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THE BOARD AGAINST ALL ODDS: ASSESSING THE POWERS OF DELEGATED MANAGEMENT IN BRAZIL

*Alexandre Edde Diniz de Oliveira**

THIS article aims to analyze the contractual allocation of decision-making power to the board of directors in Brazilian public companies. Unlike U.S. law, Brazil's corporate statute bestows original and supreme decision-making power to the shareholders' meeting in running of the firm, while reserving a comparatively ancillary role to the board. At the same time, however, the statute permits shareholders to delegate part of these powers to the board through charter provisions. Whether or not parties take advantage of private ordering to empower the board is of great interest given the changing normative framework applicable to Brazil's capital markets over the past two decades. This article's empirical analysis of the corporate charters and shareholder agreements of companies listed on the São Paulo Stock Exchange (BM&FBOVESPA, now also known as B3-Brasil, Bolsa e Balcão) reveals that shareholders appear to augment the board's decision-making power by charter provision, especially in dispersed ownership and Novo Mercado companies. It remains unclear, however, whether such a tendency reflects a genuine predilection for greater board empowerment, or simply a means to extend the clout of a controlling shareholder, or group of controlling shareholders, onto the board, in view of the binding force of shareholder agreements under Brazilian law.

I. INTRODUCTION

Concentrated ownership is the norm in Brazil. Brazilian public companies do not generally enjoy a separation of ownership and control,¹ at

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1. See Nelson L. Eizirik, *O Mito do Controle Gerencial: Alguns Dados Empíricos* [*The Myth of Managerial Control: Some Empirical Data*], 66 REVISTA DE DIREITO MERCANTIL, INDUSTRIAL, ECONÔMICO E FINANCEIRO 103 (1987) (revealing a

least not to the same degree as experienced in the United States under the traditional Berle and Means model.² In this vein, the literature refers to several factors to explain ownership concentration, such as the stiffening of entrepreneurial activism and competition by the state,³ poor minority shareholder protection by the law,⁴ the private benefits exacted by controlling shareholders,⁵ a path dependence with respect to previous corporate ownership models,⁶ and political preconditions that impede the development of deep and liquid capital markets.⁷

Brazilian corporate law is unique, however, as it is historically the product of the decisive influence of political elites and oligarchies, which carefully select and import those foreign legal rules better suited to their private interests.⁸ Notable influences also include the heavy presence of state enterprise in the economy since at least the 1950s,⁹ and the institutional incentives for the migration of well-established multinationals through local branches with ample self-financing capabilities.¹⁰

complete lack of Brazilian public companies with ownership dispersion in the 1980s); Érica Gorga, *Changing the Paradigm of Stock Ownership from Concentrated Towards Dispersed Ownership? Evidence from Brazil and Consequences for Emerging Countries*, 29 *Nw. J. INT'L L. & BUS.* 439, 456 – 59 (2009) (describing the prevalence of ownership concentration across all BM&FBOVESPA segments in the beginning of the twenty-first century).

2. See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 47 – 118 (1933).
3. See John C. Coffee Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 *YALE L. J.* 12 (2001).
4. See Rafael La Porta et al., *Law and Finance*, 106 *J. POL. ECON.* 1113, 1116 (1998); Aldo Musacchio, *Laws Versus Contracts: Shareholder Protections and Ownership Concentration in Brazil, 1890-1950*, 82 *BUS. HIST. REV.* 445, 445 – 46 (2008).
5. See Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 *J. FIN.* 537, 589 – 90 (2004).
6. See Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence of Corporate Ownership and Governance*, 52 *STAN. L. REV.* 127, 129 (1999).
7. See Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 *STAN. L. REV.* 539, 601 (2000).
8. See Mariana Pargendler, *Politics in the Origins: The Making of Corporate Governance in Nineteenth-Century Brazil*, 60 *AM. J. COMP. L.* 805 (2012) (describing the means by which traditional elites deliberately picked and chose the elements of comparative law best suited to their private interests in the drafting of early Brazilian commercial legislation).
9. See Mariana Pargendler, *State Ownership and Corporate Governance*, 80 *FORDHAM L. REV.* 2917, 2932 – 42 (2012); Mariana Pargendler, *The Unintended Consequences of State Ownership: The Brazilian Experience*, 13 *THEORETICAL INQUIRIES L.* 503 (2012) (describing the evolution of the state as a shareholder in Brazil throughout the twentieth century, and identifying, as negative externalities thereof, an increase in the private benefits of control for the state, the exploitation of minority shareholder value through related-party transactions, increased conflicts of interest between the political and profitability goals of the state, and a general disincentive to the development of deep capital markets).the political and profitability goals of the state, and a general disincentive to the development of deep capital markets).
10. See Paulo Roberto Davidoff Chagas Cruz, *Capitais Externos e o Financiamento de Longo Prazo no Brasil* [*Foreign Capital and Long-Term Financing in Brazil*], in *HISTÓRICA ECONÔMICA DO BRASIL CONTEMPORÂNEO* [ECONOMIC HISTORY OF CONTEMPORARY BRAZIL] 183 (Tamás Szmeccsányi & Wilson Suzigan eds., 1997) (attributing the lack of deep capital markets or long-term financing sources in Bra-

These factors explain the political economy advanced by the current Brazilian corporation statute of 1976.¹¹ This statute was enacted with the express mandate of promoting the rise of large national conglomerates,¹² pursuant to the military government's goal of concentrating the economy in the hands of wealthy industrial and financial elites.¹³

To this effect, the law is centered on the controlling shareholder's clout.¹⁴ One of the controversial means whereby it accomplishes this is by allowing shareholders to bind the votes of appointed directors to their prior directives through shareholder agreements (*acordos de acionistas*).¹⁵ The law sets that votes cast in disregard of these agreements are void,¹⁶ and that the absence of a bound director at a board meeting entitles other bound directors to vote in their name.¹⁷ Although generally seen as a poor corporate governance practice,¹⁸ studies have shown that binding shareholder agreements are on the rise among Brazilian public companies.¹⁹ Indeed, thin and uncertain lines separate firm and control-

zil to the military government's stimulus for the migration of foreign conglomerates).

11. See Lei No. 6.404, de 15 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.12.1976 (Braz.).
12. See ALFREDO LAMY FILHO & JOSÉ LUIZ BULHÕES PEDREIRA, A LEI DAS S/A [THE CORPORATIONS LAW] 139 – 156 (1992) (“[T]he draft corporations law . . . has as its primary objective ‘the creation of a corporate form for the development of the large private enterprise, as required by the current stage of the Brazilian economy’ . . .”).
13. See REPÚBLICA FEDERATIVA DO BRASIL, II PLANO NACIONAL DE DESENVOLVIMENTO (1975-1979) [II NATIONAL DEVELOPMENT PLAN (1975-1979)] 47 – 55 (1974) (Braz.) (describing the military government's mergers-and-acquisition policy in the development of “large financial or industrial-financial conglomerates”).
14. See Lei No. 6.404, de 15 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] Art. 116 de 17.12.1976 (Braz.).
15. See *id.* art. 118. The most common way by which such a control is exercised is through prior shareholder meetings (*reunião prévia*) in which the parties to a shareholder agreement decide how their appointed directors should vote in any given board meeting. Directors are usually required to abstain from voting on the matter if no consensus is reached, or if one shareholder exercises contractual veto rights in that regard.
16. See *id.* § 8.
17. See *id.* § 9.
18. The relevance of this issue has prompted the development of a comply-or-explain code by independent corporate governance associations, which, if adopted by the Brazilian securities regulator, may apply to all companies listed in BM&FBOVESPA. See GRUPO DE TRABALHO INTERAGENTES, CÓDIGO BRASILEIRO DE GOVERNANÇA CORPORATIVA: COMPANHIAS ABERTAS [BRAZILIAN CORPORATE GOVERNANCE CODE: PUBLIC COMPANIES] § 1.2.1 (2016) (recommending public companies to strike board-binding shareholder agreements from their governance arrangements).
19. See *Evolução da Governança Corporativa nas Empresas Listadas em Bolsa [Evolution of Corporate Governance in Listed Companies]*, INSTITUTO BRASILEIRO DE GOVERNANÇA CORPORATIVA (2014) (Some examples of these inconsistent trends include: a 18.4% decrease in the number of companies which disclose information on conflicts of interests and related-party transactions between 2009 and 2012 (from 60.8% to 42.4%); a mere 0.5% increase in the number of companies with boards comprised entirely of independent directors between 2004 and 2012 (from 73.5% to 74.0%); a 1.9% decrease in the number of companies which ban cash loans in favor of related parties between 2010 and 2012 (from 7.3% to 5.4%); and a 13.6% increase in the number of companies with shareholder agreements which

ling shareholder²⁰ and, as a result, controlling shareholders of Brazilian firms extract greater private benefits of control than in any other jurisdiction.²¹

In this article, I will assess the implications of this ownership model on the relative decision-making power of the board of directors over corporate affairs. More specifically, I will assess whether shareholders allocate additional decision-making power to boards, beyond the statutory default, by means of the corporate charters (*estatutos sociais*) of all companies listed at *BM&FBOVESPA*, the São Paulo Stock Exchange (*Bolsa de Valores, Mercadorias e Futuros de São Paulo*). To this effect, Part I provides a brief overview of the theory and practice on delegated management in Brazil and abroad. Part II describes the methodology used. Part III presents and discusses the study's main results.

A. DELEGATED MANAGEMENT IN BRAZIL AND IN THE UNITED STATES

In the United States, ownership dispersion has led corporate law to vest original and undelegated decision-making powers to the board.²² That is, insofar as managers are more attached to and familiarized with the firm than shareholders, the law attributes all except those most fundamental corporate decisions to the board.²³

This arrangement leads to information asymmetries and agency costs between shareholders and management, such as those expenditures necessary for preserving the welfare of the delegated management model, including monitoring and bonding costs.²⁴ The legal and contractual provisions that govern a company can increase, to varying extents, these agency costs. Yet the fact of the matter is that the default rules of U.S. corporate statutes enshrine the independence and the autonomy of the

bind, to any extent, the board's votes between 2004 and 2012 (from 17.7% to 31.3%).

20. See MARIO HENRIQUE SIMONSEN, EXPOSIÇÃO DE MOTIVOS Nº 196, DE 24 DE JUNHO DE 1976, DO MINISTÉRIO DA FAZENDA [MINISTRY OF FINANCE'S JUSTIFICATION NO. 196, DATED JUNE 24, 1976] (1976) (convoluting firm and controlling shareholder by setting as a fundamental premise of the draft statute that "legal entities have the behavior and reputation of its controllers").
21. See Dyck & Zingales, *supra* note 5 at 550.
22. See DEL. CODE ANN. tit. 8, § 141(a) (West 2017); *Manson v. Curtis*, 223 N.Y. 313, 322–23 (1918) ("In corporate bodies, the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke these powers. They are derivate only in the sense of being received from the state in the act of incorporation."). On the defining features of the board, see generally John Armour et al., *What is Corporate Law?, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 1, 11–13 (Reinier Kraakman et al. eds., 3rd ed., 2017) [hereinafter *ANATOMY OF CORPORATE LAW*].
23. Armen A. Alchian & Harold Demsetz, *Production, Information Costs and Economic Organization*, 62 AM. ECON. REV. 777, 787–89 (1972).
24. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 JOURNAL FIN. ECON. 305, 323–26 (1976).

board by restraining the means whereby shareholders may actively influence how the firm operates.²⁵ The board, for instance, must approve charter amendments or corporate reorganization proposals prior to their assessment by shareholders.²⁶ Additionally, the board is subject to shareholder oversight, in its regular course of duty, only when transacting with “all or substantially all” of the company’s assets.²⁷ Finally, the law requires a supermajority quorum for the removal, without cause, of directors who sit on standard boards, and bars without-cause removal of directors sitting on classified boards.²⁸

This state of affairs has called attention to the director-centric nature of U.S. corporate law. Given how the statute grants shareholders only very exceptional instruction rights with respect to the board, advocates of this director-centric model back the board’s original and unfettered power to direct and conduct business affairs—even at shareholders’ expense.²⁹ Opponents, however, back a redefinition of this status quo in favor of a shareholder-centric law that grants shareholders the power to initiate or propose fundamental changes to the company.³⁰

The shareholder-centric approach falls in line with shareholder treatment under Brazilian law. By any measure, Brazil is a fundamentally shareholder-centric jurisdiction. With scarce exceptions, the Brazilian model is not strictly comparable to its U.S. counterpart.³¹ Few jurisdictions require board supervision for as few matters as does Brazilian law. The only decisions necessarily subject to the board’s authority under the current statute are the appointment and monitoring of officers, the (non-binding) annual review of the officers’ accounts,³² the appointment of appraisers for purposes of appraisal proceedings,³³ and the power to call a

25. *Manson v. Curtis*, 119 N.E. 559, 562 (N.Y. 1918) (“As a general rule, the stockholders cannot act in relation to the ordinary business of the corporation, nor can they control the directors in the exercise of the judgment vested in them by virtue of their office . . . Directors are the exclusive, executive representatives of the corporation and are charged with the administration of its internal affairs and the management and use of its assets.”).

26. DEL. CODE ANN. tit. 8, §§ 242(b)(1), 251(b)-(c) (West 2017).

27. *Id.* § 271(a).

28. *Id.* § 141(k)(1).

29. See Martin Lipton & Jay W. Lorsch, *A Modest Proposal for Improved Corporate Governance*, 48 BUS. LAW. 59 (1992); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003).

30. See Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005). For responses to this submission, see Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006), and Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733 (2007).

31. See Mariana Pargendler, *How Universal is the Corporate Form? Reflections on the Dwindling of Corporate Attributes in Brazil* 26-29 (2016) (unpublished working paper) (on file with author.) (arguing that the near unanimous presence of controlling shareholders, the supremacy of the shareholder meeting’s powers pursuant to the applicable statute, and the possibility of binding a board’s votes through shareholder agreements severely hamper the *delegated* nature of Brazilian boards).

32. See Lei No. 6.404, de 15 de dezembro de 1976, art. 142, I, III, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.12.1976 (Braz.).

33. *Id.* art. 45, § 4.

shareholder meeting (which can be superseded by five-percent of shareholders if the board delays a summons for eight days, or by any shareholder should this delay reach sixty days).³⁴ In addition, although the statute sets the board's authority to fix the general directives for the company's business,³⁵ such directives are subject to the shareholders' instruction rights to decide on any matters involving the company's management and operation.³⁶

Moreover, almost every Brazilian public company is controlled by a clearly-defined shareholder or group of shareholders,³⁷ as companies can access equity finance sources at no prejudice to the controlling shareholders' interest via the issuance of non-voting preferred shares.³⁸ The long list of statutory powers allocated to the shareholder meeting,³⁹ the shareholders' right to increase these powers by means of binding shareholder agreements,⁴⁰ and the lack of security of tenure enjoyed by dissenting directors, all work to vest decision-making power in the controlling shareholder or shareholders.⁴¹ As a result, controlling shareholders are *de facto* entitled to run the company, regardless of board acquiescence to their directives.⁴²

Consequently, any board authority beyond the statutory default will depend on private ordering. The statute permits shareholders to contract around certain default rules and to confer additional decision-making power upon the board through the company's charter.⁴³ To be sure, such freedom is restricted to those issues not already allocated to the shareholder meeting's authority.⁴⁴ Further, shareholders are free to later revoke any such powers through a charter amendment or a without-cause removal of dissenting directors. Finally, shareholders may restrict the scope of these powers by means of a binding shareholder agreement.⁴⁵

Despite this, assessing the extent that shareholders take advantage of their permission to delegate part of their authority to the board is interesting because the very idea of a strong monitoring board is fairly recent.

34. *Id.* art. 123.

35. *Id.* art. 142.

36. *Id.* art. 121.

37. *See supra* note 2.

38. *See* Lei No. 6.404, art. 15, § 2.

39. Such issues include the unfettered power to: repurchase shares; amend the charter; authorize corporate reorganizations; file for bankruptcy or insolvency proceedings; reduce the minimum dividend payout; exit or enter a group of companies; set management's compensation; grant employee stock options; and takeover other close or public companies. *Id.* arts. 44, 122, 136, 152, 168, 255.

40. *See Id.* arts. 116, 118, §§ 8, 9; *see supra* notes 18-19 and accompanying text.

41. *See* Lei No. 6.404, art. 140.

42. To be sure, the shareholder meeting will never be able to represent the company or otherwise usurp the (few) original and undelegated prerogatives of management, but will rather have to simply remove and appoint those managers (including members of the controlling group itself) loyal to the controlling shareholder's interest. *Id.* art. 139.

43. *See infra* Part II.

44. *See* Lei No. 6.404, arts. 44, 122, 136, 152, 168, 255.

45. *See Id.* arts. 116, 118, §§ 8, 9; *see supra* notes 18-19.

The study of corporate governance, which is primarily concerned with the agency relationship between managers and shareholders, only came to the forefront of legal scholarship in the 1970s.⁴⁶ At that point, the scholarship began to advocate the empowerment of the board's monitoring power through independent or non-executive directors as a means to curtail serial cases of corporate abuses and corruption in the United States.⁴⁷ Under this new arrangement, independent directors would function as trustees to the shareholders before the company's insiders in dispersed-shareholding companies, or to minority shareholders before controlling shareholders in concentrated-shareholding companies.⁴⁸

The Brazilian capital markets felt these developments towards the end of the twentieth century, when BM&FBOVESPA created three premium governance-listing segments: *Nível 1*, *Nível 2* and *Novo Mercado*.⁴⁹ In light of repeated failures at legislative reform, BM&FBOVESPA took the initiative in creating opt-in segments directed at newly-listed companies; it reflected an attempt to kindle the voluntary adoption of better corporate governance practices by Brazilian companies.⁵⁰ These best practices seek to empower minority shareholders and independent directors, and, in the *Novo Mercado* segment, include a bar on the issuance of non-voting preferred shares,⁵¹ a mandatory bid rule for all shareholders,⁵² and the attribution of at least twenty-five percent of the board's seats to inde-

46. See Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 361, 362 (2016) (describing the rise of the corporate governance field as a reaction to the deregulation of Wall Street in the 1970s, and to a growing jadedness toward the quality of state intervention, so that corporate governance, in this light, arose as an attractive alternative to the increasing market and state failures).

47. See *id.*, at 369-378, and Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1514-20 (2007).

48. John Armour et al., *The Basic Governance Structure: The Interests of Shareholders as a Class* 17-21 (ECGI, Law Working Paper No. 337/2017) (describing the trusteeship strategy as an efficient and prevalent (albeit imperfect) means of mitigating agency costs across different corporate contexts, and describing how, in concentrated-shareholding systems like Brazil, "truly independent directors are more likely to be seen as champions of minority shareholders").

49. Further BM&FBOVESPA reform created the Bovespa Mais and Bovespa Mais Nível 2 segments in 2007 and 2014, respectively, directed to small and medium enterprises wishing to gradually go public and adopt the best corporate governance practices required for admittance into the Novo Mercado segment. Needed citation, 49a, 49b: See BM&FBOVESPA, BOVESPA MAIS, http://www.bmfbovespa.com.br/pt_br/listagem/acoes/segmentos-de-listagem/bovespa-mais/; see also BM&FBOVESPA, BOVESPA MAIS NÍVEL 2, http://www.bmfbovespa.com.br/pt_br/listagem/acoes/segmentos-de-listagem/bovespa-mais/. Albeit of limited relevance as of this date, I equally considered the 15 companies listed in these segments on the reference date herein.

50. See Maria Helena Santana, *The Novo Mercado, in NOVO MERCADO AND ITS FOLLOWERS: CASE STUDIES IN CORPORATE GOVERNANCE REFORM* 2-36 (Maria Helena Santana et al. eds., 2008) (describing the motivations, legal grounds, results and perspectives of the Novo Mercado segment); Ronald J. Gilson et al., *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States and the European Union*, 63 STAN. L. REV. 475, 482-502 (2011).

51. BM&FBOVESPA, REGULAMENTO DE LISTAGEM DO NOVO MERCADO, § 3.1(viii) (2011).

52. *Id.* § 8.1.

pendent directors.⁵³

BM&FBOVESPA's reform had an astounding effect on the Brazilian capital markets. In varying degrees, it limited the pre-existing divorce between political and financial rights in a company's shares⁵⁴, it stirred the development of the primary market's liquidity and of ownership dispersion among the more developed companies⁵⁵, and led to an exponential increase in the value of listed assets and shares of Brazilian companies.⁵⁶ But despite this success, empirical studies have shown an inconsistent trend in the adoption of those best corporate governance practices regarding the board⁵⁷, so that conclusively evaluating the extent of its effects, at least with respect to the empowerment of Brazilian boards, requires further research.

II. METHODOLOGY

In this study, I undertook to analyze the corporate charters and the shareholder agreements of all 346 companies listed on *BM&FBOVESPA* as of September 13, 2016⁵⁸ whose charter and shareholder agreements (if any) were made available on the website of either *BM&FBOVESPA* or the Brazilian securities regulator, *Comissão de Valores Mobiliários*.

I surveyed each charter pursuant to fourteen variables chosen to represent fourteen decisions with which the board may be incumbent depending on how shareholders approach the default rules on power allocation. For each variable, a company received a point if its charter attributed a decision to the board, or no point where it attributed it to the shareholder meeting or to the officers, or simply did not reference it where the statute's default rule does not allocate such decision to the board.

Further, I examined each shareholder agreement (if applicable) to account for boards that in spite of having authority under the charter, are

53. By reserving at least 20% of the board's seats to independent directors, and forbidding the chief executive officer from also holding the seat of the chairman of the board. *Id.*

54. See Gilson, *supra* note 50, at 498 (noting that the *Novo Mercado* segment increased the cost of common voting shares to the controlling shareholders by barring non-voting preferred stock, thereby mitigating "the previously pervasive wedge between voting and cash flow rights").

55. See Gorga, *supra* note 1, at 523-5, (describing how the five largest shareholders of companies listed in the *Novo Mercado* segment hold, on average, 56.16% of its shares; a number which rises to 91.60% in the *Nível 2* segment, 84.79% in the *Nível 1* segment, and 85.19% in the traditional segment).

56. See *Dados de Mercado [Market Data]*, *BM&FBOVESPA* (Jul. 13, 2016), http://www.bmfbovespa.com.br/pt_br/servicos/market-data/consultas/dados-de-mercado/. (This data shows a 433% increase in the total *BM&FBOVESPA* market capitalization between 2002 (the *Novo Mercado* segment's debut year) and 2009 (the last year before the stagnation and eventual decline of the Brazilian economy, as a result of the current recession)).

57. INSTITUTO BRASILEIRO DE GOVERNANÇA CORPORATIVA, *supra* note 17.

58. A list of these companies was obtained at *Empresas Listadas [Listed Companies]*, *BM&FBOVESPA* (Sep. 13, 2016), http://www.bmfbovespa.com.br/pt_br/produtos/listados-a-vista-e-derivativos/renda-variavel/empresas-listadas.htm.

bound by *ex-ante* shareholder directives. In this regard, a company received a point for every decision conditioned to prior shareholder consent under a shareholder agreement.

I divided the fourteen variables according to the default allocation of power under the statute, bearing in mind that shareholders are free to contract around any such rules. Variables one through three refer to decisions for which the board is responsible under the default rule. Variables four through eight refer to decisions for which the officers are responsible under the default rules. Variables nine through fourteen refer to decisions for which the shareholder meeting is responsible under the default rule.

A. DEFAULT RULES ALLOCATING POWER TO THE BOARD

Variable 1. Sale of real estate. The default rule holds the board incumbent with approving the sale or transfer of permanent assets, which include real estate⁵⁹, be they held for purposes of investment or as a part of the company's fixed assets.⁶⁰ This variable looks at whether the charter keeps this authority within the board's reach.

Variable 2. Guarantee of third-party obligations. The default rules empower the board to approve guarantees for third-party obligations.⁶¹ To be sure, this variable disregards subsidiaries and focuses on obligations entirely extraneous to the company. This variable also looks at whether such power is maintained within the board in the charter.

Variable 3. Issuance of non-convertible debentures. In public companies, the default rule is that the board may issue non-convertible debentures at its own discretion.⁶² This variable also looks at whether the board retains power over this decision in the charter.

B. DEFAULT RULES ALLOCATING POWER TO THE OFFICERS

Except where the law states otherwise, the officers have the power to execute any and all agreements and undertake any and all measures deemed necessary for the running of the company.⁶³ The law permits shareholders, however, to subject some or all of such decisions to prior board approval.⁶⁴ Whether or not shareholders contract to condition these decisions to board approval is the object of variables four through eight.

59. See Lei No. 6.404, de 15 de Dezembro de 1976 (Braz.).

60. *Id.* art. 178, § 1 and art. 179.

61. *Id.* art. 142, VIII.

62. *Id.* art. 59, § 1. This variable excludes financial institutions, which are subject to severe legal restrictions on the issuance of debentures. See Art. 35, Lei No. 4.595, de 31 de dezembro de 1964, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 31 de janeiro de 1965 (Braz.).

63. See Lei No. 6.404, de 15 de Dezembro de 1976 (Braz.). An officer may not, however, make donations at the company's costs without board approval, loan herself cash or assets without director or shareholder approval, or vote as a shareholder in the approval of her own accounts.

64. *Id.* art. 142, VI.

Variable 4. Debt contracts. This variable looks at whether the board must approve loans or other similar types of debt agreements before their execution by the officers.

Variable 5. Waivers. This variable looks at whether the board must approve any rights, waivers, or releases, including settlements in judicial proceedings, before concluded by the officers.

Variable 6. Corporate acquisitions. This variable looks at whether the board must approve the purchase of equity interests in other companies prior to being carried out by the officers.

Variable 7. Opening of branches. The law does not allocate authority over the opening of branches, offices, or establishments. The charter must therefore expressly set such an authority, lest it shall fall within the officers' general powers of representation.⁶⁵ Accordingly, this variable will identify those companies that have allocated such authority to the board.

Variable 8. Related-party transactions. Regarding conflicts of interest issues, Brazilian corporate law only directs shareholders and managers to avoid decisions in which they have a conflicting interest with the company, or from which they may derive private benefits or gains.⁶⁶ But the law is silent as to the how these related-party transactions should be approved, *i.e.* whether they require prior board or shareholder approval, so that, unless otherwise provided to the charter, officers may execute such transactions without board or shareholder oversight.⁶⁷

Following international convergence⁶⁸, the most advocated alternative to this default rule in Brazil is that of prior board approval of related-party transactions.⁶⁹ This variable will look to whether the board is so empowered by the charter. Nonetheless, given the widespread presence of controlling shareholders among Brazilian companies, a *majority of the minority* rule might be even more effective for purposes of curtailing private benefits of control and ensuring the rejection of impartial transactions.⁷⁰ This would follow other jurisdictions, such as the United Kingdom, which opts to allocate authority over related-party transactions

65. *See id.*

66. *See* Lei No. 6.404, de 15 de Dezembro de 1976 (Braz.).

67. *See id.*

68. *See* Luca Enriques et al., *Related-Party Transactions*, in *ANATOMY OF CORPORATE LAW*, *supra* note 22, at 153-154 ("the significant development in past years has been convergence in jurisdictions' reliance on board approval, at least when it comes to listed companies").

69. *See* Grupo de Trabalho Interagentes, *supra* note 18 (recommending, within the code's purported 'comply or explain' scope, that "[t]he charter shall define which related-party transactions should be subject to approval by the board of directors.").

70. *See* Leo E. Strine Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 *DEL. J. CORP. L.* 673, 678 (2005) (describing how, in the U.S. context, a majority of the minority rule for controlling-shareholder transactions creates powerful protections for minority shareholders).

to the shareholder meeting, in regards to transactions with directors⁷¹, or to disinterested shareholders, in regards to transactions with substantial shareholders.⁷² The receptiveness to such a rule in Brazil, however, is unclear.

C. DEFAULT RULES ALLOCATING POWER TO THE GENERAL MEETING

Variable 9. Issuance of new shares. When so authorized by the charter, the board may increase the company's share capital upon the issuance of new shares.⁷³ The limit of this increase is the authorized capital, as set forth by the shareholders in the charter.⁷⁴ This variable thus looks at whether boards are empowered to issue new shares in this respect.

Variable 10. Interim dividends payments. As a rule, dividends are paid out on an annual basis, pursuant to the annual shareholder meeting's directive.⁷⁵ Management, however, may have the power to declare and pay interim dividends on a monthly basis if so expressly authorized by the charter.⁷⁶ This variable will hence identify boards that are so empowered.

Variables 11 and 12. Prior approval or review of charter amendments. In Brazil, the shareholder meeting has the original and undelegated power to amend the charter, regardless of board approval.⁷⁷ This differs from the mandatory rule in the United States, where charter amendments require both board and shareholder approval.⁷⁸ These variables will look at whether shareholders adopt a comparable rule through the charter and grant the board power to, respectively, approve or review charter amendment proposals before shareholders hear and vote on them.

To be sure, such a rule might be of less relevance in an ownership concentration scenario as that present in Brazil, where controlling shareholders retain their undelegated right to remove, without cause, any directors that attempt to block their charter amendment proposals.⁷⁹ Nonetheless, it is interesting to survey whether companies contractually adopt a similar rule in Brazil because even the power to review proposals is indicative of the board's influence on the shareholder meeting's decision-making process. Further, whereas a small number of Brazilian companies enjoy

71. See Companies Act, 2006, c. 46, §§ 108-206 (U.K.), and also Luca Enriques et al., *supra* note 68, at 156-158 (describing other jurisdictions, such as the United States and France, which adopt this normative basis).

72. See Listing Rules, 2005, S.I. 2005/35, LR 11.1.7 (U.K.).

73. See Lei No. 6.404, de 15 de Dezembro de 1976, Dezembro 1995 (Braz.).

74. *Id.* arts. 166 and 168.

75. *Id.* art. 132, II.

76. *Id.* art. 204.

77. *Id.* art. 122, I.

78. See Del. Code Ann. Tit. 8, §§ 242(a)(1), 251(b); Edward Rock et al., *Fundamental Changes*, in *ANATOMY OF CORPORATE LAW*, *supra* note 22, at 174-180.

79. See Lei No. 6.404, de 15 de Dezembro de 1976, Dezembro 1995 (Braz.); Rock et al., *supra* note 78, at 174-78 ("In a system with concentrated holdings, by contrast, a bilateral board-shareholder veto is likely to be empty since controlling shareholder can generally choose boards that will do their bidding.").

ownership dispersion⁸⁰, the same rationale used for U.S. companies could justify the prior board approval of charter amendments rule therein.⁸¹

Variables 13 and 14. Prior approval or review of corporate reorganizations. In mergers, incorporations, or spin-offs, Brazilian corporate law mandates that managers of the companies involved (that is, the officers, as representatives of the company⁸²) must execute a protocol with the terms of the reorganization⁸³, which, together with a justification, is submitted to the shareholder meeting's approval.⁸⁴ Corporate reorganizations thus do not require board approval if articulated directly between shareholders and officers. This is indeed opposite to the mechanism adopted in the United States and United Kingdom, where the board must always approve reorganization proposals before shareholder review.⁸⁵ As such, these variables will look to whether a charter expressly empowers the board to respectively approve or simply review reorganization proposals before their submission to the shareholder meeting's approval.

III. RESULTS AND DISCUSSION

The results of the study are set out in TABLE 1 to TABLE 6. I have separated their presentation into five subparts: the results for the entire population, the results by *BM&FBOVESPA* listing segment, the results by ownership dispersion, the results for financial institutions, and the results for state-controlled companies.

A. RESULTS FOR THE POPULATION

TABLE 1 presents the results for the entire population by variable. It shows that shareholders allocate additional decision-making power to the board 56.06 percent of the time, ranging from 95.94 percent of boards with the power to issue non-convertible debentures, to 1.45 percent of

80. See *infra* Part II.B.

81. Considering the shareholder meeting's power to amend the charter, doubts remain where such a rule would even be enforceable before Brazilian courts should shareholders opt to circumvent it. Whereas shareholders of Brazilian companies are empowered to summon shareholder meetings, there would be few obstacles in practice for them to bypass this rule and approve an amendment previously rejected by the board. See *supra* note 34 and accompanying text. The references to the original and undelegated powers of the shareholder meeting in the commentary on this matter appear to strengthen the contention that courts might not accept the imposition of the board in this particular decision-making process. See 2 Modesto Carvalhosa, *COMENTÁRIOS A LEI DE SOCIEDADES ANÔNIMAS* [COMMENTARY ON THE CORPORATIONS LAW] 777-786 (5th ed., 2011); 2 Nelson L. Eizirik, *A LEI DAS S/A COMENTADA* [COMMENTATED CORPORATIONS LAW] 29-32 (2011).

82. See Lei No. 6.404, de 15 de Dezembro de 1976, Dezembro 1995 (Braz.).

83. See *id.*

84. *Id.* art. 225.

85. See *supra* note 26 and accompanying text, and Companies Act, 2006, c. 46, § 905(1) (U.K.). Although issues of enforceability remain with respect to these variables, scholars seem to be more receptive thereof than of variables 11 and 12. See Nelson L. Eizirik, *supra* note 81, at 294 (acknowledging that "certain corporate reorganizations, such as spin-offs and mergers, [could be subject] to the board's prior review").

companies subjecting charter amendments to prior board approval. Additionally, TABLE 1 shows that directors are bound to shareholder agreements 21.40 percent of the time, ranging from 35.57 percent in respect to decisions on related-party transactions, to 9.03 percent in respect to decisions on the opening of branches.

I propose two interpretations of these results. First, the 56.06 percent rate might suggest that shareholders contract around default rules in order to augment the board's true and independent decision-making power. Shareholders would therefore prefer to allocate additional powers to the board, widening the scope of its authority, and restricting shareholder interference on the management of company affairs.

Such an interpretation, however, ignores the ownership framework of these companies. As discussed, control by one or a group of clearly-defined shareholders, often instrumentally strengthened by the use of a binding shareholder agreement, is the norm among Brazilian public companies.⁸⁶ With the shareholders' power to remove dissenting directors in mind, it would make little sense for them to expand the number of issues subject to the approval of costly and time-consuming shareholder meetings. That is, shareholders exercise more efficient control through binding shareholder agreements, or plausibly through the removal of dissenting directors, than through the constant summons of minority shareholders to shareholder meetings.

In this light, the large number of empowered boards would merely reflect an economizing strategy, whereby a controlling shareholder puts the discussion of these issues beyond the minority's control through the cheaper and quicker decision-making process of the board. With related-party transactions specifically, approval by the board, even if entirely bound by a shareholder agreement, avoids *ex ante* or *ex post* legal battle over the validity of a controlling shareholder's vote at a shareholder meeting, in light of the statutory provision on conflict of interests.⁸⁷

Indeed, the relatively high proportion of empowered boards greatly decreases in issues where the private interest of shareholders is more acutely apparent. For instance, related-party transactions are unusually important to influential shareholders that might also be suppliers, consumers, creditors, or simply commercial partners of the company, and thus might use these transactions to exact as many private benefits from their control as possible.⁸⁸ Consequently, these transactions are also of great interest to minority shareholders, which have an interest in delegating these decisions to impartial directors and thus curbing the controlling shareholder's power to unduly extract these private benefits to their detriment.⁸⁹ Such dichotomy could explain why related-party transactions

86. See *supra* notes 15-19 and accompanying text; also see Lei No. 6.404, de 15 de Dezembro de 1976, Dezembro 1995 (Braz.).

87. See Lei No. 6.404, de 15 de Dezembro de 1976, Dezembro 1995 (Braz.).

88. See Vladimir Atanasov et al., *Law and Tunneling*, 37 J. CORP. L. 1, 7-8 (2011).

89. See Enriques et al., *supra* note 68, at 153-54 (listing as benefits of delegating related-party transaction approval to independent directors: low costs of monitoring;

are subject to board approval only 43.06 percent of the time, and why board decisions in this respect are bound to shareholder agreements a record 35.57 percent of the time. In other words, although considered a corporate governance best practice,⁹⁰ companies either rarely set forth board approval of related-party transactions or only do so when combined with a means to bind the board's independence to a controlling shareholder's will.

The board's power to approve or reject charter amendments or corporate reorganizations is also subject to the same rationale. It is true that doubts as to the enforceability of such a rule can at least in part explain these small percentages.⁹¹ Regardless, the particularly high stakes for shareholders—especially controlling shareholders—when it comes to charter amendments or corporate reorganizations, may also play a hand in these variables.⁹² For example, as the document responsible for defining the basic governance structure of a company, charter amendments are subject to a particularly high threshold of review by shareholders, which may not be willing to subject this decision to the uncertainty inherent of a board's decision.⁹³ Corporate reorganizations, in turn, may not only fundamentally alter the nature of a shareholder's initial investment, but also lead a company to comply with costly appraisal rights⁹⁴, or possibly with the procedure to list the surviving company at *BM&FBOVESPA*.⁹⁵ In either event, a controlling shareholder's wariness at having their private interests potentially contested by an unfavorable board decision may explain the few empowered boards in this respect.

TABLE 2 addresses the relationship between empowered boards and bound boards, and also tends to support this latter interpretation. It first shows that stronger-than-average boards are generally bound to a greater degree by shareholder agreements than weaker-than-average boards. It also shows that boards bound to any degree by shareholder agreements are generally stronger than those not subject to any binding at all. This data corroborates the conclusion that a board is strong only to the extent a controlling shareholder harnesses the means to enjoin its subservience, such as a binding shareholder agreement.⁹⁶ Accordingly, controlling

a high probability that transactions that are effectively profitable for the company will still be approved; and the power such directors will have to question suspect or self-interested controlling shareholder transactions); see also La Porta et al., *supra* note 4 (discussing the benefits at large of empowering minority shareholders, and finding a correlation between oppressed minority rights, *i.e.* the minority's right to judicially contest a controlling shareholder's decision, and ownership dispersion).

90. See *supra* note 69 and accompanying text.

91. See *supra* notes 81, 85 and accompanying text.

92. See Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395, 416 (1983) (arguing that, given their magnitude, "[s]hareholders, as residual claimants, have the most to lose (or to gain) as a result of fundamental corporate changes").

93. See Edward Rock et al., *supra* note 78, at 178.

94. See Lei No. 6.404, de 15 de Dezembro de 1976, Dezembro 1995 (Braz.).

95. *Id.* art. 223, § 3.

96. See *supra* notes 15-19 and accompanying text; also see Lei No. 6.404, de 15 de Dezembro de 1976, Dezembro 1995 (Braz.).

shareholders grant less power to directors where they lack such a mechanism to do so, as to avoid costly *ex post* court battles to cancel or void dissenting votes.

Some concrete examples serve to advance this argument. The company with the most powerful board is B2W, an e-commerce company, which scored in all fourteen variables. This company, however, is subject to the majority control of *Lojas Americanas*, which, in turn, is subject both to the majority control of the 3G Capital group and to a shareholder agreement that completely binds its directors' votes. The second strongest board belongs to *Odontoprev*, a dental insurance company, which scored in thirteen variables and is subject to the minority control of an investment fund. This fund, however, is wholly-owned by Mr. José Seriperi Filho, the founder, chief executive officer, and board member of the company. All things considered, there seems to be little difference in how control is exercised in these two companies. For instance, in the weakest company of the population, *Suzano Holding*, a paper and rubber company scored in only one variable and is completely controlled by its founders, the *Feffer* family. In all cases, managerial power is inseparable from the controlling shareholder's clout, so that it would be hard to argue that the board has independent decision-making power, in the true sense of the phrase.

If this is the case, then shareholders do not truly intend to empower the boards authority. Although this may well be the case for a certain class of companies,⁹⁷ the data for the population suggest that allocating authority to the board may be more of an economizing strategy of the controlling shareholder, to which exercising control through tightly-bound directors rather than through the shareholder meeting is economically more efficient, than a means to enshrine the board's independent monitoring and decision-making powers.

B. RESULTS BY BM&FBOVESPA LISTING SEGMENT

The data in TABLE 3 addresses the effects of the different *BM&FBOVESPA* listing segments—the traditional segment, *Nível 1*, *Nível 2*, *Novo Mercado*, *Mais*, and *Mais Nível 2*—on the decision-making power of the board. It shows an upward trend in power as one goes from the traditional segment through the *Nível 1*, *Nível 2*, and the *Novo Mercado* segments. In the latter, boards are substantially more powerful than the mean of the population, while companies listed in the former are considerably weaker relatively, when compared thereto.

A few reasons may explain this trend. First, the application of the one share, one vote principle⁹⁸ and a greater number of minority shareholders as a result of free-float rules in the *Novo Mercado* segment⁹⁹ lead to more

97. See *infra* Parts III.B and III.C.

98. See *supra* notes 38, 51 and accompanying text.

99. Companies listed in the *Nível 2* and *Novo Mercado* segments must have at least 25 percent of free-floating shares (*i.e.* shares not held by the controlling shareholders,

minority shareholders with greater decision-making rights.¹⁰⁰ They may consequently exert greater influence in the board's appointment process and pressure it to resist controlling shareholder measures detrimental to the minority.¹⁰¹ Further, controlling shareholders might wish to signal their commitment with best corporate governance practices to minority shareholders and investors at large by increasing the scope of independent director review.¹⁰² This would be in line with the U.S. trend of independent director empowerment as a means to curtail the dark side of insider influence.¹⁰³ Finally, considering the correlation between *Novo Mercado* listing and shareholding dispersion,¹⁰⁴ greater power among *Novo Mercado* companies might simply reflect the lack of shareholder interest in effectively informing themselves as to its business and, as is commonplace in the United States¹⁰⁵, their tendency to delegate such decisions to specialized management. As will be seen, the data in TABLE 4 below corroborates this inference.¹⁰⁶

Accordingly, no surprises lay in the weakness of traditional-segment boards, given the strong divorce between political and financial shareholder rights¹⁰⁷, the lack of independent directors¹⁰⁸, and the extremely

their related parties, or managers). See *Regulamento de Listagem, do Novo Mercado* [*Novo Mercado Listing Rules*], BM&FBOVESPA, § 3.1(vi), (2011); *Regulamento de Listagem do Nível 2* [*Nível 2 Listing Rules*] BM&FBOVESPA, § 3.1(vi) (2011).

100. By prohibiting the issuance of non-voting preferred shares, minority shareholders gain additional decision-making rights and more adequate means to contest a controlling shareholder's will in shareholder meetings and board meetings. See Enriques et al., *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, in ANATOMY OF CORPORATE LAW, *supra* note 22, at 84.
101. By requesting, for instance, cumulative voting in the election of the board, pursuant to Art. 141, § 4, Lei No. 6.404, de 15 de dezembro de 1976 (Braz.). See Luca Enriques et al., *supra* note 68, at 80-84 (describing an appointment rights strategy, *i.e.* the empowerment of minority shareholders in the election of the board, as a means of reducing agency costs between controlling and minority shareholders).
102. Given the rules of the *Nível 2* and *Novo Mercado* segments regarding independent director participation. See *supra* note 53 and accompanying text.
103. The literature considers independent directors a viable means to reduce agency costs across corporations inasmuch as they serve as fiduciaries in the monitoring of self-interested agents. See *supra* notes 46-47 and accompanying text. More specially, in regards to majority and minority conflicts, moral and reputational concerns may enjoin the adoption of a more combative stance by independent directors against self-interested dealing by controlling shareholders, reducing the latter's influence within the board. Approaching the issue from a different standpoint, a desire to empower minority shareholders may simply enjoin the allocation of more decision-making power to the board, thereby reducing a controlling shareholder's means of *initiating* exploitive measures against the minority. The result, in either event, is greater decision-making power to the board. See Luca Enriques et al., *supra* note 68, at 94-95.
104. See *supra* note 55.
105. See *supra* note 23.
106. See *infra* Part III.C
107. The analyzed charters revealed that 82.66% of the companies listed in the traditional, *Nível 1* and *Nível 2* segments issued at least some non-voting preferred shares.
108. The analysis also reviewed that the charter of only 11.48% of the companies listed in the traditional and *Nível 1* segments provide for the mandatory participation of

concentrated shareholdings¹⁰⁹ among these companies. Indeed, light is shed upon this contrast when noting how 69.23 percent of companies scoring in over eleven variables are *Novo Mercado* companies, while ninety percent of companies scoring in fewer than four variables are traditional-segment companies.

Yet, TABLE 3 also casts some doubt as to the suitability of these conclusions. The table shows that *Novo Mercado* boards are subject to over twice as many binding shareholder agreements than traditional-segment boards.¹¹⁰ Even though low percentages are involved, such a stark difference may favor the interpretation that powerful boards tend to reflect only the controlling shareholder's power within the board, in line with the data set out in TABLE 2 above.

Two examples may help to advance this contention. Both *São Carlos*, a construction company, and *Tegma*, a logistics company, are *Novo Mercado* companies that scored in twelve variables herein—a result which could lead to the conclusion that these are companies with relatively strong boards.¹¹¹ Shareholder agreements, however, completely bind their directors' votes and allow for decision-making only upon shareholder consent. These boards can therefore take no decisions without prior shareholder approval, so they are in effect less independent than that of *Suzano Holding*, which is at least united in its few decisions. Relevant in this sense is how *Nível 2* companies—the second-best premium corporate governance segment—bind, on average, over one-third of their directors' votes, including almost two-thirds of votes pertaining to related-party transactions.¹¹²

In sum, the positive relationship between premium corporate governance listing segments and board decision-making power presented in TABLE 3 suffers due to the number of binding shareholder agreements to which *Nível 2* and *Novo Mercado* boards are subject. Notwithstanding, the given the percentages involved, the common-sense intuition that *Novo Mercado* companies enjoy stronger boards, as a result of their better corporate governance practices, appears to be confirmed by the

independent directors on the board. On the qualitatively poor organization of Brazilian boards in general, see Bernard S. Black et al., *Corporate Governance in Brazil*, 11 EMERG. MARK. REV. 21 (2010).

109. See *supra* notes 1, 55 and accompanying text.

110. To be sure, a relatively high number of shareholder agreements among *Novo Mercado* companies makes sense, given the greater level of shareholding dispersion in this segment. Yet the shareholder agreements discussed herein go beyond a mere coordination mechanism for purposes of securing a majority at shareholder meetings to also bind the vote of party-appointed board members. See *supra* notes 15-19 and accompanying text. It is this latter type of arrangement which is detrimental to the independent decision-making power of the board, inasmuch as it essentially forbids boards from taking any such decisions without first consulting and obtaining the controlling shareholder's consent.

111. See *Regulamento de Listagem, do Novo Mercado*, BM&FBOVESPA. .

112. See *Regulamento de Listagem do Nível 2*, BM&FBOVESPA.

data.¹¹³

C. RESULTS BY OWNERSHIP DISPERSION

TABLE 4 displays the study's results for the ninety-seven companies with less than five percent of free-floating common shares and for the twenty-one companies with over ninety-five percent of free-floating common shares.¹¹⁴ The table also shows a clear contrast between these two subsets: the boards of concentrated-shareholding companies are nearly ten percent weaker than the mean, while the boards of widely-held companies are nearly twenty percent stronger than the mean.

This difference is particularly noticeable in decisions regarding related-party transactions, charter amendments, and corporate reorganizations, in which dispersed-shareholding companies score over twice as much as concentrated-shareholding companies. That is, the contrast comes to the forefront in those variables in which a board can more acutely impose itself against an influential shareholder's private interests.¹¹⁵

Further, data in TABLE 4 supports the independent nature of board power in dispersed-shareholding companies inasmuch as they are subject to far fewer binding shareholder agreements than are concentrated-shareholding companies. Although higher shareholder coordination costs among dispersed-shareholding companies might explain these results, the end product is that directors of these companies are also freer from shareholder interference in exercising their greater decision-making power compared to concentrated-shareholding companies.¹¹⁶

This data therefore suggest that dispersed-shareholding companies are a subset in which the board's independent decision-making power is effectively empowered, and not as a part of a controlling shareholder's economizing strategy. Two different narratives may explain this scenario.

On one hand, the individually insignificant holdings in these companies may cause shareholders to become rationally apathetic as to the company's business, mostly because it is economically irrational for them to expend time and money with such information given their likely meek financial benefit.¹¹⁷ Shareholders might deem it more efficient to delegate a greater number of decisions to a specialized board, as is commonplace in the United States.¹¹⁸ Of course, this inference warrants a caveat insofar as shareholders may always revoke such additional powers down the road, or simply remove directors that utilize them against their private interests.¹¹⁹

113. See *Regulamento de Listagem, do Novo Mercado*, BM&FBOVESPA; *Regulamento de Listagem do Nível 2*, BM&FBOVESPA.

114. On the rules concerning free-float, see *supra* note 99.

115. See *supra* notes 88-95 and accompanying text.

116. See *Infra* at Table 4.

117. On the issue of shareholder rational apathy in general, see the debate described *supra* notes 29-30 and accompanying text.

118. See *supra* note 23 and accompanying text.

119. See *supra* notes 39-36 and accompanying text.

On the other hand, information asymmetries between dispersed shareholders and executive directors¹²⁰ may have prompted the board to propose and promote charter amendments in favor of its own power throughout the years, thereby exacerbating shareholder-manager agency costs. Although this is a recurring theme with respect to antitakeover rules in the United States¹²¹, it is unprecedented in Brazil given its predominantly-concentrated ownership framework.¹²² Confirmation of this hypothesis would require a longitudinal analysis of these charters; but, the disparity in board power between concentrated- and dispersed-shareholding firms seems to suggest it holds some merit.

Several individual companies support this analysis. *BRF*, the food services company, and *Equatorial*, an energy distributor, both scored in twelve variables herein and are not under the control of any clearly-defined shareholder group, so their board has unfettered independence in exercising their considerable statutory powers. Other dispersed-shareholding companies, such as *Renner*, a clothing reseller, *Embraer*, the aircraft manufacturer, and *Paranapanema*, in the metallurgy market, all scored in over nine variables therein. Further, although twenty of the twenty-one dispersed-shareholding companies are also *Novo Mercado* companies, *Kepler Weber*, a silo manufacturer, stands alone as the only traditional-segment, dispersed-shareholding company. It scored in twelve variables, but has a board partially bound by a shareholder agreement among the minority shareholders, *Previ* and *Banco do Brasil*.

In conclusion, collective action and rational apathy problems, in addition to efficiency considerations, may have led shareholders of dispersed-shareholding companies to delegate a greater number of decisions to their boards. Alternatively, managerial agency costs may have prompted a board to promote charter amendments in favor of its own authority

120. See Lucian A. Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1836-1840 (1989) (arguing for constraints on the charter amendment process on the basis of a shareholder's inability to discern value-increasing from value-decreasing proposals when presented by a self-interested board).

121. See Harry DeAngelo & Edward M. Rice, *Antitakeover Charter Amendments and Stockholder Wealth*, 11 JOURN. FIN. ECON. 329 (1983).

122. For instance, the widespread use of poison pills and other antitakeover mechanisms in Brazil mainly derived from attempts by concentrated-shareholding companies to restrict the development of combative minority blockholders when listing their shares in premium corporate governance segments. See Modesto Carvalhosa, *As Poison Pills Estatutárias na Prática Brasileira: Alguns Aspectos de sua Legalidade* [*Poison Pills in Brazilian Corporate Practice: Some Legality Considerations*], in DIREITO SOCIETÁRIO: DESAFIOS ATUAIS [CORPORATE LAW: CURRENT CHALLENGES] 21 (Rodrigo R. Monteiro de Castro & Leandro Aragão eds., 2009) (noting that "poison pills have been distorted by the Brazilian capital markets: instead of protecting against hostile takeovers, they are used to reinforce the company's current controlling shareholder"), and Érica Gorga, *supra* note 1, at 479-483 (noting the use of poison pills among concentrated-shareholding companies, and concluding that "controlling shareholders do not understand the effect of the clauses and that lawyers fail to explain to their clients the full implications of antitakeover clauses").

over time. Regardless, the results point to a strong relationship between ownership dispersion and a board's independent decision-making powers.

D. RESULTS FOR FINANCIAL INSTITUTIONS

The last items of this Article address two subsets of companies that require special attention in light of the normative regimes to that they submit: financial institutions and state-controlled companies.

TABLE 5 displays the study's results for the twenty-five financial institutions part of this study.¹²³ The table shows that financial institutions enjoy significantly weaker boards when compared to the mean, but which are also subject to far fewer binding shareholder agreements.

Three different features of Brazilian financial institutions may explain these results. First, extreme ownership concentration is the norm among financial institutions.¹²⁴ Indeed, financial institutions have, on average, only 10.77 percent of free-floating common shares, so their controlling shareholders exercise uncontested power over the management of their business affairs. Nonetheless, this could only serve as a partial explanation, as financial institutions have boards that are even weaker than the concentrated-shareholding subset of companies examined herein.¹²⁵

The second reason stems from the specific normative regime advanced by corporate governance scholars for financial institutions on the basis of their importance to the economy and the high leverage to which they are subject.¹²⁶ In practice, information asymmetry considerations insulate influential and well-informed officers from board and minority shareholder oversight, which hampers these constituencies' monitoring function vis-à-vis the financial institution's insiders.¹²⁷ That is, operational and regulatory matters unique to financial institutions mean independent directors may not have the desired effect on the quality of management or the company's results, given their inevitable informational dependency on

123. See *infra* at Table 5.

124. See Part III.C *supra* for a discussion on the relationship between ownership dispersion and board decision-making power.

125. See *infra* Table 4.

126. See ROSS LEVINE, *THE CORPORATE GOVERNANCE OF BANKS: A CONCISE DISCUSSION OF CONCEPTS AND EVIDENCE* (World Bank Policy Research Working Paper No. 3404, 2004); Jonathan R. Macey & Maureen O'Hara, *The Corporate Governance of Banks*, 9 FRBNY ECONOMIC POLICY REVIEW 91 (2003).

127. See Thankom G. Arun & John D. Turner, *Corporate Governance in Banks in Developing Economies: Concepts and Issues*, 12 CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW 371 (2004) (arguing that "the opaqueness of bank assets makes it very costly for diffuse equity holders to write and enforce effective incentive contracts or to use their voting rights as a vehicle for influencing firm decisions"); Peter O. Mülbert, *Corporate Governance of Banks*, 10 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW 411 (2009) (describing how a financial institution's balance sheets are notoriously plagued by opacity, so that "[the] board of directors will find it difficult to observe whether management did actually meet their performance targets and whether this resulted from the shift to a riskier business strategy than expected and anticipated").

the company's insiders.¹²⁸

This problem is particularly aggravated when an identical group of persons both control and manage a financial institution. This is often the case in Brazil, where the near-totalitarian control of financial institutions is the norm. Officers hold massive stakes in their respective companies, which impairs or impedes board oversight and entrenches insiders loyal to a controlling shareholder's directives.¹²⁹ Further, as described in the literature, these officers tend to use their influence to elect only those board members who pledge to offer little resistance to their tenure.¹³⁰

In Brazil, controlling shareholders dominate the most important managerial roles of financial institutions. Among the forty-seven chairmen, vice-chairmen and chief executive officers of the seventeen private financial institutions analyzed herein, legal disclosures personally and expressly list twenty-five of them as controlling shareholders. For instance, while Mr. Pedro Moreira Salles leads the board of Brazil's largest bank, *Itaú Unibanco* and, Mr. Roberto Setúbal holds the office of chief executive officer, and both men are members of the bank's controlling family group.¹³¹ The *Malucelli* family controls *Banco Paraná*, and has appointed Mr. Alexandre Malucelli as chairman and Mr. Cristiano Malucelli as chief executive officer of the company.¹³² Mr. Sasson Dayan, Mr. Morris Dayan, and Mr. Carlos Moche Dayan are all controlling shareholders of *Banco Daycoval* and sit, respectively, as chairman, vice-chairmen, and chief executive officer of this bank.¹³³ Even less traditional financial institutions, such as *Banco BTG Pactual* or *Banco Pine* employ controlling shareholders as chairmen of the board.

128. See Marcelo Cabus Klotzle & Luciana de Andrade Costa, *Governança Corporativa e Desempenho dos Bancos no Brasil* [*Corporate Governance and Bank Performance in Brazil*], 4 REVISTA ELETRÔNICA DE GESTÃO ORGANIZACIONAL 22 (2006) (finding no correlation between best corporate governance practices, including the appointment of independent directors, and the financial results of 19 Brazilian banks between 1998 and 2003, which is attributed by the authors to the heavy regulation on the financial sector in Brazil).

129. See Stephen Prowse, *Corporate Control in Commercial Banks*, 20 THE JOURNAL OF FINANCIAL RESEARCH 509 (1997). In this paper, the author shows how boards of financial institutions appear to be unable to effectively react to negative results, so that these "boards appear to be less assertive in their corporate governance responsibilities than in manufacturing firms". The offered explanation is that insider managers are especially entrenched in financial institutions by holding more shares in the company than independent directors or dissenting minority shareholders. As a result, officers are free from third party interference, while independent directors have little monetary incentives and even fewer practical means to exercise their monitoring function. In this regard, see also Ross Levine, *supra* note 126, at 7-8.

130. See Anil Shivdasani & David Yermack, *CEO Involvement in the Selection of New Board Members: An Empirical Analysis*, 54 J. FIN. 1829 (1999).

131. Press Release, Itaú Unibanco Holding S.A., Itaú Unibanco Announces New Chief Executive Officer and New Executive Committee (Nov. 9, 2016).

132. *Company Overview of Parana Banco S.A.*, BNA, <http://www.bloomberg.com/research/stocks/private/people.asp?privcapId=26960746>.

133. *Company Overview of Banco Daycoval S.A.*, BNA, <http://www.bloomberg.com/research//stocks/private/people.asp?privcapId=28286814>.

In other cases, officers, albeit not expressly cited as controlling shareholders, are even more bound to the shareholders who appointed them. For example, Mr. Gilberto Occhi not only leads the board of *Banco PAN*, but is also the chief executive officer of the state bank *Caixa Econômica Federal* and chairman of its subsidiary *Caixa Participações*, which is one of *Banco PAN*'s two controlling shareholders.¹³⁴ *Banco Bradesco* is currently controlled by the joint efforts of *Fundação Bradesco*, the *Aguiar* family, and a group of employees and managers encompassed by the holding company *BBD*.¹³⁵ Mr. Lazaro de Mello Brandão, the current chairman of *Banco Bradesco*, is not only the largest shareholder of *BBD*, but also serves as chairman and chief executive officer of *Fundação Bradesco*, which, directly holds around seventeen percent of the bank's voting shares.¹³⁶

In either event, the study has shown that a thin and tenuous line separates a financial institution's top-tier management and its controlling shareholders. This disposition means that a board, or a board's monitoring functions, are very unnecessary, as the interests of the officers will be identical to that of the company's residual financial owners further eliminating any potential agency costs between these two constituencies. Even in those companies with a greater number of minority shareholders, controlling shareholders can curb their influence by dictating the board's agenda through its chairman and vice-chairman. As a result, there is no need to allocate many issues to the board's authority. In fact, it is preferable that power be exercised directly through the company's officers and indirectly through the controlling shareholder's entirely unfettered powers.

A third reason further explains the weakness of these boards. Financial institutions are under a very specific unlimited liability statute.¹³⁷ Upon such a company's liquidation or invention proceedings, managers are liable for all acts or omissions and for all obligations contracted during their tenure that have been defaulted by the financial institution.¹³⁸ Case law has even held that managers charged for such faults are under a rebuttable presumption of fault.¹³⁹ Further, controlling shareholders are jointly liable, regardless of fault, to the same extent as managers during

134. *Board of Directors & Management*, PAN, https://ri.bancopan.com.br/conteudo_en.asp?idioma=1&conta=44&tipo=62313.

135. *Board of Directors*, BRADESCO, <https://www.bradesco.com.br/site/conteudo/interna/default3.aspx?secaoId=806&idiomaId=2>.

136. See generally *id.*

137. See Mariana Pargendler, *supra* note 31, at 20-21 (describing the liability regime to which managers and controlling shareholders of financial institutions are subject).

138. See Arts. 39 and 40, Lei No. 6.024, de 13 de março de 1974, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 8 de abril de 1974 (Braz.).

139. See S.T.J., REsp No. 447.939/SP, Relator: Ministra Nancy Andrighi, 04.10.1995, DIÁRIO DA JUSTIÇA [D.J.], 25.10.2007, 166 (Braz.); but see also S.T.J., REsp No. 592.069/SP, Relator: Ministro Carlos Alberto Direito, 15.02.2007, DIÁRIO DA JUSTIÇA [D.J.], 30.04.2007, 308 (Braz.) (holding that managers may be held liable for outstanding obligations regardless of fault).

these liquidation or intervention proceedings.¹⁴⁰

In light of these outcomes, it can be inferred that controlling shareholders have little incentive to allocate greater authority to the board. This is especially true for independent or non-executive board members to the extent that any future harm caused or outstanding obligations contracted by these managers could be demanded from the shareholder body in a potential liquidation or intervention proceeding.¹⁴¹ That is, the law applicable to financial institutions favors the legal status quo with the empowerment of the shareholder meeting and the reservation of only a second role to the board of directors. Indeed, of all analyzed financial institutions, only two enjoyed a board more powerful than the mean: *Banco de Brasília*, which scored in eight variables, and *Banco Mercantil de Investimentos*, which scored in nine variables—both companies marked by high ownership concentration.

In sum, the study has revealed that weak and seldom-bound boards are a defining feature of financial institutions. These results can be explained both by the high degree of shareholding concentration in these companies, which has led to a near-perfect identity between managers and controlling shareholders, and by the pressures arising out of the unlimited liability regimes to which these constituencies are subject.

E. RESULTS FOR STATE-CONTROLLED COMPANIES

Finally, the last item of this study assesses board power among state-controlled companies (*sociedades de economia mista*).

The literature on the state as a shareholder is vast and convergent as to concerns for possible conflicts of interests between the state's dual objectives of (a) satisfying the public interest that motivated the state enterprise's creation, and (b) generating profit for its shareholders.¹⁴² Attempts to counter these conflicts have been proposed in Brazil over the years including *BM&FBOVESPA's Special Program on State Enterprise Governance*, which is a listing certificate granted to state-controlled companies that implement certain corporate governance best practices¹⁴³,

140. See Art. 1, Lei No. 9.447, de 14 de março de 1997, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 15 de março de 1997.

141. An efficiency argument may explain the erosion of limited liability in respect to financial institutions. In light of the legal system's inability to curb negative externalities arising out of the financial sector, the law curtails moral hazard by holding managers and shareholders to the threat of personal liability, thereby reducing their incentives to undertake socially undesirable business. See Mariana Pargendler, *supra* note 31, at 34-36 ("the erosion of limited liability for financial institutions in Brazil intervenes in the *ex ante* incentives of controlling shareholders and managers of banks, a regulatory option that may be more effective than the system of command and control regulation of banks").

142. See *supra* note 9 and accompanying text. For a comparative overview of state-controlled companies, see Curtis J. Milhaupt & Mariana Pargendler, GOVERNANCE OF LISTED STATE-OWNED ENTERPRISE: A REPORT PREPARED FOR ASSOCIAÇÃO BM&F (2016) (working paper) (on file with authors).

143. See *BM&FBOVESPA, PROGRAMA DESTAQUE EM GOVERNANÇA DE ESTATAIS [SPECIAL PROGRAM ON STATE ENTERPRISE GOVERNANCE]* (2015), available at

and the *State Enterprise Act*, which sets forth a new legal framework for all state-controlled companies.¹⁴⁴

Notwithstanding the above, listing a state-controlled company may be a fruitful endeavor for the state, the company, and potential private investors. A private investor's incentives to monitor and discipline state-appointed managers tend to promote efficiency and bestow credibility upon the enterprise.¹⁴⁵ In exchange, private investors receive legal and financial guarantees of the security and profitability of their interest, which can come in the form of voluntary adoption of best corporate governance practices further restraining the scope and severity of potential conflicts of interest between the state and minority shareholders.¹⁴⁶ Further, if state officials have financial incentives to promote private oversight of state enterprise, and if minority shareholders receive, in exchange, the means to carry out this function, stronger-than-average boards among state-controlled companies should result.

TABLE 6, however, shows that the boards of state-controlled companies are in fact weaker than the mean, albeit subject to an almost null level of binding shareholder agreements. Nonetheless, a closer look at the data shows that the above presented theoretical model may hold true in relation to the pertinent companies. Out of the twenty-six examined state-controlled companies, sixteen have less than eight percent of free-floating common shares, so it would be difficult to argue that minority shareholders are present in a sufficient number of them.¹⁴⁷ Actually, the boards of

http://www.bmfbovespa.com.br/pt_br/listagem/acoes/governanca-de-estatais/. As opposed to the *Nível 1*, *Nível 2* and *Novo Mercado* segments, this program is not an actual listing segment, but rather a voluntary, opt-in certificate, from which a company may later detract at no cost or penalty. This change in *BM&FBOVESPA*'s strategy is criticized as reducing the incentives for a company to stick with the (little ambitious) best corporate governance practices adopted thereunder. Up to September 13, 2016, not a single company had adhered to the program. See Curtis Milhaupt & Mariana Pargendler, *supra* note 142, at 50-51.

144. Lei No. 13.303, de 30 de junho de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1º de julho de 2016 (Braz.).

145. See Mariana Pargendler et al., *In Strange Company: The Puzzle of Private Investment in State-Controlled Firms*, 46 CORNELL INT. L. J. 569, 575-577 (2013).

146. See Mariana Pargendler et al., *supra* note 145, at 582-589.

147. Yet a lack of minority shareholders should not constitute *per se* an impediment to the empowerment of the board. In certain scenarios, wholly-owned state enterprise may be beneficial where the state is particularly conflicted in pursuing its political and profitability goals. See Pargendler, *supra* note 9, at 2959 - 61. Indeed, the Organization for the Economic Co-operation and Development recommends the empowerment of the board's monitoring function regardless of whether the state owns all or part of such an enterprise. See Organization for Economic Co-operation and Development [OECD], *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (2015), <http://www.oecd-ilibrary.org/docserver/download/2615061e.pdf?expires=1492549044&id=id&accname=guest&checksum=452FBBF8EFD9427F34D36840AAA13307>. Brazilian law follows this approach, at least in part, by treating state-controlled companies and wholly-owned state enterprise in the same vein throughout most of the *State Enterprise Act*. Both of these companies, for example, are required to subject related-party transactions to the board's review, which must be composed with at least 20 percent independent directors. See Lei No. 13.303, de 30 de junho de 2016, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 07.01.2016 (Braz.).

these sixteen companies are on average 10 percent weaker than the boards of the nine companies with over one-third of free-floating common shares.¹⁴⁸

Moreover, on average, the boards of the fifteen companies listed on the traditional *BM&FBOVESPA* segment score on exactly half of the variables, while the four *Novo Mercado* companies score 60.71 percent of the time.¹⁴⁹ This statistic at least shows a strong resistance among the more traditional state-controlled companies in adopting best corporate governance practices that are liable to stimulate a more active role for the board and for minority shareholders. For instance, if the eighteen state-controlled companies currently issuing non-voting preferred shares adapt to the *Novo Mercado* segment's directives, or if the eighteen state-controlled companies not currently attributing any board seats to independent directors adapt to the *State Enterprise Act*, minority shareholders may enjoy greater decision-making.¹⁵⁰ This trend could force greater board involvement in corporate affairs in the near future, as the board also comes to act as a trustee for the interests of these minority shareholders.¹⁵¹ Interestingly, the State of São Paulo's state-controlled companies (*CESP*, *EMAE* and *Sabesp*) appear to have taken the forefront in this respect, as these three companies also enjoy the three strongest boards among the examined state enterprises, scoring 78.57 percent of the time.

Finally, the small number of binding shareholder agreements should not come as a surprise, as these companies are legally required to remain under a majority control by the state.¹⁵² The few shareholder agreements that exist generally arise from state-private investor arrangements – such as the agreement between the State of Minas Gerais and *Andrade Gutierrez* for a minority investment in *CEMIG*—or from inter-state arrangements—such as the agreement between the State of Goiás and *Eletrobrás*, a state-run electricity company for the management of *CELGP*AR.

All in all, even if the boards of state-controlled companies are weaker than the mean listed company, there is both empirical and theoretical support to infer a change in this trend in the near future. As these companies come to adopt better corporate governance practices it is likely that the presence of minority shareholders and independent directors will give way to a more active role for the board so that weak boards cannot be construed as a feature of state enterprise per se.

148. See generally *id.*

149. See generally *id.*

150. As minority shareholder come to hold voting common shares, and not non-voting preferred shares, and thus acquire the means to object to the controlling shareholder's initiatives at shareholder meetings. See *supra* note 51, 54 and accompanying text.

151. See *supra* note 103 and accompanying text.

152. See Art. 5, III, Decreto-Lei No. 200, de 25 de fevereiro de 1967, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17 de julho de 1967.

IV. CONCLUSION

This article sought to analyze the contractual allocation of decision-making power surrounding the board of directors in Brazilian public companies. The results show that although shareholders appear to empower boards through their contractual arrangements—especially those shareholders of *Novo Mercado* and dispersed-shareholding companies—any conclusion inferred therefrom must be tempered with at least four considerations.

First, any additional decision-making power will never surmount the shareholder meeting's supreme authority over the company, nor can it somehow restrain shareholders in revoking this power later on down the road through a charter amendment or a without-cause director removal. Second, the matters to which the variables refer are relatively trivial when compared to those matters under the shareholder meeting's original and undelegated legal authority. Third, given the predominance of the concentrated-shareholding model in Brazil, additional board decision-making power could reflect a mere economizing strategy by the controlling shareholder, thereby avoiding costly shareholder meeting discussions through the enforcement of directives by its appointed board members. Finally, any board decision-making power might not be as independent as the charter implies due to the fact that controlling shareholders often bind a director's vote to fully-enforceable shareholder agreements.

This study was therefore a first attempt at mapping the allocation of independent decision-making power among Brazilian boards, especially in light of the transformation undergone by the Brazilian capital markets over the last couple of decades. Future efforts may go beyond the scope proposed herein by examining, for instance, the *de facto* interactions between shareholders, directors, and officers and the influence each of these constituencies bear on the handling of the company's business or the changes in board power over a set period of time. In any event, I hope the data and conclusions obtained herein will enrich the future debates on the matter.

TABLES

TABLE 1

Empowered and bound boards in the population

Variable	Empowered boards (%)	Bound boards (%)
1	94.80	24.70
2	95.38	21.21
3	95.94	17.59
4	66.47	30.87
5	44.51	22.73
6	80.64	25.45
7	41.62	9.03
8	43.06	35.57
9	80.06	20.22
10	91.04	15.24
11	1.45	0
12	23.99	14.46
13	4.34	13.33
14	24.57	14.12
Mean	56.06	21.40

TABLE 2

Relationship between empowered and bound boards

Type of board	Number	Binding events (%)	Type of Board	Number	Empowerment events (%)
Stronger than mean	205	22.71	Bound	89	61.24
Weaker than mean	141	15.30	Not bound	257	53.86

TABLE 3

Empowered and bound boards by *BM&FBOVESPA* listing segment

Listing segment	Empowered boards (%)	Bound boards (%)
Traditional	49.40	11.48
Nível 1	50.90	22.34
Nível)	59.92	36.94
Novo Mercado	63.93	25.59
Mais	63.74	41.38
Mais Nível 2	53.57	80.00

TABLE 4

Empowered and bound boards in companies with less than 5% and more than 95% of free-floating common shares

Variable	Free-floating common shares (%)			
	0-5		95-100	
	Empowered boards (%)	Bound boards (%)	Empowered boards	Bound boards (%)
1	89.69	22.99	100	9.52
2	93.81	20.88	95.24	10.00
3	93.02	15.00	100	14.29
4	58.76	31.58	90.48	15.79
5	40.21	20.51	66.67	14.29
6	78.35	26.32	100	14.29
7	49.48	6.25	28.57	0
8	29.90	27.59	52.38	9.09
9	69.07	16.42	100	9.52
10	90.72	10.23	100	4.76
11	0	0	4.76	0
12	20.62	10.00	33.33	0
13	2.06	0	9.52	50.00
14	17.53	0	42.86	11.11
Mean	52.04	18.54	65.99	10.82

TABLE 5

Empowered and bound boards among financial institutions

Variable	Empowered boards (%)	Bound boards (%)
1	92.00	8.70
2	84.00	9.52
3	N/A	N/A
4	40.00	0
5	32.00	0
6	76.00	10.53
7	44.00	0.00
8	4.00	0.00
9	64.00	18.75
10	88.00	9.09
11	0	0
12	20.00	0
13	0	0
14	16.00	0
Mean	43.08	7.86

TABLE 6

Empowered and bound boards among state-controlled companies

Variable	Empowered boards (%)	Bound boards (%)
1	96.30	7.69
2	88.89	0
3	84.21	18.75
4	81.48	13.64
5	55.56	0
6	88.89	4.17
7	33.33	0
8	18.52	0
9	59.26	0
10	88.89	0
11	0	0
12	25.93	0
13	0	0
14	22.22	0
Mean	52.43	4.64

