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Designing Regulatory Institutions for Infrastructure—Lessons from Argentina

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As in many aspects of infrastructure reform, Argentina has been a leader in experimenting with the design of regulatory agencies. This Note describes the essential elements of good regulatory agency design—*independence, autonomy, expertise, and accountability*—and rates Argentina's performance against these benchmarks in the gas, power, water, and telecommunications sectors. The Note concludes that the biggest challenges to design are achieving political independence and establishing rules to ensure regulatory accountability.

What the doctor would have ordered¹

Most regulatory experts would argue that there are some common elements that designers of regulatory agencies need to address. First, governments must decide on breadth of regulatory authority. In principle, regulatory authorities can be *industry-specific* with separate agencies for gas, water, electricity, and so on, as in the United Kingdom. They can be *sector-specific* with separate agencies for groups of related industries, such as for gas and electricity combined, as in Colombia and Hungary. Or they can be *multi-sectoral* with a single regulatory agency for all or most infrastructure sectors, as in the case of state-level regulators in the United States and national regulators in Jamaica. Most experts agree that a multisectoral agency offers advantages over the alternatives. It pools regulatory resources (regulatory economists and lawyers, for example), especially important in countries with limited regulatory capacity. And by pitting interest groups against one another, it tends to increase resistance to regulatory capture and political interference and to improve the consistency of decisions across sectors.

Next, the designers face a set of interrelated issues to do with independence, autonomy, and accountability:

Independence. Ideally, regulators should operate independently from political pressures—from ministries and from the regulated enterprises, private or public. Here, most experts would argue that as a minimum for ensuring this independence, regulators should be appointed on the basis of professional rather than political criteria and should have formal protection from arbitrary removal during their term. In addition, the appointment process should involve both the executive and the legislature, to ensure proper checks and balances.

Autonomy. To be autonomous, regulatory agencies must first have their own resources—from their own funding sources. Relying on budgetary transfers controlled by politicians is often viewed as a threat to regulators' independence. Cutting their allocation would be an easy way to reduce their effectiveness. The most common method of funding is through levies on the regulated firms or the consumers of the regulated services. These levies can be viewed as user fees for the protection services provided by the regulators. But autonomy must go beyond financing. Regulators should also have autonomy in staffing, so that they can recruit staff with high levels of expertise. The tasks of the agency should determine the size of the staff—not political considerations such as how many people





MAIN FEATURES OF ENRE'S STRUCTURE AND FUNCTION

Structure

- Government-appointed board of five directors.
- Recruiting and hiring of the president, the vice president, and one director were based on public job listings (candidates were required to be an engineer or economist and to have relevant experience; they were interviewed by an international consulting firm, which short-listed three from which the secretary of energy selected the president and the vice president). The other two directors were selected from a short list proposed by the Federal Energy Council (a provincial entity).

Functions and obligations

- Determine the basis and criteria for assigning concessions.
- Enforce the regulatory framework, contracts, and public service obligations.
- Issue rules and regulations on matters of safety, technical procedures, and norms, and monitor compliance.
- Monitor billing, control and use of meters, interruption and reconnection of service, access, and service quality.
- Define the basis for calculating tariffs and ensure compliance.
- Publicize the general principles that regulated entities must follow to avoid discrimination among consumers.
- Organize public hearings.
- Regulate the proceedings for imposing sanctions and impose the appropriate penalties.
- Take relevant issues to court.
- Issue an annual report and recommend policy actions to the executive as needed.

have lost their jobs through privatization. Overstaffing the agency can lead to interference with the commercial operation of regulated firms. Achieving staffing autonomy in regulatory agencies often requires exempting them from civil service salary and recruitment rules. It may also mean allowing them to recruit external consultants. Where economic, accounting, and legal expertise is in short supply, banning subcontracting can constrain regulatory capacity.

Accountability. Accountability requires transparency in the regulatory agency's decisionmaking process, something that is often counterintuitive for many bureaucrats. It also requires clear, simple procedural rules. Most important are:

- Rules setting deadlines for decisions
- Rules requiring detailed justifications and nonpolitical reviews of decisions
- Processes to ensure that all concerned parties have the opportunity to express their views in public hearings and to appeal decisions
- Rules to permit the removal of regulators in cases of proven misconduct.

Another key factor in accountability is the number of regulators. Generally, a regulatory commission made up of three to five members is a better choice than a single regulator, because each member of the commission ends up monitoring the others, increasing accountability. The advantage of regulatory commissions is now widely recognized even in the United Kingdom, which originated the single-regulator approach.

Argentina's experience at a national level

In Argentina responsibility for infrastructure services is divided between the national and the provincial governments. The national government initiated a privatization program in 1989 for all utilities under its purview—mainly gas, electricity generation and transmission, and water and electricity distribution in the Buenos Aires metropolitan area. Like the United Kingdom, the national government created industry-specific agencies for the four main utilities: electricity (ENRE), gas (ENARGAS), telecommunications (CNT), and water and sanitation (ETOSS). But unlike the United Kingdom, Argentina has opted for regulatory commissions for each agency rather than a single regulator.

Gas and power. Most successful have been the two agencies covering the power sector, ENRE (Ente Nacional Regulador de la Electricidad) and ENARGAS (Ente Nacional Regulador del Gas). These agencies are addressing many issues that are similar or strongly related and it could be argued that the two should be amalgamated into one (see box for structure and functions of ENRE). Still, they have generally been extremely effective in carrying out most of their responsibilities. Both are reasonably independent, autonomous, and accountable.

They have their own sources of funding and sufficient funding to perform all their tasks—though some would argue too much funding. Both have a small, technically competent, well-paid staff (less than 100, including regional offices), and the regulators on their commissions are accountable to both the legislative and the executive branches of government.

But both have been criticized for the absence of any systematic external scrutiny of their practices and administrative processes and for the lack of transparency in some of their decisions. This lack of transparency increases the risk of capture—and the risk that regulatory costs may be too high and that users may be overcharged. There is public concern about the power that the energy secretary still retains over some aspects of the regulation of the gas and electricity sectors. The secretariat is the first administrative step in appeals of regulatory decisions, implying that in conflicts between a regulator's decision and the government, the regulator is likely to lose. (In other countries, the appeal will often be straight to the courts.) And both agencies still lack a key regulatory tool—a set of accounting standards and procedures. Consistent regulatory accounts across all firms, with detailed cost information for each type of service, are essential for effective economic regulation, particularly for revising prices and monitoring whether regulated firms are using cross-subsidies.

Water. The water regulator, ETOSS (Ente Tripartito de Obras y Servicios Sanitarios), has been less effective. Although its performance is improving, it has taken about two years to start to come to grips with its problems. Some issues will be hard to resolve. For example, a potential problem for the agency's independence is that its commission represents the interests of three different levels of government: the national government (as owner of the assets), the municipality of Buenos Aires, and the province. All three layers of government may be controlled by different political parties, which could lead to political tensions that might affect decisions.

ETOSS is funded by a fee the concessionaire levies on consumers (2.67 percent of the bill).

There may be too many staff and they lack many of the skills required for effective regulation, indicating that the agency may not have sufficient autonomy or accountability. Over the past year or so, ETOSS has begun to fix these problems, hiring international consultants to deal with specific issues. But as a result of initial failures in resolving problems with the concessionaire, ETOSS still operates under heavy scrutiny from the media and other interest groups. This shows the importance of getting things right at the start. Once lost, credibility is hard to rebuild—especially when there is a lack of transparency in decisionmaking.

Telecommunications. The weakest performer has been CNT (Comisión Nacional de Telecomunicaciones). It was created by a 1990 executive decree that divided the regulatory responsibilities for telecommunications between CNT and the Secretariat of Telecommunications. Creation by executive decree tends not to be conducive to independence, because it makes the regulator accountable to the executive branch, not the legislative. The decree creating CNT has already been modified twice, reducing the agency's regulatory role and expanding the executive's.

CNT's operation is supposed to be financed through a 0.5 percent sales tax on telecommunications firms and payments by broadcasters for radio spectrum. But it has not yet managed to achieve autonomy in decisionmaking or expertise. The problem stems in part from the executive branch's influence on some key decisions and in part from the way regulatory responsibilities have been divided between the ministry and CNT. For example, end-user rates and access rates need to be harmonized, but the ministry is responsible for the first, and CNT for the second. The costs of the division have been highlighted recently in the controversy over rebalancing the rates to correct a distortion between long-distance and local rates and between commercial and residential rates. This controversy also exposes the cost of CNT's staffing problem: CNT has not yet assembled in-house the skills required to address the complex issues it faces. But it has begun to hire consultants to



address the rebalancing issue, and staff training is on the regulators' reform agenda.

CNT's accountability performance has also been under the spotlight. With no time limits for making decisions or resolving conflicts, CNT has typically been slow. And review of CNT's activities has been less transparent than it should be, even though CNT reports directly to the president's office. Overall, the regulatory experience in telecommunications has shown the tough political consequences that failures in institutional design can have for policymakers. But it has also provided useful lessons for regulators in other sectors.

The provincial regulators

Provincial governments began to follow the national government's privatization lead in the mid-1990s. Seven provinces have granted concessions for water and sanitation services, and eleven provinces concessions for electricity distribution. The privatization process and the concession contracts in electricity, prepared with technical assistance from the National Energy Secretariat, have been fairly standard across provinces. There is more variation in the water concessions, which differ in award criteria, contractual obligations, and tariff design.

The institutional arrangements adopted by the national and provincial governments have much in common and the provincial regulatory institutions, just now getting off the ground, face problems similar to those at the national level. Most provinces are following the national government's lead, opting for industry-specific agencies—though some, such as Catamarca, have opted for the preferred public utility commission approach. Most of the focus at this early stage centers on staffing. Some provinces have fallen short in ensuring the political independence of commission staffs, with some staff political appointees. Staff numbers are reasonable, however (ranging from seven to forty). The regulatory agencies avoided an important misstep early on, rejecting suggestions that they hire much of the personnel of the public utilities declared redundant by the concessionaires.

That would have led to conflicts reflecting the new regulators' resentment at not being kept on by the private company taking over the utility.

Regulatory agencies are addressing training needs for their staff. But salaries are not always high enough to retain the most qualified staff or to attract new staff. Funding seems secure—all provinces have introduced a regulatory user fee. But as at the national level, processes are not yet adequately defined, raising concerns about accountability. In the cases of Cordoba and Tucuman the problems led to the cancellation of privatization processes.

Conclusion

The biggest challenges for regulatory design are achieving political independence and introducing rules to ensure accountability. Political independence requires a commitment by the government early on in the process. And accountability requires robust procedural and sound accounting rules. However, ensuring the independence of the regulatory agencies is likely to be more complex because politicians often have a hard time giving up control over resources considered politically sensitive.

Argentina's experience shows that even the most innovative reformers can have problems ensuring the independence, autonomy, and accountability of regulatory agencies. But these problems, even in the case of telecommunications, have not yet been serious enough to offset the short-term gains of privatization. The Argentine public is receiving better utility services—and often at lower prices—than before privatization. Whether these gains can be sustained in the longer run depends on the strength of the regulatory agencies and on their capacity to deliver on their responsibilities. Time is the test for these institutional issues.

¹ For a recent overview of best practice in utility regulation, see "Utility Regulators: Creating Agencies in Reforming and Developing Countries," W. Smith (1996), a paper presented to the International Forum for Utility Regulation, Oxford, England, June 1996.

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