, and therefore are reinforced by these other systems to a point where they are difficult to change (cf. Lessig 1995).

In the context of transplanted agencification, whatever strength of the regulatory epistemology will have will most likely come from the strength of its closure, since such transplants will generally lack significant embeddedness with other, indigenous epistemologies found in its new society. In the case of an indigenous social system, the strength of a regulatory epistemology is more likely to come from embeddedness. The stronger experiential foundation of such systems means that their regulatory devices will often be less formalized and theorized, and more deeply integrated into other aspects of social life (cf. Berger and Luckman 1967, pp. 129–72). In this sense, the quality of epistemic strength is likely to be asymmetrical as between a transplanted IRA model and its new regulatory environment. Indeed, it is this asymmetry that gives rise to the regulatory trilemma.

With all this in place, we can now begin to understand how a regulatory environment is likely to respond to the regulatory trilemma that is provoked when the IRA model is transplanted into that environment (see Table 11.1). Since indigenous epistemologies will tend to be 'social' in character, they will therefore favour socialization. Transplant epistemologies will tend to be juridical

**Table 11.1** Plotting the trilemmic trajectory of transplants

| | Strong transplant epistemology | Weak transplant epistemology |
|---|---|---|
| Strong indigenous epistemology | Decoupling (double movement) | Socialization |
| Weak indigenous epistemology | Legalization | Decoupling mutual indifference |

in character—law is the paradigmatic closed epistemic system—and therefore will favour legalization. When one is strong and the other weak, the strong one's tendencies will likely prevail. When both epistemologies are strong, or both are weak, neither legalization nor socialization can occur, and this leaves decoupling as the only available response. But as we shall see later, this decoupling takes a different form when both ideologies are strong than it does when both are weak, with the former being characterized by a distinctive, Polanyian 'double movement' involving both the transplanted and indigenous systems, and the latter involving what Teubner called 'mutual indifference' between the two systems (as we shall see, this latter form of decoupling is likely to be a rarity).

The asymmetry between the regulatory epistemology of a transplant versus that of the social environment into which it is being injected parallels the famous asymmetries Polanyi (2001) identified in the interrelation between 'commodification' and 'habitation'. Like the regulatory epistemology of transplants, that of commodification is abstracted. It is both comprehensive and closed, in that its evaluations are determined solely by reference to an objective epistemic metric, that of market price. Habitation, by contrast, describes a distinctly social epistemology. Its behaviour derives from the collision of a diversity of social regulatory systems, interacting in ways that are too complex for rationalist comprehension. Everything else being equal, the more closely the regulatory epistemology of a transplant maps onto an epistemology of commodification, the stronger that epistemology will be. Conversely, the more closely the regulatory epistemology of the endogenous regulatory environment maps into an epistemology of social citizenship, the stronger it will be.

## *1. Legalization and socialization*

The studies in this volume seem to lend support to such a mapping. Consider Prado's study (this volume) of transplanted agencification in Brazil's telecom and electricity sectors. In the case of telecoms, the IRA transplant seems to have been relatively successful. This is in contrast to other studies of transplanted telecom regulation in other countries, such as in this volume's study of Indian telecom regulation by Thiruvengadam and Joshi. In addition, it was successful in comparison to the other transplanted IRA Prado (this volume) considers involving the electricity sector. Translated into trilemmic terminology, we would say that when

agencification was transplanted into Brazil's telecom sector, the response was legalization; but when agencification was transplanted into India's telecom sector, and when agencification was transplanted into Brazil's electricity sector, legalization did not occur. What was so special about Brazil's telecom transplant vis-à-vis India's telecom transplant and Brazil's electricity transplant?

We might start by noting that the regulatory epistemology that underlies both telecom agencification and electricity agencification tends to be particularly strong. Both telecoms and electricity are core tradition foci of the IRA model. Both are archetypical of the kind of industry that model was designed to regulate: namely, industries that provided a vital service to society but due to network effects and high start-up costs both discourages competition and, at the same time, are particularly vulnerable to what is sometimes called destructive competition. Here, the purpose of the agency is to induce or otherwise replicate competitive market dynamics within an industry in which such dynamics are difficult to sustain on their own (Morgan 1976, pp. 66–7). In other words, here, the regulatory purpose sits very well with the goals of commodification.

But from the perspective of the regulatory trilemma, there is a contradiction built into this particular regulatory model. As noted above, one of the things that recommend telecoms and electricity for agencified regulation is the fact that both are also seen as providing a valuable social good. Clearly, access to both telephony and electricity is critical to one's ability to be a fully functioning member of modern society. This suggests that a strong social regulatory epistemology will also likely issue from the indigenous environment in these sectors. And this in turn suggests that both telecom agencification and electricity agencification should provoke a strong versus strong epistemic conflict, and thus result in decoupling—exactly what happened in both India's telecom sector and Brazil's electricity sector. So why did it not happen in Brazil's telecom sector?

In fact, Brazil's approach to telecom regulation was unique in at least one critical aspect: Brazil's telecom regulation focused exclusively on mobile telephony. Mobile telephony does not have as strong an indigenous regulatory epistemology as does the fixed, landline telephony that are the principal focus of traditional telecom agencification. As a newer technology, mobile telephony has not yet become as integrated into social life; it has not yet developed a robust collection of social meanings that link it to other essential aspects of that life. So with regards to Brazil's telecom regulation, and in contrast to that of Brazil's electricity sector and India's telecom sector, the regulatory trilemma that resulted from the transplanted agencification of Brazil's telecom sector took the shape of a strong transplant epistemology interacting with a weaker indigenous epistemology, thus explaining the distinct, legalization response experienced by that regulatory environment.

Indeed, Badran's study (this volume) tells a similar story about regulatory agencification in Egypt's telecom sector. As in Brazil, regulatory transplant there also proved relatively effective. But also like that of Brazil, it focused, at least initially, on mobile telephony and other 'non-basic services' rather than landlines. At the same time, as that regulatory institution was expanded later on to include more essential telecom services, most notably landlines, there may have

been a subtle shift towards socialization. In particular, respondents to Badran's study, while pleased with the overall performance of the regulator, also characterize that regulator is being only 'partially independent'. As we saw above, this is suggestive of a more peripheral, political form of agencification in which deliberative polyarchy replaces technocracy as the source of regulatory authority and legitimacy.

And this brings us back to Dubash's study (this volume). The socialization response described by Dubash seems curious in the context of electricity regulation. Socialization implies a weak transplant epistemology. But as we saw above, the transplant epistemology for electricity is likely to be strong; electricity being one of the initial foci of agencified regulation (see, e.g., Covaleski, Dirsmith and Samuel 1995). Indeed, Prado's study of electricity-sector agencification (this volume), which seems to have resulted in decoupling, seems to confirm this. Why did electricity agencification in India result in socialization, rather than in decoupling, as found in Brazil?

One possible answer is found in the distinctive process of transplantation experienced by India. India is a federated republic, and transplantation of the IRA model into the electricity sector initially occurred on the provincial level rather than at the national level. The first province to transplant the IRA model was that of Orissa. As was the case in Brazil, that transplant failed. When other provinces undertook similar regulatory reforms, their transplant epistemology was significantly informed not simply or even primarily by the idealized epistemology of the IRA model, but also by the actual social experiences of Orissa. Moreover, the lessons gleaned from these experiences were social and political in nature, not simply economic. This would have resulted in the transplant epistemology being significantly less closed, and certainly less comprehensive, than more typical telecom transplant epistemologies, which as we saw derive overwhelmingly from market concerns. When that weaker transplant epistemology comes into contact with the strong indigenous regulatory epistemology that is likely to attach to electricity, which as we saw is a basic need for effective social functioning, the socialization of the transplant system is likely to result.

## *2. Decoupling: double movement vs. mutual indifference*

As discussed above, when the regulatory epistemologies of both the transplant and the local environment are strong, or when both are weak, the result will likely be decoupling. When both are weak, this decoupling will likely take the form of mutual indifference, or irrelevance. But when both are strong, this decoupling will likely take the form of what Polanyi (2001) called a 'double movement'. Polanyi's double movement initially described a dynamic in which the commodification in one social sphere often triggered a symbiotic decommodification in some other social sphere. In the context of transplanted agencification, this suggests that when the transplanted epistemology and the local epistemology are both strong, the legalization induced by the transplant may often be compensated for by a greater socialization in some symbiotic social sphere.

A good example of this double movement is found in Murillo and Post's study (this vloume) of electricity and water regulation in Argentina. Murillo and Post look at this regulation as it manifests itself specifically in times of crisis. Both electricity and water are core subjects for agencified regulation, in that their public provision involves strong network effects characteristic of natural monopolies. Both are also core necessities for social inclusion, and thus are likely to be supported by strong local regulatory epistemologies. Murillo and Post found that after agencification, what ultimately emerged in Argentina was a distinctly two-tiered regulatory process in which IRAs 'are integral players in regulatory politics during "normal" times, [but] tend to be sidelined by the executive branch during contract renegotiations following crises, consulted with primarily for technical advice'.

In particular, they note that in contrast to the IRAs, the executive branch seems more political and polycentric: its foci include both long-term and short-term political concerns, and reflect a wider diversity of social interests (such as consumers) (cf. Prosser 2013). Notably, the executive is not necessarily more anti-industry than the regulator. It will often choose to subsidize providers in exchange for contract renegotiation, in order to maintain infrastructure capacity even in times of economic crisis. This is not an issue of capture. It is simply a reflection of the fact that the more deliberative and polycentric processes of the executive (see discussion above about how agencification is likely to work in more peripheral environments) make it better able to integrate regulatory response, particularly during times of crisis, into the larger political environment.

Another example of this kind of double movement is found in Urueña's study of water regulation in Colombia (this volume), where processes of what he called 'neo-constitutionalism' emerged '[as] a counterbalance to the unchecked expansion of neo-liberal policies'. The forum in which this counterbalancing takes place is the Colombian Constitutional Court, and the process he describes uses public interest litigation to construct a distinctly polyarchical and politically comprehensive dialogue that integrates the technocratic discourse of neo-liberal regulation into a larger and more polycentric discursive framework that includes other 'languages' focusing on rights and constitutional-democratic principle. As with electricity and water regulation in Argentina, the result was not to supplant technocratic regulation, but to supplement it, locating it within a larger framework in which its particular epistemology are counterbalanced by the emergence of other, more socially oriented regulatory forms:

> For the Court, the whole point is that, while regulatory practices may have [their] inner economic rationale (and we know now that this means a neo-liberal inclination), the goal of regulation is to guarantee the effectiveness of the welfare state. In this way, the Court tries to square the circle, finding a common ground [for] the neo-liberal rhetoric and its very own neo-constitutional interests.

A final example of this double movement is found in Chng's description of water-sector regulation in the Philippines (this volume). Here, the introduction of the IRA model into urban water regulation in Manila is described as catalysing large-scale institutionalization within the informal water sector. The informal water

sector is the principal source of water for Manila's urban poor—a sector of the population that due to corruption and lack of technical expertise has been unable to participate in the formal regulatory process. This new, informal water-regulatory institutionalization is more relationally structured, resulting in what Chng refers to as a *moral* economy, and thus consistent with habitation forms of regulation.

Notice, finally, that in all these examples of double movement, the double movement is eventually institutionalized back into the formal regulatory system. In Columbia, this is through the formal device of judicial review. In Manila, it is through the emergence within the informal regulatory sector of advocacy groups that participate in the formal regulatory apparatus. In Argentina, it is in the recognition of an informal division of labour in which the IRA is given regulatory priority in normal times, whereas the executive is given regulatory priority during times of disruption. In this sense, the double movement often appears as a prelude to socialization. One suspects that over the long term, even the strongest transplanted regulatory epistemology has difficulty preserving itself over time in the face of a robust indigenous epistemology.

Finally, a fourth possible response to the regulatory trilemma that is occasioned by the introduction of a legal transplant—in this case that of the IRA—is what we have been calling 'mutual indifference'. This occurs when both the regulatory epistemology of the transplant and the regulatory epistemology of the indigenous social regulatory sphere are both too weak to compel a response from each other. None of the studies in this volume seem to provide an example of this kind of response. This could be a reflection of the fact that these kinds of situations are likely to be quite rare. A weak transplant epistemology would suggest that the transplant had not been regarded as particularly important in the countries of origin, while a weak social epistemology would suggest that local society has not been particularly concerned with regulating behaviour in that particular environment either. It seems highly unlikely that anyone would dedicate the time and resources to transplanting a regulatory model into an environment in which neither the transplanting culture nor the recipient culture seems to have much interest in regulating. Moreover, where examples of decoupling do seem to occur, they tend to be short-lived (see, e.g, the experience of early IRA experiments in Orissa). One suspects that under normal regulatory conditions, instances of mutual indifference are relatively unstable, and will rapidly evolve into one of the other three regulatory trajectories.

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# 12

# The Regulatory State Goes South in the South

*Lant Pritchett*

This set of essays examines the 'regulatory state' approach—the use of the state as regulator of services produced by others rather than as a direct producer—and especially the notion of 'independent regulatory authorities' in the domain of infrastructure. The chapters in this volume cover a number of country settings (Argentina, Brazil, Colombia, Egypt, India, the Philippines) in at least one of three sectors—electricity, urban water and sanitation, or telecommunications.

As a general development economist, with experience both as practitioner (working inside the World Bank for a number of years, including as a co-author of the 1994 World Development Report on Infrastructure) and as an academic, but with no in-depth specialization in these areas, I think I could be most helpful in commenting on how these essays relate to more general issues in development thought and practice.

There are four big questions these essays raise. First, how do ideas move from one context to another? Second, related, what does one do when ideas fail? Third, can design mechanisms really resolve fundamental conflicts? Fourth, do rules matter in a deals world? I address three of these questions.

## I. Transplantation and how ideas move

The current fad in development is to proclaim that 'one size does not fit all'. Sometimes I am part of that fad, as my recent papers extend the sociologists of organizations concept of 'isomorphic mimicry' (DiMaggio and Powell 1983) and criticize 'transplantation' efforts at building state capability generally (Andrews, Pritchett, and Woolcock 2012).

This bitter taste with transplantation is grounded in legitimate disappointments. The 'structural' reforms intended to restore growth in Latin America led to the 'Lost Decade(s)'. The transition from central planned to market economies in the former Soviet bloc led to disastrous—and prolonged—falls in some (though not all) countries (e.g. Mukand and Rodrik 2005). The general failures of the state in Africa (e.g. Somalia, ex-Zaire) and South Asia (Pakistan, Nepal) and the inability to (re)construct states post-conflict in Afghanistan and Iraq naturally create disappointment. This bitterness is intertwined with a sense that reforms were not

home-grown but imposed by transnational actors—whether via direct conditionality as part of financing from the World Bank or the IMF—or, in the case of trade issues, as part of accession to the WTO. It is one thing to go to the doctor and take bitter medicine and get better, but quite another to swallow the bitter pill and have the doctor say, 'Well, that didn't work out.' These days President of the World Bank Robert Zoellick says that the World Bank should not be a 'purveyor of prescriptions but a seeker of solutions' (Zoellick 2012). Thanks a lot doc.

These essays generally have this distaste for 'transplantation', so let me at least push back a bit, in four ways.

First, 'one size doesn't fit all' trips nicely off the tongue but the elision from 'one size doesn't fit all' to 'anything goes' is easy—and stupid. Think about the phrase 'one size doesn't fit all' in a common context for size, like shoes. Actually, if I have a shoe that does fit one human's foot it is actually pretty close to the right size for another human. Starting from the size that fits *someone* well and tinkering, rather than imagining a shoe a mile long or a millimetre long, seems common sense.

Second, the basis of all modern civilization is literally transplantation, as humans consciously moved plants around the planet and purposively adapted them to their climate and conditions. Every modern human being eats the products of transplanted foods every day of their life. There is of course dumb transplantation that does not actually understand organic processes and cuts a tree off at the tree level—without roots—and replants the tree and expects it to grow or cuts a rose and expects a rose garden. Not all plants will grow equally well in all conditions, but failure of dumb transplantation is not because soil and climatic conditions weren't similar enough—it was that an organic whole was not transplanted.

This is, of course, the key question raised by these essays: 'What are the conditions in which transplantation of an organic whole, plus some time of selective adaptation to local conditions, will work?' Certainly transplantation of institutional and organizational forms was sometimes dumb transplantation (not understanding the necessary organic properties of institutions) and sometimes the conditions just were impossible (roses to Antarctica) but this does not make transplantation per se a doomed endeavour.

Third, innovations really do happen, and organizations really do learn and when it is important those lessons diffuse across countries. There are no direct competitions across tax collection organizations or regulatory authorities or central banks. However, one arena in which country organizations come up against each in direct competition is war. You really can tell who has more capable armed forces. As technologies of warfare have changed military organizations have changed to adapt their structure and organization to those technologies. Those that did this earliest and best prevailed—and then others scrambled to catch up. At one stage of history the world was full of Prussian military advisers training officers in the new military organizational techniques. This cuts both ways as the old saw goes that armies go to war prepared for the previous war and if the technologies, tactics, and organizational forms are not relevant, even the most 'capable' armies lose to less 'capable' ones. There is no army that can fight the war the US Armed Forces want to fight

and prevail. However, this has not prevented long quagmires and humiliating losses in places like Vietnam and (potentially) Afghanistan.

This illustrates the need for both transplantation and adaptation to context. But the adaptation to context never involves starting from scratch and ignoring the history of success and failure.

Fourth, the search is really for *principles* that are more robust than the specific *procedures* or *practices* that embody them. The *principles* hopefully do transplant in ways that instantiations of those principles into specific contexts may well not.

For instance, it is a *principle* that people will invest more for the future when they are more confident they will reap the rewards of their current sacrifices and efforts. It is also a fact, if not rising to the level of principle, that people prefer to pay less than pay more. These two simple principles mean that while I would love for you to invest today and pay you less than your cost tomorrow, this isn't going to happen repeatedly: 'Fool me once, shame on you, fool me twice, shame on me.' This means that mechanisms of *pre-commitment* will be needed to induce investment as *time consistency* is a deep, and analytically common, problem.

What do we make of it when someone says, 'Hey, we have invented this mechanism of pre-commitment and it is really working well to deliver the goods for us?' The temptation to transplantation is powerful, and legitimate, as maybe they really have invented a better mousetrap and beating a path to the Prussian's door is sometimes a great idea.

What is needed is more knowledge about the principles of successful adaptation itself. That is, what do we know about how to take what has been demonstrated to work elsewhere and make it work here? Certainly, understanding the differences in context is important: are the underlying sources of difficulty with *pre-commitment* the same in your context as my context? Are the mechanisms of reducing uncertainty from lack of pre-commitment that worked for you truly available for me? But I suspect there is more to it than that. I suspect that there are actually principles of the *process* of transplantation itself that is more likely to make it work than not. I wish I knew what those are.[1]

My argument is that the pushback against transplantation or isomorphic mimicry or 'one size fits all' is legitimate, but can also go too far.

This sense of bitterness is perhaps inevitable. Divorce, even when necessary, is often an ugly process as it involves the unravelling of commitments. All of these essays have a certain ring of nostalgia or wistfulness or perfectionism. That is, the main 'problem' examined is the transplantation of the 'regulatory state' and its vectors. Overall, this struck me like a close examination of the ways in which divorce lawyers are creepy. I would guess there are few, if any, examples of the transplantation of ideas by the World Bank or others into well-functioning systems that people were happy with. Most of these papers seem to have a first-hand grasp of the *current* issues with transplantation but have only read about at a distance the *past* problems that led people down the path to transplantation. Every now and

[1] I have some guesses but at this stage they are observationally informed conjectures, not even well-formed hypotheses, so I won't share them.

again it is mentioned that things were terrible with the old water utility in Manila or that the electricity sector in India is in a complete shambolic mess or it was the fiscal crisis that led to the need for private investors in Brazil, but this always seems distant compared with the problems at hand. Overall, these papers give a nearly completely unsympathetic treatment of the overall process that drove the adoption of the regulatory state approach in the first place.

In particular, there is a certain 'perfectionism' that runs through these papers perhaps best expressed in the chapter about telecoms in India. Read this passage:

> The process of liberalization implemented since the early 1980s has had both positive and negative effects. It has led to dramatic increases in telephone connections from 14.9 million in 1998 to 420 million in 2009, significantly lower tariffs and widespread availability of cellular service. However, rural India still lags behind in the spread of telecom services. And although the stranglehold of the DoT has been considerably reduced in the wage of selective corporatization, critics note that the predatory behaviour of the private sector is equally dangerous for consumers.

On one level this seems very academic and even-handed: 'this but that'. But in the effort to be even-handed the author misses the point completely. In just 11 years, 400 million people gained access to telephony, compared with just 14 million in the entire 50-year period from Indian independence. That is just fantastic. In the peak of expansion more people were added to telephony in a month than in the entire history of regulation under the DoT. Yet the author seems to give credence to critics that the private sector is 'equally' dangerous. No. This is just wrong. Perfectionism as criticism, that rural India 'lags' and the private sector may have 'predatory behaviour' is like carrying around a tree in front of you for fear of actually seeing the forest.

When I say the overall treatment here of the general approach to the regulatory state is 'unsympathetic', a case in point is the discussion of water and electricity privatization in Argentina. Here, there is solid empirical evidence about the gains from this privatization exercise—including reduced child mortality from better water supply (Chisari, Estache, and Romero 1999; Galiani, Gertler, and Schargrodsky 2005). Sure, it wasn't perfect, but parts of it were pretty good. Then, in the course of a financial crisis—which had nothing fundamentally to do with these privatizations—lots of tragic things happened. People lost their jobs, people lost their savings, and companies went bankrupt. But one of the things that happened is that these electricity and water companies had their assets expropriated. Companies that had acted in good faith and who had invested in reliance on Argentine law had their assets wiped out by the deliberate action of the executive. One could read this paper and not know that at all. One could think companies were negotiating for higher rates in the 'business as usual' ways in which companies negotiate for higher rates. But these were really pretty desperate attempts to salvage something out of a completely terrible situation—and the fact that most just walked away is not surprising.

Overall, I think the most negative assessment of the approaches tried is that they did not solve the problems they hoped—and were perhaps hyped—as solving. But

they did not create the problems. And perhaps nothing is going to solve the problems.

## II. What can mechanism design do?

In the late 1980s, Jean Tirole had a facetious Folk Theorem (the actual Folk Theorem had just stopped being 'folk' a few years earlier when it was proven). His theorem was that the optimal degree of state ownership in a modern economy was (near) 100%. His reasoning was simple and compelling. In modern firms there is diffuse ownership (shareholders) and hence professional managers make all the key decisions. These managers operate and make decisions—including creating incentive mechanisms for the rest of the organization—based on the incentive mechanisms designed by the shareholders. In principle, any incentive mechanism that can be created for the managers of a private firm can also be created for the managers of a public firm. Therefore, any incentives markets can create—including bonuses, promotions, stock options, performance incentives—the state can also create and hence the state can do no worse than the market. But, the state can also incorporate into the incentives of the managers other objectives like properly pricing environmental externalities or addressing poverty concerns. This makes outcomes more efficient because, rather than responding to private costs and benefits, managers can face incentives related to social costs and benefits. And, of course, the state can structure the market however it wants and so can have multiple firms in the same domain competing to garner the benefits of competition and creative destruction.

Of course, this Folk Theorem was facetious as it was postulated on the brink of the collapse of the Soviet Union. The articulation was mean to ask: what is wrong with this logic? In particular, one thing that was clear about the Soviet economies was not just that they were terrible at economic efficiency or innovation—that was perhaps to be expected—but that also they were much, much worse on the environment than were capitalist firms. Not only did state owned firms not internalize externalities, they were actually *less* responsive to environmental (and other) regulatory concerns than private firms in market capitalism.

Part of the big question is how much of outcomes is due to policies or design mechanisms that are potentially changeable in the short term and how much of outcomes is determined by the combination of deeper political and social structures and by the fact that problems are hard. The 'institutions rule' view suggests that policies are mostly epiphenomenal and that success or failure is deeply rooted.[2]

In this sense, a fair amount of the debate about the structure of arrangements for infrastructure was driven by problems that alternative arrangements for infrastructure really could not solve. Let me illustrate this with examples from a sector the papers did not cover: the construction of inter-urban highways. Here, the arguments

[2] I argue this is a pretty fair reading of say Acemoglu and Robinson (2012) or North, Wallis, and Weingast (2010).

for private-sector engagement were always a little strange as they were mostly dancing around the point that they were really driven as an alternative mode of financing.

Let's say the government of country X wants to build an inter-urban highway. Governments nearly always contract the actual construction out to the private sector, so in terms of the 'efficiency' of the private sector this can be achieved through properly structured contracts and bidding. If the government wants (for efficiency or other reasons) to make the road a toll road it can do so and collect the tolls. There is no theory of incentives that suggests high-powered incentives are needed to be efficient at toll collection. So the natural thing would be for the government to borrow money and then either repay the loan out of general tax revenue or collect tolls to cover (or more than cover) the cost of the highway.

The arguments for the high-powered incentives created by transferring *ownership* of the highway and making a private corporation the residual claimant on the road always seemed intellectually forced. It was never clear how arrangements like BOT (Build Operate Transfer) or BOOT (Build Own Operate Transfer) were going to produce 'efficiency' in a routine, non-innovative, plain vanilla, industry like a toll road.

But now, suppose country X has structurally deep fiscal problems; structurally deep in the sense that the politics of revenue collection (resistance to taxes) and the politics of demand for spending (resistance to cuts in spending) just don't line up. Then country X will have a substantial risk premium to its borrowing and lenders (whether domestic or foreign) are nervous (rightly) about repayment. In a time of a negative shock these fiscal constraints can be very tight and risk premium can be very high.

Now the BOT mechanism makes sense. There is a bundled contract between the private-sector contractor and the government wanting a highway. The contractor borrows the money and the interest rate is built into the agreement about the amount of toll revenue the contractor can keep. If the contractor can borrow in the corporate bond market more cheaply than the government can issue sovereign debt then this contract can make sense even in the absence of any 'real' productivity gains or innovation from the private sector.

However, this mechanism only makes sense if the government's credibility about allowing toll collections of sufficient magnitude is more reliable than the government's credibility about its financial obligations. After all, there is a 'real' side risk premia to the contractor that once assets are constructed the government will act in ways that either de jure or de facto renege on the agreement and don't allow the contractor to make the money back. So if the deep-seated problem is that the state has a voracious appetite for revenue and no ability to pre-commit itself to not renege on contracts then the risk premium on a BOT contract would be the same—or higher—than on borrowing and the advantage is nullified.

On one level the creation of the apparatus of the 'regulatory state' could just be an attempt by a government that is fiscally strapped to signal that it will behave itself on 'real' contracts even if it is not trusted by financial markets on financial contracts. This could work, especially if the signal is 'true'—that is, the government

really is to be trusted. This probably was the case, for instance, in Colombia. The government really was to be trusted on 'real' contracts even when the fiscal side was a mess.

But the interesting cases are those like India. In India the overall government does not have a high-risk premia. For a variety of reasons the cost of financing of the Indian government has been cheap—even when it is running big fiscal deficits. But the Indian government (both central and the states) actually has trouble making 'real' commitments. That is, the Indian government is more likely to use a regulatory apparatus to egregiously renege on commitments to the private sector that it is likely to renege on financial instruments (as reflected in the perceptions of lenders). In this case the BOT model makes no sense at all as the government really should just borrow the money and contract construction to the private sector based on bidding for the construction itself without bundling it with financing. In fact, bundling the real side risk with financing makes the overall project more expensive—and hence less fiscally sustainable as the real side risk premium would have to be built into allowed tolls and *ex post* consumers will object to the high costs of service.

But the main point is whether mechanism design matters at all. The problem is that the state is the state and, as the state, has two great difficulties as a contracting partner.

First, what it means to be the state is to have monopoly on legitimate coercive violence. The state has all the guns. Which means when push comes to shove, the private sector gets shoved and cannot shove back. Mechanism design can try to create spaces and fora in which the private sector feel its interests will be represented in a dispute—like 'independent' regulators. But the power of the 'independent' regulators depends on the good will of the state as it can always be taken back. As many of the essays show, particularly the essays on the Indian judiciary and the legal movement in Colombia, the decisions of regulators often end up in court. Courts can easily (if not arbitrarily) reverse whatever agreement the private sector thought it had with the government and the 'independent' regulator. As the essay on the Argentine situation post-crisis showed, the decisions about contract renegotiations depended on the personality and politics of the provincial governor. This reveals what a thin façade the law and the 'independent' regulators really were, and how, once assets were sunk and immovable, the state could be as unreliable a partner as it chose to be.

The second element that makes the state a difficult contractual partner is that private firms have to engage with the state on many levels, so even if an 'independent' regulator creates a desirable design mechanism to limit arbitrary decisions on specific items, like rates for power producers, the state can still do so many other things to limit profitability. The state controls the levers of taxation and can always construct a tax that produces the same effect as rate limitations. The state also controls a variety of other regulatory processes—labour, environmental, land use—such that if it chooses to 'punish' a private-sector firm for not being a docile partner it can do so within the bounds of the law—and it controls the law. The essay on the Argentine negotiations shows that having other assets at risk led investors to be less

likely to walk away. A plausible interpretation of that is that the investors feared that lack of cooperation on one front would lead the state to go after other assets of the investors.

As the essay on Indian electricity regulation suggests, the outcome of low rates for farmers may be politically overdetermined and clever mechanism design cannot force the system to make political choices that the fundamentals of the politics push for.

It is possible that legal mechanism design matters most only where it matters least—where things were likely to go well anyway and where design matters most; where things are going badly, it matters least as it cannot fix the deep-seated problems.

## III. Rules in a deals world

A rule is a mapping from states of the world to outcomes: for example, if the ball is caught in the air then the batsman is out (cricket); if the ball crosses the plane of the goal line within the net it is a goal (football). But to be rules they also need to specify the mechanism for the adjudication of what that state of the world 'really' is for purposes of the game. This adjudicated reality may, or may not, have any close relationship to common-sense notions of what the state of the world 'really' is. A baseball umpire was once asked how he could tell at such high speeds which pitches were balls and which strikes. His response was 'until I call 'em they ain't nothin'', which is a sophisticated understanding of the socio-political construction of reality. For the purposes of the game he declared the juridically relevant state of the world and if that happened to differ with what others perceived as the 'true' state of the world, they could boo or hiss or come out of the dug-out and complain but the relevant juridical state of the world of balls and strikes is not in the physical position of the ball but in the head of the umpire.

This creates the very real risk that those with a financial stake in the outcome of games will get to referees and induce them to shade their decisions towards certain outcomes (this is obviously most risky when betting is against a spread so that a referee can change the spread without changing the win-loss outcome).

Which leads to the joke about interviewing accountants for a job. The interviewer asked the first candidate what two plus two was and the response, 'I think it is five.' Next candidate. 'What is two plus two?' 'Four.' 'Are you sure?' 'Yes, absolutely, two plus two is always four.' Next candidate. 'What is two plus two?' The candidate gets up, closes the door, and lowers his voice. 'What do you want it to be?'

I have recently completed a study which compares two measures of the 'investment climate'. The Doing Business survey hires experts to assess how much time and expense compliance with various regulatory obligations would take *if firms complied with the law.* The Enterprise Surveys ask firms about their own experiences. For three indicators: time to get an operating licence/start a new business, time to get a construction permit, and time to get imports through customs, these two sources have estimates of the days to compliance. This means that, for instance,

we have an estimate of how long it would take to get a construction permit (for a typical structure for a typical firm) for lots of countries and for many of those same countries we have responses from lots of firms that got construction permits about how long it took them. Our study comes to three conclusions (Hallward-Driemeier and Pritchett 2011).

First, on all three measures there is almost zero correlation across countries between the Doing Business measures of time to legal compliance and the Enterprise Survey reports of actual times. Countries that differ by 100 days in the Doing Business legal compliance time to get a construction permit differ by only a few days in actual reported times.

Second, this lack of correlation is driven by the fact that, especially at higher levels of legal compliance times the actual reported times are much, much shorter. For instance, in Brazil in 2009 the Doing Business survey reported that it would take the typical firm 411 days to get a construction permit for its reference structure. In that same year, the 262 firms who reported they had undertaken construction reported that it took an average of 85 days. The gap between the time experts report legal compliance would take and firms reported it actually took them is 326 days.

Third, there were massive differences in the times firms in the same country reported that compliance took them. In Brazil there were 262 firms who reported construction activity and the 10th percentile (the 26th fastest time) was only 12 days. The 90th percentile (the 236th slowest firm) took 180 days. So, how long does it take to get a construction permit in Brazil? Two weeks? That is what the fast firms report. Six months? That is what the slow firms report. The answer almost certainly is that 'it depends'. It depends on lots of things, including probably who you are and what you do to influence the decisions.

This means that differences in the 'rules' across countries appear to matter less than differences across firms in the same country. For the 50 countries where we had more than 30 firms that had undertaken construction, the average spread between the 10th percentile (fast) and 90th percentile (slow) firms was 171 days. So, the fast firms reported getting construction permits almost six months faster than the slowest firms *in the same country.* The entire range of average reported times to get a permit was only 154 days. So the *typical* difference within the same country across firms is larger than the *maximum* difference across countries. Crudely put, it seems to matter more *who* you are than *where* you are.

Let me conclude with a prosaic example and a question. A recent study of the process of a simple administrative procedure like getting a driver's licence in New Delhi, India, found that when people getting a driver's licence hire a tout only about 10% of them actually took the legally required driving examination before getting a licence (Bertrand et al. 2007). So the administrative process declared the 'state of the world' was that they had the legally required competence to operate a motor vehicle even though this was not assessed (and, as the study shows, was not 'in fact' true as a neutral assessment found that two-thirds of those who got a licence by hiring a tout could not drive at all). In contrast, those who did not hire a tout had to take the driving examination and most of them failed. So in India, a state

often rated highly for its 'bureaucratic quality' or 'state effectiveness', even simple administrative processes like getting a driver's licence or a passport or eligibility for social programmes are completely a 'deal' in which the 'facts' of the matter in the rules do not matter but facts that should not matter, like payments or political connections, are all that matter.

Which leads to my final question: what kind of 'regulatory state' is possible in a state that cannot give a driver's licence without corruption? The question is not rhetorical. Perhaps some decisions can be insulated from overall state decrepitude—the spread of independent central banks that have been allowed to operate as independent is an example. But if the deep underlying problem is a government administrative (and juridical) apparatus that expects deals then constructing clever rules and mechanisms for the selective enforcement of those rules—such as 'independent' regulators—may be the proverbial deck chairs on a sinking ship. Perhaps either more radical proposals (e.g., moving to life boats) or more pessimism (until the big hole is fixed—and it may not get fixed—the ship is going to sink) are in order.

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# 13

# The Regulatory State and the Developmental State: Towards Polymorphic Comparative Capitalism

*David Levi-Faur*

## I. A commentary

This collection brings together highly useful contributions on state adaptation in the 'global South'. A new administrative layer of the modern capitalist state is now being nurtured partly as a substitute, partly as an extension and partly as a refinement of older administrative structures. The new reforms privilege regulatory actors, institutions, and instruments. States increasingly invest in regulation and, paradoxically, the neo-liberal age is also the age of the regulatory state. Instead of deregulation we have more regulation, often regulation-*for*-markets and regulation-*for*-capitalism (Levi-Faur 2005). This holds both to the 'North' and the 'South' as the data on the global diffusion of regulatory agencies demonstrates most clearly (Jordana, Levi-Faur, and Fernandez 2011). To better understand the regulatory state we need to contextualize it historically. We also need to better place it within the theory of the capitalist state in general and the capitalist states of the 'South' in particular. Taking the rise of the regulatory state as an important signifier of the current order, it makes sense to ask what is the regulatory state and to what extent it represents a break from the past? The aim of this commentary is hence to extend the discussion that was offered by the contributors to this volume. It offers a critique of the tendency to see the regulatory state and the developmental state in antagonistic relations as if the regulatory state replaces the developmental state. At the same time, it offers a definition of a regulatory state: a definition that may travel backward and forward, beyond our era; one that will correspond with the theory of the state in general and with the state of the 'South' in particular. To do so I advance a polymorphic approach to the state—an approach that theoretically allows for the co-expansion of the developmental state and the regulatory state.

A certain confusion, silence, and ambiguity surround the issue of the relations between the developmental state and regulatory state. The origin of the confusion around their relations may be traced to some of the founding scholars of both the developmental governance and the regulatory governance fields. Thus, in the

developmental field it was the late Johnson (1982) who first coined the notion of the developmental state and first contrasted it with the regulatory state. In the field of regulatory governance, it was Majone (1991, 1994, 1997) who in the 1990s practically reinvented regulation as a European political science enterprise. For Majone, the rise of the regulatory state was the decline of the positive interventionist state. Johnson's and Majone's works were, and still are, highly influential in their respective fields. The fields of public policy, political economy, and developmental studies would have been considerably poorer without their contributions. Nonetheless, the contrast they draw between the regulatory state and the developmental state and their understanding of the regulatory state as a minimal and liberal state hinders further theoretical development and exchange between regulation and development scholars. Some regulatory states can be minimal. Others can be highly authoritative and even despotic. The model of regulation that is currently promulgated in the North and in the South is highly interventionist, not only because in social and risk arenas but also in the economic arenas as well (Levi-Faur 1998). In financial arenas, where deregulation ideology thrived, the reverse trend is now clearly visible. In short, we live in the age of the regulatory state. Regulation and capitalism march in tandem even if this is somewhat ambiguous and little understood. Misperceptions are perpetuated by the walls that separate the scholarly communities of regulation and of development.[1] Discussing the regulatory state and the development state together allow us to conceptualize them as a configuration of the capitalist state, and therefore about market-building, market nurturing alongside state-building and state nurturing.

## II. The origins and diffusion of the concepts

The concept of the regulatory state was for many years a label of the US administrative state.[2] It was used in passing in the interwar and post-war periods to indicate the growth of the US administrative state. The earliest reference that I have found to the term is in a paper by Holmes (1890) with the title 'State Control of Corporations and Industry in Massachusetts'. The term continued to be used as a label of the administrative state in the interwar period but was not given systematic treatment. It appeared prominently for the first time in the title of a book written by Anderson: *The Emergence of the Modern Regulatory State* (1962). Anderson analysed government and bureaucratic expansion via specialized independent agencies such as those that originated in the US progressive period. He did not, however, define or conceptualize the term 'regulatory state'. The term was diffused very slowly and was used mainly by scholars of US administrative law and

[1] Johnson clearly acknowledges that regulation is an instrument of the developmental state. Similarly, Majone certainly had development in mind when he studied the forms and logic of the European integration process. Yet the scholarly traditions that they launched rarely meet (to assess the extent of the divide, just cross-reference the authors' names, 'Majone' and 'Johnson', in any citation database).

[2] This part of the commentary draws and builds on Levi-Faur (2013).

US public administration; but even in their work the term appeared in the subtitles rather than the main titles (e.g., Sunstein 1990; Rose-Ackerman 1992). By the end of the 1970s, the regulatory state was portrayed as a command-and-control state or as a hierarchical and progressive state, which was born—at the federal level—sometime towards the end of the 19th century as a result of political struggles by popular movements against big business. A change in the fortunes of the term followed the publication of the fourth edition of Seidman and Gilmour's *Politics, Position and Power*: *From the Positive to the Regulatory State* (1986). Like his predecessors, Seidman does not define the regulatory state, but there is something new in the way he presents it. His regulatory state is not connected necessarily with the expansion of federal administration in the progressive period, nor is it the product of a social movement fighting big business, but it is closely connected with outsourcing and privatization. Seidman uses the term to make sense of US President Ronald Reagan's 'revolution'. Seidman's conceptualization of a paradigm change—a transition from a positive state to a regulatory state—had captured the imagination of Europeans rather than Americans. While clearly originating as a concept in the US, the term gained currency and matured in European political science only in the 1990s. Indeed, it is more popular nowadays in the scholarly world outside the US than in its country of origin.

The origins of this displaced popularity can be found in a series of path-breaking papers by Majone (1994, 1997). Majone set the agenda for the study of regulation first in the EU and later well beyond it, making the concept of the regulatory state for the first time common currency in social science discourse (Loughlin and Scott 1997; Lodge 2008). In his 1997 paper 'From the Positive to the Regulatory State', Majone explicitly adopted Seidman's subtitle of his book as the title of the paper (in hindsight, this move signifies the Europeanization of the regulatory state). Majone's conceptualization of the regulatory state is similar to Seidman's: limited government by proxy—a state that puts administrative and economic efficiency first. Majone does not define the notion of the regulatory state but instead does an excellent job of characterizing the politics of regulation and of the regulatory space. A new advance came in the early 2000s when Braithwaite coined the term 'new regulatory state' (Braithwaite 2000). Braithwaite's new regulatory state is contrasted with the old one. The assumption is that the regulatory state is older than the 1970s. Yet we have seen changes since the 1980s. Braithwaite's new regulatory state uses more steering than rowing and is contrasted with the night-watchman state on the one hand and the old direct-control and hierarchical regulatory state on the other. The new regulatory state differs from the old one in its reliance on self-regulatory organization, enforced self-regulation, compliance systems, codes of practice, and other responsive techniques that substitute for direct command and control. It is therefore concerned with the decentralization of the state, 'rule at a distance', ranking and shaming, and other forms of soft regulation (Braithwaite 2000). Braithwaite's conceptualization reminds us that there was an old regulatory state, which is identified with the centralization of government and command and control (see also Moran 2000, p. 6). This understanding of the regulatory state as decentralized is currently dominant in the literature of regulation. More recently,

Leisering (2011) applied the term 'new regulatory state' to the expansion of state regulation from the economic sphere to the social sphere. Still, when scholars use the notion of the regulatory state nowadays they mean the regulatory state in the age of governance, or the 'new regulatory state' in the same manner as has been suggested explicitly by Braithwaite (2000) and more implicitly by Moran (2000), Seidman and Gilmour (1986), and Majone (1997).[3] I expect that this 'new' regulatory state will not be that new within a few decades, and therefore the question is how we can define the regulatory state in a way that will capture both the old and the new from our vantage point but also from the point of view of one or two decades hence.

The most straightforward definition of the regulatory state would define it with reference to its instruments of control. It is a state that applies and extends rulemaking, rule monitoring, and rule enforcement either directly or indirectly. This definition reflects an understanding that human behaviour is rule-based, that law is an expansionary project, and that liberal democracy is about the expansion of rules of conduct of both the regulatees and the regulators. As an institutionalist, my understanding of rulemaking goes beyond coercion and towards compliance with collective and individual rules. Rulemaking, rule monitoring, and rule enforcement can be undertaken directly via the bureaucratic organs of the state or indirectly via the supervision of another organizational regulatory system (meta-regulation). The purposes of regulation, the procedures of rulemaking, the types of monitoring, the agents of enforcement, the moral judgements, and the day-to-day relations with regulatees vary from one regulatory state to another and from one period to another. This definition permits the regulatory state to promote equality or economic growth, to emphasize either efficiency or efficacy, to enslave or to empower, or all of these at the same time. It does not require a preference for or an inclination towards either judicial or quasi-judicial mechanisms of conflict resolution. The definition is agnostic about the substantial centralization and decentralization of the state; it is also agnostic about the extent of delegation employed. It does not suggest that regulatory agencies are unique to, or the *sine qua non* of, the regulatory state. The defining feature is the capacity and preference for governing via regulation, that is, with rules rather than violence, rules rather than direct taxing, and a delegation of functions via rules instead of direct service provision. Nonetheless, the definition does not suggest that the regulatory state necessarily involves regulatory agencies, or that it is either liberal and progressive or illiberal and repressive. There are different types of regulatory state, not least because all states are regulatory to some degree. Unlike Majone's, this definition does not suggest that the rise of regulation requires, or is the result of, the decline or stagnation of fiscal transfers.

When compared with the regulatory state, the concept of developmental state is relatively new. It first appeared in 1982 in Johnson's *MITI and the Japanese Economic Miracle: The Growth of Industrial Policy, 1925–1975*. Johnson introduced

[3] Scott (2004) coined the term 'post-regulatory' state, both to capture the 'new regulatory state' and to introduce Foucauldian insights to the study of the regulatory state.

the concept of the developmental state to distinguish between different types of capitalism and to challenge conventions on the role of the state in the economy (Öniş 1991). The Japanese developmental state, Johnson argued, was a central actor in shaping the country's 'economic miracle'. In so doing, he was challenging laissez-faire accounts, which either tended to minimize the role of the state and politics in development or made them a major obstacle to growth and development (Johnson 1982, 1999). The developmental state was distinguished from the regulatory state on the one hand and the 'plan-rational' Soviet-type state on the other. The term was adopted at the time enthusiastically and provided a framework for exchange on the benefits of state support of the markets. No more states against markets but state with markets as the way forward. The model was Japan and later on other East Asian countries where capitalism was nurtured and guided by the state. While the generalizability of the model was always contested, similar interpretations of historical origins of capitalism in the US as well as in Germany provided support to the developmental state model extending and assessing its validity in Latin America and Africa (Evans 1995), Israel (Levi-Faur 1998A; Krampf 2010), Ireland (Ó Riain 2004), under conditions of democratic rules and with reference to the relations between law and development. More recently a flexible, governance-oriented form of regulatory state is being explored (Ó Riain 2000; Block 2008; Trubek 2011).

The idea of a contrast, even antagonistic relations, between the developmental state and the regulatory state and consequently between Japan on the one hand and the US on the other, derives from the basic distinctions made by Johnson:

> These two differing orientations toward private economic activities, the regulatory orientation and the developmental orientation, produced two different kinds of government–business relationships. The United States is a good example of a state in which the regulatory orientation predominates, whereas Japan is a good example of a state in which the developmental orientation predominates. A regulatory, or market-rational, state concerns itself with the forms and procedures – the rules, if you will – of economic competition, *but it does not concern itself with substantive matters* . . . (Johnson 1982, p. 19; emphasis added)

What Johnson initially contrasted in a static, monomorphic manner as two opposite forms of state was later portrayed by Majone as a *shift* from one type of state to another. The age of the rise of the regulatory state, so the argument goes, is therefore the age of the decline of the positive-developmental state. The rise of the first and the decline of the second, it is now widely held, are in turn causally associated with the rise of neo-liberalism and the belief in the superiority of markets as mechanisms for maximizing the public good.

In Johnson's formulation, Japan is a developmental state that prioritizes development and where the bureaucracy can use discretion administratively to 'guide' business. The US, by contrast, is a regulatory state that emphasizes rules and procedures and limits the administrative capacities of the bureaucracy. Note that Johnson understands rules and regulation in a procedural rather than a substantive sense. The content of the rules is ignored, which therefore limits—by definition—

any in-depth and extensive understanding of the regulatory state and its transformative capacities.[4] In Majone's formulation, the post-war order was characterized by a positivists-interventionists state. Europeanization, neo-liberalism, globalization, and learning lead us away from the positive state towards a regulatory state (Levi-Faur 2007).

There are three problems with this conceptualization of the regulatory state. First, to imply that the rules in rule-governed states do not have a purpose or do not reflect politics, interests, ideas, and power is problematic, because procedural rules, or the rules of the game, are purposive in shaping the results and determining the winners even if they do not name the winners. Regulation includes procedural rules, but these are neither the most numerous nor the most important. While there are systematic attempts to depoliticize regulation in general and the rule of procedures in particular, these attempts are at best unconvincing. One can regulate *for* development, and such regulations can be highly transformative and highly intrusive. Intellectual property regulations base their contested legitimacy on their developmental effects (Drahos 2010). They are good examples of highly intrusive and highly transformative regulations that create winners and losers at the level of the corporation as well as at the level of the global division of wealth. Changing the procedure changes the results; and to the extent that this is the case, procedures are not neutral. In addition, only a small number of rules in the regulatory state are procedural. Most are purposive. In an era of regulation, the meaning, scope, intensity, and purpose of rulemaking processes and institutions deserve more attention than is generated by the current juxtaposition between the regulatory state and the developmental state.

Second, the juxtaposition between the rule-governed state and the purpose-governed state implies that purpose-governed states do not or cannot use rules in order to advance their purposes. For this reason it does not make sense to use it. The point was ignored, first by Johnson, and later by Majone, and their followers. The juxtaposition was useful as a metaphor to convey the differences between the US and Japan and, by extension, the differences between Anglo-Saxon and East Asian capitalism. The differences between countries are real; but the differences between forms of developmentalism cannot be captured in terms of the intensity of rules in the US or the centralization and flexibility of policymaking capacities in East Asia or Continental Europe. The reason is simple: there is nothing in the rule-orientation of the US that prohibits developmental policies, and there is nothing in East Asian developmentalism that prohibits more rule-based governance. Perhaps this was why Evans's path-breaking study of the developmental state contrasts it not

[4] To better understand the origins of this distinction and gauge Johnson's very narrow view of regulation and the rulemaking process, I returned to his book. I found that his interpretation rests on Bertrand de Jouvenel's distinction between a 'rule-governed state' (*nomocratic*) and a 'purpose-governed state' (*teleocratic*). De Jouvenel, was one of the founders of the economically liberal international Mont Pelèrin Society (Mirowski and Plehwe 2009). Johnson was drawing on him indirectly, referring to Kelly's (1979) paper in a special issue of *Daedalus* on 'The State'. See also Plant (2009), who discusses these distinctions in Michael Oakeshott's work.

with the regulatory state but with the predatory state (exemplified by Mobutu's Zaire).

Third, the suggestion that one can capture the 'essence' of the state by capturing its highest priority assumes that the state has a highest priority and that this highest priority marginalizes other priorities. But then what if the state's priorities are multiple? What if there is no highest priority and that instead there are multiple priorities which mutually support each other rather than contradict and compete with each other? What if the secret of success of states is not a focus on one priority but the ability to achieve few goals at the same time, for example, achieving development and social welfare? Indeed, many would agree that the rise of Japan at least until the Second World War was highly correlated with a successful tie between the pursuit of national power and national plenty.

As an alternative to this conceptualization, I would like to push forward a polymorphic approach for the state, one that allow us to leave open, for empirical research, the issue of the relations between the regulatory state and the developmental state. Far from being singular and centralized, Mann writes, modern states are polymorphous power networks stretching between centre and territories. In chemistry, a polymorph is a substance that crystallizes in two or more different forms, usually belonging to different systems. The term conveys the way states crystallize at the centre—but in each case at a different centre—of a number of power networks (Mann 1993, p. 75). While some of the morphs of the state represent 'higher-level crystallization', others represent 'lower-level crystallization'. The relations between the different morphs, Mann tells us, are not necessarily diametrically opposed, nor are the relations necessarily hierarchical. This makes sense only if we consider the many adjectives of the state that we use: democratic, weak, corporatist, city, activist, predatory, crony, administrative, pluralist, corporatist, contract, neo-liberal, and social-democratic. Such a plurality can signify confusion but it can more fruitfully signify the polymorphic nature of the state. Polymorphic analysis allows for a diversity of state forms within a single polity. It also allows us, directly on the basis set out by Mann (1993), to conceive of the capitalist state as higher form of crystallization than other morphs such as the regulatory state and the developmental state. None of this would seem strange either to Knudsen and Rothstein (1994), who imagined the state as a coral reef, an institutional complex shaped by deposits over a long period, or to Caporaso (1996), who analysed the EU polity in the light of three stylized state forms: the Westphalian, the regulatory, and the postmodern. Thinking of both the developmental state and the regulatory state as forms of the capitalist state will also allow us to examine the effects, limits, and paradoxical outcomes of neo-liberalism not as a transition from a Keynesian to a neo-liberal form of state but rather as the neo-liberal impacts on the regulatory state and on the developmental state. It may also help us to understand the difficulties and pains of transplantation as the challenge of adjusting developmentalism, better regulation, and polycentred governance in authoritarian settings (Ozel 2012; Kayaalp 2012; Jarvis 2012; Dubash and Morgan 2012; Dowdle 2013 (this volume)).

## III. Concluding remarks

This commentary has advanced three main assertions. First, that the developmental and regulatory states are or at least can be interdependent forms of governance. We need to ask how the regulatory capacities of the state promote development, and how does development allow or prohibit the extension of the regulatory state. We need to think on varieties and hybrids of both types of state rather than only on the tension between them. Developmentalism as a feature of institutions (as captured by adjectives attached to 'state', 'regime', and 'governance') reflects the bias of these institutions towards growth and sometimes also their credible commitment to progress. States, of course, vary in their commitment to development and in their capacities to promote development. They also differ in the types of development that they pursue and, of course, in their capacities to deliver growth and in the types of growth they pursue (e.g., sustainable growth, steady growth, balanced growth, or indiscriminate growth). Yet, to be successful they all need to be developmental in the sense that few things are as central to the stability, legitimacy, and resilience of the capitalist order as growth. Growth is both power and plenty, a source of both input and output legitimacy, and a measure of the performance of state elites. I cannot think of a capitalist state in which developmentalism is not a priority. It may be an empty commitment but there is little escape from it. At the same time all states are regulatory, and it is impossible to grasp fully the varied facets of the state without the notion of the regulatory state. While states vary in their commitment, application, and performance with regard to the use of regulation as an instrument of governance, they all employ regulatory instruments extensively. In this sense all states are regulatory. Of course, not all states apply regulation to the same extent or degree of efficiency, or according to the same procedures and norms. Some are more successful and reflexive than others; some serve as examples to follow, others do not.

Second, it might be useful to consider not only the possibility of the coexistence of the regulatory state and the developmental state but also their co-expansion. The approach developed here allows us to grasp the continuity in the expansion of the role and functions of the state and thus helps us to contest assertions that economic globalization and neo-liberal interests and ideas have resulted in significant deregulation or the decline of the developmental state. This contestation is in itself nothing new (Vogel 1996; Weiss 1998; Thurbon 2012). What this commentary does is to present an approach to rule-based governance where power is polycentred (i.e., new developmental and the new regulatory state) and polymorphic, but the state has the discretion to act as rulemaker, rule monitor, and rule enforcer of first or last resort. This is a promising twist of the governance literature. While the emergence of governance as a scholarly research agenda and as a perspective of change is commonly understood as reflecting a shift from government to governance, it may suggest an *expansion* rather than a *shift*, in other words the expansion of government via governance (Levi-Faur 2012) or governance *with* rather than *without* the state (Börzel and Risse 2010). This 'big governance' perspective

suggests that governance as decentred institutional order allows and probably encourages (but does not dictate) the expansion of both regulatory and developmental institutions with and without the state and well beyond it.

This brings me to a third and final assertion. The discussion of the regulatory state needs to takes the theory of the state seriously. Independence, autonomy, capture, and legitimacy of agencies, for example, are product of our conceptions of the state. Can regulatory agency be independent when the state itself is dependent? What is the meaning of agency independence when the court and the politicians are not independent? We only have started to deal with these questions and this is again true for both the global South and the global North. But it is not only that regulatory scholars need to take state theory more seriously. The regulatory state opens a new agenda for state theorists and allows them to think about the capitalist state as a polymorphous state. The notion of coexistence of different types of state within single polity challenges methodological nationalism and monomorphic characterization of the state. If states can be both regulatory and developmental, the research agenda is changing and so is the conceptualization of comparative capitalism: no longer capitalism that varies only or mainly across nations but capitalism that varies both across and within nations. The polymorphous approach to institutions thus pushes the comparative analysis forward not by the essentialization of one morph of a polity but by working out its various morphs.

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# 14

# Institutional Development and the Regulatory State of the South

*Roselyn Hsueh**

Countries of the South today are more intimately integrated with the rest of the world than ever before. In this context of interconnectedness, indigenous regulatory institutions that may or may not resemble those of the North or other countries of the South have emerged to confront new and old interests of the state and of society. The case studies in this timely and important volume edited by Dubash and Morgan represent valiant attempts to understand regulation as practised in the South. They shed light on the before and after of the introduction of regulatory norms associated with Western liberal economic models of market governance, enabling a better understanding of which factors are important, at what level of analysis, and how do they unravel to shape regulation today. The case studies provide the 'microfoundations' for understanding distinct national responses (however formal or informal) to external pressures to liberalize and sustain market opening with particular governance structures, adopted among 'best practices' of the North. The edited volume contributes to a growing number of studies, which examine how countries in the South from Brazil and China to Egypt and India have in reality responded to external ideological and market pressures, given internal heightened politics of redistribution and limited state capacity.

Dubash and Morgan question the utility of conceptualizing 'regulation' in the South as 'problems to be corrected' when attempting to understand the *how* of regulatory politics. Rather, they propose examining the institutional contexts and patterns of government–society relations and regulatory behaviour as subjects of inquiry, even if it means scholars might conclude these differing dynamics represent a redefinition of what constitutes regulation in the developing world. A 'reclassifying' is required because, as the studies of this volume show, elite decision-makers in the developing world confront, much more so than in the developed world, previously unserved and underserved citizens, as well as existing informal service providers not already incorporated into a legal regulatory framework and the formal policymaking process.

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This volume's studies also confirm existing literature that regulatory policy and enforcement outcomes are embedded in national contexts. As Dubash and Morgan establish in their introductory chapter, the case studies seek to link the macro-level 'emergence of law-backed specialized agencies' assuming objectives of economic efficiency and redistribution, to governance as practised on the micro-level. Regulatory governance at the micro-level involves social and political dynamics which existing literature on the 'regulatory state' either acknowledges but gives short shrift to, or skips altogether to focus on the transitional and hybrid aspects of institutional arrangements. Dubash and Morgan point to scholarship on the developmental state studied by political scientists and sociologists as providing a precedence for their exploration of an 'institutional trajectory distinctive of the non-OECD world' and 'implications of contextual variation for the contours of the regulatory state'.

In the rest of this commentary I will discuss the debates in the study of political economy of development within political science on the conditions, which shape institutional transformation and development outcomes. I focus in particular on theoretical contributions germane to the study of state–society relations in the countries and regions of the South. Next, using these existing debates as a point of departure, I highlight the contributions of this volume in enhancing our understanding of *the multidimensionality of regulatory goals*, *impacts of institutional arrangements*, and *impacts of sectoral and corporate specificities*, in the practice of regulation in the South. When relevant, I identify the ways in which the greater themes of this volume and the findings of the specific case studies engage my own research findings on the politics of market reform in China.

## I. Institutional change and political economy of development

The research assembled in this edited volume joins an active tradition within the study of comparative political economy in political science in understanding the embeddedness of economics in politics and society. Scholars of the political economy of development from Gerschenkron (1962) to Chaudhry (1993), studying early and late development, have pointed to the difficulties inherent in the relationship between state- and market-building as countries become exposed to the international economy.[1] In less-developed countries, throughout history, these are twin processes, occurring simultaneously, as a less than coherent state apparatus and a society agitated by the complexities and changes that go hand in hand with modernization grapple with achieving economic and political development. To successfully achieve development, development scholars argue, the state needs to have political legitimacy and administrative capacity; or proxies, which include an all-powerful external patron and sustainable sources of capital infusion.[2]

[1] Relatedly, focusing on political economic developments in the North, Polanyi (1944) shows the relationship between market- and state-building in the rise of the welfare state in Europe. Polanyi's work has influenced 'institutionalists' of all perspectives, from rational-choice to sociological and historical.

[2] Huntington (1968), for example, maintains that liberal institutions, such as the political party, which represent pluralistic interests, can achieve the political order required for confronting the difficulties of modernization.

Unfortunately, political legitimacy and administrative capacity are not easily attainable in the South. Too often state formation in the post-Second World War period confronts a litany of constraining political economic factors, from colonial legacy and Cold War dynamics to neo-liberal ascendance and the global economic system, which influence the type of elite coalitions that arise to undergird any attempts at creating regulatory institutions. Scholars of East Asia have attributed economic nationalism, a 'soft authoritarian' political system, and auspicious Cold War politics, which provided a context for foreign capital flows absent of conditionality, to the 'state-directed development' of the region.[3] Elsewhere in the South, countries were unable to calibrate the 'triple alliance' relationship between the state, local capital, and foreign capital in ways that contributed to local development; and the autonomous state 'embedded' in society never emerged to engage the global economy to achieve state goals in quite the same way.

Unable to intervene efficaciously or to create effective regulatory institutions, states in the South resort to intrusive interventions, including taking over productive processes.[4] More recent scholarship has argued that in response to domestic and global conditions, the state in Latin America in varying ways and degrees has responded to demands by activist labour movements and industrial elites nurtured by import substitution industrialization (ISI) policies, with social welfare and export-oriented economic and trade policies, respectively, which showcase the emergence of 'embedded neoliberalism'.[5]

But even in the context of successful development, none of the developmental states of East Asia established regulatory institutions that resembled the independent administrative agencies tasked with ensuring a competitive equal playing field witnessed in the North.[6] Analysts blamed that lack of regulatory institutions for the sufferings endured by East and South East Asia in light of the 1998 financial crisis, even as other scholars argued that 'deeper causes of the Asian crisis lie in the core economies and their governments, especially that of the US, and in the kind of international financial system they have created'.[7] As we entered the 21st century, the East and South East Asian economies have all largely recovered. Now, as countries in the advanced industrialized world confront financial crises and economic recessions, scholarship on the 'new developmental state' sheds light on why and how some countries have responded to sectoral and global economic changes to achieve development and escape the potentially devastating effects of global financial integration.[8]

[3] Johnson (1982), Haggard and Cheng (1987), Amsden (1989), Wade (1990), Woo-Cumings (1991), Evans (1995), and Kohli (2004).

[4] Chaudhry (1997).

[5] Kurtz and Brooks (2008). See also Murillo (2009) on the partisan origins of this new politics, and Etchemendy (2011) on the role of policymaking styles and the compensatory measures, which explain cross-national variation across Iberian and Latin American countries.

[6] Vogel (1996) finds that even among advanced industrialized countries the actual nature and scope of market regulation varies remarkably due to existing ideas, institutions, and interests.

[7] See Wade (2000).

[8] These studies include Ó Riain (2000) and Breznitz (2007), and most recently, Levi-Faur (2012), which considers the future of 'the developmental state in the age of regulation'.

Meanwhile, China's Open Door Policy in 1978 launched market reforms, which three decades later has led to the emergence of 'China's regulatory state'. Scholars question whether the central state in China has the capacity and legitimacy of a developmental state; yet China does not appear to confront the problems of the neo-liberal state.[9] Investigating government–business relations and regulatory developments in China's global integration, my own research has found that the Chinese government has maximized the benefits of economic liberalization and minimized the costs by extensively liberalizing foreign direct investment and selectively reregulating at the microsectoral level to achieve state goals, such as economic development and political and social stability.[10] This institutional trajectory departs from the 'regulatory model' suggested by scholarship on the North and the developmental states of East Asia, which had strictly regulated foreign direct investment.

I develop this argument by contrasting the Chinese central state's reinforcement of control in strategic industries, such as telecommunications, with its relinquishing of control in less strategic sectors, such as textiles. It has introduced competition in telecommunications to promote network development, and consolidated ministerial-level authority and expanded administrative discretion to achieve security imperatives, including control of communication networks and information dissemination. The state exercises only incidental control in textiles, however, by combining market liberalization with the decentralization of economic decision-making to sector associations, local government authorities, and private economic actors. Importantly, structural sectoral characteristics influence regulatory details and the organization of institutions and economic conditions during critical junctures affect temporal variation within these dominant patterns of market governance.

## II. Comparing regulatory institutions of the South in the 21st century

The case studies of the edited volume before us resonate with my research findings on the political economy of regulation in China today and echo the analytical focus, which has captivated political science scholarship in the study comparative political economy of development. To begin, the chapters assembled here are a step beyond existing studies that define regulation in the realm of independent regulators as referee and any intervention beyond that as falling outside of regulation. Studies of the developing world focusing only on formal regulatory institutions overlook the most interesting questions in the South: the diverse institutional contexts and the different actors and processes that comprise them, and how they function together. These existing institutions may be weak state capacity and 'ill-functioning political

[9] See Tsai (2003) for a review of debates on the nature of the local developmental state in China and implications for centre–local relations. See Pearson (2005) and Yang (2004) for varying accounts on the regulatory scope and capacity of the Chinese state.

[10] Hsueh (2011).

institutions' as interpreted by the standards of the North, which as the editors specify is a lot about the absence of democracy, but it need not be.

The law-backed specialized agencies created in response to global neo-liberal norms as espoused by international organizations, such as the WTO and the International Telecommunications Union, in the last few decades, are the main focus of examination in many of the volume's chapters. Case selection contextualized in global time makes a lot of sense, especially if indeed a central purpose of this project is to explore economic governance in developing countries in the context of globalization broadly defined. Focusing primarily on these regulatory institutions, however, may overlook other more or equally as important formal and informal institutions that do the actual job of regulating. Perhaps the starting point for these studies, as they focus analysis on governance in infrastructural sectors in developing nations, should be an analytical framework rather than an existing regulatory model. The distinguishing appeal of the research that Dubash and Morgan have brought together is the mission to *characterize* rather than to *evaluate and asse*s, although a prescriptive undercurrent is noticeable in some of the case studies.

In my own work, I use 'regulate', 'reregulation', and 'regulatory' in the literal sense of the state formulating and creating rules to govern industry, however formal and informal and however democratic or authoritarian. I also develop a typology of state control focusing on three dimensions: goals, relationship with industry, and methods of formal and informal market governance. This conceptualization of state control captures the seamless reality of law and informal regulation, and the divide between law and policy implementation in China today. The degree of formality and democratization matters for regulatory outcomes; but we need not judge the regulatory patterns identified with the legal standards of the democratic, liberal economic West.

Select case chapters explore the emergence of distinct regulatory trajectories and the political and economic factors that might explain them. These chapters affirm the importance of the *multidimensionality of regulatory goals* as diverse actors become involved in governance; the participation of state and non-state actors in the context of *existing institutional arrangements*; and the *impact of sectoral or corporate specificities* on the nature of regulatory governance. These factors shape the dominant national and intranational regulatory patterns that I have observed in my own research on China and elsewhere, including India.[11]

## A. The multidimensionality of regulatory goals

Chng's chapter on regulatory mobilization in the Philippines focuses on the role of civil society in motivating the country's regulatory architecture. Chng's findings reveal how *regulatory mobilization* contributes to explaining the multidimensional goals of the regulatory state in the South, a distinct departure from the conventional view of independent regulators in liberal market economies tasked with ensuring a

[11] See Hsueh (2012).

competitive playing field and performing basic security functions. The chapter shows how regulatory mobilization may garner positive effects, augmenting the regulatory capacity of weak state institutions; as well as lead to politically fraught policymaking as a result of variegated state and non-governmental stakeholders, who relate to one another in a context of political and social power asymmetries. In China's one-party authoritarian state, the sources of multidimensionality in state interests originate in central government and quasi-state stakeholders, in addition to decentralized actors operating inside and outside the boundaries of the local state.[12] In the Philippines, non-state and local government actors involved in the governance of water provision by the recently privatized utility may be outside of the formal regulatory framework; yet depending on the situational circumstances where local and sectoral politics collide, they can influence the formal regulatory environment in ways that are not 'fully transgressive, nor entirely co-opted'.

That competing interests shape the actual details of regulation is also highlighted by Dubash's explication of regulatory practice among subnational governments in India and Prado's study of sectoral variation in degree of regulator independence. In the period following the creation of electricity regulators across India, the particulars of governance mechanisms, from tariffs to procedural safeguards, varied by local institutional context. Local stakeholder groups became politicized and mobilized for policies most beneficial to their respective interests, which drastically shifted away from 'apolitical decision-making based on technocratic criteria'.

## B. Impacts of existing institutional arrangements

For developing contexts where the establishment of independent regulators has already taken place, the question becomes more than about the nature of weak institutional environments and their impacts on the move toward regulatory rationalization. The question shifts to, what explains intracountry variation in institutional design details. Examining how regulatory restructuring mandated at the national level and embraced at the local level as a prerequisite for attracting foreign investment varies locally, Dubash's subnational stories centre on the impact of existing institutional organization, namely, the local institutional context and specific transplant process, on the actual content of regulation in India. He shows that the introduction of tariffs and procedural safeguards becomes the pretext for local stakeholders to articulate their interests, leading to politicization, which operates differently according to local conditions in the three Indian states examined. Dubash's findings confirm Chaudhry's contention that in developing contexts, when the state, without administrative capacity and political legitimacy, cannot foster the regulatory institutions that sustain market competition, it often

[12] Hsueh (2011) discusses the central and decentralized sources of multidimensionality in Chinese state interests. Also, Mertha (2008) shows that an increasingly pluralistic landscape (populated by media, NGOs, and other activist entities) positions environmental policymaking within the context of bureaucratic infighting and bargaining in China.

takes on organizing tasks in less than effective ways, responding to prevailing special interests as opposed to public interests.

Also interested in understanding intracountry variation upon the introduction of independent regulators, but focusing on sectoral variation in institutional organization, Prado's chapter argues that bureaucratic resistance sheds light on why within the same country (Brazil, in her case), some regulators exercise more independence (as measured by length of the directors' terms of office, existence of staggered terms, and the interval between each nomination) and others confront resistance from former administrators. The creation of regulatory agencies conforms to the 'political bias' hypothesis concerning the influence of electoral interests and existing ideas about the role of the state on politicians vested with the power to create regulatory agencies; yet bureaucrats greatly influenced the details of agency independence because of technical differences between sectors and the fear of losing power and influence over an industry.

## C. Impacts of sectoral or corporate specificities

Several studies in this volume identify the structuring effects of sectoral attributes, structural or institutional, as key in understanding the particulars of regulatory governance mechanisms. How does the state's role in economic development and regulatory efficacy vary by sector? By investigating telecommunications and electricity in Brazil, Prado (this volume) is able to explicate sectoral variation in the successful implementation of independent regulatory agencies. She brings her analysis to the microbureaucratic level at the moment after the president decides to enforce an independent regulator and delegates the design of the regulator to other state actors. 'It is at this level that agencies ended up with different institutional guarantees of independence in the telecommunications and electricity sectors.'

Prado's comparative sectoral analysis on the varying impacts of sectoral and institutional factors inspires inquiries worthy of further investigation. The Brazilian electricity bureaucrats began shaping the future independence of their regulator from the very beginning, including during the initial bill-drafting stage. But the president and the legislature still have ultimate authority; in this understanding, what is the precise relationship between them and the industrial bureaucrats? How does this relationship compare to the autonomous yet embedded in society technocrats that presided over the East Asian developmental state à la Johnson (1987), Evans (1995), and Kohli (2004)? Moreover, what motivates bureaucratic resistance to the electricity regulator? Is it ideological or power driven? Does the technical organization of electricity generation and distribution play a role? Are these conditions absent among telecommunications bureaucrats? Why were telecommunications bureaucrats more welcoming of liberalization; and thus, more accepting of regulator independence than their electricity counterparts?

Also examining sectors and companies to explicate within country variation, Post and Murillo (this volume) identify post-economic crises as moments when host governments and regulated companies have the most influence in affecting the contractual terms of infrastructural utilities. Post and Murillo compare contract

negotiations in electricity and water sectors to understand the impact of company-level characteristics (asset diversification and ownership type) and sectoral attributes (the profit-generation potential) on the scope of contractual settlements. They find that 'lead investors possessed diversified operations in the political jurisdiction that regulates their contract, and hence had access to a wide range of informal negotiating strategies, as well as incentives to moderate their demands'. The focus on the causal power of firm-level and sectoral characteristics in understanding within country variation provides the nuance and also potential in understanding the diversity within Southern countries. Moreover, their findings echo my own on the centrality of the state in shaping the terms of regulation, and the role of economic conditions in influencing intracountry variation in reregulation.

## III. Toward a regulatory state of the South in the age of globalization

The studies edited by Dubash and Morgan are motivated by the idea of a *distinct regulatory state* with *distinctive implementation dynamics of the South*, and the secondary analysis of national variation within it. They confirm the embeddedness of regulation in state–society relations as theorized in the literature on the political economy of development in political science; they also confirm and provoke further study on whether or not the South has its own distinct varieties of regulatory capitalism and how they function. Moreover, the chapters that highlight the *multidimensionality of regulatory goals*, *impacts of existing institutional arrangements*, and *sectoral and corporate specificities* are particularly salient to my understanding of the China experience.

I welcome these studies, which seek to explain intracountry variation and the relative impact of structural characteristics, be they sectoral ones or local institutional arrangements. Such micro-level studies provide empirical nuance to our understanding of the nature of regulation; as well as explicate intracountry variation, raising theoretical questions about the relative importance of national, local, sectoral, and firm-level attributes. In the study of the Chinese political economy existing scholarship debates whether the state continues to possess interventionist tendencies but lacks regulatory capacity, is increasingly rationalized as an adept regulator, or has transformed to account for local agency. This volume corroborates that macroperspectives provide a good starting point of inquiry and micro-level comparative studies help to adjudicate between competing views of 21st-century regulation in the South in the context of global integration.

This volume provides a better understanding what some of these regulatory institutions look like and how their practices may or may not resemble their counterparts elsewhere in the world. They help me to understand what of the Chinese experience is unique and what of it are issues and problems grappled by all developing countries experiencing similar domestic, regional, and global forces of change. Sectoral variation in the dominant patterns of regulation has emerged in

China; but the ways in which sectoral differences manifest and interact with existing ideas and institutions and economic conditions shape the agency and autonomy of state decision-makers. The Chinese state contends with microsectoral developments as it establishes context-specific regulatory institutions to manage increasingly globalized economic interests and achieve state imperatives of technological development and political and social stability.

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# 15

# Roles of Law in the Regulatory States of the South

*Benedict Kingsbury and Megan Donaldson*

The rise of the 'regulatory state' in the North Atlantic world is often associated with 'a process by which economic management becomes "proceduralised" . . . characterised by an increasingly rule-based, technocratic and juridical approach to economic governance' (Phillips 2006, p. 24; see also Loughlin and Scott 1997). Legalization overlaps with proceduralization, but legalization can have significant substantive and systemic as well as process dimensions (and conversely, much proceduralization takes place outside law). International bodies, such as the World Bank, which promote the creation of independent regulatory agencies (IRAs) and other elements of a regulatory state model in developing countries associate regulatory state reforms with the rule of law, purvey them through a language of governance (transparency, accountability, even participation) that derives force from its association with public law, and deploy 'good governance' indicators to measure the quality of national legal institutions. The chapters in this book invite consideration of the questions of how far legalization has in fact been a concomitant of the rise of regulatory states in distinct forms in developing countries, and what exactly such legalization has consisted of.

Law has long figured in some way in the arrangements for provision of utilities services in most countries. Even state-owned utilities with service provision managed by departments of government (often, in the cases of electricity or piped water, based on decades-old arrangements with colonial-era governance models) were frequently subject to laws and administrative regulations defining entitlements of households or businesses to access services, or at least specifying lawful means of enforcing payment or compliance with conditions of access. Privatization or corporatization of state providers, the entry of private operators to compete with former monopolies, and regulatory cultures associated with newer technologies such as mobile telephones and internet services, have typically been accompanied by legal innovation and greater roles for law (at least formally). Law is integral to the construction of much of the apparatus of the regulatory state (establishing contractual arrangements, constituting regulatory authorities, and prescribing their modes of functioning); to defining and adjusting the relations between corporations, consumers, and regulatory authorities, and between regulatory authorities

and the executive; and to courts or other legal institutions resolving disputes arising out of the regulatory process.

Although legalization is often seen as a unitary phenomenon in relation to regulation, and associated with a certain set of ideals (including 'rule of law' and property rights), the case studies complicate this picture by illuminating several diverging ways in which the shift to a regulatory state may interact with particular aspects of law or legal institutions. Our reading of the case studies suggests it may be helpful to distinguish between at least four different phenomena involved in 'legalization':

I. The use of structures or vocabularies of law (as opposed to, say, economics, morality, tradition) as a technique of governance.
II. The practice, role and relations of 'legal' institutions such as courts, arbitral tribunals, and administrative agencies, together with the private bar, government counsel, and attorneys-general.
III. The use of particular forms of law (whether norms are contained in treaties or contracts, executive decrees or statutes; whether they take the form of detailed prescription or general principle and so forth).
IV. Implications for the content of law at various different levels of abstraction (such as shifts in the importance of certain bodies of law vis-à-vis others, and the development of new norms within particular bodies of law).

This commentary elaborates briefly on each of these four phenomena, drawing out some examples from the case studies, and identifying questions for further research. We suggest that it will be useful in future research not only to assess the significance (*vel non*) of legalization as an overall phenomenon in regulatory states in the South, but to ask more focused questions about what legal vocabularies are in play, how they relate to alternative vocabularies (such as economics, and econo-legal hybrids), what kinds of legal institutions and instruments are most central to particular regulatory systems, and what changes are observed to the substantive content of law. Breaking 'legalization' into a cluster of distinct phenomena, and trying to assess the range of changes within each that may be associated with the shift to the regulatory state, is likely in turn to help address whether, or how, law is distinctive among the panoply of available vocabularies, institutions, and governance techniques, and to give more critical purchase on notions such as 'legalization' and the 'rule of law' in regulatory systems.

## I. Vocabularies of law

The case studies as a whole demonstrate the global spread of legal vocabularies as a means to articulate principles and concepts concerning governance of utilities. Legal vocabularies focused on rules, rights, and obligations, repeatedly bump into economic discourses focused on efficiency and incentives (or, as in Chng's chapter on informal water service provision in the Philippines, complex 'moral economies'

embedded in local communities). Much of the literature on utilities regulation emanating from global bodies (e.g., Brown, Stern, Tenenbaum, and Gencer 2006) reflects a fusion between economic discourses and some structures and vocabularies familiar from public law, producing a hybrid discourse of 'good governance'. René Urueña (this volume), for example, argues that the reform of water governance in Colombia initially shared many features of transnational neo-liberal trends, including an understanding of the constitutional and legal order as primarily limiting the power of the state and protecting property and basic liberties. Urueña then shows, however, how this neo-liberal framing encountered resistance grounded partly on the notion of water as a human right, and partly on the constitutional and legal order as guarantors of socio-economic rights more generally. Urueña's analysis reveals two distinct turns to 'law' rather than 'politics', one focused narrowly on property entitlements, and the other on a broader and more dynamic set of rights. When the new regulatory policy in the water sector (guided by economic efficiency) was challenged on constitutional grounds, the Constitutional Court adroitly brought the neo-liberal and neo-constitutionalist perspectives into relation. Asserting that the goal of regulation was to guarantee the effectiveness of the '*estado social de derecho*' ('social state grounded on the rule of law'), the Court accepted economic efficiency as a tool for achieving this, rather than an end in itself.

Urueña suggests that the neo-liberal and neo-constitutionalist views might actually have certain concealed compatibilities. Both drew strength from globalized discourses, were channelled into Colombian political debates by elites trained overseas, and converged on the need to wrest power from a political system seen as corrupt and inadequate. Moreover, the view of access to water as a human right, though originally articulated in opposition to privatization, might end up resembling a neo-liberal account in which corporations and individuals hold rights enforceable against the collective. Global discourses of 'good governance' which fuse legal and managerial vocabularies may parallel the hybrid approaches articulated in Colombian judicial discourses, and the various fused or hybrid approaches may influence each other; indeed quite different vocabularies may coexist and be rendered 'legal' through their employment by courts and lawyers. In some situations, the differences between various legal vocabularies, in terms of the rationales for regulation of particular kinds, or the interests that are privileged, may be more significant than the distinction between 'legal' and other 'non-legal' vocabularies.

The chapter by Murillo and Post on post-crisis concession renegotiation indicates that there may also be a temporal dimension to the adoption of particular vocabularies—perhaps even a process of de- and re-legalization. In the post-crisis renegotiations they document, arrangements embedded in contract and legislation become the subject of pragmatic bargaining, in which law may not be the dominant feature, the putatively responsible regulator is often sidelined to make way for direct negotiation between investors and governments, and investors' other holdings in the state may play an important role in determining the course of these negotiations. If negotiations are successful, the new arrangement reached is re-enshrined in a new legal regime, and the regulator re-established as the primary decision-maker.

## II. Legal institutions

Regulatory processes involve a wide range of lawmaking and law-applying institutions, from legislatures to enforcement agencies and administrative review panels. The role of courts is highlighted in some of the studies in this book, both in pivotal constitutional cases, such as the Colombian Constitutional Court's decision on a challenge to the constitutionality of new water privatization and regulation arrangements (Urueña, this volume), and in more routine engagement with regulatory processes (Thiruvengadam and Joshi, this volume). Across these different contexts, courts may be important in a range of different ways:

(a) Litigation and the threat or existence of adverse judgments may be instruments of different interest groups: the financial and reputational cost, and the implications of public or governmental scrutiny associated with litigation, may serve as weapons in conflicts over regulatory policy.

(b) Courts provide a privileged forum for the invocation of particular (legal) vocabularies in which to debate economic and regulatory policy, and may thus be a site for persuasion and legitimation (or de-legitimation) of broader liberalization and privatization agendas.

(c) Courts may sometimes be called upon to systematize and endorse particular factual evidence, such as evidence about how privatization or reform projects have fared, or about regulatory norms and the functioning of regulatory institutions, in other jurisdictions, and this marshalling and presentation of information may in turn influence the policy process.

(d) The status of courts as arbiters of the meaning of legislation and other legal texts requires courts to articulate conflicts between, or reconcile, newly crafted or imported regulatory structures, on one hand, and existing structures and norms of public law, on the other, and to determine the powers of the different bodies involved in the regulatory regime (particularly important where there is confusion or uncertainty about the mandates and roles of various actors, and courts may effectively be teaching new regulatory agencies or other actors about relevant principles or proper process).

Multiple aspects of courts' importance may be present in any given case. The Colombian Constitutional Court articulated the rationale of regulation and the role of economic efficiency in the new water regulatory system, but in the distinct context of the existing constitutional order. That court also determined some specific aspects of the regulatory regime, such as the requirement that regulatory agencies to adopt notice and comment procedures for new regulation, and it helped inculcate a 'legal consciousness' into regulatory officials. The Indonesian Constitutional Court, in considering the constitutionality of the 2002 Electricity Law which paved the way for transition from a state-owned monopoly to a competitive energy market, acted as a forum for the contestation of privatization; systematized and laid out a number of facts about privatization and its effects in

other jurisdictions; and articulated the incompatibility of new regulatory structures with constitutional requirements, indicating that government regulation of the sector alone would not satisfy the requirement in article 33(2) of the Constitution that '[p]roduction sectors that are vital to the state and that affect the livelihood of a considerable part of the population are to be controlled by the state' (Jarvis 2012; see also Butt and Lindsey 2010, p. 246).

Indian courts, in the challenges brought by the Indian Department of Telecommunications against the telecommunications regulator Telecom Regulatory Authority of India (TRAI), were used strategically to bring pressures associated with litigation to bear in the struggle for control of telecommunications policymaking. But decisions in these cases, such as the judgment of the Delhi High Court in *Union of India v. TRAI*,[1] also clarified and explicated the mandates of these two bodies, and fleshed out the structure of the regulatory regime (Thiruvengadam and Joshi, this volume). This decision was effectively reversed by legislative amendment, prompting in turn a new round of litigation over the powers of the reconstituted regulatory bodies. When a newly established administrative tribunal took an unduly restrictive view of its own powers, the Supreme Court 'adopt[ed] a pedagogical role towards empowering' the reconstituted telecom regulator and articulating its proper role (Thiruvengadam and Joshi, this volume). A concurring judgment seemed similarly to be directed towards laying out the jurisdiction of a new Telecom Disputes Settlement and Appellate Tribunal, and fostering the Tribunal's exercise of its proper powers. In another foundational decision, at the very outset of telecommunications privatization, the Indian court in the *Delhi Science Forum* case[2] drew into the Indian discourse ideas from a comparative study of other jurisdictions in making the point that in other cases of privatization, governments had created an IRA prior to privatization processes—and the Court's attitude seems to have prompted the government to announce the establishment of an IRA prior to handing down of judgment.

Courts exist in an ecosystem of other institutions and actors. Most are reactive institutions, taking cases that are brought before them, and their activity and influence is in considerable part dependent on enabling actors and interlocutors (such as plaintiffs and the legal profession). Further, the significance of courts in the regulatory landscape can change over time. Indian courts played strong tutelary roles in the early days of private telecommunications provision as regulators were established (Thiruvengadam and Joshi, this volume), but courts' behaviour evolved as regulators become better established. In Colombia, regulatory processes changed as regulators absorbed and tried to implement judicial decisions (a process discussed in Urueña, this volume).

It is likely that distinctive features of the Indian and Colombian legal systems allocate to high-level courts a greater role than such courts would play in other countries (Shankar and Mehta 2008; Rodríguez Garavito 2011). Indian and Colombian courts have been prominent political actors more generally, not merely

[1] *Union of India v. TRAI*, 3 Comp LJ 400 (Del) (1998).
[2] *Delhi Science Forum v. Union of India*, 2 SCC 405 (1996).

in the arena of regulatory policy, and their centrality is therefore unsurprising (Thiruvengadam and Joshi suggest that the high level of judicial independence contributes to the influence and interventionism of the Indian judiciary, together with the fact that telecommunications are under the control of the central government, rendering responses to judicial decisions more predictable than would be the case if the matter were delegated to subnational units). South African courts have also been much involved in utilities regulatory issues, for example in relation to disconnection of the poor from water or electricity services (Dugard and Langford 2011). Counterpoint studies could helpfully address countries in which courts have not been heavily involved in social policy, or in which the regulatory system seeks to bypass existing courts for the resolution of regulatory disputes, or to minimize court involvement by narrowly circumscribing grounds for overturning regulatory decisions, or requiring courts to consult experts (see, e.g., the recommendations in Brown, Stern, Tenenbaum, and Gencer 2006, pp. 106–8).

Finally, local and national tribunals operate in a global system, in which perceived failures or inadequacies in the local regulatory system may prompt investors to seek recourse outside the national judicial system, for example in arbitration under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). Global standards, such as 'fair and equitable treatment' for investors, have invited the elaboration of a minimum threshold for regulatory systems (indeed, some now argue for a more sophisticated comparative methodology that would connect international investment norms to older notions of rule of law: Schill 2010, pp. 151–82). The direct impact of global jurisprudence (emanating from ICSID and other arbitral panels) on the functioning of regulatory regimes appears to be quite limited, although this has not been systematically studied, and may be a fruitful area for further research. Arbitral awards are occasionally referred to in national courts, and much more often in national press or public discussions of particular cases (one instance in which ICSID proceedings have constrained the approaches open to local administrative authorities and tribunals is discussed in Morgan 2006, pp. 229–31). In some countries, politicians appear willing to disregard the shadow of future potential liability under international investment law, partly because by the time any adverse arbitral award is issued, it is likely to be someone else's problem. On the other hand, Peru, for example, has established a Special Commission including representatives of different state agencies involved in investment to coordinate responses to investment disputes, including negotiating with investors, mediation, and other processes prior to arbitration (UNCTAD 2011). The Special Commission is also empowered to determine the liability of particular agencies for any costs arising from investment disputes, and these costs can in theory be internalized, by being subtracted from the budget of the specific agency whose actions breached the treaty. The development of centralized and uniform processes of this kind may increase the impact of international investment law and disputes on domestic practices. Systematic research is needed to assess the influence of investment treaties and arbitral jurisprudence on domestic public law, including in connection and comparison with the degree and pathways of influence of other global bodies of law (e.g., human rights norms).

## III. Forms of law

The case studies in this volume do not deal directly with the different *forms* of law implicated in shifts to a regulatory state, but they do contain traces of some of the variations that arise in this domain: whether legal obligations concerning the regulatory process are elaborated primarily in public law (treaties, statutes, regulations) or in contracts with particular corporations; the relative role of statutes versus regulations and other subordinate instruments not requiring direct legislative sanction; and the relative role of detailed and prescriptive rules versus general principles. Variations in the forms of law in which the norms governing the regulatory state are enshrined may be associated with very different processes of lawmaking and actors involved in the lawmaking process, and thus different procedures for the change of legal rules over time; differences in how responsive rules are to particular needs, or to pressure or influence from global institutions or experts; and differences in how rules interact with other aspects of the domestic legal system. No doubt in many countries there have been such vast gaps between the formal law and what in fact happens in practice that studies of the niceties of variations in form may seem arcane and naïve. But the proposition that the forms of law are irrelevant needs to be established rather than simply asserted, at least in all but the most egregious cases. To completely disregard all aspects of legal form may be to miss aspects of legalization that have policy or distributional significance or hold the potential for leveraging change over the longer term (Prado, this volume).

As a general proposition, and assuming a loosely representative legislature, sectoral reforms established by statute are likely to require broader public and political support than reforms introduced by decree or subordinate instrument, or outlined in a contract with a particular private-sector provider (although unpopular reforms of the latter kind may also have electoral consequences). Depending on the jurisdiction of domestic courts, statutory regimes may also be subject to greater judicial scrutiny (e.g., in Indonesia, the government was able to partly circumvent a ruling of the Constitutional Court striking down a law on reform of the electricity sector by reintroducing some aspects of the law in a regulation, which the Court did not have jurisdiction to examine (Butt and Lindsey 2010, pp. 252–3)). In some scenarios, there will be significant scope for judicial involvement in developing legal norms (as in the Colombian Constitutional Court's enunciation of a requirement for notice and comment on new regulations). In other cases, the adoption of detailed rules may actually forestall or replace developments of this kind (e.g., Dubash notes that the statutory apparatus for electricity regulation in different Indian states contained a number of procedural requirements, departing from the primarily judge-made character of Indian administrative law). Variations in which actors (executive, private companies, legislature, courts, etc.) are most involved in the lawmaking process may make a difference to which interests are best represented, and which models are drawn upon in developing national systems. Moreover, the shift to a regulatory state and in particular the creation of IRAs charged with particular responsibilities and subject to certain

procedural requirements may itself change how laws, in the form of subordinate instruments of various kinds (such as those setting prices or terms of service), are made in relation to relevant sectors, for example by requiring some process of expert review or public consultation.

Differences in the forms of law may also be associated with different degrees of interconnection between specific sectoral regimes and other bodies of national public or administrative law. Regulatory regimes that comprise detailed and specific rules, functionally tied to individual sectors, may end up being virtually isolated in the legal system, whereas those more reliant on general principles common across sectors may, through the action of administrators, judges, or advocacy groups, come to borrow the norms or practices of other sectors, or be more closely integrated with background law on matters such as transparency and public participation in decision-making.

Whether or not variations in the forms of law are associated with some of the factors mentioned here (lawmaking processes and which actors are most heavily engaged and represented, the revisability of laws and their integration into the larger legal system) depends to a great extent on the material, social, and political circumstances in which regulatory policy is made. The post-crisis renegotiations outlined by Murillo and Post (this volume) make clear that even the most elaborate regulatory systems may be sidelined or remade in direct bargaining between political principals and private actors. Moreover, global institutions and external consultants are often heavily involved in the design of regulatory systems regardless of the form in which these systems are ultimately enshrined. In many of the cases collected here, the World Bank played some role in requiring or supporting the transition to liberalization, privatization, and concomitant regulation (Dubash; Prado; Urueña; Badran; Thiruvengadam and Joshi (all this volume); see also Jarvis 2012, and Butt and Lindsey 2010). In pushing for reforms, global institutions may interact primarily with the executive, while nevertheless seeking to have reforms enacted in the form of comprehensive legislation. The World Bank *Handbook for Evaluating Infrastructure Regulatory Systems*, for example, argues for the superiority of statutory reform relative to reform by decree, and outlines how expert evaluators can present governments with ready-made programmes for legislative and even constitutional reform to achieve recommended policy changes (Brown, Stern, Tenenbaum, and Gencer 2006, pp. 34–5, 185–6). Material such as this indicates an understanding of the differential effects of particular forms of law in embedding reform, even as the particular lawmaking process associated with the statutory form may be dominated by global institutions and expertise, and driven by the executive, in practice.

## IV. Content of law

The cases are not focused specifically on the content of law, but they provide glimpses of the different ways in which the content of law may be changed by (or constrain) the emergence of a regulatory state. The shift to a regulatory state may be

accompanied by constitutional reform to remove public monopolies, require changes to property law (e.g., by creating new kinds of property and property rights capable of being traded or licensed), and raise questions about the extent or enforceability of social and economic rights. The creation of independent regulatory agencies may, depending on whether there are analogous bodies already in existence, require the development not only of corporate and public contracting law affecting the regulated service providers, but also of public law concerning the organization or organs of government, together with ancillary matters such as employment and personnel conditions, records retention, and freedom of information. New provisions for matters such as notice and comment and public participation (some of which may result in quite significant changes to regulatory process, depending on the existence of qualified interlocutors and the degree of mobilization) may require the development of, if not law, then at least procedures that confront questions such as the evidentiary threshold required for public comments to be given weight, or the kinds of organizations accepted as representing public constituencies. Courts will face questions about the applicability and nature of judicial review of decisions of independent regulatory authorities.

Although there are strong elements of borrowing and diffusion in the higher order features of the regulatory state, and even in the detail of the design and procedure of regulatory institutions, there remains scope for considerable variation in the content of regulatory regimes, and a certain contingency in their potential interactions with existing law and legal institutions within states.

## V. Legalization and its tensions

The picture of legalization sketched so far has emphasized its formal aspects, rather than how institutions and regimes actually work: their reconstruction under crisis conditions (Murillo and Post, this volume), the complexities of social norms and networks that affect their function (Chng, this volume) and the 'micropolitics' that can produce significant variations even in systems that are formally similar (Dubash, this volume).

However, even leaving aside these irreducibly contextual matters, the foregoing elaboration of different aspects of legalization indicates that the notion of a regulatory state as involving a more 'legalized' mode of economic management may not, itself, indicate much about the contours of the regulatory state. The precise legal vocabularies in use, the legal forms, content of legal norms, and role of legal institutions may be significantly different across sites, especially where global models encounter national legal particularism. Even if the degree of borrowing or institutional isomorphism has masked these differences in practice, breaking down legalization into different aspects at least gives a better sense of the breadth and complexity of the model that is being diffused, and its potential variations. Looking more closely at the different facets of legalization also calls into question associations between the regulatory state and specifically IRAs, on one hand, and the rule

of law, on the other, and indicates the wide range of values or ideals which 'legalization' may further.

At the simplest level, various cases indicate that recourse to vocabularies of law, and the creation of rule-backed institutions, need not be manifestations of 'rule of law' in any broad sense. In Indonesia, a rule-bound independent electricity regulatory agency and a competitive power market were brought into existence by a regulation apparently designed, at least in part, to circumvent the judicial review that would have attended a primary statute (Butt and Lindsey 2010, pp. 252–3). In Latin America, the investment regime promoted and facilitated by global institutions, themselves insisting on the importance of independent, depoliticized regulators, reverts in circumstances of crisis to a negotiation between the executive and private investors, in which considerations of legal obligation appear far less relevant than financial imperatives (Murillo and Post, this volume; Morgan 2006, pp. 228–32). In many cases, the way in which regulatory policy and regulatory law is made reflects close engagement between the executive and global bodies, bypassing the legislature, and sometimes a lack of meaningful control even by the executive. Disentangling the different dimensions of legalization may ultimately reveal a system in which law is used episodically and instrumentally, to create a particular institutional apparatus primarily geared to encouraging, and stabilizing the environment for, private involvement in service provision.

Greater attention to the specific dynamics of legalization within regulatory states in the South, as exemplified by the studies in this book, is now enriching global thinking on regulatory governance. It is precisely insights from Southern contexts about the ambiguity of ideas like rule of law, and the tensions within legalization, which offer opportunities to diversify current thinking, and potentially open it to a wider range of accounts of the kinds of principles which should govern infrastructure regulation, and of what these principles actually require in practice. There is nothing inherent in public law as such, as distinct from the actual content of constitutional norms in particular systems, that mandates collective ownership of utilities. Yet different legal vocabularies, or the content of particular norms, may be invoked to argue for ends other than, or transcending, efficiency, such as minimum levels of service for all, or some more ambitious notion of collective benefit, or priority for populations currently marginalized or underserved. Globalized vocabularies of rights, or principles of equality or economic development in national constitutional frameworks, may be deployed in these ways. Notions of 'participation', 'accountability', and 'transparency', often promoted as necessary or desirable features of regulatory frameworks and associated with particular institutional processes (like notice and comment-type procedures prior to tariff reviews), are rather open-ended, and potentially amenable to development through experiment at the local level. 'Participation', for example, might be understood as requiring something more than bare arrangements for public comment, for example scrutiny of the range of public submissions, and perhaps deliberate efforts to seek out and, over time, enhance the calibre of comments from under-represented groups, to ensure that 'participation' is as broadly-based as possible and not skewed to already-privileged sectors of the population. Principles such as 'accountability' and

'transparency' might exert significant leverage if transposed from the lower reaches of regulatory processes to the higher order policymaking that precedes major reforms, for example by requiring a clear statement, prior to the introduction of major statutes or decrees, of the roles played by global institutions, expert consultants, and corporate actors in the preparation and design of those reforms.

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# 16

# Civil Society and the Regulatory State of the South

*Kathryn Hochstetler*

The basic rationale of the regulatory state is to insulate certain kinds of decision-making from political actors. According to proponents of the regulatory state, political actors are inherently inclined to use regulation for political ends, rewarding friends (including themselves) and punishing enemies. From the standpoint of those who are regulated, this creates unstable rules that are unevenly applied. The rules might well deviate considerably from technically ideal ones. By creating independent regulatory agencies and protecting them from political control, states are hoping to signal that their regulations, in contrast, can be relied on to be the opposite: stable, evenly applied, and technically appropriate for public ends. Those who are regulated can then take a longer-term perspective that is more conducive both for their own profits and for national development, broadly defined. In addition, private investors should be attracted to purchase or finance the regulated firms and services. These claims have all been both empirically and theoretically contested, of course, including by the authors of other chapters of this book (see also Braithwaite 2006; Levi-Faur 2005).[1]

This commentary takes up two axes of challenges to the idealized version of the regulatory state. The main purpose is to focus on the ways that members of civil society often shadow and contest the central actors of the regulatory state, even though they are ostensibly well outside it. The second axis of challenge explores the consequences of the transfer of the regulatory state to the global South, and the way that change in location shapes both the role and impact of civil society and the regulatory state itself. I return at the end to the question of what civil society's experiences in the global South might mean for the 'rationalized myth' (Dubash) of the regulatory state.

The starting point for considering the role of civil society is that while the debate about the regulatory state has tended to concentrate on the 'state + regulated actors'

[1] Among the most important counter-arguments is the point that good policy and regulation actually require extensive state involvement, by a state with deep roots in society, an 'embedded' and/or developmental state (e.g., Evans 1995; Johnson 1982).

dyad, civil society actors are closely related to both sides of that dyad and really cannot be excluded from the discussion. Members of civil society are the voters and constituents of democratic state leaders. Even in non-democracies, citizens make some claims as political subjects and have some ability to demand responsiveness from the state for their claims. State authority requires that the state's action be regarded as legitimate by civil society and depends on citizens for final implementation through their compliance. Civil society actors make their own assessments of how well the regulatory state is promoting public ends, using their various kinds of expertise (local knowledge, scientific, etc.) or as principled advocates. Regulated industries and firms typically face members of civil society as consumers and customers, as well as workers. These and others may be geographic neighbours of their physical installations. In short, when the regulatory state model is implemented to rebalance relations between the state and regulated actors, all these other relationships potentially shift as well and the central dyad inevitably considers them. Not surprisingly, too, citizens in all these roles may seek to influence regulatory agencies and to exercise their own new forms of regulatory control.

Similarly, the geographic relocation of the regulatory state to the global South raises a number of considerations about its functioning there. In its Northern sites of origin, the idea of the regulatory state was an endogenous domestic political choice. It grew fairly organically out of local state–society relations, taking on adaptations to fit varying conditions. Southern political systems, in contrast, more commonly acquired independent regulatory agencies through the intervention of the North, with global financial actors promoting a specific and universal regulatory transplant (Badran; Dubash; Jarvis (all this volume); Jordana and Levi-Faur 2005). The appeal of the transplant into the South was often in *how different* it was from business as usual, rather than in its local rootedness. Nonetheless, what the chapters here show is that the transplant rarely resulted in a full-grown regulatory agency that matched the global model. Instead, it was often transformed in the act of transplant or came to be embedded in local conditions and relations in ways that have eventually made the Southern regulatory state also quite variable in practice. Civil society, in its rather different Southern and Northern guises, has been instrumental in forcing this process of local adaptation.

In this commentary, I aim to provide a framework for thinking about how civil society is related to the regulatory state, using the chapters as examples of particular approaches and views. This is primarily an exercise in classification, as I offer three distinctions meant to help broaden and sharpen analysis of the roles and impact of civil society actors. Part of the intent is also to draw attention to the places civil society might be expected to be present, with the aim of helping to identify when it is absent or unsuccessful, in addition to its successful interventions. For each of the three distinctions, I also highlight some of the most important likely implications as the regulatory state moves from the global North to the global South.

## I. Types of associations: expertise-based versus associations without expertise

Any discussion of civil society carries an obligatory mention of how complex and contested the topic is (Cohen and Arato 1992; Hall 1995). In the conventional inclusive definition used here, civil society is a sphere of diverse voluntary associations that is analytically distinct from both the state and market spheres, even as it is closely interrelated with them. Those associations may be formal organizations or more ephemeral networks, held together by common interests and/or values on the basis of all the identities identified above and more, for example, as consumers, workers, residents, and so on.

Because of the terms in which the regulatory state presents itself—a technocratic, expertise-based space free from confounding purposes—the most important distinction among types of civil society associations is whether they can make credible claims to a similar status. Expertise-based civil society groups such as scientists, occupational associations, and the like may actually find themselves with more access to the regular internal workings of the regulatory state than to other forms of states. Even authoritarian states that are otherwise hostile to civil society participation may welcome expertise-based input. This may come through regular consultation, inclusion in expert advisory bodies, or through career trajectories that move individuals between civil society and the regulator. In Brazil's environmental regulation agencies, for example, we found a life cycle for many individuals: they started in civil society organizations during their educational periods and young adulthood and then moved into state agencies as they needed more secure forms of employment; some eventually returned to civil society (Hochstetler and Keck 2007). Expertise-based participation is partly a function of the nature of the group, but can depend on how the group presents itself. The much more effective consumer organizations in Andhra Pradesh adopted an 'expert' style of presentation of their input and gained influence, while the less effective organizations of Delhi did not (Dubash).

Civil society groups that cannot claim entrance to the regulatory state on the basis of expertise will either have to approach it from outside, or will be dependent for access on ways that the regulator deviates from the conceptual ideal. Approaching from outside is not necessarily a position of weakness, as the service constituencies of regulated entities are often quite numerous. While that makes organization more difficult, it also means potentially large mobilizations, including some which have overturned privatization of water services (Bakker 2007; Morgan 2008), insisted on smaller rate hikes (Dubash; Jarvis; Post and Murillo; this volume), or generated their own service provision and regulation outside the formal framework (Chng, this volume). Their numbers make them difficult and costly to ignore, while their outsider status makes them legitimate and potentially able to place formidable checks and balances on the state (Braithwaite 2006; Levi-Faur 2005). Electoral considerations may force government negotiators to consider the preferences and power of

consumer advocacy groups as they negotiate—and renegotiate—contracts with providers (Post and Murillo, this volume).

Civil society actors also make their way into the regulatory state through the gaps between the ideal-type and the real-world versions. Essentially all the authors in this collection of papers have signalled the many ways in which the Southern regulatory state-in-practice does not match the idealized version discussed in the academic and policy literatures (see Jarvis for an especially comprehensive view). Below, I discuss in more detail how and why 'independent' regulators are often set up in ways that build in special access for some groups. Here, I am signalling that the gaps exist, and that the groups that gain access through them frequently reflect non-expertise-based claims for participation. Depending on the nature of their access and claims, their presence indicates that the regulatory system may continue to suffer from corruption, clientelism, and other frequent criticisms of regulation despite a veneer of a new regulatory model.

The level and distribution of expertise in civil society is quite different in the South than in the North. The range in the capacity of civil society actors will be wider, with small numbers being as competent as state actors (if not more so), while considerably more citizens will lack the most rudimentary conditions for effective participation. Literacy can be assumed in the North, but not the South, for example. Because the ideal type privileges the parts of civil society with expertise and they are a smaller and more unusual fraction of their societies, civil society participation under a Southern regulatory state may deepen rather than mitigate social inequalities. Dubash's case studies (this volume), where influential and competent consumer groups from the middle and upper classes speak for their rather particular needs, raise questions about whose interests will be served by civil society participation in such a state. Groups without expertise can also have influence, but it will not be as systematic. Note that these critiques are relevant only if an independent regulator approaching the ideal type exists. If it does not, then the regulatory state is likely to manifest whatever patterns of unequal access and participation exist in the political system more generally.

## II. Transition to the regulatory state versus operation of the regulatory state

The regulatory state is quite new, and many of the existing studies of it are not about the regulatory state per se, but about the process of putting the regulatory state in place. Civil society relates to these stages differently, as the process of putting the regulatory state in place is openly political compared with the ideal-type technical quality of the operation of the regulatory state. The choice to change regulatory models is usually made by elected officials or other central political leaders. As an episodic and explicit political choice, it is either a matter of open public debate or might be resisted through targeted mobilization. The regulatory state in operation tends to be more associated with long-term rather

than short-term forms of participation, although some of its decisions like rate hikes or the siting of new facilities may also generate spikes of mobilization.

David Levi-Faur describes the political move of creating independent regulatory agencies in these terms: 'Democratic governance is no longer about the delegation of authority to elected representative [sic] but a form of second-level indirect representative democracy—citizens elect representatives who control and supervise "experts" who formulate and administer policies in an autonomous fashion from their regulatory bastions . . . ' (Levi-Faur 2005, p. 13). The transition to a regulatory state is often a moment of high engagement by civil society since institutional choices lay down rules that generate distributions of costs and benefits that may persist for some time (Boix 1999). Interest groups inside and outside the state try to protect their interests, whether they are occupational, rents, or remaining in office (Jarvis; Murillo 2002; Prado). Actors who think an independent regulator might work against their interests may successfully distort it at this stage so that it is far from the regulatory ideal (Dubash). Highly mobilized actors can block important components of the regulatory state model altogether, with opponents frequently targeting the accompanying privatization of state assets. In Andhra Pradesh, voters turned a pro-privatization chief minister out of office, and his successors did not broach the subject again (Dubash). The more common tactic is mass mobilization. Opponents to water privatization, for example, have spread protests across the South, claiming a human right to water (Bakker 2007; Morgan 2008).

When the regulatory state is in operation, much civil society participation will be regularized and long term, with the exact form depending on how the regulator is set up. Many independent regulatory agencies will have stakeholder boards, for example, or will hold public hearings either regularly or for special initiatives. These participatory opportunities are likely to be dominated by expertise-based organizations or by other civil society actors that might have close ties with the bureaucracies. They may be genuine opportunities for influence and participation in decision-making, although outcomes can be tightly controlled by who is invited to participate. For example, Argentina has been much more permissive of agriculture based on genetically modified organisms (GMOs) and seeds than Brazil, in part because the technical agency that approves GMOs in Argentina gave its civil society seats to seed companies' associations, while Brazil's technical agency seated representatives of environmental and consumer agencies. Even though those civil society representatives have been out-voted in Brazil, their seat at the table gave them access to information that permitted them to be successful in court challenges to GMOs for almost a decade (Hochstetler 2007). As this example suggests, it will be difficult to generalize about how civil society will interact with the operating regulatory agency, as both specific rules about civil society participation in the agency and more general political openings like the ability to use the judiciary are relevant.

Several of the chapters point out that the operational regulatory state may also coexist with an 'alternative regulatory environment' where additional regulation and provision is carried out by civil society itself (Chng; Levi-Faur 2005). In Chng's study of water provision in the Philippines (this volume), informal civil society networks fill

in for a state regulatory agency that cannot meet social needs. The moral economy of local communities produces self-regulated services. In this example, the additional citizen-based regulation is broadly supportive of the larger state regulation structure, filling its lacunae. However, state water providers eventually decided that the informal sector was undermining their formal regulatory structure (with all its flaws) and have been trying to reassert control.

A final kind of civil society participation in the operational regulatory state consists of citizen resistance to the decisions it takes. Here, we find citizens protesting, boycotting, refusing to pay for services, and generally opposing its choices. The conceptual justifications for the regulatory state—political isolation so that it can cut subsidies, price at market levels, and generally take politically unpopular decisions—by design lead to creating an institution that takes decisions that are (unsurprisingly) politically unpopular. On the other hand, a regulatory agency that deviates from these ideals and uses the cloak of expertise-based neutrality to try to hide decisions that continue to favour small subsets of the population will also generate overt opposition.

Putting an independent regulator in place involves a significant change in how political decisions are made, in theory removing powers from political actors—directly answerable to the population in democracies—to more distant bureaucrats. Carrying out this process in the South rather than the North commonly carries with it two differences that affect the probable civil society response. The first has to do with the nature of political regimes, which are generally democratic in the North while more mixed in the South. Citizens experience a loss of direct political control as the regulatory state is put in place only in democracies. In non-democracies, authority is moving from one unelected form of political leadership to another, and so the regulatory state may mean citizens have less to lose in those systems. In fact, expertise may be a preferred basis for the exercise of power.

As noted, Southern political systems have commonly acquired independent regulatory agencies through the intervention of the North. The foreignness of the model becomes one of the major reasons civil society organizations cite in fighting its implementation (Bakker 2007). Yet, the international dimension is complex. Foreign NGOs are also frequently a support for Southern NGOs that might try to resist this global regulatory model (Urueña). Whatever the interpretation of the international role, the fact of international participation in promoting the model has shaped the response of civil society—and the 'state + regulated sectors' dyad as well—and so needs to be a part of the analysis in ways that it is not in the study of the regulatory state in the North.

## III. Blocking and enabling, complementary or substitutive?

A final distinction among kinds of civil society participation asks whether it on balance advances and enables the operation of the regulatory state as intended or whether it seeks to block the regulatory state and its actions. A related formulation asks whether the civil society participation is complementary to the functioning of

the regulatory state, or substitutive of it. While much citizen participation can be characterized as generally one or the other type, some—like Chng's 'regulatory mobilization'—skirts the edge of both.

Much of the academic and public attention to civil society's engagement with the regulatory state focuses on blocking activities. Civil society organizations usually put together blocking coalitions in conditions of perceived threat, using protests and elite allies to try to stop a policy decision or its implementation (Hochstetler and Keck 2007, p. 19). Issues are typically framed in adversarial ways, with some combination of regulated sectors and parts of the state itself portrayed as villains. Blocking activities tend to take place in political settings that activists consider hostile. They are highly visible, given that success often depends on gaining media attention and popular support. International actors may be key members of blocking coalitions, as in the well-known transnational advocacy networks (Keck and Sikkink 1998). A number of the examples above—consumer groups protesting rate hikes, activists trying to block or overturn privatization, and the like—are blocking activities (Dubash; Jarvis). Civil society groups themselves often will consider their participation to be substitutive of the state (Friedman and Hochstetler 2008). Blocking activities can also be thought of as complementary to state action in the larger regulatory process, as when civil society groups try to make up for state omission or weakness in enforcing technical standards (Levi-Faur 2005).

While blocking activities capture more attention, the bulk of civil society activities by quantity are probably enabling activities. These are more cooperative modes of interaction that either start from shared ends between state and society or reach such consensus through dialogue and engagement. Embedding regulators in close relations with civil society can greatly improve the quality of the information they need to function well, although they also need to maintain autonomy for independent action (Evans 1995). Civil society participation is often routinized in enabling activities. These kinds of civil society activities are inherently much less visible—another regular monthly meeting excites neither academic nor popular interest. Not least because of the longer time frame of enabling activities, international participants are less common (Hochstetler and Keck 2007, p. 20). The scholars most likely to notice civil society actors in these roles are public administration and policy scholars, who are themselves looking at routine ways of doing things. Enabling activities often take place within the regulatory agency itself, as in the examples mentioned above of regular consultation with stakeholders or inclusion of expert groups in decision-making. As Chng suggests, however, civil society groups may also be broadly enabling of regulation through outside action, as in his 'regulatory mobilization' model of water provision that services people who the formal regulatory structure cannot or does not. Embedded relations can tip into 'capture' when state actors fail to maintain some autonomy from the industries they regulate.

One of the most striking differences between the regulatory state in the South and the North is that regulatory agencies in the North typically oversee well-established sectors that require maintenance rather than wholesale creation.

In contrast, Southern regulatory agencies usually need to oversee substantial extension or establishment of the services they regulate. Economic and political crises are often more common, disrupting normal service provision (Post and Murillo). These conditions mean very different sets of challenges that affect whether citizens view the regulator in an adversarial or cooperative way. When Southern states extend services, the new coverage can greatly increase the legitimacy of the agency. When citizens do not receive the new services they are expecting, in contrast, disappointment can be a powerful fuel for mobilization. The interests of citizens who have the service often differ from those who do not, as in the Indonesians who resisted rate hikes meant to pay for universalizing access to electricity (Jarvis). Put together, the implication is that citizens will be much more actively monitoring the activities of the regulatory agency and the outcomes of its action in the South, and so regulation will be inherently more fraught and likely to generate mobilization of some kind. As a corollary, the Southern regulatory agency will typically have a greater *need* for complementary and enabling action by citizen groups because it struggles more with service provision than do its Northern counterparts.

## IV. Conclusion

This commentary began by repeating a stylized version of the regulatory state model, which emphasizes the independence and separation of regulatory agencies from political concerns. As this commentary has shown, it is unlikely that real regulatory agencies ever approach this 'rationalized myth' (Dubash). Political negotiations and oversight are inevitably a part of the establishment of regulatory agencies, and continue as they operate. In good part this is because civil society actors of various stripes are tightly bound to both the states and the regulated actors who form the core actors of this model. Not only do they loudly insist on their inclusion—as voters, consumers, clients, and the like—but also the good functioning of the regulatory state depends on their participation as experts, stakeholders, and compliant citizens. As such, this political embedding is not necessarily as problematic as the stylized version suggests. Equally important, an apparently independent regulatory agency often does not match its own rhetoric. Both of these observations suggest that the right analytical approach is to *assume* that particular empirical examples of the regulatory state are politically embedded, and then to proceed to determining the advantages and pathologies of that particular embedding.

This approach is doubly important for studying the regulatory state in the global South, where the rhetorical claims of independence are especially strong, and the empirical foundations for those claims probably particularly weak. This discussion of civil society has highlighted some greater inequalities in civil society in the South that affect the functioning of the regulatory state there. Relevant expertise is held by a much smaller part of the population, but prized by the regulatory state. Citizens are much more likely to be divided into haves and have-nots of the services overseen by regulatory agencies, as universal service provision is less common than in the North. These inequalities within civil society mean that those parts of civil society

who actively engage regulatory agencies, states, and regulated industries probably do not mirror their societies as a whole; they may well be protecting their special privileges through their participation. Given a larger context that is less likely to be democratic and where powerful international actors promote the regulatory state model, a sustained look at the politics of the regulatory state—North and South—is critical. This commentary only begins that task.

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# CONCLUSION

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# 17

# The Embedded Regulatory State: Between Rules and Deals

*Navroz K. Dubash and Bronwen Morgan*

This book has argued that there has been a marked rise of particular forms of the regulatory state in the South in recent decades, often centred around the introduction of relatively autonomous regulatory agencies. It has also argued that there is a link between this empirical phenomenon and the dominance of a certain complex of ideas and knowledge that we have linked to 'mainstream' regulatory state approaches. In the opening chapter, we posed a challenge to the shared assumptions of the mainstream regulatory literature, querying whether they were equally salient to the many and variable contexts of the South. While fully recognizing that variation, we hypothesized that three commonalities might nonetheless have an especially salient bearing on the rise of the regulatory state: realities of institutional transplant; politics of redistribution, and questions of state capacity. In this final chapter, we build on the case-study findings and the dialogue that follows with our various commentators, to make an affirmative argument that repositions the regulatory state, allowing its dynamics to be tracked and interpreted *without presuming that solutions are necessarily to be found in a rule-based, apolitical and technocratic world*.

We would argue that displacing this assumption is vital to taking forward the study of the regulatory state in both the South and the North. The means of displacing it is to understand the regulatory state as positioned on a spectrum 'between rules and deals', a task we elaborate in Part I of this chapter. The path for productively taking forward the research agenda is threefold. First, as discussed in Part II of this chapter, we need to articulate the contextual determinants of movement along the spectrum, by identifying elements of national political economies that locate particular governance challenges at various points between rules and deals. Second, we need to understand the institutions of the regulatory state as embedded in social relations: this is best done, we suggest in Part III, by bringing the regulatory state literature into direct conversation with the developmental state literature. Finally, in Part IV, we draw on public law traditions of regulatory theory to argue that proceduralization is a useful framework for explicit consideration of the role of the regulatory state in shaping, constraining, and legitimizing arenas for negotiation. Throughout the chapter, we recognize and engage with one of the

major challenges to viewing regulatory agencies as a negotiating space placed on a spectrum between rules and deals: the contested nature of legitimacy in such a space. Our answer stresses the importance of procedurally constrained spaces for negotiation even as we acknowledge that challenges to legitimacy are inevitable in the context of negotiations.

## I. Between rules and deals

Two broad generalizations can be made from the complex of case studies that are presented in the first half of this book. The primary observation is the persistence within regulatory state arenas of negotiated forms of decision-making that cut against the grain of rule-based governance, and strongly question claims of neutral expertise deployed in politically insulated settings. A secondary observation is the importance of a wider network of actors than the regulatory agency and its political principals—as highlighted in the 'regulatory space' literature—which plays a substantial role in shaping the outcomes of negotiated processes. The courts, civil society, and bureaucratic networks loom particularly large in this network.

The persistence and prevalence of these observations leads us to propose a reconceptualization of the regulatory state with respect to a spectrum of governance approaches. In Pritchett's (this volume) blunt phrasing, this spectrum is bracketed by a 'rules world' at one end of the spectrum and a 'deals world' on the other. In a 'rules world', governance challenges and contexts are resolved through the careful and consistent application of rules, and this world is the primary focus of the regulatory state literature. In a 'deals world', negotiation is the dominant mode, with the imagery of deals implying a particularly unconstrained space for deal-making. In practice, regulatory challenges fall at various points along this spectrum, depending on a range of contextual circumstances, as we spell out below. The regulatory state literature is well tuned to exploring contexts where apolitical rule-frameworks provide governance solutions. We suggest equal complementary analytical attention to the scope for regulatory governance to constrain, shape, and legitimize arenas for negotiation; how can the regulatory state of the South be equally relevant to a deals world?

In this part of the conclusion, we explore the implications of reconceptualizing regulatory challenges along a spectrum from rules to deals. We first articulate and develop the idea of a spectrum of governance challenges and explain why we believe this device facilitates closer engagement between the regulatory state and developmental state literature. Reconceptualizing the objective of regulatory governance along a spectrum from rules to deals is driven by the need for a theory that encompasses the empirical realities of the South, as represented in this volume. The cases illustrate that the institutionalization of regulatory agencies is often shaped by the presumption that regulatory challenges are amenable to rules-based solutions, only to find a subsequent tussle—including the participation of actors such as the judiciary and civil society—to reconceptualize regulatory functioning in ways that are locally relevant.

Urueña's (this volume) articulation of the constitutional regulatory state, for instance, captures a tension between understanding the role of a regulator for correction of market failures through the application of international economic law principles within a rule-based formulation, and the use of regulatory agencies to implement redistributive policies articulated in the language of political participation. Thiruvengadam and Joshi (this volume) discuss how the telecoms regulator in India evolved over time through the strong steering role of India's Supreme Court. Once established, the regulatory agency may also play a role in eliciting reaction or be pulled into spheres of negotiation. Chng (this volume) illustrates the rise of 'regulatory mobilization' by civil society groups in both engagement with the water regulator in Manila and in parallel to the functioning of that regulator. Dubash (this volume) shows how India's state-level electricity regulators have become, in part, embryonic spaces for engagement on entrenched problems related to service delivery. But this role of regulatory agencies as 'irritant' (Levi-Faur, this volume) is incompletely theorized at best.

The construct we propose here begins with the need to characterize the governance problems that regulation (and here we are largely concerned with regulatory agencies) are meant to address along a spectrum from rules to deals. Toward the rules end of the spectrum, rational, technocratic rule-based regulation that rests on the separation of efficiency and distribution provides feasible and effective solutions to governance problems. Towards the deals end of the spectrum, rule-based regulation operated through independent regulators is unlikely to result in effective governance solutions. When rules are created, they are under stress because the underlying political pressures for deals remains in place, and institutional capacities and norms are insufficiently developed to resist these pressures. Critically, however, these political pressures are often the outcome of perfectly legitimate interests demanding democratic political solutions—the chicken-and-egg problem of tariff increases and service quality improvements in public utilities, for example. These pressures are not amenable to rule-based solutions. Instead, solutions retain an explicit political component and often require an element of negotiation.

However, it is not our contention that regulation is irrelevant at the deals end of the spectrum, but instead that its function shifts from defining, monitoring, and enforcing rules, to shaping, constraining, and legitimating spaces for negotiation. In Dowdle's (this volume) substantially similar formulation, the 'real function of regulatory agencies seems to lie in their capacity to integrate structural distinct regulatory environments into the constitutional-political environment, rather than in their capacity to shield regulatory decision-making from . . . "politics" per se'. Jordana (this volume) similarly articulates a view of regulation that is necessarily messy and engaged with distributive politics: ' . . . a healthy system of governance in a country is not the one that concentrates most of the authority in a powerful regulatory agency, but the one capable of solving regulatory disputes in an effective way, without creating persistent losers in the distributive struggles related to the policy-making.' In other words, the regulatory state should play a role in creating the conditions for political rather than only technocratic and apolitical deliberation.

The evidence in this volume suggests that, in many cases in the South, regulators are forced to operate in this terrain, but that doing so is somehow illegitimate with

respect to institutional design and intent, because it risks undermining progress towards a rule-based world. This perspective, as Jayasuriya (this volume) reminds us, is rooted in the spread of regulatory agencies as functional to the rise of neo-liberalism: '... regulatory institutions become the mechanisms through which market reform is functionally embedded.' Of course, more overt political contestation of the legitimacy of market reform as a substantive policy issue often muddies the waters when debating the most appropriate design of regulatory agencies, and we will return more directly to the issue of (competing notions of) legitimacy later in the conclusion. Suffice to say at this point that conceiving of regulators as facilitating legitimate forms of negotiation, rather than as neutral rulemakers, monitors, and enforcers, is, we would argue, at the heart of understanding the regulatory state as positioned *between* rules and deals. It is a starting point that blurs the distinction between distributive politics and rational economic decision-making, a distinction that is at the heart of Majone's (1997, 2001) influential conception of the market-correcting regulatory state. It is this that is central to our move away from 'mainstream' regulatory state assumptions: we do seek to re-inject politics, albeit in a (at least potentially) more orderly fashion. Nonetheless, we are not presuming that any automatic legitimacy attaches to either rules or deals—but we do wish to pry apart any automatic link between legitimacy and *de*policization. We also acknowledge that it is quite likely that neither end of the spectrum empirically exists in 'pure' form, but we are using this language in a relatively stark way to push back against the deeply embedded assumptions of the most policy-influential literature to date.

Part II of the chapter contextualizes our main argument in a much more nuanced way. Both because of the intellectual roots of the regulatory state, and its historical association with the spread of neo-liberalism, regulatory agencies, then, are designed as if the polities within which they are embedded occupy the rule end of the spectrum—the 'rationalised myth' of the regulatory state (Dubash, this volume; Hochstetler, this volume). Indeed, efforts at transplant are seldom rooted in domestic political processes that match regulatory institutional forms to appropriate locations along the spectrum between rules and deals. In the absence of these domestic processes of design, the result is frequently a dissonance between the (often latent) assumptions of regulatory approaches and institutions drawn from a homogenized global 'best practice', and the specific governance context. This dissonance, we have argued, is often more apparent in the South, and the adjustment more protracted and complex. In Dowdle's (this volume) formulation, because 'peripheral regulatory environments are fragmented, volatile and less standardised, they will be harder to integrate ... into the large political-regulatory regimes simply through the construction ... of abstract, universal technocratic knowledge systems'.

Because the cases often illustrate instances of dissonance, many of the contributions in this volume have focused at least as much on the *ex post* process of adjustment in the face of dissonance after institutionalization of regulatory agencies. This is an important complement to the existing literature on the regulatory state, which emphasizes careful comparative analysis of *ex ante* conditions under which regulatory agencies emerge and are successful. The stress on *ex post*

adjustment evokes but modifies the metaphor we outlined in the introduction of a hollow regulatory space that is subsequently populated by institutional practices, norms, and expectations.

It is worth emphasizing that we do not see ourselves as invoking or reproducing the deterministic logic of the modernization paradigm that Jayasuriya (this volume) warns against. Indeed, we agree with Jayasuriya's argument that the very process of market-making can create and exacerbate unevenness—tensions over water and electricity tariffs in newly privatized contexts are prime examples—which inevitably shape and structure the work of regulatory agencies. Such unevenness is pervasive—a mismatch between regulatory construct and regulatory environments need not be a function only of the South. Countries of the North may drift into contexts that require explicit negotiation, much as has happened during the global financial crisis of 2008, and countries of the South or particular sectors may develop traditions of rule-based governance. What is important is to capture the full range of contexts, and develop analytical approaches to mapping and understanding these contexts.

In sum, the model we propose here conceptualizes regulatory environments along a spectrum from rules to deals, where 'rules versus deals' is understood as a useful heuristic, one compatible with a recognition that no regulatory system could ever be entirely rules-based, nor would any regulatory system orient itself towards a form of regulatory state entirely grounded in deals. In practice, the spectrum is nuanced, with the location of any particular national and sectoral regulatory context determined by a range of different contextual circumstances as we articulate below in Part II. Regulatory institutions, however, particularly when shaped by global trends towards market-making, are typically institutionalized as if the regulatory environment operates at the rules end of the spectrum. The analytical challenge is to describe both the *ex ante* regulatory environment and regulatory design, and then identify the processes through which any dissonance between the two is shaped through subsequent processes of adjustment. Of course, it may also be the case that dissonance is minimal; regulatory agencies focusing on creating, monitoring, and enforcing rules operate within a rules-based environment, or indeed, that regulators designed explicitly to do so operate to structure and legitimize negotiation in contexts where deals are the norm. But assessing this degree of match or dissonance becomes largely an empirical question, for which the starting point is mapping contextual factors that locate cases on a spectrum from 'rules' to 'deals'. As we argue in Part II, those processes of adjustment are typically driven by the relative intensity of redistributive politics and by interaction between regulators and the bureaucracy, judiciary, and civil society, as well as by sectoral specificities, crisis contexts, and the relative presence of democratic or authoritarian control. To the extent that competing notions of legitimacy intrude, as they inevitably do, into these contextual mapping exercises, Part III will suggest ways in which their importance can be accommodated by shifting the larger analytical framework towards that of an embedded regulatory state.

## II. The contextual determinants of an embedded regulatory state

In the introductory chapter, we identified three contexts that we viewed as commonalities of 'the South' that might be expected to produce distinctive trajectories in the development of the regulatory state. In this section, we reformulate those contexts in terms of six contextual factors that we think are crucial determinants of a regulatory agency's location along the spectrum between rules and deals. Most of these are more narrowly tailored than our original three starting points, which have been unpacked in more detail by the case studies and commentaries. Redistributive politics, however, retains its primary salience.

### A. Redistributive politics

The relative intensity of redistributive politics in Southern settings is overall the most salient contextual factor at a micro level to the narratives and perspectives in the case studies and commentaries of the book. At a general level, the import of high-stakes redistributive politics for the rise of the regulatory state can be summarized as follows: the greater the intensity of such politics, the more tendency there will be for a regulatory agency to act as a new democratic space or even to facilitate broader 'regulatory mobilization', as Chng's (this volume) case study demonstrated. This finding illustrates our earlier point about the need for ways of talking about regulation without assuming that solutions are to be found in a rule-based world. From the 'rules' end of a spectrum between rules and deals, and certainly from the point of view of mainstream regulatory literature, redistribution is squeezed out as precisely the sort of issue that regulatory agencies should be insulated from, and allocated to a political space defined in contradistinction to the space within the regulatory agency. Even Levi-Faur, who adopts a generally capacious approach to the scope of functions undertaken by the regulatory state, makes this juxtaposition:

> The regulatory state invests in rule making, monitoring and enforcement at the expense of other types of policy including service provision, subsidies and, more generally, redistribution. (Levi-Faur 2009, p. 184)

Yet the case studies, as both Dowdle (this volume) and Hochstetler's (this volume) commentaries emphasized, show that redistributive politics can be theoretically bracketed but will empirically return, rendering regulatory agencies either irrelevant or ill equipped. Thus a 'pure' regulatory state perspective does not advance any capacity to deal with the persistence of redistributive politics, either theoretically or practically.

However, the contention that we view the regulatory agency as a negotiating space placed on a spectrum between rules and deals brings us up against a challenge: at what point do such negotiations become illegitimate deals? As we suggested earlier, exploring the conditions under which the regulatory state can credibly structure negotiations is not the same as granting sanction to all forms of negotiated outcome. Hochstetler (this volume) discusses, for example, the potential for

middle-class civil society actors to dominate regulatory decision-making, and Dubash (this volume) describes a specific instance of this outcome with reference to regulation of electricity in Delhi. What competing notions of legitimacy underpin these interventions, who controls the outcomes, and according to what criteria? We think the answer here must point in two directions, as argued in more detail in Parts III and IV, using developmental state theory to reframe the problem and public law-influenced regulatory theory to suggest tools and techniques for responding to the reframed problem. We would acknowledge in advance that we are not able to—nor do we seek to—'solve' challenges facing the rise of the regulatory state in the sense of providing instrumental solutions in these concluding sections. But we would defend the stance that confronting directly the challenge of distinguishing legitimate negotiation from arbitrary abuse of power is a more productive way to engage with the rise of the Southern regulatory state than directly *juxtaposing* rulemaking with redistribution. In the meantime, we continue to explore further contextual factors shaping the embedded regulatory state. As will emerge in the discussion, these factors help to not only position a particular regulatory state on the spectrum but also operate to constrain arbitrary exercises of power.

## B. Crisis context

As Post and Murillo's (this volume) case study shows, a crisis situation can render a regulatory agency irrelevant, substituting high-level executive influence as the core shaping factor for governance decisions. Kingsbury and Donaldson's (this volume) commentary characterizes this as delegalization followed by relegalization. Severe and sudden crises might therefore be expected to shift regulatory institutions abruptly further along the spectrum from 'rules' towards 'deals', not least because they will usually catalyse macro-scale redistributive politics, which cannot be accommodated by neutral technocratic expertise. Post-crisis, there may well be a shift back along the spectrum. This kind of exceptional movement can provide a research opportunity to flesh out our understanding of more incremental movement along the spectrum in 'business-as-usual times'.

Explicit acknowledgement of the political dynamics that drive outcomes in the regulatory state in crisis settings could help to guide thinking about how to draw the line between a constrained and legitimate negotiating space on the one hand and trajectories that promote arguably illegitimate pursuit of special interest deals on the other hand. For example, Post and Murillo (this volume) helpfully identify investor characteristics as an important political variable in times of crisis, especially the relative embeddedness of domestic investors with diverse holdings in multiple sectors. A more fine-grained understanding of how different types of investors relate to the political principles of regulatory institutions, and of the formal and informal procedures that shape that relationship, would advance the capacity to explain, predict, or understand more incremental shifts along the spectrum between rules and deals outside times of crisis. And as countries in the North increasingly experience crisis conditions that arguably destabilize institutional stability as much, though in different ways, as Southern countries, the interdependence of

North and South will intensify the mutual relevance of research that explores this and other aspects of a politicized negotiating space.

## C. Sector specificity

The redistributive impact of shifts in the regulatory landscape will sometimes depend on sector-specific dynamics, especially the technological dimensions of a particular infrastructure. For example, the technology of mobile telephony has allowed liberalization in telecommunications to rapidly benefit rural areas, while available technologies in water and electricity tend not to shift urban-rural disparities as effectively. This may be one contributing factor to the fact that regulatory institutions in telecoms in Brazil (Prado, this volume) are located closer to the spectrum of 'rules' than electricity regulations, and are able in India (Thiruvengadam and Joshi, this volume), with the complementary support of the judiciary, to maintain a degree of insulation from 'pure' dealmaking. Post and Murillo (this volume) show sectoral difference even between water and electricity in Argentina, despite the fact that both technologies share similar capital and land-intensities. However, as they note, 'The higher level of patience we observe among electricity investors [who chose not to exit the market in the wake of the 2000–01 currency crisis] can at least in part be explained by higher revenues and lower investment obligations in the electricity sector [as compared with the water sector]' (Post and Murillo, this volume). Finally, Hsueh's (this volume) commentary also picks up on the importance of sector-specific dynamics in explaining variation in regulatory governance patterns and the various questions she identifies highlight both technological differences and the political implications of such differences.

## D. Interaction with other actors and institutions

The importance of actors outside the regulatory agency and their interactions within a regulatory space has been a clear theme of many of the case studies, with a particular focus on judicial actors, civil society actors, and bureaucratic politics and traditions as drivers for locating regulatory governance at specific places along the spectrum. Indeed, two of the commentaries pull out the importance of juridification (Kingsbury and Donaldson, this volume) and civil society (Hochstetler, this volume) as themes worthy of entirely independent focus, and we refer the reader to those chapters for more detail there. For the purposes of our argument here, what is important is that the input of these actors helps to constrain the negotiating space created in the regulatory space of the South in ways that prevent it being abused by 'special interests' or manipulated to arbitrary effect, as both Pritchett (this volume) and Hsueh (this volume) caution against in their commentaries. Moreover, those constraints are, analytically at least, agnostic in terms of which direction they push along the spectrum between rules and deals.

In the case of the judiciary, for example, Urueña's (this volume) chapter on water regulation in Colombia can be nicely juxtaposed with Thiruvengadam and Joshi's (this volume) chapter on Indian telecommunications. Both cases deal with the ways

in which the agency operates after the period of inception, but chronicle a significant structural influence of the judiciary on those operational workings, which feeds back onto the design of the regulatory state. That feedback effectuates an adjustment of the kind that we argue is necessary to connect effectively the context of Southern countries with the political challenges they face. But Urueña's (this volume) chapter shows an adjustment *away from* rules while Thiruvengadam and Joshi (this volume) chronicle an adjustment away from deals and *towards* rules.

In the case of Urueña's chapter, he shows how courts open up the regulatory space to a greater range of actors and scope of issues than the narrower focus on economic efficiency promoted by the local–global coalition supporting the inception of the agency. The judicial decisions push regulatory agencies towards a more inclusive space where a constrained negotiation (via notice and comment procedure) can take place.

By contrast, Thiruvengadam and Joshi provide an account of how judicial intervention supported the *insulation* of a new agency from political interference. In other words, like Urueña's case, courts are important actors in the wider regulatory space shaping the trajectory of the regulatory state, but unlike Urueña, the movement along the spectrum driven by the judiciary is away from deals and towards rules. This shows the agnostic nature of including the judiciary as an important element of the analytical framework for viewing the regulatory state in a space between rules and deals, and its potential for elaboration through future research.

Similarly, Hochstetler (this volume), in her account of the salience of civil society actors in the regulatory space, indicates two possible roles for such actors—an expertise-based role that adjusts regulatory dynamics in the direction of rules, and a 'blocking' role that pushes away from rules (although not necessarily towards deals). The first of these stories is reflected in Dubash's (this volume) account of how civil society actors in the Indian context helped to achieve operational effectiveness when they could deploy specific expertise and appropriate vocabularies of intervention. Chng (this volume), by contrast, takes up the second story, developing a concept of 'regulatory mobilization' that helps to explain an empirical sequence of iterative 'blocking' and negotiation by civil society actors in water regulation in the Philippines. This sequence, in his account, is both constructive and yet still vulnerable to the darker side of political clientilism. It portrays an adjustment towards the 'deals' end of the spectrum that maintains a slippery boundary of legitimacy in relation to that extreme. The productive nature of this characterization is demonstrated by its take-up by several commentators (Jayasuriya, this volume; Hochstetler, this volume; and Dowdle, this volume) whose cumulative analyses suggest that 'regulatory mobilization' could provide a microframework for future research within the broader analytical template we set out here.

## E. Bureaucratic practices

A few of the cases highlight the importance of nationally specific bureaucratic practices in shaping how regulatory questions are framed and answered. Understanding these influences often requires peering beyond the broad macropolitical

forces to examine the micropolitics through which regulators are established and function. Prado (this volume), for example, notes that bureaucrats in Brazil play a primary role in designing regulatory institutions once political approval for them is given. She attributes a weaker regulatory structure for Brazilian electricity as compared with Brazilian telecoms to perceptions about the desirability of a privatization and regulation-based reform among the respective bureaucrats dealing with each sector. This difference, in turn, has to do with how the bureaucrats interpreted global evidence and national track records in each sector.

Also discussing independence, Badran (this volume) notes that in Egypt, the practice of appointing the minister of communications and information technology as the head of the board of the National Telecommunication Regulatory Authority raised no eyebrows, including among staff of the independent regulator. In Egyptian bureaucratic traditions, direct oversight by political authorities was unexceptional; indeed, the converse would have aroused comment. And in India, Dubash (this volume) suggests the relationship between the bureaucracy and the political class is more nuanced, and embedded within the larger culture of the Indian Administrative Service, from which many electricity regulators are drawn. In this case, regulators drew on their bureaucratic traditions to preserve the perception of rule-based technocratic independence, even while finding creative ways to accommodate political pressures. These three cases show that varying bureaucratic traditions and cultures are an important dimension of a regulatory space in which competing notions of legitimacy circulate. Specific repertoires of 'how things are done around here' both constrain and legitimize the ways in which regulatory agencies occupy a particular position on the spectrum between rules and deals.

## F. Democracy and authoritarianism

The last contextual factor we think is important is the relation between democracy and regulation. In Badran's (this volume) case study of Egypt, he suggests that there is a reasonable basis for believing that the telecommunications regulatory agency will not, at least in the short to medium term, operate substantially differently under a democratic regime. In the longer term, he suggests that pressures from redistributive politics may be likely to 'gradually change the focus of the regulatory system from economic efficiency towards equality and wealth redistribution in [Egyptian] society', bolstering our observations about the salience of redistributive politics and foreshadowing the importance of the developmental state perspective for accommodating such pressures.

Given the very recent nature of changes in Egypt, Badran does not spell out at any length the argument for the short- to medium-term similarity between trajectories of regulatory governance under democratic or authoritarian conditions, although he does note that even authoritarian states are embedded in the global economy and need to reassure foreign investors. Adding to this, Hochstetler's (this volume) commentary suggests that the terms in which the contemporary regulatory state presents itself—technocratic and expertise-based—encourage similar patterns of participation whether controlled by democratic or authoritarian principles: 'Even

authoritarian states that are otherwise hostile to civil society participation may welcome expertise-based input' (Hochstetler, this volume).

We do not have enough cases in this volume to elaborate on the potential for variation in regime type to shape movement along a spectrum between rules and deals, but we think this would be a rich area for future research. It is a variable that operates naturally at the national macro level and as such lends itself to harnessing the literature on varieties of capitalism. Recent scholarship does just this, exploring Latin American and Iberian pathways to economic liberalization with a focus on different forms and modes of compensation developed (Etchemendy 2011). Etchemendy's project illustrates both the high salience of redistributive politics that we have already emphasized, and interestingly incorporates a specific hypothesis about the effect of democratic versus authoritarian regimes.

He argues that democratic reformers prioritized compensation to organized business and unions or union-represented workers. By contrast, authoritarian neo-liberals bypassed compensation to organized actors, repressing them coercively and instead compensating the informal poor to cultivate some form of mass popular legitimacy. Further research could explore whether this hypothesis has any traction in the context of the regulatory state.

This completes the discussion of the range of factors that we would argue collectively provide an initial attempt at determining features that help to locate regulatory environments on a spectrum from rules to deals. Exploring these contextual variables in Part II has helped us to understand the microdynamics of mapping the various empirical manifestations of the regulatory state in Southern contexts to a position on the spectrum. But we now need a broader conception of what prevents those dynamics from collapsing into arbitrary state fiat or illegitimate special interests deals. The challenge is a twin one: how do regulatory actors know enough to productively and yet legitimately shape the space for political negotiations? As will emerge in Part IV, we would contend that the general concept of a *procedurally constrained* space for political negotiations as a core and inevitable dimension of regulatory governance is at the heart of the answer. But we think it is vital to view proceduralization as embedded in social relations rather than as an apolitical and technocratic means of managing regulatory dynamics. For this reason, before we elaborate on proceduralization in Part IV, we return in Part III to the importance of the developmental state literature. Parts III and IV are related: the notion of the developmental state provides a frame for understanding the dynamics of the regulatory state of the South (Part III), while the public-law influenced literature on the regulatory state provides the tools and techniques of those dynamics (Part IV). In the final two sections, we discuss each in turn.

## III. Towards an embedded regulatory state?

Using the lens of the developmental state literature alters the frame for understanding the regulatory state of the South in significant ways. Take for example the widely used idea of regulatory capture in the mainstream regulatory literature.

The normatively neutral examination of the process through which regulatory institutions become embedded within national contexts for which we have argued alters the very conceptual basis of the idea of capture. As Jordana (this volume) reminds us, efforts to understand and devise metrics of independence, or the fulfilment of credible commitment, have a long tradition in regulatory studies. These include using proxies such as the existence of formal rules promising autonomy, to indices of political vulnerability measured by studying rates of turnover of regulators. Underpinning all these approaches, however, is a presumption that *any* substantial influence on the regulator is a negative.

By contrast, we suggest that the process through which regulatory functioning is, over time, shaped by a process of embedding within national contexts, influenced by the range of contextual factors discussed above, need not signal the undermining of regulatory integrity and may even be productive. To construct, shape, and constrain legitimate spaces for negotiation, regulatory agencies cannot operate with complete detachment on the bases of absolute rules. This engagement invokes the developmental state notion of 'embedded autonomy', which seeks to capture the idea that greater connection with actors in the larger regulatory space improves both the understanding of diverse interests, as well as the ability to engage with actors credibly in a deliberative manner (Evans 1995). Clearly, this can be taken too far, hence the juxtaposition of embeddedness with autonomy. This construct also evokes Ayres and Braithwaite's (1992) intriguing notion that responsive regulation may require 'optimal' levels of capture.

Concepts such as the regulatory state and developmental state have very different histories and analytic roots and, as Levi-Faur (this volume) argues, to bring them into conversation requires greater definitional and conceptual clarity on each. He suggests the essence of the regulatory state is its rule-based instruments of control, and argues for a concept of the developmental state that is based less on approaches to development and more on the credible intent to develop. These definitions allow him to argue for a constitutive rather than an oppositional understanding of the two concepts, which allows the instruments of the regulatory state to be harnessed in service of credible intentions to develop.

While appealing, this articulation of how the concepts can be integrated is perhaps a little too neat and also perhaps insufficiently appreciative of the context within which the developmental state literature developed—a history of sustained failures at state-led modernization and a few notable successes—which make intent alone an insufficiently rich and useful basis for definition. Substantively, Levi-Faur's approach implies that, over time, there is an inevitability to rule-based mechanisms. It provides little space for deliberate engagement with what the case studies here suggest are ongoing processes of negotiation that require credible structuring. This formulation also hollows out the developmental state, the strength of which as a concept rests on its serious engagement with *how* states can enable development, through a variety of techniques that simultaneously embed and preserve autonomy.

Perhaps a better synthesis would start with an alternative construction—the embedded regulatory state. This construct suggests that regulatory institutions are embedded within broader political economies, in the tradition of both Ayres' and

Braithwaite's responsive regulation and Evans' embedded autonomy, while retaining the attributes of rule-based and technocratic governance, for those sectors and countries where regulatory environments are conducive to this approach. Moving along the spectrum towards a deals world, however, would require nurturing mechanisms and approaches to embedding while preserving the credibility, in part due to autonomy, of the regulatory agency. We recognize that appeals to 'credibility' in a zone between rules and deals will raise questions of competing notions of legitimacy, which are not easy to resolve, particularly when decisions that have qualities of a 'deal' about them could vary powerfully in terms of their intuitive legitimacy. In particular, some 'deals' involve much more collective representation of a wider scope of relevant actors than others and the appropriate balance between embedding, credibility, and autonomy will be rather different for such regulatory interaction than for more private, individualized interactions serving 'special interests'.[1] This is a fraught area and we certainly think that further research exploring in more depth the notion of a spectrum between rules and deals could profitably develop a typology of different kinds of 'deal-like' interactions and explore their implications. For the present, we would emphasize that the broad idea of an embedded regulatory state is especially sensitive to collective interests and can accommodate a wide range of patterns of social embedding. Moreover, some limited constraints can also be provided by judicious reliance on proceduralization, as we explain in Part IV, and we see this tied in substantial measure into our approach to an embedded regulatory state.

## IV. Proceduralization: the politics of deliberation

Given the centrality of rules to any discussion of the regulatory state, it is no surprise that (attempts to) control regulatory dynamics through procedures have become a motif of the regulatory state. And our earlier discussion of the contextual factors shaping location along the spectrum between rules and deals has already identified the importance of courts and judicial actors in that mix of variables. Courts and judicial actors are certainly one important source of proceduralization capable of balancing competing demands for social embeddedness and autonomy in the regulatory space. We would suggest that collectively, the case studies and commentaries collected in this book convey a more responsive than autonomous notion of law in the context of regulatory states in the South. Notably, however, these responses remain focused on procedures. Even where distributive issues and questions of human rights drive the findings of courts, as in Thiruvengadam and Joshi's study of India (this volume), and Urueña's study of Colombia (this volume), the specific tools endorsed by the court are usually procedural.

But, as Kingsbury and Donaldson (this volume) note, the process of legalization that accompanies the regulatory state has multiple dimensions, and can lead to a

[1] We are grateful to Megan Donaldson for drawing our attention to this point.

range of vocabularies driven through a variety of institutional vehicles. This malleability suggests that proceduralization may usefully be viewed as an agnostic technique that can be deployed by multiple actors to multiple ends with variant political outcomes. In the context of the different frameworks we have explored for understanding the rise of the regulatory state, procedures can equally be used as a tool for securing credible commitments by insulating regulatory governance from politics (the more mainstream view) or as a political tool for securing credibly structured negotiation. This is the additional view we are arguing in favour of in this conclusion, though not as a substitute for rules but as an additional perspective.

Given the context of our emphasis on constructing spaces for negotiation, we do not think proceduralization is equivalent to legalization or tied to courts and judicial actors. Rather, it is a broader conception of procedures that buttress the relational capacity of agencies to construct a dialogue between competing forms of legitimacy—what is important is the capacity to bring in different groups and to properly respond to their different legitimacy claims. There are a number of strands of regulatory literature that draw on this inherently Habermasian claim, including Prosser's account of the public-facing aspects of privatization reforms (Prosser 2000), Black's defence of 'thick proceduralism' in the context of regulatory theory (Black 2001), and Jayasuriya's writings on accountability communities (Jayasuriya 2008).

In short, a procedurally robust space is more than simply a site or an arena, but a contribution in and of itself to politically valuable forms of deliberation. We would also stress, however, that this perspective on proceduralization calls into question, as Jayasuriya (this volume) notes in reflecting on his earlier work, a view of proceduralization as an instrument of depoliticization through creation of rules, autonomous and neutral law. Instead, it may be more useful to view it as a shift in the manner and arenas within in which politics is pursued. As Jayasuriya puts it: '. . . it is the form of politics that is at issue here rather than depoliticization.' The role of the judiciary then becomes one of meta-governance, providing 'more room for political agents to construct innovative regulatory experiments' (Jayasuriya, this volume).

The perspective above certainly would seem to require some optimism about the prospect of buffering politics from pure dealmaking. In practice, as several commentators suggest, if in quite different ways, the deployment of procedural tools as a technique is contingent on the persistent influence of long-standing elites and local social formations. Jayasuriya, for example, arguably sees room for deals that serve the narrow interests of the elites. Dowdle (this volume) associates 'socialization' more with contributions to 'social and political community and inclusiveness' that sound better positioned to serve the general interest. Most optimistically, particularly given the history of the regulatory state and its close association with projects of deepening markets, Kingsbury and Donaldson (this volume) suggest that 'different legal vocabularies, or the content of particular norms, may be invoked to argue for ends other than, or transcending, efficiency, such as . . . more ambitious notions of collective benefit . . . '.

The important point is that all three commentators mentioned above view procedures as important techniques along the spectrum between rules and deals, and as such inherently political—while at the same time the different stances adopted by the three commentators suggest varying assumptions about the

legitimate scope of such politics. The variety of stances adopted reminds us that while processes of constraining and shaping regulatory space can contribute to legitimizing spaces for negotiation, they are no guarantee of legitimate outcomes. In short, proceduralization is necessary but not sufficient and has limits: ultimately, regulatory outcomes will be (and surely should be) shaped by underlying politics and, in particular, the substantive debates through which they manifest. Moreover, we would not wish to be naïve about the fact that contesting the legitimacy of regulatory spaces is always potentially a political weapon in itself, often deployed by the losers of any particular regulatory negotiation. But even conceding this, commitments to constrain and shape spaces for negotiations are, we would argue, worthwhile commitments that go some way to securing or at least opening a space for debating legitimacy, especially given the persistence of 'deals' in regulatory settings. This brings us, then, to what Hsueh noted in her commentary (this volume) as an 'implicitly prescriptive tone' that pervades the book. Questions of appropriate normativity are worth bringing out of the shadows to conclude.

## V. Conclusion

When addressing such politically charged topics as regulation of basic services like electricity, water, and telecoms, it is difficult to separate analytical from normative considerations. Indeed, while Hsueh (this volume) expresses discomfort with prescriptive tones, other commentators such as Pritchett (this volume), forcefully urge more explicit engagement with a prescriptive agenda and with ultimate outcomes. Our effort here has been to focus on understanding and explaining what we feel are distinct empirical characteristics of the regulatory state of the South, and, in this conclusion, sketch the outlines of an intellectual agenda. At the same time, we are certainly concerned with the practical implications for political change of our analytical understanding, a concern we have sought to signal by highlighting a turn to proceduralism and deeper engagement with the developmental state literature as two useful ways forward.

For those primarily concerned with outcomes, this is unlikely to be enough. Pritchett (this volume), for instance, cautions us not to underestimate the importance of output legitimacy, such as the enormous improvement in teledensity and access in rural India, or the substantial damage inflicted on Argentinian investors after the currency crisis. However, there are conceptual challenges that make it problematic to focus exclusively, or even primarily, on outcomes in understanding the role of the regulatory state.

To begin with, regulatory decision-making is but one, if important part of a larger decision-making context and structure. As we have sought to show, at different times, other factors may overdetermine outcomes. The 2000–01 currency crisis in Argentina arguably spun the Argentinian regulatory framework well outside its design parameters. This is not to say there were not alternative forms of response, but that space for negotiation was undoubtedly limited. Similarly, in

recent years technology has played a significant role in the telecom sector, with the rise of mobile telephony. Again, different forms of regulation are undoubtedly nonetheless important, but for at least a decade, the decision-making context in telecoms has been very different to that in the electricity and water sectors, where technological change has not, as yet, had transformative effects on network economics and incentive structures. Regulation may often be necessary (and even here in the telecom context it could be argued regulators should have simply got out of the way), but it is rarely sufficient to ensure good outcomes. Our focus here has been on understanding the role of regulators in governing infrastructure sectors, in the particular contexts of the South. We see this as consistent with and contributing to a focus on outcomes, without overstating the explanatory potential of our analysis.

A second complication is that defining what is constitutes a 'good outcome' is, of course, deeply contentious. Rapidly increasing teledensity in rural India would indeed seem to be unambiguously good, but if an exclusive focus on outcome results in an implicit acceptance of growing kleptocracy in India—the 2G spectrum allocation scandal referred to in Thiruvengadam and Joshi's study (this volume)—the collateral costs are indeed high. In other words, even if particular outcomes are positive, the implications for broader institutional and political culture may be enduring, and more ambiguous. Similarly, observers could easily disagree on the relative merits and demerits of investor losses in Argentina, and on whether the effect will be salutary checks on future corporate moral hazard or capital flight with effects on the poorest.

These inevitable uncertainties around judging outcomes return us to the importance of input legitimacy, at the very least as an important complement to output legitimacy, and thereby to our focus on proceduralism. Notably, if one is concerned with outcomes, the regulatory state could cut both ways. If we build on our argument above, it has the potential to enhance transparency, equalize access, and be more rationally responsive to redistributional issues than pre-regulatory state arrangements. But it may also multiply opportunities for the use of influence, and facilitate powerful lobby associations that link up willing politicians with corporate interests. Creating a new political space will have both possibilities and dangers and certainly complicates robust accountability.

Going beyond a simple call for attention to proceduralism, and taking seriously a normative agenda, there would seem to be three particular points for action. First, procedures and mechanisms for *ex ante* consideration of the role of regulatory agencies within particular institutional and political contexts are necessary. In the language we use here, understanding the specific location between rules and deals, and minimizing dissonance of regulatory design with regulatory context, may improve outcomes. Second, a focus on procedures that structure and constrain *ex post* negotiation and adjustment, which has too often been subsumed into the category of capture, with particular attention to the role of the judiciary and civil society, may also be positive. Third, to increase the chances of a regulatory state that creates open, democratic spaces for negotiation, rather than closed spaces for

influence-mongering, it will be important to deliberately structure those spaces so as to be accessible to the politically disadvantaged.

These themes certainly have echoes in the broader literature on the regulatory state, but we have built upon and extended those earlier traces. A focus on *ex ante* analysis of context certainly echoes the work of Levy and Spiller (1994), although we emphasize much more the social embeddedness and relational capacity of regulatory agencies, as well as the contingencies that flow from this. Our analytical attention to *ex post* adjustment as a broader category than capture alone has been outlined, if in different terms, by scholars such as Ayres and Braithwaite, but we would suggest that our approach brings into more direct conversation regulatory scholars focused on regulatory design (often at a macroinstitutional level) and scholars focused on implementation and compliance. And attention to the emancipatory potential of procedures, if explicitly designed as such, has been explored by Prosser (2000) and Black (2001), as mentioned above, though with considerably less attention to the kind of overt politics that we emphasize are both inescapable and not always, or necessarily, malign. Finally, for all three strands, we would suggest they have not thus far fully informed either scholarship or practice in the context of the regulatory state of the South. Nor, for that matter, have they been brought together in a manner that informs an elastic concept of the regulatory state applicable to both North and South, which brings us to our closing point.

As Hsueh (this volume) notes in her commentary, we were originally 'motivated by the idea of a *distinct regulatory state* with *distinctive implementation dynamics of the South*, and the secondary analysis of national variation within it'. Our ending point of the analysis has certainly reinforced the embeddedness of regulation in state–society relations and as a consequence the importance of complementing regulatory state approaches with developmental state approaches. Yet—and perhaps paradoxically—it has done so in ways that perhaps dilute our own initial starting claim for the *distinctive* implementation dynamics of the regulatory state of the South. A more accurate closing reflection might be to say that the empirical context of the South throws into sharper relief the analytical spectrum that best illuminates the workings of the regulatory state in both the South and the North. Implicit elision of the empirical experience of settings peripheral to circuits of global power, in other words, has impoverished the intellectual agenda presented as universally applicable across the globe. A reframed intellectual agenda that is more accepting of limited degrees of politicization and more honest—or modest perhaps—about its capacity to provide generalized solutions at the level of principle is at the heart of the basically conceptual notion of 'a regulatory state of the South'. We would argue that this conceptual notion provides an analytical framework and a doorway for empirical research that will serve scholars better in responding to the very real and growing challenges facing the regulatory state and its efforts to better the lives of ordinary people.

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