



# Revista de Direito Mercantil

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# **Revista de Direito Mercantil**

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## INVESTMENT FUND VOTING IN BRAZILIAN PUBLIC COMPANIES: AN EMPIRICAL ANALYSIS

Alexandre Edde Diniz de Oliveira<sup>444</sup>

*How do investment fund managers vote their shares in public companies? In the United States, this answer is well known. Research in empirical law and finance shows that U.S. funds (especially index funds) mostly defer to insider management's position on issues put up to a shareholder vote. This support may waver when it comes to key issues such as executive compensation but remains solid across the board, to say the least. In Brazil, the answer, prior to this article, was unknown. In it, I exploit certain loopholes in publicly available disclosures by Brazilian public companies to match votes to funds, and thereby gauge overall deference by Brazilian investment funds in relation to their equity holdings in Brazilian public companies. I conclude that Brazilian fund managers are generally very much deferential to firm managers and controlling shareholders, though marginally less so than other shareholders, especially when individual votes, and not aggregate equity holdings, are considered.*

**Keywords:** investment funds; mutual funds; voting; deference; equity holdings; corporate governance; shareholder activism.

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## I. INTRODUCTION

The rise and prevalence of index funds in the United States have been thoroughly documented. Bebchuk and Hirst first cataloged the steep increase in index fund investment in S&P 500 companies, both in terms of their absolute equity holdings and their voting power relative to other institutional and retail investors.<sup>445</sup> Similarly, Coates tackled indexing generally to warn readers about how a dramatic climb in equity ownership by these funds could engender excessive shareholding concentration in the hands of about twelve people who ultimately but inevitably will control or strongly influence decision-making across all U.S. publicly-traded companies.<sup>446</sup> Scholarly commentary beyond these specific examples is legion.

Elsewhere, Bebchuk and Hirst, with Cohen, conducted an extensive agency-costs theoretical analysis of index fund holdings and argue that their principals consistently defer to the positions and proposals of their corporate managers.<sup>447</sup> Among the reasons advanced for this finding is the fact that managers bear the costs of stewardship activities, but only a fraction of the reward: this is particularly significant in passive funds, where managers have no incentive to increase portfolio company value (to the benefit of all other competitors), but is too significant for active funds, where an incentive to increase value exists only for companies that are overweight in a manager's portfolio relative to indices generally.<sup>448</sup>

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445 See Lucian A. Bebchuk, Scott Hirst, *The Specter of the Giant Three*, 99 Boston U. L. Rev. 721, 723 (2019) (concluding that “the Big Three will likely continue to grow into a ‘Giant Three,’” which will “likely come to dominate voting in public companies”).

446 See John C. Coates, IV, *The Future of Corporate Governance, Part I: The Problem of Twelve* (Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 1001, 2019), [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Coates\\_1001.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_1001.pdf).

447 See Lucian A. Bebchuk, Scott Hirst and Alma Cohen, *The Agency Problems of Institutional Investors*, 31 J. Econ. Perspectives 89 (2017); see also Lucian A. Bebchuk, Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 Colum. L. Rev. 2029 (2019).

448 See Bebchuk, Hirst, Cohen, *supra* note 4 at 95-104.

The result is that deference is more likely to be the value-maximizing decision for fund managers given the costs from severing business ties with management (e.g. in the form, of 401(k) management and other short-term services), costs with Schedule 13D filer status (by purporting to change or influence control)<sup>449</sup>, and fear of public and political backlash from the press against the growing power of large institutional investors.<sup>450</sup>

This theoretical proposition was established empirically by Bebchuk and Hirst, who found excessive deference by passive funds, but also relatively strong deference by active funds, to managerial proposals: (a) Big Three fund managers voted against say-on-pay proposals only 2.9% of the time, while top-three active fund managers did so 9.9% of the time; (b) Big Three managers did not make a single director nomination or Sec. 13D filing; and (c) Big Three managers did not make a single shareholder proposal, even in areas with traditionally overwhelming Big Three support (e.g. the declassification of boards).<sup>451</sup>

Similarly, Iliev and Lowry found that mutual fund managers vote with management 94% of the time on director elections, 78% of the time on director compensation, 61% of the time on governance issues, and 40% of the time on other ‘blanket’ issues (e.g. charter amendments).<sup>452</sup> A different but related strand of the literature is that of Bubb and Catan,<sup>453</sup> who investigate voting patterns by mutual funds and conclude that managers are organized into three so-called ‘parties’: the Traditional Governance Party, whose managers support management at greater rates consistent with a belief that insiders, not

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449 See 17 C.F.R. § 240.13d-1(a) (“Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is specified in paragraph (i) of this section, is directly or indirectly the beneficial owner of more than five percent of the class shall, within 10 days after the acquisition, file with the [SEC], a statement containing the information required by Schedule 13D . . .”).

450 See Bebchuk, Hirst, Cohen, *supra* note 4 at 107-10.

451 See Bebchuk, Hirst, *supra* note 4 at 2091-95.

452 See Peter Iliev, Michelle Lowry, *Are Mutual Funds Active Voters?*, 28 Rev. Fin. Stud. 446 (2015).

453 See Ryan Bubb, Emiliano Catan, *The Party Structure of Mutual Funds* (Feb. 14, 2018), <https://ssrn.com/abstract=3124039>.

shareholders, ought to manage affairs; the Shareholder Intervention Party, comprised of proactive managers with a steadfast desire to influence insiders through policy proposals; and the Shareholder Veto Party, which opposes managerial proposals but do not act as proactively as the previous party.<sup>454</sup> Of the three, the first is by far the most prevalent.<sup>455</sup>

But the purpose of this article is not to review, let alone critique, this scholarship. The purpose, instead, is to look at the case of Brazil, a developing country that has what one might call budding capital markets, but a dearth of literature on this subject. Little has been written about investment funds in Brazil as they relate to voting influence or patterns among public companies. Dalmácio and Nossa identified similar agency issues in the management of funds as did Bebchuk, Hirst, and Cohen many years later, in finding that fund charging the lowest fixed fees actually earn the most for investors but did not look at the effect of variable fees arrangements (i.e. performance fees) on profitability.<sup>456</sup> More generally, agency problems were also described by Roquete et al., who investigate abnormal returns by multimarket investment funds at semester closing dates (when performance fees are paid out) and suggest investors may be poorly suited to monitor fund managers' ability to game the system in their benefit.<sup>457</sup>

But not much else has been written specifically on agency problems, though investment funds have been around for decades and have been extensively regulated since 2002.<sup>458</sup> One explanation is that there is simply no 'big three' in Brazil, let alone a 'big one': 19

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454 *Id.* at 3-4.

455 *Id.*

456 See Flávia Zóboli Dalmácio, Valcemiro Nossa, *A Teoria de Agência Aplicada aos Fundos de Investimento* [Agency Theory Applied to Investment Funds], 1 *Braz. Bus. Rev.* 31 (2004).

457 See Raphael Roquete et al., *O Problema de Agência Aplicado aos Fundos de Investimentos Multimercados* [The Agency Problem Applied to Hedge Funds], 7 *Revista das Finanças Aplicadas* [Applied Finances Review] 1 (2016).

458 See Instrução No. 359, de 22 de janeiro de 2002, *Diário Oficial da União* [D.O.U.] de 31.01.2002 (Braz.) (establishing a comprehensive regulatory framework for exchange-traded index funds).

years later, only 24 equity index funds are being traded on B3, the São Paulo stock exchange, Brazil's only bourse<sup>459</sup>, and among this lot, only 17 track Brazilian indices.<sup>460</sup> Out of the 'giant three' identified by Bebchuk and Hirst,<sup>461</sup> only one, BlackRock, offers Brazil-based index funds, while the remaining (and vast majority) are offered by local financial institutions.<sup>462</sup> The assets under management of the largest and oldest of these index funds, BlackRock's *iShares Ibovespa Fundo de Índice*, comes in at close to BRL 15 billion, or around USD 2.67 billion,<sup>463</sup> which, even accounting for the relative size of the Brazilian stock market, is paltry in comparison to State Street's *SPDR S&P 500 ETF*'s USD 251 billion of assets under management.<sup>464</sup>

Yet the little evidence that has been compiled on the topic suggests that even Brazil's small index fund market has been expanding as of late. According to one study, total index fund assets under management have increased 416% between December 2017 and July 2019, from around BRL 8 to BRL 36 billion.<sup>465</sup> In this same time frame, equity investment fund assets increased 163%, from BRL 228 to BRL 601 billion.<sup>466</sup> By contrast, investment fund assets across all types of funds actually decreased 2%, from around BRL 6.3 billion to BRL 6.2 billion.<sup>467</sup> And looking only at Brazil-based index funds understates

459 See B3 S.A. – Brasil, Bolsa, Balcão, ETFs Listados [Listed ETFs] (Apr. 15, 2021), [http://www.b3.com.br/pt\\_br/produtos-e-servicos/negociacao/renda-variavel/etf/renda-variavel/etfs-listados/](http://www.b3.com.br/pt_br/produtos-e-servicos/negociacao/renda-variavel/etf/renda-variavel/etfs-listados/) (listing all exchange-traded, equity index funds).

460 *Id.*

461 Bebchuk, Hirst, *supra* note 2.

462 See B3 S.A., *supra* note 16. BlackRock currently offers five index funds; the majority of the remainder are offered by Banco Itaú, with nine funds.

463 See BlackRock, *iShares Ibovespa Fundo de Índice* (Apr. 15, 2021), <https://www.blackrock.com/br/products/251816/ishares-ibovespa-fundo-de-ndice-fund>.

464 See Bebchuk, Hirst, *supra* note 1 at 730 (listing the assets under management for the top U.S. exchange-traded, index funds).

465 See Associação Brasileira das Entidades dos Mercados Financeiro e de Capitais, Consolidado Histórico de Fundos de Investimento: Fevereiro/2021 [Historical Aggregate Data for Investment Funds: August/2019] (Apr. 15, 2021), [https://www.anbima.com.br/pt\\_br/informar/estatisticas/fundos-de-investimento/fi-consolidado-historico.htm](https://www.anbima.com.br/pt_br/informar/estatisticas/fundos-de-investimento/fi-consolidado-historico.htm).

466 *Id.*

467 *Id.*

demand for Brazilian stock by overlooking foreign index funds, which are not regulated and are not subject to disclosures in Brazil, that may be targeting Brazilian assets, either as a standalone unit or as part of an emerging markets basket.

Even so, studying index fund holdings of Brazilian companies remains challenging. Because the index fund market in Brazil is still relatively small, funds rarely, if ever, hold more than five percent of a company's total outstanding stock and/or are part of the company's controlling block, which means disclosure of their names and holdings in corporate annual reports is not required by the law. Moreover, though Brazil-based funds have to report all their holdings to the CVM, which then makes this dataset publicly available, foreign index funds investing in Brazilian companies do not, and the sheer number of these funds means it would be impracticable to scour each fund's disclosures for Brazilian equity holdings. Finally, to my knowledge, no comprehensive commercial database otherwise collects this information, which means these limited disclosures are the extent of data available to academics. Accordingly, estimating total index or investment fund investment in Brazilian companies is difficult at present.

However, one aspect of investment fund equity holdings that can be assessed is their voting patterns at shareholder meetings. Under current regulation, companies that permit long-distance, online voting (a relatively new development in the Brazilian capital markets) must disclose a voting map in up to a week after certain meetings are held laying out the voting shareholder's stake in the company, its votes on each matter put up to a vote, and limited identifying information, namely, the first five digits of the shareholder's tax identification number (but not their name or full identification number).<sup>468</sup> The idea behind this limited disclosure is to permit shareholders to personally confirm that their online votes were registered by the company, while

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<sup>468</sup> See Art. 21-W, § 6, II, Instrução No. 481, de 17 de dezembro de 2009, Diário Oficial da União [D.O.U.] de 02.02.2010 (Braz.).

still preserving some degree of their privacy, because no names or full identifying information are disclosed.<sup>469</sup>

But for academics wishing to study trends in these votes, there is a workaround that allows one to put names to votes and identify how each shareholder came out on each contested issue. Under Brazilian corporate law, companies, by default, must also release a list of all shareholders who either personally attended a meeting or submitted online votes, though they can opt out of this.<sup>470</sup> Tying these names for companies that do not opt out to votes then turns on obtaining each shareholder's full tax identification number and matching these numbers to the incomplete numbers disclosed under the regulation described above. This is made possible because the Brazilian Internal Revenue Service now makes these numbers public and searchable.<sup>471</sup> At the end of the day, by putting these unrelated databases to use together, one could assess how these investment funds are as deferential to management as has been the case in the United States.<sup>472</sup>

This is the dataset that I explore in this article. And I believe doing so is paramount. To my knowledge, no empirical analyses of index or investment fund holdings in the Brazilian stock market have been done to date, although the popularity and influence of these vehicles have clearly been on the rise. Unearthing their holdings and voting patterns is important to ensure Brazilian lawmakers and regulators are well informed of how these funds operate, in thinking

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469 See Comissão de Valores Mobiliários, Relatório de Análise, Audiência Pública SDM no 04/17 – Processo CVM SEI no 19957.006078/2016-32 [Analysis Report, SDM Public Hearing No. 04/17 – CVM SEI Proceedings No. 19957.006078/2016-32] (Dec. 20, 2017), [http://www.cvm.gov.br/audiencias\\_publicas/ap\\_sdm/2017/sdm0417.html](http://www.cvm.gov.br/audiencias_publicas/ap_sdm/2017/sdm0417.html) (statement of basis and purpose accompanying the final rule and describing the dueling privacy and disclosure concerns that fueled this rule).

470 See Art. 127, Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.).

471 The exact database where this information is contained is called RedeSim. See Governo Brasileiro, Portal do RedeSim [RedeSim Portal] (Mar. 20, 2019), <http://www.redesim.gov.br/>.

472 I generally find in this endeavor that having the first five numbers of a shareholder's identification number suffices to match votes to funds once I had the register for each meeting and each shareholder's full identification number.

of how to better regulate them and/or devise corporate law reform to accommodate this novel yet transformative development in modern corporation stockholdings.

To this end, Part II expands on the foregoing methodology. Part III presents the results and discusses their implication. Part IV concludes.

## II. METHODOLOGY

As can be inferred from the preceding discussion, this project relies on less than ideal data. On their faces, the CVM's and B3's databases simply do not have the information required to analyze voting patterns by investment funds or any other shareholders. It is only through this ostensibly unintentional loophole that I was able to match votes cast by individual shareholders to their names and proverbial faces, which, unfortunately, means that if the underlying corporate disclosures or incorrect or incomplete, I would have no reason to ask corporate or fund managers for this information outright. As such, the data pool, both in terms of companies in which funds cast votes and funds casting votes in these companies, is limited in the following ways.

First, I am only looking at votes cast by funds at annual or ordinary shareholder meetings. Per Brazilian law, shareholders must gather at least once, within the first four months of a fiscal year, to vote on the accounts and financial statements presented by the board, decide on the way profits and dividends will be distributed among shareholders, and elect board members, managers and members of the board of supervisors (*conselho fiscal*), as applicable.<sup>473</sup> These are relatively routine agenda items, except for the board of supervisors, a monitoring body comprised of corporate outsiders<sup>474</sup> that is only put into place

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473 See Art. 132, Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.).

474 *Id.*, Arts. 162 and 163. The duties of the board of supervisors include, for example: monitoring management, checking whether they are fulfilling their statutory and



upon the request of 10% of voting shareholders or 5% of non-voting shareholders.<sup>475</sup> Incidentally, when board members or supervisors are elected, shareholders must also vote on their compensation—a mandatory say-on-pay right.<sup>476</sup> Finally, though not explicit in the law, shareholders must also vote on the number of board members where the charter does not fix that number,<sup>477</sup> and whether a cumulative voting system will be used (as opposed to a traditional majority voting system).<sup>478</sup> I limit my analysis to these meetings because companies need only to disclose the voting maps for online, long-distance voting for annual meetings, and select special shareholder meetings,<sup>479</sup> and there are simply not enough of the latter for a consistent sample.

Second, I am only looking at the annual meetings for the 2018, 2019 and 2020 proxy season, because the CVM regulation requiring the disclosure of the first five digits of a voter's tax identification number only came into effect on March 5, 2018, and, as of the date of this article, 2021 data had not been completely released.<sup>480</sup>

Third, I am only looking at companies whose stock was a part of B3's main equity index, the *Índice Ibovespa* (IBOV), on September 4, 2019.<sup>481</sup> Beyond the admittedly arbitrary cutoff date, IBOV companies comprise about 80% of B3's total cap on said cutoff date,<sup>482</sup> and it is the preferred index for Brazilian ETFs.<sup>483</sup> The index is representative

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contractual duties, give its opinion on annual accounts and financial statements, and report fraud and other suspected irregularities to the board or shareholders.

475 *Id.*, Art. 161, § 3.

476 *Id.*, Arts 152 and 162, § 3.

477 *Id.*, Art. 140.

478 *Id.*, Art. 141.

479 See Art. 21-A, § 1, Instrução No. 481, de 17 de dezembro de 2009, Diário Oficial da União [D.O.U.] de 02.02.2010 (Braz.).

480 See Instrução No. 594, de 20 de dezembro de 2017, Diário Oficial da União [D.O.U.] de 21.12.2017 (Braz.).

481 The data that follows herein was taken from B3 data disclosures, available at [http://www.b3.com.br/pt\\_br/market-data-e-indices/servicos-de-dados/market-data/consultas/mercado-a-vista/dados-de-mercado/](http://www.b3.com.br/pt_br/market-data-e-indices/servicos-de-dados/market-data/consultas/mercado-a-vista/dados-de-mercado/) (Sep. 4, 2019).

482 On September 4, 2019, IBOV companies accounted for around US\$ 863 billion of B3's \$1.1 trillion market cap.

483 See B3 S.A. – Brasil, Bolsa, Balcão, *supra* note 16.

enough that looking at companies beyond it would either not be useful or would skew votes unfairly away from investment funds.

Fourth, I am only looking at companies who filed complete minutes and a complete voting map for annual shareholder meetings for 2018, 2019 and/or 2020, per the applicable regulation, and who did not omit the list of shareholders attending in at least one meeting, as they would otherwise have been entitled to under the statute.<sup>484</sup>

Finally, I am only looking at votes cast by Brazilian investment funds, i.e. funds regulated by the CVM. Though the data on foreign investment fund voting is out there,<sup>485</sup> looking at it in the context of this paper is either not useful (because voting patterns by foreign funds in relation to companies in Brazil are likely to track the same policies set by their managers worldwide), or overly cumbersome (because the data does not neatly match agenda items and votes as cast on the official documents reported by companies to the CVM, for reasons beyond my knowledge).

This results in 42 companies and 125 shareholder meetings,<sup>486</sup> as listed in **Table 1**. For each company, I matched the funds attending the 2018, 2019 and/or 2020 shareholder meeting with the companies' voting maps, and determined how each fund voted on each agenda item.<sup>487</sup>

<b>Table 1. Companies in the Sample. (n=42)</b>
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484 See Art. 130, § 2, Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.). The rationale behind this rule and the reasons for its implementation in practice are not clear, though it did mean that seventeen companies were excluded from the pool on its account.

485 Hence the empirical research in Bebchuk and Hirst, *supra* note 2.

486 One company, Notre Dame Intermédica Participações S.A., was only listed in late 2018.

487 For the sake of uniformity, I only accounted votes by common shareholders, though in some cases preferred shareholders might also have had the right to vote on certain agenda items.

Ambev S.A.	Estácio Participações S.A. (a/k/a Yduqs Participações S.A.) <sup>488</sup>	Notre Dame Intermédica Participações S.A.
B2W - Companhia Digital	Fleury S.A.	Petrobrás Distribuidora S.A.
B3 S.A. - Brasil, Bolsa, Balcão	Hypera S.A.	Petróleo Brasileiro S.A. - Petrobrás
BR Malls Participações S.A.	Iguatemi Empresa de Shopping Centers S.A.	Qualicorp Consultoria e Corretora de Seguros S.A.
Braskem S.A.	IRB - Brasil Resseguros S.A.	Raia Drogasil S.A.
BRF S.A.	JBS S.A.	Rumo S.A.
Companhia Energética de Minas Gerais	Klabin S.A.	Smiles Fidelidade S.A.
Companhia Siderúrgica Nacional	Kroton Educacional S.A.(a/k/a Cogna Educação S.A.) <sup>489</sup>	Suzano S.A.
Cosan S.A.	Localiza Rent a Car S.A.	Telefônica Brasil S.A.
CVC Brasil Operadora e Agência de Viagens S.A.	Lojas Americanas S.A.	Transmissora Aliança de Energia Elétrica S.A.
Cyrela Brazil Realty S.A. Empreendimentos e Participações	Lojas Renner S.A.	Ultrapar Participações S.A.
EDP - Energias do Brasil S.A.	Magazine Luiza S.A.	Usinas Siderúrgicas de Minas Gerais S.A.
Embraer S.A.	MRV Engenharia e Participações S.A.	Via Varejo S.A.

<sup>488</sup> Estácio Participações S.A. changed its name to Yduqs Participações S.A. by the 2020 proxy season.

<sup>489</sup> Kroton Educacional S.A. changed its name to Cogna Educação S.A., also by the 2020 proxy season.

Equatorial Energia S.A.	Natura Cosméticos S.A. and Natura &Co Holding S.A. <sup>490</sup>	WEG S.A.
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I then used each fund's regulatory disclosures to find out who their manager was. This showed that 121 fund managers voted in at least one shareholder meeting.<sup>491</sup> Finally, I matched manager votes with agenda items. Part III describes the results in full.

Among all agenda items being voted on, I selected eight as being sufficiently representative of a typical annual shareholder meeting.<sup>492</sup>

1. **Approval of Accounts:** Whether shareholders approved the annual accounts and financial statements presented by the board for approval. My intuition was that this would be a relatively straightforward agenda item, particularly in companies with controlling shareholders.<sup>493</sup> However, some dissent may mount given that approval of accounts releases board members and managers from liability bar evidence of a mistake, deceit, fraud, or simulation.<sup>494</sup>
2. **Distribution of Profits:** Whether shareholders approved the board's proposed profit and dividend distribution plan. I would expect this to be a boilerplate item, given that both statute and corporate charters give board members and

490 In late 2019, the Natura group announced a corporate reorganization whereby the listed and holding company of the group beginning in 2020 would shift from Natura Cosméticos S.A. to Natura &Co Holding S.A. For the purposes of this article, Natura Cosméticos S.A. is analyzed for 2018 and 2019, while Natura &Co Holding S.A. is analyzed in 2020, but both companies are treated as one and the same.

491 The median number of appearances was two, while the average was 3.73.

492 In theory, all eight of these variables should be voted on in all shareholder meetings under the unwavering statute, with the exception of board elections if directors or supervisors are elected for multiple years. But on some exceptional occasions, certain items were voted on due to court orders, lack of quorum, among other extenuating circumstances.

493 To be sure, this refers to the vast majority of Brazilian public companies. See Alexandre Edde Diniz de Oliveira, *The Board Against All Odds: Assessing the Powers of Delegated Management in Brazil*, 22 L. & Bus. Rev. Am. 333, 350-52 (2016) (describing equity composition among publicly trading firms).

494 See Art. 134, § 3, Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.).

shareholder little leeway on how to distribute profits; but some dissent may mount by virtue of the fact that law and the corporate charter (can) both set a minimum amount of dividends to be paid each distribution period, but not a maximum amount. Moreover, because the surveyed years are on the tail end of a recession for most Brazilian companies, board members could propose to withhold profits if in the company's interest,<sup>495</sup> which would foster dissent.

3. **Executive Compensation:** Whether shareholders approved the board's proposed compensation package for management. Because of the mandatory say-on-pay rules described above,<sup>496</sup> dissent is likely to mount if non-controlling shareholders believe management is over-paying itself, particularly during a period of dire economic activity in the Brazilian economy.
4. **Seats at the Board:** Whether shareholders approved the size proposed by the board for its composition for the next fiscal year. This variable only applies to certain companies that do not have fixed sizes for the board in their corporate charters. Still, dissent, beyond the actual board member taking up the position, can come in the form of resistance to the cost of an additional body on the board, or the effect that an additional pro-controlling-shareholder-board-member (where applicable) could have on voting outcomes.
5. **Cumulative Voting:** Whether shareholders requested that cumulative voting be used to elect the incoming board. Generally, the rule is that the board will present to shareholders a joint election ticket, which is then elected by a majority vote. Cumulative voting disrupts this continuity by permitting groups of shareholders to pool together and oust the outgoing board, though these shareholders might not have the clout to oust them in a majority vote. Under

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<sup>495</sup> *Id.*, Art. 202, § 4.

<sup>496</sup> See *supra* note 33 and accompanying text.

the statute, cumulative voting is adopted if shareholders representing a tenth of the outstanding capital request it,<sup>497</sup> and the regulation reduces this by up to half depending on the size of the company's capital.<sup>498</sup>

**6. Board's Proposed Directors:** In majority contests, whether shareholders voted for the board's proposed ticket. Occasionally, where shareholders for some of the members of the ticket but not others (which is naturally within their rights) I considered the votes for the chairman, or, if none was designated, for the insider director that received the most favorable vote in the contest.

**7. Board of Supervisors:** In companies where the board of supervisors is not a permanent, mandatory body, whether shareholders voted to establish the board of supervisors for the following fiscal year. Supervisors are outsiders elected by shareholders and charged primarily with monitoring management and performance.<sup>499</sup> Members of the company's board or staff, and up to their third-degree relatives, are barred from serving as supervisors, who must also have a university degree or prior managerial experience.<sup>500</sup> Management, in particular in companies with controlling shareholders, is unlikely to favor it and the additional scrutiny its work will come under.<sup>501</sup> Still, due to recent corporate governance reform and the parading of corruption scandals in Brazilian

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497 See Art. 141, Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.).

498 See Instrução nº 165, de 11 de dezembro de 1991, Diário Oficial da União [D.O.U.] de 16.12.1991 (Braz.).

499 See *supra* notes 31 and 32 and accompanying text.

500 See Art. 162, Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.).

501 In one interesting example, Localiza Rent-a-Car S.A.'s 2020 proxy ballot came with an explicit disclaimer to the effect that management was opposed to electing a board of supervisors because it believed the board of director's audit and risk committees would satisfy any monitoring requirements, a disclaimer that is at least unusual. While it may be true some functions between these two bodies overlap, their composition is drastically different.

media as of late, the fact is that boards of supervisors have become a staple for Brazilian corporations. Nonetheless, I considered its voting for its establishment as detrimental to insider management's interests.

8. ***Supervisor Compensation:*** Whether shareholders approved the board's proposed compensation package for the board of supervisors, which is gauged along the same lines as executive compensation generally, with the caveat that by law supervisors must receive at least a tenth of the board's compensation.<sup>502</sup>
9. For variables one through four, and variables six and eight, a shareholder voted in favor of management if they voted *yes* on the agenda item. For variables five and seven, the same was true if shareholders voted *no* on the agenda item. Abstentions were not counted: though in certain cases an abstaining vote may result in a pro- or contra-management outcome, concluding that an abstaining vote was cast as a means to achieve such an outcome would be too speculative.

A final methodological note is warranted. This article and the literature in the United States both refer to fund managers' tendency to defer to *management*, i.e. to the board as a decision-making authority. In the Brazilian context, and specifically in this sample,<sup>503</sup> the board is often simply a proxy for the decisions of the company's controlling blockholders, which have near-unfettered freedom to set corporate policy and remove directors at will, and without cause.<sup>504</sup> So speaking of deference to the board per se would ignore the fact that the board seldom sets its agenda in companies with controlling blockholders. Nonetheless, the foregoing terminology will be kept here, with the caveat that when I speak of deference to management in

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502 See Art. 162, § 3, Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.).

503 Around half of the companies in the sample have clearly defined controlling shareholders. See Part III *infra*.

504 See Alexandre Edde Diniz de Oliveira, *supra* note 50 at 337-40 (2016) (describing the law and reality behind this phenomenon).

closely-controlled companies, I do so only to the extent management’s proposals are the product of the controlling blockholders’ decisions.

III. RESULTS AND ANALYSES

The results and certain ramifications thereof are set out in **Table 2** through **Table 6**, and in descriptive narratives in the interim.

At the most general level, **Table 2** compares how investment funds and other shareholders voted on each agenda item across all 125 shareholder meetings. On average, non-fund shareholders voted with management a whopping 95.47% of the time, while funds voted with management at a still-high rate of 94.19%. The difference is too small to call but does suggest at least some additional resistance on investment funds’ part towards managerial proposals.

Table 2. Aggregate Deference to Management in Fund Voting. (n=121)			
Variable	Non-Fund Pro-Management Votes (%)	Fund Pro-Management Votes (%)	Difference (%)
1	99.35	99.58	0.23
2	99.02	99.15	0.13
3	92.59	96.82	4.57
4	99.16	96.36	-2.82
5	78.99	88.39	11.89
6	96.38	95.53	-0.89
7	15.18	13.46	-11.35
8	95.53	97.85	2.42
Total	95.47	94.19	-1.34

Descriptively, it is interesting to look at a few of the companies exhibiting the most and least deference levels. At the low end lies



*JBS*, one of the largest meat-product manufacturers in the world. *JBS* currently has no majority beneficial blockholder, per its equity financing strategy, but is still de facto controlled by the mogul behind it, Joesley Batista, and his family, with the assistance of the state. In 2017, *JBS* was enmeshed in one of the largest corruption scandals in Brazilian history, though not as a principal actor and more so as an unwitting participant.<sup>505</sup> Mr. Batista was arrested more than once in the interim.<sup>506</sup> Though the company has all but recovered, it remains under very strict scrutiny by investors, regulators, governments, and the like as a potentially stressful asset. Because of this, no fund voted in favor of management in any agenda item in 2018 and 2019, and, indeed, even non-fund voters followed firm managers only around 76% of the time, with some resolutions passing by slim majorities. However, no other company quite compares with *JBS*: with managers receiving fund approval 5.11% of the time, it is followed only Suzano S.A., whose managers received fund approval 76.20%, which is hardly comparable.

At the opposite end, for example, is *Usiminas*, one of the largest and most traditional mining companies in Brazil. *Usiminas* has been the site of epic battles among its two controlling blockholders, the Argentine and Japanese mining companies *Ternium* and *Nippon Steel*, who ultimately received the company from the state and successive shareholders.<sup>507</sup> But the shareholders have since settled, which only served to solidify what already was a notorious controlling blockholding through shareholder agreements (*acordos de acionistas*),

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505 See Luciana Magalhaes and Paul Kiernan, *JBS Parent to Pay \$3.2 Billion to Settle Corruption Investigations in Brazil*, The Wall Street Journal (May 31, 2017), <https://www.wsj.com/articles/jbs-parent-to-pay-3-16-billion-to-settle-corruption-charges-in-brazil-1496232139>.

506 See Luciana Magalhaes and Paul Kiernan, *CEO of Brazil's JBS Is Arrested in New Twist of Scandal at Meatpacker*, The Wall Street Journal (Sep. 13, 2017), <https://www.wsj.com/articles/brazil-authorities-arrest-jbs-ceo-wesley-batista-1505303662>.

507 See Ivo Ribeiro, *Briga de acionistas da Usiminas será decidida na Justiça* [Shareholder Infighting at Usiminas will be Decided in Court], Valor Econômico (Sep. 29, 2014), <https://valor.globo.com/empresas/noticia/2014/09/29/briga-de-acionistas-da-usiminas-sera-decidida-na-justica.gh.html>.

which permit shareholders to bind the votes for directors, among other things.<sup>508</sup> The concerted action that this agreement entails means it is unlikely that minority stockholders will ever unsettle corporate policy, unlike less stable companies that might be more amenable to outside change. Accordingly, fund voters voted in favor of management every single time across three years, while non-fund voters rallied behind it 99.78%. That said, thirteen other companies received 100% fund approval across all three years, all with varying characteristics and stories, which means the foregoing is far from a normative description of what is going on in these votes.

Looking at individual variables reveals some more interesting comparisons. As one might expect, the annual approval of accounts and the distribution of profits (variables one and two) were viewed as boiler-plate measures by funds and non-funds alike, with matching and extremely high deference rates. So was the election of directors through majority vote processes (variable six), i.e. where funds can only confirm or reject the ticket proposed to shareholders by the board.

Up next were variables relating to the size of the board and managerial compensation (variables three and four). Interestingly, both faced opposite sources of resistance. While non-fund voters were more likely to oppose the board's proposed compensation than fund voters, funds were more likely to resist the number of people to sit on the board. I must emphasize that we are talking about resistance on the margins, given that resistance rates overall were quite small. But funds may have not been as concerned with the compensation of individual board members as with the overall composition and relative voting power, e.g. of controlling shareholders who theoretically have limitless powers to add on additional board members and counter any influential minority in management. This is corroborated to some

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508 On the law, see Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial Da União [D.O.U.] de 17.12.1976 (Braz.), Art. 118. On the issues at *Usiminas*, see Renato Rostás e Ivo Ribeiro, Novo acordo encerra brigas na Usiminas [*New Agreement Settles Infighting at Usiminas*], Valor Econômico (Feb. 9, 2018), <https://valor.globo.com/empresas/noticia/2018/02/09/novo-acordo-encerra-brigas-na-usiminas.ghtml>.

extent by deference rates in the setting of the compensation of the members of the board of supervisors (variable eight), though in that variable deference rates by non-fund voters were similarly high.<sup>509</sup>

The two more controversial agenda items were cumulative voting requests (variable five) and the establishment of the board of supervisors (variable seven). As expected, by its nature, cumulative voting requests are unlikely to receive much support from controlling blockholders, since its only effect is to give an influential minority more power over the selection of board members. A similar pattern I saw was that at least some influential minority stockholders opted not to support cumulative voting to avoid creating friction with their controlling counterparts. For example, *BB DTVM*, the investment management arm of *Banco do Brasil*, the largest Brazilian state-controlled bank, will always be a very influential minority stockholder through its relationship with the federal government. But its manager abstained on cumulative voting requests every time it was submitted to a vote. Similarly, *Banco BTG Pactual*, who is off-and-on among the top three largest investment banks in Brazil, voted against cumulative voting every single time, though through its reputation and clout it would certainly garner additional influence in the boardroom had it chosen to support these resolutions. Indeed, among the 14 fund managers affiliated or controlled by banks in the sample, only two – *Credit Suisse* and *Banco Fator* – voted in favor of cumulative voting at least once, and for these, it was really only once that such a vote was cast.

This discussion tracks a more significant trend in the project, which is illustrated in **Table 3**. Recall the discussion of Bebchuk, Hirst, and Cohen, who identified among the reasons why managers deferred to management a fear of losing related business with the corporations in which they hold equity.<sup>510</sup> In the Brazilian context, it is not clear why

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509 This may, of course, be due to the fact that the minimum compensation for supervisors is set by statute, *see supra* note 59 and accompanying text, and at least some companies voted to set this compensation at this minimum amount.

510 *See supra* notes 2 and 4 and accompanying text.

this would be a fear among so-called independent fund managers, who by law have as their sole line of business the management of their funds. But it is very clear why this *would* be a concern among banks (and particularly investment banks), who do fight among themselves to secure the business of the few and select companies who opt to list their equities on the capital markets.<sup>511</sup>

<b>Table 3. Deference to Management in Fund Voting by Type of Manager.</b>		
<b>Type</b>	<b>Fund Pro-Management Votes (by shares) (%)</b>	<b>Fund Pro-Management Votes (by votes) (%)</b>
Financial Institutions (n = 14)	94.51	94.08
Independent Managers (n = 107)	94.12	92.28
<b>Difference (%)</b>	<b>-0.41</b>	<b>-1.92</b>

**Table 3** suggests that this is the case, but only just. Deference to companies was somewhat higher among financial institutions than independent managers, both when considering shares voted in the aggregate and when considering individual votes cast by managers at each meeting, regardless of equity holding. And the fact that the discrepancy was higher in the latter than in the former suggests that banks are voting in favor of management where independent managers simply are not. Contrast the examples given above with, for example, *Brasil Capital*, an independent manager with a philosophy for “attribut[ing] great importance to quality management and the incentive structure managers are exposed to” and ensuring “company

511 Unfortunately, the limited disclosures fund managers must provide to the CVM do not include information on business with related companies. See Instrução nº 558, de 26 de março de 2015, Diário Oficial da União [D.O.U.] de 27.03.2015 (Braz.). Theoretically, it may be possible to cross-reference fund managers with related-party information disclosed by companies themselves; but that it a task for a different project.

managers are aligned with all shareholders,”<sup>512</sup> which, across 15 companies, voted for cumulative voting 63% of the time. But this narrative explanation has its limits, as seen, for example, in *Velt Partners*, by all accounts an independent fund manager who voted against cumulative voting every time across nine companies. Nonetheless, at least 13 independent fund managers voted for cumulative voting every single time they were faced with the issue, while only non-independent fund manager, Credit Suisse, did so, which is not representative given that the manager was in attendance only once in the sample.

The second interesting comparison in **Table 2** pertains to the establishment of the board of supervisors. In the one significant comparison of the table, fund managers are dramatically less inclined to support establishing a board of supervisors than non-fund voters, though in theory these committees are set up to bolster the monitoring of insiders to the benefit of minority stockholders. One explanation for this is simply cost: boards of supervisors must be paid, and, depending on the compensation of the board, do not come cheap.<sup>513</sup>

A related explanation is that fund managers may simply feel adequately equipped to monitor management without the need for an inside body, especially since though the board of supervisors cannot be comprised of insiders, the controlling shareholder still has the right to appoint and elect a majority of its members.<sup>514</sup> This may feel at odds with the agency problems identified by the literature in investment management, but recall that this market in Brazil is far smaller and less concentrated than the market in the United States.<sup>515</sup>

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512 Brasil Capital, Investment Philosophy (Mar. 23, 2020), <https://brasilcapital.com/novo2019/en/company/investment-philosophy/>.

513 This is especially so given the very specific requirements set by the statute for committee members, namely that they reside in Brazil and either have a college degree or have worked as a manager or committee members for three years. See Art. 162, Lei No. 6.404, de 15 de dezembro de 1976, Diário Oficial da União [D.O.U.] de 17.12.1976 (Braz.).

514 *Id.*, Art. 161, § 4.

515 According to one study, the top three managers, *BB DTVM*, *Itaú Unibanco* and *Opportunity Asset Management* only held 35% of total assets under management in the equity investment fund market. The next manager, *BTG Pactual*, only held 10%, while the tenth-largest manager only held 1.83%. See Associação Brasileira das Entidades

Asset managers may feel they simply do not have the luxury or the need for relying on insiders to monitor or instill their vision upon corporate management.<sup>516</sup>

Interesting narratives emerge here. Financial institutions are clearly in disagreement about the board of supervisors: *BB DTVM* voted against it every single time; *BTG Pactual* came out mixed with 77% votes in favor; *Itaú Unibanco* and *Banco Bradesco*, two of the largest Brazilian commercial banks, voted in favor every time; while *XP Investimentos*, a brokerage company turned underwriter and online bank abstained every time. Independent managers mostly voted in favor of the board of supervisors too; but *Velt Partners*, who, recall, voted against cumulative voting every time, also voted against the board of supervisors 86% of the time. *Velt* has a voting power policy, which makes no mention of either matter,<sup>517</sup> so it remains an interesting outlier, as no other fund manager comes even close to that level of resistance towards the board of supervisors.

There is an additional way of looking at **Table 2** that slightly exacerbates the point being made. **Table 4** compares the fund voting data per shares voted (considering the actual equity interests held by each voter) with voting per individual votes, considering each fund's decision to vote either way irrespective of its voting shares, as was done in **Table 3**. The average does not show much of a difference, but certain variables suggest that funds are deferring to management a lot less than **Table 2** suggests, particularly smaller, independent funds not as represented in the pool as a whole.

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dos Mercados Financeiro e de Capitais, Ranking de Gestão de Fundos de Investimento: Agosto/2019 [Investment Fund Manager Ranking: August/2019] (Sep. 19, 2019), [https://www.anbima.com.br/pt\\_br/informar/ranking/fundos-de-investimento/gestores.htm](https://www.anbima.com.br/pt_br/informar/ranking/fundos-de-investimento/gestores.htm).

516 Monitoring would theoretically be possible even though these managers would have no bodies on the board, given the extraordinarily high number of action items that require prior approval by shareholders before being implemented by managers. See Alexandre Edde Diniz de Oliveira, *supra* note 50 at 335-36.

517 Velt Partners, Política de Voto [Voting Policy] (Jan. 2020), [https://velt.com/docs/PT/VELT%20Partners%20-%20Pol%C3%ADtica%20de%20Voto\\_Jan%202020.pdf](https://velt.com/docs/PT/VELT%20Partners%20-%20Pol%C3%ADtica%20de%20Voto_Jan%202020.pdf).

Table 4. Aggregate Deference to Management in Fund Voting (by votes). (n=52)			
Variable	Fund Pro-Management Votes (by shares) (%)	Fund Pro-Management Votes (by votes) (%)	Difference (%)
1	99.58	99.64	-0.06
2	99.15	97.65	1.53
3	96.82	92.91	-4.04
4	96.36	95.43	-0.97
5	88.39	67.65	-23.46
6	95.53	98.77	3.40
7	13.46	16.77	24.61
8	97.85	96.78	-1.09
<b>Total</b>	<b>94.19</b>	<b>92.90</b>	<b>-1.36</b>

The difference is particularly significant in variables three, five, and seven, which suggests that the larger funds (which are mostly the financial institutions identified in **Table 4**) bring up the average deference to managers. Individually, though, fund managers are 4% less likely to agree with firm management on its compensation, and almost 24% more likely to believe that cumulative voting would be beneficial. By contrast, fund managers are almost 24% less likely to believe that a board of supervisors is necessary. Ultimately, the distinction is academic: in the real world, a fund manager's influence will only be as big as its shareholding. But if the investment fund market continues to increase the way that it has been, and what underrepresented rebels exist acquire greater interests in public companies generally, firm managers may come to face more scrutiny in their actions than they currently receive from the overrepresented bank fund managers. However, again, because the numbers support opposing points, this is hardly a normative statement.

The general pool of companies can be split into two further interesting ways.

Following trends worldwide and with corporate governance reform in sight, in 2000, B3 (then called BM&FBOVESPA) created opt-in segments directed at newly-listed companies, called *Nível 1*, *Nível 2*, and *Novo Mercado*, in an attempt to kindle the voluntary adoption of better corporate governance practices by Brazilian companies.<sup>518</sup> The three segments were successively aimed at better-governed companies, and the practices, in the *Novo Mercado*, including a bar on the issuance of non-voting preferred shares,<sup>519</sup> a mandatory bid rule for all shareholders,<sup>520</sup> and the reservation of at least twenty percent of the board's seats to independent directors.<sup>521</sup> *Nível 2* conserves the two latter restrictions but allows preferred shares so long as their holders are guaranteed certain fundamental voting rights.<sup>522</sup> However, resistance to these more drastic measures means a lot of traditional, closely- or state-controlled blue chips have remained stationary at the *Nível 1* stage, not so much as a good-faith means to implement corporate governance reform as seen in the *Nível 2* and *Novo Mercado* rings, but rather to appease investors as the bare minimum they ought to do in light of these changing practices.<sup>523</sup>

**Table 5** groups these two categories and compares deference to management. It shows that while non-fund voters are ambivalent to

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518 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).

519 See B3 S.A. – Brasil, Bolsa, Balcão, Novo Mercado Listing Regulation, Art. 8 (2017).

520 *Id.*, Art. 37.

521 *Id.*, Art. 15.

522 See B3 S.A. – Brasil, Bolsa, Balcão, Corporate Governance Level 2 Listing Regulation (2011)

523 See Alexandre Edde Diniz de Oliveira, *Resistências ao Novo Mercado na Governança Corporativa de Companhias Abertas Brasileiras* [Resistance to the Novo Mercado in the Corporate Governance of Brazilian Public Companies] (2017), <https://archive.org/details/resistenciaaonovomercado/>.



these changing segments, fund voters are not, and are significantly less likely to defer to firm managers in the more developed *Nível 2* and *Novo Mercado* companies. The application of, respectively, a mitigated and a full one share, one vote principle and a greater number of minority shareholders as a result of free-float rules in these segments<sup>524</sup> lead to more minority shareholders with greater decision-making rights, and may consequently exert greater influence in the board’s appointment process and pressure it to resist controlling shareholder measures detrimental to the minority.<sup>525</sup> Fund managers, particularly those independent from financial institutions, are likely to take the helm as some of the most sophisticated and financially powerful shareholders and scrutinize to a greater extent the activities of firm managers relative to, for example, a company in which they exert that pressure alone.

Table 5. Deference to Management in Fund Voting by Listing Segment.			
Segment	Non-Fund Votes (%)	Pro-Management	Fund Votes (%)
Tradiconal, Nível 1 (n = 7)	94.91		94.67
Nível 2, Novo Mercado (n = 35)	93.80		90.45
Difference (%)	-1.16		-4.46

Descriptively, this argument makes sense. Consider the three *Tradiconal* companies in the sample. *Ambev*, the largest beverage manufacturer in Brazil, is very tightly controlled by the private equity

524 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, their related parties, or managers). See B3 S.A. – Brasil, Bolsa, Balcão, *supra* note 76, Art. 9, and note 79, Art. 2.1.

525 This argument was hashed out further in the context of delegated management in Alexandre Edde Diniz de Oliveira, *supra* note 73 at 347-50.

fund 3G Capital, in turn very tightly controlled by Berkshire Hathaway and Brazilian billionaires Jorge Paulo Lemann, Beto Sicupira, and Marcel Telles. These entrepreneurs have a very specific vision for *Ambev*, unlikely to be fettered by the activism of Brazilian minority investment funds,<sup>526</sup> and set many, many chains up the ladder at the holding level through *Ambev's* controlling companies, *InBev* and *AB InBev*. The same goes for *Telefônica*, the mobile network provider, which is under the strict control of its Spanish parent, *Telefónica S.A.*, and *Companhia Siderúrgica Nacional*, a mining giant that has been under the control for generations of the Steinbruch family.

An additional but related explanation is that the listing segment may be a proxy for shareholder dispersion. This is what **Table 6** gets at. Shareholdings in the *Novo Mercado* are the most dispersed by a fair margin in the Brazilian capital markets.<sup>527</sup> Though the numbers in the *Nível 2* are not as impressive, they still vastly outperform those in the *Tradicional* and *Nível 1* segments.<sup>528</sup> Historically, the divide is the heritage of political elites and oligarchies, which carefully selected and imported those foreign legal rules better suited to their private interests.<sup>529</sup> Notable influences also include the heavy presence of state enterprise in the economy since at least the 1950s,<sup>530</sup> and

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526 See generally Cristiane Correa, *Dream Big: How the Brazilian Trio behind 3G Capital - Jorge Paulo Lemann, Marcel Telles and Beto Sicupira - acquired Anheuser-Busch, Burger King and Heinz* (2014)

527 See Erica 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, 523-25 (2009) (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 85.19% in the traditional segment).

528 See Alexandre Edde Diniz de Oliveira, *supra* note 80 at 19 (describing how only 27.72% of companies in the *Tradicional* and *Nível 1* segments meet the 25% free floating voting shares requirement for entry into the *Nível 2* and *Novo Mercado*).

529 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).

530 See generally Mariana Pargendler, *State Ownership and Corporate Governance*, 80 Fordham L. Rev. 2917, 2932 - 42 (2012); *The Unintended Consequences of State Ownership: The Brazilian Experience*, 13 THEORETICAL INQUIRIES L. 503 (2012).

the institutional incentives for the migration of well-established multinationals through local branches with ample self-financing capabilities.<sup>531</sup>

Table 6. Deference to Management in Fund Voting by Shareholding Dispersion. <sup>532</sup>		
Dispersion	Non-Fund Pro-Management Votes (%)	Fund Pro-Management Votes (%)
No Controlling Shareholder (n=19)	93.99	89.56
Yes Controlling Shareholder (n=21)	94.91	94.07
Difference (%)	0.97	5.04

But **Table 6** shows that for companies that do not fit this narrative, deference to management falls sharply, particularly among fund voters. Specifically, for companies that do not have a clearly defined controlling shareholder (i.e. that freely float at least half of their outstanding voting stock on the capital markets), fund managers are less inclined to agree with firm insiders. Funds may feel that because managerial decisions are not simply the product of rubber-stamped controlling shareholder decisions,<sup>533</sup> they will have more of an incentive to expend resources on monitoring and collective action and risk challenging management. Relatedly, fund managers may feel that the risk of losing business with the company is not as great where the fund is only challenging a specific board in time, and not

531 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 *Historica Econômica do Brasil Contemporâneo* [Economic History of Contemporary Brazil] 183 (Tamis Szmecsdnyi & Wilson Suzigan eds., 1997).

532 This table excludes three companies that shifted between the two categories between 2018 and 2019.

533 See *supra* notes 60-61 and accompanying text.

the board in addition to the controlling shareholder that elected it and sanctioned its actions.

#### IV. CONCLUSION

This article sought to paint a picture, for the first time in the literature, of how Brazilian investment fund managers vote their shares in the annual shareholder meeting of Brazilian public companies. I used an innovative and unusual methodology to link votes to shareholders, and then to fund managers, to do so. The results show that though fund managers are still very much deferential to firm managers and controlling shareholders across the board, they are generally less than their non-fund counterparts (i.e. other shareholders at large), especially when individual votes, not equity holdings, are considered. There are also distinctions to be made based on the company being looked at: funds defer even less to managers for companies that are listed in premium corporate governance segments, or that do not have clearly defined controlling shareholders, probably based on their perceived ability to impact the company's day-to-day, notwithstanding the agency costs that they face. Finally, there is some evidence financial institutions bow to firm managers more often than independent managers, though the reasons behind this divide are yet obscure.

The methodology behind this article has two limitations that are both unfortunate and inspiring for future research. First, this article focuses mostly on companies, not fund managers per se. The data collected (and available) do not readily allow for large  $n$  analyses of fund manager traits or the relationship of specific managers with specific companies. Analyzing why, for example, *Velt Partners* is so out of sync with other independent managers, would likely require a different type of methodology, and would not neatly fit within the scope of this article. The second is the limited time-frame and agenda items that were analyzed, The simple passage of time will allow not only for a great number of agenda items to be analyzed through

special shareholder meetings, such as charter amendments, but more data points for the items looked at here. Ultimately, this article met its main objective: to put into place such a bizarre methodology and piece together some form of empirical puzzle, despite the regulator's reluctance to mandate adequate disclosure.

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