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DEVELOPMENT OF REGULATORY STATE IN MEXICO: FROM THE POLITICAL ECONOMICAL REFORM TO THE INSTITUTIONAL FAILURE

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Development of Regulatory State in Mexico: From the Political Economical Reform to the Institutional Failure

Jorge E. Culebro Moreno & Pablo Larrañaga

Abstract: From administrative and regulatory reforms in Mexico, we analyze the most relevant limitations institutional failures in Mexico in the design and construction of the so-called regulatory state, based on two dimension the policy/administrative, and the constitutional/legal. The purpose is to explain how these two dimensions have interacted as obstacles to economic policy reform. We present two cases that illustrate how the lack of consistency in the implementation of the reforms has thwarted the development of an effective regulatory state in Mexico. We conclude that the reforms have not been simple and homogeneous processes, but rather are characterized by their heterogeneity and contextual constraints, and that the design of the regulatory state in Mexico has taken place within a variety of institutions and political limits derived from the mixture of the political/ administrative and constitutional legal dimensions.

Keywords: Regulatory state, Administrative reform, Institutional limits, Regulatory reform, Failure State.

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I. Introduction

From the 80's, and increasingly in the 90's, Mexico began a process of institutional transformation in order to improve not only their processes and functions of government, but also to redesign the functions of the state in the economy; such changes have been associated with the figure of the so-called "regulatory state" (Majone 1996). As a result of these transformations the role of the Mexican state was modified. The public sector was supposed to change its general structure to strengthen the vertical and horizontal specialization of the government, either through the creation of various regulatory agencies characterized by a great level of autonomy, independence and regulatory power-competences; or by means of the adoption of certain successful practices of the private sector, such as cost-benefit analysis and "consumer oriented" public service strategies.

The introduction of those regulatory agencies was established as part of a broader economic policy reform that included, on the one hand, the improvement of markets and public services efficiency, and on the other hand, a re-design of government by means of de-concentrated agencies, outside the hierarchy of the Secretaries of State and with an acceptable degree of technical autonomy and independence from political contingencies. Nevertheless, this effort to build a regulatory state has encountered so many difficulties to the extent of being considered an institutional reform failure.¹ This paper argues that some of the most salient limitations have their origin in two large institutional flaws. First, the

political/administrative dimension, whereby the institutional environment and the internal dynamics of the public sector have restricted the performance of regulatory agencies, and second, the constitutional/legal dimension, by which it is possible to identify the lack of a series of “infrastructural” reforms required for any possible implementation of a regulatory state as economic governance model (Ogus 2005 y 2004).

This article aims to explain how these two dimensions of the “government reform” have interacted as obstacles of the economic policy reform. We argue that, despite the fact that in the case of Mexico a sound agenda of economic reform encouraged the two strategies of government reform, due to political-constitutional restrictions such “structural” reform has failed. We will make a comparison of three cases to show significance of these two analytical dimensions, and the manner in which the lack of coherence in the implementation of reforms has frustrated the development of an effective regulatory state in Mexico.

The argument of this paper develops as follows. First, we will present a general background of the administrative reform and the regulatory state in Mexico as part and parcel of an economic policy reform. Second, we will explain the main characteristics of the theoretical-analytical components of our argument in two sections: the political/administrative dimensions of the administrative and regulatory reform and the legal constitutional/legal dimensions of the administrative and regulatory state. Last, we present a short description of the cases of study, as well as some final considerations.

II. Background of the Administrative Reform and the Regulatory State in Mexico

The conditions of New Public Management (NPM) adoption in Mexico can be traced back to the middle of the 1970's when the Organic Law of Federal Public Administration was passed and comprehensive changes took place, such as the restructuring of the central administration through a reorganization of the Secretariats of State (Ministries), as well as the introduction of managerial tools like the “management by goals” in the federal budget. During those years, the existence of a homogeneous political context and the absence of financial crisis facilitated the reorganization of the federal public administration. In the administrative field, the Mexican public sector began to develop a new planning system, which required that all “modernization” programs should be part of the National Development Plan.² This meant, so to speak, a shift – not a breaking – in the “Stabilizing Development” model as the paradigm of economic management, and the beginning of a “technocratic” paradigm of government, more congenial with a market – oriented economic policy but nevertheless committed to the public leading of the economy (Rubio 2001).

1) First generation of reforms: De la Madrid and the adoption of market- system principles

By 1980, Mexico suffered a collapse in oil prices and had to face several financial problems. This economic crisis provoked a strong devaluation of the Mexican peso, and by 1982 the government had to drastically reduce public expenditure. As a result of that, through Miguel de la Madrid administration (1982-1988) government initiated the process of liberalization of the international trade by joining the WTO in

1986. Since then, the Mexican government has continued to adopt more market-based principles to foster the economy, such as liberalization of the trade, the privatization of state owned companies and the introduction of regulatory instruments aimed at reducing price controls. The main assumption underlying these changes was the extended belief that the previous economic model had left a legacy of an inefficient economy, poverty and greater inequality among the population. During the 1980's the idea that the role of the State was no longer central in the economic sphere of the country became a "conventional wisdom" among the "commanding heights", and the Mexican leaders were not an exception to the "zeitgeist". Accordingly, governmental functions were reoriented towards a more efficient use of public resources, administrative structures were reduced and the government began to decentralize institutions and resources from the central government to the States and Municipalities (Lustig, 1998) and (Williams, 2001).

2) The second generation of reforms: Salinas and the privatization of public services and NAFTA

Another generation of reforms was put in place as a part of a worldwide process of economic liberalization and the adoption of Mexico of a more active role in the global economic sphere. In 1994 the North America Free Trade Agreement (NAFTA) came into effect. As a result of this new economic context, several regulatory institutions were transformed, either because the recently privatized former state owned companies (such as state the telephone company, TELMEX) required a new role of the state, or by the introduction of new international standards in the functioning in the public sector. The policies related to regulation were no longer a domestic issue, and the Mexican road to the regulatory state was clearly

drawn (Aspe 1993).

3) The third generation of reforms. Zedillo and the move towards the building of the Mexican regulatory state

During the Zedillo administration (1994-2000) the Mexican government initiated another generation of radical changes aimed at institutionalizing previous reforms. In the administrative area, the reform strategy was based in adapting practices from the private sector such as re-engineering processes, total quality management, corporate planning, service driven bureaucracy and budget planning. The opportunity to learn from abroad came in 1994 when Mexico entered into the Organization for Economic Co-operation and Development (OCDE) and since then the government adopted several principles and techniques promoted not only by International Organizations but also by particular Countries like the United Kingdom. These lessons were led to two partially incompatible modernization strategies: on the one hand, the implementation of the Federal Public Administration Modernization Program – 1995-2000 – by the Ministry of Comptroller (today Ministry of Public Function); and, on the other hand, the adoption of a budgetary reform by the Ministry of Finance. While the modernization program promoted more managerial freedom and autonomy for the public organizations and officials, the budgetary reform fostered greater control mechanisms via the introduction of performance agreements.

4) The fourth generation of reforms: Fox and the good government agenda

In 2000, when Vicente Fox was elected president, the government sought to adopt a new set of administrative reform measures. In contrast to previous efforts in which

diverse offices were created within the Ministries to carry out the modernization programs, the government centralized the reforms through the so-called presidential Office of Innovation in Government. As regards implementation, the reforms in Fox's administration followed a similar pattern than the previous government. The NPM was implemented through three main areas: (1) the Good Government Agenda, (2) the introduction of the Citizen Charters and (3) the Professional Civil Service. The Good Government Agenda became the core of the modernization programs, and it was unfolded into six main strategic guidelines that contained policy transfers from international experience: (1) Honest and transparent Government; (2) Professional Government; (3) Quality Government; (4) Digital Government; (5) Government with Regulatory Reform; and (6) Government that Costs Less.

5) The fifth generation of reforms: Calderon and the pendulum shift

In 2006 Felipe Calderon took the Office, and since then the adoption of NPM was introduced to all the Secretariats of State. In particular, the Secretariat of Public Function was charged at standardizing all the modernization processes and ensuring the efficient use of public resources. ³ The main strategy was the implementation of the Public Management Improvement Program, which explicitly recognized principles of NPM, such as (1) to reduce the inequality of the public organizations through the standardization of managerial practices, (2) to facilitate the functioning and performance of public institutions through a regulatory reform, (3) to improve decision-taking processes based on the management by outputs, and (4) to improve accountability mechanisms via the generation and diffusion of public information concerning the performance of the government as a whole. These principles were

translated into five major guidelines: public service oriented to results, flexibility, innovation and experience, and synergy and citizen participation. Currently, the pillars of the government modernization strategy are the development and strengthening of the process of de-regulation and the consolidation of the civil service.

6) A provisional balance of the administrative and regulatory reform in Mexico

In contemporary Mexico, government modernization programs and regulatory reform have gone hand-to-hand, although their scope has been somehow different. For example, by the middle of the 70's the administrative reform was already focused in developing new forms of administrative simplification, and subsequently in the generation of the so-called unit front desk, whereas regulatory reform was still a long way ahead in the public agenda. It was not until the beginning of the 1990's when the administrative reform took a different shape and began to develop a new regulatory strategy aimed at fostering competitiveness, competence and transparency, with special orientation in two phenomena: one the one hand, the intensive process of privatization of public services and state owned companies and on the other hand, the management of a recalcitrant economic crisis.

A main assumption behind this policy convergence was that de-regulation would contribute to adapt the Mexican economy to the structural changes already initiated in 1980's, and that an effective regulatory environment will help to develop better opportunities for private sector investors (OECD 2004). In this regard, the reforms from 1990's were characterized for the establishment of new regulatory agencies, with a view to establishing a new paradigm of economic governance. This new arrangements were supposed to foster the effectiveness and efficiency of public

action and, in the long term, the performance of the Mexican economy. However, unfortunately, from the very beginning it has not been clear how their institutional design is supposed provide mechanisms for coordination in the public sector, ones the “old model” of public management (centralized and hierarchical) had been overridden.

Table 1. Background of the Administrative and Regulatory Reform in Mexico

Generation of Reforms	General Context	Main Policy Strategies	Organization in Charge	Regulatory Reform
1st Generation (1982-1988)	Acute economic financial crisis			
2nd Generation (1988-1994)	Post electoral crisis and economic recovery	Privatization of state-owned enterprises.	Ministry of finance	Transformation of regulatory institutions
3rd Generation (1994-2000)	Economic crisis and political contention	Federal public administration modernization program budgetary reform	Ministry of comptroller, Ministry of finance	Regulation for new markets and regulatory impact assessment (RIA)
4th Generation (2000-2006)	End of PRI regime macroeconomic balance, marginal economic recovery and low growth rate	Good governance agenda	Presidential office	Implementation of the regulatory improvement program
5th Generation (2006-)	Macroeconomic balance and low growth rate	Public management improvement program	Ministry of public function	Strengthening of RIAs

III. The Political/Administrative Dimension of the Administrative and Regulatory State in Mexico

The literature related to the phenomenon of regulation and regulatory reforms have generally been located in the field of economics and rarely from the legal or organizational perspective. It is common to find results on any impact of the regulatory sectors, for example in studies related to the creation of new regulatory economic analysis has gained greater prominence. Other studies focus on policy issues from economic approaches on out things like the theory of capture and role of incentives, legal certainty and autonomy and independence of these bodies. From the field of governance studies are influenced by the processes of administrative reform in which the variables organizational and structural gains relevance, especially in the design of new organizational forms and some problems such as lack of coordination and the tension between autonomy and control.

Here, we will focus primarily in the administrative and legal dimensions of regulatory policy and in how, in the Mexican experience, such dimensions have led to a failed regulatory state. At the institutional level, a fundamental functionalism premise is that States are constituted by complex networks of institutional arrangements, and that its design aims to provide with structure and meaning to the set of interests or goals that make up a society. Institutions are expressed in the formal structure of political organization (Hall and Taylor 1996). Thus, the political dimension of government presupposes that the administrative and institutional environment, as much as the internal dynamics of the public sector, generate outcomes that support, restrict and, sometimes, impede the performance of regulators.

From the structural perspective, there are another kinds of variables that define Mexico's political system: the distribution of competencies and powers between the different levels of government, and the structure of decision-making processes and the degree of centralization of control. In addition, in terms of authority, both the prerogatives granted to the Executive branch and thin accountability mechanisms are important to appreciate the potential influence of the Mexican presidential system in the government as a whole.

A second assumption is that public servants act with some kind of instrumental rationality to the extent they are able to design the appropriate meanings for achieving desired goals (Dahl and Lindblom, 2000). Formal institutions can be modified or manipulated through the processes of government. Thus, in the case of regulatory agencies the emphasis must be in to the manner in which agencies regulate their sector, for example in the level of complexity of their responses to the regulatory demands. In this regard the legal system under which regulatory agencies have to operate may have a strong influence in the formal structure they adopt, with obvious implications for transparency and accountability.

Other set of dimensions related to the organizational/institutional are the features of the regulatory bodies. These features have a primary legal nature, but they also express aspects of the political culture, as the kind of relationship they have with their Secretary or with higher level bureaucracy, the mechanisms for appointing their personnel and their government bodies, the characteristics of decision processes and the instruments of transparency and accountability, etc. This approach is based on the notion that the main features of the national culture have an important influence in the way in which the relations among the main actors in the regulated

sector are established.

As a result of the above considerations, we might consider an important set of variables related to regulation and the performance of regulatory agencies, such as autonomy, coordination and control. Autonomy has been conceptualized as a multidimensional term related to the degree of decision-making capacity of an organization, which results from the vertical and horizontal specialization derived from administrative reforms (Laegreid 2012). Coordination is understood as a mechanism that aims to achieve some kind of alignment between goals and objectives among several organizations (Verhoest et al 2007, Laegreid and Verhoest 2010). Controls are the institutional constraints that limit the decisions and behavior of regulatory agencies in order to achieving certain government goals and objectives (Laegreid and Verhoest 2010). These variables are related to the formal mechanisms of appointing, the composition of the board of government, the decision-making processes and the level of de-polarizations of the regulatory agencies. These institutional features have consequences not only in terms of an effective and efficient agency performance, but are also constitutive of democratic practices relevant for the legitimacy of the regulatory state such as transparency and accountability.

Table 2. Theoretical perspectives. Organizational features.

Perspective	Elements	Assumption	Institutional roots
Structural/ Instrumental	Formal design Legal form	Manipulation of formal structure	NIE New Institutionalism in Economics Rational Choice
Cultural/ Organizational	Governance mechanisms Political system Historical roots Institutional Context	Continuous Interactions between formal and informal norms Transformative relation with the context	NIS New Institutionalism in Sociology NIO New Institutionalism in Organizations NIN Normative New Institutionalism.

IV. The Constitutional/Legal Dimension of the Administrative and Regulatory Reform in Mexico

Three constitutional features are critical for understanding the development of the Administrative and Regulatory reform in Mexico: 1) The economic constitution, 2) the structuring of regulatory power through administrative law, and 3) the direct legal and constitutional control of regulatory policy through judicial review.

1) The Mexican economic constitution

In the second half of the XXth Century era, many Latin-American countries enforced some variation of social economy through some model of Developmental State. Nevertheless, in the case of Mexico, this agenda had an older tradition that was already mature in the 1917 constitution, and that was deepened, not necessarily consistently, by the post-revolutionary regime through subsequent constitutional and legal strokes; with the salient examples of the nationalization of the oil industry in 1938, under the so called “pro-socialist” government of General Lázaro Cárdenas,

and the nationalization of the electrical industry by Adolfo López Mateos in 1960, during the golden age of the stabilizing development model.

The dynamics between the constitutional transformation and the political economy ideology are complex. But for the purposes of this paper, the Mexican economic constitution can be sketched by three constitutional and legal arrangements that have proved to have pervasive effects in the Mexican “way” of carrying out Public Administration and Regulatory State reforms: a) The state managed economy, b) the public property of land and natural resources, and c) the state ownership and management of national industries.

a) State managed economy

Although the original text of the 1917 Constitution did not include an explicit formulation of the State prerogative to “lead” and “plan” economic development, in the 80’s – contemporarily to the 1st generation of reforms described above – by a series of Constitutional reforms – mainly by the addition of Arts. 25 and 26 to the Mexican Constitution – the “development leadership” of the Federal State by a “democratic planning system for the national development” was established. The purpose of those constitutional provisions was, in principle, to reduce the margin of maneuver of the Executive for politically opportunistic budgetary decisions. However, this constitutional clause also revealed a profound disagreement among political forces – e.g., technocrats vs. old fashioned politicians – about two pivotal features of the Mexican economic model: the role that the National state should play in the economy and the control of the Federal government in financial and budgetary management and taxation. As we will see in the next

section, this gap between a pro-market regulatory function and subsidiary federalism approach, on the one hand, and a pro-state productive function and a centralized approach to the role of the Mexican state in the development of the economy, on the other, has been permanent, and has had very specific effects in the Administrative and Regulatory Reforms in Mexico.

b) Public property of land and natural resources

A second institutional feature, less obvious but not less important, that has deeply influenced the Administrative and Regulatory reform in Mexico is the public property of land and natural resources, which is contained in Art. 27th of the Mexican Constitution. This is a very long, extensive, article that originally was intended to regulate an agrarian economy, but that during and after the post-revolutionary regime has been the depository of the nationalist idiosyncrasy and constitutional pathos. The systemic impact of this constitutional provision in the Mexican regulatory arena (Hancher and Moran 2002) can be summarized in three basic “rules of the game” (North 1990) of the Mexican economy:

- A residual conception of private property as rights derived from the public domain, and constrained by a power of eminent domain as executive prerogative, whose discretion has been limited by the judiciary only very recently times.⁴
- An extraordinarily large share of social wealth is allocated by the State – i.e., Federal government. This distribution is performed either directly by varied forms of licensing (i.e., mining, telecommunications, transportation, banking, financial services, etc.), or indirectly, by contracting with government agencies or

publicowned/managed industries.

- The legal deployment of these kinds of constitutional-public economic power imposes significant barriers to market entrance to economic agents, both national and international, which face a thick net of intertwined legally sophisticated obstacles and highly corrupted administrative discretion.

c) Public owned and government managed industries

The public ownership of vast resources not only frames the arena of public private relationship, but also has a deep impact in the way of running government. In the context of this paper, three aspects are worth mentioning:

- As noted above, the Mexican government has two main constitutional devices to extract wealth out of public ownership: licensing and national industries. These alternative sources of income can be considered a “spillover” of public property that has had the negative impact of sustaining a grossly inefficient tax system.⁵
- Associated with the “patrimonialist” culture just mentioned, there is the widely spread idea that some supplies (e.g., gasoline, electricity, fertilizers, etc.) and public services (transportation, water, etc.) are somehow owned by the population (i.e., the Nation), and consequently, must be produced and distributed under a general subsidy regime.
- National owned industries have been managed by the Federal government under the scheme of the “empresas paraestatales”, as part and parcel of the Federal Public Administration.

This means that the Federal government (the President) not only has the

prerogative to appoint the managers of such corporations, but also the power to intervene in its corporative governance through the Secretaries of Government that coordinate each economic sector (mainly, the Secretary of Energy and the Secretary of Finances, but also the Secretary of Economy). Of course, this model allows a substantial deviation of professional criteria for political-electoral strategies.

2) Regulatory power and agencies autonomy within the federal central public administration

The last constitutional feature noted above has substantive implications for the way in which regulatory power and autonomy is legally structured and, therefore, executed. First, regulatory competence is organized within the public administration structure; second, regulatory making is conceived as a “reglamentary” development of the law, and third, regulatory discretion is disciplined by administrative process.

a) Regulatory agencies as “de-concentrate” administrative bodies

The main organizational divide of the Mexican Federal Public Administration is between centralized and decentralized (“paraestatal”) administration. And the most relevant bodies of *centralized* public administration are the “Secretaries of State”, which “for a more effective and efficient performance of their competences can create ‘de-concentrate’ bodies, that will be *hierarchically subordinated* and will have specific competences on the matter and the jurisdiction that will be determined in each case, under the applicable statutes” (Art. 17 Ley Orgánica de la Administración Pública Federal). All regulatory agencies in Mexico are “de-concentrate” bodies of the centralized Federal Public Administration.

b) Regulatory policy as “reglamentation”

In so far as regulatory agencies are part and parcel of centralized Federal Public Administration, regulatory agencies in Mexico “share” the constitutional “fate” of the Executive branch of government (the President), and this has important the political and normative implications for the checks and balances system within the Mexican constitutional system. In Chapter III (Of the Executive Power), of Title III (Of the Division of Powers), of the Mexican Constitution, the “duties and prerogative” of the President are listed. More specifically, Art. 89, paragraph 1, says that it is a duty and prerogative of the President: “To publish and execute the statues issued by the Congress, providing in the administrative sphere for its exact compliance”. Traditionally, this duty/prerogative of the President has been called “reglamentary” prerogative, consequently in the Mexican “legal culture” there has been a systematic analogy between “reglamentation”, as a specific form of statutory development or concretization, and the scope and purpose of regulatory policy.

c) Regulatory rule-making as an administrative act

An obvious, but salient implication of the “administrative” character of regulation in Mexico is that regulatory rule-making is conceptualized as an administrative act. The main consequence of this characterization is that the regulatory process is itself disciplined by the administrative process,⁶ which, on the other hand, is a highly formally regulated process. Among the many requirements for the validity of an administrative act, two are particularly significant in this context: a) an administrative act must fulfill a public interest goal *regulated by the norms that [the very act] concretizes*, with the explicit prohibition of pursuing alternative ends, and b) the act must be both supported by a legal norm and have an explicit justification of the

factual context of decision-making.⁷ These requirements, which were originally designed to control the discretion of public officials, have proved to put an overwhelming burden of justification for regulatory rule-making.

3) Regulation vis à vis rule of law and judicial review

Structuring and deploying regulation through administrative law implies two fundamental “institutional constraints” that affect deeply the process of legitimization of the regulatory process. Two of them deserve attention in this particular context: the “judicialization” of the regulatory arena and the tensions of regulatory rule-making with the principle of Rule of Law.

a) The legal “proceduralization” of regulatory conversation

A direct effect of the scenario depicted in the previous sections is that, in the Mexican regulatory arena, courts play an extraordinarily important role. As noted above, the “reglamentation” of regulatory policy and the administrative character of regulatory rule-making imply that the institutional conversation among agencies, and the regulator-regulated conversation between agencies and the public, is systematically formulated in terms of legal competences and legal rights. In this adversarial context, courts usually have the final word, with the obvious effect that the scope and content of regulation is largely restricted to the invested interests in the legal and constitutional *status quo*.

b) Regulation by and against judicial review

A dramatic consequence of the legal “proceduralization” of the regulatory conversation can be appreciated by looking to the effects of judicial review in

regulatory policy. In Mexico, the most prominent mechanism of judicial review of the constitutionality of legislative and administrative act is known as “juicio de amparo” (Arts. 103 and 107 of the Mexican Constitution). This mechanism is a procedure of appeal for legal-constitutional protection that not only opens a constitutional instance – a third instance – that is systematically used to review the legal formalities of almost any regulatory action – i.e., an administrative act – but, more importantly, purports the possibility of suspending the effect of such a legal act if, according to the judgment of a Federal court, there is a risk that the legal act in question may affect the fundamental rights of individuals and corporations (property, liberty, due process of law, etc.). Of course, since regulation has everything to do with “affecting” fundamental legal rights of some individuals for the public interest, ones it is legalistically conceptualized as a process of “reglamentation” or concretization of statutory competences and rights, it is relatively easy to consider almost any regulatory attempt as an “*ultra vires*” act – this is, as an act that exceeds the legal powers or competences – that affects fundamental rights.

To sum up, the constitutional and legal milieu puts three obstacles to the success of the administrative and regulatory reform in Mexico: there is no constitutional agreement about the regulatory state as economic governance model; there is no constitutional and legal support for a relevant regulatory power and for the autonomy of regulatory agencies, and there are constitutional and legal arrangements that consolidate the *status quo* – i.e., the invested interest of the economic and political elite – against regulatory policy.

V. The Theoretical – Analytical Model Sketched

The model consists of two sets of variables, the first one is related to the structural features derived from the administrative and regulatory reform, and the second one refers to the level of functioning of the regulatory agencies. These variables are summarized in the following tables:

Table 3. Structural variables of the Administrative and Regulatory reform in Mexico

	Administrative	Constitutional/Legal
Political Dimensions	Federalism/Centralism Presidential/parliamentarism (Federal) – (included Centralization/ decentralization revenue)	State economic management Public property (state owner) Public sector para-state.
Organizational Dimensions	Autonomy/control	De-concentrated agencies
Decision Structure	Mechanisms of appointing Executive prerogative Government composition	Administrative process
Legitimate Dimensions	Technical capacity (expertise) Performance evaluation	Professional civil service. Justifications and precedents. Policy control

VI. The Case Studies

1) *The Federal Commission of Competition (FCC)*

a) General background

The policy of competition has not been a new problem, actually it exists since 1857 when the Liberal Constitution was issued; and later the current constitution enacted in 1917 recognized the importance of developing a healthy competition and prohibited monopolistic practices (Art. 28). As we noted above (section I), since the 1970's the

Mexican government has been committed to a more comprehensive competition program without any particularly satisfactory results (CEEY 2009), (CEPAL 2009) and (Avalos 2006).

However, in spite of this scenario, the Federal Law of Economic Competence was issued on December 24th of 1992 and the Federal Commission of Competence (FCC) was established as a de-concentrated agency of the Ministry of Economy with technical and operational autonomy. The Commission has been in charge of implementing the Federal Competition Act, which aims at protecting “the process of competition and free access to markets, through the prevention and elimination of monopolistic practices and other restrictions to market efficiency, in that of order to contribute to societal welfare”. The legal nature of the commission is similar to other regulatory agencies like the Federal Commission of Telecommunications (FCT) and the Energy Regulatory Commission (ECR), attached to different Ministries.

b) The institutional design

In order to fulfill its mandate, the FCC is entitled to regulate concentrations and anticompetitive practices (both absolute and relative). For example, it is for example entitled “to approve mergers and acquisitions, to investigate and impose penalties for monopolistic behaviors, to authorize firms that wish to participate in privatizations and public tenders for the granting of concessions and permits in regulated sectors, and to foster competition activities”. In terms of regulated sectors, the FCC has the authority to regulate all economic agents whether individuals or corporations, agencies or entities of the federal, state or local administration, private associations,

professional groups, trusts or any other form of participation in economic activities. In this regard, the FCC has the following competences: (i) Investigation: to perform the necessary inquiries into the activities of any economic agent supposedly involved in some kind anticompetitive activity; (ii) resolution: to impose fines and sanctions and; (iii) collaboration: to establish national and international agreements to combat and to prevent prohibited anticompetitive practices. However, like all other de-concentrated agencies, its budget is approved by the Secretary of Treasury, and its surveillance and control depend on an internal comptroller headed by a public servant appointed by the Ministry of Civil Services.

On the other hand, it differs from other commissions in that it has the institutional capacity not only to regulate and promote competition, but also to impose sanctions and administrative fines; for instance, it is entitled to suspend or eliminate concentration practices, to order the partial or total de-concentration, to fine up for having falsely declared or submitted false information, or for having incurred in monopolistic practices or concentrations.

As many other public organizations in the federal public administration, the organizational structure of the commission tends to be hierarchical with a high level of rigidity. This structure has four main components, (1) the Board of Government, (2) the Presidency, (3) the Executive Secretary, and (4) the General Offices. The most important decisions of the FCC as well as its governance remains within the Board of government comprised by one chairman and four commissioners, appointed by the Executive Branch for a 10 year non-renewable term, and who can only be removed for serious reasons. Decisions are reached by majority vote of the Board of Government. This form of appointment and formal independence has several

implications: it allows the commissioners to be more independent and autonomous; it providing a mechanism of insulation and de-politization of its activities and, finally, it implies that the Commission is not responsible before the attached Secretary of Economy. Nevertheless, the annual budget is tied to the Ministry of Finance and Legislative Branch.

The Chairman acts as the representative of the Commission, conducts the plenum of the board, and has the obligation to present the annual reports. In terms of the organization of the agency, the chairman has the authority to appoint and remove personnel, to implement the policies issued by the Board, and although the decisions of the Board are reached by majority, the Chairman has a casting vote. Meanwhile, the Executive Secretary is responsible for the administrative and operational issues and certifies the Board decisions. Finally, the General Office is responsible of specialized areas, such as legal affairs, economic studies, concentrations, investigations, privatizations, regional operations, international affairs, administration and public information.

c) Restrictions deriving from the legal infrastructure

Among the various constitutional and legal obstacles that the FCC faces two closely related problems can be highlighted. First, the FCC – and particularly, the Board of Government – is conceived as a quasi – jurisdictional body whose functions are reduced to the “strict” application of the Federal Law of Economic Competition, with the consequence that its resolutions are both grounded and expressed in the technical manner of administrative process and act. This implies, in the one hand, that the FCC limits both the scope and the reach of its regulatory policy to the formal and material competences contained in the legal text, without exploring and

implementing alternative regulatory instruments and, on the other hand, that the most prominent control of legality of the FCC acts, which is done by the Federal Administrative Courts is almost fully unaware of the nature of competition law, and its many particularities as to, for example, the proof of facts and the evaluation of the consequences of anticompetitive practices (Faya 2010, 107).

Secondly, this “formal-legalistic” approach to competition policy and regulation has given an enormous advantage to the regulated agents as to the strategies to elude the competition policy. In this regard, the “juicio de amparo” as a process of legality and constitutionality control has been widely used as an effective instrument to disrupt the FCC agenda (CEEY, 2009 and 2010), (OCDE / BID 2004).

2) The Federal Telecommunications Commission (FTC)

a) General background

Unlike other processes of regulatory reform, the transformation of the telecommunications industry began before the policy framework to regulate the market was established in 1990; its starting point was the privatization of state telecommunications company (TELMEX.) At that moment, this new company acquired the exclusive rights of telephony in Mexico even though the regulation was subject to provisions expressed in the concession granted by the Ministry. This continued for several years until 1996, when amendments to the legal framework permitted the entry of new players into the systems of satellite operation. Notwithstanding, in June 1995 the government enacted the Federal Telecommunications Act and the state began to regulate the telecommunications industry. The goal was, on the hand, to promote healthy competition among providers

of telecommunications services which could provide quality services at the best price to the benefit of consumers and, on the other hand, to fulfill a set of commitments to the WTO and OECD (OECD 2004).

In the particular case of the FTC, the agency was created by a transitory legal disposition as a decentralized agency of the Ministry of Communications and Transport. It has technical, operational, and management expenses, to promote the efficient and comprehensive coverage of social telecommunications and radio broadcasting. Since then, FTC has been authorized to issue administrative regulations, as well as technical reports, to manage the registration of telecommunications, to comment on the granting of concessions and permits, to coordinate the bidding process and registration fees and to propose sanctions to the Secretary of Communications and Transport, among other powers.

b) The institutional design

Until 1996, the Governing Board of the Commission was composed of 4 members appointed by the executive. Then, a presidential decree established that the governing body should have 5 commissioners, one of which would be the President, who retain a casting vote. Decisions should be taken by majority vote. The Commissioners and the President are appointed by the executive, although these appointments may be objected by the Senate. The term of the commissioners is eight years, renewable for one term, and can only be removed for serious cause. The President of the Commission is appointed by the federal executive for a period of four years, renewable for a longer period.

It is noteworthy that the Ministry of Communications and Transport has retained

some of the most important powers in terms of regulation and the ability to sanction in telecommunications, such as granting licenses and permits, fines; he also has jurisdiction to review some of the decisions adopted by the Government of the FCT Board. On the other hand, like other decentralized bodies, the FCT is hierarchically subordinate to the Secretariat. This subordination can be seen, for example, in the formulation and implementation of the agency's budget, which must be approved by the Ministry of Finance and monitored by a controller appointed by the Secretary for the Civil Service. As for the mechanisms of transparency and accountability, the Act provides that the President must submit an annual report to the full, with no obligation to submit to Congress, to make the justifications for his decisions public and, in some cases, find information about other regulatory agencies (Lopez and Haddou, 2007). Finally, it allows the appeal with the Ministry against resolutions passed by the FCC.

c) Restrictions deriving from the legal infrastructure

The FTC shares the constitutional and legal obstacles just mentioned in relation to the FCC, but in addition to these handicaps the FCT normative design has to specific flaws that affect its technical capabilities.

The most prominent limitation of the FTC is its lack of autonomy. This lack of autonomy is not only a consequence of its institutional design, but also the product of its legal scope. The competences of this regulatory agency were designed to regulate “only” the technical aspects of the telecommunications industry, letting aside the market and public policy aspects of the industrial organization. The main effect of this limited legal scope is that most of the effectiveness of the FTC depends on the performance of other agencies – mainly the FCC – and different entities of the Federal Government. This handicap has been dramatically exposed in the almost absolute

incapacity of the FTC to regulate TELMEX, due not in a minor degree to the lack of coordination among the FTC, the MCT and the FCC (OCDE 2012) and (CEEY 2009).

3) *The Energy Regulatory Commission (ERC)*

a) General background

In the Mexican post-revolution social imagination, energy has been considered not only a strategic resource for national development, but also the core of the national symbolic patrimony deserving, thus, the strongest constitutional protection. Consequently, most energy-related areas are heavily regulated; an example of this has been the evolution of Article 27 of the constitution, which established the regulatory framework for oil, gas and electricity, and Article 28, which sets out the strategic areas of state economic monopolies, such as oil and most petrochemicals.

With respect to the mechanisms of regulation, the ECR was first a general direction of the former Ministry of Energy and Mines and State Industry (SEMIP). But in the early 90's, as the markets were supposed to open in this area, the need for a regulatory body on energy arose (OECD 2004). The ERC was established in 1993 by a reform that was intended to solve various problems of coordination among its most important areas in the areas of regulation and delegate some powers of the SEMIP on energy regulation, especially from the entry of private agents in generating electricity, even when the Federal Commission of Electricity (FCE) retained many of its functions. In this sense, the ERC aimed to establish a new legal framework for regulating natural gas industry in transparent, impartial and efficient new markets with the support of specialized personnel and thereby promote investment in this sector and pricing competitive benefit to users.

Later, the ECR emerged as an area of the Secretariat advisory little independence and weak institutional capacity. In this regard, there were several changes within the Commission and by 1995 it were granted greater powers of regulation and became a decentralized organization with technical, operational, management and decision power, and it achieved greater independence. However, energy policy is still a competence of the Ministry of Energy. It should be mentioned that like the creation on the ECR, like that of other regulatory agencies, took into account the experience of other regulatory agencies such as the case of Argentina, Canada, United Kingdom.

b) Institutional Design

ECR's mission is to regulate in a transparent, impartial and efficient way to encourage productive investment, and ensure a reliable and competitively industry for the benefit of users. According to the Commission, this can be achieved by applying the following principles: clarity, stability, efficiency, transparency, fairness and autonomy. ECR consists of the following governance arrangements: The President is the legal representative; he is responsible for the administration of the Commission, in addition to carrying out the guidelines and decisions laid down by the House, and report to the Secretary of Energy. The structure and decision-making process is based on the House with a president and four commissioners who are nominated by the Secretary of Energy and appointed by the executive for a period of five years, renewable; decisions are made by majority of the Board and in a collegial manner, but the President keeps a casting vote. As for its internal operations, the ECR has an Executive Secretary appointed by the President of the Commission who is responsible for operational coordination and management in collaboration with the Directorates-

General, who also prepare draft resolutions for submission to the Parliament.

c) Restrictions deriving from the legal infrastructure

The analysis of the legal context of the FCC and the FTC shows a failure in the regulatory empowerment of these agencies, due to the entrenchment of legal institutions associated to the administrative state – e.g., the administrative proceduralism and the disruptive effects of the “juicio de amparo”, which are in tension with a regulatory state model (Scott 2010 and 2007), and have not been yet “Accommodated” in the Mexican regulatory state. The analysis of the ERC also shows a more general and profound disagreement on the economic model of the country. The establishment of the ECR was part of an economic agenda that was never completed. In response to the lessons learned from the TELMEX privatization, and the obstacles for the FTC and the FCC to regulate the telephone industry once a private monopoly was in place, the ECR was created before the existence of private actors in the sector and, of course, of markets of energy in Mexico. But, because of strong political and bureaucratic resistance, the privatization of the energy sector in Mexico (FCE and PEMEX) has not been carried out. In Mexico, the energy industry – with the exception of gas distribution – is still part and parcel of the Federal government. The Finance and Energy Ministries command almost the totality of the energy industries, with the result that the ECR has become a regulatory agency without regulated agents. Even after the very limited reform of PEMEX introduced in 2008, the functions of the ECR have not been reinforced but, on the contrary, a new agency, the Oil Commission has been created as an specify technical entity to support of PEMEX operation. The very existence of the ECR is a signal of the schizophrenia of the Mexican economic

constitution (CEEY 2009).

VII. Conclusions

This paper has taken some preliminary steps towards a larger discussion concerning the development of the regulatory state in Mexico. Policy reforms have not been straight forward and homogeneous processes, but rather they have been characterized by their heterogeneity and contextual restrictions. Nevertheless, we have argued that even if the design of regulatory state in Mexico has taken place within a variety of institutional and political restrictions, the programs, policies and institutional arrangements adopted were deeply influenced by two “dimensions”, namely, the political/administrative and the constitutional/legal.

The next steps of the research will examine the forgoing claims in a more general and comparative context. The purpose of this second stage is to carry out a comparison between regulatory experiences, and figure out a basic profile for the “Mexican” regulatory state. We expect that by analyzing the similarities and differences between the Mexican regulatory state and a more “general” model of regulatory state – in Weberian terms, a more “ideal” model – we should be able to provide a more precise explanation of the causes of the failure of the regulatory state in Mexico.

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Notes

¹ Of course, "failure" is a gross term and, naturally, a judgment in such terms can be contested. An adequate justification of this statement would take us far from the central issues of this paper. Nevertheless, we state as basis for the problems addressed in this work the failure of the reforms to improve the endemic weakness in growth pattern of the Mexican economy (Moreno– Brid and Ros 2010).

² Paradoxically, as we will see later, this administrative reform had some notorious legal counter–impacts, such as the constitutional reform to make "national development planning" under the leadership of the Federal government (i.e., the President) both a political and a legal principle (Arts. 25 and 26 of the Mexican Constitution).

³ Speech by the Ministry of Public Function.

http://portal.funcionpublica.gob.mx:8080/wb3/wb/SFP/pmg_mensaje_secretario

⁴ For example, only as recently as 2006 an opinion of the Supreme Court ruled that individuals and corporations affected by eminent domain had the right of hearing before this executive act.

⁵ The Mexican State (mainly, the Federal government) has control over 16% (aprox) of the NGP; 5% of it - almost 1/3 of the State revenue- stem from oil exports.

⁶ Art. 1, Ley Federal de Procedimiento Administrativo

⁷ Art. 3, II y V, Ley Federal de Procedimiento Administrativo