

POLICY BRIEFING

Regulation of Logistics Infrastructures in Brazil

1. This briefing document develops options that were discussed during workshop sessions at ANTT and IPEA. These meetings build on the publication of the report on the regulation of logistics infrastructures in Brazil, which received financial support from the UK Prosperity Fund.
2. The report highlighted the importance of regulatory governance and regulatory capacity in attracting investment into enhancing Brazil's infrastructure capacity. In particular, it put forward the notion of 'disciplined discretion' to guide future initiatives. There was, at present, too much emphasis on signaling 'commitment' when there was an inevitable need to establish scope for discretion to allow for non-anticipated developments in economic circumstances.
3. The key challenges that were identified for strengthening regulatory governance and capacity in the logistics infrastructure domain were the degree of dispersion among different stakeholders and their disconnection with other related policy areas, such as regional planning; the relationship management between different key parties, namely the Casa Civil, the sectoral ministries and the regulatory agencies; and the general opaqueness of processes:
 - a. The lack of integration meant that it was questionable whether the strategically 'best' projects had been put forward for prioritisation and promotion.
 - b. The concerns relating to 'relationship management' between different parts of the federal executive in Brazil meant that the different actors related to each other in mostly risk averse ways. In addition, it was suggested that the exercise of disciplined discretion at the early stage of concession processes was hindered by concerns that any decision might be challenged by the TCU at an ex post stage.
 - c. The overall opaqueness to third parties was partly a product of fragmentation, but also a result of general risk aversion by different actors.

4. There are four key areas that were highlighted and that were seen as useful in developing regulatory governance and regulatory capacity in Brazil. These were:
 - a. Regulatory impact assessments (RIAs). These were seen as useful in developing regulatory understandings and ensuring consistency overall, regardless of the well-recognised limitations of these procedural methods. There are initiatives to establish a consultative forum to advance understanding of the various experiences regarding RIAs. It will be important to establish 'safe space' venues for questioning and challenging the quality of impact assessments.
 - b. Engagement tools. It was seen as important to develop further approaches towards engaging stakeholders directly with concession-holders (where possible) and to ensure the resourcing of these exercises over time. Existing experience has not been positive, partly because of the negative response by stakeholders. However, the lack of co-operation by stakeholders should not be seen as a barrier, but rather encourage regulatory agencies to seek ways of incentivising co-operation.
 - c. Performance-standard contracts. The idea of a 'tramline', namely the use of upper and lower performance boundaries that would establish trigger points for re-negotiations, needed to be explored further. Such arrangements exist at the state-level but have, as yet, not been applied at the federal level. A credible regime requires mutually agreed triggers for re-negotiation that relate to both under- and over-performance on robust indicators.
 - d. Challenge functions. Any monitoring regime is likely to experience tendencies that reinforce dominant understandings and insufficiently challenge existing approaches and projects. Challenge functions (such as the 'devil's advocate') are therefore essential to ensure that different perspectives have been fully explored. At present, such challenge functions are largely undertaken by the TCU (in general, decision-making within organisations has been skewed by anticipatory responses to potential TCU challenges). There is therefore the need to establish, within the PPI (as central coordinator of logistics infrastructure concessions), ministries and regulatory agencies, resources that allow a 'speaking truth to power' in terms of challenging dominant approaches, performance information and enforcement approaches. Such resources may also look at alternative future scenarios and challenge 'present day' thinking that sees the future as a simple continuum of current trends.
5. There are different ways of developing these different initiatives. Broadly, four different approaches can be considered:
 - a. Ongoing decentralised ad-hoc initiatives: At present, there are plenty of interesting and important initiatives and processes ongoing in different regulators and ministries. Some examples are the collection of customer satisfaction information, emergent benchmarking of concession holders, and the scoring of concessions across a range of risks. Partly, these initiatives are a sign of the considerable progress that regulators have made in terms of developing capacity and in enhancing their own standing. However, such initiatives have always been ad-hoc

and highly localised, without sufficient cross-agency learning and stable funding to support long-term capacity building.

- b. Central initiatives. Emphasising the importance of centralised initiatives refers to both the development of a central capacity to manage concessions and the development of regulatory governance and capacity more generally. In terms of the former, the prominent role of the PPI in concession development has been emphasised. However, there are questions as to the future of such centralised initiatives. There is an inherent tendency for these initiatives to become 'mini-ministries' in their own right, with different stakeholders (concession-holders, regulators and ministries) turning to such a central body. This risks gridlock and also repeats earlier experiences that were seen as having become over-centralised and controlling, thereby reducing the capacity of sectoral bodies to develop their own initiatives and capacities.

The second centralised initiative refers to the agenda of capacity building to enhance central initiatives on the lines of the earlier PRO-REG programme (this initiative sought to develop 'best practice' across Brazilian regulators). This central initiative, organised through the Casa Civil, had the advantage of being a flagship programme, thereby enjoying attention among ministries and regulators. At the same time, such a central initiative will always be accused of being interested in centralised control rather than supporting the capacity development of ministries and regulators. It is therefore important to establish a new PRO-REG initiative that disperses responsibilities and encourages regulators and ministries to enhance their own capacity rather than to be seen to respond to initiatives from the centre.

- c. Shared responsibilities. In view of the considerable dispersion in the Brazilian executive despite overlapping responsibilities, initiatives that seek to enhance joint ownership and a sense of mutuality among regulators and other bodies would offer considerable advantages. Examples of such initiatives include
 - i. the use of horizontal peer-review across different regulatory agencies. There is a tendency among regulators to prioritise learning from agencies in other jurisdictions that operate in the same sector. However, much is to be said for learning across sectors within the same jurisdictions. Such peer-learning could focus on generic issues that affect all regulators (such as impact assessments, enforcement approaches). At the same time, such exercises could focus on areas of jurisdictional overlap. One risk is that some regulators would be unwilling to share their practices in candid and reflective ways (if at all). For instance, some 'high capacity' regulators may not see real benefit from participating. Clearly, this is a risk in this initiative that would need to be managed.
 - ii. the introduction of 'co-ordination protocols' that would establish basic parameters across the different actors involved in logistics infrastructures. This would grant regulators and other actors a space to engage in regulatory processes with a degree of confidence that conduct will not be censured during later stages.
- d. Adoption of meta-regulatory standards: In line with the legislative initiative to enhance the governance of regulators, initiatives could concentrate on 'governance

principles' that would be binding on regulators and that would be open to external validation. Such a scheme might operate if the budgetary position of the different regulatory agencies could be stabilised and made predictable.

6. A renewed PRO-REG initiative should seek to encourage the involvement of regulatory agencies. It should therefore combine a mixture of centralised initiatives to encourage the involvement and engagement of different stakeholders and of decentralised peer-review activities to support capacity strengthening. The risk of centralised initiatives is that they are perceived as controlling activities and the resourcing of these initiatives is likely to be prone to political attention cycles. A decentralised approach would build on existing capacities within agencies and support mutual learning. However, the risk of decentralised approaches is that they are ad-hoc and based on personal relationships rather than more enduring institutional ties.
7. One risk of these initiatives is that they focus on regulatory agencies alone. Given the finding that regulatory agency staff rarely communicate with actors outside their own organisation, it is critical to address boundary-spanning capacities and motivations. Focusing solely on impact assessments and procedural devices risks emphasising agency decision-making without advancing the capacities in other areas.
8. One further capacity issue that requires addressing relates to the role of ministries in particular. Earlier initiatives have included the creation of the infrastructure analyst career. Other initiatives might include staff rotation between regulatory agencies and ministries.
9. There are no simple solutions as challenges reflect inherent capacity issues associated with the Brazilian political system. However, approaches that develop increased appreciation of intractable problems and the need to find an acceptable balance between different objectives would be to encourage conversations among decision-makers, as part of co-ordination protocols and horizontal peer-reviews, about over-lapping and under-lapping objectives. It also requires a sustained effort to address long-standing capacity deficits among ministries, regulatory agencies and other central government agencies.