

UNBUNDLING PATH DEPENDENCE: A CASE STUDY OF
TELECOMMUNICATIONS REFORM IN MEXICO (1990-2006)

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Beatriz Adriana Camarena Osorno

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I certify that I have read this dissertation and that, in my opinion, it is fully adequate in scope and quality as a dissertation for the degree of Doctor of the Science of Law.

(Thomas C. Heller), Principal Adviser

I certify that I have read this dissertation and that, in my opinion, it is fully adequate in scope and quality as a dissertation for the degree of Doctor of the Science of Law.

(Alberto Díaz-Cayeros)

I certify that I have read this dissertation and that, in my opinion, it is fully adequate in scope and quality as a dissertation for the degree of Doctor of the Science of Law.

(Mariano-Florentino Cuéllar)

Approved for the University Committee on Graduate Studies.

ABSTRACT

This is a case study of the telecommunications reform in Mexico, which transformed the state telephone monopoly, through privatization (1990-1996) and liberalization (1996-2006), into a multi-competitor telecommunications market. Reform results show (1) growth, but primarily through a concentrated market and the economic output of the dominant privatized incumbents, and (2) improvements in sector development, but with insufficient levels of competition and investment, and underdevelopment in infrastructure, service diversity, pricing, technology deployment, and universal access. This dissertation explains these mixed results as the consequence of path-dependence of reform on a negative institutional endowment, one which favors regulatory governance structures that establish or enforce selective property rights (monopoly rights) on the market. The institutional endowment is defined herein as the formal structures of the federal division of powers (legislative, executive and judicial powers), as well as other institutions and organizations which affect its functions. The institutional endowment is reviewed within the broader context of a democratic transition which shifted control of policymaking between the executive and legislative branches in Mexico, but which maintained rent-seeking coalitions of political and economic entrepreneurs (elites in a position to enact policies) that gain or protect selective entitlements within the system during reform periods. This case study of regulatory reform in Mexico shows the growth and development of the

telecommunications sector to be constrained by the institutional characteristics mentioned above. At the same time, unexpected consequences of incremental strengthening of the judicial branch have presented new options for future structural reform of the regulatory governance system of the telecommunications sector.

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I also want to thank the SPILS and JSD fellows, who allowed me to read and comment their drafts, and hence helped me understand how to construct good research and dissect the meaning of interdisciplinary legal scholarship. Thank you, everyone, who at different times provided commentary to my own drafts and scholarly (or unscholarly) arguments.

During 2001, Professor Heller and Professor Erik Jensen, co-directors of the Rule of Law Program, invited me to participate in their program as research assistant. I am grateful for the opportunity to interact with them, as well as the many other distinguished scholars from Mexico, the United States of America, and other parts of the world, who brought their special knowledge about politics, economics,

development, society, and law to the seminar sessions and activities of the ROL program during the academic year 2000-2001.

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In 2002, I took a leave from the JSD program and entered public service during President Fox's administration in Mexico. From 2003 to 2006 I worked as a public officer with the telecommunications regulator, Cofetel. I am thankful for having had the opportunity to work with a talented group of people on implementing regulatory reform in a challenging environment of transition. I want to particularly express my appreciation to Jorge Arredondo, former President of Cofetel and Head of the Board of Commissioners; former Commissioners Clara Luz Álvarez, Salma Jalife, and Abel Hibert; my ex-co-workers Lorena Aragón, Liz Mora, Armando Covarrubias, Edgar Meade, Sylvia Vásquez, Rodrigo Ojeda (also a former SPILS Fellow), and Manuel Huacuja, among many other Cofetel colleagues. For me, they set the example of ethical and expert civil servants, who continuously exercised technical, legal, and independent decisionmaking, even when the formal or informal "rules of the game" discouraged this conduct. I also humbly thank former outside counsel to Cofetel,

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Linked to this thought, I want to recognize a minority of Senators of the Mexican Congress, who in an electoral year led the opposition against the “Televisa Law,” in direct contradiction to express interests of their political parties, and who furthermore provoked a constitutional controversy which resulted in a “veto” against the law by the Supreme Court of Justice of Mexico. In doing so, they set a significant precedent in the legal history of the country and a higher standard of conduct for politicians. However, the greater benefit of watching this case unfold was awareness of the shared commitment of various actors within Mexican civil society to protect the public interest, above and beyond, but preferably through, the institutions of the rule of law. In my capacity as a citizen, this led to co-authoring an *amicus curiae* brief with Salma Jalife and Clara Luz Álvarez, which was delivered to the Supreme Court and admitted as such, even though this type of brief is not recognized in Mexican procedural law. I admire Salma and Clara for their unwavering enthusiasm to do their part to make a difference.

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I. INTRODUCTION: RESEARCH PROBLEM AND METHODOLOGY

Successive administrations of the Mexican government since 1990 have introduced a sequence of regulatory reforms of privatization and liberalization, which successfully transformed the state telephone company into a multi-competitor telecommunications market in Mexico. However, this market remains concentrated and grows primarily through the economic output of the dominant privatized incumbents. Furthermore, reform failed to maintain investment and competition levels, and overcome underdevelopment in competition, services, prices, infrastructure, technology deployment, and universal access. Thus the telecommunications sector has grown, but without any of the expected redistributive effects of reform that should favor social development. The hypothesis of this dissertation is that four successive stages of telecommunications policy and reform were path-dependent to a negative institutional endowment, one which produces regulatory governance structures that selectively establish or enforce property rights (monopoly rights) on the market.

The four telecommunications policy stages that form the case study are:

- (1) state ownership of the telephone company, up to the moment of its modernization prior to privatization (that is, up to 1988). This first stage is used as the baseline for the following three stages of reform;

- (2) privatization of the telephone company and its monopoly grace period (1990-1996),

(3) liberalization (1994-2006), which sought to establish a competitive telecommunications market environment in Mexico, and

(4) convergence (2006): a legislative reform in 2006 aiming to establish a new regulatory framework for convergent broadcasting and telecommunications networks and services.

Each stage is discussed within the framework of an “institutional matrix”. The definition of an institutional matrix is drawn from Levy and Spiller (1994), and will be explained further in the Chapter II¹. The “institutional matrix” includes a description of:

(1) the “institutional endowment” of Mexico during each stage; the institutional endowment refers to the formal structures of the federal division of powers (legislative, executive and judicial branches), as well as other formal and informal institutions and organizations in Mexico that significantly influence the performance of the formal institutional endowment, and

(2) the “regulatory design” implemented by the government for each stage of telecommunications reform, which includes:

¹ Please refer to the literature review included in Section II. Levy and Spiller (1994) may be found at 16.

(a) “regulatory governance” structures intended to guarantee investors against arbitrary administrative action that could affect their rights, during and after reform, and

(b) “regulatory incentives,” which were implemented by the government to guide market conduct in the sector in order to meet competition and development objectives for each stage of reform.

The description of the “institutional matrix” of each stage is followed by an explanation of:

(3) economic performance outcomes in the telecommunications market for each period of reform.

The baseline stage and the three successive telecommunications reforms are further discussed in the context of a broader economic and political transition in Mexico that took place in the last two decades: from an authoritarian corporate state, and a closed mixed economy, dominated by import-substitution-industrialization policies (1929-1982), to a multiparty electoral system, and neoliberal economic policies that established a market and free-trade oriented economy (1982-ongoing). For purposes of defining the Mexican “institutional endowment”, this transition is otherwise described herein as a shift in control of the policymaking powers from a “rent-seeking Presidentialist system” to a “rent-seeking Legislative system.” Chapter III provides a brief historical overview to explain this transition.

The telecommunications case study shows how Mexico solved the “commitment problem” of creating regulatory governance structures (which provide security and legal certainty to investors) under the constraints of (a) the institutional instability of crisis and “shock therapy” economic and political reform, and (b) an institutional path dependence in which political and economic elites do not readily delegate power to independent regulatory structures unless they benefit from such a reform. This study contributes to the institutional analysis of utilities reform in developing nations by further exploring the “black box” of a country’s institutional matrix during transition with respect to (a) the role of coalitions of political and economic entrepreneurs (carriers of institutions) who protect their selective rights and advantages during reform, (b) the cause of reform, (for example, financial or political crisis, or technological change) which increases or decreases incentives to grant selective entitlements, and (c) path dependence in long-term institutional and economic reform by studying a sequence of reforms, over a 10 year period, in one economic sector (telecommunications) of a developing country.

The results of this dissertation and its case study can be extrapolated to other experiences in democratic, economic, and legal reform in developing countries.

The dissertation is organized into the following chapters:

Chapter II: Chapter II contains a literature review related to institutions, path dependence, economic performance, and telecommunications reform.

Chapter III: Chapter III is a brief historical review of incremental change in Mexico's institutional endowment from the late 1970s to 2006, which are broadly defined as a shift from a "rent-seeking Presidentialist system" to a "rent-seeking Legislative system".

Chapter IV merely contains a few connecting introductions to assist the transition between the historical review and the beginning of the case study segment of the dissertation.

Chapters V, VI, VII, and VIII: A chapter is dedicated to analyzing the institutional matrix of each of the telecommunications policy and reform stages in Mexico:

Chapter V: state owned monopoly (1970-1982),

Chapter VI: privatization reform (1982-1994),

Chapter VII: liberalization reform (1994-2006), and

Chapter VIII: convergence reform (2006)

The description of the institutional matrix for each stage is followed by an evaluation of performance of the sector in that period.

Chapter IX: Chapter IX provides two sets of conclusions. The first set, summarizes evidence from the case studies with respect to the main hypothesis. The second set of conclusion is about this study's contributions to existing literature on institutions, regulation, and economic reform in a transition economy. A brief endnote is likewise included with respect to implications of lessons learned for reform projects to be carried out in the current *sexenio* (2006-2012).

II. LITERATURE REVIEW: PATH DEPENDENCE, INSTITUTIONAL REFORM, AND ECONOMIC PERFORMANCE

This dissertation relies on institutional, and law and development theory to frame the discussion of telecommunications reform and its economic outcomes in Mexico².

Douglass North proposes that the entire institutional structure of a country (the formal and informal rules that provide certainty in human relations), together with technology, determine transactions costs and hence the efficiency of an economy³.

Basic institutional theory states that institutions are rules and restrictions that guide individuals' conduct and exchanges in society. These rules include incentives, expectations, and opportunities according to which individuals and organizations make decisions on how to participate in political and economic life⁴. Institutions

² These theories have a long interdisciplinary scholarship tradition. In the 1920s, Max Weber was among the first social scientists to study the connection between law and economic development. Weber argued that the type of legal system that arose in the West --systematized, formal and rational -- provided necessary elements for the rise of capitalism and the functioning of a market system. He proposed that when law is systematized and consists of formal rational rules, then entrepreneurs can more easily foresee and calculate the costs and benefits of a transactions. *For a summary see* Max Rheinstein, ed., *Max Weber on Law and Economy and Society*, (Harvard University Press, 1954) in *Law and Society: Readings on the Social Study of Law*, ed. Stewart Macaulay, Lawrence M. Friedman, and John Stookey, (W. W. Norton & Company, 1995): 186, or Randall Collins, "Weber's Last Theory of Capitalism", *American Sociological Review*, Vol. 45, No. 6. (Dec., 1980): 925-942; Ronald Coase proposed that Law creates significant transactional costs in economic processes, and hence affects the efficiency of allocation of resources in productive processes. This theory set the foundations for new institutional economics studies, including the law and economics movement. *See* Ronald H. Coase, "The Problem of Social Cost" in *The Firm, The Market, and The Law*, (Chicago: University of Chicago Press, 1988); *for the Coase theorem, see* George J. Stigler, "Two notes on the Coase Theorem", *Yale Law Journal* 99 (1989): 631-633; and *for a brief outline on the contributions of Coase, see* R.H. Coase, "The Institutional Structure of Production", in *Handbook of New Institutional Economics*, ed. C. Menard and M.M. Shirley, (Springer, 2005), 31-39.

³ *See generally*, Douglass C. North, *Institutions, Institutional Change, and Economic Performance*, (Cambridge, England: Cambridge University Press, 1990).

⁴ This definition paraphrased from Guillermo Zepeda Lecuona, "Rezagos y desafíos del desarrollo institucional" in *Políticas Económicas del México Contemporáneo*, coord. Luis Rubio, (Fondo de Cultural Económica, 2001), 90

include both formal and informal rules and constraints⁵. For example, laws and regulations are formal institutions; while informal institutions include “systems of relations consisting of a mix of cognitive mechanisms, unwritten regulative mechanisms, and unwritten normative mechanisms that influence the behavior of participants, thus structuring relations by increasing certainty”⁶. Informal institutions can subvert, compete with, or co-exist with formal institutions.

The political economy of a society and its culture determine the legitimacy or demand for formal (legal) or informal institutions⁷. Legal culture consists of “the ideas, attitudes, values and beliefs that people hold about the legal system”⁸. Individuals and organizations are carriers of institutions. Organizations are “groups of individuals bound by some common purpose to achieve objectives”⁹. Individuals and organizations in society define, transform, and endorse formal and informal institutions to create a legal culture.

⁵ See John N. Drobak, ed., *Norms and the Law*, (Cambridge University Press, 2006)

⁶ Arnulfo Valdivia-Machuca, *State and Business Groups in Mexico: The Role of Informal Institutions in the Process of Industrialization, 1936-1984*, (Routledge, 2005), 202-203

⁷ Institutions gain persistence in a society by two primary means: legitimacy and stabilizing change. Legitimacy can be gained through state recognition, cultural authority, adherence to moral rules, and effective control of behavior. Stabilizing change means that an institution is able to adapt to changes over time to produce stable outcomes and therefore longevity. Arnulfo Valdivia-Machuca (2005), 20-23, *Op. Cit. Supra* 6

⁸“(…) One should also distinguish between *internal* legal culture (the legal culture of lawyers and judges) and *external* (the legal culture of the population at large).” Lawrence M. Friedman, “Legal Culture and the Welfare State” in *Dilemmas of Law in the Welfare State*, ed. Gunther Teubner, (1985), as cited in *Law and Society: Readings on the Social Study of Law*, ed. Stewart Macaulay, Lawrence M. Friedman, and John Stookey, (W. W. Norton & Company, 1995), 269.

⁹ Douglass C. North, (1990), 5, *Op. Cit. Supra* 3

Institutional economic historians have sought to understand which institutional structures are most conducive to growth and development. The type of institutional endowment established in a country will determine incentives to invest in that economy, and affect its growth rate. Hence, much of the institutional literature has focused on the “commitment problem” between governments and asset-holders. The problem starts with a government or ruler which seeks to attract investors in order to generate higher levels of economic growth, but to do so it must generate some sort of credible commitment that it will not behave as an opportunistic rent-seeker in a later moment, and expropriate property or tax investors in such a way that implies a significant loss of investment. North and Weingast (1989) argue that a dilemma always exists because a government which is strong enough to grant and protect property rights is also strong enough to take them away¹⁰. The literature on the commitment problem generally proposes that the more sophisticated the system of checks and balances on government, such as may be present in an effective democracy or another type of limited government, the higher the probability of establishing credible commitments for investors and of generating widespread wealth that benefits government, investors, and society¹¹.

¹⁰ Douglass C. North and Barry R. Weingast, “Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England”, *The Journal of Economic History*, Vol. 49, No. 4. (Dec., 1989): 803-832, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0022-0507%28198912%2949%3A4%3C803%3ACACTEO%3E2.0.CO%3B2-9>; See also a first less explicit expression of the commitment problem in Douglass C. North, *Structure and Change in Economic History*, (New York: Norton, 1981).

¹¹ See generally Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, “Administrative Procedures as Instruments of Political Control”, *Journal of Law, Economics, & Organization*, Vol. 3, No. 2. (Autumn, 1987): 243-277, JSTOR Stable URL: <http://links.jstor.org/sici?sici=8756-6222%28198723%293%3A2%3C243%3AAPAIOP%3E2.0.CO%3B2-7>; Matthew D. McCubbins,

In the crusade to improve economic development, Jensen and Heller (2003) point out that several waves of law and development movements have come and gone in the attempt to transplant formal institutions that appear in Western developed countries to less developed countries, mostly with disappointing results¹². The authors argue that these movements have an inconsistent record of success because for the most part they do not take into consideration the broader institutional endowment of the target country, and among other things, conclude by reinforcing the existing legal institutions. North (2005) explains these results in terms of the “path dependence” of reform¹³. North argues that institutional change is constant, but it is incremental

Roger G. Noll, and Barry R. Weingast, “Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies”, *Virginia Law Review*, Vol. 75, No. 2, Symposium on the Law and Economics of Bargaining, (Mar., 1989): 431-482, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0042-6601%28198903%2975%3A2%3C431%3ASAPPAP%3E2.0.CO%3B2-7>; Barry R. Weingast, “The Political Foundations of Democracy and the Rule of Law”, *The American Political Science Review*, Vol. 91, No. 2. (Jun., 1997): 245-263, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0003-0554%28199706%2991%3A2%3C245%3ATPFODA%3E2.0.CO%3B2-7>

¹² Erik G. Jensen, “The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers’ Responses”, and ed. Erik G. Jensen and Thomas C. Heller, “An Immodest Postscript” in *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, (Stanford University Press, 2003), 336-381; 382-417; *On the Law and Development Movement*, see generally Brian Tamahana, “The Lessons of the Law-and-Development Studies”, *American Journal of International Law* 89 (1995): 470-486

¹³

“The dominant beliefs – those of political and economic entrepreneurs in a position to make policies – produce over time an elaborate structure of institutions – both formal rules and informal norms – that determines economic/political performance. The resultant institutional matrix imposes severe constraints on the choice set of entrepreneurs when they seek to introduce new or modified institutions in order to improve their economic or political positions. The resultant path dependence typically makes change incremental. But change is continually occurring (although the rate will depend on the degree of competition among organizations and their entrepreneurs) as entrepreneurs enact policies to improve their competitive position --policies that result in alterations of the institutional matrix described in the previous section. [...].”

Douglass C. North, “Institutions and the Performance of Economies Over Time” in *Handbook of New Institutional Economics*, ed. C. Menard and M.M. Shirley, (Springer, 2005), 25; see also Barry R. Weingast, “Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele

because it is constricted by “path dependence” on the institutional matrix it is attempting to reform, and by the preferences of political and economic entrepreneurs, who are in a position to introduce new policies¹⁴. From time to time, political and economic entrepreneurs choose to enact policies to improve their competitive position, but the resulting institutional structures are created and reformed on the basis of their dominant beliefs or values. For these reasons, North cautions that when economic reforms are pursued to procure growth in the third world or transition economies, “path dependence will constrain the process of institutional and economic change”; and “big bang” or “shock therapy” theories of reforms cannot realistically overcome underdevelopment¹⁵.

In 1994, Spiller and Levy published a seminal cross-nation study on the influence of the institutional endowment on the privatization and performance of firms in the telecommunications sector during the 1990s¹⁶. The authors focused on the commitment problem by which a government, in order to privatize a telephone company and improve sector performance, needs to attract long-term private

Relationships”, *Law and Contemporary Problems*, Vol. 44, No. 1, Managing the Transition to Deregulation, (Winter, 1981): 147-177, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0023-9186%28198124%2944%3A1%3C147%3ARRADTP%3E2.0.CO%3B2-G>

¹⁴ Douglass C. North (2005), 28-29, *Id. Cit. Supra* 13

¹⁵ North emphasizes a need to better comprehend the institutional structures that form choices in the developing world in order to improve models for economic development. In this particular paper, North seeks to “[put] to rest for good any simplistic general nostras such as “big bang” or “shock therapy” theories to magically overcome lack of development”. Douglass C. North (2005), 28-29, *Id. Cit. Supra* 13

¹⁶ Brian Levy and Pablo T. Spiller, “The Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation”, *Journal of Law, Economics, & Organization*, Vol. 10, No. 2. (Oct., 1994): 201-246; JSTOR Stable URL: <http://links.jstor.org/sici?sici=8756-6222%28199410%2910%3A2%3C201%3ATIFORC%3E2.0.CO%3B2-S>

investment in the telecommunications sector; but that in order to do so, it must establish a credible regulatory framework that protects investors against arbitrary administrative actions. They define this as a problem of regulatory design regarding: (1) “regulatory governance structures” that impose effective restraints on administrative arbitrariness or opportunism¹⁷, and (2) “regulatory incentives,” such as utility pricing (price-cap formulas, benchmarking, or rate-of-return regulation), subsidies, and interconnection, that govern firm conduct in the sector in order to procure welfare results¹⁸. However, Spiller and Levy argue that without a regulatory governance structure that protects investors against future arbitrary administrative intervention (expropriation or manipulation), it is difficult to assess the positive or negative impact of specific regulatory incentive structures, since the lack of regulatory governance distorts the intended effect of regulatory incentive measures on the market.

According to the authors, regulatory governance structures secure best performance results, when they place:

¹⁷ Regulatory governance structures were defined as “the mechanisms a society uses to restrain the discretionary scope of regulators and to resolve the conflicts which these restraints give rise.” To the extent that regulatory governance structures are effective, private investors are guarded against future administrative expropriation or manipulation. Brian Levy and Pablo T. Spiller, *Regulations, Institutions, and Commitment: Comparative Studies of Telecommunications*, (Cambridge University Press, 1996), 4

¹⁸ Regulatory incentive structures comprise the rules governing utility pricing, cross--or direct subsidies, entry, interconnection, etc., and are generally aimed to promote welfare, investment and growth in services. Levy and Spiller (1994): 205, 208, *Op. Cit. Supra* 16

“(a) substantive restraints on the discretion of the regulator; (b) formal or informal constraints on changing the regulatory system, and (c) institutions that enforce the above formal--substantive or procedural--constraints¹⁹.”

Levy and Spiller (1994) argue that several types of institutional arrangements could meet these objectives. However, they recognize that the choice of a regulatory governance structure, as well as of specific regulatory incentive structures, is limited by a country's institutional endowment²⁰. Formal institutions, such as the executive, the legislative, and the judiciary, provide a system of checks and balances that generally shapes the options for regulatory governance structures available to reformers and investors in the telecommunications sector of that country²¹.

In their study, the authors looked at privatization reform in several countries. These countries had institutional endowments respectively described as: (1) a “traditional

¹⁹ Levy and Spiller (1994), 202, *Op. Cit. Supra* 16

²⁰ Levy and Spiller generally define the term “institutional endowment” to include: (1) the legislative and executive institutions, including rules for appointment, lawmaking, law enforcement, and rules governing the relationship between the executive and legislative branches, (2) the judiciary, including rules for appointment of judges, internal organization, and dispute resolution, (3) custom and other informal rules that constrain individual conduct, (4) contentious social interests and values in a society, and (5) the administrative capabilities of a government. Levy and Spiller (1994): 205-208, *Op. Cit. Supra* 16

²¹ For this particular study, Spiller and Levy focus on the legislative, executive, and judicial institutions as the primary institutional endowment of a country, and refer to these as “exogenous institutions” affecting the regulatory problem. The type of regulatory governance institutions that a country can successfully establish depend on whether a country had a separation of powers that is enforced; whether the legislative powers of the executive is constitutionally limited; whether a competitive multi-party electoral system exists in which parties lack disciplinary control over their legislators; and on the existence of a federal structure that decentralized power. Alternatively, in lieu of a strong separation of powers between the executive and legislative branches, credible regulatory governance structures can be secured if a country has an independent and efficient judicial system with a tradition of limiting administrative arbitrariness, either by enforcing existing administrative law or upholding contracts and property rights, as well as by showing a record of judicial probity and ruling against the government. Levy and Spiller (1994): 205-208, *Op. Cit. Supra* 16

parliamentary system”²², (2) an “archetypal presidential system”²³, and a (3) “rent-seeking presidential system”²⁴. Levy and Spiller show how the particular institutional endowment of each country shaped the regulatory design choice that provided the necessary commitment guarantees to investors, allowing them to participate in the privatization of the national telephone company. Hence, Levy and Spiller’s study shows that in 1984, the privatization and regulation of the telecommunications company (British Telecom) in the United Kingdom was primarily structured around a license agreement. This was a suitable choice under the institutional endowment of the UK, which had an independent judiciary with a history of upholding contractual agreements against the government, as well as other informal and formal institutions

²² “[...] The political systems [...] are parliamentary, characterized by a strong judiciary and electoral rules that tend to generate two strong parties. As a consequence, the majority party invariably has an absolute majority in Parliament and controls both the government and the legislature. [...] To a large extent because of this feature of parliamentary politics, in neither country has the judiciary developed a strong administrative doctrine, although both have a long contract law tradition, and have upheld contracts against the government. [...]”. The authors further note that judicial review of administrative regulation is uncommon. Therefore there is a great degree of administrative independence. As a result, the United Kingdom and Jamaica have “electoral systems that provide for great legislative flexibility, and judiciaries that do not strongly restrain administrative action. As a consequence, neither can base its regulatory governance structures on legislative acts.” Levy and Spiller (1994): 212-217, *Op. Cit. Supra* 16

²³ “[...] the country was governed by a constitution that embodied the separation of powers, orderly transfer of authority, and regular elections between competing powers. [...] Chile’s long-standing set of legislative and executive institutions and the nature of its checks and balances can be seen as potentially providing some credible safeguards against arbitrary changes in the regulatory regime governing utilities. [...] Chile’s strong, professional, and independent judiciary provides a particularly effective check on the government, on issues of both constitutional and statutory interpretation. [...] Chile’s diffuse political power, then, provides opportunities for designing regulatory governance structures along several alternative lines. Because specific legislation is more difficult to change in Chile than, say, in the U.K. specific legislation may play a more important role in the regulatory governance structures of Chile than in the U.K. On the other hand, Chile’s strong judiciary provides also for implementing regulatory governance based purely on procedures or contract law.” Levy and Spiller, (1994): 217-218 *Op. Cit.* 16

²⁴ A “rent seeking presidential system” is one that shares the following political features: “First, [...] formal political institutions [are modeled] upon those of the United States, creating a complex system of checks and balances. [...] Second, [...] the endemic lack of respect for constitutional order has translated into a corrupt bureaucracy and judiciary, and into turns to the military as the panacea for interest group conflicts”. Levy and Spiller (1994): 218-219, *Op. Cit. Supra* 16

governing bureaucratic processes, which create disincentives to policy reversals and regulatory arbitrariness. In this case, the license agreement secured regulatory commitments better than legislation would have, because the UK's "traditional parliamentary system" could easily lead to a reversal in commitments set in law following a change in the political party or parties in power. Following privatization, British Telecom showed large investments and large welfare gains, with reasonably, but not excessively, profitable rents for investors.

Furthermore, in analyzing privatizations of UK telecommunications and electricity public utility companies, Levy and Spiller (1994)²⁵, and Holburn and Spiller (2002)²⁶, respectively, noted that the UK's institutional endowment not only provides a judiciary with a history of upholding contracts against the state, but also an independent regulatory agency for each of these sectors. These agencies are staffed with highly expert civil servants who have formal independent powers to exercise discretion in policymaking, "since few quantified objectives or constraints are written in statute²⁷." The balance of flexibility in administrative decisionmaking with formal (long-term) protection of property rights in the UK seems to have created a best-case scenario for a regulatory governance structure that can secure good economic performance from firms after reform.

²⁵ Levy and Spiller (1994), *Op. Cit. Supra* 16

²⁶ Guy L.F. Holburn and Pablo T. Spiller, "Institutional or Structural: Lessons from International Electricity Sector Reforms" in *The Economics of Contracts: Theories and Applications*, ed. Eric Brousseau and Jean-Michel Glachant, (Cambridge University Press, 2002)

²⁷ Holburn and Spiller (2002), 17-18, *Id. Cit. Supra* 26

In Chile, regulatory commitments to privatization were established in 1987 through legislation. Chile had a different institutional endowment, typified as an “archetypal presidential system,” with a functional division of power and a strong independent judiciary. Legislation is difficult to modify under the Chilean institutional endowment, and in any case, administrative attempts to change regulatory rules can be challenged in court. Hence, investors could rely on said legislative regulatory framework as a guarantee for long-term investment. After privatization, the Chilean telecommunications sector experienced unprecedentedly high rates of network expansion and traffic growth, with a good rate of return for investors.

In the case of Argentina, the privatization process was carried out within a negative institutional environment, referred to as a “rent-seeking presidential system,” that provided few constraints on administrative arbitrariness. However, reform was possible in a narrow window of opportunity during the Menem administration, because the government was able to secure sufficient transparency and regulatory commitment to the privatization process as part of a broader policy of privatization for economic reform. The firms in post-privatization Argentina initially met and surpassed investment expectations but in the longer term maintained high prices and low quality standards, while extracting high rates of return on their investment²⁸. The performance

²⁸ “In Argentina, short-termism is apparent in the extremely high profitability of the licensees. For example, in the 11 months ending September 30, 1991, the rate of return to Telecom’s operator was 26.9 percent, while that of Telefónicas’ was 203 percent. The returns to both consortia were also quite remarkable: 58 percent and 72 percent, respectively. [...] Levy and Spiller (1994): 239, *Op. Cit. Supra* 16

of the firms in Argentina evinced a regulatory governance structure that motivated the extraction of short-term rents to offset regulatory adversity.

Levy and Spiller showed that in all the cases analyzed, institutional economic change (privatization) was possible, because regulatory governance structures limited government arbitrariness against a policy reversal. However, each country had differing postprivatization performance results depending on whether the regulatory governance structure motivated long-term investment or short-term rent extraction by private investors.

Heller and Victor (2007) in a collection of case studies on power sector reform in five advanced developing economies show that regulatory reform results, like in the case of Argentina mentioned above, consistently diverge from “textbook models” which are based on the experience of privatization in the UK and Wales²⁹. The authors conclude that such results are not deviations, but the stable outcome in developing countries. They observe that institutional endowments, such as those found in the UK or the United States of America, are rarely found elsewhere, and therefore differing results should not be surprising. The political forces exerted on utility and market reforms will be different in the developing world, and those five countries studies show firms which ultimately operate in a hybrid model of private and state-led markets.

²⁹ David Victor and Thomas C. Heller, ed., *The Political Economy of Power Sector Reform: The Experiences of Five Major Developing Countries*, (Cambridge University, 2007)

These cases show that efforts to introduce formal institutional changes which maintain or increase positive growth rates should not be precluded just because they do not meet expectations of the textbook model. Rather the point as argued by Jensen (2003) is to improve the quality of rule of law reforms, whether for democracy or markets, by focusing on the “thin” definitions of the rule of law which seek “improvements in the procedures and the efficiency of legal processes”, instead of on “thick” expansive definitions that aim at broad or vague substantive goals such as protecting individual rights or stabilizing the economy³⁰. For example, Spiller and Tommasi (2005) argue that positive regulatory governance structures in utilities reform may be achieved by (1) transferring power to independent agencies, (2) establishing reliable administrative processes, (3) relying on an independent judiciary, (4) providing regulatory transparency or arranging interest-group participation in regulatory processes, and (5) in the case of unified governments, establishing regulatory commitments that rely on contract law³¹. Eberhard (2006) provides an even more comprehensive list of regulatory mechanisms which can enhance government commitments to reform, even in unstable and severely constraining institutional endowments³². These may include single mechanisms or combinations of the following: regulatory contracts (such as concession titles or power purchase agreements), contracting out of regulatory

³⁰ Jensen in ed. Erik G. Jensen and T.C. Heller (2003), 339 *Op. Cit. Supra* 12

³¹ Pablo T. Spiller and Mariano Tommasi, “The Institutions of Regulation: An Application to Public Utilities” in *Handbook of New Institutional Economics*, ed. C. Menard and M.M. Shirley, (Springer, 2005), 515-543

³² Anton Eberhard, “Infrastructure regulation in developing countries: an exploration of hybrid and transitional models”, *African Forum of Utilities Regulators 3rd Annual Conference*, (Windhoek, Namibia, 15-16 March 2006)

advisors, strong advisory regulatory agencies or department, expert panels (for conflict resolution or tariff setting), regional regulators, and/or a sector independent regulator. A negative institutional matrix will undoubtedly constrain policymakers from establishing best option regulatory structures, particularly those that effectively delegate power to independent agencies or establish administrative processes that increase the autonomy of civil servants from political interference³³. Reform will probably even recreate existing institutional incentives to some degree. However, implementing even minimum regulatory alternatives may assist in incrementally and positively changing procedures or administrative relationships that in the longer run maintain a level of development or may even procure higher levels of growth.

If at all, what is surprising about the reform results in cases such as those provided by Victor and Heller (2007) is that reform can maintain or lead to growth in countries with institutional endowments typified as “negative”, even when reform is initiated under the duress of financial and/or political crisis. Haber, Razo, and Mauer (2003) provide insight into a type of regulatory governance structure that could allow for such

³³ In order for the institutional matrix to promote long-term investment, institutions governing the sector need “to achieve a series of requirements (adequate degree of fragmentation, cross controls, common objectives, sufficient resources, credibility and plausible commitments) that allow a relationship to be articulated amongst themselves, with a game distribution and sufficient mechanisms of institutional cooperation.” David Sancho, “Regulación y agencias reguladoras independientes: elementos claves para la consolidación de su diseño institucional”, in Panel: Entre la Transformación de las Administraciones Públicas y la Creación de Nuevas Fórmulas de Gestión”, coord. Miguel Salvador Serna, *VII Congreso Internacional del CLAD sobre la Reforma del Estado y de la Administración Pública*, (Panamá, Oct. 28-31, 2003): 20

a result even in a very unstable polity³⁴. The authors show that high levels of economic growth were possible in several economic sectors during the pre-revolutionary and post-revolutionary years in Mexico (i.e. before 1910, and after 1917), because a system for selective granting and enforcement of property rights was established under General Porfirio Díaz³⁵. An improved version of this system was established under Álvaro Obregón after the Constitutional Convention of 1917. This system was in turn the precursor to the even more sophisticated institutionalized system of clientelism of the *Partido Revolucionario Institucional* (PRI or Institutional Revolutionary Party) and the long standing one-party authoritarian corporate state.

The selective entitlement system mentioned by Haber et al. (2003) is based on the vertical political integration (“VPI”) of an informal rent-seeking coalition composed

³⁴ Stephen Haber, Armando Razo, and Noel Maurer, *The Politics of Property Rights: Political Instability, Credible Commitments, and Economic Growth in Mexico, 1876-1929*, (Cambridge University Press, 2003).

³⁵ The authors define property rights as consisting of three rights: “the right to use an asset, the right to earn income from an asset and contract with other individuals regarding that asset, and the right to alienate or sell the asset. From the point of view of asset holders, all three rights are important -- all three have an impact on the value of their property. Governments play two roles regarding these rights: they specify property rights, and they enforce property rights”. The authors also state the following assumptions for their study: “First, governments may choose to enforce property rights as a private good. This may be because a particular government is not able, as a practical matter, to protect everyone’s property rights. Alternatively, governments may manipulate the level of enforcement to fit their needs. [...] Second, asset holders do not demand that the government protect everyone’s property rights. [...] On the one hand, an asset holder can receive utility from the universal protection of property rights, because this makes her assets more liquid, and therefore more valuable. On the other hand, if selective enforcement grants the asset holder market power, then it may be more profitable to demand less than universal enforcement. [...] Any profit-maximizing actor would readily accept the exclusive protection of her property rights, providing it produced net benefits to that actor. Third, [...] asset holders make decisions based on a continuum of risk assessments. This means that asset holders will tolerate a certain level of predation risk as long as they expect some positive level of profits in compensation. [...] Fourth, we assume that asset holders cannot perfectly monitor the impact of the government’s actions or policies upon their property rights. [...] This is especially the case if the government is simultaneously reforming multiple regulatory institutions, some of which potentially enhance the value of their property rights and some of which reduce them.” Haber, Razo and Maurer (2003), *Id. Cit. Supra* 34, 21-23

of government, asset-holders (industrialists), and a third-party enforcer. In basic terms, the VPI coalition required that a limited group of industrialists be granted special rights over productive resources (either property rights or exclusive government permits--*concesiones*--to exploit a resource or provide a service). Such special rights were enforceable (either as market power or as other advantages granted through selective enforcement of rules or selective award of subsidies or other government-controlled benefits) in order to generate high levels of profit or rent extraction from industrial production. These profits were then taxed by the government at a sustainable rate (through different formal or informal mechanisms) in order to allow said government to finance its operations and survive its enemies during instability. The entire arrangement was guaranteed by a third party such as labor unions, foreign governments, or asset-holders. This third-party guarantor also received rents from industrial activity and would therefore oppose any attempt by the government to increase the tax rate on the asset-holders, thus maintaining a credible commitment in situations of instability. If the government reneged on its commitments, the labor unions would withdraw popular support; foreign governments could exact hostile force or counter attack with trade barriers, and asset-holder could enforce "hostage" agreement whereby the government forfeited a resource that they held in their control. Alternatively, a failure to enforce a commitment with one industrialist could lead to loss of support from the community of other selectively entitled asset-holders.

The VPI coalition is viewed by Haber, Razo, and Mauer (2003) as a second-best solution to the commitment problem, because it is fundamentally based on

monopolistic rent-seeking and is therefore an inefficient system for allocating resources to procure growth. Furthermore, North, Summerhill and Weingast (2000) argue that such a selective property system is most sustainable under “rent-seeking” authoritarian systems³⁶. An additional cautionary note is taken from Lal and Myint (1996) who in observing path-dependent policy outcomes consider that selective entitlements granted to some groups “[...] are then politically if not impossible to rescind if future circumstances change. This then puts an effective constraint on future policy choices.”³⁷ Despite these negative aspects, Haber et al. (2003) show that the VPI allows growth to proceed under unstable institutional endowments by enforcing property rights as selective rights, rather than as universal goods. The informal VPI may further stabilize said political economy away from generalized disorder.

The literature reviewed above provoked a starting question for this research: if the commitment problem can be overcome in a developing country, under crisis, and lead to growth, why is underdevelopment not readily solved? As a first approach to this broader question, this dissertation presents a case study about telecommunications reform and economic outcome in Mexico. The sector shows good economic output, although arguably less than it could be. Furthermore, growth is reflected in wealth concentration, and does not result in widespread benefits for social development. This study seeks to understand more about the institutional constraints that reproduce this

³⁶ Douglass North, William Summerhill, and Barry R. Weingast, “Order, Disorder, and Economic Change: Laint America versus North America” in ed. Bruce Bueno de Mesquita and Hilton L. Root, *Governing for Prosperity*, (Yale Univesity Press, 2000), 17-58

³⁷ Deepak Lal and H. Myint, *The Political Economy of Poverly, Equity, and Growth: A Comparative Study*, (Oxford: Clarendon Press, 1996), 295

result. The analysis applies the institutional matrix generated by Levy and Spiller (1994) (institutional endowment and regulatory design structures) and the insights provided by Haber et al.'s (2003), to test for evidence of the establishment and reinforcement through reform of regulatory governance structures that grant and enforce property rights (monopoly rights) as private goods.

III.A BRIEF HISTORICAL REVIEW: MEXICO'S INSTITUTIONAL ENDOWMENT IN TRANSITION (LATE 1970'S TO 2006)

This Chapter provides an abbreviated review of the recent transition period of Mexico's institutional endowment, from the late 1970s to the present. The review focuses on defining the dominant formal and informal elements of the Mexican institutional endowment, and the most significant changes to that endowment, during a period in which the political economy of the country transitioned from an authoritarian corporate state to a multiparty electoral system and from a mixed command economy to a market economy. In this context, the institutional endowment of Mexico should have transitioned away from a "rent-seeking Presidential system".

During transition, existing rent-seeking coalitions seem to have been disrupted by democratic process and the delegation of power to institutions of the rule of law, but not eliminated. There are several instances during the reform years in which coalitions were established between big business and the state, supported variously by mass labor movements, trade agreements, foreign debt, or the creation of new regulatory institutions. These could be interpreted as a renovation or modernization of the VPI coalitions mentioned by Haber et al. (2003), which seek to capitalize on transition in order to gain privileged rights or protect existing privileges. However, this section is a brief review and does not attempt to fully document the existence of VPI throughout the transition. It does, however, seek to show that through the transition the institutional endowment of the Mexican system of government retained characteristics

of a “rent seeking” government, often built around coalitions of government, investors, and popular-movement leaders. This section will make an argument that although the Mexican institutional endowment transitioned away from “rent-seeking Presidentialism” it transitioned to what will be defined herein as a “rent-seeking Legislative system.” The telecommunications case study will later test whether this institutional endowment supports regulatory governance structure that grant and enforce selective property rights in a market economy.

A. STABLE RENT-SEEKING PRESIDENTIALISM: THE BASELINE OF REFORM

In order to set a baseline by which to compare changes in the institutional endowment through later periods, this next chapter explains principal institutional characteristics of the Mexican political economy in the late period of import-substitution-industrialization (“ISI”). For practical reasons, this chapter is not an exhaustive description, and instead focuses on providing brief descriptions of:

- (1) the formal division of powers,
- (2) authoritarian corporatism and the one party system,
- (3) clientelism, including elite informal networks of policymaking,
- (4) the subversion of formal legal institutions to informal institutions,
- (5) ISI policies and the organization of industrial conglomerates or *grupos*, and
- (6) the long-term economic performance of this system, concluding with its negative effects in the late 1970s.

1. *The formal division of powers in the rent-seeking presidential system*

The Mexican Political Constitution of 1917, in force today, established a system of government in Mexico based on a division of powers between the executive, legislative, and judicial branches. The head of the executive and members of the (bicameral) legislature are elected by majority vote, and the judiciary functions as a third constitutional counterbalance. However, during this period, legal order based on a division of powers was subverted by a general lack of respect for the Constitution. In this sense, Mexico's formal institutional endowment could be called a "rent-seeking presidential system" as defined by Levy and Spiller (1994). Given the power of the presidency, the system represented a negative institutional endowment for investment. Nevertheless, Mexico's presidentialist system was in power for 71 years, and for most of this period the Mexican economy was growing. Despite state intervention into the economy (by central planning, social welfare programs, and state capitalism), long-term certainty for investors was also guaranteed through a stable equilibrium of formal and informal institutions, including law, corporatism, and clientelism.

2. *Authoritarian corporatism and the one-party system*

Mexico's Presidentialist system of government was structured around a dominant party, the *Partido Revolucionario Institucional* (Institutionalized Revolutionary Party or "PRI")³⁸. Under this system of government, the President was acknowledged as the

³⁸ In 1938, President Lázaro Cárdenas (in office from 1934 to 1940) founded Mexico's corporate state, through a dominant government party called the PRM. The PRM "[...] relied on three major segments of society as the three 'pillars' of the ruling party: workers, peasants (*campesinos*), and the general popular sectors (*sectores populares*)". The PRM later changed its name to the *Partido Revolucionario Institucional* (Institutional Revolutionary Party or PRI), and from 1938 to 2000, access to the

ultimate arbitrator of conflicts and distributor of power and benefits in the state, hence, leading to the term presidentialism or *presidencialismo* to describe this type of president-centered authoritarian government³⁹. The PRI served as the foundation of an authoritarian corporate state, because like most authoritarian systems, it limited representation of civilian interests to representation through state sanctioned organizations (labor unions, business chambers, and political parties)⁴⁰. The

Presidency was orchestrated through the one-party system of government. Dale Story, *The Mexican Ruling Party, Stability and Authority*, (Praeger, 1986a), 24-26, 29; also see Evelyn P. Stevens, "Mexico's PRI: The Institutionalization of Corporatism?" in *Authoritarianism and Corporatism in Latin America*, ed. James M. Malloy, (University of Pittsburgh Press, 1977), 227-258; Cardenas transformed a government that in origin was socialist and populist in ideology into what writer Vargas Llosa calls the "perfect dictatorship." Mario Vargas Llosa, "Mexico: The Perfect Dictatorship", *New Persp. Q.*, Vol. 8, No. 1, (Winter 1991): 23. [The article is a reprint of a commentary made by Vargas Llosa in a conference in Mexico City in September 1991].

³⁹ Mexican *presidencialismo* has been addressed by the following authors: Jorge Carpizo, *El Presidencialismo Mexicano*, (Mexico: Siglo XXI, 16th ed., 2002); Scott Mainwaring, "Presidentialism in Latin America", *Latin American Research Review*, Vol. 25, No. 1. (1990): 157-179, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0023-8791%281990%2925%3A1%3C157%3APILA%3E2.0.CO%3B2-G>; Roberto G. Newell and Luis F. Rubio, *Mexico's Dilemma: The Political Origins of Economic Crisis*, (Boulder, Colo: Westview Press, 1984); Luis Carlos Ugalde, "The Transformation of Mexican Presidentialism, 1929-2000", 25 *WTR Fletcher F. World Aff.* 115 (2001); and Jaime F. Cardenas García, *Transición Política y Reforma Constitucional en México*, (UNAM: Instituto de Investigaciones Jurídicas, 2nd Ed., 2005), available online at <http://www.bibliojuridica.org/libros/libro.htm?l=1581>

⁴⁰ Corporatism in Latin America negated spontaneous interest representation in the state by limiting representation of individuals to state-sanctioned groups only, such as regulated parties, labor unions, and business chambers. Philippe Schmitter provides a definition of corporatism: "[... a] system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports." Corporatism is contrasted with the mode of political participation known as pluralism, supported in democratic states. Schmitter defines pluralism as "a system of interest representation in which the constituent units are organized into an unspecified number of multiple, voluntary, competitive, nonhierarchically ordered and self-determined (as to type or scope of interest) categories which are not specially licensed, recognized, subsidized, created and otherwise controlled in leadership selection or interest articulation by the state and which do not exercise a monopoly of representational activity with their respective categories." Philippe Schmitter, "Still the Century of Corporatism?", in *The New Corporatism; Social-political Structures in the Iberian World*, Frederick B. Pike and Thomas Stritch, eds., (University of Notre Dame Press, 1974), 85-131:93-94, 96; Another definition of corporatism is that of a "general system of interest representation in which specified groups are awarded a monopoly status with regard to their clientele and, in one form or another, brought into official recognition as the central bases for decision-making, replacing the

restrictions on representation through state-sanctioned organizations generated a hierarchical organization of power, in which elites governing these diverse organizations benefited most from the system. Elites were significant institutional carriers of *presidencialismo* and the authoritarian corporate state⁴¹. Elites are groups of individuals “who are able, by virtue of their strategic positions in powerful organizations, to affect national outcomes regularly and substantially”⁴². The elite-oriented structure of the Mexican political economy supported *de facto* monopolies on power and wealth, all of which substantially reinforced the authoritarian power of the Presidency.

parliaments built on liberal, individualistic representation” in the State. Douglas A. Chalmers, “The Politicized State in Latin America”, in ed. James M. Malloy (1977), 34-35 *Op. Cit. Supra* 38

⁴¹ In Latin America, corporatism was associated with authoritarianism. Juan Linz defined authoritarianism in relation to Spain, but his work is widely applied to Latin American countries. For Linz, authoritarianism implies a political system with limited pluralism and limited political mobilization whereby a leader or a small group exercises power with limited legitimacy. A consequence of authoritarian corporatism is that states are governed by a closed political elite. These elites have sufficient power to define which interest groups represent societal interest to the state, to the exclusion of other non-sanctioned groups (and individuals) from official representation. Juan Linz, “An Authoritarian Regime: Spain” in *Cleavages, Ideologies and Party Systems*, ed. Erik Allardt and Yrjö Littunen, (Academic Bookstore, 1964), 297; Corporate organizations, such as the bureaucracy, labor unions, peasant unions, and business chambers, were permanent organizations that were temporarily appropriated by circulating elite. Elites did not waste time constructing alternative institutions, but instead focused on developing relations with other elites in a stable corporate state to rise to the political and economic benefits of the system. Kaufman Purcell writes, “[t]he Mexican political system can therefore be conceptualized as a rigid-looking authoritarian façade that overlays a hyperfluid clientelist interior composed of multistatus elites who are in perpetual motion.” Susan Kaufman Purcell, “Mexico: Clientelism, Corporatism and Political Stability,” in *Political Clientelism, Patronage and Development*, ed. S.N. Eisenstadt and René Lemarchand, (Sage Publications, Volume 3, 1981), 192-216: 205

⁴² Lowell Field, John Higley, and Michael Burton, “A New Elite Framework for Political Sociology”, *Revue européenne des sciences sociales*, 28 (1990), 152 as quoted in Roderic Ai Camp, *Mexico’s Mandarin’s: Crafting a Power Elite for the Twenty-First Century*, (University of California Press, 2002), 9; Camp however cautions that this definition assumes or “[...] require[s] an elite to hold an organizational post”, which if strictly used to determine elites in Mexico and other Third World countries, would exclude other influential actors. Roderic Ai Camp (2002), 9-10, *Id. Cit*

3. *Subversion of formal legal institutions to informal institutions*

Under *presidencialismo*, the legislative power was submissive to the dictates of the executive power⁴³. The policymaking and lawmaking processes were centralized by the executive and rubber-stamped into approval by Congressional representatives after being negotiated with leaders of the corporate state⁴⁴. The process did not support the

⁴³ The Federal Congress in Mexico is composed of two houses, Chamber of Deputies (*Cámara de Diputados*) and House of Senate (*Cámara de Senadores*). Diputados (representatives or Deputies) are elected for three years, and senadores (Senators) for six-year terms. The Mexican Constitution prohibits consecutive reelection of legislators. During the pre-transition period, both Houses of Congress were dominated by PRI party members, and therefore remained highly responsive to the President as the State policymaker and the unwritten leader of the PRI. Throughout the pre-transition period Congress remained characteristically submissive to the Executive power given the ties of the majority of members to the official party:

“[...] [T]he President retained significant ‘indirect’ legislative powers by virtue of the political leadership of the President in a one-party ‘democratic’ system. For this reason, the constitutional separation of legislative and executive powers in Mexico was, until recently, a legal fiction that did not reflect reality. While the President was careful to follow the *formal* constitutional requirements prohibiting executive incursions into the legislative arena, the political process allowed him to dictate the development of Mexican law.”

S. Zamora et al., *Mexican Law*, (Oxford University Press, 2004), 137

⁴⁴ Using a case study of Mexico, Susan Kaufman Purcell examined the processes by which new policies were enacted through new legislation. Her study shows that legislation was a process of bargaining with corporate interest groups, led by the President. The author looked at a particular policy decree in which President Lopez Mateo amended Article 123 of the Mexican Constitution to make effective a dormant clause on profit-sharing for workers. The presidential initiative gave the federal government, authority to establish a national profit-sharing system in the country. The legal reform called for the creation of a national tripartite profit-sharing commission (labor, government, business) that would define the specific details by which companies would have to share profits with workers. In Purcell’s case study, the President was trying to remedy the neglect suffered by the labor unions under the prior administration, and therefore issued a decree for mandatory profit-sharing. This case study analyzed a controversial issue of the redistribution of wealth in which there was active participation from business organizations and labor unions throughout the country. Kaufman Purcell describes the legislative process in Mexico as follows: (1) the President sends an initiative to Congress and Congress provides a rubber-stamp approval in order to introduce a new decree or law, generally broad or vague in scope; (2) the President awaits the reactions of interest groups, and a special commission is usually formed to oversee a policy negotiation process; (3) the special commission mediates positions among interest-group leaders to detail the policy implementation; at this point, interest groups use their political, social, and economic resources to influence a draft of secondary legislation more favorable to their interests; and (4) if negotiations result in secondary legislation, this initiative is also sent by the President to be rubber-stamped by Congress, or else the President will issue an administrative regulation by decree or by a Secretariat, which is then officially publicized. This secondary legislation serves as the set of rules defining the policy implementation, which sometimes enforces terms opposite to the original legislative act, and hence to the original policy direction.

The *ad hoc* committee established to assist corporate interest groups in drafting an agreement through secondary legislation dissolves once the specific terms of the law or secondary rules have been defined.

formal system of checks and balances among the executive or legislative powers, nor did it provide broad democratic representation of social interests⁴⁵.

Similarly, the judiciary was not performing as an independent, functional, and effective branch of government, but rather as an administrative body subordinated to the executive⁴⁶. In general, access to justice was slow and costly in Mexico, which increased legal uncertainty⁴⁷. The role of judges and legal academics was technical and distant from daily exchanges affecting individuals and organizations⁴⁸. Hence, although Mexico early on codified a well-established body of administrative, civil, commercial, and contract law (among other legal rules) that could support a variety of regulatory governance structures, the legal system was subject on the one hand to arbitrary administrative action, which also served to provide selective enforcement of

In this way, the implementation of the President's policy is assured, while permanent delegation of authority is avoided. The law or rules resulting from negotiations among the interest group leaders would usually be enforced by the corresponding administrative office, in gradual steps, in order to avoid further mobilization by groups expressing opposition to the initiative. Kaufman Purcell confirms this pattern of decision-making with other studies of policymaking processes. Susan Kaufman Purcell, "Decision-Making in an Authoritarian Regime: Theoretical Implications from a Mexican Case Study", *World Politics*, Vol. 26, No. 1. (Oct., 1973): 28-54, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0043-8871%28197310%2926%3A1%3C28%3ADIAART%3E2.0.CO%3B2-6>; see also Susan Kaufman Purcell, *The Mexican Profit-Sharing Decision: Politics in an Authoritarian Regime*, (University of California Press, 1975), 47-54, 94-129

⁴⁵ Kaufman-Purcell attributed this pattern of policymaking processes to general characteristics of the Mexican authoritarian state. Kaufmann defined those authoritarian traits as "elite consensus," "limited pluralism," "low mobilization," "patrimonial rulership" (a reference to clientelism) and "centralization". Susan Kaufman Purcell (1973), 34, *Id. Cit*; see also Susan Kaufman Purcell (1975), 44-54, *Id. Cit.*; Susan Kaufman-Purcell & John F.H. Purcell added "centralized authority" in the Executive as a specific authoritarian trait which influenced policy in Mexico. John F.H. Purcell and Susan Kaufman Purcell, "Mexican Business and Public Policy", in ed. James M. Malloy, (1977), 191-226: 192-201, *Op. Cit. Supra* 38.

⁴⁶ Luis Rubio et als., *A la Puerta de la Ley*, (CIDAC/ Cal y Arena, 1994), 170-171, available online at <http://www.cidac.org/vnm/libroscidac/puerta-ley/TextoCompleto.PDF>

⁴⁷ Luis Rubio et als. (1994), 52, 110, 124-132, *Id. Cit. Supra* 46

⁴⁸ Miguel González Compeán and Peter Bauer, *Jurisdicción y democracia: Los nuevos rumbos del Poder Judicial en México*, (CIDAC/Cal y Arena, 2002), 120-121

rules to favored industrialists, and on the other hand to a style of judicial interpretation that kept law static and thus supported the *status quo* of the Mexican authoritarian corporate state⁴⁹.

4. *Clientelism, including elite informal networks of policymaking*

Clientelism (a system of patron-client relationships) was the primary informal institution for allocating resources and benefits between the state and individuals⁵⁰. Starting from the President as the primary distributor and benefactor in the state, clientelism was replicated as the informal distributive mechanism throughout other institutions and organizations of Mexico's corporate state, including the electoral

⁴⁹ The Judiciary on the whole maintained a low profile on the political scene, and promoted itself as a humble interpreter of the spirit of the law, which was a way of supporting the political will of the one-party hegemonic state. Miguel González Compeán and Peter Bauer (2002), *Id. Cit. Supra* 48, 120-121; Luis Rubio et als. (1994), *Op. Cit. Supra* 46, 170-171; *See generally* S. Zamora et. al, (2004), *Op. Cit. Supra* 43.

⁵⁰ The stability of the Mexican corporate party state was legendary, and was sustained not only through the formal structures of corporatism, but also through informal relationships shaped by clientelism. Clientelism or patron-client networks are an alternative interest-mediation system, by which individuals negotiate with authorities the exceptional enforcement of policies and rules, as well as the distribution of material or political benefits. Kaufman defines clientelism as “an informal, particularistic, exchange relationship between actors of unequal power and status” and argues that while corporatism constrains representation and autonomy of interest groups through formal legal structures of the state, clientelism provides corporatist states with flexible “forms of problem-solving behavior.” Broadly defined, clientelism presents “an extensive distrust of impersonal authority; a tendency to rely on the activation of diffuse primary relationships in order to accomplish assorted social, economic, and political goals; and most important, a posture of personal dependency on superiors within the status hierarchy.” Robert R. Kaufman, “Corporatism, Clientelism, and Partisan Conflict”, in ed. James M. Malloy (1977), *Op. Cit. Supra* 38, 113; Roniger characterizes clientelism as a patronage network between “individuals of high and low status rather than between corporate groups”, and offers this definition of clientelistic relations: “Particularistic, hierarchical, and diffuse ties contracted by social actors who command resources that they exchange in selective asymmetric but mutually beneficial and open-ended transactions”. Luis Roniger, *Hierarchy and Trust in Modern Mexico and Brazil*, (Praeger, 1990), 2-4; Clientelism allowed the corporate state to attend to individual demands through the discretionary powers of the bureaucracy, and was therefore the means by which individual interests were represented, and specific benefits distributed, in the corporate state. Heredia argues that clientelism had “[...] an enduring centrality [...] in directly processing vast portions of the relations between rulers and ruled, as well as in structuring the internal operation of corporatist institutions themselves”. She also argues that the inability of the state to maintain a distributive system of clientelism after the late 1960s was a significant factor in the breakdown of the PRI system. Blanca Heredia Rubio, “Clientelism in Flux: Democratization and Interest Intermediation in Contemporary Mexico”, *Documento de Trabajo*, No. SDTEI31, (Mexico: CIDE, 1997): 4-5, 10-18.

system⁵¹, the PRI,⁵² the legislative processes⁵³, the public administration under the executive⁵⁴, the judiciary⁵⁵, the popular sector unions⁵⁶, and even business

⁵¹The most important mechanism that the PRI used to control access and distribution of power was the President's prerogative of personally designating a successor. Presidential elections were held without reelection at the end of each six-year term (*sexenio*), at which time the President in office *unofficially* handpicked a PRI party candidate who would rotate into the Presidency at the end of each term. Thus, in Mexico, each *sexenio* was a process of negotiating and anticipating a presidential successor. Elites and their followers formed political cliques called *camarillas*. Throughout the presidential term, the *camarillas* "bet" on which government coalition would ascend to the Presidency in the following *sexenio*. Patron-client relations would rearrange themselves into new alliances and loyalties at the end of each *sexenio*, when a new PRI presidential candidate was about to be designated, and again at the beginning of each *sexenio*, when the new President came into power. Members of the *camarillas* constantly attempted to increase their opportunities to advance politically in a system that distributed power from the top. The winning *camarilla* was the one that supported the presidential successor and was therefore best positioned to take seats of power and access further political or material benefits. The one-party system posed as a democratic electoral system by having PRI candidates actually contend for office against an opposition party. However, the Presidency, vested in one citizen elect, held extended control over Congressional elections and judicial nominations as *de facto* leader of the PRI. The PRI also controlled state and municipal electoral offices. Elections were often fraudulent; but in many cases there was no need for fraud, since votes were secured through the patronage networks of the PRI between citizens and government officials, even at the municipal level – or, some would argue, especially at the municipal level due to the *cacique* system. Thus, state and society in Mexico interacted in a web of relationships for distribution of benefits, which was fastidiously institutionalized, bureaucratized, and coordinated through the PRI Party. See generally Jorge Castañeda, *Introduction to Perpetuating Power: How Mexican Presidents Were Chosen*, (New York: The New Press, 2000), ix-xxiv; See generally Jeffrey Weldon, "The Political Sources of Presidentialism in Mexico" in ed. Scott Mainwaring and Mathew Soberg Shugart, *Presidentialism and Democracy in Latin America*, (Cambridge University Press, 1997).

Other studies on clientelism in Mexico focus on either of two systems of clientelism: the presidential chain of command or local chieftains. Patron-client relations in municipal or local government, exemplified by *caciques* [chieftains] in townships. There is a great deal of literature on *caciques*, *camarillas*, and other patron-client networks of Mexico. For a bibliography of literature on *caciques* and *camarillas* in Mexico, see Luis Roniger (1990), *Op. Cit. Supra* 50, 320-322; Kaufman points out that clientelism at the local *cacique* level also played the function of taking policies coming from the center and reinterpreting them according to local needs. Susan Kaufman Purcell in ed. S.N. Eisenstadt and René Lemarchand, (1981) *Op. Cit. Supra* 41, 207-213

⁵² Stability in the distributive system of the State was dependent on "political discipline" and "political negotiation." Political discipline refers to the discipline of party members in adjusting to orders from the top. "Political negotiation" refers to the unspoken agreement among interest groups of the corporate state to maintain close proximity to the original proposal of the Revolution. The original bargain, based on the ideals of the Revolution, was: "[...] to share power among proponents of quite different interests and constituencies," these being "representatives of lower-class revolutionaries and middle-class revolutionaries." "Political discipline" and "political negotiation" allowed ruling groups to continuously and creatively renew the original bargain between the government and the working class, the peasants, and the private sector. These principles kept the system stable and flexible within those limits. Susan Kaufman Purcell and John F.H. Purcell, "State and Society in Mexico: Must a Stable Polity Be Institutionalized?", *World Politics*, Vol. 32, Issue 2 (Jan., 1980): 195-196, JSTOR Stable URL:

<http://links.jstor.org/sici?sici=0043-8871%28198001%2932%3A2%3C194%3ASASIMM%3E2.0.CO%3B2-K>

⁵³ The President, as main distributor of benefits among all interest groups, was charged with maintaining stability in the corporatist system. The policy choices of each administration determined the Congressional agenda. The entry of a new President was commonly accompanied by major ideological shifts from left to right in economic policies, depending on the interest group which required favoring at that moment. In terms of economic development, this was known as the “pendulum effect”: “predictable shifts from one side of the ideological spectrum to the other as presidents succeed one another in Mexico.” Dale Story (1986a), 30-44, *Op. Cit. Supra* 38. With each new presidential term, the administration in turn pursued economic initiatives aimed at redistributing resources and benefits among interest groups that had been neglected by the policies of a prior administration (in simplistic terms, labor versus business). Each pendular swing brought about a new cycle of negotiation among interest groups that would result in new policies and new regulations in the context of a shifting political ideology. Jonathan Heath calls the pendulum swing “Mexico’s Sexenio Curse” because the economic crises of the 1970s through the 1990s were also deeply related to government intervention into the economy at the end (or start) of each presidential term. The government intervened at the end or beginning of a sexenio with policy initiatives to raise support for the PRI from sectors that had been less favored by the prior administration; or, if the policy shift was towards the end of a sexenio, the President would be attempting to create popular good will for the PRI presidential candidate. *see* Jonathan Heath, *Mexico and the Sexenio Curse: Presidential Successions and Economic Crises in Modern Mexico*, (CSIS Press, 1999).

⁵⁴ Tuohy, in his study of political elite behavior in Mexico, concludes that a good public officer in the Mexican system knew how to follow lines of command and enforce them: “the ‘good’ administrator thus is the efficient manager of delegated responsibilities and a manipulator of the public environment; he is not a responsible or responsive public servant in the classic democratic sense.” Rapid rotation in office, however, tended to corrode “[a long-term and] creative focus on problems of public policy”; therefore Tuohy observes that “developmental planning gets sacrificed to system maintenance, and patronage takes precedence over expert performance.” Clientelism further assured that policy swings and other distributive measures would be implemented by the bureaucracy to produce a stable outcome: the fulfillment of commands issued by the President whoever he may be. For this and other reasons, Tuohy notes that “the fate of Mexican development is an eminently political question.” William S. Tuohy, “Centralism and Political Elite Behavior in Mexico” in *Development Administration in Latin America*, ed. Clarence E. Thurber and Lawrence S. Graham, (Durham, 1973), 260-280: 278-280; See also Jack W. Hopkins, “Contemporary Research on Public Administration and Bureaucracies in Latin America”, (in *Topical Review*), *Latin American Research Review*, Vol. 9, No. 1. (Spring, 1974): 109-139. JSTOR Stable URL: <http://links.jstor.org/sici?sici=0023-8791%28197421%299%3A1%3C109%3ACROPAA%3E2.0.CO%3B2->

⁵⁵ Clientelism within the judicial power was as pervasive in pretransition Mexico as in the rest of government. Clientelism in the Federal court system seemed to be independent from clientelism in the executive power, given that most of the ministers assigned to the Supreme Court had followed a career path within the judiciary. However, clientelism was commonly exercised within the judicial system through the power held by higher-level career judges in determining rewards and disciplinary actions in a lower court judge’s career. Therefore, judges had a greater incentive to follow the dictates of higher-ranking judges than to improve their performance as actors in the balance of power within the state. Furthermore, Supreme Court Ministers were directly designated by the President, creating a link to the clientelistic system pervasive in the bureaucracy. State and local judges were much less independent from the Executive, since the election of a new governor implied the removal or substitution of the majority of judges and magistrates from their offices. In this sense, the judiciary in pretransition Mexico also functioned with certain negative incentive structures. *See* Hector Fix-Fierro, “Judicial Reform in Mexico. What Next?” in ed. Erik G. Jensen and Thomas C. Heller (2003), 240-289, *Op. Cit Supra* 12

⁵⁶ The “popular sector” is a term often used in Spanish to refer to workers and their organizations, in a limited definition, but also colloquially to the broader population associated to the working class,

organizations⁵⁷. Clientelism is intrinsically a system that selectively grants rights (property or otherwise) and the selective enforcement of those rights within an authoritarian system of government.

whether unionized or not. See Luis Alberto Romero, "Los sectores populares en las ciudades latinoamericanas del siglo XIX: la cuestión de la identidad", *Desarrollo Económico*, Vol. 27, No. 106. (Jul. - Sep., 1987): 201-222. For unionized workers, gaining leadership or close access to leaders of federations (such as the FSTSE or CT) was a means to gain individual benefits of power and wealth in the corporate authoritarian state. The following is a description of labor federations and their leaders in the one-party system:

"Labour federations became the principle vehicles not just for organizing worker demands, but also for co-opting union leaders and controlling labour militancy. The leaders of these federations – Luis Morones, Vicente Lombardo Toledano, and Fidel Velásquez, among others --became important figures in Mexican politics, not just as advocates for the workers they represented, but also as backstage supporters of the PRI's political agenda. [...] Organized labour was assimilated into the PRI as a major component of the party's grass roots support. Union leaders who co-operated with the PRI received benefits (job security, access to decision-makers) that loyal actors in the corporatist system would receive."

S. Zamora et. al (2004), *Op. Cit. Supra* 43, 418-419; Political benefits for union leaders were often in the form of seats in Congress. The PRI party was able to control majority electoral outcomes through clientelistic ties in every region or else through fraud; therefore the PRI could determine who would fill the majority of seats in the Senate or Chamber of Deputies (*Camara de Diputados*). Consecutive reelection of Congress members is prohibited by the Mexican Constitution; however, the study by Esteban David Rodríguez shows that a percentage of individual party members affiliated to the PRI (as well as other party members) maintained a long-standing and almost consecutive presence in Congress, by alternating between seats in both houses in consecutive elections or between being elected as a majority representative versus a plurinomial representative, or simply by changing districts and even states represented. Esteban David Rodríguez shows that of the individuals who have held seats for the longest consecutive periods in Congress, of the top four legislators, three were union leaders as well as PRI party members. In total, these union leaders held a seat in Congress for more than 20, 30, or 40 years. This is a significant evidence of subversion of the "nonconsecutive reelection" principle established for Congress in the Mexican Political Constitution. The consecutive presence in Congress was secured by these union leaders through allegiance to their parties. Rodríguez concludes that "[i]n the case of the *prúistas*, the *caciques* and worker leaders were those who adjudicated for themselves more positions and for longer periods in Congress." From these seats, labor leaders were able to voice and represent policy positions of labor unions in Congress. As can be noted, these labor leaders represented a mass segment of the population within the one-party structure, but at the same time were not responsible to any particular body of the electorate. Their long-term presence shows the extensive power of a party in determining which representatives got elected into Congress. Esteban David Rodríguez, *Los Dueños del Congreso*, (Editorial Grijalbo, 2004).

⁵⁷ Clientelism was also a characteristic relationship within the business sector. Clientelism in the business sector was manifested by how lower ranking businessmen related to higher ranking, or wealthier, business owners. In national chambers and private organizations, medium-sized and smaller businessmen often found themselves outside the loop of representation to policymakers. To offset the imbalance in representation, lower-ranked businessmen relied on personal contacts with more important businessmen or chamber leaders to represent their interests to high-ranking bureaucrats or other high-ranking businessmen. The administration and leadership of the chambers and organizations generally resided in lower-ranking businessmen. The presidencies of the chambers were given to up-and-coming entrepreneurs or career Chamber representatives who were trying to work themselves into the "ranks of

Corporatism and clientelism reinforced incentives to join or remain close to elite ranks of union leaders, business leaders, or policymakers within the system, which had access to benefits and power from the top. In a regime where clientelistic relationships generate certainty, and nontransparent or illegal exchanges between members of society and officers of government are not easily proven or sanctioned, corruption is also an institution of benefit distribution⁵⁸. Concerning corruption and elites in an

self-made Mexican entrepreneurs.” The great exception is the CMHN. Forty-four percent of leaders have come from elite families, but that has more to do with the fact that the CMHN exclusively concentrates the 30 wealthiest businessmen. In interviewing diverse businessmen “represented” in the chambers, Camp concluded that elite businessmen did not need to be in the limelight of politics and chamber leadership, because their influence in the politics of business was wide and independent of chamber leadership. A Mexican entrepreneur interviewed by Camp called chamber leaders “capitalist hired guns,” since elite or big entrepreneurs generally did not hold leadership positions in chambers, because they were able to determine chamber stances anyway. In fact, many elite businessmen found political posts to be beneath their status. Roderic A. Camp, *Entrepreneurs and Politics in Twentieth-Century Mexico*, (Oxford University Press, 1989), 144-159; Smith, Camp, and Derossi mention in their studies that in general, top Mexican entrepreneurs showed disdain for political and bureaucratic posts. Their wealth already privileged them with hierarchical access to chamber leadership and government officials. see Roderic Ai. Camp, *Political Recruitment Across Two Centuries: Mexico, 1884 –1991*, (University of Texas Press, 1995a); Roderic Ai. Camp, *Mexican Political Biographies, 1935-1993*, 3rd edition, (University of Texas Press, 1995b); Peter H. Smith, *The Labyrinths of Power: Political Recruitment in Twentieth-Century Mexico*, (Princeton University Press, 1979); and Flavia Derossi, *The Mexican Entrepreneur*, Development Centre Studies, (OECD, 1971), 174-192; Due to clientelism, big business leaders were able to use business chambers to harness a critical mass in the private sector to oppose or to support government policies in terms that favored their agendas. Examples of unified chamber action include destabilizing actions such as capital flight to developed nations during the 1970s and 1980s; press reports evidencing a lack of control of the government over big business; and political activism whereby larger businesses would round up the support of lower-class merchants to riot. These were exit and pressure tactics used to oppose or to prevent the implementation of unfavorable policies and to push the government to retreat or change policy initiatives. Roderic A. Camp (1989), 244-149, *Id. Cit.*

⁵⁸ Ugalde provides a simple definition for corruption:

“... as the acts through which a public officers is motivated to behave in a manner different from the normative standards of the system in order to favor particular interests in exchange for a reward. Four acts of this nature can be distinguished: co-author, peculate, nepotism, and extortion. The first is a reward to the public officer for changing his judgment and decisions in favor of private individuals; the second consists in the allocation of public funds for private use; the third takes place in the concession of employment or public contracts on the basis of kinship relations rather than merit; and the fourth is the appropriation or usurpation, including by means of violence, of the property or rights of an individual or group.”

authoritarian corporate state, Valdez Ugalde argues that the design of the system promotes a lack of accountability by political elites and protects their ability to allocate resources selectively⁵⁹.

Clientelistic policy networks allowed the elite private sector to influence economic policy in a consistent manner during this period. Valdivia-Machuca argues that clientelistic relationships between elite state policymakers and elite businessmen evolved into a stable informal policy consultation network, which secured a long standing policy of ISI from 1936 to 1984⁶⁰. He calls this state-business policy network an Informal Consultation and Exchange System or ICES, and considers it a stable informal institution of the Mexican political economy because it was flexible enough to adapt to the political economy's changing circumstances. In the ICES model, elite individuals, through elite political and economic networks with different levels of access to the Presidency, interacted informally and at once horizontally and vertically to produce a foreseeable economic outcome⁶¹. Historically, the ICES prospered as an

Translation provided by author. Francisco Valdes Ugalde, "La corrupción y las transformaciones del burguesía en México, 1940-1994" in *Vicios Públicos, Virtudes Privadas: La Corrupción en México*, coord. Claudio Lomnitz, (CIESAS, 2000), 197

⁵⁹ Francisco Valdes Ugalde (2000), 196, *Id. Cit.*

⁶⁰ He defines policy networks as:

"[...] a pattern of relatively stable relations through which state and private actors negotiate their interdependent interests. Here, the key concept is interdependence [...]. The groups that have resources that the state perceives to be important for particular goals will probably be incorporated into the policymaking process and vice versa. Accordingly, these groups will often influence policy outcomes more than those groups that are excluded."

Arnulfo Valdivia-Machuca (2005), 36-39, *Op. Cit. Supra* 6

⁶¹ In Valdivia-Machuca's work the ICES is defined as "a collection of informal institutions [...]"; "[...] a system constituted by at least seven policy networks that operated in the economic areas of the Mexican government from 1936 to 1984. The system linked the public and private sectors through the exchange of information and resources. This relation seems importantly to have influenced policy-making as well as economic and political stability." The study proposes, first, that the ICES is an

institution because it had “[...] two chief goals: (i) to maintain economic stability; and (ii) to promote industrialization [through ISI]. The prominence of the ICES stems from these two goals being also the main objectives of the Mexican State after 1934 [...]”⁶². The ICES could also be construed as proof of a continuity of more sophisticated VPI coalitions sustaining a system of selective grant and enforcement of property rights, as described by Haber et al. (2003).

5. Import-substitution-industrialization (ISI) policies and the rise of industrial conglomerates or grupos

ISI was a formal economic policy guiding state activity from the 1930s until its decline in the 1970s, and demise in the early 1980s; which coincides with the arc of rise, stability, and decline of the PRI corporate system. ISI policies were originally aimed at breaking Latin America’s dependency on developed economies⁶³. From the

informal institutionalized network of Mexico (the network is normative in the public policy process); second, elites in the former Mexican authoritarian corporate state worked with state policymakers to establish general favorable long-standing public policies; third, formal state institutions (such as the President and his cabinet), interact with formal and informal private elite institutions and organizations of the corporate state (such as favored or high ranking businessmen, and state sanctioned and non-sanctioned business organizations), in the policymaking processes; and fourth, the ICES was a horizontal accountability mechanism which checked the omnipotent PRI President in a system in which Congress and the Judiciary substantially lacked such capacity. Historically, the ICES prospered as an institution because it had “[...] two chief goals: (i) to maintain economic stability; and (ii) to promote industrialization. The prominence of the ICES stems from these two goals being also the main objectives of the Mexican State after 1934 [...]”. The result of the ICES was the establishment of ISI policies in Mexico, in force until the early 1980s. The author also claims that the breakdown of the ICES accelerated the 1982 economic crisis. Arnulfo Valdivia-Machuca (2005), 169-197, *Op. Cit. Supra*

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⁶² Arnulfo Valdivia-Machuca (2005), 73-74, *Op. Cit. Supra* 6

⁶³ ISI asserted that the specialization of Latin America on raw materials and the North on manufacture, which were capital intensive, led to the subordination and continuing transfer of wealth to the developed world since terms of trade always moved against the resource supplying nations. In other words, the benefits of growth were always concentrated outside Latin America and would be until a different balance in trade specialization could be established. Economic dependency was viewed as an inheritance of colonialism, because the need to rely on the markets of developed nations continued subordination. ISI policies were thus linked to dependency theories. Dependency theories advocated that Latin America and other developing regions needed to make an effort to develop homegrown

1930s to the late 1970s, Mexico applied protectionist, nationalistic economic policies, in which the government intervened in specific industrial areas through regulatory incentives such as trade tariff barriers or subsidies to national industry in order to guide economic growth purposefully out of dependency⁶⁴. Regulatory restrictions and benefits were aimed to steer domestic capital into certain target areas of industrialization, which on the one hand resulted in protection of national industry

industries that would satisfy internal consumer demands and eventually satisfy demand for intermediate and capital goods. ISI policies were meant to break “dependency” of Latin American countries to foreign capital, and aimed to establish a homegrown industrial base that would support long-term development. See James M. Cypher, *State and Capital in Mexico: Development Policy Since 1940*, (Westview Press, 1990); See generally Werner Baer, “Import Substitution and Industrialization in Latin America: Experiences and Interpretations”, *Latin American Research Review*, Vol. 7, No. 1. (Spring, 1972): 95-122, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0023-8791%281972%297%3A1%3C95%3AISAIL%3E2.0.CO%3B2-D>; René Villarreal, *Industrialización, deuda y desequilibrio externo en México: Un enfoque neoestructuralista (1929-1997)*, (Mexico: Fondo de Cultural Económica, 3a edición, 1997); ISI policies were originally aimed for late-comers to industrialization such as post-war Japan and Germany. Therefore, Latin American countries were considered “late late” industrialists. The objective of ISI policies for developing nations was to make them export-competitive, so that:

“(a) Through exports they would overcome whatever obstacles of market size limit their growth or prevent their establishment.”; “(b) Through exports they would loosen the balance-of-payments constraint which may otherwise prevent capacity operation of existing industries as well as establishment of new industries”; and “(c) Finally, by competing in world markets, industries would be forced to attain and maintain high standards of efficiency and product quality and would thereby acquire defenses against oligopolistic collusion and decay to which they often succumb in highly protected, small local markets.” However, by the late 1960s, there was a widespread belief in the failure of ISI policies to draw Latin America out of underdevelopment. Albert O. Hirschman, “The Political Economy of Import-Substituting Industrialization in Latin America”, *The Quarterly Journal of Economics*, Vol. 82, No. 1. (Feb., 1968): 24, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0033-5533%28196802%2982%3A1%3C1%3ATPEOII%3E2.0.CO%3B2-1>

⁶⁴ For example, in 1970, almost 80% of imports required government licensing compared to 25% in 1956. Strict quantitative controls for imports were also set so that by 1970, 75% of imports were controlled. This meant that the private sector had to petition the bureaucracy to obtain adequate permits to introduce any type of goods (capital, intermediary, or consumer). Benefits were likewise broken down according to a diversity of norms regulating loan programs (such as privileged access to restricted imports, guarantees against investment loss, interest ceilings, large-scale borrowing), subsidies (tax exemptions, tariff protection, price supports, subsidies, provision of information on investment opportunities, subsidies on equipment), and normative exemptions (labor law exemptions in agricultural holdings and exemptions on foreign investment). The 1941 Law of New and Necessary Industries granted tax exemptions (up to 40% on income) for domestic industries supportive of ISI, as well as a subsidy (65%) on machinery and equipment that represented capital goods and technology that the Mexican industry could not secure. René Villarreal (1997), 75-96, 89, *Id. Cit. Supra* 63; see also Dale Story, *Industry, the State, and Public Policy in Mexico*, (University of Texas Press, 1986b), 33-39

from competition, and on the other, in an overregulation of business activity⁶⁵. This overregulation allowed the authoritarian state to manage selective grant of benefits,

⁶⁵ See James M. Cypher (1990), 62-66, *Op. Cit. Supra* 63; The intent of the Mexican government was to keep the private sector active within those economic areas that the government prioritized for development under ISI policies and to keep the private sector out of those areas that the state wanted to exclusively develop. Regulation was meant to guide resources into state-sponsored economic activities. To this end, the bureaucracy and its administration of regulations was a highly effective system for providing government control over wealth distribution. Due to this authoritarian control over economic activity, patterns of regulatory supervision developed, identified by Purcell and Purcell as “regulatory distribution,” “indirect, piecemeal regulation,” and “regulatory redistribution.” The authors define different wealth distribution strategies of the state over business, depending on the degree of regulatory intervention by the bureaucracy in business activity. The authors say that “regulatory distribution” existed when the state attempted to promote certain economic activities and high-priority development goals by establishing barriers or benefits through law. “Regulatory distribution” was thus evidenced by the existence of many different (disaggregated) norms applicable to a commercial activity. For example, the government regulated the import of foreign goods by applying devaluation, tariff protection, import quotas, and import licenses. In many cases the state even used the principle of “state interest” to justify dramatic regulatory actions of wealth distribution, such as expropriation. The government’s ability to closely supervise business was of course also related to the existence of an authoritarian corporate state which intervened heavily into the economy, which intervention was characterized by (1) pervasive government involvement in the economy, (2) authoritarian political control, (3) unorganized constraints or uncoordinated bureaucratic activity, and (4) the existence of a relatively well-defined ideology of “state interest.” For the co-authors it was surprising to learn that “regulatory distribution” was the main use of law for governing the business sector, since they noted that elsewhere in the Mexican political system, regulation was “informal, personalistic, and piecemeal.” This type of “indirect, piecemeal regulation” was characteristic of those economic areas in which the government wanted to restrict the use of private property and the incursion of private investment. In these economic areas, already designated for development by the state, the government bureaucracy was coincidentally too uncoordinated to attempt serious direct regulation of private investment. That is, in economic areas in which the state had no interest in allowing private investment, permits or filings were ignored or detained in red tape without consequences for the executive branch (“indirect, piecemeal regulation”). Any attempt by private actors had to result in personalism and corruption. Regulatory action infrequently took the form of “regulatory redistribution.” Purcell & Kaufman-Purcell note that by forcing the business sector to expend time and resources on complex rules, regulations, and red tape, even for the purpose of obtaining incentive benefits, the state pushed the private sector to integrate into the political system. The complex nest of regulations over business activity made it necessary for the authorities to exercise case-by-case discretion in interpreting laws and norms in order to allow and support the introduction of useful investments, or to adapt norms to executive directives. The red-tape bureaucracy was also plainly useful for disincentivizing investment where the state was interested in keeping private investment out, or on occasion, for expropriating private property as a regulatory means of redistributing resources. John F.H. Purcell and Susan Kaufman Purcell (1977), 192-197, 200-212, *Op. Cit. Supra* 45

Valdivia-Machuca considered the red-tape bureaucracy one of the seven principal policy networks of the ICES. Although this policy network lacked hierarchical influence, it was useful as a pressure gauge to measure opposition and problems which might be arising in the lower echelons of business. “Regulatory redistribution” refers to those cases in which regulation directly leads to redistribution of resources. An extreme case is nationalization. Although not common, notorious cases of nationalization (or expropriation) of land or industry, in which the state dramatically used or changed regulation to

such as subsidies, and selective enforcement of rules, such as exemptions from fines, import quotas, and taxes.

In the early stages of ISI, the policy objective was to substitute imported consumer goods with locally manufactured non-durable consumer goods; (also known as *horizontal ISI*)⁶⁶. After 1950, growing social discomfort with cyclical inflationary-devaluation crises forced the Mexican government to change its economic plan and aim for macroeconomic stability as a condition for sustainable economic and social development. The period of this economic plan was termed the period of stabilizing development (*desarrollo estabilizador*) from 1958 to 1970⁶⁷. The change in fiscal policy allowed a stable period of what Story terms, *vertical ISI*⁶⁸. During this period, ISI was geared towards the substitution of intermediate and capital good imports.

Elite business structures evolved in response to ISI policies in Mexico's authoritarian state. In a seminal study, Cordero and Santín addressed industrial *grupos* as the "new economic organization of Mexico"⁶⁹. According to these authors, *grupos* are

redistribute resources among interest groups, did occasionally take place. This was perhaps the single most notable show of force the authoritarian state could exert on private property and towards the private sector. See Arnulfo Valdivia-Machuca (2005), 180, *Op. Cit. Supra* 6

⁶⁶ Dale Story (1986b), 23 *Op. Cit. Supra* 64

⁶⁷ Antonio Ortiz Mena, *El desarrollo estabilizador: reflexiones sobre una epoca*, (El Colegio de México, 1998), 9, 41-42, 49, 287

⁶⁸ Dale Story (1986b), 23, *Op. Cit. Supra* 64

⁶⁹ Salvador Cordero and Rafael Santín, "Los grupos industriales: una nueva organización económica en México," *Cuadernos del CES*, No. 23, (Centro de Estudios Sociológicos, El Colegio de México, 1977). It is debatable that *grupos* were new organizations at all in the Mexican economy. Heredia and historians such as Cerutti make the point that the structure of business groups existed in Mexico even prior to the Revolution. Blanca Heredia (1980), 283, *Op. Cit. Supra* 50; "Que nadie descubra en 1982, entonces, estilos de comportamiento en lo económico y en lo social que – en Monterrey – son parte de

conglomerates of companies bound through vertical and horizontal ties that include common family, ownership and management relationships, and which have a wide diversification in industry in order to offset market instabilities in a developing nation⁷⁰. In regards to *grupos*, Tarun Khanna and Rivkin remind us that business groups are present all over the developing world, as a type of business structure best

una historia no solo cotidiana sino casi secular.” Mario Cerrutti, *Burguesía y Capitalismo en Monterrey (1850-1910)*, (Mexico: Claves Latinoamericanas, Primera Edición, 1983), 185

⁷⁰ The leadership of the *grupo* was also usually centered in the industrial company favored by ISI policies, and which often acted as the holding company. Ownership, directorship, and management of large companies in Mexico overlapped frequently because a holding company maintained the group together. In terms of the characteristics of *grupos*, the authors observed that, “[...] a reduced number of individuals or family members (nuclear or extended) controlled a great part or the totality of the shares of companies that composed the *grupo*, and at the same time, occupy key offices in their management [...]”. The word *grupo* was often used in the legal denomination of the holding company. However, companies may be publicly recognized as belonging to a business group or *grupo*, even if their legal denomination is not linked to a *grupo*, because of ownership and directorship ties. Cordero and Santin summarize basic characteristics of a *grupo* are: “ (...) (a) cluster of relatively powerful and stable companies or enterprises, related amongst themselves by capital and the power of decision making of common directors and (b) production of goods and services for different markets in the industrial sector, which can be very diversified and cover ample sectors of the industrial sectors.” The authors also mention that *grupos* are a response to imperfect market conditions in Mexico, which at the time included: (a) insufficient production of resources; (b) insufficient technical and capital capacities of employees; (c) insufficient administrative and entrepreneurial capacities; and (d) a lack of information and uncertainty in decision making over investments and production. Salvador Cordero and Rafael Santín (1977): 3-12, 20-23, 72, *Op. Cit Supra* 69; also Salvador Cordero, Rafael Santín, and Ricardo Tirado, *El Poder Empresarial en México*, (Terra Nova, 1983), 35-65, 72, 90-112; On family ties within business groups, Larissa Lomnitz writes that management through family and trusted partnerships, as well as through the social networks managed by wives of businessmen, was essential because it improved information flows that were closed to elite circles of business families. Offspring of the families (mostly male) are trained in family companies since their youth to eventually take over management at the death of their father. Business is part of the identity of these families, and these families have an emotional tie to their enterprises as sources of prestige and power in Mexican society. Over time, the largest groups adopted the structures of modern corporations for their businesses. However, networking in social environments remained essential for screening business possibilities. Families have networked relationships in society, business, and government to facilitate access to significant business information, which is available to only a closed circle of elite actors. Lomnitz explained that elite business families managed three main networks to enhance their business potential. Social networks (which include carrying out social and family rituals, such as baptisms, marriages, dinners, attending clubs, etc.); action networks which have an economic purposes (involving placing extended family members, even if of a different class, in positions requiring trustworthiness), and power networks (which involve knowing the right person in the government). These networks are used to assist the flow of information. She even points out that wives hold a special role as public relations officers, since a good wife needs to be “knowledgeable in business issues and a good conversationalist in order to separate the important information from irrelevant gossip.” Larissa Adler Lomnitz and Marisol Pérez Lizaur, *Una familia de la elite mexicana, 1820-1980: Parentesco, clase y cultura*, (Mexico: Alianza Editorial, 1993), 123-144

fit for dealing with negative investment environments⁷¹. Even today, *grupos* are generally characterized by specific ties, such as family (social), ownership, interlocking boards, and indirect equity ties⁷².

In another study, Khanna and Fisman argue that business groups provide alternative solutions for development in less advanced economies, because they generate mechanisms to enforce property rights where the rule of law is too weak to protect them⁷³. Khanna also studied the impact of business groups on social development, and he concludes that “group affiliation is simultaneously welfare enhancing, since groups can be responses to market failures, and welfare reducing, since groups can be used to exploit minority shareholders in particular.”⁷⁴ He further agrees that there is evidence that “[t]he most direct way through which groups might keep out domestic competitors is through obtaining preferential access to permits and licenses and

⁷¹ Tarun Khanna and Jan Rivkin, “Ties that Bind Business groups: Evidence from an Emerging Economy”, *Competition & Strategy Working Paper Series*, No. 00-068, (Harvard Business School, April 2000)

⁷² Tarun Khanna and Jan Rivkin (2000) *Id. Cit. Supra* 71

⁷³ Tarun Khanna and Raymond Fisman, “Facilitating Development: The Role of Business Groups”, *World Development*, Vol. 32, No. 4, (2004): 609–628

“A defining characteristic of developing countries is the inadequacy of basic services normally required to support organized economic activity. One way in which the private sector acts to facilitate development is through investments orchestrated by agglomerations of firms called business groups. Such groups dominate the landscape of virtually all developing countries. Our study of plant location decisions in India shows that group-affiliates are more likely to (profitably) locate in less-developed states than unaffiliated firms; the magnitude of this “group effect” is large and significant. Furthermore, this result is stronger for more recent location decisions that are less likely to have been driven by political economy considerations. We suggest that this is because the scale and scope of groups, and the de facto property rights enforcement within groups in environments where legal enforcement is lacking, permit them to overcome some of the difficulties that impair production in underdeveloped regions.”

⁷⁴ Tarun Khanna, “Business groups and social welfare in emerging markets: Existing evidence and unanswered questions”, *European Economic Review* 44 (2000): 758

implicitly denying these to de novo entrants”⁷⁵. However, he cautions that very few studies exist on how groups work, and suggests that “an extreme characterization of groups as purely socially harmful or purely socially welfare enhancing appears unsupported by the evidence”⁷⁶. In any case, Khanna’s studies suggest that business groups are organizations suitable for dealing with imperfect market conditions, including among other things the protection of their property rights where the legal system does not provide protection.

When Cordero and Santín tried to understand which industries made *grupos* thrive, it was clear that the most important domestic capital investment was concentrated in industries promoted by government through ISI⁷⁷. The co-authors also realized that the top 10 *grupos* were also responsible for 60.01% of total production of the top 50

⁷⁵ Tarun Khanna (2000): 757, *Id. Cit. Supra* 74

⁷⁶ “[...] Evidence is sorely needed on the extent to which groups facilitate rent-seeking or the exercise of market power, and on the extent to which the existence of groups hampers the future development of markets”. This leads Khanna to suggest that “In emerging markets, it may be that focusing on building the institutions that reduce market failures may be the first-order issue, rather than regulating firm behavior which may be seen as a response to existing market failures.” Tarun Khanna (2000): 758, *Id. Cit. Supra* 74

⁷⁷The main productive activity of the largest *grupos* was in basic and nonbasic consumer goods, which were two of the main types of goods directly promoted by the official policy of import substitution at that moment. Of their original sample of 168 enterprises, the authors showed that 51.2% of companies were in the production of consumer goods, 29.7% in nonbasic consumer goods, 17.3% in basic intermediate goods, 7.2% in capital goods, and 80.9% were in the production of consumer and nonbasic consumer goods. ISI government policies had given Mexican entrepreneurs the opportunity to profit in a protected business environment. The 639 companies reviewed by the authors were distributed in industry in the following manner: food (27.54%), textiles (15.02%), drinks (8.8%), chemical products (8.45%), basic metals (6.2%), metal products (6.2%), paper and cellulose (5.63%), non-metal minerals (5.63%), electronic equipment (4.23%), graphic arts (3.76%), tabaco (3.14%), transport products (2.82%), clothing (1.9%), wood and cork (1.41%), leather (0.78%), machinery (0.78%), oil derivatives (0.31%), furniture and home accessories (0.16%). Cordero and Santín mention that *grupos* are “[...] a product of adaptation [...] to the governmental incentives which sought to promote industrialization during various decades”. ISI policies and the legal framework supporting ISI, pushed economic growth through a monopolistic phase, which was characterized by these business or industrial *grupos*. ISI promoted substitution of all imported goods, consumer, intermediate and capital. Salvador Cordero and Santín (1977): 8-9, 66, *Op. Cit Supra* 69

grupos, equivalent to 46.93% of total production of a sample 131 *grupos*⁷⁸. Thus, in the economy, as in politics, there was a pyramidal organization of wealth and power concentration through favored business groups.

6. *Economic performance and political consequences, in the late 1970s*

For three decades (1940-1970), the Mexican economy experienced an average annual industrial growth rate of 6.9%⁷⁹. For the same time period, compared to Argentina, Chile, Brazil, and Venezuela, only Venezuela had a higher average annual growth rate than Mexico (7.7%), which is attributable to Venezuela's earlier use of oil revenues to finance manufacturing⁸⁰. Mexico's economic growth was termed a "miracle" and the country became generally recognized as an advanced developing nation⁸¹.

However, in the late 1970s, PRI Presidentialism began to suffer macroeconomic and political instabilities. These instabilities emerged from internal causes such as a rising opposition that clamored for increased political pluralism⁸² and an income inequality

⁷⁸ Salvador Cordero and Santín (1977): 16-17, *Op. Cit Supra* 69

⁷⁹ Dale Story (1986b), 20-21 *Op. Cit. Supra* 64

⁸⁰ Dale Story (1986b) *Id. Cit.*

⁸¹ Roger D. Hansen, *The Politics of Mexican Development*, (John Hopkins Press, 1971), 1-10, 41-69

⁸² On October 2, 1968 at the *Plaza de Tres Culturas* in Tlatelolco, Mexico City, students, teachers, and protesters met with an assault by armed police that ended in the disappearance or death of approximately 300 people. This incident bore forth a generation of elite intellectuals, activists, and politicians who formed Mexican opinion supporting increased political pluralism. Mexican intellectuals of this generation were witnesses to or victims or critics of the government's violent repression of the student movement of 1968 and of subsequent incidents. Intellectual figureheads of that generation include Luis Gonzalez de Alba, Raúl Álvarez Garín, Professor Heberto Castillo, Elena Pontiatowska, Octavio Paz, Carlos Fuentes, and Sergio Aguayo. Octavio Paz (2000 Nobel Prize in Literature) resigned from his post as Mexican Ambassador in India in protest against government action against the student movement. Others of these intellectuals were directly affected by the massacre in the Plaza de Tres Culturas. See Julia Preston and Samuel Dillon, *El Despertar de México: Episodios de una búsqueda de*

gap compounded by a population explosion⁸³; but they also arose from the inability of the institutional endowment and its carriers to adapt to the collapse of the Bretton Woods system, and make a timely yet monumental shift away from ISI policies⁸⁴. Instead of pursuing a timely macro-economic reform, the Mexican state began to

la democracia, (original version in English titled *Opening Mexico: The Making of a Democracy*), (Ed. Oceano, 1st reprint in Spanish, 2004), 33-50

⁸³ From 1940 to 1980, Mexico's population would also increase from 19.6 million to 71.9 million people. The population nearly tripled in 40 years, with peak years of growth in the decade from 1960 to 1970. In that decade, the population rose from 35 million to 50.7 million, a 45% increase with a 3.8% average annual growth rate. In addition, estimates from the census of 1970 show that 26.8% of the economically active population of Mexico was unemployed. Although the Mexican economy had been growing, it had done so through a radical inequality of wealth distribution. ISI policies had led to "growth without development." Hansen views ISI policies to have provoked a disparity of wealth through the capital and income concentration in favor of elite industrialists. In 1963, 20% of Mexican families in the highest range of society received 60% of the national income, while 50% of Mexican families in the lowest range of society shared only 15.5% of the national income. Similar statistics from an IDB publication show that in 1977, the poorest 40% of households received 11.5% of income distribution, while the top 10% of households had 36.3% of income distribution. Inequalities in wealth distribution became more extreme due to this population explosion that took place in the last decades of ISI. Roger D. Hansen (1971), 71-95, 97-131, *Op. Cit. Supra* 81

⁸⁴ In 1944, an international system of fixed exchange rates under the Bretton Woods Agreement was established to provide postwar monetary stability. In 1971, the Bretton Woods system collapsed and a floating system of exchange rates was established by the United States under the Nixon administration. Mexico, like many other developing countries under ISI, had been maintaining an artificially high exchange rate for the peso to discourage imports. On the one hand, the fixed exchange rate was a source of protection for national industries; on the other hand, government controls on the exchange rate created an incentive for entrepreneurs and bankers to profit from promoting capital flight. Early in his term, López Portillo would face the choice of whether or not to accede to membership in the General Agreement on Trades and Tariffs ("GATT") and thus adjust to the changing international monetary and trade dynamics. Instead, he responded to pressure from the business chambers, many of which represented industrialists profiting under the protection of ISI policies, and deferred GATT membership as well as a badly-needed peso devaluation. The system pegged a country's currency to a fixed parity (plus or minus 1%) to gold. However, in practice that parity became fixed to the dollar. The system worked as long as the United States held sufficient dollar reserves and a trade deficit that provided the system with liquidity. However, the system became unstable when Japan and Europe generated trade deficits and reserves of their own that began to closely match the United States, alongside the fact that an international monetary market was created under the system. This promoted speculation between the value of gold and the dollar, as well as between strong and weak currencies which were artificially over or undervalued and from time to time were adjusted. *See generally* Michael D. Bordo and Barry Eichengreen, ed., *A Retrospective on the Bretton Woods System: Lessons for International Monetary Reform* (National Bureau of Economic Research Project Report, 1993); Saúl Escobar Toledo, "Rifts in the Mexican Power Elite, 1976-1986", in *Government and Private Sector In Contemporary Mexico*, ed. Sylvia Maxfield and Ricardo Anzaldúa M., Monograph Series 20, (Center for U.S.-Mexican Studies, University of California, San Diego, 1987): 65-88; Dale Story, "Industrial Elites in Mexico: Political Ideology and Influence", *Journal of Interamerican Studies and World Affairs*, Vol. 25, No. 3 (Aug., 1983): 351-376, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0022-1937%28198308%2925%3A3%3C351%3AIEIMPI%3E2.0.CO%3B2-1>

increase its intervention into the economy by absorbing productive activities and implementing direct redistributive policies in the late 1960s and through the 1970s⁸⁵.

In 1977, as a means to negotiate social peace, President López Portillo also conceded an electoral reform that included a rule for “proportional representation” that would secure 25% of the seats in the Federal Congress to opposition parties⁸⁶. This reform

⁸⁵ During the late period of ISI implementation (from 1970-1982), the Mexican state stepped in to take over failing sectors of industry and heavily expanded its role in the economy. Under President Echeverría (1970-1976), the decline of ISI was manifested by a rapid encroachment of the state into the economy through state companies and state run industries. State companies were known as *empresas paraestatales*, due to their nature as state firms that ran parallel to other government traditional structures. From 1970-1975, *paraestatales* jumped from 278 to 493. *Paraestatales* were for the most part small, however the top ten *empresas paraestatales* concentrated 89.5% of total capital and 76.9% of total sales in the parasector. Furthermore, 78.5 percent of the state’s industrial output was concentrated in intermediate goods, which evidenced the state’s attempts to maintain ISI policies. Main state companies included PEMEX, CFE, Fundidora Monterrey (steel), Siderurgica Las Truchas (steel), Ingenios Azucareros (52 companies), FERTIMEX (fertilizer), Altos Hornos de México (steel), Industrias Peñoles (which owned 21 firms), Mexicana de Cobre (copper), and Grupo Condumex (19 firms). James M. Cypher (1990), 96-97, 131, *Op. Cit. Supra* 63

⁸⁶ Growing opposition to the PRI system prompted a legal concession in electoral laws supporting more pluralistic policies in 1977, but a true impact on *presidencialismo* would only be evidenced in years to come. At the time, the electoral reform was another example of the flexibility of the Mexican authoritarian corporate state to adapt to social pressure by being inclusive of major popular concerns. In retrospect, this small institutional change became the rule on which formal democratic transition evolved in Mexico. Changes in the configuration of Congress are attributed most importantly to the 1977 Federal Law of Political Organizations and Electoral Processes (*Ley Federal de Organizaciones Políticas y Procesos Electorales* or LFOPPE) which improved upon a new electoral configuration for the Chamber of Deputies to secure seats for minority parties with a minimum national vote: “The LFOPPE adopted a mixed electoral system for the election of the federal *diputados* [representatives] (a preponderant majority system, with new elements of proportional representation or *representación proporcional*); at that time, the Congress consisted of 400 *diputados* of two types: there were 300 *diputados uninominales*, who were elected by majority vote in 300 single-member districts into which the country was divided geographically; and 100 *diputados plurinominales* (also called *diputados de representación proporcional*), who were elected from separate regional lists of candidates submitted by each party (known as *circunscripciones plurinominales*) would be allocated in the *Cámara de Diputados* for minority political parties. [...] Minority parties receiving at least 1.5 per cent of the vote in all regional lists of *plurinominal* elections received a number of *plurinominal* seats that was proportional to their percentage of the *plurinominal* vote, [...]”. The 1977 electoral reform secured that a minimum of 25% of seats to be allocated to the opposition parties. S. Zamora et. al (2004), 166-167, *Op. Cit. Supra* 43

would fortify a downward trend in the majority hold of the PRI over Congressional seats⁸⁷.

Echeverria's (1976-1982) and Lopez Portillo's (1976-1982) *sexenios* became known as the Tragic Dozen, in which most of the economic growth and stability gained by Mexico prior to those years was lost⁸⁸. These twelve years of Mexican ISI policy ended in an oil boom followed by an oil crisis and peso devaluation⁸⁹; massive borrowing by industrialists from external banking sources followed by a national debt crisis⁹⁰; monetary speculation through capital flight and bankruptcy of state reserves

⁸⁷ In pre-transition times, the PRI majorities started a downward trend as an effect of electoral reforms aimed at appeasing political confrontation during the PRI hegemonic period. In 1949 the PRI had a 96.6% majority in the Chamber of Deputies, 94.41% in 1955; 96.6% in 1961, 81.8% from 1973-1976, and 74% from 1979-1982. In the Senate, the PRI held an overwhelming majority until 1988-1991, with 93.8% of seats.

“Table 5.1: Percentage of seats in Cámara de Diputados won by each party

	1946	1949	1952	1955	1958	1961
PRI	91.16	96.60	93.79	94.41	94.41	96.6
PAN	2.72	2.72	3.11	3.73	3.73	2.8

Source: Molinar Horcaditas, J.F., *Elecciones, Autoritarismo y Democracia en México* (El Colegio de México, doctoral thesis, August 1989), 42, as quoted in S. Zamora et. al, (2004), 165, *Op. Cit. Supra* 43; and references to the composition of Congress in pre-transition Mexico, in Ricardo Becerra, Pedro Salazar, and José Woldenberg, *La Mecánica del Cambio Político en México: Elecciones, partidos y reformas*, 2nd Ed, (Cal y Arena, 2000), 69-70.

⁸⁸ James M. Cypher (1990), 87-126, *Op. Cit. Supra* 63

⁸⁹ During López Portillo's *sexenio*, new oil fields were discovered, and his administration decided to rely --almost exclusively --on new oil income to expand and finance Mexico's overburdened social welfare state and to relieve the external balance of payments. In 1981 there was a world wide recession in the oil industry. Oil prices plummeted, and the Mexican government devalued the peso by 65%. Celso Garrido Noguera and Enrique Quintana Lopez (1987) in ed. Maxfield and Anzaldúa, 105-126, *Op. Cit. Supra* 84

⁹⁰ Mexico's industrialization was initially supported by internal capital, but in the 1970s the *grupo* industrialization structure stopped thriving since Mexico lacked a more developed internal financial market. Mexican credit institutions functioned almost exclusively as intermediaries to external credit lines. Business entrepreneurs shifted their capitalization strategies and began to substitute personal investment and even their companies' own capital for long-term external debt. Into the late 1970s they found easy financing from external creditors because Mexico was able to guarantee these debts with its booming oil reserves. Many private business conglomerates of the industrialization period were heavily indebted to external banks, and the peso devaluation forced the government to bail out indebted Mexican industrial conglomerates. Jorge Basave Kunhardt, *Los grupos de capital financiero en Mexico*

that ended in bank nationalization⁹¹; and an open struggle between state and business that concluded in ruptured relationships with the private sector⁹². Valdivia-Machuca argues that the crisis was a result of a breakdown in the ICES. He argues that the breakdown was a consequence of the state under Echeverría becoming “rentist” through access to large foreign debt backed by oil reserves and predatory takeover of national industries, which broke the system of checks and balances between industrialists and government⁹³. Such “rentist” behavior continued under López Portillo, and a complete breakdown of the ICES was only avoided during this period because his indebted government continued to subsidize domestic industry and allow monetary speculation by bankers⁹⁴. During this period the financial axis of the ICES, which for a long time had been allowed to determine government financial policy,

(1974-1995): *La etapa de consolidación*, (UNAM: Instituto de Investigaciones Economicas, Ediciones Caballito, 1996), 53-59, 67-98.

⁹¹ The oil price collapse was followed by mass exodus of domestic reserves through privately owned banks, many of which were affiliated to the indebted industrial groups. As the peso devaluated, the redistributive effect of the devaluation was in favor of those who exercised capital flight. Lopez Portillo was forced to declare a bank nationalization (expropriation) to avoid further capital flight and bankruptcy of state reserves. Capital flight alongside the prior indebtedness of the government was bankrupting the Mexican state.

“The link between indebtedness and capital flight is clear and direct (...). In 1981 and 1982, the public sector’s net indebtedness ascended to 33 billion dollars, while capital flight during this period had been conservatively estimated at 20 billion dollars. The cumulative peso value of capital flight rose from 276 billion in 1981 to 4.7 trillion by the end of 1982. In constant pesos, this represents an increase of 884.6 percent. To put it another way, cumulative capital flight since 1970 equalled 6.5 percent of GDP in 1980; by 1982 it represented 50.6 percent.”

Celso Garrido Noguera and Enrique Quintana Lopez (1987) in ed. Maxfield and Anzaldúa, 115, *Op. Cit. Supra* 84; With the bank nationalization, former owners were stripped of stock in many industrial enterprises. This sudden turnover of private resources further increased the incursion of state controls on economic activity. From 1976 to 1982, parastate firms and organizations increased to 1,155. By 1984, the total number of parastate firms had increased to 1,212. *see* Jacques Rogozinski, *La privatización en México: Razones e impactos*, Editorial Trillas, (1997), as cited in *La Constitución y el Desarrollo Económico de México*, Isaac M. Katz, (Cal y Arena, 1999), 348; James M. Cypher (1990), 133, *Op. Cit. Supra* 63

⁹² Paraphrasing, James M. Cypher (1990), 87, *Op. Cit. Supra* 63

⁹³ Arnulfo Valdivia-Machuca (2005), 140-141, 176-178, *Op. Cit. Supra* 6

⁹⁴ Valdivia Machuca, quotes Asdrúbal Baptista’s (1997) definition of a “rentist state” as “one that continually receives ‘income of international origin that is significant in relation to internally-generated income’”. Arnulfo Valdivia-Machuca (2005), 141-157, 213-214, *Op. Cit. Supra* 6

became alienated from the President, which only worsened the 1982 crisis when the President stopped counting on their expertise⁹⁵. To end his term, López Portillo resolved a rift in the PRI in favor of a presidential successor--Miguel de la Madrid--who as part of the financial axis of the ICES could secure future liberal macroeconomic reforms to solve the crisis. This would in fact reintegrate the ICES into a primarily financially (rather than industrially) oriented policy network⁹⁶.

B. RENT-SEEKING PRESIDENTIALISM IN A FLUX: THE PRIVATIZATION YEARS
PRI Presidents Miguel de la Madrid (1982-1988) and Carlos Salinas de Gortari (1988-1994) operated under the same formal institutional endowment of the “rent-seeking Presidential system” described in the previous section, except that the system had

⁹⁵ “This policy network was constituted by the Secretariat of the Treasury, the Bank of Mexico, and the Mexican Bankers Association (ABM), and the Mexican Association of Insurance Institutions (AMIS). [...] Other groups related to the network are the CMHN and the CCE through interlocking membership with the ABM; Comparmex; the national and multinational firms linked to the ABM; and the AMCHAM (through ideological influence. The ‘financial axis’ was the stronghold of the monetarist-liberalist officials of the Mexican Government”. Arnulfo Valdivia-Machuca (2005), 176, *Op. Cit. Supra* 6

⁹⁶ Arnulfo Valdivia-Machuca (2005), 151-168, *Op. Cit. Supra* 6; Dramatic changes in economic policy in Mexico took place, as a consequence of López Portillo’s choice in presidential successor. In designating Miguel de la Madrid as his presidential successor, López Portillo resolved an internal debate within the PRI between a camarilla of *políticos* and *técnicos*. *Políticos* wished to continue pursuing nationalistic policies supporting a welfare state and subsidization of industrialization, while the *técnicos* were characterized as a group of younger, foreign-educated economists and lawyers which supported sweeping macroeconomic reforms for restructuring and stabilizing the economy following a new model of development based on liberal economics. See generally Roderic Ai Camp, “El tecnócrata en México,” *Revista Mexicana de Sociología*, Vol. 45, No. 2 (Apr., 1983): 579-599, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0188-2503%28198304%2F06%2945%3A2%3C579%3AETEM%3E2.0.CO%3B2-A>; Roderic A. Camp, “The Political Technocrat in Mexico and the Survival of the Political System,” *Latin American Research Review*, Vol. 20, No. 1 (1985): 97-118, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0023-8791%281985%2920%3A1%3C97%3ATPTIMA%3E2.0.CO%3B2-S>; Steven E. Sanderson, “Presidential Succession and Political Rationality in Mexico,” *World Politics*, Vol. 35, No. 3 (Apr., 1983): 315-334, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0043-8871%28198304%2935%3A3%3C315%3APSAPRI%3E2.0.CO%3B2-9>

become unstable. During these two administrations, the Presidents were able to exercise their authority, including by way of authoritarian control, to secure reforms that provided a solution to Mexico's financial crisis and supported an open market economy⁹⁷. However, as a consequence, constant incremental changes took place that significantly reduced the legitimacy of PRI *presidencialismo* and the authoritarian corporate state in Mexico, with the effect of securing a competitive multiparty electoral system by the end of Salinas' term in office.

This section provides a brief review of the primary institutional changes in the rent-seeking presidentialist system, which include:

- (1) Neoliberal economic policies and legal-market reforms,
- (2) Reform of the authoritarian corporate state as a consequence of privatization reforms, labor conflict, the rise of party plurality, and spontaneous movements from within civil society.
- (3) Renewal of state-business coalitions and the rise and continuity of *grupos* under privatization, and
- (4) Unsolved unemployment and wealth disparity under privatization.

⁹⁷ The success of the Salinas administration was often attributed to its ability to impose top-down decisions. Salinas is quoted as having said:

“When you are introducing such a strong economic reform, you must make sure that you build political consensus around it. If you are at the same time introducing additional drastic political reform, you may end up with no reform at all. And we want to have reform, not a disintegrated country. (...) The priority is economics.”

New Perspectives Quarterly 1991, 8, as cited in Alina Rocha Menocal, “The Myth of the Infallible Technocrat: Policy-Making in Mexico under the Salinas Administration”, *Journal of Public and International Affairs*, Vol. 9, No. 1 (Spring 1998): 169, http://www.princeton.edu/~jpia/pdf1998/Vol9_Spring98_9.pdf [Last viewed on July 28, 2007].

1. *Neoliberal economic policies, and legal-market reforms*

Changes began with an economic reform based on the Washington Consensus, which aimed to solve the macro-economic instabilities that were felt throughout Latin America with the collapse of the ISI model⁹⁸. The Washington Consensus can be summarized in its three main ideological axioms:

- 1) Open Latin American markets to the world economy through trade liberalization and new regimes facilitating foreign direct investment;
- 2) Reduce government intervention in the economy through privatization as well as increase the professional role of economic ministries through fiscal discipline, balanced budgets, and tax reforms; and
- 3) Increase the significance of the market in the allocation of resources and make the private sector the main instrument of economic growth through deregulation, property rights, and financial liberalization⁹⁹. Since this ideology was similar in principal to that expressed by Adam Smith and David Ricardo; it came to be known as neoliberalism.

In line with the Washington Consensus, neoliberal economics, and conditional loans, Presidents De la Madrid and Salinas transformed the regulatory governance landscape

⁹⁸ This model of reform arose in Latin America in the 1980s and 1990s as a consequence of new policies being implemented and incorporated in conditions on loans being granted by the World Bank, the International Monetary Fund (IMF), the Inter-American Development Bank (IADB), and other Washington-based multilateral organizations to assist Mexico and other Latin American countries out of their debt crisis. This policy for development in Latin American came to be known as the Washington Consensus. Rosemary Thorp, *Progress, Poverty and Exclusion: Economic History of Latin America in the 20th Century*, (Distributed by the John Hopkins University Press for the Inter-American Development Bank and the European Union, 1998): 226-227

⁹⁹ Robert N. Gwyne and Cristobál Kay, ed., *Latin America Transformed: Globalization and Modernity*, (Arnold, 1999), 83-84.

in Mexico¹⁰⁰. De la Madrid negotiated Mexico's entry into the GATT and promoted several legal initiatives that liberalized tariffs and otherwise deregulated trade in keeping with the GATT¹⁰¹. Follow-up commitments to GATT required continued deregulation of ISI tariff structures by issuing new laws such as the 1993 GATT Customs Valuation Code¹⁰²; the 1993 GATT Code on Technical Barriers to Trade¹⁰³; and the 1993 Law of Foreign Commerce (Ley de Comercio Exterior)¹⁰⁴.

In the realm of public administration, President Miguel de la Madrid (1982-1988) introduced laws that reorganized state companies; decentralized state functions; and established budget-planning rules to formalize administration priorities for the budget approved by Congress, thereby improving the financial accountability of the executive branch. De la Madrid also supported new legislation that improved the accountability of public servants and reformed laws regarding government control of public

¹⁰⁰ To resolve the crisis, the Mexican government applied new crisis adjustment and management strategies oriented towards fiscal reform, deregulation of economic activity, and reduction of the role of the state in the economy, and leaned heavily on multilateral lending institutions and conditioned loans. Thacker recalls:

“Mexico received several short-term adjustment and stabilization loans from the IMF, as well as a pair of Trade Policy Loans from the World Bank in 1986 and 1987. These kinds of loans typically specify certain policy goals that the borrower must attain before the next tranche of credit is released. If a borrower did not reach these goals, it would be cut off from both official and private sources of international credit after losing the “seal of approval” of the international financial institutions. [...] While such factors can certainly be exaggerated (see Kahler 1993), and while there are significant conceptual and empirical problems with some of these arguments [...], the influence of these forces is widely considered to constrain severely the options of economic policy makers across the developing world.”

Strom C. Thacker, *Big Business, The State, and Free Trade: Constructing Coalitions in Mexico*, (Cambridge University Press, 2000), 21-22

¹⁰¹ In 1986 Mexico entered the GATT (D.O. 17 July 1986). As a consequence, Mexico enacted the 1988 Mexican Antidumping Code (D.O. 22 April 1988); the 1988 GATT Code on Technical Barriers to Trade (D.O. 20 April 1988); and the 1988 GATT Customs Valuation Code (D.O. 25 April 1988). References taken from S. Zamora et. al (2004) *Op. Cit. Supra* 43.

¹⁰² D.O. 25 April 1993.

¹⁰³ D.O. 20 April 1993.

¹⁰⁴ D.O. 27 July 1993.

resources and property¹⁰⁵. In 1994, during the Salinas administration, a new Federal Law of Administrative Procedure (*Ley Federal de Procedimiento Administrativo*)¹⁰⁶ was approved to increase the efficiency of bureaucratic procedures.

In 1992 under Salinas, Mexico signed the North American Free Trade Agreement (“NAFTA”), which came into force in 1994¹⁰⁷. On May 18, 1994, Mexico delivered the instrument of acceptance to the Organization of Economic Cooperation and Development (“OECD”) Council, and that year Mexico also gained membership into the World Trade Organization (“WTO”), under the obligations of the Uruguay Round¹⁰⁸.

As part of renegotiating Mexico’s external debt with the Bank Advisory Committee, new commitments were made to further open foreign investment in the country¹⁰⁹ and new laws at the national level followed these commitments¹¹⁰. Other laws and

¹⁰⁵ 1982 General Law of National Property (*Ley General de Bienes Nacionales*) (D.O. 8 Jan. 1982, as amended 29 Dec. 1999); 1982 Federal Law of Liability of Public Servants (*Ley Federal de Responsabilidades de los Servidores Públicos*) (D.O. 31 Dec. 1982, last amended 13 March 2002); 1983 Planning Law (*Ley de Planeación*) (D.O. 5 Jan. 1983); 1986 Federal Law of Quasi Governmental Agencies (*Ley Federal de Entidades Paraestatales*) (D.O. 14 May 1986, as amended, 24 Jul. 1992, and 24 Dec. 1996). References taken from S. Zamora et. al (2004) *Op. Cit. Supra* 43

¹⁰⁶ D.O. 4 Aug. 1994, as amended D.O. 19 April 2000

¹⁰⁷ D.O. 20 Dec. 1993. References taken from S. Zamora et. al (2004), 384, *Op. Cit. Supra* 43

¹⁰⁸ D.O. 4 Aug. 1994. References taken from S. Zamora et. al (2004), 384, *Op. Cit. Supra* 43

¹⁰⁹ “Each creditor bank will be asked to choose one or more of the options. Under the principal-reduction and interest-reduction options, creditor banks could exchange their medium--and long--term loans for 30-year bonds to be issued by the Government of Mexico. Principal payments would be collateralized by U.S. Treasury zero-coupon obligations or comparable collateral purchased by Mexico with the enhancements. Interest payments would be partially backed by a collateral account established by Mexico.” PR Newswire, “Government Of Mexico And Advisory Committee For Mexico Reach Agreement On Financing Package”, July 24, 1989; also “Mexico Makes a Deal”, *Wall St. Journal*, July 26, 1989 Review & Outlook (Editorial)

¹¹⁰ In 1989, Salinas issued the Foreign Investment Regulation (*Reglamento de Inversión Extranjera*), a presidential decree, which countered the effects of the existing 1973 Foreign Investment Law. In 1993,

executive regulations relevant to the banking and financial sectors, as well as to resources managed exclusively by the government (such as central bank reserves, gas, water, oil, satellites, and railroads, and general environmental laws) were likewise issued or amended to deregulate new private and foreign investment. In conjunction, new laws and regulations were issued to modernize relevant regulatory and administrative offices.

Among the new regulatory bodies created during these two administrations, the *Banco de México* (Central Reserve Bank) was established as an autonomous constitutional body, buffered against political intervention. Other semi-independent administrative agencies included the CNBV (*Comisión Nacional de Banca y de Valores* or National Commission for Banking and Stocks); CNA (*Comisión Nacional de Agua* or National Water Commission); and COFECO (*Comisión Federal de Competencia Económica* or Federal Competition Commission). These agencies were semi-autonomous in the sense that they reported hierarchically to a cabinet Secretary within the executive branch, even though they were granted exclusive powers to regulate their assigned economic sectors.

Through these reforms, the President delegated control over the economy to the private sector under the regulatory supervision of expert agencies within his administration. Although the semiautonomous agencies would often prove to be weak

the Foreign Investment Law (*Ley de Inversión Extranjera*) was issued to correct the constitutional anomalies of the 1989 presidential decree. This law further opened economic sectors to direct foreign investment.

regulatory structures, the creation of the constitutionally autonomous Central Reserve Bank definitively meant that the Executive no longer had control over monetary policies. The structural reforms pursued by the state after 1983 “substantially modified the rules and conditions of operation of the overall economy, as well as market structures and conditions for competition which prevailed prior to that period.” This allowed for a recovery and reorganization of productive resources¹¹¹. Luis Rubio called the trade agreements and the successive regulatory reforms a “straitjacket” that would impede the Mexican government from backing out of market reform¹¹². These regulatory changes established institutional protection for property rights for a broader base of investors. However, as will be seen in the telecommunications case study, enforcing these commitments often proved very challenging because institutional changes and complementary systems of checks and balances were incomplete.

2. Reform of the authoritarian corporate state as a consequence of privatization reforms, labor conflict, the rise of party plurality, and spontaneous civil society

The process by which the state transfers public enterprises and industries to the private sector is generally known as privatization¹¹³. A privatization program was likewise

¹¹¹ Celso Garrido, “El Liderazgo de las Grandes Empresas Industriales Mexicanas”, in *Grandes Empresas y Grupos Industriales Latinoamericanos*, coord. Wilson Peres, (Siglo XXI/CEPAL, 1998), 398

¹¹² Luis Rubio, comment by visiting lecturer, *Rule of Law Seminar: Mexico*, Rule of Law Program/Stanford Law School, Spring 2001

¹¹³ Privatization is generally thought of as selling enterprises to the private sector or as a decrease of state investment in public enterprises. However, privatization also refers more broadly to the policy that views the private sector as a necessary protagonist of economic reform and economic development. Privatization policies support the transfer of industrial and productive activities once belonging to the state to a market-run economy, where production and distribution are a response to principles of supply and demand; see Carlos Zubiaur, Chief of Staff of the Office of General Counsel at Telefonica de Argentina, “Presentation: Privatization, Demonopolization, and Deregulation in the Argentine Telecommunications Market” and Ivana Sonia Kriznic from Telecom Argentina, “Presentation:

pursued in Mexico under President De la Madrid and continued under President Carlos Salinas de Gortari to alter the nature and extent of state intervention in the economy, generate a market economy, and make the country export-competitive in manufactured goods¹¹⁴. At the start of De la Madrid's *sexenio* there were a total of 1,155 public-sector entities, which was reduced to 412, and to 219 by the end of Salinas' term in office. Salinas privatized the larger entities, and these sales account for most of the revenue generated for the public sector during the privatization period from 1982 to 1994 (98% approximately, equal to 74.6 billion new pesos)¹¹⁵.

Privatization transformed the authoritarian corporate state in Mexico. During the years of privatization, many state companies with large worker populations were

Towards Liberalization in Argentina” in Eduardo J. Benitez et al., *Practicing Law in the Americas: The New Hemispheric Reality: Telecommunication Reforms in the Americas: New Legislation and the Regulatory Framework* (Conference), 13 *Am. U. Int'l L. Rev.* 971: 987-1006 (Carlos Zubiaur distinguishes privatization, demonopolization, and deregulation of the Argentinian telecommunications industry as separate stages of reform: He emphasizes that in order for the market to open to competition in deregulation, there must be new regulation. In this regard, Ivana Kriznic provides an opinion about requirements for liberalization in Argentina. She uses the word “liberalization” as an equivalent for introducing new regulation for effective competition and increase in services.); *see also* Edward R. Leahy et. al, “Telecommunications Law and Technology in the Developing World”, 22 *B.C. Int'l & Comp. L. Rev.* 1 (1999): 12 (The authors argue that “Multilateral effort, in the form of the GATS Agreement on Basic Telecommunications, does not present an answer to the problems of developing nations because its conception of privatization and liberalization was formed from perceptions of developed countries' markets which cannot be simply transplanted to the emerging markets of the Third World. However, telecommunications laws that combine economic realities with national policies promoting universal access, economic growth and structured competition can be used to create contracts between the public and private sectors that will serve developing nations well”); *see also generally* Paul Starr, “The Meaning of Privatization” in *Privatization and the Welfare State*, ed. Sheila B. Kamerman and Alfred J. Kahn, (Princeton University Press, 1989)

¹¹⁴ Privatization was pursued because it was believed to: “raise funds and reduce borrowing to improve a nation's effective economic management; increase efficiency at the enterprise level; reduce government and bureaucratic interference in the day-to-day business of an enterprise; increase the share in enterprise ownership; create competition in the market; and promote discipline in the market place”. J. Gould, “Challenges of Privatization and Corporatization: The UK Experience”, Conference paper presented in Singapore, Singapore (1990) as quoted in *Who Benefits From Privatisation?*, ed. Moazzem Hossain and Justin Malbon, (Routledge, 1998), 1

¹¹⁵ Jacques Rogozinski, *High Price for Change: Privatization in Mexico*, (IDB, 1998), 75-76

privatized¹¹⁶. As a consequence, official labor unions became disenfranchised from traditional corporatist relationships with the PRI party. As the privatization program took force, confrontations between official state union workers and the government increased, at times inciting repressive action from the state¹¹⁷. In view of the

¹¹⁶ “The ten sold companies with the most employees	<i>Number of employees</i>
<i>Teléfonos de México</i>	<i>51,126</i>
<i>Bancomer</i>	<i>37,041</i>
<i>Banamex</i>	<i>31,385</i>
<i>Mexicana de Aviación</i>	<i>13,027</i>
<i>Impulsora de la Cuenca de Papaloapan</i>	<i>3,617</i>
<i>Astilleros Unidos de Veracruz</i>	<i>2,988</i>
<i>Compañía Minera de Cananea</i>	<i>2,973</i>
<i>Compañía del Real del Monte y Pachuca</i>	<i>2,416</i>
<i>Dina Camiones</i>	<i>1,678</i>
<i>Tabamex</i>	<i>1,259</i>
Source: Office of Privatization; Ministry of Finance”	

As cited in Pedro Aspe, *Economic Transformation, the Mexican Way*, (MIT Press, 1993), 219

¹¹⁷ The state often responded to resistance by forcefully repressing opposition of labor unions in this period. Examples of repression or forceful privatizations include the declaration of bankruptcy and shutdown of the Cananea Mines, and the incarceration of *La Quina*, the long standing leader of PEMEX’s (*Petroleos Mexicanos* or the Mexican Petrol Company) labor union. The Cananea mines were a twice-failed privatization under De La Madrid’s administration. In the third try at privatization, as workers started to unite for a mass strike, Salinas’ government followed a strategy used in the early Aeromexico privatization. The administration declared the company bankrupt and then had a bankruptcy court rule for the sale of the company assets in order to complete privatization. In August 1989 the army was called in to take over the mines and subdue the workers’ strike with armed force. The entire town economy was attached to the mines and the situation escalated so badly as to require that international aid be sent to the workers laid off in the privatization. The case was especially scandalous since Cananea is the historic site of a victorious battle of resistance of the town miners against foreign intervention. The telecommunications privatization would take place a month after with no resistance whatsoever from the telephone labor union. Matt Moffett, “Salinas Takes On the Phone Company, Hoping to Bridle Another Mexican Union” 3/13/89 *Wall Street Journal*; In the case of PEMEX, the company was not privatized, but repressive action was taken against the long standing union leader La Quina, who was vehemently opposing privatization strategies. La Quina’s oil workers had been the most advantaged beneficiaries of the former labor union-PRI alliance. La Quina had led Latin America’s largest and richest labor union for 26 years. His labor union was managing 40% of all work contracted out on behalf of the state oil refining and distribution monopoly, *Petroleos Mexicanos* (Pemex). La Quina was a rival of President Salinas, since Salinas was Minister of State Budget. During that time Salinas arbitrarily ended the automatic grants to La Quina’s union on approximately half of all Pemex work contracts. La Quina took it upon himself to place all sorts of obstacles in the way of Salinas’ presidential campaign and the privatization program. He spoke in Congress to degrade his candidacy and even financed a book telling the story of how Salinas as a young boy had shot and killed a maid. Salinas’ coup d’etat on an “untouchable” PRI figure of Mexico was beyond expectations. When La Quina was arrested, the front door of his house was burst with a bazooka. He was dragged away in his underwear by army soldiers and taken to jail. He was then charged with homicide, illegal weapons

repression, some official unions opted to renew their loyalty to the Presidentialist system by cooperating with privatization. Relevant to this study, the cooperation strategy of Teléfonos de México, S.A. de C.V.'s (Telmex's) labor union is said to have transformed Telmex's privatization into the "star project" of Salinas' administration¹¹⁸.

possession, importing prohibited weapons, and resisting arrest (some of these charges are said to have been fabricated by the arresting forces). As a security measure, the army was sent out to supervise PEMEX oil tanks and refineries to discourage unionists from retaliating with any sort of violent outbreak. Dave Todd, "Mexico rocked by raid", *Vancouver Sun*, January 13, 1989

¹¹⁸ Judith Clifton studied the longstanding STRM (*Sindicato de Telefonistas de la Republica Mexicana* or Telephone Union of the Mexican Republic) and the privatization of Telmex to show that during the 1990s, corporatism in Mexico adapted to neoliberal economic reform. For neoliberalism, there was substituted neocorporatism. Clifton shows that by contrast to other modernization projects, Telmex's labor union was the primary promoter of the firm's improvement. The STRM with 49,000 members was Mexico's second largest union after Pemex's. Francisco Hernández Juárez, leader of the STRM, sought to distinguish the STRM from the long standing CTM and the PEMEX union, which vehemently opposed privatization. The STRM decided to create an advantage from labor conflicts related to modernization and privatization of state companies by modeling a new way in which labor unions could remain government allies. Dubb argues that the decisions that the telephone labor union made concerning privatization influenced the government's own decisionmaking processes. In great measure, union adaptation was a survival mechanism in facing an authoritarian state, since Salina's openness towards the STRM was a purposeful message that contrasted to the violent subordination of less cooperative groups, such as the PEMEX labor union. Judith Clifton, *The Politics of Telecommunications in Mexico: Privatization and State-Labour Relations, 1982-95*, (New York: St. Martin's Press in association with St. Antony's College, Oxford, 2000), 63-72; Mercado Maldonado points out that:

"... the political vision of [the leader of the STRM] Francisco Hernández with respect to the reform of the state and the privatization of public enterprises in Salinasism is very pragmatic in relation to the power-holders. The leader did not simply adapt to the "privatizing project"; he is its leader. He learned very well the lessons suffered by the workers' movement of 1958; integrate and be disciplined to the system or prepare for elimination, including physical elimination."

Asael Mercado Maldonado, *Telmex-STRM: Una Historia Política*, (U.A.E.M: Centro de Investigación en Ciencias Sociales y Humanidades, 1994), 127; The modernization of Telmex was initially designed by the Ministry of Finance, but became a significant collaborative effort with the STRM. Hernández wrote that for these reasons, "[t]he sale of TELMEX started to become the star project of the government." Fernández Hernández quoted in Asael Mercado Maldonado (1994), 128, *Id. Cit.*; See also Ignacio Medina Nuñez, *Sindicalismo y Estado: Los Telefonistas en México*, (U.A.G.: Centro Universitario de Ciencias Sociales y Humanidades, Editorial CUCSA-UDEG, 1996), 129-136; Steve Dubb, *Logics of Resistance: Globalization and Telephone Unionism In Mexico and British Columbia*, (Garland Publishing, 1999), 6.

Nevertheless, many workers became estranged from the PRI, and a rift was generated within said party. This rift resulted in the formation of an opposition coalition called the FDN (*Frente Democrático Nacional* or National Democratic Front), the precursor to the establishment of the PRD (*Partido de la Revolución Democrática* or Democratic Revolution Party)¹¹⁹. Cuauhtémoc Cárdenas, a PRI dissident and the son of the founder of the PRI became the FDN coalition's presidential candidate for the 1988 federal elections. The official count of the 1988 presidential elections was widely believed to have been fraudulently manipulated against the FDN coalition in order to allow the PRI candidate, Carlos Salinas de Gortari, to retain control of the Presidency¹²⁰.

Alongside the rise of the PRD, the ranks of the PAN (*Partido de Accion Nacional* or National Action Party) were fortified in this period. Business-government relations

¹¹⁹ In 1986, a split in the PRI party took place. Ruptures within the PRI had occurred from time to time in its history, but this one had lasting consequences. Cuauhtémoc Cardenas (son of former President Lazaro Cardenas, founder of the PRI) represented a newly formed center-left faction of the PRI known as the Democratic Current, which among other things, opposed further neoliberal reform. When in 1986 Cardenas was not elected as the official PRI candidate, he tried without success to oppose and reform the internal PRI electoral system. In 1987, members of the Democratic Current spun off from the PRI, and Cardenas accepted a nomination as presidential candidate to the left-wing political party, the PARM (*Partido Aútenico de la Revolución Mexicana* or Authenic Mexican Revolutionary Party). Cardenas then formed a coalition among smaller left-wing parties to establish the Frente Democratico Nacional ("National Democratic Front" or "FDN"). Cardenas harnessed an important following for the 1988 presidential election. After the 1988 elections, Cardenas went on to establish the *Partido de la Revolución Democrático* (Democratic Revolutionary Party or PRD) – a left-wing opposition party that harnessed the support of the former lowerclass base of the PRI in municipalities all around the country. Ann L. Craig and Wayne A. Cornelius, "Houses Divided: Parties and Political Reform in Mexico", in *Building Democratic Institutions: Party Systems in Latin America*, ed. Scott Mainwaring and Timothy R. Scully, (Stanford University, 1995), 259

¹²⁰ In 1988, Carlos Salinas de Gortari, PRI party candidate, was elected President by the PRI's smallest margin of victory to that date: a difference of 1.03% votes over half the total votes shed. Official results showed that Salinas had won with 50.36% of votes; followed by: Cuahutémoc Cárdenas (FDN party) 30.8%; Manuel J. Clouthier (PAN party) 17.07%; Gumersindo Magaña (PDM party) 1.04% votes; and Rosario Ibarra (PRT party) 0.42% votes. Ricardo Becerra, Pedro Salazar, and José Woldenberg (2000), 202, *Op. Cit. Supra* 87; See Julia Preston and Samuel Dillon (2004), 85-108, *Op. Cit. Supra* 82

sharply deteriorated after the bank nationalization of 1982. In the past, business-government relations tended to mend once government channeled benefits to elites at the top of the business chain, but an unanticipated effect of the bank nationalization was a breakaway of small and medium entrepreneurs based in Jalisco and Monterrey from the traditional business corporate structures¹²¹. Many medium-ranked businessmen from Jalisco and Monterrey joined the PAN. The incursion of businessmen into Mexican political life marked a significant breakage of the *esprit de corps* of the PRI system, in which the holders of economic wealth did not typically also contend for political power¹²².

In addition to strengthening the formal electoral system, spontaneous social movements in this period led to the rise of civil associations and nongovernmental organizations that represented social interests outside of the corporate state, with a significant focus on human rights and electoral observation¹²³. To borrow words from

¹²¹ Blanca Heredia (1997), *Op. Cit. Supra* 50

¹²² See Kenneth C. Shalden, "Neoliberalism, Corporatism, and Small Business Political Activism in Contemporary Mexico," *Latin American Research Review* 35 (2000): 73-106, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0023-8791%282000%2935%3A2%3C73%3ANCASBP%3E2.0.CO%3B2-H>; Matilde Luna Ledesma, *Los empresarios y el cambio político: México, 1970-1987*, (UNAM: Instituto de Investigaciones Sociales, Ediciones Era, 1992); Kevin Middlebrook, "Review: Dilemmas of Change in Mexican Politics", *World Politics*, Vol. 41, No. 1 (Oct., 1988): 120-141, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0043-8871%28198810%2941%3A1%3C120%3ADOCIMP%3E2.0.CO%3B2-2>; Saúl Escobar Toledo, "Rifts in the Mexican Power Elite, 1976-1986", in ed. Sylvia Maxfield and Ricardo Anzaldúa (1987) *Op. Cit. Supra* 84; Kristin Johnson Ceva, "Business-Government Relations in Mexico Since 1990: NAFTA, Economic Crisis, and the Reorganization of Business Interests", in *Mexico's Private Sector: Recent History, Future Challenges*, ed. Riordan Roett, (Boulder: Lynne Rienner, 1998), 125-157.

¹²³ Reporters Julia Preston and Samuel Dillon mention several critical moments of spontaneous manifestations of Mexican civic culture during the democratic transition. The first was the student protests of 1968 which gave birth to a generation of elite intellectuals, activists and politicians who formed Mexican opinion. The next watershed moment in civil organization arrived with the 1985 earthquake. Civilians affected by the earthquake were outraged by slow and ineffective government action and formed neighborhood organizations to save victims, recover bodies, clean wreckage, and

Jonathan Fox, the Mexican population began a transition from clientelism to citizenship: from being clients of a system to voicing demands, exercising freedoms, and finding various ways to represent themselves to the state outside of state-sanctioned organizations and even outside the electoral system¹²⁴.

Under pressure to retain legitimacy and in order to provide an outlet for the increased demand for representation, Salinas would concede victories to opposition parties in state governments and further revise electoral rules regarding the election and nomination of representatives of Congress and adopt of new rules for regulating party

oppose government actions that they believed harmful to their interests. Many people who experienced the earthquake talk about the rise of a collective consciousness in which citizens realized that they had control over their personal circumstances, in contrast to authoritarian government control. Media was also suddenly affected by an open reporting of the earthquake to the detriment of government control over information. Throughout the 1990s, in part fed by a global movement, the human rights movement also spread in Mexico. Two climactic moments of this movement were in 1990, the establishment of a human rights ombudsman in Mexico, the Human Rights Commission, as an autonomous constitutional body; and second, in in 1994, the rise to world recognition of the charismatic indigenous guerrilla movement known as the *Ejército Zapatista de Liberación Nacional* (Zapatista Army for National Liberation or EZLN). Intellectual and other human rights organizations of diverse religious, philosophical, political and fair-trade tendencies rallied around the Zapatista movement to form a common front in defense of human rights. Julia Preston and Samuel Dillon (2004), *Op. Cit. Supra* 82; Global and civil organization spilled over into the electoral reforms of the 1990s. In the 1994 presidential elections, these same organizations provided large bodies of officially registered international and national electoral observers that gave legitimacy to suffrage. Alianza Cívica, led by Sergio Aguayo, is perhaps the best recognized Mexican electoral NGO: “It recruited election observers from four hundred nongovernmental and civic groups to watch five thousand polling places. In 2000, it concentrated its electoral observation program on 200 districts in 27 states, using more than 7,000 volunteers.” Roderic Ai Camp, *Politics in Mexico: The Democratic Transformation*, 5th Edition, (Oxford University Press, 2007), 162; Nongovernmental organizations increased in number and diversity in Mexico in the transition period. These types of organizations included organizations focused on welfare and assistance, the environment, human rights, women, indigenous services, art, culture, science, and rural development: “By the mid-1990s, more than 5,000 such groups existed in Mexico, half of them in Mexico City, and an additional 25 percent in four cities: Guadalajara, Tijuana, Oaxaca, and Saltillo”. Roderic Ai Roderic Ai Camp (2007), 162, *Id. Cit. Supra*

¹²⁴ Jonathan Fox, *The Difficult Transition from Clientelism to Citizenship: Lessons from Mexico*, *World Politics*, Vol. 46, No. 2., (Jan. 1994): 151-184, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0043-8871%28199401%2946%3A2%3C151%3ATDFTCT%3E2.0.CO%3B2-2>

finances and campaign expenditures and the presence of electoral observers¹²⁵. The last reform of Salinas' term of office, in 1994 was to grant the IFE (*Instituto Federal Electoral* or Federal Electoral Institute) the legal status of an autonomous constitutional body (as was granted to the *Banco de Mexico*), which elevated the legal status of the IFE to that of a constitutional entity such as the judiciary, executive and legislative bodies. The reform also introduced citizen counselors on the Board of the IFE, specified the nature of national and foreign electoral observers and established maximum campaign budgets for political parties. Successive reforms would establish an electoral tribunal as part of the Judiciary (the *Tribunal Federal Electoral* or "TFE"), improved voter rights and voter registry, new rules of party registration, new Congressional representational rules, improved electoral processes for dispute resolution, and improved equality and accountability in campaign financing and media coverage among political parties¹²⁶.

With these reforms, for the first time, electoral institutions had an adequate and uniform organization throughout the country¹²⁷. The reform of electoral rules under Salinas effectively served to validate opposition politicians as contenders for public

¹²⁵ Salinas recognized the victory of the PAN opposition over a state governorship for the first time in history (PAN candidate Ernesto Ruffo, in Baja California Norte). In 1991, the electoral results in Guanajuato and San Luis Potosí were reversed in favor of the opposition candidates when evidence of PRI fraud surfaced. In 1992, the gubernatorial elections in Chihuahua were also overturned in favor of the PAN. In 1991 in Guanajuato and San Luis Potosí, electoral fraud would again force the hand of the President to concede electoral victories. These concessions were accepted by PRI candidates out of discipline to the party system, although they increased internal conflict within the party. Michael C. Meyer and William L. Sherman, *The Course of Mexican History*, 5th edition, (Oxford University Press, 1979), 696; *see also* Ricardo Becerra, Pedro Salazar, and José Woldenberg, (2000), 295-312, *Op. Cit. Supra* 87

¹²⁶ *See* Ricardo Becerra, Pedro Salazar, and José Woldenberg (2000), *Op. Cit. Supra* 87

¹²⁷ *Id. Cit. Supra* 87

office and hence relegitimized the PRI as an actor in a more pluralistic state. Salinas' second nominated successor as PRI presidential candidate, Ernesto Zedillo Ponce de Leon, ran for election under the protection of electoral transparency and stepped into office with a high degree of legitimacy. Voter turnout for the 1994 presidential election was a record-breaking 78% of registered voters (approximately 35 million citizens), almost double that of 1988. Official results showed that the PRI won with 50.13% of votes; followed by the PAN with 26.9%; the PRD with 17.07%; PT with 2.83%; and others with 3.28% votes¹²⁸. In that same year, in the first election to the Federal District Assembly of Representatives almost 30 out of 66 seats went to opposition parties, with the PAN alone taking 19 seats¹²⁹.

3. Renewal of state-business coalitions and the continuity of grupos under privatization

Neoliberalism and privatization depended on reestablishing state-business relationships in order to once again attract investment and increase growth levels after the crisis. President De la Madrid (1982-1988) would regain the trust of businessmen and the Financial Axis by taking specific actions in their favor: among other moves, he (1) compensated expropriated bankers with generous funds that were tax-free and tradeable on the stock exchange (providing the bankers with immediately liquid funds to reinvest); (2) widened private investment in banking to 34% and returned nonbanking assets to previous owners, such as industrial, commercial, and financial firms under bank control (which also allowed financiers to retain their stock brokerage

¹²⁸ *Id. Cit. Supra* 87, 356

¹²⁹ *Id. Cit. Supra* 87, 204-205

firms); (3) prohibited banks from investing in other financial ventures, thus reducing competition for stock brokerage firms; (4) began a program of privatization of state-owned companies; (5) struck a pact with labor unions to freeze wage rises while growth levels were reestablished, but at the same time began favoring the reconfiguration of unions; (6) filled positions in his cabinet with members of the Financial Axis; and (7) established FICORCA (*Fideicomiso para la Cobertura de Riesgos Cambiarios* or Trust For Covering Exchange Rate Risks), which acquired the dollar debt of firms that were then allowed to pay the government in pesos¹³⁰. Valdivia-Machuca argues that De la Madrid was able to reinstate the ICES by giving the former industrial policy network a new financial orientation, and the Financial ICES seemed to have had the same stabilizing effect on a finance-based economy as the prior ICES had on industrialization¹³¹. During the administrations of De la Madrid and Salinas, new great wealths were generated through the purchase of privatized firms, by stockbroker firms, which then issued stock from these companies on the financial markets¹³². By 1994, twenty-four new Mexican billionaires were announced by Forbes¹³³.

¹³⁰ Valdivia-Machuca (2005), 159-161, *Op. Cit. Supra* 6

¹³¹ “Because of the notably financial orientation of the Mexican economy from 1985, industrialization ceased to be the prime objective of the Mexican government [...]. Accordingly, our historical account of the effect of the ICES on industrialization must stop here, since the process has virtually ended. However, it is noteworthy to mention that, despite its differences, the Financial ICES seems to have had a stabilizing impact similar to that of the Industrial ICES in the Mexican system.” Valdivia-Machuca (2005), 167-168, *Op. Cit. Supra* 6

¹³² Valdivia-Machuca (2005), 167, *Op. Cit. Supra* 6

¹³³ In 1993, *Forbes* reported that eleven new Mexican billionaires had risen to its list of Richest People in the World in only the last two years, and this rise in wealth was attributed to “[...] Salinastroika, a top-down reform launched in 1989 by Mexico's President Carlos Salinas de Gortari, who moved aggressively to build upon the earlier reforms initiated by his predecessor, Miguel de la Madrid.” Joel Millman, “The world's wealthiest people. (Cover Story),” *Forbes*, Vol. 152; Issue 1, July 5, 1993. In 1994 there were 24 new billionaires from Mexico on *Forbes'* list. This increase was higher than in any

Thacker argues that businessmen and business organizations formerly under the protection of ISI policies, who in theory would have opposed opening the economy to free trade, were successfully and thoroughly incorporated by the government into backroom negotiations leading to the opening of the economy by way of GATT and NAFTA¹³⁴. Business-government relationships were reconstructed by allowing business organizations to participate directly in economic policymaking (which, Valdivia-Machuca points out, was the objective of the ICES policy network). Thacker argues that the dynamics of business-government relations in the presidencies of De la Madrid and Salinas explain why Mexico was the early reformer in Latin America and went the farthest in liberalizing trade¹³⁵.

As a consequence of NAFTA and/or the growth of large export companies in the country from 1990 to 1999, the manufacturing sector grew 42.5% (measured as a constant productive value) and showed an increase of 25.3% in establishments and of

other country save the U.S., U.K. and Japan. However, by 1995, of those 24 new billionaires only 10 remained on *Forbes*'s list. Most notably, the Garza family was dwindling in importance. Christopher Palmaeri and Kerry A. Dolan, "A tough new world: the Mexican dynasty Garza Sadas and the new generation," *Forbes*, (The Billionaires: Cover Story), Vol. 156, No. 2, July 17 1995

¹³⁴ Strom C. Thacker (2000), *Op. Cit. Supra* 100

¹³⁵ "International factors alone cannot explain Mexico's move toward free trade that has been formalized in NAFTA. Along with domestic-level variables, however, they can help us understand how and why the balance of interests within the policy-making apparatus shifts to favor certain kinds of trade policies. Historically, vested interests within both the public and private sectors in Mexico had successfully opposed trade opening. But partly as a result of changes in international and domestic political and economic conditions, the relationship between the business and the state in Mexico changed in the 1980s and 1990s in such a way that free trade became not just a possibility, but a political and economic reality." Strom C. Thacker (2000), 11, *Op. Cit. Supra* 100

29.1% in the numbers of employed personnel¹³⁶. Nonetheless, in 1993, 63% of sales in the manufacturing sector were still generated by the largest establishments in the sector, which represented only 0.9% of all industrial establishments¹³⁷; and in 1999, although small and medium enterprises showed an improvement in export competitiveness, only 566 enterprises in the entire sector were responsible for 75% of exports¹³⁸.

During 1988-1989, 40.7% of capital assets in the country were concentrated in six groups, which with the inclusion PEMEX increases to 86.1%¹³⁹. These six groups included Teléfonos de México (Telmex), Grupo Industrial Alfa, Vitro, Visa, Volkswagen, Fomento Económico Mexicano, Sidermex, Desc Sociedad de Fomento Industrial, Cemex, and Industrias Peñoles, with primary activities in communications, mining, petrochemicals, iron and steel production, automobile and auto parts manufacturing, glass, beverages, and cement¹⁴⁰. Garrido also calculates that from 1987 to 1991, the sales output of the top 59 *grupos* (or the 987 firms they comprise) was equivalent to 65% of sales generated by the top 500 firms in Mexico as a percentage of GNP (198 of those 500 firms are owned by the same 59 top *grupos*)¹⁴¹.

¹³⁶ INEGI as cited in Cristina Puga, *Los Empresarios Organizados y el Tratado de Libre Comercio de América del Norte*, (UNAM/Porrúa, 2004), 218

¹³⁷ Celso Garrido (1998), *Op. Cit. Supra* 111, 402

¹³⁸ Concamin as cited in Cristina Puga (2004), 219, *Op. Cit. Supra* 136

¹³⁹ Grupo Editorial Expansión, “Los grupos más importantes de México”, *Expansión*, No. 548, August 29, 1990, as cited in Matilde Luna, “La Estructura de Representación Empresarial en México. La década de los noventa y los cambios en las estrategias corporativas” in coord. Cristina Puga and Ricardo Tirado, *Los Empresarios Mexicanos, Ayer y Hoy*, (Ediciones El Caballito, 1992), 273-275

¹⁴⁰ Source: Expansión (1990) in Luna (1992), 274 *Id. Cit. Supra* 139

¹⁴¹ This list excludes PEMEX but includes other Mexican state enterprises. Source: Expansion 500 in Garrido (1998), 411, *Op. Cit. Supra* 111, 411

He further notes that in 1991 nine out of the 59 top *grupos* participated in 56% of total sales and 55.1% of shareholders' equity of the entire set of 59 *grupos*¹⁴². These 9 *grupos* are controlled by national capital. Ranked in order, the *grupos* are Vitro, Carso, Alfa, Cemex, Visa, Desc, Industrial Minera Mexicana, Pulsar, and Peñoles. Their activities are mainly in glass, communications, iron and steel, petrochemicals, food, cement, beer, beverages, autoparts, mining and tobacco¹⁴³. Matilde Luna argues that wealth concentration was the result of clientelism between government and favored businessmen that derived from the direct allocation of privatized resources, without any means (such as consumer protection regulation or laws requiring transparency) of curbing monopoly rights¹⁴⁴.

From 1988-1989, stock brokerage also became concentrated in three firms that accounted for 40.2% of financial market activity and that were owned by 2/3 of the most prominent businessmen of Mexico¹⁴⁵. Jorge Basave shows that concentration of *grupo* resources through the financial system was a trend that began prior to bank nationalization, continued through the recovery period under De la Madrid, and through the re-privatization of the banking system under Salinas, with a strategy to finance corporate investment through the stock exchange¹⁴⁶. In parallel, major bank groups both prior to nationalization and after the 1990 reprivatization purchased stock

¹⁴² Source: Expansion 500 in Garrido (1998), 412, *Op. Cit. Supra* 111

¹⁴³ Source: Expansion 500 in Garrido (1998), 413-414, *Op. Cit. Supra* 111

¹⁴⁴ Matilde Luna (1992), *Id. Cit. Supra* 139

¹⁴⁵ Source: Expansión (1990) in Matilde Luna (1992), 275, *Id. Cit. Supra* 139

¹⁴⁶ Basave (1996) *Op. Cit. Supra* 90

in major industrial groups, which resulted in the increased financial capacity of *grupos* and their oligopolistic consolidation through national financial holding groups¹⁴⁷.

With this new capacity, top *grupos* were as of the 1990s in a position to pursue strategic global alliances in order to acquire technological know-how and opportunities to put their products on global markets. Foreign investment in the country quickly accelerated in this period to represent 2.70% of the GNP in 1990-1992 (structured as 62.4% direct foreign investment and 37.6% in the stock exchange) and was rapidly absorbed by the top business groups. In 1993, 15 business groups in Mexico captured 84.2% of the FI on the stock exchange, and of those groups Telmex represented 40.3% of that FI value¹⁴⁸.

The largest *grupos*, with strategic alliances to foreign firms and foreign investors, soon became export-competitive. In several cases, such as Cemex, Panamco, Telmex (Grupo Carso), VITRO, Grupo Maseca, Grupo Modelo, Grupo Industrial Bimbo, and Grupo Televisa, among others, the result was the transformation of the Mexican firm or *grupo* into a competitive transnational enterprise¹⁴⁹. The top 34 transnational companies from Mexico in 1997 consolidated \$11.144 billion in sales in the following

¹⁴⁷ Basave (1996), 163-208, *Id. Cit. Supra* 90

¹⁴⁸ Basave (1996), 210, *Id. Cit. Supra* 90

¹⁴⁹ Carlos Morera Camacho, "La Nueva Corporación Transnacional en México y la Globalización", in *Globalización y Alternativas Incluyentes para el Siglo XXI*, coord. Jorge Basave et. al, (UNAM/IIIE/Porrúa, 2002), 397-434; *see also* Jorge Basave, "Modalidades de Integración Internacional y Perspectivas de Expansión de Empresas Mexicanas", in Jorge Basave et al. (2002), 435-460, *Id. Cit.*

industries: automobile, electronics, beverages, chemical, commerce, photography, cellulose, mining, tobacco, financial system, food, and cement¹⁵⁰.

Unfortunately, as Basave points out, the outstanding success of export-oriented groups and transnational companies from Mexico, which represent a concentration of productive resources in the country and of export capacity, did not translate into expected development benefits for internal markets or the broader population¹⁵¹.

4. *Unsolved unemployment and wealth disparity under privatization*
Extensive “shock therapy” neoliberal reform had a negative impact on the overall quality of life of the Mexican population. To begin with, reforms did not improve employment levels. In the years 1986 to 1997, the population grew at an annual average rate of 1.38 million Mexicans per year (by 15.2 million people)¹⁵². In that same 11-year period, people aged 12 and above (who form the base for calculating the “population of economically active people” or “PEA”), increased at an average rate of 1.4 million per year (by 16.6 million people)¹⁵³. However, the PEA only grew at an average annual rate of 936,000 PEA (by 10.3 million people)¹⁵⁴. In sum, the PEA grew

¹⁵⁰ Morera (2002), 424, *Id. Cit. Supra* 149

¹⁵¹ Basave (1996), 245 and Conclusions, *Id. Cit. Supra* 90

¹⁵² The population in Mexico grew from 69.6 million in 1980 to 94.7 million Mexicans in 1997. Javier Aguilar García, *La Población Trabajadora y Sindicalizada en México en el Periodo de Globalización*, (Co-edition UNAM and FCE, 2001), (Reprint 2003), 53-54

¹⁵³ Aguilar (2001), 55, *Id. Cit. Supra* 152

¹⁵⁴ Aguilar (2001), 56, *Id. Cit. Supra* 152

more slowly than the average growth rate of population of people 12 and above, as well as the average growth rate of the population as a whole¹⁵⁵.

Income distribution improved from 1950 until 1984. However, from 1989 to 1992, the inequality gap between the bottom 40% and top 10% of households once again widened. A table on income distribution in Mexico adapted from an IDB publication is replicated below for the period 1950 thru 1992.

Mexico Nationwide	Poorest 40% of households	Top 10% of households
1950	12.6	44.7
1963	10.2	42.2
1967	10.4	42.2
1977	11.5	36.3
1984	14.3	32.8
1989	12.9	37.9
1992	12.7	38.2
Source: Thorp/IDB (1998) ¹⁵⁶		

¹⁵⁵ Aguilar (2001), 56, *Id. Cit. Supra* 152; In 1986, the PEA represented 50.4% of the population of 12 years and above; 55.2% in 1993, and 56% in 1997; hence throughout this period, the PEA grew, although at a rate below the population growth rates. Aguilar García attempted to calculate employment levels in the economically active population (Occupied PEA) by using official statistical information. However, he found a serious discrepancy, given that the official information would lead one to conclude that the Occupied PEA was growing at a higher average annual rate than the PEA for the 11-year period studied. Aguilar García concludes that the official statistics are skewed, and points out that the statistical database considered only urban areas, to the exclusion of rural or agricultural zones. Official unemployment rates are likewise impossibly low since they would place unemployment rates in Mexico below those in Germany or France. In part, Aguilar García attempts to show the lack of reliable statistical information for the study of Mexico's working population. The lack of reliability is notable when compared to poverty indexes in the country. Javier Aguilar García (2001), 58-65, *Id. Cit. Supra* 152

¹⁵⁶ Adapted from Thorp (1998), 28, *Op. Cit. Supra* 98

In 1984, the income gap between both groups narrowed to 18.5%; however, by 1992 that gap had increased to 25.5%, comparable to the 24.8% income gap between said percentiles in 1977. In the same approximate period (1950-1992), compared to Argentina and Colombia, Mexico showed the greatest income inequality between these two groups of the three countries, and one of the highest in the world¹⁵⁷.

The average GDP growth rate for Mexico from 1900 to 1996 (almost a century) was 5%; Mexico ranked fourth among Latin American countries during that period¹⁵⁸. The country's highest average GDP growth rate took place from 1945 to 1972 (6.5%) during the period of "stabilized development" under ISI, followed by 1972-1981 (5.5%), during the period of "shared development."¹⁵⁹ The slowest period of GDP growth in Mexico was from 1981 to 1996 (1.5%), during the debt crisis and privatization reform years. Mexico had not experienced such a low average GDP growth since the period after the Mexican Revolution (1913-1929; 1.4%)¹⁶⁰; which may be an apt comparative consequence of the kind of institutional upheaval which the country experienced in the last two and a half decades.

C. A STABILIZING RENT-SEEKING LEGISLATIVE SYSTEM: THE LIBERALIZATION AND ON-GOING PERIOD

¹⁵⁷ *Id. Cit.*

¹⁵⁸ After Venezuela (5.9%), Brazil (5.5%), and Costa Rica (5.1%). Thorp (1998), 318, *Id. Cit. Supra* 98

¹⁵⁹ Thorp (1998), 318, *Id. Cit. Supra* 98

¹⁶⁰ Thorp (1998), 318, *Id. Cit. Supra* 98

President Ernesto Zedillo Ponce de León (1994-2000) followed Salinas de Gortari into office. He was succeeded at the end of his *sexenio* by President Vicente Fox Quesada (2000-2006), the first opposition President to be elected since the establishment of the PRI (a PAN party member, representing a coalition). Fox entered office in 2000 with an overwhelming popular and formal electoral legitimacy, as the first President of a transition government¹⁶¹.

Despite their electoral legitimacies, Zedillo and Fox incrementally experienced the limitations of a weak presidency, as defined by a stronger rule of law, which evidenced the weak formal powers of the executive in the Mexican Constitution by comparison to a formally stronger legislative branch, backed by corporatist party interests. I argue that during this period rent-seeking coalitions were reconstructed around the political parties which gained control of policymaking through the Legislature, and which were therefore in a position to affect the regulatory governance structures of the country. Under these circumstances, the institutional endowment changed from an “unstable rent-seeking Presidentialist system” to a stabilizing “rent-seeking Legislative system.”

This section explains the incremental changes that stabilized such a “Legislative rent-seeking system” in Mexico, which include:

¹⁶¹ The incremental changes leading to alternation in presidential power will be explained below. The important point being that Fox was the consequence, and remained an ongoing participant of incremental democratic transition, under a multiparty competitive electoral system, rather than a conclusion to transition.

- (1) Strengthening of the Legislature vis-à-vis the weakening of the Executive in the policymaking process, and the problem of dominant party lines in the system of representation,
- (2) Representation of elites in a “rent-seeking Legislative system,”
- (3) Transparency, accountability, and regulatory quality reform of the Executive,
- (4) The rising importance of the Judiciary in the division of powers,
- (5) Transitioning corporatist structures of labor unions and business chambers,
- (6) State-run industries in the post-privatization period and the continued prosperity of *grupos*, and
- (7) Wealth concentration in select individuals, income disparity, and unresolved poverty.

1. Strengthening of the Legislature vis-à-vis the weakening of the Executive in the policymaking process, and the problem of dominant party lines in the system of representation

Electoral rules had the effect of eroding the political culture of trust and hierarchy that sustained clientelism to the President from within the PRI party¹⁶². By different degrees and stages, diverse political parties began growing a base support in

¹⁶² With a dissolving PRI monopoly, President Zedillo experienced the brunt of party discipline breakdown. The most resounding case was the electoral conflict of November 1994 over the governorship of the state of Tabasco between the PRI candidate, Roberto Madrazo, and the PRD candidate, Andres Manuel Lopez Obrador (both of whom are contenders to the Presidency today). Official electoral results favored Madrazo, and Lopez Obrador rejected the results with a civil insurrection that kept the capital of Veracruz (Villahermosa) under military watch. Due to findings of numerous irregularities, Zedillo ordered a revision of results. Madrazo refused to concede victory to the opposition party, against Zedillo’s express request, and proceeded to take office in January 1995; thus the President’s weakened command over the PRI party was exposed. Preston and Dillon (2004), 166-170, *Op. Cit. Supra* 82

municipalities, states governments, and local and federal Congresses¹⁶³. Electoral regulation eventually weakened Presidentialism and the one-party corporate state in Mexico.

In the 1997 mid-term elections, Cuauhtémoc Cárdenas of the PRD was elected first mayor of Mexico City, and the PAN won another two governorships in the states of Nuevo Leon and Queretaro. The 1997 district elections also evidenced a new voting pattern in which the PRI retained a fairly uniform vote across the country, the PAN gained votes in major northern cities, and the PRD found support in the cities and municipalities of central and southern Mexico¹⁶⁴. Mexico was experiencing a plural party system.

In 2000, Vicente Fox –former PAN governor of Guanajuato--ran as presidential candidate for a coalition called Alliance for Change (*Alianza por el Cambio*) and won with a firm majority of 42.52% of votes¹⁶⁵. Without hesitation, in order to secure public peace, President Zedillo took it upon himself to concede the victory to

¹⁶³ In 1977, there were only four municipalities governed by a party other than the PRI; the number increased to 39 in 1988, and 583 prior to the July 2, 2000 federal elections. At the state level, in 1977, there were no non-PRI governors; in 1989 there was one, and prior to the 2000 elections there were 11 governors (out of 31 states plus the Federal District) from parties other than the PRI. By 1999 the PAN was governing seven states, equivalent to 30% of the population; the PRI had 21 states governing 47% of the population, and the PRD four states (including the Federal District) governing 21% of the population. At the state level, in 1977 the PRI held majority representation in 31 congresses (not counting the Chief of Government of the Federal District, which was not an elected position until 1997); in 1989 the PRI majority in state congresses dropped to 26; and at the time of the elections in 2000, there was only one state congress with a qualified PRI majority. Becerra, Salazar, and Woldenberg (2000), 476-499, *Op. Cit. Supra* 87

¹⁶⁴ Becerra, Salazar, and Woldenberg (2000), 464-482, *Op. Cit. Supra* 87

¹⁶⁵ The results of the presidential Elections 2000 were as follows: Alianza por el Cambio 43.52% vote; PRI 36.10%; Alianza por México 16.64%; PCD 0.55%; PARM 0.42%; and DS 1.57%, with a 64% registered voter turnout. Becerra, Salazar, and Woldenberg (2000), 533-534, *Op. Cit. Supra* 87

President Fox. The results of the 2000 presidential elections are sometimes viewed with wonder, due to the peaceful transition from PRI Presidentialism to the installation of an opposition party President within a multiparty scenario. These results are less surprising considering that they were preceded by more than two decades of laborious electoral reforms, during which credible long-term electoral institutions and organizations were established; political parties exercised their rights under new rules, and Mexican citizens exercised a vote that counted in an environment of “normality”¹⁶⁶.

The loss of the Presidency by the PRI was an impressive symbolic event, but the strengthened plural configuration of Congress was the real transformation of the institutional endowment. For the 1997-2000 congressional period, the PRI retained only 47.8% of Representative seats¹⁶⁷. In the Senate, the PRI managed to keep a majority, albeit a decreasing one: from 93.8% in the period 1988-1991, to 74.2% in 1994-1997, and 60.2% in 1997-2000. In the midterm elections for the LVII Legislature (1997-2003) the PRI lost its majority in the Chamber of Deputies. President Zedillo was the first President since the foundation of the PRI to govern without a PRI majority of Deputies in Congress. President Fox (2000-2006) followed him into office with a divided Congress in which the PAN held 41.2% of the seats in the Chamber and 35.9% in the Senate. The PRI opposition remained strong in both Houses: 42.2% in the Chamber (2000-2003) and 46.8% in the Senate (2000-2003).

¹⁶⁶ Becerra, Salazar, and Woldenberg (2000), 491-492, *Op. Cit. Supra* 87

¹⁶⁷ In 1979-1982, the PRI had a 74% majority, which would drop to 52% in 1988-1991. Becerra, Salazar, and Woldenberg (2000), 476, 499, *Op. Cit. Supra* 87

Table 2. Composition of the Chamber of Deputies by political party (1973-2009)

	PRI	PAN	PARM	PPS	TOTAL													
1973-1976	189 (81.8%)	52 (22.5%)	7 (3.0%)	10 (4.3%)	231													
1976-1979	195 (82.3%)	20 (8.4%)	10 (4.2%)	12 (5.1%)	237													
1979-1982	296 (74%)	43 (10.8%)	12 (3%)	11 (2.8%)	PCM 18 (4.5%)	PDM 10 (2.5%)	PST FCRN 10(2.5%)	400										
1982-1985	299 (74.8%)	51 (12.8%)		10 (2.5%)			11 (2.8%)	PSUM 17 (4.3%)	400									
1985-1988	292 (73%)	38 (9.5%)	11 (2.8%)	11 (2.8%)			12 (3%)	12 (3%)	PRT 6 (1.5%)	PMT 6 (1.5%)	400							
1988*-1991	260 (52.0%)	101 (20.2%)	30 (6%)	32 (6.4%)			34 (6.8%)				PMS 19 (3.8%)	Others* 24 (4.8%)	500					
1991-1994	320 (64%)	89 (17.8%)	15 (3%)	12 (2.4%)			23 (4.6%)						PRD 41 (8.2%)	500				
1994-1997	300 (60%)	119 (23.8%)											71 (14.2%)	PT 10 (2%)	500			
1997-2000	239 (47.8%)	121 (24.2%)											125 (25%)	7 (1.4%)	PVEM 8 (1.6%)	500		
2000-2003	211 (42.2%)	206 (41.2%)											Others + 9 (1.8%)	50 (10%)	7 (1.4%)	17 (3.4%)	500	
2003-2006**	203 (40.6%)	148 (29.6%)											++ 29 (5.8%)	97 (19.4%)	6 (1.2%)	17 (3.4%)	500	
2006-2009**	106 (21.2%)	206 (41.2%)											+++ 16 (3.2%)	127 (25.4%)	11 (2.2%)	17 (3.4%)	Convr. 17 (3.4%)	500
Others: *In the 1988 elections, there were 24 representatives of relative majority nominated by different coalitions; + CD (4); PSN (3); and PAS (2); ++ CD (5); and Without Party (24); and +++ Nueva Alianza (9), Alternativa (5), and Without Party (2)																		
Source: Ricardo Becerra, Pedro Salazar, and José Woldenberg (2000); and ** Source: Grupos Parlamentarios, Cámara de Diputados, Congreso de la Unión de México.																		

Table 3. Composition of Senate by political party (1988-2012)

	PRI	PAN	PRD	<i>TOTAL</i>					
1988-1991	60 (93.8%)		4 (6.3%)	64					
1991-1994	63 (98.4%)	1 (1.6%)		64					
1994-1997	95 (74.2%)	25 (19.5%)	8 (6.3%)	128					
1997-2000	77 (60.2%)	33 (25.8%)	16 (12.5%)	PT 1 (0.8%)	PVEM 1 (0.8%)	128			
2000-2003	60 (46.8%)	46 (35.9%)	15 (11.7%)	1 (0.8%)	5 (3.9%)	CD 1 (0.8%)	128		
2003-2006**	58 (37.5%)	47 (36.7%)	15 (11.7%)		5 (3.9%)		N/P 3 (0.6%)	128	
2006-2012**	33 (25.7%)	52 (40.6%)	26 (20.3%)	5 (3.9%)	6 (4.9%)		1 (0.8%)	Convergencia 5 (3.9%)	128

Source: Becerra, Salazar, and Woldenberg (2000); ** Source: Grupos Parlamentarios, Cámara de Senadores, Congreso de la Unión

Tables 2 and 3 above show the changing representative majorities in the Federal Chamber of Deputies (1973-2009) and the Senate (1998-2012), respectively.

Without a dominant party majority in the Chamber of Deputies, party pluralism in Congress modified traditional policymaking practices between the President and Legislative power. In the LVI Legislature (1994-1997), the Executive was responsible for 76.9% of all initiatives sent and 98.8% of all initiatives approved¹⁶⁸. After the PRI lost its majority, the Executive began to lessen the number of initiatives sent to Congress, and opposition parties in Congress became more proactive in presenting initiatives. For the LVII Legislature (1997-2000), the volume of initiatives increased by 26.9%. The PAN was responsible for 18.5% of total initiatives approved, the PRI originated 17.4%, and the PRD 12.7%¹⁶⁹. The President was only responsible for 20.4% of all initiatives sent to Congress in that period (down from 76.9% in the previous Legislature), nonetheless, 87.5% of initiatives approved were originated by the Executive¹⁷⁰. The success rate of the Executive was high, but has continued to decrease. Official statistics show that from 2000 to August 2004 only 63.7% of initiatives sent by the Executive were approved¹⁷¹.

¹⁶⁸ Benito Nacif, "Instituciones políticas y transición a la democracia en México", *Documentos de Trabajo*, No. 158, (CIDE, Junio 2003): 12

¹⁶⁹ Benito Nacif (Junio 2003):13, *Id. Cit. Supra* 168

¹⁷⁰ Benito Nacif (Junio 2003):12, *Id. Cit. Supra* 168

¹⁷¹ Presidencia de la República, *4o Informe de Gobierno*, (2004): 294

Legislature	Approved	%	Rejected	%	Without result	Total
LIV (1988-1991)	70	99	0	0	1	71
LV (1991-1994)	133	99	0	0	2	135
LVI (1994-1997)	90	99	0	0	1	91
LVII (1997-2000)	63	90	2	3	5	70
Total	356	97	2	0.5	9	367
Source: Jeffrey Weldon, as quoted in Aguayo, <i>México en Cifras</i> ¹⁷²						

Or

Measurement of Activity	1994-1997 Legislature	1994-1997 Legislature	2000-2003 Legislature
Bills presented	223 (N)	674 (N)	1128 (N)
Deputy success rate	16	21	13
Executive success rate	99	90	67
Source: Jeffrey Weldon, as quoted in Camp (2007) ¹⁷³			

¹⁷² Sergio Aguayo Quezada, *México en Cifras*, Ed. Grijalbo, (2002), 161

¹⁷³ Roderic Ai Camp (2007), 182, *Op. Cit. Supra 123*

Table 6. Status of initiatives sent by the Executive to the Federal Congress (December 2000- August 2004)							
	Presented 1/		Approved		Pending approval 2/		
	A	B	C	D=(B+C)	E	F=(A-C)	G=(E+F)
Legislative period	In the period	From previous periods	From the period	Approved in the period	Presented in previous periods	Presented in the period	Total from the period pending approval
Dec. 2000--Aug. 2001	28	n.a.	14	14	n.d.	14	14
Sept. 2001--Aug. 2002	30	7 3/	18 3/	25	7	12	19
Sept. 2002--Aug. 2003	28	6 3/	18	24	13	10	23
Sept. 2003--Aug. 2004	41	7	11	18	17 4/	30 5/	47
Subtotal	20			61			
Total Accumulated Initiatives	127			81			
Source: Secretaría de Gobernación ¹⁷⁴							

¹⁷⁴ 1/ Initiatives presented in previous periods which were left pending review cannot be accounted as having been presented in the period in the corresponding row.

2/ Initiatives pending approval can only be accounted by legislative period. In consequence, the result of subtracting the sum of “total of accumulated initiatives” from “total of accumulated initiatives approved in the period” (127-81=46) does not equal the total of initiatives pending approval in the period September 2003 to August 2004 (47).

3/ Given the accounting criteria, these values were reported in the 3rd Address to the Union (3er Informe de Gobierno) as 5 and 8 initiatives approved which were delayed from prior periods, and 17 initiatives presented and approved in the same period. With the objective of avoiding discrepancies in the computation of initiatives, on this occasion they were modified and substituted by the values, 7, 6 and 18, respectively.

4/ Incluye the initiative of reforms to the Organic Law of the Federal Fiscal and Administrative Justice Tribunal (*Ley Orgánica del Tribunal Federal de Justicia Fiscal y Administrativa*) which was rejected.

5/ Three initiatives which were rejected are counted in: Reforms to the Law of Value-Added Tax (*Ley del Impuesto al Valor Agregado*), Law of Income of the Federation for the Fiscal Exercise 2003 (*Ley de Ingresos de la Federación para el Ejercicio Fiscal 2003*), and the Law of Sales and Services Tax (*Ley de los Impuestos a las Ventas y Servicios al Público*).

n.a. Not available.

Secretaría de Gobernación as referenced in Presidencia de la República, *5o Informe de Gobierno*, (2005), 294 (Translation by autor)

The experience of the Fox administration shows that Congress has become a decisive actor in the policymaking process. However, the legislative policymaking process is marred by party-line biases.

The party system of Mexico evinces several problems inherited from a recent authoritarian corporate past. Nacif attributes those problems to the following foundations of the party system in Mexico¹⁷⁵:

A) Nonconsecutive reelection: The Mexican Political Constitution of 1917 established a “no reelection” rule, which mandates single presidential six-year terms and nonconsecutive terms of office for members of Congress. Nacif points out that the nonconsecutive reelection rule reduces the individual accountability of Congress members and transfers that accountability to the party¹⁷⁶.

B) Prohibition of independent candidates: Citizens must belong to a registered political party in order to hold a publicly elected office. Parties are strengthened by their monopoly over candidacy¹⁷⁷.

¹⁷⁵ Benito Nacif (Junio 2003), *Op. Cit. Supra* 168, 23

¹⁷⁶ “The nonconsecutive reelection of legislators has important consequences for the representational system and the organization of political parties. Given that legislators are prohibited from presenting themselves as candidates to the same office in the next election, they cannot be held individually responsible by the electorate for their performance. Who remains accountable is really the political party. Therefore, it can be said that in Mexico the collective responsibility of the party prevails over the electorate. [...]”. (Translation supplied by dissertation author). Benito Nacif (Junio 2003), *Id. Cit. Supra* 168, 19

¹⁷⁷ “Said measure granted political parties a *de facto* monopoly on political representation, since no other type of organization can put forward a candidate for publicly elected office”. Benito Nacif (Junio 2003), *Id. Cit. Supra* 168, 24

C) Proportional representation by lists: Another institutional foundation mentioned by Nacif, “proportional representation by lists,” further aggravates the problem of legislator accountability. The legal figure of *diputados plurinominales* was introduced as a mechanism to secure a presence in Congress for minority parties¹⁷⁸. However, plurinominal deputies and senators are chosen by parties and placed on closed lists that cannot be modified by voters. Depending on the national vote obtained by a particular party, it is proportionally entitled to place candidates in Congress by their order on the list. Plurinominal representatives account for more than one third of all legislators currently in the Federal Congress. As Nacif mentions, the system of proportional representation of lists “annulled the system of accountability based on the link between representative and voters, by stripping voters of the power to reward or punish legislators in the following election.¹⁷⁹” David Rodriguez agrees by pointing out that,

“[...] 200 (40 per cent) of the 500 federal diputados and 32 (25 per cent) of the 128 senators are elected by the plurinominal via, in other words, they are designated by party oligarchies, which leads to conclude that 232 (37 per cent) of the 628 federal legislators, more than a third part of legislators, represent in first instance the political institutes which favored them with their nomination.¹⁸⁰”

¹⁷⁸ See reference to rule of proportional representation at footnotes Supra 86 and 87

¹⁷⁹ Translation by author. Benito Nacif (Junio 2003), *Id. Cit. Supra* 168, 15

¹⁸⁰ Esteban David Rodriguez (2004), *Op. Cit. Supra* 56, 81

Nacif further shows that today, the rule rewards parties that obtain a greater national vote with a slight overrepresentation in the Senate and Chamber of Deputies, and underrepresents medium-sized parties. Hence, the rules create an incentive for relative majority parties to maintain plurinominal candidatures in Congress as a means of securing party control of policy formation¹⁸¹. In addition, the party system in Mexico allows political parties, rather than elected legislators, to designate the leadership of the party factions in Congress¹⁸². Parties therefore retain control of the legislative agenda of their Congressional factions.

(D) Party campaign finance rules: In regards to “party campaign finances,” political parties are legally in charge of the use of public resources assigned to each political party. This gives the leadership of a party substantial power in determining what financial resources are assigned to each party candidate for campaigning¹⁸³. Internal patronage networks of the party are strengthened by these rules.

The dominance of political party interests over citizen-interest representation in the electoral system should however not be surprising, since it is a direct consequence of electoral reforms negotiated by political parties¹⁸⁴. The party system which pluralized

¹⁸¹ Benito Nacif (Junio 2003), *Op. Cit. Supra* 168: 19-20

¹⁸² Benito Nacif (Junio 2003), *Id. Cit. Supra* 168: 24-25

¹⁸³ Benito Nacif (Junio 2003), *Id. Cit. Supra* 168: 20

¹⁸⁴ “The electoral system [is] the product of successive reforms that responded to the changing interests of a hegemonic party in decadence”. “[P]olitical parties are very strong. This is due to the institutional framework in which they develop and function. This institutional framework is the result of decades of electoral reformism, which made parties central organizations for the development of long and successful political careers in Mexico” (Translation supplied by dissertation author). Nacif suggests that a deeper electoral reform, focusing precisely on the institutional foundations of the party system, would

democracy in Mexico may ironically be the next impediment for continued transition towards a representative democracy¹⁸⁵. The rules of the party system uphold a continuity of corporatism and clientelism: the rules of nonconsecutive reelection, proportional representation by lists, no independent candidates, and party-based electoral financing motivate career politicians to follow party lines instead of procuring representation of citizen interests.

Furthermore, very few formal institutional restrictions were developed over the rent-seeking legislative system developed during the liberalization period. A law approved by a majority in the Chamber of Deputies must be approved by a majority in the Senate. The constitutional powers of Congress are formally tempered by its bicameral organization. Furthermore, any law can be vetoed by the President. However,

improve representative democracy and legislator accountability in Mexico. Benito Nacif (Junio 2003), *Id. Cit. Supra* 168: 23; One such suggestion is to reform the Constitution to allow for consecutive reelection of legislators. However, reform of the no-reelection rule has been repeatedly attempted without gaining support from the political parties. Esteban David Rodríguez (2004), *Op. Cit. Supra* 56: 57-79; During his term, President Fox presented two initiatives to continue electoral reform; however, neither initiative touched upon any of the points mentioned above. On March 23, 2004, the Executive sent a bill to regulate political pre-campaigns and campaigns. The initiative called for:

- Diminishing public financing for electoral processes and political parties to 50% during intermediate elections and 25% for presidential elections.
- Obligatory return of public goods to the State, in case of loss of registration or dissolution of political parties.
- Reduced period of campaigns from 180 to 90 days for presidential elections, from 90 to 45 days for representatives; from 105 to 45 days for Senators; from 90 to 60 days for governors; from 85 to 30 days for local congresses; and from 75 to 30 days for municipal governments.
- Stronger systems of control and audit over origin and use of resources by political parties,
- Determination of a specific date for state elections.
- 30 days before election day, prohibition of political propaganda; IFE exclusively to promote voting to the period immediately prior to elections.
- Prohibition of public or mass-media appearances by candidates outside the national territory.

On June 15th, 2004, the Executive sent another bill to allow for overseas voting in presidential elections. Presidencia de la Republica (2005), *Op. Cit Supra* 174: 293-294, 297

¹⁸⁵ See also Riordan Roett, ed., *The Challenge of Institutional Reform in Mexico*, Lynne Reiner Publishers Inc., 1995

Congress can overturn a Presidential veto by approving the law again with a 2/3 majority. The Mexican President is formally a weak source of Constitutional counterbalance.

2. *Representation of elites in a rent-seeking Legislative system*

As a result of the party system, patronage networks between parties and interest groups have also been strengthened in Congress. To begin with, party leadership is positioned to determine who within the party gains access to the political benefits of a long-term political career, since it controls who attains key publicly elected positions with certain continuity¹⁸⁶. Parties can use proportional representation by lists, to allow politicians to by-pass the nonconsecutive reelection rule. Rodríguez shows that despite the nonconsecutive reelection rule all parties have maintained individuals or families in Congressional seats for consecutive decades¹⁸⁷. From 1934 to 2006, 16.7% of PRI legislators managed to maintain a consecutive tenure as a legislator; from 1946 to 2006, 13% of PAN legislators maintained a consecutive tenure; and from 1989 to 2000, 10.5% of PRD legislators were “reelected” for a consecutive period¹⁸⁸. (This last percentage includes PRD members who defected from the PRI and previously held legislative office).

¹⁸⁶ Nacif writes, “[T]he nonconsecutive reelection favors centralization within political parties, since it transforms them into the coordinators of a scheme of rotation through offices and grants their leaders a powerful influence in the selection of candidates”. Benito Nacif (Junio 2003), *Id. Cit. Supra* 168, 19

¹⁸⁷ The difference between parties is in the type of individual who is allowed longevity as a legislator. In the case of the PRI, consecutive periods were maintained by political elites such as labor union leaders or local *caciques*. In the case of the PAN, political families associated with local state interests or economic interests such as business chambers have maintained a consecutive presence in Congress. The PRD, being a relatively new party, does not have a consistent type; however, several affiliated politicians have also maintained a consecutive legislative presence. Esteban David Rodríguez (2004), *Op. Cit. Supra* 56: 15-46

¹⁸⁸ Esteban David Rodríguez (2004), *Op. Cit. Supra* 56: 16, 18, 33 and 42

By allowing a long-term consecutive electoral presence of certain individuals or families, parties are able to guarantee political careers as well as representation of elite labor, business or regional interests. Current President Felipe Calderon Hinojosa (2006-2012) is a very good example of an elite career politician in the PAN, born into a career PAN family from Michoacán. Several members of the Calderon family have alternated seats in local and federal legislatures to maintain a legislative presence for 21 years¹⁸⁹. In several ways, Calderon's nomination as presidential candidate of the PAN for elections 2006 also exemplifies current party corporatism in Mexico. His

¹⁸⁹ Rodríguez writes,

“The Calderons from Michoacan have also given the [PAN] a good number of legislators. The Michoacan lawyer Luis Calderón Vega, founder of the PAN and of his own dynasty, reached Congress as a diputado for the 1979-1982 period. Six years passed without any member of his family stepping [into the state or federal Congresses]. His daughter, the psychologist Luisa María Guadalupe Calderón Hinojosa, began her local legislative life as a deputy of the Michoacan Congress (1983-1986), and in 1988 obtained her first federal *diputación* [representative seat], which ended in 1991.

In that same period the young lawyer Felipe Calderón Hinojosa was a member of the Assembly of Representatives of the Federal District (1988-1991) and when he left, his sister Luisa María, at 29 years older, came to replace him, covering the period 1991-1994 in the Chamber of Deputies. In that same period another of his siblings, Juan Luis Calderón Hinojosa, was also a federal deputy. Therefore the family had two seats in Congress at the same time.

Felipe Calderón was national president of the PAN and then ran unsuccessfully for governor of Michoacan, and so returned to the Chamber of Deputies where he acted as coordinator of his parliamentary group from 2000 to 2003.

Luisa María is the eldest of the Calderón Hinojosa, therefore she was granted the first senatorial seat (2000-2006). They are a young family, with only their first 21 years in Congress.

In 2003 Mrs. Margarita Zavala, wife of Felipe Calderon, who already functioned as Secretary of Energy for President Fox, occupied a seat in San Lázaro [precinct of the Federal Congress]. [...]”

Another example from PAN is the Vicencio family, which has maintained a legislative presence for 48 years, consecutive except for a 3-year period (1970-1973). (Translation by author). Esteban David Rodríguez (2004), *Op. Cit. Supra* 56: 35, 37

nomination is consistent with the present stage of democratic transition, in which without a hegemonic one-party system orchestrated by the President, political parties need to consolidate their bases of power both internally and externally. In contrast to the presidential rent-seeking system, for the 2006 elections the PAN favored a career politician from a political family rather than President Fox's chosen candidate, rumored to be Santiago Creel.

Furthermore, patronage networks between parties and economic elites have also been renewed through Congress. Rodríguez analyzed 1,128 curricula corresponding to the LVIII (2000-2003) and LIX (2003-2006) legislatures, including *diputados* and *senadores*, and measured the current or former membership of *diputados* and *senadores* to company boards or business chambers and organizations¹⁹⁰. By analyzing legislator profiles, Rodríguez concludes that from 1991 to 2004, entrepreneurial and financial interests went from between 7%-13% to 35% of total seats in Congress¹⁹¹. The PAN and the PRI contributed the majority of said business-affiliated Congressmembers in the legislative period of 2003-2006¹⁹².

¹⁹⁰ Of the 128 senators of the 2000-2006 period (covers both legislatures), 60 senators (equivalent to 47% of the Senate) were or had been members of company boards or business chambers or private organizations. In the LVIII legislature, 154 out of 500 deputies (equivalent to 30.8% of the Chamber of Deputies) showed an affiliation to company boards or business organizations. In the LIX legislature, 125 out of 500 deputies showed a similar affiliation to business interests, equivalent to 25% of the Chamber of Deputies. Esteban David Rodríguez (2004), *Op. Cit. Supra* 56: 81-83

¹⁹¹ Esteban David Rodríguez (2004), *Op. Cit. Supra* 56: 81

¹⁹² In the LIX legislature, PAN deputies were reduced from 207 to 151. In the prior LVIII legislature, more than 50% of PAN deputies were affiliated with company boards or business organizations, and in the LIX legislature 30.5% of PAN deputies had a similar business affiliation. However, in the LIX legislature, 26.26% of PRI deputies (59 out of 222) had a business affiliation to company boards or chambers. This was almost twice the number than in the previous legislature. The PRD also had contributed business-affiliated deputies, thought to a lesser extent. In conclusion, 339 out of 1,128

Parties are further capable of securing representation of elite interests in Congress by gaining representation on or leadership of Congressional commissions. During 2006, there were 43 ordinary commissions in the *Cámara de Diputados*, plus 18 special and 5 investigation commissions¹⁹³. In the Senate there were 48 ordinary commissions and 20 special commissions¹⁹⁴. There are also three bicameral commissions. The ordinary legislative commissions are in charge of reviewing initiatives received in their House of origin, and issuing a *dictamen* which includes a report and recommendation. A final vote cast by the Commission determines whether the initiative will be submitted for approval in the Chamber of Deputies or the Senate, depending on the house to which the committee belongs. The Commissions are effective filters of initiatives not in line with party politics.

Rodríguez shows in his work that several Presidents, Secretariats, and other representatives of the LIX legislature (2000-2003) sitting on the boards of the ordinary Commissions with an economic orientation, such as the Energy, Economic, Finance,

legislators in the 2000-2003 legislative period had a business affiliation (35.4% of Congress). Esteban David Rodríguez (2004), *Op. Cit. Supra* 56: 84-85

¹⁹³ Cámara de Diputados, “Ordinary commissions”, official website, http://sitl.diputados.gob.mx/album_comisiones/comisiones/listado_de_comisiones.asp?1; “Special commissions” at http://sitl.diputados.gob.mx/album_comisiones/comisiones/listado_de_comisiones.asp?2; “Bicameral commissions” at http://sitl.diputados.gob.mx/album_comisiones/comisiones/listado_de_comisiones.asp?21; and “Investigation commissions” at http://sitl.diputados.gob.mx/album_comisiones/comisiones/listado_de_comisiones.asp?3. (Last viewed June 30, 2006)

¹⁹⁴ Cámara de Senadores, “Ordinary commissions”, official website, <http://www.senado.gob.mx/comisiones.php?tipo=ordinaria>; “Special commissions” at <http://www.senado.gob.mx/comisiones.php?tipo=especial>; “Bicameral commissions” at <http://www.senado.gob.mx/comisiones.php?tipo=bicamaral>, (Last viewed June 30, 2006)

Budget and Tourism commissions, have held a seat on company boards or continue to have membership or office in a business chamber¹⁹⁵. Rodríguez shows that several Congressional representatives exercise formal administrative leadership in commissions in which they have a conflict of interest in the commission's area of responsibility, without any mechanism of accountability for their performance. Without mechanisms of representative accountability for Congressmembers, there is no deterrent for representatives to favor elite interests represented by themselves or their parties.

In many ways, the current party system continues to be fundamentally based on the corporatist party model that made PRI hegemony possible. In this system, it is once again possible for elite policymakers to be captured by elite economic interests, without significant accountability to the population. Camp confirms that entrepreneurs began to participate in politics via the PAN to the point of being able to influence policy through the party system¹⁹⁶. Given wealth concentration through *grupos*, as well as the changing structure of popular-sector leadership, big business continues to

¹⁹⁵ Given the importance of the subject, a broader research into legislator profiles would be required to establish if the business affiliation of Congressmembers is higher or lower in the commissions dealing in economic matters than the 35% business affiliation mentioned by Rodríguez for Congress as a whole, or if those are limited examples. Esteban David Rodríguez (2004), *Op. Cit. Supra* 56: 96-108

¹⁹⁶ "The overt participation of entrepreneurs in the electoral arena has changed the traditional relationship between business and government. Entrepreneurs' support was crucial to the PAN's success and strengthened the opposition generally before 2000. As individual businesses or business groups become directly tied to the electoral process and to the fortunes of political candidates, they acquire powerful political capital that they can use to negotiate with the state. In turn, governments must pay closer attention to business's demands, especially given the increasing electoral competitiveness and business' greater ability to determine the outcome of elections." Roderic Ai Camp (2007), *Id. Cit. Supra* 123: 152-153

hold a greater influence over economic policy orientation than do labor unions¹⁹⁷, popular sectors or small and medium firms¹⁹⁸. During this period, the percentage of seats traditionally assigned to labor union leaders in Congress by the PRI fell, and instead are now being assigned to teachers' union representatives and a growing number of party members moving up from state electoral posts¹⁹⁹. Clientelistic policy networks between the entrepreneurial sector and the Legislature (as the strong policymaker in the state) seem to have been renewed by a "rent-seeking Legislative system."

¹⁹⁷ Thacker states: "In the Mexican context, the formal political organization and relative influence of the labor sector over economic policy have decayed in recent years (see Samstad and Collier 1995, Teichman 1996). Davis (1992) traces Mexico's trade opening to the restructuring of its corporatist political system and the relative decline of labor within the governing PRI and of the PRI itself (relative to the President). Pastor and Wise (1994) explain Mexico's free trade policy by adopting Rodrik's (1992b) notion of a "political cost-benefit ratio," the level of which was influenced in the Mexican case by institutional exclusion, the fight against inflation, asymmetric information flows, and policy makers' ideology. In particular, the potential opponents of free trade, including labor, were institutionally distanced from the decision. These developments helped lower the political cost of opening to the government enough to make it a viable alternative. At the same time, business, especially the managers of large, outward-oriented national and multinational firms, became much more active in economic policy making (Luna 1995, Valdés Ugalde 1996, Schneider 1997, Thacker 1999b). [...]" Strom C. Thacker (2000), *Op. Cit. Supra* 100: 18-19

¹⁹⁸ Small and medium firms composed the losing factions in the free trade agreements. Strom C. Thacker (2000), *Op. Cit. Supra* 100: Footnote 11

¹⁹⁹ Langston studied the dynamics of PRI worker, rural, and popular sector (education and government employees) nominations of the PRI to seats in the lower house of Congress, and shows that in the transition period, labor gradually lost representation because of the same initiative by the PRI. Labor was traditionally assigned 24% of all PRI seats in the lower house of Congress. In the 1988 elections, labor candidates were assigned 21% of PRI nominations but were only able to secure 33% of the districts in the elections. As a result, when the PRI compiled its candidate lists for the 1991-1994 Congressional elections, the worker segment of the PRI was assigned 6% fewer candidacies than in the previous elections. For the 1997-2000 elections, labor representatives secured only 11% of the PRI faction in Congress, which was 13.5% less than in the previous elections. During this period, popular sector representatives such as the education union gained seats, and the profile of the candidates of the PRI turn towards selection of candidates with previous experience in electoral positions at a state level. Joy Langston, "Competencia Electoral y Selección de Candidatos", (reprint) in *Lecturas sobre el Cambio Político en México*, (compilers) Carlos Elizondo et al., (CIDE-FCE, 2002), 428-429

3. *Transitional corporatist structures for labor unions and business chambers*

Changes in representative seating in Congress reflect overall incremental changes in previous corporatist arrangements. Javier Aguilar García published a study of change in the unionized worker population in Mexico during the reform periods in which he found that the number of unionized workers in relation to the occupied (or employed) economically active population of Mexico (Occupied PEA) of Mexico has been decreasing steadily since the 1980s, and unions are suffering losses in relative terms²⁰⁰. The study also reveals change in the composition of unions themselves²⁰¹. Today, the unionized population of the overall PEA tends to be found in federal government unions (Section B unions), rather than in private-sector labor unions (Section A unions), the latter including the union workforce of state-owned

²⁰⁰ The study compares the number of unionized workers in Mexico to the occupied (or employed) economically active population of Mexico (Occupied PEA) from 1978 to 2000. The author found that in 1978 unionized workers represented 11.59% of the Occupied PEA; 15.05% in 1986; 13.33% in 1993; and 11.92% in 1997. Although the total number of unions has slightly increased from 1986 to 2000, the number of affiliates compared to the growth rate of the PEA or Occupied PEA, has a negative growth rate. “[...] 1,548 in 1986, 1,667 in 1993, 1,726 in 1997 and 2,155 in 2000.” Javier Aguilar García (2001), *Id. Cit. Supra* 152:111-112, 378

²⁰¹ Labor is regulated by the federal government in accordance to Article 123, Sections A and B, of the Mexican Political Constitution. Unions are categorized according to Sections A and B of Article 123 as private sector unions (Section A unions) and public sector unions (Section B unions). In the prereform period, unions were obliged to register with the Labor Ministry. Most Section A workers are regulated by the Federal Labor Law (*Ley Federal de Trabajo* or LFT), and were obliged to register under one of the specific categories of industrial activity listed in article 123, Section A of the Constitution. Section A unions also include unions associated with state-owned companies such as *Petróleos Mexicanos* (Pemex) and with quasi-state agencies such as the Federal Electricity Commission (*Comisión Federal de Electricidad* or CFE).

Sector B unions comprise federal and state public administration workers, including teachers’ unions associated with the public education system. Most of these unions are regulated by the Federal Law of Workers at the Service of the State (*Ley Federal de los Trabajadores al Servicio del Estado* or LFTSE). A 1938 secondary law regarding Section B unions mandated that there could only be one union per government agency; this rule is no longer in effect but set the precedent for state control over government unions. S. Zamora et. al (2004), *Op. Cit. Supra* 43: 417-431

enterprises²⁰². Although the longstanding *Congreso del Trabajo* or CT²⁰³, a pillar of old-style corporatism, continues to house the greater number of Section A unions²⁰⁴, new labor union organizations unaffiliated to the traditional worker confederations of the CT are increasing in number and relevance²⁰⁵. Moreover, in 2001, the Supreme

²⁰² Sections A and B unions maintained an approximately equal percentage of workers from the Occupied PEA from 1978 to 1997. Section A unions represented: 6.48% of Occupied PEA in 1978; 5.79% in 1986; 6.9% in 1993; and 6.19% in 1997. Section B unions represented: 5.11% of Occupied PEA in 1978; 9.26% in 1986; 6.41% in 1993; and 6.07% in 1997. However, in 1978, Section A union affiliates (including all active and inactive workers) were a significantly higher percentage of the overall PEA, but a reverse trend developed so that by 1997, Section B union affiliates are now a slightly higher percentage of the PEA. In 1978, unionized personnel in Section A represented 5.85% of PEA and Section B represented 4.61%; in 1986 Section A represented 4.77% of PEA and Section B comprised 7.62%; in 1993 Section A was 6.75% of PEA and Section B was 6.26%; and in 1997 Section A represented 5.90% of PEA and Section B was 5.78%. Javier Aguilar García (2001), *Id. Cit. Supra* 152: 111, 114 -116.

²⁰³ A and B Section unions were further organized into hierarchical federations or “centrals” that collectively represent unions. Section A federations and centrals coalesce around a supreme labor organization called the Labor Congress (*Congreso del Trabajo* or CT). The following national federations have traditionally formed part of the CT: the Worker Central of Mexico (*Central de Trabajadores de México* or CTM), the Revolutionary Confederation of Workers and Peasants (*Confederación Revolucionaria de Obreros y Campesinos* or CROC), the Regional Mexican Confederation of Workers (*Confederación Regional Obrera Mexicana* or CROM), the Revolutionary Worker Confederation (*Confederación Obrera Revolucionaria* or COR), the General Worker Confederation (*Confederación General de Trabajadores* or CGT), and the Worker Groups Federation (*Federación de Agrupaciones Obreras* or FAO). Since the late 1930s, Section B public-sector unions are affiliated in the Federation of Unions of Workers at the Service of the State (*Federación de Sindicatos de Trabajadores al Servicio del Estado* or FSTSE). S. Zamora et. al (2004), *Op. Cit. Supra* 43: 417-431

²⁰⁴ Aguilar mentions that the CT retains its traditional hierarchical and elitist decisionmaking structure as well as a large number of dispersed affiliated unions, which gives it a loose organization: 1,458 in 1986, 1,677 in 1993, 1,726 in 1997, and 2,155 in 2000. Aguilar considers this traditional structure a weakness, since the multiple small unions under the CT cannot easily coalesce on their own to generate pressure for fulfillment of group demands. In this sense, the “official” unions lack the capacity to address new needs faced by the growing economically active population of Mexico as well as the challenges of unemployment, a weakness that is being capitalized by the more modern organization of unaffiliated unions. Javier Aguilar García (2001), *Id. Cit. Supra* 152: 381-382

²⁰⁵ In 1997, after the death of CTM leader Fidel Velasquez, a new confederation arose to oppose the CTM: the National Workers Union (*Unión Nacional de Trabajadores* or UNT) composed of 110 unions and 2 million affiliates, whose leadership would be in the hands of none other than Hernández Juárez, the former leader of Telmex’s union. Roderic Ai Camp (2007), 155, *Op. Cit. Supra* 123; In recent years, union organizations *unaffiliated or unassociated* with the main official A Section federation, the CT, have been increasing in numbers: “67 in 1986, 219 in 1993, 373 in 1997, and 469 in 2000”. Likewise affiliates to these unassociated unions have multiplied: “52,458 in 1986; 248,756 in 1993, 282,280 in 1997 and 1,101,127 in 2000; the latter number is already greater than that of the affiliates of the CTM”. The CTM is the largest union affiliated to the CT. Aguilar García argues that unions unaffiliated to official state unions rose in numbers during this period as a result of government

Court declared exclusion and admission clauses in labor unions invalid²⁰⁶, thereby ending the corporatist formal legal structure of union membership and hence also union clientelism²⁰⁷.

Changes in labor union configurations do not imply that existing labor unions, whether of Section A or B, now lack relevance in policymaking processes, but simply that corporate worker unions continue to reorganize into a yet-to-be-stabilized system of *neo-corporatism*. Associated with the public education system, “[t]he teachers’ union, or *Sindicato Nacional de Trabajadores de la Educación (SNTE)[...]*, is the largest labor union in Latin America, representing 1.4 million public school teachers throughout the country.²⁰⁸” The leadership of the teacher’s union (in the person of leader María Esther Alba Gordillo) has become one of the most controversial cases of President Fox’s administration, due to renewed corporatist and clientelistic ties. Other labor populations attached to state agencies continue to be significant: In 2000, IMSS had 356,819 government employee positions; PEMEX 117,200; ISSTE 93,780; CFE

policies promoting this change during privatization years in the 1980s and 1990s. Javier Aguilar García (2001), *Id. Cit. Supra* 152: 377, 380

²⁰⁶ Roderic Ai Camp (2007), *Op. Cit. Supra* 123: 154

²⁰⁷ The original 1931 labor law as well as the 1970 reform to the LFT, allowed Section A unions to establish exclusivity and admission clauses in worker and union contracts. Exclusivity clauses stated that a workers who was expelled from a union would have to be fired from her or his job; admission clauses stated that for a worker to be hired, he or she would have to join a particular union. With these limitations in place, union leaders controlled access to power and benefits for workers.

In similar fashion, Section B workers remained highly responsive to union controls. Unlike Section A unions, which were able to organize strikes over specific differences with employers (fulfillment of labor contract or wages), Section B unions were more limited in their right to strike, since they had first to prove a systematic violation of rights. Workers’ strikes and benefits were therefore controlled and orchestrated through the hierarchical structures of their unions. However, although Section B unions were highly controlled, they were able to negotiate numerous government benefits through years of patronage relationships between union leaders and state officials affiliated to the PRI.

S. Zamora et. al (2004), *Op. Cit. Supra* 43: 418-431

²⁰⁸ S. Zamora et. al (2004), *Op. Cit. Supra* 43: 429

73,142; Luz y Fuerza del Centro 34,666; Capufe 5,957; ASA 3,337, and the Lotería Nacional 1,959 government positions²⁰⁹.

A variety of authors revisited authoritarianism and corporatism in Latin America to review how states after democratic and economic transition may continue to be structured around corporatism. A conclusion offered by this exercise is that policy reformers in Latin America ought still to be considering advancing democratic reform “through some form of social or democratic corporatism, or neocorporatism in the European fashion,” which is more appropriate to “Latin American history, institutions, and political culture than is either a fully laissez-faire economy or a political regime of completely unfettered interest group-activity”²¹⁰.

Business chambers and organizations continue to have a similar organization but without the legal restrictions previously in place. In 1996 the Supreme Court ruled against mandatory chamber membership, and this ruling affected the revenue capacity of former quasi-state business chambers²¹¹. Like official labor unions, these quasi-state business chambers have weakened and private business organizations have been strengthened²¹². Formerly quasi-state organizations have allied with private business organizations to generate a joint critical voice against government policies. Camp considers that business organizations have developed independent

²⁰⁹ Sergio Aguayo Quezada, (ed.) (2002), *Op. Cit. Supra* 172,158

²¹⁰ Howard J. Wiarda, ed., *Authoritarianism and Corporatism in Latin America – Revisited*, (University Press of Florida, 2004), 301

²¹¹ Roderic Ai Camp (2007), *Op. Cit. Supra* 123:150

²¹² Roderic Ai Camp (2007), *Id. Cit. Supra* 123:150-153

entrepreneurial political behavior that can “no longer be considered remotely corporatist”²¹³. Nonetheless, Ben Ross shows that despite an erosion of state corporatism, Mexican business is still anomalously highly organized by comparison with other Latin American countries, and suggests that among other reasons, this is because the Mexican state continues to promote business organizations as interlocutors in policymaking²¹⁴. Furthermore, clientelistic hierarchies among business chambers and organizations continue to exist to and mediate access to the elite²¹⁵.

4. Transparency, accountability, and regulatory reform of the Executive

Compounding the President’s problem of a formally weak Executive, Fox’s administration brought forth reforms to increase transparency, accountability, and the professionalization of public servants, which in many cases succeeded in changing incentive structures in the bureaucracy and weakened traditional command and

²¹³ Roderic Ai Camp (2007), *Id. Cit. Supra* 123: 153

²¹⁴ Ben Ross Schneider, “Why is Mexican Business so Organized?,” *Latin American Research Review*, Vol. 37, No. 1. (2002): 77-118, JSTOR Stable URL: <http://links.jstor.org/sici?sici=0023-8791%282002%2937%3A1%3C77%3AWIMBSO%3E2.0.CO%3B2-6>

²¹⁵ The business chambers of the pretransition period, which originated as quasi-state corporate interest groups mandatory under law, continue to exist today. These include CANACINTRA, CONCANACO and CONCAMIN. The strongest private business organizations continue to be COPARMEX, AMIS, ABA, CCE, and CMHN. Members of the CMHN continue to be “leading capitalists” who are granted “special access to government decision makers, including the President”.

In analyzing the CMHN, Camp mentions: “Only fifty-seven individuals have ever been a member of this group in forty years of existence. The turnover argument is substantially countered by the fact that more than a fifth of the new members are the children or nephews of original members, and an even larger percentage are related by marriage to older members. Camp also states, “In the private sector, the most influential organizations are not company bureaucracies but corporate boards and the Mexican Council of Businessmen. The advantage of boards is that they are small and, as demonstrated earlier, overlapping. The advantage of the Council is that it is small, has overlapping membership from various economic sectors, has direct access to top government officials and the President, and provides its members with direct access to thirty-nine of Mexico’s top capitalists.” Roderic Ai Camp, *Mexico’s Mandarins: Creating a Power Elite for the Twenty-First Century*, University of California Press (2002), 221-226

clientelistic lines between the Presidency and lower-tier public officers. In this reform package, Fox put forward the 2000 Law of Acquisitions, Leasing and Services in the Public Sector (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*)²¹⁶; the 2000 Law of Public Works (*Ley de Obras Públicas y Servicios relacionados con las mismas*)²¹⁷; the 2002 Federal Law of Liability of Public Servants (*Ley Federal de Responsabilidades de los Servidores Públicos*)²¹⁸, which called for the creation of the Registry of Property of Public Servants (*Registro Patrimonial de los Servidores Públicos*); the 2002 Federal Transparency Law (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*)²¹⁹ which made delivery of public information mandatory for public servants; and the 2003 Federal Civil Service Law (*Ley Federal del Servicios Profesional de Carrera*)²²⁰ aimed at breaking the old-style *camarilla* shifts in bureaucracy and promoting a continuity and professionalization of government personnel. In 2002, Congress amended Article 113 of the Constitution to permit a government agency to be held for civil liability, which opened the door to the enactment of the 2004 Law of Patrimonial Responsibilities of the Government (*Ley Federal de Responsabilidad Patrimonial del Estado*).²²¹

The transparency legislation called for related Presidential decrees to be issued: the 2003 Regulation of the Federal Transparency Law (*Reglamento de la Ley Federal de*

²¹⁶ D.O. 4 January 2000.

²¹⁷ D.O. 4 January 2000

²¹⁸ D.O. 13 March 2002

²¹⁹ D.O. 11 June 2002

²²⁰ D.O. 10 April 2003

²²¹ D.O. 31 December 2004

Transparencia y Acceso a la Información Pública Gubernamental)²²² and Internal Regulations of the Federal Institute of Access to Information (*Reglamento Interior del Instituto Federal de Acceso a la Información*)²²³, among other administrative regulations. The Federal Institute of Access to Information or IFAI is a new organization whose board of commissioners is designated by the President with approval by Congress. A main function of the IFAI is to resolve conflict between federal agencies and civilians in regards to access to information. Public agencies cannot appeal decisions by the IFAI. The IFAI is therefore unencumbered by the procedural quagmire provoked by the *amparo* system and other appeals procedures, which has led to an expedited process of public access to an enormous amount of government information. Prior to his exit, President Zedillo issued the 2000 Federal Law of Administrative Procedures (*Ley Federal de Procedimiento Administrativo*) which created the Commission on Regulatory Improvement (*Comisión Federal de Mejora Regulatoria*)²²⁴, and which led Fox to declare a moratorium on any new administrative regulation unless it specifically fell into a regulated exception, starting May 13, 2004²²⁵.

Despite these efforts, corruption scandals in Fox's administration flourished because of the continuity of corporate pacts and clientelistic arrangements between political

²²² D.O. 11 June 2003

²²³ D.O. 11 June 2003, last reformed 9 September 2006

²²⁴ Reform of LFPA. D.O. 19 April 2000

²²⁵ Presidencia de la República (2004), *Op. Cit. Supra 171*: §4.5, available online at <http://cuarto.informe.fox.presidencia.gob.mx/index.php?idseccion=285>

and economic elites and the Mexican state²²⁶. The children of Fox's wife (Martha Sahagun) became the source of corruption scandals when it was revealed that they had been establishing and running companies that were benefiting from government public bids for low-income housing construction and receiving federal funds to finance their companies²²⁷. Furthermore, the closeness of Fox and his wife with Elba Esther Gordillo (also known as *la maestra*), the leader of the SNTE or National Education Workers Union (the teacher's union) is seen as evidence of failure to democratize old corporatist behavior, and in particular exemplified a renewal of old-style corporatist ties between unions and the government²²⁸. An article in *The Economist* calls Gordillo "the second most powerful politician in the country" today, after President Calderon, and mentions that one of the factors that may have tipped the 2006 elections in favor of President Calderon was the widely commented "unwritten" alliance with *la maestra*. This alliance provided him with popular support in exchange for allowing her

²²⁶ See generally D. Arellano-Gault, "Corruption in Mexico Under the New Regime: Why is it still so high?", *ASPA Online Columns*, April 12, 2002, available online at <http://64.91.242.87/publications/COLUMNS/archives/2002/04Apr/arellano0412.html>

²²⁷ Jesusa Cervantes, "El 'consorcio' del sexenio: Supuesto tráfico de influencias en gobierno de Vicente Fox/ Inversiones y Finanzas de Manuel Briebesca Sahagún, hijo de Marta Sahún", *Proceso*, January 15, 2006, 20; Jesusa Cervantes, "Fox 'encubre' a sus hijastros", *Proceso*, August 27, 2006, 9.

²²⁸ See Jesusa Cervantes and José Gil Olmos, "Marta --Elba Esther objetivo: el adoctrinamiento. (Presidencia)," *Proceso*, February 9, 2003, 6; First Lady Marta Sahagun, by way of her foundation Vamos Mexico, signed an agreement with teacher union leader Elba Esther to jointly produce and distribute three booklets which comprised *A Guide for Parents (Guia para padres de familia)*. The articles critique the questionable alliance and the conservative indoctrination promoted by the publication). Jesusa Cervantes and José Gil Olmos, "Como ser buen padre en 408 paginas," *Proceso*, February 9, 2003, 7; Explains that the "nongovernmental organization" established by Marta Sahagun was in a privileged position to obtain funds, thus diminishing financial support that longstanding civilian-established NGOs in Mexico could ever possibly consider receiving. The article critiques the First Lady's dismissal of her position as a conflict of interest in carrying out social assistance programs during Fox's *sexenio*. Jesusa Cervantes and José Gil Olmos, "Los abusos de Marta", *Proceso*, June 26, 2002, 14

continued control over the school system, a control widely seen as an impediment to improving Mexican public education²²⁹.

Alongside increased concern over corruption, with the collapse of the former clientelistic and corporatist structures of social order crime rates increased, and law enforcement as a primary function of the Executive power became a focus of debate²³⁰. In 1996, Article 16 of the Constitution was reformed to include organized crime as a criminal offence, and opened the way to the enactment of the 1996 Federal Law against Organized Crime (*Ley Federal contra la Delincuencia Organizada*)²³¹. President Fox procured a 2003 Criminal Justice Reform, which attempted to make criminal proceedings more swift, effective, and just by including oral hearings. Nonetheless, the problem of soaring crime rates and public insecurity, compounded by the collapse of informal means of social control, the rise of the drug economy, and increases in poverty, remains one of the single most important challenges to the stability of the Mexican political economy.

²²⁹ “Education in Mexico: “‘The teacher’ holds back the pupils”, *Economist*, July 21, 2007, 2

²³⁰ Starting in 1990, Salinas issued the Organic Law of the Attorney General of the Republic (*Ley Orgánica de la Procuraduría General de la República*). D.O. 16 April 1990. This was followed by the Presidential decree establishing the National Commission on Human Rights (*Comision Nacional de los Derechos Humanos* or CNDH), which required a reform of Article 102 of the Constitution to establish the CNDH and other agencies as autonomous constitutional organizations. D.O. 5 June 1990. In 1991 the Federal Law for the Treatment of Juvenile Offenders (*Ley para el tratamiento de menores infractores*) was issued. D.O. 24 December 1991

²³¹ D.O. 3 July 1996, followed by D.O. 7 November 1996

5. *The rising importance of the Judiciary in the division of powers*
The 2002 study *So Far, So Near! The Rule of Law and Legal Transformation in Mexico (1970-1999)*²³² found that the judiciary had become more successful in resolving backlogs, specializing in different subject areas, increasing its budget, increasing the number of federal state courts, and decentralizing work towards those courts.²³³ However, the number of *amparos* being resolved by *sobreseimiento* (dismissal due to noncompliance with formal requirements) continued to increase: In 1997, the percentage of *amparos* resolved by *sobreseimiento* was as high as 73%.²³⁴ This meant that despite certain improvements in the administrative structure of the judiciary, the quality of court performance as a constitutional enforcer remained deficient²³⁵.

The findings of the study mentioned above are complemented by Fix-Fierro's study on court efficiency, in which he notes that the increase in the number of federal courts has

²³² Sergio Lopez-Aylon and Hector Fix-Fierro, "¡Tan Cerca, Tan Lejos!. Estado de derecho y cambio jurídico en México (1970-1999)", *Boletín Mexicano de Derecho Comparado*, Nueva Serie, Año XXXIII Número 97, January-April 2000: 155-267, available at <http://info.juridicas.unam.mx/publica/rev/boletin/cont/97/art/art3.htm>

²³³ Sergio Lopez-Aylon and Hector Fix-Fierro (2003) *Id. Cit. Supra* 232: 22-29

²³⁴ Sergio Lopez-Aylon and Hector Fix-Fierro (2003) *Id. Cit. Supra* 232: 25

²³⁵ On this subject, A.L. Magaloni and L. Negrete analyzed judicial activity from 1940 to 1998 and found that on average two out of three *amparos* were decided by *sobreseimiento*. This means that most *amparos* are decided without resolving the conflict between citizens and authorities. The authors argue that such results are provoked by the incentives in the professional career of judges. Using a mathematical model, the authors establish a direct causal correlation between the implementation in the judiciary of a policy to diminish backlogs and the increase in *sobreseimientos* for resolving *amparos* in the period mentioned. Thus they argue that judges follow an unwritten policy in their public service careers, whereby a good judge is one with a smaller backlog of pending cases. At a time when cases brought to the federal courts require resolution under a new context of political rights and pluralism, the authors conclude that the federal courts are not fulfilling their role as comptrollers of the constitutional and legal limits on the exercise of power by authorities, and that instead judges fall back on a tradition of formal legalism to resolve increases in workloads. Ana Laura Magaloni and Layda Negrete, "El Poder Judicial y su Política de Decidir sin Resolver", *Documentos de Trabajo de Derecho*, Número 01, (CIDE, 2001)

not significantly resolved the backlog problem, since workloads per federal court have also increased. Fix-Fierro concludes that workloads and backlogs in 2001 are quite similar in percentage terms to those in the 1970s. Instead, the growth of the judicial body has created new and significant problems regarding administrative controls, which divert resources from jurisdictional functions.²³⁶ Fix-Fierro argues that the growth of the judicial body, the excessive workloads of judges, and the strategies employed by lawyers in courts are actually impeding the establishment of incentives for career judges to pursue a new social role, and hence there is the risk of insufficient human resources to perform this role in the judiciary for the future.²³⁷

Alongside the constant demand for improvement in court accountability²³⁸, accessibility,²³⁹ and administration, as well as as for a long-overdue reform of the *amparo*, a demand to improve the quality of judicial decisions seems to be rising mostly rapidly. In his book *The Constitutional Theory of the Supreme Court of Justice*²⁴⁰, now Supreme Court Minister José Ramón Cossío critiques the role of the Supreme Court by stating that the role of such a high court is not to interpret law

²³⁶ Hector Fix-Fierro (Noviembre 2002), *Op. Cit. Supra* 55: 26-30

²³⁷ Hector Fix-Fierro (Noviembre 2002), *Op. Cit. Supra* 55: 31-37

²³⁸ Regarding accountability and transparency Fix-Fierro explains that the 2002 Law for Transparency and Access to Public Government Information has forced the Judiciary to open its archives to public scrutiny; and a freer press keeps the courts in public debates. Judges seem to feel that the major effect of this sudden transparency is evidence of a general public ignorance of law and legal procedures. In response to this perception, Fix-Fierro states that improved access to court decisions does not mean that judicial decisions written in excessive legalese make “public” access any more real. Hector Fix-Fierro (Noviembre 2002), *Op. Cit. Supra* 55: 26-27

²³⁹ In terms of access to justice, little ground seems to have been gained in establishing public defense offices that would provide the common citizen with adequate legal advice. This problem is particularly notorious in state courts. Hector Fix-Fierro (Noviembre 2002): *Op. Cit. Supra* 55, 33

²⁴⁰ José Ramón Cossío, *La teoría constitucional de la Suprema Corte de Justicia*, Doctrina Jurídica Contemporánea, 1st Edition (2003), Reprinted (2004)

through traditional legalism but to assume the role and duty of interpreter of the legal state of a democratic system; otherwise it promotes the *status quo* of an authoritarian regime. The qualitative demand for a better judiciary springs in part from the Supreme Court's gradual insertion into a political and social role for judges. Supreme Court decisions such as the ones in the Aguas Blancas case are becoming a novel legal literature in Mexico²⁴¹.

Furthermore, with a rent-seeking Legislature and a weak Presidency, the role of the Supreme Court of Justice as Constitutional counterbalance to Congress has become more relevant. In this respect, the liberalization period produced a judicial reform that only now is becoming relevant to the institutional endowment²⁴². Zedillo introduced the new 1995 Organic Law for the Judicial Power (*Ley Orgánica del Poder Judicial de la Federación*)²⁴³. As part of reform, constitutional controversies and actions of unconstitutionality have given the Court a more political role. For example, an action of unconstitutionality based on article 105, section II, (b) of the Mexican Federal Constitution, allows a minimum minority of Congressmembers to present a case in

²⁴¹ On April 23, 1996, on request of President Zedillo, the Supreme Court issued a report on civil rights violations perpetrated by the governor of the state of Guerrero, Ruben Figueroa, against farmers belonging to the Organización Campesina de la Sierra Sur (OCSS). The report found Figueroa alongside other government and police agents principally responsible for an armed attack on June 28th, 1995 against a group of activists belonging to the OCSS and other passengers traveling on a truck, at a site known as Aguas Blancas. The report was not part of a case filed with the Supreme Court and charges were never filed against Figueroa, but nonetheless the report had lasting impact as a memorable first moment in which the Supreme Court contradicted the handling of a case by a Federal prosecutor and hence broke allegiance to the hegemonic system by evidencing the accountability of government officials in a massacre. Julia Preston and Samuel Dillon (2004), *Op. Cit. Supra* 82, 178-184

²⁴² De la Madrid initiated judicial reform in Mexico. Hector Fix-Fierro (Noviembre 2002), *Op. Cit. Supra* 55: 20

²⁴³ D.O. 26 May 1995.

which a law is deemed to be unconstitutional²⁴⁴. The inclusion of this type of action has granted the Supreme Court of Justice a type of “veto,” which when activated according to the rules, may lead to all or part of a legislative act being ruled invalid. Contrary to the *amparo* these rulings have *erga omnes* effects. Actions of unconstitutionality have risen in the past years, from 9 in 1994-1997 to 21 in 2000-2003²⁴⁵. Thus, the legal system shows a strengthening of formal checks and balances among the Constitutional bodies comprising the division of power.

Magaloni and Sánchez argue that the 1994 reform of the judicial power during Zedillo’s term in office was a conscious delegation of the President’s *de facto* powers to settle disputes in a hegemonic system to the Supreme Court, because in the new multiparty context, the prospect of having to settle state electoral disputes between the PRI and opposition parties created inconvenient costs for the Presidency (the President’s decisions and authority were being contested as obsolete by both the opposition and by PRIístas)²⁴⁶. The choice, however, was significant, because as the

²⁴⁴ For example, Article 105, Section II (b) of the Mexican Political Constitution (*Constitución Política Mexicana*):

“The Supreme Court of Justice of the Nation shall know, in the terms of the regulating law, of the following cases:

[...]

II. Actions of unconstitutionality introduced with the objective of showing a possible contradiction between a norm of general application and this Constitution.

Actions of unconstitutionality may be exercised within the thirty consecutive days after the date of publication of said norm, by:

[...]

(b) The equivalent of 33 percent of the members of the Senate, against federal laws or laws of the Federal District issued by the Congress of the Union or international treaties; [...].”

²⁴⁵ Roderic Ai Camp (2007), *Op. Cit. Supra 123*: 191

²⁴⁶ This study suggests that Zedillo pursued the reform of the judiciary in order to avoid the costs of maintaining the Presidency as the mediator of political conflicts in a competitive party scenario,

authors speculated, the reform could eventually allow the Supreme Court to turn into a powerful Constitutional tribunal.

6. State-run industries & business grupos in the post-privatization period

State companies continue to be extremely relevant to the Mexican economy. *Expansión* magazine in Mexico, which each year lists the top 500 companies in the country, ranked nineteen state enterprises in 2005 among the top revenue earning companies. These top ten state enterprises on the list, by ranking, include²⁴⁷:

- (1) Pemex (no. 1)
- (2) Comisión Federal de Electricidad (no. 2)
- (3) Infonavit (low income housing) (no. 33)
- (4) Luz y Fuerza del Centro (no. 38)
- (5) Banobras (no. 69)
- (6) Capufe (toll highway administrator) (no. 78)
- (7) ASA (airport administrator for Mexico City) (no. 81)
- (8) Bancomex (federal reserve bank) (no. 117)
- (9) Diconsa (marginated community subsidy and supply company) (no. 156)

particularly after his confrontation with Roberto Madrazo over the governorship of Tabasco. The Presidency's rapid distancing from the PRI and Zedillo's need to maintain political peace in this time may also explain why he readily pursued the electoral reforms which would make the IFE and the Federal Electoral Tribunal primary institutions and organizations for conflict resolution. Applying a game-theoretical model, Magaloni and Sanchez conclude that the President chose to establish an independent Supreme Court according the calculation that the Court would remain subservient to the Presidency though his term and continue to favor the hegemonic party while presenting a favorable situation for the President in which he could avoid the costs of settling electoral disputes in a multiparty context; Beatriz Magaloni and Arianna Sanchez, "Empowering Courts as Constitutional Veto Players: Presidential Delegation and the New Mexican Supreme Court", Paper presented at the Annual Meeting of the American Political Science Association, San Francisco, August 30-September 2, 2001, 21-22

²⁴⁷ Grupo Editorial Expansion, "Las empresas mas importantes de Mexico (2005)", *Expansión 500*, CD-ROM, (2006)

(10) Lotería Nacional (no. 198)

In 2004, PEMEX represented 2.5% of the GNP; CFE 2%; and Luz y Fuerza del Centro 0.4%. In total, in 2004, these three companies generated 4.9% of GNP. The average share of GNP for these companies from 1990 to 2004 is 4.4%.

Table 7. Pemex, CFE and LFC revenue as percent of GNP

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
PEMEX	3.3	2.7	2.5	2.2	2.3	2.8	3.1	2.4	2.2	2.3	1.7	1.7	2.2	2.2	2.5
CFE	1.7	1.6	1.7	1.7	1.5	1.7	1.6	1.6	1.6	1.7	1.7	1.7	1.7	2.0	2.0
LFC	0.3	0.3	0.3	0.2	0.3	0.2	0.2	0.2	0.3	0.3	0.2	0.3	0.3	0.4	0.4
<i>Total</i>	5.3	4.6	4.5	4.1	4.1	4.7	4.9	4.2	4.1	4.3	3.8	3.8	4.2	4.6	4.9

Source: Adapted from President Fox's Fourth State of the Union Report. (4o Informe de Gobierno de Presidente Fox, 2004)

Income of state enterprises, as a percentage of the GNP for 2006, was 6.4%; with Pemex accounting for 2.2% of that total²⁴⁸. Total fiscal revenue was 23.3% GNP in 2006, which means that approximately 27% of all tax revenue perceived by the Federal Government came from state enterprises under government control, and almost 10% from Pemex. In August 2007, the Secretary of Finance (*Secretaría de Hacienda y Crédito Público*) announced that from 2006 to 2007, oil revenue fell 6.2%²⁴⁹. The fall in oil revenue will impose a necessary fiscal reform for the Mexican reform, which will in turn ignite a classic “credible commitment problem” to be sorted out in the Mexican Legislature. This is possibly the most critical reform which Calderón will have to carry out; same one which former President Fox failed to push through Congress.

These three state companies continue to represent valuable energy resources which by law may only be exploited by the state. These firms also have large “official” labor unions. The Mexican state continues to depend on oil revenues to cope with state expenditure. Certain types of petroleum industries have been opened to private investment. However, the Mexican state, as mandated by the Constitution, continues to be the exclusive exploiter of oil in the country. Although the building and exploitation of power plants has been opened to private investment, electricity also remains tagged by the Constitution as an exclusive economic activity of the state.

²⁴⁸ “Anexo Estadístico: Ingresos públicos como porcentaje del PIB”, Presidencia de la República, 6^o *Informe de Gobierno*, (2006): 278.

²⁴⁹ Antonio Castellanos, “SHCP: caen 6.2% ingresos petroleros”, *La Jornada*, August 1, 2007, available online at <http://www.jornada.unam.mx/2007/08/01/index.php?section=economia&article=020n2eco>

President Fox attempted a reform of the electricity sector in 2002, but the reform was heavily rejected by the LFC labor union. The electricity reform is now a project of President Calderon's administration.

Business and growth in Mexico continues to thrive around a few top *grupos* in the country. *Expansión* magazine provides a nominal list of the principal sixty-five *grupos* in the country for 2005, which includes a short list of their affiliated and subsidiary companies. Reconstructing these *grupos* exclusively with information from the top 500 companies (i.e. excluding companies in the *grupo* which are not on the *Expansión* 500 list), we find that these *grupos* absorb 225 of the top 500 *Expansión* companies for 2005, and most of the top 100 companies on the list²⁵⁰. The sixty-five *grupos* generate sales equivalent to 45% of the GNP (2005), with the top ten *grupos* generating sales equivalent to 23.5% of the GNP (2005).

Of the sixty-five *Expansión* principal *grupos*, sixteen are identified as foreign controlled or owned *grupos*. The top ten foreign *grupos* on the list, in terms of sales revenue, are²⁵¹:

- (1) Walmart (USA - *grupo* no. 1 in Mexico)
- (2) Grupo Financiero BBVA-Bancomer (Spanish – *grupo* no. 8)

²⁵⁰ Among the 275 companies not directly listed as part of the 65 principal *grupos*, 19 are state companies; 105 are listed as foreign owned enterprises, and 105 are Mexican controlled companies. Some of these companies are large, such as Grupo Modelo (no. 26), and under another type of categorization may be considered in the top *grupo* list. However, for purposes of providing a general reference to the persistence of *grupos* wealth and structure, the list provided by *Expansión* magazine was not modified, and simply reconstructed with information provided about the top affiliated or subsidiary companies. Grupo Editorial *Expansión* (2006), *Op. Cit. Supra* 247

²⁵¹ Grupo Editorial *Expansión* (2006), *Id. Cit. Supra* 247

- (3) Grupo Financiero Banamex (USA/Citibank – *grupo* no. 9)
- (4) DaimlerChrysler de México (German – *grupo* no. 10)
- (5) Grupo Financiero Santander (Spanish – *grupo* no. 12)
- (6) Ford Motor Company (USA/Citibank – *grupo* no. 22)
- (7) Grupo Financiero HSBC México (British – *grupos* no. 24)
- (8) Grupo Financiero Scotiabank Inverlat (Canadian – *grupo* no. 32)
- (9) Grupo Financiero ING (Dutch – *grupo* no. 37)
- (10) Siemens en México (German – *grupo* no. 39)

The financial groups mentioned above were previously owned by Mexicans after the bank privatization, and afterwards the controlling shares in these groups was sold to foreign financial conglomerates when foreign investment in the banking sector was raised to 100% foreign ownership.

Excluding, the previously mentioned foreign owned *grupos*, the top 10 Mexican owned/controlled private *grupos* are²⁵²:

- (1) América Móvil (*grupo* no. 2) (mobile telecommunications)
- (2) Fomento Económico Mexicano, FEMSA (*grupo* no. 3) (holding/beverages)
- (3) Grupo Carso (*grupo* no. 4) (holding/diversified)
- (4) Cemex (*grupo* no. 5) (cement)
- (5) Telmex (*grupo* no. 6) (telecommunications)
- (6) Grupo Alfa (USA/Citibank – *grupo* no. 7) (holding/diversified)

²⁵² Grupo Editorial Expansion (2006), *Id. Cit. Supra* 247

- (7) Grupo Bal (*grupo* no. 11)
- (8) Grupo Salinas (*grupo* no. 13) (holding/telecommunications & media)
- (9) Controladora Comercial Mexicana (*grupo* no. 37) (retail commerce)
- (10) Grupo México (*grupo* no. 15) (transport/mining)

These top Mexican *grupos* are or hold the Mexican companies which generate the top net incomes in the country, alongside some of the largest sales revenues²⁵³. Considering only Mexican *grupos*, the top ten *grupos* mentioned above represent sixty percent of all sales revenues of the top 49 Mexican *grupos* on the *Expansión* list. These sales are equivalent to 19% of the GNP (2005). The total 49 top Mexican *grupos* have sales equivalent to 32.3% GNP (2005).

Although specific families tend to own the controlling shares in a *group*, as will be shown below with regards to Telmex and Televisa, within Mexican groups there are cross-board membership ties, which generate a more complex, but still closed circle of information among the top *grupos*.

²⁵³ Amounts in millions of pesos:

1. América Móvil (\$182,153.2 mill. in sales revenues; \$31,641 mill. net profit)
2. Telmex (\$162,948.1 mill. in sales revenues; \$28,179.9 mill. net profit)
3. Cemex (\$162,708.6 mill. in sales revenues; \$ 22,425.1 mill. net profit)
4. Carso (\$78,092.3 mill. in sales revenues; \$8,603.9 mill. net profit)
5. Grupo Alfa (\$69,334.8 mill. in sales revenues; \$7,790.1 mill. net profit)

The Slim family has controlling interest in the first four mentioned above. Lorenzo Zambrano is principal shareholder in the fifth.

Grupo Modelo (Corona beer and other), which is not on the list of principal *Expansión* grupos, is the 26th company on the 2005 report, and has \$49,550.5 mill. in sales revenues; and has one of the highest net incomes at \$9,503.0 mill. net profit. In similar terms, Grupo Televisa has \$32,481.0 mill. in sales revenues; and has one of the highest net incomes at \$6,125.5 mill. net profit. Grupo Editorial Expansion (2006), *Id. Cit. Supra* 247

a) Business Structure of Grupo Televisa and Associated Companies in 2006

Grupo Televisa is owned through a Shareholder's Trust. "The beneficiaries of the Shareholder Trust are a trust for the benefit of Emilio Azcárraga Jean (the "Azcárraga Trust"), and a trust for the benefit of Promotora Inbursa, S.A. de C.V. (the "Inbursa Trust"). Promotora Inbursa, S.A. de C.V. is an indirect subsidiary of Grupo Financiero Inbursa, S.A. de C.V., (which as mentioned before, is directly or indirectly owned by Mr. Slim Helú and his immediate family.) [...] The Azcárraga Trust beneficially owns 87.29% of the Televisa shares held through the Shareholder Trust and the Inbursa Trust beneficially owns 12.71% of the Televisa shares held through the Shareholder Trust.²⁵⁴" The Slim Family therefore also holds a voting interest in the dominant competitor in the broadcasting market.

Mr. Emilio Azcárraga Jean is Chairman of the Board of Directors and President of Grupo Televisa S.A. de C.V.²⁵⁵. Grupo Televisa's Board of Directors shows ties to the Boards of other Azcárraga family investments and to the Boards of other large Mexican holding companies with interests in the financial, services, and communications industries. Carlos Slim Domit sits on the Board of Directors of Grupo Televisa.

²⁵⁴ Grupo Televisa, S.A., *SEC Form 20-F: Annual Report 2005*, (SEC, June 30, 2006): 104-105, available online at <http://www.secinfo.com/dsvr4.v89z.htm#1stPage> (Last viewed December 4, 2006)

²⁵⁵ Grupo Televisa-SEC (2005), *Id. Cit. Supra* 254: 92-97

Table 8. Board of Directors of Grupo Televisa	
Board member	Primary occupation and business experience
Emilio Azcárraga Jean, Chairman of the Board, President and Chief Executive Officer and President of the Executive Committee of Grupo Televisa	Primary Occupation: Chairman of the Board, President and Chief Executive Officer and President of the Executive Committee of Grupo Televisa Business experience: Member of the Boards of Teléfonos de México, S.A. de C.V. and Banco Nacional de México, S.A. and former Vice Chairman of the Board of Univision
Alfonso de Angoitia Noriega,	Primary Occupation: Executive Vice President and Member of the Executive Office of the Chairman and Member of the Executive Committee of Grupo Televisa Business experience: Former Chief Financial Officer of Grupo Televisa and former Alternate Member of the Board of Univision and Partner, Mijares, Angoitia, Cortés y Fuentes, S.C. (1994-1999)
María Asunción Aramburuzabala Larregui	Primary Occupation: Vice Chairwoman of the Board and Member of the Executive Committee of Grupo Modelo, S.A. de C.V., Business experience: Chief Executive Officer of Tresalia Capital, S.A. de C.V. and Member of the Boards of Grupo Financiero Banamex, S.A. de C.V., Banco Nacional de México, S.A. and América Móvil, S.A. de C.V.
Pedro Aspe Armella	Primary Occupation: Chairman of the Board and Chief Executive Officer of Protego Asesores, S.A. de C.V.; Business experience: Member of the Boards of The McGraw-Hill Companies and Xignux and former Member of the Board of Vector Casa de Bolsa, S.A. de C.V.
Julio Barba Hurtado	Primary Occupation: Legal Advisor to the President, Undersecretary to the Board and the Executive Committee of Grupo Televisa and Secretary to the Audit Committee of Grupo Televisa Business experience: Former Legal Advisor to Televisa, S.A. de C.V.
José Antonio Bastón Patiño	Primary Occupation: Corporate Vice President of Television and Member of the Executive Committee of Grupo Televisa Business experience: Former Vice President of Operations of Grupo Televisa, former General Director of Programming of Grupo Televisa and former Member of the Board of Univision
Alberto Bailleres González	Primary Occupation: President of Grupo Bal; Business experience: Member of the Boards of Valores Mexicanos, Casa de Bolsa, S.A. de C.V., Desc., S.A. de C.V., Fomento Económico Mexicano, S.A. de C.V. (FEMSA), Grupo Financiero BBVA Bancomer, S.A. de C.V., Industrias Peñoles, S.A. de C.V., Grupo Nacional Provincial, S.A., Grupo Palacio de Hierro, S.A. de C.V., Profuturo GNP, S.A. de C.V., Aseguradora Porvenir GNP, S.A. de C.V. and President of the Board of Governors of the Instituto Tecnológico Autónomo de México, A.C. (ITAM)
Manuel Jorge Cutillas Covani	Primary Occupation: Director of Grupo Televisa; Business experience: Member of the Board of Bacardi Limited and former Chairman of the Board of Bacardi Limited
Carlos Fernández González	Primary Occupation: Chief Executive Officer and Chairman of the Board of Grupo Modelo, S.A. de C.V. Business experience: Member of the Boards of Anheuser Busch Co., Grupo Financiero Santander Mexicano, S.A. de C.V. and

	Emerson Electric, Co.
Bernardo Gómez Martínez	Primary Occupation: Executive Vice President and Member of the Executive Office of the Chairman and Member of the Executive Committee of Grupo Televisa; Business experience: Former President of the Mexican Chamber of Television and Radio Broadcasters and Deputy to the President of Grupo Televisa
Claudio X. González Laporte	Primary Occupation: Chairman of the Board and Chief Executive Officer of Kimberly-Clark de México, S.A. de C.V.; Business experience: Member of the Boards of Kimberly-Clark Corporation, General Electric Co., Kellogg Company, Home Depot, Inc., Alfa, S.A. de C.V., Grupo Carso, S.A. de C.V., América Móvil, S.A. de C.V. and Investment Company of America, and former President of the Mexican Business Council
Roberto Hernández Ramírez	Primary Occupation: Chairman of the Board of Banco Nacional de México, S.A.; Business experience: Former Chief Executive Officer of Banco Nacional de México, S.A. and Member of the Boards of Citigroup, Inc., Gruma, S.A. de C.V., Grupo Financiero Banamex Accival, S.A. de C.V., and the Nature Conservancy and World Monuments Fund
Enrique Krauze Kleinbort	Primary Occupation: Chief Executive Officer of Editorial Clío Libros y Videos, S.A. de C.V.; Business experience: General Director of Editorial Clío Libros y Videos, S.A. de C.V.
Germán Larrea Mota Velasco	Primary Occupation: Chairman of the Board, Chief Executive Officer and President of Grupo México, S.A. de C.V.; Business experience: Chairman of the Board and Chief Executive Officer of Asarco Incorporated, Southern Peru Copper Corporation and Grupo Ferroviario Mexicano, S.A. de C.V. and former Member of the Boards of Banco Nacional de México, S.A. and Bolsa Mexicana de Valores, S.A. de C.V.
Gilberto Pérezalonso Cifuentes	Primary Occupation: Chief Executive Officer of Corporación GEO, S.A. de C.V. and Member of the Audit Committee of Grupo Televisa Business experience: Member of the Boards of Grupo Gigante, S.A. de C.V., Southern Peru Copper Corporation and Afore Banamex, S.A.
Carlos Slim Domit	Primary Occupation: Chairman of the Board of Grupo Carso, S.A. de C.V. and Teléfonos de México, S.A. de C.V. and President of Grupo Sanborns, S.A. de C.V. Business experience: Vice Chairman of America Telecom, S.A. de C.V. and Member of the Boards of Grupo Condumex, S.A. de C.V., Phillip Morris Mexico, S.A. de C.V. and Sears Roebuck de Mexico, S.A. de C.V.
Alejandro Quintero Iñiguez	Primary Occupation: Corporate Vice President of Sales and Marketing and Member of the Executive Committee of Grupo Televisa Business experience: Shareholder of Grupo TV Promo, S.A. de C.V. and former Advisor to former Mexican President Ernesto Zedillo
Fernando Senderos Mestre	Primary Occupation: Chairman of the Board and Chief Executive Officer of Desc, S.A. de C.V. Business experience: Member of the Boards of Teléfonos de México, S.A. de C.V., Alfa, S.A. de C.V., Kimberly Clark de México, S.A. de C.V. and Industrias Peñoles, S.A. de C.V.
Enrique F. Senior Hernández	Primary Occupation: Executive Vice President and Managing Director of Allen & Company Incorporated

	Business experience: Member of the Board of Pics Retail Networks and Member of the Board of Coca Cola Femsa and Member of the Board of Cinemark
Lorenzo H. Zambrano Treviño	Primary Occupation: Chairman of the Board and Chief Executive Officer of Cemex, S.A. de C.V. Business experience: Member of the Boards of Alfa, S.A. de C.V., Empresas ICA, Sociedad Controladora, S.A. de C.V., Fomento Económico Mexicano, S.A. de C.V. and Vitro, S.A. de C.V.
Source: Grupo Televisa Form F-20/SEC (Filed June 2006)	

b) Business Structure of Telmex and Associated Companies in 2006

Telmex is a subsidiary of Carso Global Telecom, S.A. de C.V. (Carso Global Telecom), which owns 71% of Telmex's total voting shares²⁵⁶. Telmex's other major stockholder is SBC International, which owns 21% of total voting shares²⁵⁷.

	AA Shares (1)		A Shares (2)		L Shares (3)		Percent of voting shares (4)
	Shares (millions)	Percent of class	Shares (millions)	Percent of class	Shares (millions)	Percent of class	
Carso Global Telecom (5)	6,000.0	73.9	92.0	19.7%	4,050.0	32.6%	71.0%
SBC International (5)	1,799.5	22.2	-	-	-	-	21.0%
Brandes Investment Partners, L.P.(6)	-	-	-	-	1,007.7	8.1%	-
Franklin Resources, Inc.(6)	-	-	-	-	1,091.6	8.8%	-
JPMorgan Chase & Co.(6)	-	-	-	-	929.2	7.5%	-

²⁵⁶ Telmex, S.A. de C.V., *SEC Form 20-F: Annual Report 2005*, (SEC, Filed June 29, 2006): 73, available online at <http://www.secinfo.com/d14D5a.v48G7.htm#b5r7>, (Las viewed January 2, 2006); See also Global Telecom Carso, *Informe Anual 2005*, Bolsa Mexicana de Valores, http://emisnet.bmv.com.mx/informes/infoanua_5715_2006.pdf, (Last viewed January 2, 2006), 21

²⁵⁷ Telmex-SEC (2006), *Id. Cit. Supra* 256: 73; Global Telecom Carso-B.M.V (2005), *Id. Cit. Supra* 256: 21

- (1) As of June 8, 2006, there were 8,115 million AA Shares outstanding, representing 94.5% of the total full voting shares (AA Shares and A Shares).
- (2) As of June 8, 2006, there were 468 million A Shares outstanding, representing 5.5% of the total full voting shares (AA Shares and A Shares).
- (3) As of June 8, 2006, there were 12,436 million L Shares outstanding.
- (4) AA Shares and A Shares.
- (5) Holders of AA Shares and A Shares are entitled to convert a portion of these Shares to L Shares, subject to the restrictions set forth in our bylaws. See Item 10. Additional Information—Bylaws and Mexican Law.
- (6) Derived from reports of beneficial ownership of our shares filed with the SEC. All figures are as of March 31, 2006.

Source: TELMEX Form 20-F /SEC (Filed June 2006)

Carso Global Telecom is a holding company controlled directly or indirectly by Carlos Slim Helú and members of his immediate family. The Slim family owns other large conglomerates, including: (1) America Telecom, which is the family’s flagship company in wireless telecommunications investments in Latin America such as America Movil, which in turn owns Telcel in Mexico²⁵⁸ (in 2004, America Movil was the fifth-ranking mobile service operator by proportionate subscribers in the world);²⁵⁹ (2) Grupo Carso, S.A. de C.V., which holds commercial, industrial and consumer

²⁵⁸ For general information about “America Telecom”, <http://www.amtelecom.com.mx/aat.html#s>, (last viewed January 2, 2006); In 2004, Carso Global Telecom acquired AT&T Latin America, and gained controlling assets in several telecommunications companies throughout Latin America. The following are some of the main investments of Telmex in Latin America: Teléfonos del Noroeste, S.A. de C.V.; Uninet, S.A. de C.V.; Embratel Participações, S.A.; Empresa Brasileira de Telecomunicações, S.A.; Star One, S.A.; Telmex do Brasil, Ltda.; Telmex Chile Holding, S.A.; Telmex Corp., S.A. (antes Chilesat Corp., S.A.); Techtel LMDS Comunicaciones Interactivas, S.A.; Telmex Argentina, S.A.; Metrored Telecomunicaciones, S.R.L.; Telmex Colombia, S.A.; and Telmex Perú, S.A. See Global Telecom Carso-B.M.V (2005), *Id. Cit. Supra* 256: 21-23; see also Telmex-SEC (2006), *Id. Cit. Supra* 256: 43; Grupo Carso Telecom and America Movil also recently signed an agreement with Verizon Telecommunications Inc. to acquire Verizon’s 28% interest in Compañía Anónima Nacional Teléfonos de Venezuela. Telmex-SEC (2006), *Id. Cit. Supra* 256: 7, 43.

²⁵⁹ ITU, “Mobile Cellular Operators, 2004 [by proportionate subscribers]”, (December 2004), available online at http://www.itu.int/ITU-D/ict/statistics/at_glance/topptoc_2004.html (Last viewed March 19, 2007).

services companies²⁶⁰; and (3) Grupo Financiero Inbursa, S.A. de C.V., which holds various financial and investment institutions²⁶¹.

Telmex's Board of Directors²⁶² is chaired, in a lifetime honorary position, by Mr. Carlos Slim Helú. However, his son Carlos Slim Domit is acting chairman and President of the executive committee of Telmex. Telmex's Board of Directors shows crossties to Boards of Directors of other Slim Family investments, and to the Boards of Directors of other large Mexican holding companies with interests in the financial, consumer services, and media industries, by way of cross-directorships. Relevant to this case study is the fact that Mr. Emilio Azcárraga Jean, Chairman of the board of directors and President of Grupo Televisa and primary beneficiary of controlling stock

²⁶⁰ Grupo Carso subsidiaries include: (1) Condumex (Mexico's most important electrical conductors manufacturer); (2) Nacobre (A major Latin American manufacturer of copper, PVC, and aluminum tubing and other products); (3) Frisco (the company holds rights to the Mexico-Veracruz-Coatzacoalcos railroad and investments in mining and chemical industries); (4) Porcelanite (the largest wall and floor ceramic producer in the World); (5) Cigatam (tobacco distribution company with Marlboro and Benson & Hedges distribution rights in Mexico, among other brands); and (6) Grupo Sanborn's (consumer service stores, including Sears, Sanborn's, Mix-up which is a music outlet store, and the bakery chain store El Globo). *For more information about "Grupo Carso",* <http://www.gcarso.com.mx/LayoutEmpresas.asp> (Last viewed January 2, 2006)

²⁶¹ Grupo Financiero Inbursa subsidiaries include: Seguros Inbursa, S.A., Grupo Financiero Inbursa; Pensiones Inbursa, S.A., Grupo Financiero Inbursa; Fianzas Guardiana Inbursa, S.A., Grupo Financiero Inbursa; Banco Inbursa, S.A., Institución de Banca Múltiple, Grupo Financiero Inbursa; Arrendadora Financiera Inbursa, S.A. de C.V., Organización Auxiliar del Crédito, Grupo Financiero Inbursa; Operadora Inbursa de Sociedades de Inversión, S.A. de C.V., Grupo Financiero Inbursa e Inversora Bursátil, S.A. de C.V., Casa de Bolsa, Grupo Financiero Inbursa, así como por las siguientes empresas de servicios complementarios: Outsourcing Inburnet, S.A. de C.V. y Asesoría Especializada Inburnet, S.A. de C.V. *For more information* Bolsa Mexicana de Valores, "Grupo Financiero Inbursa", http://www.bmv.com.mx/BMV/JSP/sec5_infoemis.jsp?idmenu=1&seidemi=5428

²⁶² Telmex-SEC (2006), *Id. Cit. Supra* 256: 59-64; *See also* Telmex, *Informe Anual*, (2005): 2, 5-6, available online at <http://www.telmex.com.mx/mx/esto/reInversion.html#> (Last visited December 2, 2006)

in Grupo Televisa, sits on Telmex's Board of Directors. As mentioned above, Mr. Carlos Slim Domit sits on the Board of Directors of Grupo Televisa, S.A. de C.V.²⁶³

Board Member	Other directorships and business experiences
Carlos Slim Helú, Honorary chairman for life of Telmex	Other directorships: Honorary chairman for life of the board of directors of Grupo Carso, S.A. de C.V., Carso Global Telecom, S.A. de C.V. and América Telecom, S.A. de C.V. Honorary chairman for life of the board of directors of América Móvil, S.A. de C.V. and Grupo Financiero Inbursa, S.A. de C.V.
Carlos Slim Domit, Chairman; president of the executive committee of Telmex	Other directorships: Chairman of the board of directors of Grupo Carso, S.A. de C.V., Grupo Sanborns, S.A. de C.V., US Commercial Corp. and Altria Group, Inc., Vice Chairman of the board of directors of Carso Global Telecom, S.A. de C.V. and América Telecom, S.A. de C.V. and member of the board of directors of Grupo Televisa S.A. de C.V. Business experience: Chief Executive Officer of Sanborn Hermanos, S.A.
Jaime Chico Pardo Vice Chairman; member of the executive committee of Telmex	Principal occupation: Vice Chairman of the board of directors and Chief Executive Officer of Telmex Other principal directorships: Member of the board of directors of América Móvil, S.A. de C.V., Carso Global Telecom, S.A. de C.V., América Telecom, S.A. de C.V., Grupo Carso, S.A. de C.V. and Honeywell International Business experience: Chief Executive Officer of Grupo Condumex, S.A. de C.V. and Chairman of Corporación Industrial Llantera (Euzkadi General Tire de México)
Emilio Azcárraga Jean Director	Principal occupation: Chairman of the board of directors and President of Grupo Televisa S.A. de C.V. Other directorships: Member of the board of directors of Banamex-Accival, Univisión and Grupo CIE and member of Consejo Mexicano de Hombres de Negocios, A.C.
Antonio Cosío Ariño Director; alternate member of the executive committee	Principal occupation: Chief Executive Officer of Cía. Industrial de Tepeji del Río, S.A. de C.V. and Tejidos Puente Sierra, S.A. de C.V. Other directorships: Chairman of the board of directors of Bodegas de Santo Tomás, S.A. de C.V. and Grupo Hotelero Brisas, S.A. de C.V. and member of the board of directors of Grupo Sanborns, S.A. de C.V., Grupo Carso, S.A. de C.V., Grupo Financiero Inbursa, S.A. de C.V. and Banamex-Accival
Laura Diez Barroso de Laviada	Principal occupation: President of Tenedora y Promotora Azteca S.A. de C.V. Other directorships: Member of the board of directors of Grupo

²⁶³ Grupo Televisa-SEC (2006), *Id. Cit. Supra* 254

Director	Financiero Inbursa, S.A. de C.V., Fundación del Centro Histórico de la Cd. de México A.C. and Royal Caribbean International
Amparo Espinosa Rugarcía Director	Principal occupation: Chief Executive Officer of Documentación y Estudios de Mujeres, A.C.
Élmer Franco Macías Director	Principal occupation: Chief Executive Officer and member of the board of directors of Infra, S.A. de C.V. Other directorships: Member of the board of directors of Corporativo Infra, S.A. de C.V., Electroodos Infra, S.A. de C.V., Envases de Aceros, S.A. de C.V., Corporacion Infra, S.A. de C.V., Conglomerado Industrial y Metaloides and Banco Nacional de México, S.A. Business experience: Various positions at Grupo Infra since 1958
Ángel Moreno Director	Principal occupation: Chairman of the board of directors and Chief Executive Officer of Grupo Gigante, S.A. de C.V. Other directorships: Chairman of the board of directors of Office Depot de México, S.A. de C.V. and member of the board of directors of Grupo Financiero Banamex—Accival, S.A. de C.V., Price Smart, Inc and Food Market Institute
Rómulo O’Farrill Jr. Director	Principal occupation: Chairman of the board of directors and Chief Executive Officer of Novedades de Acapulco, S.A. de C.V. Other directorships: Chairman of the board of directors of Grupo Automotriz O’Farrill y Balderrama, S.A. de C.V., Novedades de Quintana Roo, S.A. de C.V. and Distribuidora O’Farrill Puebla, S.A. de C.V.
Juan Antonio Pérez Simón Vice Chairman; member of the executive committee	Principal occupation and other directorships: Chairman of the board of directors and member of the executive committee of Sanborn Hermanos, S.A. and member of the board of directors of Grupo Carso, S.A. de C.V., Grupo Financiero Inbursa, S.A. de C.V., Carso Global Telecom, S.A. de C.V., Cigarros La Tabacalera Mexicana, América Telecom, S.A. de C.V. and Sears Roebuck de México, S.A. de C.V.
Fernando Senderos Mestre Director	Principal occupation: Chairman of the board of directors and Chief Executive Officer of Desc, S.A. de C.V. Other directorships: Member of the board of directors of Industrial Peñoles, S.A. de C.V., Kimberly Clark de México, S.A. de C.V., Alfa, S.A. de C.V. and Televisa, S.A. de C.V. and member of Consejo Mexicano de Hombres de Negocios, A.C.
Marco Antonio Slim Domit Director; alternate member of the executive committee	Principal occupation: Chairman of the board of directors and Chief Executive Officer of Grupo Financiero Inbursa, S.A. de C.V. Other directorships: Member of the board of directors of Grupo Carso, S.A. de C.V., Carso Global Telecom, S.A. de C.V., América Telecom, S.A. de C.V. and Grupo Sanborns, S.A. de C.V.
Rayford Wilkins Jr. Director	Principal occupation and other directorships: Group President of AT&T and member of the executive committee of América Móvil, S.A. de C.V. Business experience: Various positions in the wireless industry at SBC Group
Richard P. Resnick Director; member of the executive committee	Principal occupation: President of AT&T México
Larry I. Boyle	Principal occupation: Chief Financial Officer of AT&T México

Director; alternate member of the executive committee		
Rafael Kalach Mizrahi Director		Principal occupation: Chairman of the board of directors and Chief Executive Officer of Grupo Kaltex, S.A. de C.V. Other directorships: Member of the board of directors of Grupo Carso, S.A. de C.V., Sears Roebuck, S.A. de C.V., Grupo Sanborns, S.A. de C.V. and US Commercial Corp.
Ricardo Martín Bringas Director		Principal occupation: Chief Executive Officer of Organización Soriana, S.A. de C.V. Other directorships: Member of the board of directors of Banco HSBC México, S.A., Grupo Financiero Banamex—Accival, S.A. de C.V., Grupo Financiero Banorte, S.A. and ING de México and member of Consejo Mexicano de Hombres de Negocios, A.C.
Source: Telmex 20-F Form Filing/SEC (filed June 2006)		

Beyond the cross-directorships of Mr. Azcárraga and Mr. Slim Domit, the Board of Directors of Telmex and Grupo Televisa reads like a list of “who’s who” among the business elite of Mexico. On the Board of Grupo Televisa, María Asunción Aramburuzabala Larregui is head and major stockholder of Grupo Modelo, which produces Mexico’s two largest quality beer exports (Corona beer is one). Pedro Aspe Armella was Secretary of Finance during President Carlos Salinas de Gortari’s administration. Lorenzo Zambrano is CEO and major stockholder in Cemex--the world’s 3rd largest cement company. Roberto Hernández is a chairman on the board of Mexico’s largest bank, Banamex, of which he sold his controlling shares to Citigroup Corp in 2004. On the Board of Telmex, Laura Diez Barroso de Laviada is cousin to the Azcárragas and is married to Carlos Laviada, a major stockholder in an airport consortium. Amparo Espinosa is identified in SEC information, as head of a woman’s NGO; however, she is the daughter of a banking family headed in the 1970s by her father Enrique Espinosa Yglesias. Elmer Franco Macías is CEO and major stockholder in an industrial and pharmaceutical gas consortium with family business origins from

1921. Angel Losada Moreno is head of Grupo Gigante, which manages a large supermarket chain consortium. Romulo O'Farill (who died in May 2006), was an original founder of Televisa who sold his controlling interest to the Azcárragas. Fernando Senderos Mestre, as head of Grupo DESC, has a controlling stock in one of Mexico's largest industrial groups, formed during the 1970s.

The directorship structure described above is typical among the larger business groups in Mexico. Groups are also typically predominantly owned or controlled by a particular family. Except for old money traditionally seen in the groups from Northern Mexico, many of the fortunes described above were formed in association to government policies of industrial subsidization during the 1950-70s or of privatization in the later 1990s.

7. Wealth concentration in select individuals and grupos, income gap disparity, and the continuity of poverty

The tendency toward wealth concentration and income disparity in the privatization period continued through the Zedillo and Fox administrations. The following table shows Mexican nationals who have been placed on *Forbes* magazine's List of Richest People in the World from 1996 to 2007²⁶⁴. This list is interesting in several ways.

First, the list provides specific rankings for the wealthiest people in Mexico. For example, Carlos Slim Helú was ranked fourth richest man in the world by *Forbes*

²⁶⁴ Luisa Kroll and Allison Fass, eds., "Special Report: The World's Billionaires", *Forbes.com*, March 8, 2007, available online at http://www.forbes.com/2007/03/07/billionaires-worlds-richest_07billionaires_cz_lk_af_0308billie_land.html

during 2005, and third richest in 2006, after his wealth grew by \$19 million in one year²⁶⁵. In April 2007, Slim was acknowledged by *Forbes* as the Second Richest Man in the World, and in August as the “richest”²⁶⁶. The climb in ranks is primarily attributed to the increased value of his América Móvil stock. The growth in Slim’s wealth is attributed to his business prowess, and his recent jump in rank to “a strong Mexican equities market and the performance of his wireless telephone company, America Movil”²⁶⁷. A Wall Street Journal article after scrutinizing Slim’s wealth quipped that he had made his fortune “old-style”, by way of monopolies²⁶⁸. His wealth is said to represent “6.3% of Mexico's annual economic output”²⁶⁹.

Second, more than a decade has passed since the peak years of neoliberal reform in which new Mexican millionaires were created, and many of these new rich faded away, leading to larger fortunes again being concentrated in fewer families. The list showcases a renewal of elites in Mexico, whereby newcomers from the neoliberal period such as Carlos Slim Helú, Roberto Hernández, Alfredo Harp Helú and Ricardo Salinas Pliego become dominant elite members alongside some older elite individuals

²⁶⁵ Helen Coster, “Carlos Slim Helu's fortune is up almost \$20 billion in a year, built amid poverty and resentment in Mexico. Now he's gaining on Warren Buffett”, *Forbes.com*, March 26, 2007, available online at http://www.forbes.com/free_forbes/2007/0326/134.html

²⁶⁶ Helen Coster, “Carlos Slim Helu Now World's Second-Richest Man”, *Forbes.com*, April 11, 2007, available online at http://www.forbes.com/business/2007/04/11/billionaires-helu-telecom-biz-cz_hc_0411helu.html; Stephanie N. Mehta, Fortune senior writer, “Carlos Slim, the richest man in the world, The son of a Mexico City shopkeeper has built a staggering \$59 billion fortune”, *Fortune.com*, August 6, 2007, available online at <http://money.cnn.com/2007/08/03/news/international/carlosslim.fortune/>

²⁶⁷ “The World's Billionaires: #3 Carlos Slim Helu”, *Forbes.com*, March 8, 2007, available online, http://www.forbes.com/lists/2007/10/07billionaires_Carlos-Slim-Helu_WYDJ.html

²⁶⁸ David Luhnow, “The Secrets of the World's Richest Man Mexico's Carlos Slim makes his billions the old-fashioned way: monopolies”, *The Wall Street Journal*, August 4, 2007, Page A1, available at <http://online.wsj.com/article/SB118615255900587380.html>

²⁶⁹ Helen Coster (March 26, 2007), *Id. Cit. Supra* 265

and families who steadily remain on the list such as J ronimo Arango, Alberto Bailleres, Lorenzo Zambrano and family, the Aramburuzabala family, and the Azc rraga family; while some former elite members, such as the Peralta family and members of the Garza family, are fading away. Third, in 2007, the top 10 Mexican billionaires in Mexico ranked among the top 25 billionaires in the whole of Latin America²⁷⁰.

²⁷⁰ Luisa Kroll and Allison Fass (March 8, 2007), *Op. Cit. Supra* 264, (List ranked by region/Latin America) at http://www.forbes.com/lists/2007/10/07billionaires_The-Worlds-Billionaires-Latin-America_6Rank.html

Table 11. Mexican nationals on Forbes' List of Richest People in the World from 1996-2007 (amounts in billions of dollars)												
	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Slim Helú, Carlos	6.1	6.6	7.2	8	7.9	10.8 (25th)	11.5 (17th)	7.4 (35 th)	13.9 (17th)	23.8 (4th)	30 (3rd)	59 (1st)
Baillères, Alberto	1.8	-	-	-	1.2	1.9	1.5	1.7	2.3	2.7	2.8	5
Salinas Pliego, Ricardo	1	1.7	3.2	1.4	1.4	3	1.6	1	1.8	2.6	3.1	4.6
Arango, Jeronimo	1	-	-	1.9	1.5	1.8	3.7	3.4	4	3.6	4.6	4.3
Azcárraga Milmo, Emilio	2	1.6**	3.5	2.1	1.5	3	1	-	-	1	1.7	2.1
Hernández, Roberto	-	-	-	-	-	1.3	1.8	1.6	2	2	2	2.0
Aramburuzabala, Family	1.4	-	-	1.4*	1	1.8	1.5	1.2	1.5	1.8	2	2.0
Zambrano, Lorenzo	1.2	1.7	2.9	2.1	2.1	2.9	2.8	2	3.1	2.2	1.8	1.7
Harp Helú, Alfredo	-	-	-	-	-	1.3	1.6	1.5	1.8	1.6	1.4	1.6
Saba Raffoul, Isaac	1.1	-	2	2	1.4	1.3	1	1.1	1.1	1.2	1.4	1.8
Garza Laguera, Eugenio	1.1	-	2.7	2.1	2	2.5	2.3	1.8	2.5	-	-	-
Peralta, Alejo	2.5	-	-	1.4***	1.1	1.5	1.3	1.3	1.5	-	-	-
Garza Sada, Bernardo	1.5	-	-	-	-	-	-	-	-	-	-	-
Larrea, Jorge	1.4	-	-	-	1.1****	1	-	-	-	-	-	-
Martin Bringas, Ricardo	-	-	-	2	1.5	-	-	-	-	-	-	-
Romo Garza, Alfonso	1.4	2	2.4	2.1	1.2	-	-	-	-	-	-	-
González Barrera, Roberto	1.1	1.7	-	-	-	-	-	-	-	-	-	-
Autrey, Family	1	-	-	-	-	-	-	-	-	-	-	-
Gonzalez, Claudio X.	-	.6	-	-	-	-	-	-	-	-	-	-
* María Asunción takes over the Aramburuzabala family businesses and fortune												
** Jean Emilio takes over the Azcárraga family businesses and fortune, after his father's death.												
*** Carlos Peralta takes over Alejo Peralta's fortune.												
**** German Larrea Mota-Velasco takes over.												
Source: Forbes.com: The World's Richest People (1996-2007)												

By comparison to these fortunes, information from INEGI, the national statistical institute, for 1977-2000 shows a continued trend toward income inequality that started in the privatization years. In 2000, 40% of the Mexican population was living on less than 2 dollars a day²⁷¹: 28% of the population lived in extreme poverty, and 15% in moderate poverty (43% total). Most poverty is concentrated in rural areas, but urban and rural areas showed similar levels of extreme poverty in 2000: 27% and 29% respectively²⁷².

While there has been a slight alleviation of poverty in the bottom 40% of the population since the late 1970's, income inequalities between the top and bottom percentiles of population continues to be very high. The income gap between the top 10% and bottom 40% of the population has been reduced since 1977²⁷³; however, the difference in income between the top and bottom 10 percentiles of the population has increased²⁷⁴. In other words, while there has been some overall poverty alleviation, income distribution shows that the top richest got richer in Mexico, leading to an

²⁷¹ (INEGI, 2001) as quoted in Sergio Aguayo Quezada (2002), *Id. Cit. Supra* 172: 134

²⁷² (INEGI, 2001) as quoted in Sergio Aguayo Quezada (2002), *Id. Cit. Supra* 172: 134

²⁷³ In 1977, the bottom 40% of the Mexican population had 10.3% total income, and the top 10% of population had 36.7% of income (26.4% gap). In 1989, the bottom 40% represented 11.7% of income, and the top 10% represented 39% of income (27.3% gap). And in 2000, the bottom 40% represented 19% of income, while the top 10% represented 38.7% (19.7% gap). "Income per Household, 1977-2000", (INEGI, 2001) as quoted in Sergio Aguayo Quezada (2002), *Id. Cit. Supra* 172: 135

²⁷⁴ In 1977, the bottom 10% of the Mexican population had 0.9% total income, and the top 10% of population had 36.7% of income (35.8% gap). In 1989, the bottom 10% represented 1.1% of income, and the top 10% represented 39% of income (37.9% gap). And in 2000, the bottom 10% represented 1.5% of income, while the top 10% represented 38.7% (37.2% gap). "Income per Household, 1977-2000", (INEGI, 2001) as quoted in Sergio Aguayo Quezada (2002), *Id. Cit. Supra* 172: 135

increase in the income gap between this group and the poorest ten percent of the population.

	Top 10%	Bottom 10%	Bottom 40%	gap b/w top 10% and bottom 10%	gap b/w top 10% and bottom 40%
1977	36.7%	0.9%	10.3%	35.8%	26.4%
1989	39%	1.1%	11.7%	37.9%	27.3%
2000	38.7%	1.5%	19%	37.2%	19.7%

Source: Adapted from INEGI 2001, as cited by Aguayo ed. (2002)

In the period 1990-2001, unemployment levels increased from 2.7% of PEA in 1990 to 2.2% PEA in 2000, and 2.4% in 2001²⁷⁵. Underemployment remained high, at 20.5% of the PEA in 1990 to 19.9% of PEA in 2001. Likewise, an important percentage of the population lived on insufficient income or on less than the minimum wage in that same period: 16.8% of PEA in 1990 and 9.9% in 2001²⁷⁶. The minimum national wage was 13.06 pesos a day in 1993 and 35.12 pesos a day in January 2000. However, as Aguayo points out, when compared to inflation, the minimum wage lost 47% of its acquisition power from 1994 to 1997²⁷⁷.

From 2000 to 2004, Mexico's average GDP growth rate was 2.46%, which was a positive improvement from the previous 1.5% shown from 1981 to 1996²⁷⁸. However,

²⁷⁵ See Scott Sernau, *Economies of Exclusion: Underclass Poverty and Labor Market Change in Mexico*, Praeger, (1994)

²⁷⁶ (INEGI, 2001) as quoted in Sergio Aguayo Quezada (2002), *Op. Cit. Supra* 172: 132

²⁷⁷ (INEGI, 2001) as quoted in Sergio Aguayo Quezada (2002), *Id. Cit. Supra* 172: 132

²⁷⁸ Presidencia de la República (2004), *Op. Cit. Supra* 171: 101-102

in 2004, the average GDP growth rate was 3.8% after no growth in the prior two years, which may perhaps signal a new tendency, though it is too soon to say at the moment.

In a country in which more than 40% of the population has lived in poverty for three-quarters of a century, the continued concentration of personal wealth in a few individuals is troubling. Similar to ISI policies, neoliberal economic policies in the reform years sustained the development of mega-Mexican conglomerates, cross-tied by boards and owners in these families. Given the disparity in income distribution in Mexico, the problem of curbing poverty and achieving economic, social, and political stability seems intrinsically tied to how the institutional endowment continues to maintain wealth concentration in a top 10 percentile of the population.

This section concludes the historical review of the Mexican transition period. This Chapter III reviewed the institutional endowment of the country over a period of political and economic transition, in order to understand its major institutional characteristics, principal institutional changes, and economic outcomes of the transition period of Mexico. The institutional endowment defined by change and continuity over time, provides the context for discussion of the stages of telecommunications reform in Mexico, from the late 1970's to 2006.

IV. BRIEF INTRODUCTION TO CASE STUDY SECTION OF DISSERTATION

The following four chapters compose the case study section of this dissertation. As mentioned previously each chapter reviews a specific stage of telecommunications policy and development. Chapter V looks at the state-telephone company as the baseline of reform (late 1970's). Chapter VI contains the case study on the privatization reform (1990-1996). Chapter VII reviews the liberalization or the opening of the telecommunications market to competition. Chapter VIII analyzes the most recent telecommunications reform which aimed to create a convergent (a broadcasting, Internet and telecommunications) communications market

Pursuant to the methodology explained in the Introduction, each case study presents:

- (1) the institutional endowment of each period,
- (2) the regulatory design of the reform, which includes
 - (a) regulatory governance structure of the telecommunications sector, and
 - (b) regulatory incentives shaping telecommunications outcomes; and
- (3) the economic performance of each period.

Chapter IX contains a summary of conclusions from the case studies and the dissertation with regards to whether a system of selective property rights was granted or enforced during each period of telecommunications reform, and whether the result of this inquiry helps explain the economic performance of firms and telecommunications sector as a result of reform.

V. THE INSTITUTIONAL MATRIX OF THE STATE TELEPHONE SYSTEM (1970-1990)

This chapter describes the institutional matrix of the baseline of telecommunications reform. The objective is to test for evidence of a pre-existing regulatory governance system that selectively grants or selectively enforces property rights (monopoly rights) in the market.

A. THE INSTITUTIONAL ENDOWMENT OF THE STATE MONOPOLY PERIOD: STABLE RENT-SEEKING PRESIDENTIALISM

The institutional endowment during the ISI period was a “rent-seeking Presidentialist system,” which among other things, included a one-party authoritarian system of government in which legal order as a distributive mechanism was subverted by formal and informal networks of corporatism, clientelism, and corruption. This system became unstable towards the late 1970s, due among other things to increased state incursion into the economy, which provoked an opening of both the political and economic order.

B. REGULATORY GOVERNANCE STRUCTURES OF THE STATE TELEPHONE COMPANY

Teléfonos de México, S.A. de C.V. (“Telmex”) was established, in the 1930s, as a foreign-owned company. In the following decades, its ownership changed from majority foreign ownership to majority domestic private ownership and increasingly towards majority state control. In 1972, President Echeverría’s administration raised

the government's share in Telmex to a 51% equity control²⁷⁹. Consistent with the policy direction of ISI, the justification given for raising state control in Telmex was “technological independence,” or a strategy to “reduce dependency on the exterior and to stimulate the growth of the domestic telecommunications industry”²⁸⁰.

Telmex, as a state-owned company, was formally governed by a Concession Title granted by the state. Furthermore, the company was under a special tax and tariff regime with the primary purpose of generating cash for the Treasury²⁸¹. From 45.4% to 97.8% of the amount paid for telephone services was paid in taxes²⁸². The country had the highest telephone tax rates in the world,²⁸³ which generated 1% of total government revenues²⁸⁴. A state enterprise that operates with the primary objective of

²⁷⁹ The government first increased its equity control in Telmex in 1956, through a special issue of AA shares. Later in 1963, state ownership in the company was significantly increased when the government bought a special series of AA shares. By 1971, the government owned 46% of the company. The special AA shares remained under exclusive government control until privatization of the company. These AA shares were issued and purchased against an accumulated credit of 500,000 million pesos previously granted by the government to Telmex. In 1972, the government raised its share to a 51% controlling interest in the company. The remaining 49% of shares were open to private and foreign ownership and publicly traded on the Mexican Stock Exchange and New York Stock Exchange as ADRs. In 1971, Telmex shares represented 28% of total share volume on the Mexican Stock Exchange. Inder Ruprah, “The divestiture of Telmex, Regional Project on Proposals for Policy Reforms”, *LC/L.871* (ECLAC/ Government of Netherlands, November 1994):9; Kathleen A. Griffith, “Mexico”, in *Telecommunications in Latin America*, ed. Eli Noam, (Oxford University Press, 1998), 171.

²⁸⁰ Inder Ruprah (November 1994), *Id. Cit. Supra* 279: 10

²⁸¹ The tax regime was run in conjunction with a schedule of telephone tariffs. Managing telephone tariffs allowed the government to control inflation and redistribute income through the manipulation of price schemes. Inder Ruprah (November 1994), *Id. Cit. Supra* 279: 11

²⁸² In 1985, due to damage to the network caused by a major earthquake, an additional “emergency tax” was levied on local and national long distance phone rates. Juan Ricardo Pérez Escamilla, “Telephone Policy in Mexico: Rates and Investment”, in *Changing Networks: Mexico's Telecommunications Options*, ed. Peter F. Cowhey, Jonathan D. Aronson and Gabriel Székely, (La Jolla, Calif.: Center for U.S.-Mexican Studies, University of California, San Diego, 1989):113-114

²⁸³ Juan Ricardo Pérez Escamilla (1989) *Id. Cit. Supra* 282: 113

²⁸⁴ Peter F. Cowhey and Jonathan D. Aronson, “Trade in Services and Changes in the World Telecommunications System”, in ed. Cowhey, Aronson and Szekely (1989) *Op. Cit. Supra* 282: 8

generating income for the government may colloquially be termed a cash cow²⁸⁵. Cash cows allowed the Treasury to subsidize other government activities.

The state company was also structured around a relationship between company management and Mexico's second largest state company union at the time, the STRM (*Sindicato de Telefonistas de la República Mexicana* or Telephone Union of the Mexican Republic) which represented 41,251 workers of the 49,000 employed by Telmex²⁸⁶.

In this arrangement, the Mexican government had exclusive monopoly rights in the provision and commercialization of services. It was purposefully positioned to extract rents from the state company. The complexity of labor union agreements with company management, as well as demands placed by industrialists requiring services for productive purposes were the primary forces curbing rent extraction.

In 1988, the Mexican government began to modernize the state telephone company²⁸⁷. In 1989, it announced Telmex's imminent privatization²⁸⁸. This is an indication of the

²⁸⁵ Peter F. Cowhey and Jonathan D. Aronson (1989), *Id. Cit. Supra* 284: 6-9, 36; *see also* Inder Ruprah (November 1994):11, *Op. Cit. Supra* 279

²⁸⁶ Ben A. Petrazzini, *The Political Economy of Telecommunications Reform in Developing Countries: Privatization and Liberalization in Comparative Perspective*, (Praeger, 1995): 115

²⁸⁷ This model of telephony reform is called by Cowhey, the Monopoly Modernization Model. In the Monopoly Modernization Model, telecommunications infrastructure is upgraded without necessarily leading to privatization. Cowhey and Aronson make reference to the Scarcity Model, the Cash Cow Model, the Monopoly Modernization Model, the Boutique Model, and the Full Competition Model. The first three assume the telecommunications industry as a natural monopoly. In these, there is one provider of services, generally run by the government. In the Scarcity Model, telephone services are seen as a scarce commodity only provided to specialized users such as government ministries. The

shifts in the political economy which were forcing the government to reform under financial crisis. However, prior to this moment Telmex was governed under a tax extraction regime dependent on government monopoly over services.

C. REGULATORY INCENTIVES OF THE STATE TELEPHONE COMPANY

Telmex followed basic regulatory incentives set forth in its Concession Title. Like most state companies it followed a basic standard for universal service commitments

monopoly generally runs at a loss. The Cash Cow Model, as explained above, runs at a profit which is absorbed mostly by the treasury to fund the state, but also operates on the basis of certain universal service commitments. The Monopoly Modernization Model considers that a monopoly, whether state run or private, can be held to benchmark commitments that make it internationally competitive. In this model, countries are seeking to modernize their telecommunications system in order to attract foreign investment due to improved services, or for a future buy out, or to avoid privatization all together. As their names imply, the Boutique and Full Competition Models emphasize industrial development on the basis of selective or full competition, respectively. Mexico progressively moved from a Cash Cow Model to a Modernization Model to a Boutique Model and finally to Full Competition. Peter F. Cowhey and Jonathan D. Aronson (1989), *Id. Cit. Supra* 284: 6-14

²⁸⁸ The intent to privatize the state telephone company was first announced by President Salinas on September 18, 1989, at an official meeting of the STRM. Andrés Caso Lombardo, Minister of Communications and Transport, September 20, 1989, Desincorporacion de Teléfonos de México, (announcement) as transcribed in Ignacio Medina Nuñez, *Sindicalismo y Estado: los telefonistas en México*, Centro Universitario de Ciencias Sociales y Humanidades, (Universidad de Guadalajara, Editorial CUCSA-UDEG, 1996), 255-261; The government justified Telmex's privatization as the only way to attract sufficient (private) resources to develop telecommunications infrastructure and services in the country.

“[...] In light of the challenge implied by telecommunications development, it is indispensable to open new possibilities for its financing by way of increased participation of private investment and internal resources generated by service provision, without diverting resources from the State required by other infrastructure and social development programs.

[..]

The Federal Government has decided to reduce its stock ownership in Telmex premised on [...] radically improving telephone service and securing its expansion in a sustained manner, and promotion of scientific and technological research in telecommunications.”

The language of the Concession Title also assures that foreign intervention into economic affairs of the nation would not come as a result of foreign investment in Telmex, since the company would be in Mexican hands and supervised by the Mexican government; that a privately owned Telmex would work to improve the quality and variety of services for the public as well as the technological advancement of the public networks; and that Telmex would protect and improve worker's rights and labor conditions according to the signed 1989 Union Agreement. §Antecedentes V, VI and VII, S.C.T., *Modificación al Título de Concesión de Teléfonos de México, S.A. de C.V.*, D.O. 10 de agosto de 1990. (Translated by author.)

to place phones in every village²⁸⁹. Under the tax regime, the company was also managed under a cross-subsidy structure which sought to redistribute benefits to lower-income groups by maintaining low prices in local residential services and high prices in long-distance services. At the time, long-distance services were luxuries available to higher income groups or the private business sector²⁹⁰. These social redistributive incentives were distorted by the regulatory governance structure of the “cash cow model” which exerted pressure to re-distribute profits towards other government projects rather than re-invest profits for universal service development.

D. ECONOMIC PERFORMANCE OF THE STATE TELEPHONE COMPANY

In 1978 telephone density in Mexico was 6.3 telephones per 100 inhabitants²⁹¹, and most infrastructure was concentrated in urban centers. Pérez Escamilla mentions that

²⁸⁹ Peter F. Cowhey and Jonathan D. Aronson (1989) *Id. Cit. Supra* 284: 8

²⁹⁰ The government aimed to provide basic service at the lowest cost for the greater population while taxing the largest base of services (local service) to gain the greatest income from taxes. Telmex had one of the cheapest local telephone rates, but in order to support this model, the long-distance telephone rates were also among the highest rates in the world. This was a cross-subsidy model often used during this period in telephony. Long-distance services were also used by the wealthier population of the country, including business users. Therefore, this scheme was construed as an income redistribution mechanism to give residential users the lowest tariff rates. To compensate the high rates, the tax levied on long-distance services was also in the lowest range of the Mexican tax schedule. The Mexican government received further income from international settlement rates paid to Telmex by the U.S. carriers to terminate calls. Mexico received and terminated two-thirds more calls between the U.S. and Mexico than did the U.S., therefore settlement rates favored Mexico as a source of dollar income.

Depending on the type of telephone rate (local, national long-distance, international long-distance, and depending on whether the user was residential or commercial) the Secretary of Finance would levy a telephone tax ranging from 60% to 26.4% of the applicable telephone tariff. Local service was heavily taxed by contrast to long-distance services. In addition to the special telephone taxes, rates were subject to a value added tax of 15%. This tax scheme would continue well into the late 1980s. The high rate on long-distance services was meant to distribute income in favor of local service. However, given that the use of long-distance services was low and limited within the population, the effectiveness of a redistribution policy or cross-subsidization based on higher tariffs for long-distance service was questionable. Juan Ricardo Pérez Escamilla (1989) *Id. Cit. Supra* 282: 111-114

²⁹¹ Alfredo Pérez de Mendoza, “Telefonos de Mexico: Development and Perspectives”, in Peter F. Cowhey et. al (editors), (1989), *Op. Cit. Supra* 282: 93-94

only 16% of Mexican households owned a phone at all in 1989²⁹². Only a fraction of profits and tax income were reinvested in the company to pursue universal service goals and the modernization of the network²⁹³. Under the Cash Cow Model, Telmex fulfilled the objective of being a very profitable company for financing state activity. For these reasons, Telmex's minimum universal service standard of a phone in every village was not nearly achieved, since resources were not invested towards villages but again towards the most populated urban centers²⁹⁴.

Nevertheless, in 1989, as the government prepared to privatize Telmex, the company achieved a ratio of 105 lines per employee, which was a reasonable rate of productivity among Latin American countries at the time; a performance indicator of 10.34% annual growth rate in lines installed; and an annual average growth rate in investment of 29.5%²⁹⁵. Telmex's modernization also implied a tariff upgrade that increased all prices. In this modernization period, local prices rose 186%²⁹⁶. These were new policies that aimed to increase the sale price of the company and guarantees for investors.

²⁹² Juan Ricardo Pérez Escamilla (1989) *Op. Cit. Supra* 282: 113

²⁹³ Peter F. Cowhey and Jonathan D. Aronson (1989) *Op. Cit. Supra* 284:8

²⁹⁴ Peter F. Cowhey and Jonathan D. Aronson (1989) *Id. Cit. Supra* 284: 8

²⁹⁵ Ben A. Petrazzini (1995), *Op. Cit. Supra* 286: 61

²⁹⁶ Ben A. Petrazzini (1995), *Id. Cit. Supra* 286: 117

VI. THE INSTITUTIONAL MATRIX OF TELECOMMUNICATIONS PRIVATIZATION REFORM (1990-1996)

This next chapter aims to be a comparative contribution to Levy and Spiller's (1994) study of solutions to the regulatory design problem in the privatization of state telephone companies and their subsequent economic performance.

A. THE INSTITUTIONAL ENDOWMENT OF THE PRIVATIZATION PERIOD: RENT SEEKING PRESIDENTIALISM IN A FLUX

The institutional endowment during the privatization period was a continuation of the “rent-seeking Presidentialist system,” but in contrast to the ISI period, the system was unstable. This is an important clarification to the similar case study of Argentina in Spiller and Levy (1994) because differing results are also attributable to reform as a reaction to crisis, rather than reform as a pro-active policy which seeks to respond to technological changes and maintain advantages in development. Among other things, privatization took place in the context of continuous electoral reform (which led to a multiparty system) and a transformation of the Mexican legal framework in order to support privatization (although not adequately oriented to support a competitive market economy). A consequence of privatization was the renewal of elite *grupo* structures through privatization as well as a continuity of wealth disparity and poverty.

Similar to the cases of Argentina and Chile discussed in Spiller and Levy (1994), the Mexican rent-seeking presidentialist system could provide only weak credibility through regulatory governance structures. An extremely dubious short-term regulatory credibility for the reform was provided by the persistent, albeit waning, authoritarian

will of the President²⁹⁷ and by the series of formal long-term economic policies of privatization, liberalization, and deregulation that the Presidents of this period were attempting to establish²⁹⁸. However, of these structural changes, international commitments through multilateral agreements provided better assurance to investors that privatization commitments would endure into a medium- or longer-term credibility and stability. Yet with a system of government in constant institutional flux, it would not have been entirely possible at the time to predict the outcomes of the ongoing political transition and its effect on future economic policies, nor the ability of the President to continue supporting the privatization trend.

The ability of the government to establish regulatory governance structures supporting long-term incentives to invest was extremely limited because of the threats to presidentialism during this period. In Mexico, privatization reform policy was a reaction to instability in the political and financial system. Nevertheless, the Executive

²⁹⁷ Ben Petrazzini carried out a comparative study of telecommunications privatization efforts in 1990s, with a focus on Mexico and Argentina. Petrazzini concluded that privatization and liberalization reforms in less developed countries were most likely to succeed, if (1) the state retained relative autonomy and insulation from political pressures, (2) the Executive concentrated political power (held a monopoly on power), and (3) the country had an attractive economic profile for investors. Petrazzini's work implies that the success of the privatization reform in Mexico was due to the government holding authoritarian control during the process of opening the sector to a market economy and being formally bound to international commitments to pursue long-term neoliberal economic policies.

“In summary, states with insulated governments and a high concentration of power in the executive are more prone to achieve privatizations of their SOTEs [State Owned Telecommunications Enterprises] than are exposed and permeable administrations with executives who lack a monopoly of power within the state. Similarly, countries with an attractive economic profile are more likely to simultaneously achieve both privatization and liberalization than are those with poor economic prospects. [...]”

Ben A. Petrazzini (1995), *Op. Cit. Supra* 286: 43

²⁹⁸ Petrazzini uses the following definitions of privatization, liberalization, and deregulation in his work: “Privatization can be defined as “the transfer of commercially oriented SOEs, activities, or productive assets of the government to the total, majority, or minority private ownership or to private control” Ben A. Petrazzini (1995), *Op. Cit. Supra* 286: 16, note on (Vuylsteke 1988, 1)

was still capable of imposing top-down reform by way of systemic authoritarian control, and privatization reform provided a semblance of “success.” However, carrying out privatization in a period of instability of the rent-seeking Presidentialist system raised incentives for elite economic entrepreneurs to secure selective property rights from reform, primarily by way of protected monopoly rights. In exchange, elite political entrepreneurs carrying out reform received financial backing to carry out structural changes and increase their likelihood of surviving instability by showing positive results.

In this scenario, there is a high incentive to form an informal VPI-style coalition, which would favor a regulatory governance structure that grants selective monopoly rights to asset-holders in this market. In the particular case of Telmex, unlike other privatization cases, the labor union reorganized to support privatization and new management in order to acquire political and economic benefits from the sale. Privatization of the telephone company was possible because of a coalition of government, business, and labor leaders.

B. REGULATORY GOVERNANCE STRUCTURES OF THE PRIVATIZATION REFORM

In October 1990 the government put the controlling interest represented by Series “AA” shares up for bid, and published Telmex’s Modified Concession Title (hereinafter defined as the “Modified Concession Title”) ²⁹⁹. The 1990 Modified

²⁹⁹ In June 1990, Telmex’s shares were rearranged, making the “AA” series the controlling interest. At an Extraordinary Stockholder’s Meeting, Telmex’s stock was rearranged into three series: Series “A”, Series “AA” (this was the controlling interest), and Series “L” Under the rearrangement, Series “AA” shares represented 20.4% of the capital stock, and the *controlling interest* in Telmex. The majority of

Concession Title was the license under which Telmex would operate once privatized³⁰⁰. The formal regulatory governance structure was primarily reliant on this “contract” or “Concession Title” between the State and the licensee, which gave Telmex an exclusive right to operate telephone services in Mexico until October 2026 (except in mobile services, which at that time were considered value-added services). Telmex’s Concession Title expressly granted a six-year monopoly grace period after privatization prior to opening the long distance telephony market to competition in 1996.

Telmex was also subject to the general rules established by way of Presidential Decree, in the 1990 Telecommunications Regulations (*Reglamento de Telecomunicaciones*)³⁰¹. According to articles 2 and 13 of the 1990 Telecommunications Regulations, a Concession Title for a “public telephone network” could be granted only to a Mexican citizen or association and constitutes a temporary permission to build and operate a network infrastructure in order to commercialize

these shares had to remain under the control of Mexicans at all times. Series “A” shares represented 19.6% of the capital stock and could be owned by domestic or foreign investors. Like the Series “AA” shares, “A” shares had full voting rights, but represented the lesser half of the controlling stock. Series “L” shares represented 60% of the capital stock of Telmex. “L” shares had no restrictions on ownership but had limited voting rights. “L” shares could be owned by foreigners. These shares were issued and publicly traded on the New York and Mexican stock exchange. “L” shares assured the flow of foreign capital, while control of Telmex remained in the hands of a selected group of Mexican and foreign partners, through the “AA” and “A” shares. *see* Gabriel Szekely et al., *Teléfonos de México: Una empresa privada*, (1995); *see also* Título de Concesion Telmex (1990) *Op. Cit. Supra* 288.

³⁰⁰ Título de Concesion Telmex (1990) *Op. Cit. Supra* 288.

³⁰¹ The new regulations included (a) new rules governing concession titles and permits for telecommunications networks, (b) new rules governing authorization of mobile service companies and cable television companies; (c) new powers of the Secretary of Communications and Transport (“SCT”) to govern telecommunications enterprises, and (d) other rules such as interconnection obligations that set a basis for fair competition in local and mobile services. Reglamento de Telecomunicaciones, D.O. October 29, 1990

services, which in the case of telephony were considered public services³⁰². This was a barrier to control of the telephone company by foreign investment, which can otherwise be seen as a protection for national capital.

In this regulatory arrangement, once the company is privatized, the state could still find reason to rescind the concession contract, but the operator to some extent holds the network hostage because of the technological challenges of managing the system³⁰³. In any case, an administrative action by the government to rescind a Concession Title could certainly be challenged in a court. However, during this period, the judiciary in Mexico was still strongly biased in favor of the presidentialist system, which made a “contract” an unreliable regulatory guarantee.

The protection of Telmex’s rights under the Concession Title was therefore a question of political and economic good standing. Such tentative regulatory governance

³⁰² According to the 1940 Law of General Means of Communication (*Ley de Vías Generales de Comunicación*), as in force when Telmex’s concession title was granted, a public telecommunications network, which in the case of Telmex included a public telephony network, is a general means of communication that can be established and operated only by concession or permission of the state. Furthermore, the regulation of general means of communication is considered to fall under Federal jurisdiction. Regulation regarding general means of communication is attached to Article 28 of the 1917 Mexican Federal Constitution, which established that the State can grant a concession to a third party to provide a public service or use goods of the public domain when this is deemed to serve the public interest.

³⁰³ Given the legal construction of the Concession Title and the nature of the services, a rent-seeking state could find reason to show that a privatized Telmex was not fulfilling commitments to provide adequate public services or was not operating a general means of communication in the public interest, and so could opt to rescind the “contract.” Except for an expropriation of the network, this is the highest possible “fine” that a concessionaire can face, and it could more appropriately be considered a redistributive policy. However, then and now, the state might find itself hard pressed to “fine” the privatized incumbent in such a way without also “expropriating” the infrastructure built by investors. An unstable state is unlikely to want to run the company itself, not only because of likely political repercussions, but also due to the financial and technical expertise required to run such ventures (which, by the way, is the common reason given for privatizing such companies in the first place).

structures of privatization, within an unstable rent-seeking Presidentialist system, distort regulatory incentives for investors and instead create informal incentives to interact in patronage networks and focus on short-term rent-reaping and high rates of return, rather than on long-term development objectives.

C. REGULATORY INCENTIVES OF THE PRIVATIZATION REFORM

The regulatory incentives that would guide Telmex's market conduct were also primarily established in the 1990 Modified Concession Title. The Concession Title mandated Telmex to comply with several commitments over the first years of operation, including: (1) an annual 12 percent growth in lines from 1989 to 1992 (equivalent to doubling the existing number of lines in service); (2) the expansion by 1994 of basic services to communities with more than 500 inhabitants, and automatic switching services to communities with more than 5,000 inhabitants; (3) a four-fold increase in the number of public phones in urban areas; (4) a 60% expansion of the long-distance infrastructure, including digitalization of 65% of the nation's existing lines as well as additional digital networking; (5) installation of fiber optics; (6) obliged Telmex to increase the number of public phones to two public telephones for each 1,000 persons by 1994 and to five per 1,000 people by 1998, (7) drop the waiting period for new services to 6 months in 1996, and subsequently by one month every year after until the waiting period was one month by 2000, (8) attend to repairs within

8 hours of reports, and (9) award credit to customers 72 hours after an interruption in service³⁰⁴.

The 1990 Modified Concession Title further established that Telmex would be regulated by a price cap formula (RPI-X formula), which would be revised every four years pursuant to incremental costs³⁰⁵.

The tax regime was modified prior to privatization so as to transfer the effect of the tax as a price increase and lower the effective tax rate to 29% of Telmex's revenue, with the additional incentive that Telmex could offset 65% of that tax rate against investments³⁰⁶.

The 1990 Modified Concession Title guaranteed an initial six-year grace period from long distance competition, but established basic competition commitments such as (1) an obligation to interconnect new entrants to the market, (2) the resale of idle capacity of leased private lines as of 1996, and (3) recognition of the SCT as a regulating authority empowered to demand technical plans and to revise said plans³⁰⁷.

³⁰⁴ Antonio Botelho and Caren Addis, "Privatization of Telecommunications in Mexico," in ed. Rolph Van der Hoeven and Gyorgy Sziraczki, *Lessons from Privatization: Labour issues in developing and transition countries* (Geneva: ILO), (1997); see also Kathleen A. Griffith (1998), *Op. Cit. Supra* 279: 179; Ben A. Petrazzini (1995), *Op. Cit. Supra* 286: 118-119

³⁰⁵ Ben A. Petrazzini (1995), *Id. Cit. Supra* 286: 119

³⁰⁶ Ben A. Petrazzini (1995), *Id. Cit. Supra* 286: 117

³⁰⁷ Ben A. Petrazzini (1995), *Id. Cit. Supra* 286: 118-119

The SCT, however, did not enforce the implied “liberalization” of local services which were not covered under the grace period, by deferring issuing rules for competition or deferring granting of new concessions³⁰⁸. The SCT required Telmex to spin off its mobile service company (although it remained owned by the winning bid group) as well as other value-added service interests to allow competition in those sectors³⁰⁹. Since 1990, wireless services were open to competition, however, Telcel had only one other competitor, Iusacell, which was already operating at the moment of privatization, and no other concessions were granted until 1996³¹⁰. These are examples of how Telmex acquired a selective enforcement of rights from the government that favored the maintenance of its monopoly rights in the local service market as well as the long-distance market, even if formally the latter was open to competition.

D. ECONOMIC OUTCOMES OF PRIVATIZATION REFORM

In December of 1990, the Secretary of Finance declared the joint venture headed by Grupo Carso, Southwestern Bell, and France Telecom, the winner of the auction³¹¹.

³⁰⁸ “[...] while the Telmex privatization has met (or exceeded) the government’s goals, the legacy of the overall reform program was mixed. The new telecommunications Reglamento, for example, contemplated to grant of additional licenses of a range of services. And although by 1994 the SCT had issued over forty licenses for value-added services, applications for local service concessions had been deferred; paging concessions were delayed, and cable TV had remained a local area monopoly. Likewise, despite an initial push to establish the ground rules for competitive long-distance service, a general policy on interconnection was delayed until July 1994, and the various technical and administrative issues (for example, numbering, tariffs) were still under review by the SCT.” Björn Wellenius and Gregory Staple, “Beyond Privatization: The Second Wave of Telecommunications Reforms in Mexico”, World Bank Discussion Paper No. 341, (World Bank, 1996): 3

³⁰⁹ Ben A. Petrazzini (1995), *Id. Cit. Supra* 286, 119

³¹⁰ Ben A. Petrazzini (1995), *Id. Cit. Supra* 286, 122-123

³¹¹ Initially twenty-three investors were interested in bidding for Telmex. Investors came from the United States of America, Canada, Spain, Japan, France, England, and Mexico. Sixteen groups

By way of a company loan granted by Telmex, the telephone workers' union bought 4.4% of the series "AA" shares³¹². The government received \$1,757.6 million from the sale of the controlling shares³¹³. The financial resources gained were greater than those in the PTT privatizations in Brazil or Argentina³¹⁴. After the state sold its

qualified to bid. The Mexican firms that qualified were Casa de Bolsa Inverlat, Acciones y Valores, Gentor and Grupo Carso. Foreign qualifiers were Southwestern Bell, GTE, Citibank, US Sprint, Bell Canada, Telefónica de España, France Cable and Radio, STET, Nippon Telephone and Telegraf, Singapore Telecom, Nynex International, and Cable and Wireless PLC. Four joint ventures were made from the qualifying companies: 1) *Acciones y Valores, Telefónica de España* and *GTE*; 2) *Grupo Carso, Southwestern Bell* and *France Cable and Radio, Casa de Bolsa Inverlat, Bell Canada* and *Nynex Internacional*; 3) Monterrey-based consortium, *Grupo Gentor*. "Sixteen Companies Qualify to Bid For Mexican Telephone System", *Associated Press*, October 18, 1990; "Mexico Gets 3 Bids for Phone Firm Communications: Two of the groups include U.S. telephone companies," *Los Angeles Times Business*, November 16, 1990; Matt Moffett, "Southwestern Bell, GTE Groups File Offers for TelMex," *The Wall Street Journal*, November 26, 1990

³¹² Stephen Baker, "Salinas Goes After Another Monster: The Phone System ---He Wants To End The State Monopoly--And Tame The Union" *Business Week*, March 6, 1989; see also "Mexican phone net will challenge buyer: The service is terrible, and new owner must promise to make improvements" *San Diego Union & Tribune*, December 5, 1990; Modernizing the phone system prior to privatization primarily implied preparing the company for private ownership --for example, by downsizing Telmex employment rates. Most U.S. and European telephone companies managed with fewer than 6 workers for every 1,000 lines, while Mexico's telephone union ratio exceeded 10 workers per 1,000 lines. Telmex's telephone labor union (*Sindicato de Telefonistas de la Republica Mexicana* or STRM), with 49,000 members, was Mexico's second largest union after Pemex's, and represented one of the highest employee-to-line ratios in the world. However, in the case of Telmex, in contrast to other modernizations or privatizations, the union sided with the government's program and became the primary promoter of Telmex's modernization. Salinas' government restructured Telmex management-labor relations by inviting the STRM to join in the benefits of privatization. On April 14, 1989 the authorities and the union signed an agreement to cooperate in the modernization of Telmex: workers agreed to freeze hiring, to accept more flexible job descriptions, to improve performance, to work under one general labor contract, and to receive constant training on upgrades in equipment and services, all in return for salary and benefits increases; the union also negotiated an option to buy controlling stock in Telmex upon its privatization (the "1989 Union Agreement"). Telmex's Concession Title mentions that the agreement between workers and government is the Union Concertation Agreement for Modernization signed 14 April 1989. It also mentions that "the Federal Government will oversee the mechanisms of workers' economic participation in the company, pursuant to their savings capacity." §VII Antecedentes, Titulo de Concesion Telmex (1990) *Op. Cit. Supra* 288; After the auction, the government retained a 34.6% stake in Telmex in the form of limited voting shares. Of this, 4.4% was reserved for Telmex employees, 5.1% was set aside for consortium options to purchase and the remainder was put up for sale. From 1991 to 1994, the Mexican government gradually reduced its holdings through various offerings on domestic and international financial markets. Telmex was completely privatized in May 1994. See, "Mexico Coy on Telmex Date But Banks See May Sale," *Reuters Financial Service*, April 8, 1991

³¹³ Ben A. Petrazzini (1995), *Op. Cit. Supra* 286: 121

³¹⁴ Brent Lee Vannoy, "Comment: Mexican Telecommunications: Privatization And Nafta Open The Door For U.S. Expansion Into Mexican Markets", *17 Houston Journal Int'l L* 309, (1994).

remaining interest in Telmex and Telmex completed the public offering of the “L” series shares, the Mexican government grossed \$6,150 million from the privatization.³¹⁵ The Mexican government achieved recognition for having managed one of the most successful privatizations in Latin America. Winning-bid investors retained gained control of an affiliated cellular company, Radiomóvil Dipsa, S.A. de C.V. (known as “Telcel”).

In keeping with benchmarked service goals, Telmex maintained an annual average growth rate in lines of 12.5% from 1991 to 1994³¹⁶. The quality and continuity of service, measured by waiting lists and frequency and length of service delays, also improved in all regions except Mexico City, where the network was essentially being rebuilt.³¹⁷ In 1990, at the time of Telmex’s privatization, there were 6.48 lines per 100 inhabitants; by 1994 that figure increased to 9.18³¹⁸. Digitization of Telmex’s plant likewise rose from 29% in 1990 to 89.80% in 1996.³¹⁹

³¹⁵ see Gabriel Szekely et al., (1995) *Op. Cit. Supra* 299

³¹⁶ Leonardo E Torres C., with collaboration from Armando López V, “El Mercado Telefónico en México: Diez Años después de la Privatización de Telmex”, *Documento de Investigación No. 17*, (Centro de Análisis y Difusión Económica, August 10, 2000):5; also Norman Lerner, “Latin America: The New Telecom Scene,” 29 *Telecommunications (Int'l Ed.)*, Oct. 1995: 173.

³¹⁷ Bjorn Wellenius, “Telecommunications Restructuring in Latin America: An Overview” in eds. Bjorn Wellenius and Peter A. Stern, *Implementing Reforms In The Telecommunications Sector* (World Bank, 1994), 121, 143 n. 25.

³¹⁸ Leonardo E. Torre C. (2000) *Op. Cit. Supra* 316: 5; also Norman Lerner (1995), *Op. Cit. Supra* 316, at 173.

³¹⁹ Cofetel, *Informe de Trabajo*, (2001), 43-44, available online at http://www.cft.gob.mx/cofetel/html/1_cft/informe_2001/Informe_2001.pdf

Its mobile subsidiary, Telcel, showed similar success. The number of cellular phone subscribers reached 386,100 in 1993, and 1,021,900 by 1996³²⁰. Initial penetration rates of cellular service in Mexico for 1993, exceeded the rate experienced in other developed countries, such as Denmark, Norway, Spain, and Switzerland³²¹.

As Telmex's concession obligations and monopoly grace period reached an end, investment and development rates also fell. Public telecommunications investment as a percentage of telecommunications revenue in Mexico had averaged 112.5% from 1988-1990, but decreased to an average 55.9% from 1991-1993, and to an average of 24% from 1994-1996³²². Growth in fixed lines dropped from 12.5% to reflect an annual average growth rate in lines of 1.18% from 1995 to 1998³²³.

In 1990, the change in the tax cross-subsidy structure implied a local rate increase of 620% alongside a drop in international service rates, on the understanding that at first, increases mostly reflected a similar total amount for consumers as had been paid with taxes³²⁴. For Telmex, the tariff increase resulted in a 126.4% profit increase in 1990³²⁵. Casarus states that Telmex's revenues increased 44 percent from 1989 to 1990³²⁶ and 21 percent from 1990 to 1991, while operating expenses rose only seven

³²⁰ OECD, *Communications Outlook*, (2007), 117

³²¹ OECD (2007) *Id. Cit*

³²² OECD (2007), *Id. Cit*: 124

³²³ Leonardo E. Torre C. (2000) *Op. Cit. Supra* 316: 3-4; Telmex's commitments to expand lines by a yearly 12% ended on December 31, 1994. §3-2, Titulo de Concesion Telmex (1990) *Op. Cit. Supra* 288

³²⁴ Ben A. Petrazzini (1995), *Op. Cit. Supra* 286: 117

³²⁵ Ben A. Petrazzini (1995), *Id. Cit. Supra* 286: 117

³²⁶ Carlos Casarus, "Privatization of Telecommunications: The Case of Mexico" in *Implementing Reforms in the Telecommunications Sector*, ed. Bjorn Wellenius & Peter A. Stern, (1994), 183.

percent³²⁷. From 1989 to 1990, the value of Telmex's stock is reported to have increased over 460 percent³²⁸. During 1993 and 1994, Morgan Stanley ranked Telmex as the leading company by market value (\$25.6 billion in 1993 and \$32.9 billion in 1994) among developing countries, which included companies from Korea, Taiwan, Brazil, Argentina, and Chile³²⁹. The results are evidence of rent-reaping by Telmex during the short-term grace period. Telmex's private monopoly position in this period was indicative of regulatory governance structures that formally and informally protected the company's selective rights on the market.

³²⁷ Bjorn Wellenius (1994) *Op. Cit. Supra* 317: 143, n. 26.

³²⁸ Carlos Casassus, *Id. Cit. Supra* 326

³²⁹ Ben A. Petrazzini (1995), *Op. Cit. Supra* 286: 4

VII. THE INSTITUTIONAL MATRIX OF TELECOMMUNICATIONS LIBERALIZATION REFORM (1996-2006)

At the start of a liberalization period (according to theory, at least) the government should provide investors with incentives to place resources in the country's telecommunications sector in order to participate in a competitive market and generate growth. Similar to the privatization period, investors require credible commitments that their property rights (concession, investment, and networks) will not be expropriated or somehow significantly subject to administrative arbitrariness. Unlike the privatization reform, liberalization reform begins with a private incumbent that owns the existing network resources in the market. Therefore, among the most important commitments required by telecommunications investors from the government are (1) lower entry barriers to the market, and (2) supervision of the incumbent to comply with rules of fair competition, which includes among other things providing interconnection to existing network resources and preventing predatory pricing.

During liberalization, regulatory governance structures protecting the incumbent monopoly are threatened with elimination by competing models of market regulation. Continued reform is inevitable under the institutional endowment, primarily because of commitments generated through international agreements (in this case, most importantly the GATS-WTO) that require governments to continue structural reform. Consequently, asset-holders that were previously granted selective property rights (monopoly rights in the case of Telmex) will see those rights diminished.

A. THE INSTITUTIONAL ENDOWMENT OF THE LIBERALIZATION PERIOD (1994-2006): A STABLIZING RENT-SEEKING LEGISLATIVE SYSTEM

The institutional endowment of Mexico during the liberalization period is no longer a rent-seeking presidentialist system but instead has been defined as a stabilizing “rent-seeking legislative system” elsewhere in this text. The rent-seeking legislative system arises in the context of a multiparty system and alternation in government; the strengthening of the legislature in the policymaking process vis-a-vis the weakening informal control of the executive, the enhanced relevance of the judiciary, and new legal frameworks supportive of a competitive market economy. This stage also shows a strong consolidation of elite business *grupo* structures, as well as unresolved wealth disparity and poverty compounded by rising crime levels.

A stable electoral system and a better-grounded market economy perform as formal stabilizing institutions in this period. Similar to the old PRI clientelism, the multi-party system has a fluid clientelistic interior of circulating elite members. Congressional members have a high capacity to represent elite interests with a low accountability for their voting patterns. There is also no formal re-election, but public offices may be secured through party appointments. Therefore party members have an incentive to follow party lines in order to access benefits.

Party leaderships are effectively positioned in Congress, whether or not they are members themselves, to introduce new policy or regulatory governance structures

through the legislature. Institutionalized pluralism, weak though it may be, eliminates the usefulness of informal VPI coalitions. Furthermore, party leaders only have the capacity to provide credible regulatory commitments in the short term, that is, per *sexenio*. Unlike the old one party PRI system, the multi-party system implicitly makes parties unstable rulers aiming to capture the Presidency and Congressional seats from *sexenio* to *sexenio*. But, for economic entrepreneurs, this temporary appropriation by rent-seeking political elites may be sufficient to extend or enforce selective property rights, *sexenio* by *sexenio*, or until the rent-seeking legislative system becomes unstable and a new configuration of power is determined. The civilian vote is guaranteed by a stable electoral system, but which has the greatest impact on punishing or rewarding the Presidency.

Parties seeking to successfully control the Executive still require the support of major asset-holders (big business groups), and may agree to protect selected rights in order to enhance their chances of entering another period. To effectively prolongue pre-established monopoly rights, such as those granted in the telecommunications market, all the Congress has to do is *not* establish strong regulatory commitments in legislation.

B. REGULATORY GOVERNANCE STRUCTURES OF THE LIBERALIZATION REFORM
In 1995, during the administration of President Ernesto Zedillo Ponce de León (1994-2000), the Mexican Federal Congress issued the Federal Telecommunications Law

(*Ley Federal de Telecomunicaciones* or 1995 FTL)³³⁰. It should be noted that when the 1995 FTL was issued, the PRI still held a majority in Congress. Market liberalization under the 1995 FTL was announced as a policy decision that aimed to generate several development benefits such as diverse telecommunications services, more and better options for consumers, internationally competitive pricing, sector employment, and an overall increase in national competitiveness³³¹.

The 1995 FTL was a progressive legislation which promoted a free, fair, and open market structure, by including clear and transparent rules regarding:

- (1) The powers of the Secretary of Communications and Transport (“SCT”) to issue policy guidelines and regulate telecommunications based on principles of telecommunications development, a healthy competitive environment, and nondiscrimination among service providers.

³³⁰ Ley Federal de Telecomunicaciones, D.O. 7 de junio de 1995 (“1995 FTL”).

³³¹ “[...] The opportune opening to competition in telecommunications services will contribute to our economic development and to overcoming the savings crisis currently suffered by the country. Therefore, a law is proposed that incorporates vanguard regulatory guidelines in that subject matter, which should take us towards an open and efficient telecommunications market.

“This new regulation seeks to promote, in the whole national territory, the availability of diverse telecommunications services, to offer more and better options to consumers, and to have internationally competitive pricing in these activities.

“Coassisting diverse economic agents to gain access to telecommunications services of high quality and low cost will allow the whole economy to augment its competitiveness and at the same time, to stimulate production, investment, employment, and general development of our nation.

“The opening of the telecommunications sector will directly and indirectly bring important benefits. Directly, investment in this sector generates employment within the same sector and in the primary industries related to telecommunications, especially in manufacturing and construction. Indirectly, since they are a fundamental input to practically all productive activities, better and more accessible telecommunications services will promote economic activity and employment growth. [...]”
§Exposición de Motivos, 1995 FTL *Id. Cit. Supra* 330, (Translation by author)

- (2) The powers of the SCT to supervise carrier obligations to interconnect and maintain open-architecture networks.
- (3) SCT authority in spectrum usage and management, including authority by which the State could reserve spectrum for state usage or public interest services, as well as specific rules by which the state would grant a Concession Title to use spectrum through a similarly clear public-bid process.
- (4) A short list of requirements that were to be fulfilled in an open application process for a public telecommunications network Concession Title and other permit authorizations mentioned by the law, and the set of common legal language that all Concession Titles and permits would hence include.
- (5) Rules for transferring, terminating, relinquishing, or revoking a Concession Title both for spectrum and networks.
- (6) Broad rules for commercialization of services.
- (7) A free tariff system and the authority of the SCT to establish special obligations on service providers that were considered economic agents with substantial market power.
- (8) Monitoring and enforcement powers of authority of the SCT, including a range of fines it could impose for regulatory noncompliance.
- (9) An advanced regulatory focus, which in line with digital telecommunications network technologies aimed to regulate networks rather than defining regulation by specific services. (A subsequent chapter explains technological advances that began in this period).

A transitory article of the 1995 FTL also called for a telecommunications regulator to be established by August 10, 1996, as an *órgano desconcentrado*³³² of the Secretary of Communications and Transport (SCT)³³³. On August 9, 1996, the presidential Decree which Establishes the Federal Telecommunications Commission (*Decreto por el cual se crea a la Comisión Federal de Telecomunicaciones* or Decree Creating Cofetel), was issued by President Zedillo and published in the Official Gazette of the Federation³³⁴. The Decree Creating Cofetel empowered the agency, the Board of Commissioners, and the President and Chairman of the Board of Commissioners of Cofetel as legal authorities in telecommunications regulation.

The 1995 FTL established broad regulatory commitments in legislation that generated high incentives for investors to seek long-term investment. A new framework of international agreements and national regulatory reforms guaranteed private domestic and foreign investors that Mexico was committed to a market economy in the long

³³² “*Órganos desconcentrados* lack independent legal personality; they generally lack budgetary independence, but they maintain some autonomy over decisions within their jurisdiction. Two types of *órganos desconcentrados* exist in Mexico: (1) those agencies whose chief executive officer is subordinate to the upper levels of the hierarchical structure, and (2) those agencies that are technically not accountable to superior bureaucratic authority in exercising decision-making powers. [...] The second type of *órgano desconcentrado* is generally created by law or an executive order or decree which either contains an express provision creating the agency, or implicitly charters such an agency by virtue of technical, operational, or budgetary independence granted to it. Examples of these types of agencies include the Federal Antitrust Commission (*Comisión Federal de Competencia*) [...], the Tax Administration Service (*Servicio de Administración Tributaria*) [...], the National Commission on Banking and Securities (*Comisión Nacional Bancaria y Valores*) [...], and the National Energy Regulatory Commission (*Comisión Nacional Reguladora de Energía*) [...]. These are enforcement agencies, rather than policy-making agencies; as such, they are *desconcentrados* so as to be able to carry out their functions independently from other agencies. Several of these agencies are new, and reflect a level of independence from hierarchical influence that was relatively unknown during the heyday of authoritarian government and *presidencialismo* [...]”.S. Zamora *et al.* (2004), *Op. Cit. Supra* 43: 295-296

³³³ Eleventh transitory article, 1995 FTL, *Id. Cit. Supra* 330.

³³⁴ Decreto por el cual se crea a la Comisión Federal de Telecomunicaciones. D.O.F. 9 August 1996. (“1996 Cofetel Creation Decree”)

term. Furthermore, investors were protected by a concession contract and promised that an independent regulatory body would be established to oversee the fulfillment of these regulatory commitments. In principle, the liberalization reform signaled a strong regulatory governance environment for investors.

Unfortunately and in retrospect, what became most remarkable about the 1995 FTL was what it lacked. In simple terms, it avoided establishing a strong independent regulator. Instead the regulator was established by way of a presidential “Decree Creating Cofetel” (secondary regulation). Pursuant to the powers of authority granted to Cofetel in this decree, the regulator was granted independent decisionmaking powers in all matters related to telecommunications regulation, except the following:

- (1) authorizing Concession Titles and permits for new entrants, in the understanding that these authorizations were initially conceived as minimum barriers to entry,
- (2) enforcing regulation through the determination and implementation of fines on telecommunications operators or other actors who disobeyed regulation, and
- (3) establishing policy aimed at achieving social development goals, which included social coverage, rural telephony, and the drafting of sectoral development policies for each presidential *sexenio*.

In all these cases, the SCT is the issuing authority. The Cofetel is obliged to recommend a decision, but its recommendations are not binding. Hence, by formal

limitations of its authority and its legal nature, Cofetel is a subordinated agency to the SCT, with a hierarchical line of command to the head of the SCT (a political body of the Executive power)³³⁵.

The lack of a clearly established regulatory governance structure empowering an independent regulatory agency in the 1995 FTL proved to be a discreet way, under the conditions of liberalization, whereby the Legislature protected Telmex's existing monopoly position in the telecommunications market, at the start of competition.

C. INEFFECTIVE REGULATORY GOVERNANCE STRUCTURES FOR COMMITMENT ENFORCEMENT

The privatization of state resources in key economic sectors, including the telecommunications sector, had left strong private incumbents without institutional structures to secure the entry and success of competition³³⁶. Liberalization reform in telecommunications depended on introducing two new features: competition, and good-quality regulation in the sector. A strong regulator was not established. Furthermore, the liberalization stage in the telecommunications sector was

³³⁵ Given that the Cofetel was an agency of the SCT, another presidential Decree was published on October 29, 1996 to reform the Internal Regulations of the SCT or *Reglamento Interior de la Secretaría de Comunicaciones y Transportes*, to add article 37-B which replicated and detailed the powers of authority previously granted to the Cofetel in the Decree of Establishment of Cofetel. On December 9, 2006, the Internal Rules of Cofetel or *Reglamento Interior de la Cofetel* issued by the Board of Commissioners was published in the Official Gazette of the Federation, which empowered other Cofetel officers besides the Board of Commissioners, and the President and Chairman of Cofetel. This administrative structure of powers would in the future lead to difficulties in sustaining the validity and even constitutionality of Resolutions issued by the Board of Cofetel before the courts.

³³⁶ In relation to the banking privatization process, a researcher, Jose Alberro, Colegio de Mexico, was quoted as saying: "Salinas is like a skater on thin ice. The secret is not to slow down. But there seems to be very little strategic thinking about what sort of regulations or controls will govern this new relationship between the banks and the government". David Clark Scott, "Privatization Plan Tests Economy", *Christian Science Monitor*, June 22, 1990

characterized by the difficulty of enforcing either competition or regulatory decisions issued by Cofetel. Regulatory governance commitments made to new investors in the 1995 FTL proved to have a limited effectiveness.

Instead of reviewing specific regulatory incentive structures generated by the 1995 FTL and the regulator, this section will discuss the regulatory design of commitment enforcement during the liberalization period. Without commitment enforcement mechanisms, regulatory incentives produced distorted effects on market conduct. The following sections provide specific instances in which regulatory governance structures were not set in place, or if weak, were not modified to perform optimally or else not enforced at all. The inability to enforce commitments was a combination of (a) the lack of independence of regulatory agents, (b) weaknesses in judicial performance, (c) legislative paralysis, and (d) executive division, all of which characterized the period of democratic and economic transition in Mexico. The overall effect was a selective enforcement of property rights on the market in favor of the privatized incumbents, Telmex and Telcel.

1. A controversial settlement rate (1996-1999)

Similar to the UK system, the 1995 FTL was shaped by broad incentives to competition and supervision of market conduct that were intended to be executed by a flexible, professional, and independent administrative regulatory agency. Prior to the creation of Cofetel, the SCT began to implement key administrative regulations that would allow the start of competition, including rules for a tiered presubscription

process to facilitate the entry of new competitors into the long-distance market, national plans for signaling and numbering, and interconnection-rate resolutions. Once established, the Cofetel continued to develop further administrative regulation to promote competition in the long-distance, local, mobile, pay television, and value-added service markets.

One of the first regulatory actions to politicize the enforcement of liberalization was the controversial administrative resolution issued by the SCT (prior to the establishment of Cofetel) to end carrier disputes over the first interconnection fee between Telmex, as a local carrier, and the new long-distance entrants. On April 26, 1996 the SCT set the interconnection rate at 2.5 US cents, with an additional surcharge of 2.8 US cents, for a total of 5.3 US cents for 1997 and 1998 (the “April 1996 Interconnection Resolution”)³³⁷. The surcharge was justified as a necessary subsidy of Telmex’s local residential operations to avoid a sharp raise in residential tariffs due to lost income on the long-distance market, while the company completed a delayed rebalancing of local and long-distance service tariffs. Furthermore, in the April 1996 Interconnection Resolution, Telmex was entitled to charge new entrants an amount

³³⁷ The surcharge was aimed to cover 58% of the settlement rate for termination of incoming long-distance calls on behalf of other carriers. S.C.T., “Resolución administrativa por la que la Secretaría de Comunicaciones y Transportes establece la regulación tarifaria aplicable a los servicios de interconexión de redes públicas de telecomunicaciones, autorizadas para prestar servicios de larga distancia”, D.O. 26 April 1996 (“1996 SCT Interconnection Resolution”); This resolution was challenged and later upheld by the Cofetel. Judith Mariscal, *Unfinished Business: Telecommunications Reform in Mexico*, (Praeger, 2002), 82-83

determined by an expert for special projects incurred by Telmex in order to provide new carriers with interconnection³³⁸.

The April 1996 Interconnection Resolution effectively allowed Telmex to lower long-distance service prices to a price cap set in its Modified Concession Title, exactly at the point when new carriers were beginning to compete in this market, and to raise local service prices in a market in which Telmex had a *de facto* monopoly³³⁹. “Revenues from local service [rose] rapidly as a portion of total revenues, from about 40% in 1996 to about 60% in 1998, while long-distance revenues (domestic and international) [fell] from about 57% in 1996 to about 34% in 1999”³⁴⁰. Furthermore, the special-projects fees would allow Telmex to dilute the cost of investing in infrastructure arrangements to provide mandatory interconnection to new long-distance carriers. All long-distance carriers, including Telmex, filed judicial actions against the April 1996 SCT Interconnection Resolution³⁴¹.

On March 11, 1998, the April 1996 Interconnection Resolution was upheld by Cofetel when a court ordered the new telecommunications authority to respond to industry

³³⁸ 1996 SCT Interconnection Resolution, *Id. Cit. Supra* 337.

³³⁹ OECD, *Regulatory Reform in Mexico's Telecommunications Industry*, (1999), 10

³⁴⁰ OECD (1999), *Id. Cit. Supra* 339: 10

³⁴¹ “As in many other countries, the introduction of competition has been associated with high-profile disputes and litigation as both the incumbent and the entrants seek to clearly establish their legal rights and to use all political and legal mechanisms at their disposal to influence regulatory decisions in their favour. These disputes have often given rise to legal injunctions. In Mexico, any act of authority deemed to violate the constitutional rights of a plaintiff can be suspended by means of an amparo (injunction) until the underlying merits of the case are resolved in court. Amparos are not class actions – only the plaintiff is granted relief. Industry-wide or class action suits, with their promise of generalised regulatory correction, do not exist in Mexico.” OECD (1999), *Id. Cit. Supra* 339: 9

filings against the rate³⁴². The surcharge was justified by Cofetel as a necessary measure that “includes a contribution to cover what [the authority] believes is a deficit in the provision of residential telephone service [... and] to prevent an additional sharp increase in residential service rates”³⁴³. Cofetel’s resolution confirming the rate provoked another flurry of litigation, in which Avantel was successful in attaining a temporary relief from the interconnection and special projects fees until the *amparo* case was definitively resolved³⁴⁴.

On November 27, 1998, Cofetel settled a new disagreement over interconnection charges applicable for 1999 to 2000 and reduced the interconnection tariff to 2.6 US cents by dropping the 2.5 US cents surcharge and adjusting the prior rate to inflation according to the national consumer price index³⁴⁵. Despite the decrease, in March 2000, the interconnection rate in Mexico was still 200 times as high as tariffs charged

³⁴² OECD (1999), *Id. Cit. Supra* 339: 9

³⁴³ OECD (1999), *Id. Cit. Supra* 339: 21.

“At the time of the introduction of competition, Telmex still had not completely rebalanced its prices, in part due to the delay in the rate of rebalancing during the 1995 crisis. Therefore, in the first two years following the introduction of competition (from January 1996 until the first quarter of 1998) local service prices increased rapidly in real terms until they reached the individual price-caps originally scheduled for 1996. At the same time, and in accordance with the overall price-cap on Telmex’s operations, Telmex substantially lowered domestic and international long-distance prices. Revenues from local service have risen rapidly as a portion of total revenues, from about 40% in 1996 to about 60% in 1998, while long distance revenues (domestic and international) have fallen from about 57% in 1996 to about 34% in 1999.”

Id. Cit. p. 10

³⁴⁴ OECD (1999), *Id. Cit. Supra* 339: 9

³⁴⁵ § 4.2 “Interconexión”, Cofetel, *Informe de Labores*, (2000), 29-30, available online at http://www.cft.gob.mx/cofetel/html/1_cft/informe3/index.shtml

in the UK, USA, Argentina, and Canada, and remained the highest among a group of 12 countries that averaged an interconnection rate of 1.78 US cents³⁴⁶.

2. *Regulatory actions of Cofeco and Cofetel to curb anti-competitive practices in the telecommunications sector (1998-2006)*

The Federal Competition Commission (*Comisión Federal de Competencia* or Cofeco) was one of the first regulatory agencies to be established in Mexico³⁴⁷. After Cofetel was established in 1996, Cofeco continued to retain certain regulatory oversight in the telecommunications sector. The 1995 FTL stated that, in order for Cofetel to apply specific telecommunications obligations to a dominant market player, Cofeco (as the primary antitrust regulator) would first have to declare that agent as having “significant power in the relevant market.”³⁴⁸

³⁴⁶ The twelve countries analyzed by the author were Chile, UK, USA, Argentina, Canada, Sweden, Spain, Germany, Peru, Holland, Switzerland, Denmark, Italy, France, Belgium, and Japan. Leonardo E. Torre C. (2000) *Op. Cit. Supra* 316: 30-32

³⁴⁷ In 1992, the Federal Law of Economic Competition (*Ley Federal de Competencia Económica* or LFCE) was issued (D.O. 24 December 1992, effective 23 June 1993), and the Federal Commission on Economic Competition (*Comisión Federal de Competencia Económica* or Cofeco) was established as the primary authority regulating monopolistic practices. Cofeco was further empowered by the 1993 executive Internal Regulations of Cofeco (*Reglamento Interior de la Comisión Federal de Competencia Económica*), D.O. 12 October 1993; and the 1998 executive Regulations of the Federal Law of Economic Competition (*Reglamento de la Ley Federal de Competencia Económica*). D.O. 4 March 1998. The L.F.C.E repealed the following laws issued under ISI policies: the Law on the Powers of the Federal Executive Branch in Economic Matters (*Ley sobre Atribuciones del Ejecutivo Federal en Materia Económica*) D.O. 30 December 1950; the Law of Industries of Transformation (*Ley de Industrias de la Transformación*) D.O. 13 May 1941; and the Law of Associations of Producers for the Distribution and Sale of their Products (*Ley de Asociaciones de Productores para la Distribución y Venta de sus Productos*) D.O. 25 January 1937. Reference taken from footnote 20 in S. Zamora *et al.* (2004), *Op. Cit. Supra* 43: 392-393

³⁴⁸ In other words, Cofetel could only impose special obligations on a carrier (often with *ex ante* intentions) once that carrier was declared by Cofeco to be a dominant market player (which is an *ex post* regulation, dependant on the agent being proved dominant). Article 63 of the 1995 FTL. *Op. Cit. Supra* 330.

In 1997, Cofeco found Telmex to have significant power in five relevant telecommunications markets (basic local telephone service, access, national long distance, interurban transport, and international long distance)³⁴⁹. This resolution was confirmed by Cofeco in 1998, after a review process initiated by Telmex³⁵⁰. Telmex then filed an *amparo*³⁵¹ against the confirmed resolution, and in 1999 a court granted

³⁴⁹ See Background notes (Antecedentes) in *Resolución Administrativa por la que la Secretaria de Comunicaciones y Transportes (La "Secretaria"), por conducto de la Comisión Federal de Telecomunicaciones (la "Comisión"), en estricto cumplimiento a la sentencia de fecha 11 de mayo de 2001 del Primer Tribunal Colegiado en Materia Administrativa del Primer Circuito y de acuerdo a lo ordenado por dicho Tribunal Colegiado mediante Resolución del 27 de mayo de 2002, deja sin efectos la diversa por la que se establecieron a Teléfonos de México, S.A. de C.V. ("Telmex"), Obligaciones Específicas relacionadas con Tarifas, Calidad de Servicio e Información, así como distintos actos relacionados con la misma, Cofetel, 8 July 2002, Resolución de Pleno número P/___/08/07/2002, http://www.cft.gob.mx/cofetel/html/9_publica/resoluciones/12jul2002.shtml [Last viewed July 31, 2007]; see also summary of this issue in OECD, *Mexico: Progress in Implementing Regulatory Reform, OECD Reviews of Regulatory Reform*, (2004), 109*

³⁵⁰ OECD (2004) *Id. Cit. Supra* 349.

³⁵¹ The *amparo* is a judicial recourse for the protection of individual constitutional rights.

“*Amparo* provides protection to such a broad range of individual rights that most acts undertaken by government agencies or officials are subject to *amparo* review. By virtue of Articles 12 and 16 of the Constitution, all acts of government officials are subject to due process (a broad concept by itself) and must conform with applicable laws, treaties, and administrative regulations. Thus, almost any final act of any government official at the federal, local, municipal, or Federal District levels, and within each branch of government (legislative, executive and judicial), is susceptible to challenge under *amparo* law. [...] *Amparo* has become so crucial to litigation that in many judicial and administrative proceedings the parties are not as interested in the outcome of the ordinary process itself as they are in using the regular trial as preparation for a subsequent *amparo* suit.”

[...]

“Mexican courts and legal experts identify two broad categories of *amparo*, according to the number of procedural levels (*instancias*) or courts involved in the process: ‘indirect’ or ‘direct’ *amparo*. [...] *Indirect amparo*: This encompasses all two-stage procedures that begin at the District Court level and move up either to the Circuit Court, or in some instances, all the way up to the Supreme Court; the procedural track that the case follows depends on the subject matter of the challenge. [...] By means of an indirect *amparo*, challenges can be lodged against the constitutionality of legal provisions that apply to the general population (*amparo contra leyes*), against most administrative decisions resulting from proceedings other than a trial (*amparo administrativo* and some agrarian *amparo*), and against arbitrary detention (*amparo habeas corpus*). After a request for *amparo* is filed by an individual, a District Court Judge presides over and hears the first stage of an indirect *amparo* proceeding.” [The final ruling of the District Court may be subject to a review process before the Supreme Court if it involves a challenge to the constitutionality of a law, and before the Collegiate Circuit Courts in all other cases.] [...] “*Direct amparo*: This encompasses all processes that must be heard in a single stage before panels of Circuit Court judges. This type of *amparo* is the process designed for individuals to assert their right to judicial protection against a decision of any Mexican court at any level of government, local, state, or federal, in either criminal, civil, administrative, or labour matters, and is also known as ‘judicial *amparo*’ (*amparo judicial*). [...] Under direct *amparo*, the final judgement is unappealable, except when the complainant

Telmex constitutional protection from Article 52 of the Regulations of the Federal Economic Competition Law, under whose terms Cofeco had substantiated the review process³⁵². Against this court ruling, affected industry agents filed their own *amparos*, and Cofeco filed for an *amparo* review process. In 2001, the court reversed the decision granting Telmex protection from article 52 of the Regulations of the Federal Economic Competition Law, and ordered Cofeco to issue a new definitive resolution³⁵³.

Meanwhile, in 1998, Cofeco had officially notified Cofetel of the resolution confirming Telmex as carrier with substantial power in five markets. In 2000, Cofetel proceeded to initiate procedures to impose specific obligations on Telmex³⁵⁴. Telmex filed an *amparo* against Cofetel's notification of the resolution to begin determining such specific obligations. In 2002, once procedures against the first Cofeco resolution were concluded, Cofetel was ordered by the judiciary to nullify its own resolution of initiation of procedures as well as other subsequent resolutions that had been

challenges the constitutionality of a law, or when the Circuit Court has taken it upon itself directly to interpret a constitutional provision. In such cases, the Supreme Court has sole jurisdiction to hear what is known as 'direct *amparo* in review' (*amparo directo en revisión*), by which the Court is to issue a ruling exclusively on the constitutional precept or issue in question (Mexican Constitution, Article 107, Section VIII).

[...]

"*Amparo* cases may result in one of three possible consequences: granting of the petition for judicial protection, after the court determines that a violation of constitutional rights has occurred; denial of the petition, after the court determines that there has been no violation of rights; or dismissal of the case on the technical or procedural grounds (lack of standing, etc.). [...]" S. Zamora et. al (2004), *Op. Cit. Supra* 43: 258-259, 266-268, and 272, On *amparo* see generally 257-274

³⁵² S. Zamora et. al (2004), *Id. Cit. Supra* 43

³⁵³ S. Zamora et. al (2004), *Id. Cit. Supra*

³⁵⁴ S. Zamora et. al (2004), *Id. Cit. Supra* 43: 112

substantiated on the Cofeco resolution³⁵⁵. Pursuant to the court order, Cofeco proceeded to issue a new definitive resolution derived from the original investigation into Telmex in 1997. In October 2006, after another series of judicial proceedings, a final *amparo* in favor of Telmex nullified Cofeco's second resolution, primarily because the information used by Cofeco was outdated³⁵⁶.

To date, Telmex remains an undeclared agent with substantial power in several markets, even though current information, on stock markets no less, provides evidence of its dominant market position. Cofetel has not been able to impose specific obligations on Telmex under Article 60 of the 1995 FTL; however, it does regulate Telmex based on the terms of the 1990 Modified Concession Title, which stipulate that the authority shall review and authorize all new tariffs and charges to be applied by Telmex, and shall review the price cap on the services basket every four years³⁵⁷. Thus, even after an intense regulatory reform for liberalization, the most important legal instrument regulating the incumbent remains the 1990 Modified Concession Title, which is the authorization issued to Telmex to operate as a private monopoly under benchmarking policies of privatization, which is not an adequate institutional regulatory governance or incentive structure to consolidate liberalization.

³⁵⁵ S. Zamora et. al (2004), *Id. Cit. Supra*

³⁵⁶ "Gana Telmex partida a la Cofeco", *Reforma*, Octubre 6, 2006

³⁵⁷ §§6-1 and 6-5, Título de Concesion Telmex (1990), *Op. Cit. Supra* 288.

3. *WTO telecommunications panel (USA vs. Mexico) (2000-2004)*

New entrants in the Mexican long distance market began to push for stronger regulatory measures to restrain the incumbent. On February 17, 1999, MCI formally asked the U.S. Trade Representative (USTR) to take action to ensure that the Mexican government complied with its commitments under the WTO Telecommunications Agreement³⁵⁸. On August 17, 2000 the United States formally launched a WTO panel case to force Mexico to open up its domestic telecommunications market³⁵⁹. The U.S. filing accused Mexico of violating the GATS, including by way of "anti-competitive cross-subsidization, anti-competitive pricing practices, discriminatory application of tariffs to calls to regions where competitive suppliers do not have facilities, the use of unregistered tariff and discount plans, requiring competitive carriers to lease unnecessary private lines, discriminatory billing and collection practices." ³⁶⁰

³⁵⁸ "MCI Requests USTR Action to Ensure Mexico's Compliance With Its WTO Telecommunications Commitments," *PR Newswire*, February 18, 1998

³⁵⁹ Reuters Staff, "U.S. Takes Mexico to the WTO, Business & Regulatory", *Total Telecom*, August 21, 2000, available online at <http://www.totaltele.com/view.asp?ArticleID=30102&pub=tt&categoryid=0> .

³⁶⁰ It also accuses the Mexican telecommunications companies of wrongfully using information obtained from competitors with anticompetitive results, including "the improper use of pre-subscription information." The paper adds that Telmex has failed to make available to other telecommunications companies "on a timely basis, technical information about essential facilities and other commercially relevant information which are necessary to provide telecommunications services." And it says that Telmex has "refused to provide private lines and circuits to competitive carriers on a timely basis," has denied "private lines and circuits to certain Internet service providers" and has indulged in "discriminatory treatment for calls to ISPs." Other specific examples of actions that have led the U.S. to request formal consultations with Mexican diplomats at WTO headquarters in Geneva include: (a) The International Long Distance Rules of 1996, which prevent U.S. telecommunications companies "from supplying cross-border telecommunications services and from obtaining competitive rates for the termination of international traffic" and (b) Rules established by the SCT, which prevent American telecommunications companies from "exercising effective control over concessionaires authorized to provide telecommunications services in Mexico." Keith Nuthall, "U.S. slams Mexico for "discriminatory" regulations," *Total Telecom*, September 5, 2000, <http://www.totaltele.com/view.asp?ArticleID=31347&Pub=tt>

As a consequence of this filing, in October 2000, the Cofetel determined a new interconnection rate of 1.25 US cents for the year 2001³⁶¹. Soon after, on December 26, 2000, Avantel and Telmex reached a settlement agreement in which they adopted the interconnection rate issued by Cofetel and resolved several administrative and judicial disputes related to pending payment on the 58% surcharge and interconnection fees, as well as to special projects³⁶². Alestra and Telmex reached a similar settlement agreement on December 29, 2000. Other similar settlement agreements followed with other carriers³⁶³.

Nonetheless, on April 2, 2004, the WTO Panel ruled “that Mexico violated its GATS commitments because:

Mexico failed to ensure interconnection at cost-oriented rates for the cross-border supply of facilities-based basic telecom services, contrary to Article 2.2(b) of its Reference Paper;

Mexico failed to maintain appropriate measures to prevent anti-competitive practices by firms that are a major telecom supplier, contrary to Article 1.1 of its Reference Paper; and

³⁶¹ Capítulo 4, Cofetel (2001) *Op. Cit. Supra* 319: 31

³⁶² Cofetel (2001) *Id. Cit. Supra* 319: 31

³⁶³ Cofetel (2001) *Id. Cit. Supra* 319: 31-32

Mexico failed to ensure reasonable and non-discriminatory access to and use of telecommunications networks, contrary to Article 5(a) and (b) of the GATS Annex on Telecommunications.

In respect of cross-border telecom services supplied on a non-facilities basis in Mexico, however, the Panel ruled that Mexico did not violate its obligations because it had not taken commitments for these services.³⁶⁴”

The Dispute Settlement Body adopted the Panel Report on June 1, 2004, and in 2006, the U.S. declared its satisfaction with Mexico’s compliance with the WTO Panel resolution, considering that interconnection rates had by then dropped to near cost levels, that the proportional return system had been eliminated, and that in 2005 an Executive Regulation had been issued in Mexico to make effective the terms of the 1995 FTL by opening long-distance services to commercialization by non-facilities-based providers, thereby increasing competition in the international long-distance market³⁶⁵.

³⁶⁴ WTO, “Summary: Mexico — Measures Affecting Telecommunications Services”, *Dispute Settlement: Dispute DS204*, (Summary to date January 5, 2007), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm

³⁶⁵ “On 1 June 2004, Mexico and the United States reached an agreement on the former’s compliance with the recommendations of the panel report. The agreement states that a reasonable period of time to comply with the recommendations of the Report is 13 months. At the DSB meeting on 31 August 2005, Mexico announced that on 12 August 2005, it had published its new resale regulations allowing for the commercial resale of long distance and international long distance services originating in Mexico and thus, with these changes, it had fully complied with the DSB’s recommendations. The United States expressed its satisfaction with the changes introduced by Mexico.”

WTO Summary, *Id. Cit. Supra* 364

The WTO Panel, which concluded in 2004, responded to regulatory demands generated by long-distance competitors after the initial liberalization period in Mexico. The results were favorable to competition, and provide an index of the effectiveness of the WTO Panel as a trans-border regulatory agency. However, by the time the resolution was issued, long-distance services had lost significance in telecommunications revenues worldwide³⁶⁶; this tempers the apparent value of the WTO Panel as an effective remedy for enforcing regulatory commitments.

4. *OECD regulatory reviews of Mexico (1999 and 2004)*

In June 1999, the OECD published a report titled “Regulatory Reform in Mexico's Telecommunications Industry” (the “1999 OECD Report”)³⁶⁷. The 1999 OECD Report acknowledges strengths of the telecommunications regulatory reform in Mexico, including a successful opening to competition in several markets, particularly the long-distance market, and it states that “[t]he fundamental telecommunications law is generally sound, and establishes an institutional basis for independent regulation of the industry”³⁶⁸.

However, the report also acknowledges several institutional weaknesses. These weaknesses can be categorized into three types³⁶⁹: The first are structural regulatory

³⁶⁶ See OECD (1999) *Op. Cit. Supra* 339: Footnote at 496.

³⁶⁷ OECD (1999) *Op. Cit. Supra* 339: 48

³⁶⁸ *Box 4: Strengths*, OECD (1999), *Id. Cit. Supra* 339: 47

³⁶⁹ Weaknesses:

“Institutional arrangements for the regulator do not yet provide adequate independence from the government, which has a direct role (through SCT) in granting and enforcing concessions.

problems derived from the fact that Cofetel is a subordinated agency or *órgano desconcentrado* of the SCT³⁷⁰. Second, regulatory decisionmaking processes were not subject to adequate processes of public consultation and transparency. Third, the regulator was failing to issue telecommunications regulations in an opportune manner that would effectively continue to liberalize and secure competition in a fair and open manner in the telecommunications sector, with the aim of benefiting the broader public interest in development.

In light of these weaknesses, the OECD issued a series of recommendations for regulatory reform, which included: establishing more transparent public consultation processes for rulemaking; enhancing the independence of the regulator from the SCT; reforming or eliminating regulation, as required to stimulate competition; and

Consultation and transparency in rule-making processes need more development, while the rule-making powers of the regulator are not subject to adequate oversight or review by other agencies.

The concession system gives significant discretionary power over entry to the regulator, and sanctions for violations of concessions are too weak.

Interconnection charges are high relative to international levels and the basis for establishing those charges is not yet sufficiently transparent.

Inclusion of competitive prices in the 'basket' of the price-cap regulation system enhances the incentives on the incumbent to act anti-competitively.

--Requirements to register and disclose prices facilitate collusion among competitors and restrict innovation.

--International proportional return arrangements restrict competition and raise prices on international rout."

Box : Weaknesses, OECD (1999), Id. Cit. Supra 339: 48

³⁷⁰ This administrative structure limited the empowerment of Cofetel and therefore its independent decisionmaking capacity; it remained under a line of command to the SCT, which is a political department of state, and certain decisions (such as granting concession titles to enter the market or imposing fines and revoking authorizations) were a joint process with the SCT. Likewise, all final decisions by the President of Cofetel or the Board of Commissioners were subject to a review processes, upon request of an affected party, by the head of the SCT. Ley Federal de Procedimientos Administrativos

developing a more comprehensive competition policy that would resolve problems of coordination between Cofetel and Cofeco in regulating agents with substantial market power, including by raising fines³⁷¹.

³⁷¹ In abbreviated format, these recommendations were:

- 1) “Ensure that regulations and regulatory processes are transparent, non-discriminatory and applied effectively,” including:
 - (a) “To enhance the independence of Cofetel by: appointing Commissioners for overlapping fixed terms; enhancing their tenure by making removal from office difficult”;
 - (b) “To delegate the power to issue, enforce and revoke concessions from SCT to Cofetel”;
 - (c) “To establish formal consultation and transparency procedures for Cofetel with the government, the industry, and the public to enhance the level of participation and improve the quality of decision making. This consultation process should include an opportunity for agencies such as the CFC to express their views publicly”;
 - (d) “To ensure that full use of mandatory quality controls established by the government for the review of its regulatory powers is made in the telecommunications sector”;
 - (e) “To disclose the total amount of spectrum that could technically be used for a new service prior to auctioning new spectra”; and
 - (f) “To implement and enforce asymmetric regulation for the dominant carrier in conformance with article 63 of the FTL”.
- 2) “Reform regulations to stimulate competition and eliminate them except where clear evidence demonstrates that they are the best way to serve the broad public interest,” including:
 - (a) “Limit the discretion of Cofetel to grant concessions and to impose conditions on concessions”;
 - (b) “Reconsider the proportional return system for international traffic with the US and with other countries as competition develops”;
 - (c) “Amend the FTL to eliminate, for carriers which are non-dominant, the requirement for Cofetel to register and publicise prices”;
 - (d) “Undertake a number of policies to improve the foundations on which interconnection charges are set, namely: clearly identify the components of interconnection charges which are designed to compensate for the fixed and common costs of local service; allow the process of rebalancing to be completed by allowing Telmex to raise its prices for local service (especially business local service) to eliminate any remaining deficit; and pursue other approaches to the covering a deficit on local service (if one exists) through other mechanisms (such as the fund mechanism below)”;
 - (e) “Structure interconnection charges according to the underlying cost – especially, adopt a flat per-call charge for interconnection for local calls and reduce real interconnection charges over time according to best practice to ensure that Telmex improves productivity”;
 - (f) “Promote network expansion, universal service and economic efficiency objectives by establishing an explicit, portable, competitively and technologically neutral funding mechanism”;
 - (g) “Develop and carry out plans to implement number portability and access to rights of way as soon as possible. [...] An absence of number portability acts as an artificial disincentive for customers to switch from the incumbent to a new entrant because such switching imposes transaction costs, such as the burden of informing others of their new number”;
 - (h) “Restrict the price cap to only those services in which there is an absence of competition”;
 - (i) “Dominant local carriers should be prevented from restricting competition by acquiring existing cable television infrastructure”; and

In 2004, the OECD published a follow up report on Mexico titled “Mexico: Progress in Implementing Regulatory Reform” (the “2004 OECD Report”)³⁷². This report, among other things, assessed progress made in implementing the 1999 OECD Report recommendations for the telecommunications sector. The 2004 OECD Report considered previously identified problems to be systemic and affecting several regulators. The OECD noted that while Mexico had made “significant progress in implementing regulatory policies” since 1999³⁷³, there were still many regulatory challenges related to (a) a general lack of mechanisms to assure the quality and transparency of regulation and legislation processes, (b) administrative structures that limited the regulatory capacity of all regulators, not only the Cofetel, and (c) the abuse of the *amparo* and limitations of appeals proceedings, with the effect of suspending or

3) “Review, and strengthen where necessary, the scope, effectiveness and enforcement of competition policy,” which includes:

- (a) “Develop formal co-operation arrangements between Cofetel and CFC for the joint enforcement of competition law prohibitions in the telecommunications sector”; and
- (b) “Increase the maximum sanctions set out in the FTL to a level at which the sanctions could have a material impact.”

OECD (1999), *Id. Cit. Supra* 339: 50-53

³⁷² The report was part of the OECD Regulatory Reform Programme, which carries out monitoring exercises to assess progress made by members in implementing recommendations of past reviews. The 2004 OECD Report assessed Mexico’s progress over recommendations of the 1999 OECD Report, but also regarding Cofeco, the electricity regulator, and the water regulator. *See* Foreword, OECD (2004) *Id. Cit. Supra* 349: 3

³⁷³ Progress is specifically identified in the following areas:

- (1) the reform of the Administrative Law in Mexico and the COFEMER (*Comisión Federal de Mejora Regulatoria* – Federal Regulatory Improvement Commission) to reflect a Regulatory Improvement Program aimed at facilitating business investment by simplifying bureaucratic federal, state, and local municipal requirements, under one umbrella procedure;
- (2) the Regulatory Impact Assessment tool by which Cofemer requires government agencies to calculate the regulatory costs and benefits of any new administrative regulation, with an aim to reduce regulatory costs; and
- (3) the Federal Registry of Requirements and Services (Registro Federal de Trámites y Servicios) of Cofemer, aimed to streamline government forms and requirements in all federal agencies. OECD (2004) *Id. Cit. Supra* 349: 10

in other ways making ineffective administrative regulations aimed to order the marketplace and development priorities³⁷⁴.

In regards to the administrative structure of regulators, the 2004 OECD Report once again noted that regulators were *órganos desconcentrados*: semi-autonomous agencies or agencies subordinated to a line Secretary. The *órgano desconcentrado* was a legal structure created in the 1970s in Mexican administrative law to help decentralize decision making in Secretariats for technical decisions and enforcement processes. The Mexican administrative system traditionally emphasizes ministerial authority as the principal government authority, establishing a centralized command structure³⁷⁵. Thus, independent regulators with decisionmaking capacity simulating that of a Secretary or Ministry were not integrated into the Mexican public administrative system³⁷⁶. As a consequence, regulators such as Cofetel remain in a line of command

³⁷⁴ “[...] The lack of structure and hierarchy among regulatory instruments and the administrative act has an impact on the overall quality of the regulatory framework. Congress is increasingly making use of its legislative faculties, which generates a great volume of legislation that is not subject to the regulatory quality requirements. Weak enforcement and compliance mechanisms hinder positive results. The complexity of the legal and judicial system has negatively affected the enforcement of regulations. Abuses of the amparo process have had economic implications, suspending the implementation of administrative decisions. [...]”. OECD (2004) *Id. Cit. Supra* 349: 11

³⁷⁵ S. Zamora et. Al, (2004), *Op. Cit. Supra* 43, 294-295

³⁷⁶ The OECD mentions:

“In the Mexican context, the practice of ministerial oversight has generally overshadowed the role of regulators, particularly in the most important cases. However, Mexico is also undergoing a period of transition, and has only made some initial attempts at setting up independent regulators. The deconcentrated bodies enjoy some technical autonomy, reflecting a trend towards decentralised management. However, there was no will in the past to let some strategic decisions be managed at arms’ length from the political environment. In this sense, Ministers are accountable for their decisions to the President, who is elected, and to Congress, which can also influence the content of policy contained in legislation. Transposing a regulatory model based on fully independent regulators represents a challenging task in this context because it requires deeper changes in several Laws, and possibly of the Constitution. The need to balance independence with proper requirements for accountability requires

to their line Secretary, which is a political body, reporting to the head of the Executive³⁷⁷.

Not surprisingly, from 1997 to 2006, there have been 5 Presidents of Cofetel³⁷⁸. This is an average turnover of a President (and Chairman of the Board) every 1.8 years during the nine years since the designation of the first President³⁷⁹. The other three positions on the Board have each had three or four new Commissioners in the same nine-year period; that is a total of 11 people for the other three Commissioner Offices

progressively implementing a new set of institutional relationships, fostering transparency and trust.”

OECD (2004) *Id. Cit. Supra* 349: 116-117

³⁷⁷ With regards to regulatory agencies in Mexico, including the Cofetel, the OECD has noted:

“These regulatory agencies are considered to be ‘deconcentrated bodies’ under the Mexican public administration framework. This reflects the hierarchical authority exerted by ministers on all bodies or units under their responsibility, while searching for administrative efficiency through managerial deconcentration. This institutional design does not provide enough power or independence to regulatory authorities to perform their regulatory function. The governance arrangements for regulatory authorities should normally ensure independence from political intervention and from regulated interests.”

OECD (2004) *Id. Cit. Supra* 349: 11

³⁷⁸ The 1996 Decree Creating Cofetel also mentions that one of the Commissioners acts as Chairman of the Board of Commissioners and President of Cofetel. The President of the Cofetel is the administrative head of the agency, and is in a direct line of command to the Head of the SCT. Although decisions in telecommunications matters are resolved by a majority of the Board of Commissioners, the President holds a higher level of command than the other Commissioners, first because he has administrative hierarchy, and second because in a tied vote, the President may exercise a deciding vote to determine approval (or not) of a resolution. In administrative issues, there was a strict line of command from the head of the SCT to the head of Cofetel, and from the President of Cofetel to the Commissioners and the rest of the subordinated public officers.

Prior to the 2006 Convergence Reform, the President and Commissioners were designated by the President of the Republic by recommendation of the head of the SCT and likewise removed at will. For purely administrative reasons, under the previous structure, the President of Cofetel was both in a more powerful decisionmaking position than the other Commissioners and more vulnerable to political pressure; this pushed the President of Cofetel to act as a mediator of interests between the head of the SCT, the undersecretary of Communications of the SCT, the Commissioners, and industry agents.

³⁷⁹ Information provided by Cofetel in response to a petition for information under the SISI system of the IFAI (Instituto Federal de Acceso a la Información or Federal Institute for Access to Information). Cofetel, *Response to SISI Transparency of Information Request Number 0912100010807*, submitted February 19, 2007, Response March 20, 2007

in nine years, with an average of a new Cofetel Commissioner every 2.6 years³⁸⁰. The turnover rate of the Board members is indicative of the ease of removal and vulnerability of these high-ranking officials. This also means that there was no stable regulatory body in place to determine a long-term policy for development in the telecommunications sector.

President	Date of entry	Date of exit	Approx. Time in office
Carlos Casasus López Hermosa	January 1, 1997	April 27, 1998	1 year, 4 months
Javier Lozano Alarcón	April 28, 1998	May 26, 1999	1 year, 1 month
Jorge Nicolín Fischer	Junio 9, 1999	November 20, 2001	2 years, 5 months
Jorge Arredondo Martínez	November 21, 2001	April 30, 2006	4 years, 4 months
Héctor Guillermo Osuna Jaime	June 27, 2006	To date	-

Source: Cofetel (March 2007, in response to SISI filing)³⁸¹

	Commissioner	Area	Date of entry	Date of exit	Approx. Time in office
1	Jorge Eduardo Arreola Cavazos	Economic	January 1, 1997	January 31, 2002	5 years, 1 month
	Abel Mauro Hibert Sánchez	Economic/ now Commissioner "A"	February 1, 2002	April 10, 2006	4 years, 2 months
	José Luis Peralta Higuera	"A"	June 16, 2006	To date	-
2	Jorge Lara	Legal	January	January 31,	4 years, 4

³⁸⁰ SISI *Id. Cit. Supra* 379.

³⁸¹ SISI *Id. Cit.*

	Guerrero		1, 1997	2002	months
	Gerardo Soria Gutiérrez	Legal	February 1, 2002	June 15, 2002	4 months
	Clara Luz Álvarez González de Castilla	Legal/ now Commissioner "C"	January 20, 2003	April 11, 2006	3 years
	Eduardo Ruíz Vega	"C"	June 27, 2006	To date	-
3	Enrique Melrose Aguilar	Engineering	January 1, 1997	March 31, 2001	4 years, 2 months
	José Luis Muñoz Balvanera	Engineering	Febrero 1, 2002	September 30, 2003	1 year, 7 months
	Salma Leticia Jalife Villalón	Engineering/ now Commissioner "B"	October 1, 2003	April 11, 2006	2 years, 6 months
	Gerardo Francisco González Abarca	"B"	June 27, 2006	To date	-
Note: The 2006 Administrative Reform of Cofetel eliminated designation of Commissioners according to specific subject areas (economic, legal and engineering) and instead designated them A, B, C, in the understanding that all Commissioners must have interdisciplinary capacities, and the 2006 Convergence Reform added one more Commissioner to the Board, as shown below:					
4	José Ernesto Gil Elorduy	"D"	June 27, 2006	To date	-
Source: Cofetel (March 2007 in response to SISI filing) ³⁸²					

The legal nature of *órganos desconcentrados* such as Cofetel further implies that parties may file a regular appeal against regulator decisions by way of a *recurso administrativo de revision* (administrative appeal), or *juicio administrativo contencioso* (administrative contentious trial)³⁸³. The *recurso administrativo de revision* is resolved by the immediate superior of the issuing authority. In the case of Cofetel, the head of the SCT is the supervising authority of the President and the Board of Commissioners of the Cofetel, which means that the head of the SCT shall

³⁸² Cofetel-SISI *Id. Cit.*

³⁸³ OECD (2004) *Op. Cit. Supra* 349: 118

review decisions of these authorities over telecommunications issues. Thus, the independence of the Board and President of Cofetel is limited by subordination to the line Secretary. Furthermore, an *amparo* is still available to parties even when a *recurso de revision* is filed.

In regards to the *amparo*, the OECD noted that regulators were partially ineffective due to the abuse of *amparos*, given that *amparos*

“[...] can be used with the sole aim of suspending a regulatory authority’s decision, undermining its powers. Many *amparos* are questionable, mobilizing significant private and public resources and having serious implications on key sectors of the economy.”³⁸⁴

A consequence of *amparos* is that protection is provided only on an individual basis. This means that when *amparos* are filed against a regulation, different market agents may achieve different degrees of protection depending on their own litigation strategies and judicial outcomes. The experience in the telecommunication sector became complex as different industry agents achieved different statuses of protection from sector regulation. A good example is the litigation that ensued over the Fundamental Technical Plan for Quality of Local Mobile Service Networks issued by Cofetel in August 2003 (the “2003 Local Mobile Service Quality Plan”)³⁸⁵. The 2003 Local Mobile Service Quality Plan created new obligations for local mobile service

³⁸⁴ OECD (2004) *Id. Cit. Supra* 349, 31

³⁸⁵ Plan Técnico Fundamental de Calidad de las Redes de Servicio Local Móvil, D.O. 5 August 2003, available at http://www.cft.gob.mx/cofetel/html/9_publica/acuerdos/05082003.pdf

providers to reach minimal quality standards in transmission and service provision, and to file periodic reports with the Cofetel regarding compliance to these new obligations. Affected carriers included Telcel, Iusacell, Telefónica Movistar, Unefon, and Pegaso. Cofetel's intent was to improve service quality in this market, generate information for consumers, and thus improve competition. Indirect *amparos* were filed by affected carriers to challenge the legality of the regulation, since they argued that this new regulation was not supported by the terms of the 1995 FTL, and exceeded the obligations to which they were bound to under their Concession Titles. At the conclusion of the review process, Movistar Telefónica (which includes several regional mobile companies) was granted an *amparo* with definitive relief (*suspensión definitiva*) from complying with the 2003 Local Mobile Service Quality Plan; while Iusacell, Pegaso, Telcel, and Unefon were denied an *amparo*³⁸⁶. Thus, due to the *amparo* review process, these regulated companies subject to compliance of the same regulation have different regulatory obligations.

Table 15 below shows the different *amparo* filings initiated by each mobile carrier. As shown by the table, each company followed a litigation strategy which resulted in a first level judicial decision by a District Court, followed by a review process of that decision in a Circuit Court. In some cases, the District Court reviewed an *indirect amparo* against the legality of Cofetel's resolution, but in some other cases, the carrier filed another type of recourse, which when denied, was subjected to a judicial *amparo*

³⁸⁶ Cofetel, *Response to SISI Request Number 0912100046707*, submitted August 3, 2007, Response August 31, 2007

against the first court. In the case of Telcel, the company litigation strategy resulted in five different cases in four different first level courts, which resulted in judicial *amparos*. The third column of the table summarizes the result of the *amparo* filing for each party; and the fourth column provides a simple yes or no answer to whether the carrier must comply with the 2003 Local Mobile Service Quality Plan.

Table 15. Effect of <i>amparos</i> on a regulatory process: The case of the 2003 Local Mobile Service Quality Plan			
Docket Number and District Court	Party to Amparo (<i>Quejoso</i>)	Amparo for Definitive Relief (<i>Suspensión Definitiva</i>)	¿Must it comply with the Plan?
1.- 1426/03 5th District Court "B"	Iusacell PCS, S.A. de C.V.; Comunicaciones Celulares de Occidente, S.A. de C.V.; Sistemas Telefónicos Portátiles Celulares, S.A. de C.V.; Telecomunicaciones del Golfo, S.A. de C.V.; Portatel del Sureste, S.A. de C.V.; and SOS Telecomunicaciones, S.A. de C.V.	Denied	Yes
2.- 1698/03 2nd District Court	Pegaso Comunicaciones y Sistemas, S.A. de C.V.	Denied	Yes
3.- 1707/03 5th District Court	Baja Celular Mexicana, S.A. de C.V.; Movitel del Noroeste, S.A. de C.V.; Telefonía Celular del Norte, S.A. de C.V., Celular de Telefonía, S.A. de C.V. (Movistar)	Denied by District Court Granted by Circuit Court	No
4.- 1756/2003 2nd District Court	Operadora Unefon, S.A. de C.V.:	Amparo not requested, but first level court case was filed against terms of resolution. Amparo against first court resolution was denied	Yes
5.- 1664/2003 9th District Court	Radiomóvil Dipsa, S.A. de C.V. (Telcel)	Same as above	Yes
6.- 1748/2003 15th District Court	Radiomóvil Dipsa, S.A. de C.V.	Same as above	Yes
7.- 1929/2003 5th District Court	Radiomovil Dipsa, S.A. de C.V.	Same as above	Yes
8.- 235/2004 2 nd District Court	Radiomovil Dipsa, S.A. de C.V.	Same as above	Yes
9.- 1107/05 15 th District Court	Radiomovil Dipsa, S.A. de C.V.	Denied	Yes

(Before 1277/2004 2 nd District Court)			
Source: Cofetel in response to FOIA filing (2007) ³⁸⁷			

The 2004 OECD Report issued general recommendations for regulatory reform, which included: reform of the Organic Law of the Public Federal Administration (*Ley Orgánica de la Administración Pública Federal* or LOAPF) to generate a new independent legal authority structure for regulators in Mexico; improvement of transparency and accountability measures for regulators; reform of the *amparo* and appeals procedures; new investigative or factfinding powers for regulators; strengthening of competition by improving cooperation mechanisms between specific sector regulators and the Cofeco; and promoting public debate and stronger consumer organizations³⁸⁸.

5. *The ConParTe legislative initiative to reform regulatory weaknesses (2001-2002)*

During the LVIII Legislature (2000-2003), the Mexican Federal Congress established the first Parliamentary Conference on Telecommunications (known as the “*ConParTe*”)³⁸⁹. (This Legislature was the first to lack a PRI majority.) In March 2001, the ConParTe was formed by five Senators and five Deputies, with the objective of generating a new Federal Telecommunications Law Initiative³⁹⁰. The 2002

³⁸⁷ *Id. Cit Supra.*

³⁸⁸ OECD (2004) *Op. Cit. Supra* 349: 150-153

³⁸⁹ Comisión de Comunicaciones y Transportes del Senado de la República, *Actividad Legislativa durante la LVIII y LIX Legislaturas de la Comisión de Comunicaciones y Transportes*, (2006), 134-137 (“Reporte de Actividades de la la Comisión de Comunicaciones y Transportes”).

³⁹⁰ The Senators of the ConParTe were Héctor Osuna Jaime; Eric Rubio Barthell; Javier Corral Jurado; Emilio Gamboa Patrón y José Moisés Castro Cervantes, and the five Deputies were Jesús Orozco

ConParTe Initiative was in origin a Congressional effort to update and correct regulatory shortcomings of the 1995 FTL. The ConPartTe determined 10 principles that would guide its activities:

- (1) Promote an increase in teledensity, penetration, and connectivity, including coverage of rural populations;
- (2) Contribute to the strengthening of national integration, to the growth of telecommunications infrastructure through instruments of promotion;
- (3) In general, support educational development of the population by facilitating connectivity to educational infrastructure in the country;
- (4) Facilitate the general public's access to more and better health services at a distance;
- (5) Promote and create incentives for research and technological development in telecommunications in the country, allow modernization with high levels of competition;
- (6) Allow the technological convergence implied by technological evolution, simplifying processes;
- (7) Promote and create incentives for competition by way of a clear legal framework that guarantees the rights of investors in telecommunications

Alfaro, Emilio Goicoechea Luna, Javier Sánchez Campuzano, Alonso Ulloa Vélez y Alejandra Barrales Magdalena. §Segundo Año, Septiembre 2001 Agosto 2002, "Conferencia Parlamentaria de Telecomunicaciones, *Informes de Trabajo de la Comisión de Comunicaciones y Transportes del Senado*, <http://www.senado.gob.mx/comisiones.php?ver=informes&lk=comunicaciones/comunicaciones.html> (last viewed January 9, 2006)

networks with respect to transparency, equality, legal certainty, and information, ensuring that all of the above leads to the benefit of the user;

(8) Guarantee the rights of telecommunications service users with respect to quality, access, information, competitive pricing, and alternatives in service provision;

(9) Adapt, modernize, complement, attend, and eliminate the technical, administrative and/or legal omissions evident in the Law [1995 FTL] in force; and

(10) Strengthen the managerial capacity of the Federal Telecommunications Commission as regulating agency³⁹¹.

The ConParTe held 32 formal meetings, in which critical telecommunications issues were addressed, including spectrum management, licensing procedures, access (unbundling) and interconnection, convergence, dominance, universal service and access, foreign investment, the telecommunications regulator, and social (rural) coverage, among other topics³⁹². The ConParTe further held a public consultation from September to November 2002 in which it received and responded to 438 proposals and 983 commentaries to those proposals on 22 telecommunications

³⁹¹ Senate of the Mexican Federal Congress, LIX Legislature, Opinion of the Joint Commissions of Communications and Transport, and Legislative Studies which contains a Draft Decree that reforms, adds, and derogates diverse norms of the Federal Telecommunications Law and Federal Radio and Televisión Law, §I-1 Exposición de Motivos, *Dictamen de las Comisiones Unidas de Comunicaciones y Transportes; y de Estudios Legislativos, el que contiene Proyecto de Decreto que reforma, adiciona y deroga diversas disposiciones de la Ley Federal de Telecomunicaciones y de la Ley Federal de Radio y Televisión*, March 17, 2006, (discussed in first reading in the Senate on 29 March 2006, and approved by the Senate on 30 March 2006).

³⁹² 2006 Work Report from the Communications Commission of the Senate, *Op. Cit. Supra* 389: 134

topics³⁹³ from various colleges, companies, government officials, institutes, and associations. An international forum was even organized with keynote speakers: “Dr. William Melody, from the Teleinformation Centre of Denmark; Sam Pitroda, from Worldtel Limited; and Gregory Sidak, from the American Enterprise Institute,”³⁹⁴ to secure full discussion of a new Initiative.

Besides issues of market dominance and increased competition, the ConParTe Initiative was attempting to enforce a focus on consumers and telecommunications development. As political topics, increased consumer rights, rural telephony, advanced communications, and universal service attracted serious public support for politicians. However, any solution set out in the law created regulatory and economic costs for industry agents, whether new entrants or incumbents, and generated division over even the procompetitive terms of the Initiative.

Despite the initial united effort, the ConParTe negotiations began to break down in April 2002 when Diputado Jesus Orozco Alfaro, President of the ConParTe on behalf of the Chamber of Deputies, presented on the floor an alternative Initiative (supported by the parliamentary delegations of the PRI and PRD against the PAN) counter to the

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“[...] Principles and Objectives of the Law; Definitions; Concessions and Permits; Convergence; Foreign Investment; Radioelectronic Spectrum; Satellite Communication; Interconnection; Dominance; Anticompetitive Practices; Rights of Way; Commercialization of Services (Reselling); Value Added Services; Information; Standardization; Conflict Resolution; Consumer Rights; Inspection, Infractions, and Fines; Telecommunications Registry; Social Telephony Coverage; Regulator; and Radiocommunications [...]” [Translation by dissertation author].

2006 Work Report from the Communications Commission of the Senate, *Id. Cit. Supra* 389: 135-136

³⁹⁴ 2006 Work Report from the Communications Commission of the Senate,, *Id. Cit. Supra* 389: 136

one that had been discussed by the ConParTe in the previous 14 months³⁹⁵. This initiative eliminated reforms related to regulation of market dominance. Senator Javier Corral, PAN member and President of the ConParTe on behalf of the Senate, accused Jesus Orozco Alfaro of caving in to pressure from Telmex to stop the ConParTe Initiative³⁹⁶.

The ConParTe formally concluded on August 21, 2002, almost a year and a half after its inauguration. On August 28, 2002, the final draft of the Initiative discussed in the ConParTe negotiations was presented to the Senate by the Senators and Deputies heading the ConParTe, with the exception of Diputado Orozco Alfaro who issued a dissenting opinion³⁹⁷. According to the 2006 final report on activities for the LVIII

³⁹⁵ Victor Ballinas y Ciro Perez, “Reta al panista Corral a presentar pruebas de acusaciones; lo haré, responde el senador: Niega diputado priísta presiones de Telmex para que no se aprobara la ley de telecomunicaciones”, *La Jornada*, May 7, 2002, available online at <http://www.jornada.unam.mx/2002/05/07/007n1pol.php?origen=politica.html>, (last viewed January 9, 2007)

³⁹⁶ Andrea Becerril and Roberto Garduño, “El senador priísta rechaza tener vinculación, “ni fuerte ni débil”, con la empresa: Corral Jurado presenta “pruebas” de los nexos de Orozco Alfaro con Telmex”, *La Jornada*, Política, May 9, 2002, available online at <http://www.jornada.unam.mx/2002/05/09/015n1pol.php?origen=politica.html> (last viewed January 9, 2007); Andrea Becerril and Roberto Garduño, “Los diputados promotores, “ligados a Telmex”, acusa el panista Javier Corral. Albazo de Slim, la iniciativa en telecomunicación”, *La Jornada*, Política, May 2, 2002, <http://www.jornada.unam.mx/2002/05/02/016n2pol.php?origen=politica.html> (Last viewed January 9, 2007); Patricia Muñoz and Rosa Elvira Vargas, “Apertura total a trasnacionales o control en manos mexicanas, foco del debate: La nueva ley de telecomunicaciones, atorada en una telaraña de poderosos intereses económicos: Sin consenso legislativo, dos iniciativas antagónicas que definirían el futuro del mercado: Intenso cabildeo en el Congreso tanto de Telmex como de las compañías extranjeras”, *La Jornada*, June 24, 2002, <http://www.jornada.unam.mx/2002/06/24/008n1pol.php?origen=politica.html> (Last viewed January 9, 2007); The General Counsel of Telmex in a ConParTe hearing expressed opposition to the reform. See Andrea Becerril, “Se viola la Constitución, aseguró el representante de la empresa telefónica: La nueva ley de telecomunicaciones, lesiva para Telmex y usuarios: Javier Mondragón: El panista Javier Corral aseveró que incluye planteamientos de las compañías del ramo”, *La Jornada*, October 17, 2002, <http://www.jornada.unam.mx/2002/10/17/029n1eco.php?origen=economia.html>, (Last viewed January 9, 2007).

³⁹⁷ 2006 Work Report from the Communications Commission of the Senate, *Op. Cit. Supra* 389: 136

and LIX Legislatures of the Communications and Transport Commission, the strengths of the ConParTe Initiative lay in the following contributions:

“[...] propose the incorporation of the consumer figure as a central theme, by protecting user rights in a specific section of the Law; establish the obligation, for telecommunications service providers, to present their consumer adhesion contracts for registration [to the regulator]; impose on service providers obligations directly related to service provision, through a catalogue; promote the Social Coverage of Telecommunications; grant greater autonomy to the regulator--the Federal Telecommunications Commission--for issuing its resolutions; incorporate definitions regarding access and interconnection; impose the obligation on concessionaires to interconnect their networks with others in non-discriminatory and transparent conditions and based on objective criteria; review the minimal conditions that an interconnection agreement should contain; and contemplate specific norms for operators declared thus dominant with regards to access and interconnection, in order to prevent those concessionaires declared dominant from using interconnection resources to carry out monopolistic practices.³⁹⁸”

The ConParTe Initiative was turned over to a special joint Senate Committee to be formed by the Communications and Transport, Legislative Studies, and Internal

³⁹⁸ 2006 Work Report from the Communications Commission of the Senate, *Op. Cit. Supra* 389, 135-136. (Translation by author)

Affairs Commissions of the Senate to provide a final recommending Opinion³⁹⁹. However, the Opinion was not issued, since the Initiative that resulted from the ConParTe remains under review in the Commissions⁴⁰⁰. Apparently, the division between the Chambers, provoked by industry opposition and party interests, resulted in the demise of the ConParTe Initiative. No other efforts to modify the 1995 FTL were successfully advanced from 2000 to the beginning of 2006.

In the final report of the Senate Communications and Transport Commission for the LVIII (2000-2003) and LIX (2003-2006) Legislatures, the Commission lists having seen a total of eight Initiatives from Senate members and one Minute from the Lower House of Congress related to telecommunications reform⁴⁰¹. Of the nine telecommunications-related Initiatives and Minute analyzed by the Senate Communications and Transport Commission over that period of six years, only four received an opinion from said Commission (three approvals and one dismissal)⁴⁰². The approvals were sent to the Chamber of Deputies to await a similar review process, but

³⁹⁹ Work Reports from the Communications Commission of the Senate or *Informes de Trabajo de la Comisión de Comunicaciones y Transportes del Senado*, see “Segundo Año, Septiembre 2001 Agosto 2002”, “Conferencia Parlamentaria de Telecomunicaciones” <http://www.senado.gob.mx/comisiones.php?ver=informes&lk=comunicaciones/comunicaciones.html> [last viewed January 9, 2006] ; see also 2006 Work Report from the Communications Commission of the Senate, *Op. Cit. Supra* 389, 136; see also Text of ConParTe Initiative, “Iniciativa de los senadores Javier Corral Jurado, Emilio Gamboa Patrón, Erick Rubio Barthell y Héctor Osuna Jaime; y de los diputados Emilio Goicoechea Luna, Alonso Ulloa Vélez y Angel Artemio Meixueiro González, “La que contiene proyecto de Ley Federal de Telecomunicaciones”, *Gaceta No. 36*, August 28, 2002, LVIII Legislatura, Año 2; Communication of Diputado Jesús Orozco Alfaro: “Comunicación del Dip. Jesús Orozco Alfaro, Presidente de la Comisión de Comunicaciones y Copresidente de la Conferencia Parlamentaria en materia de telecomunicaciones, en relación con la iniciativa de Ley Federal de Telecomunicaciones”, *Gaceta No. 36*, August 28, 2002, LVIII Legislatura, Año 2.

⁴⁰⁰ 2006 Work Report from the Communications Commission of the Senate, *Op. Cit. Supra* 389, 145

⁴⁰¹ Two Initiatives actually called for a new mobile-consumer protection legislation instead of reform of the 1995 Federal Telecommunications Law.

⁴⁰² See 2006 Work Report from the Communications Commission of the Senate, *Op. Cit. Supra* 389

only the Minute that had arrived from the Lower Chamber received approval from both Chambers to become the 2006 Convergence Reform.

Strategies to reinforce competition and market commitment structures buckled under the new institutional equilibrium of a multiparty corporatist system, which through omission maintained the *status quo* of economic monopolies created during the privatization period.

6. *Executive division over the administrative reform of Cofetel, in lieu of legislative reform (2003-2006)*

Internal investor pressure and external incentives from the OECD and WTO continued urging improved regulation during this period. Commitments to reform the regulator for the telecommunications sector were stable policies during the entire administration of President Fox (2000-2006)⁴⁰³. After exhausting resources in Congress to procure a legislative reform, in 2003, the Executive began to pursue reform of Cofetel through

⁴⁰³ The 2001 official work agenda of the SCT stated that it would work to reform and update the 1995 FTL. This same message was repeated in the 2002 work agenda, which stated that the SCT would work to conclude the negotiations for reforming the 1995 FTL, including achieving consensus in Congress. §3.1.1, S.C.T., *Programa de Trabajo del Sector de Comunicaciones y Transportes*, (2001) and § 3, *Programa de Trabajo del Sector de Comunicaciones y Transportes* (2002), 75; When Congress failed to pass a reform, the 2003 official work agenda of the SCT changed its objectives to include: “Update administrative regulations in telecommunications, within the legal framework in force” and “Conclude the restructuring process of the Federal Telecommunications Commission, with the objective of strengthening its efficiency and regulatory nature, by way of a reform to its Internal Regulations”, §3, S.C.T., *Programa de Trabajo del Sector de Comunicaciones y Transportes*, (2003),. 79; The 2004 official work agenda of the SCT included the same commitment as the previous 2003 agenda; but in the 2005 official work agenda, these commitments were reduced to concluding the reform of Cofetel by a reform of its Internal Regulations, §3, S.C.T., *Programa de Trabajo del Sector de Comunicaciones y Transportes*, (2004), 85, and S.C.T., *Programa de Trabajo del Sector de Comunicaciones y Transportes*, (2005), 96; It should be noted that in the 2006 Official Work Agenda (albeit produced after the 2006 Convergence Reform that is the subject of this case study) all mention of reforming the regulator was dropped from the “Communications” commitments and emphasis was placed on advancing convergent communications services. §3, S.C.T., *Programa de Trabajo del Sector de Comunicaciones y Transportes*, (2006), 104. All sector programs may be viewed on the SCT webpage at <http://dgp.sct.gob.mx/index.php?id=459> (last viewed February 17, 2006).

administrative instruments under its own control. Specifically, the SCT and Cofetel aimed to modify the presidential decrees and administrative rulings that empowered and organized Cofetel, as a way to improve the organization and distribution of powers between the Cofetel and the SCT, and internally between Cofetel departments.

There were obvious limitations to the scope of reform that could be achieved in this approach, since an Executive decree has to be carefully crafted to regulate and expand upon the terms of a law, in this case the 1995 FTL. It cannot exceed the legislative intent, since that would constitute a breach of the constitutionally protected separation of powers and hierarchy of norms. This hierarchy of norms characterizes civil law systems like Mexico's and justifies a formalistic approach to the application of law⁴⁰⁴. Executive administrative regulations must respect these restraints, otherwise the regulation and any act of application by an authority is vulnerable to reversal or suspension by way of *amparo* cases.

The first reform to be generated by the Board of Commissioners was a draft in 2003 of a new Decree and Internal SCT Regulations, which implied no changes to the 1995 FTL. On the basis of the 2003 draft reform, the OECD commented that the administrative reform would increase overall efficiency of the regulator, even if the

⁴⁰⁴ In the civil law tradition, the recognized sources of law are the constitution, statutes, regulations, and custom, and their applicability is hierarchically ordered in that way. John Merryman points out,

“This may all seem very technical and of dubious importance, but in fact it is basic to our understanding of the civil law tradition, since the function of the judge within that tradition is to interpret and apply “the law” as it is technically defined in his jurisdiction.”

John H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, (Stanford University Press, 1985)

powers of the regulator could not at the moment be reformed by legislation⁴⁰⁵. The first reform effort was delayed by an internal conflict of interests among the Secretaries, departments and agencies of Mexico's first transition government. Cofemer required these new reforms to be subjected to the new Regulatory Assessment processes. The Secretary of Public Function required new organization plans to be assessed under fiscal policies aimed at reducing administrative budgets and salaries, and internal comptrollers revised all sorts of purchasing and service contracts required to modernize the networks and the new quality processes that the Cofetel administration wished to apply. Meanwhile the President's office of attorneys

⁴⁰⁵ OECD quote:

“A new Presidential Decree regulating the Federal Telecommunications Commission of Mexico (COFETEL) is currently envisaged to increase the legal basis in the sector and to improve the capacity of the agency. The new Decree is complemented by a Reglamento Interior for the COFETEL. These legal instruments substitute the original Presidential Decree setting up COFETEL; provide the COFETEL with a regulatory framework distinct from that of the SCT; and substitute the former Reglamento Interno issued by the board of COFETEL. The new regulation involves a precise division of tasks between COFETEL and the line Secretary and establishes a new structure of the agency based on quality processes. COFETEL specifically acquires new powers, previously in the remit of the Secretary of Communications and Transport, for exclusively and directly issuing: 1) telecommunications permits; 2) sanctions; and 3) authorizations to expand coverage zones in a license agreement. (Thus adding to the list of license agreement modifications which COFETEL can directly resolve, without intervention of the Secretary.) The structure of the agency would shift from one based on divided disciplines to another one based on integrated processes. At present the administrative structure below the plenary of the agency is organised to reflect the division between engineering, law, and economic sectors. This involves substantial delays and concentrates all final decisions in the Board itself, thus reducing efficiency. The proposed new structure would reflect a new organisation, with three substantive units based on interdisciplinary teams: industry services, supervision and verification, and regulation. The board itself will concentrate on strategic regulatory planning and issue regulations on the basis of the work submitted by the prospective and regulation department, while the enforcement of rules will be carried out by the supervision and verification departments and the petitions addressed to the agency will be resolved by the industry services department. This reform proposed as a Decree would involve fixed staggered terms for members of the Board. This would help to improve the management of the agency, with a more flexible structure and a better use of human resources. However, the level of independence would still be attached to that offered by a Decree, which does not offer the same level of guarantees and powers as a law. However, it is more difficult to implement changes at the level of the law in Mexico at the moment.”

OECD (2004) *Id. Op. Cit. Supra* 349, 149

questioned the language used in drafting the new powers. Given these circumstances, the Administrative Decree Drafts were revised several times to insert, delete, and modify the language and organizational structure proposed by Cofetel.

In July 2004, the draft Decrees finally obtained the formal approval (*refrendo*) of the Secretaries of SCT and of Public Function; but the Secretary of Finance, who was previously the CEO of Avantel (one of the principal long-distance carriers) refused to provide a *refrendo* for the reform, instead sending an explicit letter to the President of the Republic stating that the scope of the reform was shortsighted⁴⁰⁶. This conflict between the Secretary of Finance and the SCT was brought to the Office of the Presidency, which in turn questioned the limitations of the administrative reform. The administrative reform was, hence, delayed by division within the Executive Power.

The administrative reform originally proposed by Cofetel was ultimately reduced in scope to a proposal to change a few paragraphs of Article 37-Bis of the Internal Regulations of the SCT. It proposed to reinforce a new administrative structure for Cofetel (as shown below), and to specifically empower the Board of Commissioners to delegate functions to its subordinates. It would thus distribute workloads more

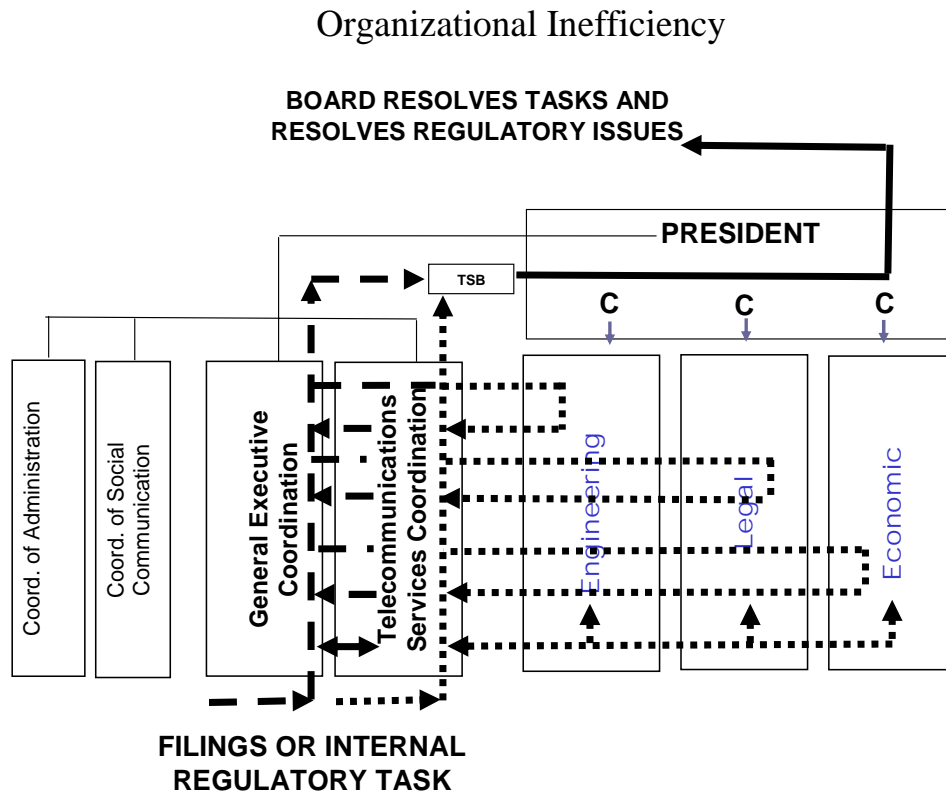
⁴⁰⁶ Dario Celis, “Adios a la reestructura de la Cofetel; Gil Diaz la rechaza y rompe lanzas con Cerisola”, *Reforma* July 23, 2004; Maricarmen Cortés, “Cofetel, la manzana de la discordia”, Grupo Radio Formula, July 26, 2004, at <http://www.radioformula.com.mx/finanzas/rf2101.asp?ID=24398>; “Vuelva a Marcar, Señor Presidente”, Sección Nada Personal, *RevistaVértigo*, <http://www.revistavertigo.com/historico/14-8-2004/nadapersonal.html>; Marco A Mares, “Telecomunicaciones, choque de trenes”, *Radio Formula*, July 29, 2004, <http://www.radioformula.com.mx/programas/formulafinanciera/articulos.asp?ID=24472>; Divergencias en el seno del gobierno amenazan existencia de Cofetel, *Devnet/Red Tips*, August 3, 2004; La Comunidad Latinoamericana de Comercio Electrónico de las PYMES, at <http://tips.org.uy/SPA/portal/NOTTexto.asp?Nro=16877&Pais=MEX>

efficiently and legally. This simple administrative reform would help streamline work processes and make Cofetel more efficient.

The following Figures 1 and 2 were adapted from Cofetel's 2005 Annual Report to explain the structural changes of the administrative reform ("before" and "after" scenarios). Figure 1 shows a division of labor whereby the President of Cofetel is head of the administrative structure of Cofetel and the Board of Commissioners, and the other three Commissioners each head one of Cofetel's Economic, Legal, or Engineering department. This organization--pursuant to the regulation empowering Cofetel officers since 1996--funneled most final resolutions to the Board of Commissioners, including simple regulatory tasks, such as favorable opinions for permit granting after petitioners show to fulfill a list of requirements; or resolutions recommending straightforward fines, when evidence is procured showing a non-compliance to a norm. In this organization, all resolution drafts of the Board were developed through a bureaucratic process requiring the three departments to issue separate opinions on matters to be reviewed by the Board. The General Coordination of Telecommunications Services or depending on subject matter, the General Executive Coordination would function as an integrating department. In this process, the different departments often fell into a conflict of priorities, visions, and formal opinions, as to how to resolve a case. Matters were complicated by the fact that each of the specialized (economic, legal, or technical) departments was headed by a Commissioner specialized in that topic, who naturally has a sense of entitlement over

how an issue should finally be resolved on the Board. Thus the organization of Cofetel caused bureaucratic delays and internal uncoordination.

Figure 1. Cofetel’s organizational structure prior to administrative reform

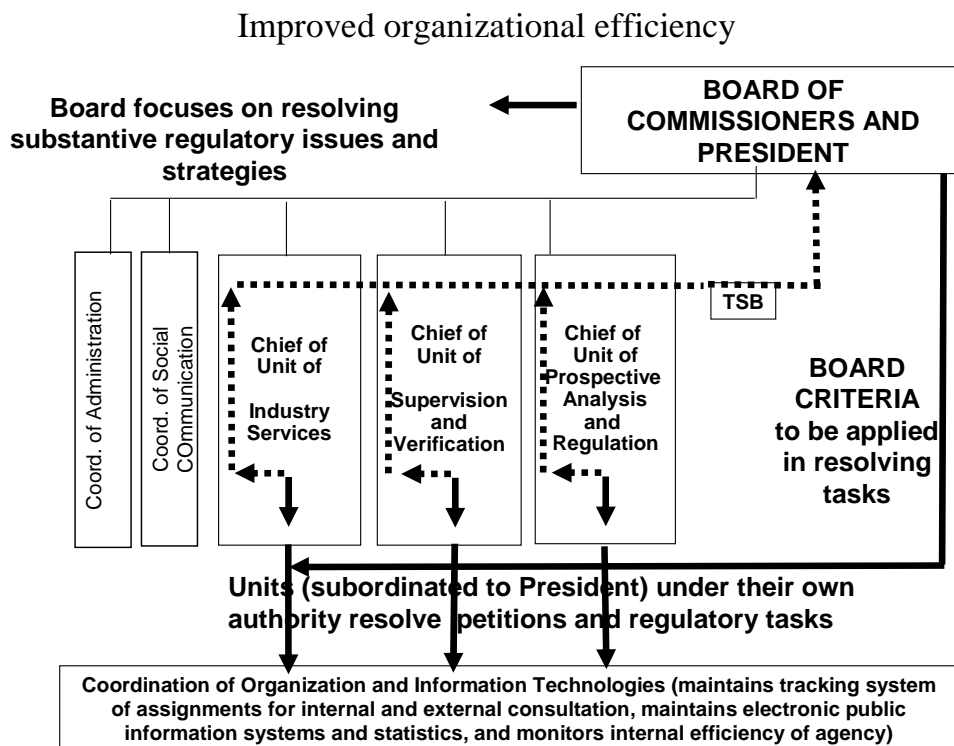


*TSB: Technical Secretary of the Board of Commissioners
 Source: Adapted from Cofetel, *Informe de Trabajo*, 2005

The administrative solution proposed by Cofetel (shown in Figure 2 below) retained the President as head of the administrative structure of Cofetel and the Board, but reorganized the agency into three departments: (1) industry services, (2) supervision and verification, and (3) regulatory issues. Public officers of Cofetel were reassigned to interdisciplinary teams of engineers, lawyers, and economists (alongside other appropriate professions and specializations) to deal with same types of issues, either

(1) industry petitions; (2) inspections and fines; or (3) regulation and cases requiring a regulatory pronouncement. This meant that each department was integrally responsible for producing an interdisciplinary response to a type of agency task, and exceptionally required a cross-consultation with another department looking at other types of issues. The Industry Service department was further empowered to directly issue opinions to the SCT on permit requests, and the Supervision and Verification department was empowered to directly issue recommendations to the SCT on fines resulting from inspections carried out by Cofetel, except for orders to revoke a Concession Title, which were recommended by the Board itself. The Board of Commissioners retains the power to attract any taks which it considers has regulatory content, and may from time to time issue regulatory guidelines or criteria to be followed by the Cofetel departments in resolving repeat regulatory tasks. Each of the Commissioners, instead of heading a specific area, was assigned a personal staff to review proposals sent by the new departments on regulatory issues to be resolved by the Board. Therefore, by turns, each Commissioner with her or his staff --in a way similar to how collegiate courts function-- owns the draft resolution, which is then presented to the Board, and voted or dissented upon by the other members. This reform followed guidelines provided by the Fox administration to reform the public administration organizations according to integrated decisionmaking processes seeking increased efficiency of agencies.

Figure 2. Cofetel’s organizational structure after administrative reform



*TS

B: Technical Secretary of the Board of Commissioners
Source: Adapted from Cofetel, *Informe de Trabajo*, 2005

On November 21, 2005, the Reform to article 37-Bis was published in the Official Gazette of the Federation for entry into force at the end of a 30-day period; on January 2, 2006 the new Internal Rules approved by the Board of Commissioners creating a new organization for Cofetel were finally published in the *Federal Gazette* for entry into force on January 5, 2006 (the “2006 Administrative Reform of Cofetel”) ⁴⁰⁷.

⁴⁰⁷ S.C.T., *Decreto que reforma, adiciona y deroga el Reglamento Interior de la Secretaría de Comunicaciones y Transportes, por medio del cual, entre otras cosas, se modifica el párrafo segundo y se adicionan los párrafos tercero, cuarto, quinto y sexto del artículo 37 Bis de ese ordenamiento*, D.O. 21 November 2005; Cofetel, *Reglamento Interno de la Comisión Federal de Telecomunicaciones*, D.O. 2 January 2006, http://www.cofetel.gob.mx/wb2/COFETEL/COFE_Reglamento_Interno_de_la_Comision_Federal_2 (Last viewed March 20, 2006)

Unfortunately, the administrative reform entered into force in January 2006, as the debacle of the 2006 Convergence Reform (which will be reviewed below), and the start of a presidential electoral year were unfolding⁴⁰⁸. For reasons to be explained in the next Chapter, the Commissioners who approved this structure were also not around to see it implemented.

In an initial assessment of the impact of the 2006 Administrative Reform, the outgoing administration of Cofetel noted significant changes in the workload of the Board of Commissioners. The Board had shifted from 66% of Board Resolutions in 2005 dedicated to recommending fines to the SCT, towards a focus (in the first trimester of 2006) on recommending that the SCT grant Concession Titles (42% of Resolutions) or grant approval to operators wishing to expand service provision (38% of Resolutions). The changes in percentage reflect a Board of Commissioners that was being freed from daily transactional work related mostly to recommending lesser fines. During 2005, resolutions regarding recommendations for concession grants took up 12% of Board Resolutions; thus, they became a larger relative percentage of Board Resolutions after the administrative reform. It is worth noting that formerly the fines recommended by the Board were the result of inspections carried out by lower-ranking officials in the normal conduct of Cofetel activity to confirm noncompliance with

⁴⁰⁸ This also meant that a new administrative structure generated by the Board of Commissioners that would leave Cofetel by April 2006 would have to be implemented by the new Board of Commissioners entering under the 2006 Convergence Reform. The timing implied overlaps in the implementation of the 2006 Convergence Reform; these overlaps required further organizational reform whereby the Department of Radio and Television of the SCT, as well as a new fifth Commissioner and his staff, would have to be incorporated into the Cofetel administrative structure. Transitory Articles of Decree to reform, add, and derogate diverse norms of the Federal Telecommunications Law and the Federal Radio and Television Law, D.O. 11 April 2006.

norms and regulations by service providers and other parties. Even the resolutions regarding Concession Titles, then and now, are also the result of prior assessments by subordinated officials to verify whether petitioners have fulfilled legal and regulatory requirements. In both cases, there is little additional input from the Commissioners, since these are in general terms bureaucratic transactions (*trámites*) determined by compliance or noncompliance with established law and regulation.

If split processes were resolved in such a way that Cofetel owned the process by which (1) regulated parties were supervised, fined where appropriate, and arising controversies were litigated by the Cofetel, and (2) permit and Concession Title requests were reviewed and resolved, the Board could retain authority over the most important regulatory issues surrounding these ordinary processes as part of a comprehensive focus on analyzing, modifying, and/or issuing institutional regulatory incentives to correct market failures. Currently the resources of the regulator continue to be diverted into solving bureaucratic problems rather than regulatory ones.

Due to limitations imposed by the format of Presidential decrees and division among departments in the Executive, the reform made improvements but could not resolve problems related to processes split between Cofetel and the SCT⁴⁰⁹. This despite the

⁴⁰⁹ In the original proposal for the Administrative Reform of Cofetel, the Board of Commissioners sought subordinated departments to be empowered to directly resolve matters of fines, permit grants, and Concession Title modifications (instead of having the Board send recommendations to the SCT on these issues) on the understanding that the Commissioners retained powers to take over any such transactional issues that could have a regulatory impact. Under this proposal the Board of Commissioners would then primarily focus on resolving issues pertaining to current and prospective market regulation. Furthermore, administrative and Constitutional Mexican legal theory suggests that

fact that the 1995 FLT is oriented towards establishing expedited administrative processes for Concession Titles, in order to facilitate market entry of network-based operators and when necessary to fine such operators for noncompliance. This legislative intent was complicated by ensuing administrative rulings that empowered the Cofetel and SCT under split processes. They were not implemented adequately by the Executive and they were not corrected by the Legislature. Throughout this period, the Judiciary remained a wildcard and unreliable enforcer of regulatory objectives.

D. ECONOMIC OUTCOMES OF THE LIBERALIZATION REFORM

The economic outcome of liberalization is a mixed result. It established a market, but showed growth primarily through the dominant incumbents, and in other ways failed to distribute benefits of development among society. Results are shown below.

1. A multi-competitor market established

The 1995 FTL set the kickoff date for competition as January 1, 2007, since this was the mandatory interconnection date for long distance carriers⁴¹⁰. Interested investor

Concession Titles must be issued--and in any case revoked -- by the Head Secretary of the respective economic sector. Therefore, in these matters, the Board of Commissioners would remain empowered only to recommend to the SCT the approval or revokal of a Concession Title request due to grave noncompliance with norms. It is the bureaucratic nature of Cofetel as a subordinated agency of the SCT--itself a political body--that complicates the authorization processes of new network operators. As a consequence, Cofetel cannot be an independent agency with legal authority to issue Concession Titles. This raises a second question of whether instead of a Concession Titles there should exist a simpler legal permit that can be issued by Cofetel to investors seeking to establish a network in Mexico in a competitive telecommunications market environment.

⁴¹⁰ New national and international long distance carriers could begin to provide services after August 10, 1996 (which marked the termination of Telmex's grace period), however, interconnection between such long distance carriers could only begin as of January 1, 1997. Transitory Articles Seventh and Tenth of the 1995 FTL; According to the Modified Concession Title, Telmex was obligated to interconnect other authorized public telecommunications networks to its own network, but only until January 1, 1997, could Telmex be obligated by the SCT to interconnect other long distance networks in such a way, that the user could choose among carriers Modified Concession Title. Telmex could also charge a tariff or charge, for interconnection services provided to authorized permit holders or

parties filed requests for a Concession Title to establish and operate a public telecommunications network with the Secretary of Communications and Transport (*Secretaría de Comunicaciones y Transportes* or SCT). The 1995 FTL restricts foreign investment in telecommunications carriers to 49% (except in mobile services)⁴¹¹; therefore, several joint ventures were formed between foreign and domestic partners to establish new long-distance carriers in Mexico. New Concession Titles to establish public networks and provide long distance telecommunications services were issued by the SCT in 1995 and 1996 to: Marcatel (a joint venture among Radio Beep, Westel Inc., and IXC); Avantel (a joint venture among Banamex-Accival, and MCI); Iusatel (a joint venture among Iusacell and Bell Atlantic); Alestra (a joint venture among Grupo Alfa, Bancomer-Visa, AT&T, GTE, and Telefónica de España); Investcom (a joint venture among Compañía San Luis, Nextel, LCC& Carlyle); Miditel (Antonio Canahuati), and Cableados (Grupo Varo)⁴¹². These new long distance carriers invested a total of \$7,512 million dollars in Mexico, at the start of competition⁴¹³.

Competition increased in the wireless mobile service markets with the first spectrum bidding processes under the new 1995 FTL. From 1996 to 1999, 13 spectrum bidding processes were held, and in that same period, 322 new Concession Titles over

concessionaires of a public telecommunications network, or complementary or value added networks, in accordance to terms of the Modified Concession Title. §§5-1, 5-4 and 6-8, Titulo de Concesion Telmex (1990) *Op. Cit. Supra* 288.

⁴¹¹ Article 12 of the 1995 FTL.

⁴¹² Source is Cofetel (1999) as referenced in Judith Mariscal (2002), *Op. Cit. Supra* 337: 83

⁴¹³ Judith Mariscal (2002), *Op. Cit. Supra* 337: 83

spectrum frequencies related to a variety of services were granted, as well as an added 120 Concession Titles for public networks by winning parties⁴¹⁴.

Competition in the local service market also began in 1998. The local service market had not been restricted to competition under Telmex's grace period or any other regulation, but there had been no intent to provide rules to open the local service markets since Telmex's privatization, which meant that the delay was a discretionary decision of the government⁴¹⁵. In 1998, rules for requesting a local service Concession Title were issued, thus opening competition in that sector⁴¹⁶. The first local service concessions were granted during 1996 and 1997 to Amaritel, Maxcom Telecomunicaciones, Unión Telefónica Nacional (Unitel), Red de Servicios de Telecomunicaciones (Resitel), Metro Net, Megacable (a cable tv company), and Telefonía Inalámbrica del Norte⁴¹⁷.

Pay television companies were also regulated under the 1995 FTL as public telecommunications networks, therefore, new rules were established by Cofetel to

⁴¹⁴ §8.1 Licitaciones, Cofetel (2000), Op. Cit. Supra: 86-87

⁴¹⁵ The SCT stated that "until adequate economic and legal conditions were given, new concession [titles] were not requested". § "Telefonía Local", Cofetel, *Primer Informe Annual 1996-1997*, http://www.cft.gob.mx/cofetel/html/9_publica/6_primer%20informe/info13.shtml [visited February 13, 2006]

⁴¹⁶ New local service market rules included: Acuerdo por el que se establece el procedimiento para obtener concesión para la instalación, operación o explotación de redes públicas de telecomunicaciones locales al amparo de la Ley Federal de Telecomunicaciones, D.O. 5 January 1996.

⁴¹⁷ Informe Annual 1996-1997 Op. Cit. Supra 415; see also Concesionarios de redes públicas de telecomunicaciones locales, webpage Cofetel, http://www.cft.gob.mx/cofetel/conse/tel_local.shtml [visited February 13, 2006]

increase competition in this market⁴¹⁸. In August 1996, 146 new Concession Titles for cable television networks had been granted; in 1999, there were a total of 417 new Concession Titles; and in April 2003, there were a total of 761 pay television concessions including cable television, multiple multipoint distribution service (“MMDS”)--a form of wireless pay television reception--and Direct To Home Satellite (“DTH”) television⁴¹⁹.

2. Despite new competitors, market concentration characterizes the telecommunications sector

What was the impact of competition on market structure? In the first year of liberalization of the long distance market (1997), Telmex’s share dropped to 55%. However, by 1998, Telmex’s long-distance market share had risen again to 70%; in 1999, to 79%⁴²⁰; and in 2006, Telmex had a 77% share of the long-distance market (this average includes national and international long distance)⁴²¹. In June 2006, several years after local services were open to competition, Telmex reported having 18.7 million fixed local lines, which translates into an approximate 96% share of the local service market in Mexico⁴²². In the wireless service market, in 1997, Radiomóvil Dipsa, S.A. de C.V. or *Telcel* held 60% of the national mobile service market, while

⁴¹⁸ Acuerdo (1996), *Op. Cit. Supra* 416

⁴¹⁹ There were a few Concession Titles granted prior to the 1995 FTL. §*Televisión por Cable*, Informe Annual 1996-1997 *Op. Cit. Supra* 415; §1.4-B. *Nuevos Concesionarios*, Televisión y Audio Restringidos, Cofetel, *Informe de Labores de septiembre de 1997 a mayo de 1999*, http://www.cft.gob.mx/wb2/COFETEL/COFE_Informes, (Last viewed visited February 13, 2006)

⁴²⁰ Judith Mariscal (2002), *Op. Cit. Supra* 337, 84

⁴²¹ Telmex-SEC (2006), *Op. Cit. Supra*

⁴²² Cofetel reported that in 2005, the number of fixed telephone lines in Mexico had risen to 19.5 million. Telmex owns 18.7 million of those fixed lines. Cofetel, *Informe de Labores*, (2005) 3 http://www.cft.gob.mx/cofetel/html/13_transparencia/InformeWEB_2005.pdf, (Last viewed December 7, 2006)

its closest competitor Iusacell held 25%⁴²³. In 2006, Telcel reported having a 77% share of the mobile services market (PCS and cellular)⁴²⁴, which was higher than its market share in 1997.

In regards to the development of the pay television market which is considered a telecommunications market in Mexico, in 2002, Grupo Televisa, S.A. de C.V. (“Grupo Televisa”) held 27% of the total pay television market⁴²⁵, which included its investments in (1) a 58.7% interest in Innova, S. de R.L. de C.V., with the remaining 43% owned by DirectTV. Innova is also known commercially as Sky Mexico⁴²⁶, which is the “only participant in the Mexican DTH [Ku Band Direct to Home satellite television] [...]”⁴²⁷; (Sky Mexico represented 6% of the national average of households with pay television in 2002⁴²⁸); and (2) a 51% interest in Cablevision⁴²⁹ which is the leading pay television company in Mexico City⁴³⁰; Telmex owns the

⁴²³ Judith Mariscal (2002), *Op. Cit. Supra* 337, 80

⁴²⁴ America Móvil, S.A., 2005 Annual Report, Form 20-F of the United States Securities and Exchange Commission. Filed 06/30/06. <http://www.secinfo.com/d14D5a.v48Sx.htm#5s82> [Last viewed 17 de agosto de 2006.

⁴²⁵ Cofetel (April 2003), *Op. Cit. Supra* 531, Slide/page 21

⁴²⁶ Grupo Televisa, SEC Form 20-F, 2005, *Op. Cit. Supra* 538, 12

⁴²⁷ Grupo Televisa, SEC Form 20-F, 2005, *Id. Cit. Supra* 538, 22

⁴²⁸ Dirección General de Televisión y Audio Restringidos, *Diagnóstico TV por Cable 2003*, Slide show presentation, (April 2003), Cofetel, Slide/page 7, http://www.cft.gob.mx/wb2/COFETEL/COFE_Diagnosticos_e_indices_de_produccion_del_sec2 [viewed March 11, 2007]

⁴²⁹ Cablevision had 355,000 and 422,000 basic subscribers, in 2004 and 2005 respectively. Of those subscribers, for those same years, 123,000 and 283,200 subscribers had acquired a digital service package (IP based multi-service provision). Cable modem subscribers had jumped from 26,500 in 2004 to 61,000 at end of 2005, due to the rolling out of new digital set top boxes and conversion from analogue to digital transmission technologies in their network. *see* § *Prospectus Summary*, Grupo Televisa, S.A., SEC Form F-4: Registration Statement of a Foreign Private Issuer for Securities Issued in a Business-Combination Transaction, Filed 06/13/05., 8, <http://www.secinfo.com/dsvr4.z74c.htm> (Last viewed December 4, 2006); *see also* Grupo Televisa, SEC Form 20-F, 2005, *Id. Cit. Supra* 538, 22

⁴³⁰ Grupo Televisa, SEC Form F-4, 2005, *Id. Cit. Supra* 429, 8

remaining 49% of shares of Cablevision⁴³¹. The rest of the pay television market in 2003 was divided up into Megacable (9%), Cablemás (8%), Grupo Galaxy Mexicana (Direct TV) (8%) and MVS (6%), with a diversity of smaller cable companies holding 3% or less of market share for the rest of the sector⁴³². Despite the large number of concessions issued by the SCT for pay television in the country, competition in the pay television sector is best understood by the diversity of service providers per locality: In 2002, in the 830 localities where pay television service was provided (from a total of 199,369 localities in Mexico), 139 localities had 2 or more different concessionaires operating in the locality; 22 had 3 or more different concessionaires; and 9 localities had 4 or more different concessionaires operating⁴³³. These figures suggest that in the majority of localities with pay television service, there is only one service provider. Rights to provide cable services are *de facto* regional.

⁴³¹ Judith Mariscal (2002), *Op. Cit. Supra* 337, 80; see also § *Información General: Empresas Cablevision, S.A. de C.V., Bolsa Mexicana de Valores, http://www.bmv.com.mx/BMV/JSP/sec5_infoemis.jsp?idmenu=1&seidemi=5979*, [last visited December 12, 2006].

⁴³² Cofetel (April 2003), *Op. Cit. Supra* 531, Slide/page 21

⁴³³ Cofetel (April 2003), *Op. Cit. Supra* 531, Slide/page 18

The most recent OECD numbers reflect a diversity of competitors in several markets⁴³⁴:

Table 16. Number of operators in Mexico by telecommunications market				
Fixed PSTN (Local, National and International)	Cellular Mobile	Wireless local loop	IMT-2000 Operators (i.e. UMTS / 3rd Generation)	Cable TV operators
79	17	12	1	895
Source: OECD (2007)				

However, as mentioned previously, the multi-competitor market is constrained by high degrees of market share concentration across the industry.

Table 17. Operators holding largest market shares in Mexico				
Local	Long Distance	Mobile Services	IMT-2000	Cable TV operators
96% Telmex	77% Telmex	79% Telcel	100% Telmex	1 or 2 per locality
Source: OECD (2007); SEC Telmex and America Movil Forms 20-F (2006); Cofetel/SCT				

3. *Growth in revenue without similar growth in investment*

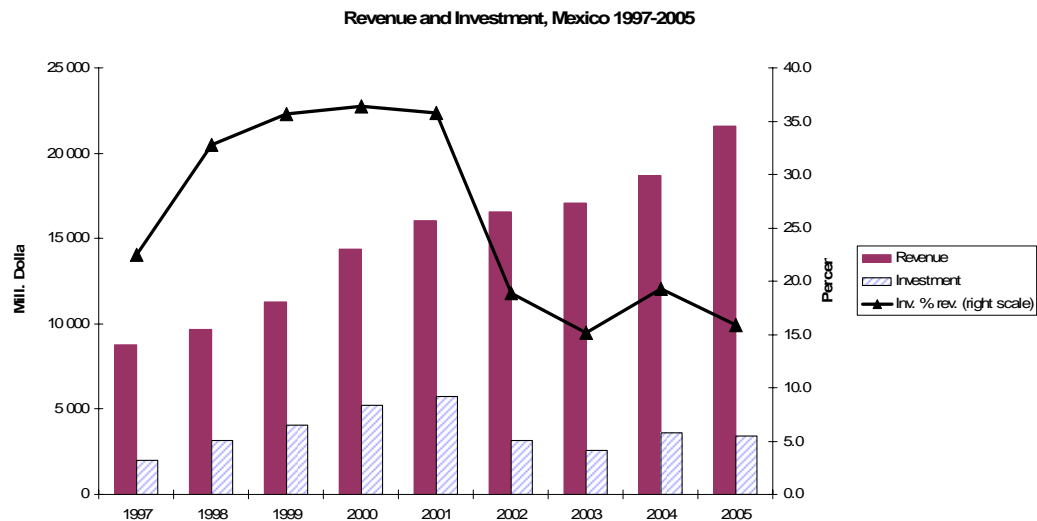
According to OECD statistics (see Figures 3 and 4 below), public telecommunications revenue in Mexico has grown at an average of 12% from 1998-2005⁴³⁵. During this

⁴³⁴ OECD Communications Outlook (2007), 35

⁴³⁵ Due to a new focus on broadband telecommunications, revenue and investment levels are once again following an upward trend among OECD countries, with an expectation that Mexico will follow this

same period, investment has grown an average of 12.5% per year. However, investment as a percentage of revenue has decreased at an average of (-1%) per year from 1998-2005.

Figure 3. Revenue and investment in the Mexican telecommunications market



Source: OECD (2007)

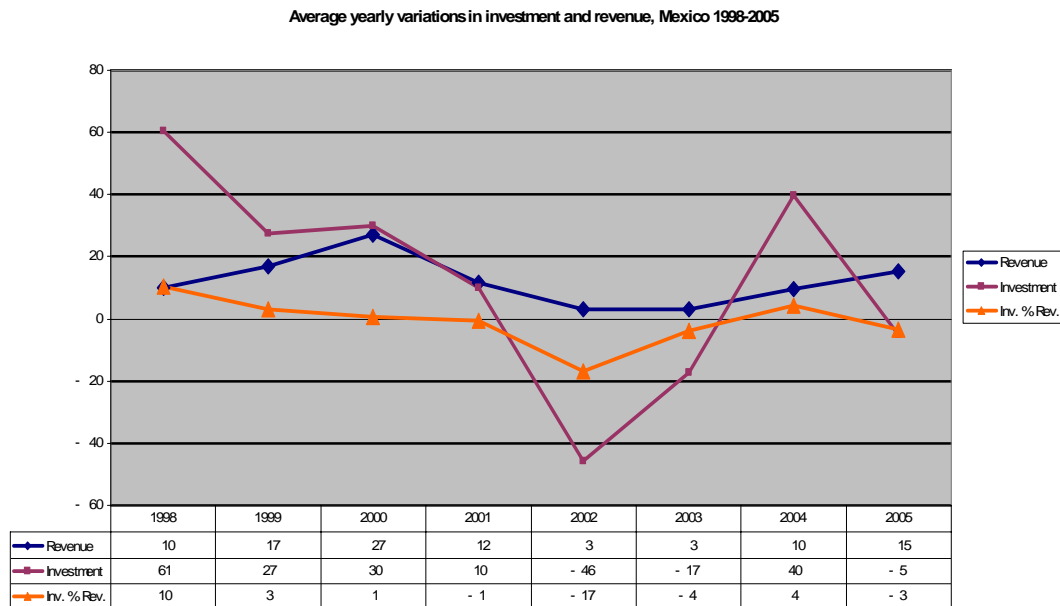
The downward trend of investment was a worldwide trend which began in 2001, due to the burst of a speculative bubble and overcapacity in markets⁴³⁶. Looking at the post-liberalization period in Mexico, from 2001 to 2005, revenue continued to grow at an average of 8.6% per year; but investment decreased at (-3.6%) per year, and

trend. OECD (2007), 124, 107. Cofetel statistics state that the Mexican telecommunications market grew 19.8% in 2004 from the previous year, while the global GNP for that year grew at a rate of 4.6%. Dirección de Estadística de Mercados, “Producto Interno Bruto Global y de Telecomunicaciones”, Cofetel, online at http://www.cft.gob.mx/wb2/COFETEL/COFE_Estadisticas_de_telecomunicaciones (Last viewed August 2007)

⁴³⁶ OECD (2007), 107.

investment as a percentage of revenue fell at an average of (-4.2%) per year in that same five year period.

Figure 4. Growth in revenue and investment by yearly percentage variations



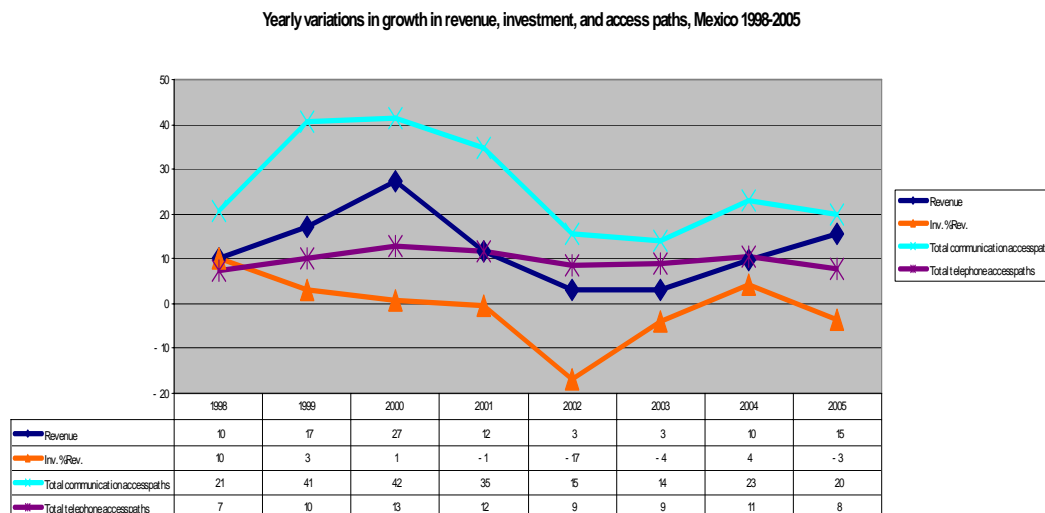
Source: OECD (2007)

T

these figures show that in the post-liberalization years, revenue increases have been partially supported by decreasing investment rates. While this may make business sense to operators attempting to maintain profit margins, in a developing country such as Mexico, decreasing levels of investment explains the difference between maintaining or overcoming underdevelopment. Despite their falling numbers, investment levels have maintained growth in telecommunications access paths in Mexico, but access path development in the last 8 years has fluctuated alongside investment levels. Figure 5 below includes the growth rate of total telephone access

paths and total communications access paths from 1998 to 2005 alongside the rate of growth of revenue and investment (as a percentage of revenue).

Figure 5. Growth in revenue, investment as a percentage of revenue, and access paths by yearly percentage variations



Telecommunications access paths include analogue lines + ISDN lines + DSL + cable modem + mobile

Telephone access paths include analogue + ISDN lines + mobile

Source: OECD (2007)

These figures indicate that if incentives to increase investment levels existed in Mexico, infrastructure and services would develop at an ever higher rate than they have done so in the past decade. Unfortunately, as the next section will show, investment levels in Mexico have failed to increase the rate of development in infrastructure and service development in the country, in such a way that would solve international and intra-national digital divides, as well as problems of expanding the market economy of this sector. Instead telecommunications development is constrained by the institutional matrices discussed above, and by the strategies pursued by operators, both incumbents

and new entrants, who have been able to gain some sort of selective access and enforcement of rights in this sector.

4. Services and infrastructure development increased, but did not reach competitive levels of developed nations

Development of services and infrastructures in Mexico has remained dissatisfactory by national and international levels. The increase in competition helped generate a steady growth in outgoing international minutes from Mexico: from 13.7 minutes of international telecommunications traffic (MiTT) per capita in 1998 to 20.6 MiTT per capita in 2003⁴³⁷. However, despite the increase in long-distance traffic, in 2003, Mexico was the third worst performer among OECD countries in international traffic, which had a weighted average of 74.2 MiTT⁴³⁸.

Growth in fixed lines dropped from a 12.5% yearly growth rate (during the early years of Telmex's grace period) to an annual average growth rate in lines of 1.18% from 1995 to 1998⁴³⁹. Fixed line teledensity in 1998 (the year in which local telephone services were opened to competition) was 10.36 fixed telephone lines per 100 inhabitants in Mexico, whereas in the same year, comparable economies such as Argentina had reached 19.74 lines per 100 inhabitants, Brazil had 12.05, Chile 18.57,

⁴³⁷ In 1999, 16.1 MiTT per capita; 19.1 MiTT per capita in 2000; 20.4 MiTT per capita in 2001; 19.7 MiTT per capita in 2002. OECD, Communications Outlook, (2005), 84

⁴³⁸ OECD (2005), *Id. Cit. Supra* 437, 84

⁴³⁹ Leonardo E. Torre C. (2000) *Op. Cit. Supra* 316, 3-4; Telmex's commitment to expand lines by a yearly 12% ended on December 31, 1994. § 3-2, *Modificación al Título de Concesión de Telefonos de Mexico* (1990) *Op. Cit. Supra* 288.

and Colombia 16.13 lines per 100 inhabitants⁴⁴⁰. Some of these countries had more than doubled their number of lines between 1990 and 1998. Meanwhile, other advanced developing nations such as Korea had achieved a teledensity level of 43.27 lines per 100 inhabitants in 1998, and developed countries such as Japan had reached 50.26 lines per 100 inhabitants⁴⁴¹. In 1998 “the average rate in OECD countries [...was] around 50 lines per 100 persons”⁴⁴². Poland, the next worst performer after Mexico among OECD countries, had 19.4 lines per 100 inhabitants, compared to Mexico’s 10.3 lines per 100⁴⁴³.

By 2005, Mexico reached 18.2 lines per 100 inhabitants, which placed the country’s teledensity levels above Venezuela (13.5 lines/100 inhabitants) and Colombia (17.1 lines/100 inhabitants) but below comparable economies in the region such as Chile (22 lines/100 inhabitants), Argentina (22.8 lines/100 inhabitants), Brazil (23.5 lines/100 inhabitants), and Uruguay (30.9 lines/100 inhabitants)⁴⁴⁴. Moreover, in 2005, the entire Latin American region lagged in teledensity behind countries such as Spain (42.9 lines/100 inhabitants), Italy (43.1 lines/100 inhabitants), South Korea (49.2

⁴⁴⁰ See *Cuadro 1: Densidad Telefónica: Líneas Telefónicas por cada 100 habitantes y por cada 100 hogares*. [Sources: *World Communication Development Report 1999* (IUT) and *Statistic Annual: Telecommunications Services, Chronological Series 1989-1998* (ITU)]; Leonardo E. Torre C. (2000) *Op. Cit. Supra* 316, 4

⁴⁴¹ See *Cuadro 1: Densidad Telefónica: Líneas Telefónicas por cada 100 habitantes y por cada 100 hogares*. [Sources: *World Communication Development Report 1999* (IUT) and *Statistic Annual: Telecommunications Services, Chronological Series 1989-1998* (ITU)] Leonardo E. Torre C. (2000) *Id. Cit. Supra* 316, 4

⁴⁴² OECD (1999), *Id. Cit. Supra* 339, 79

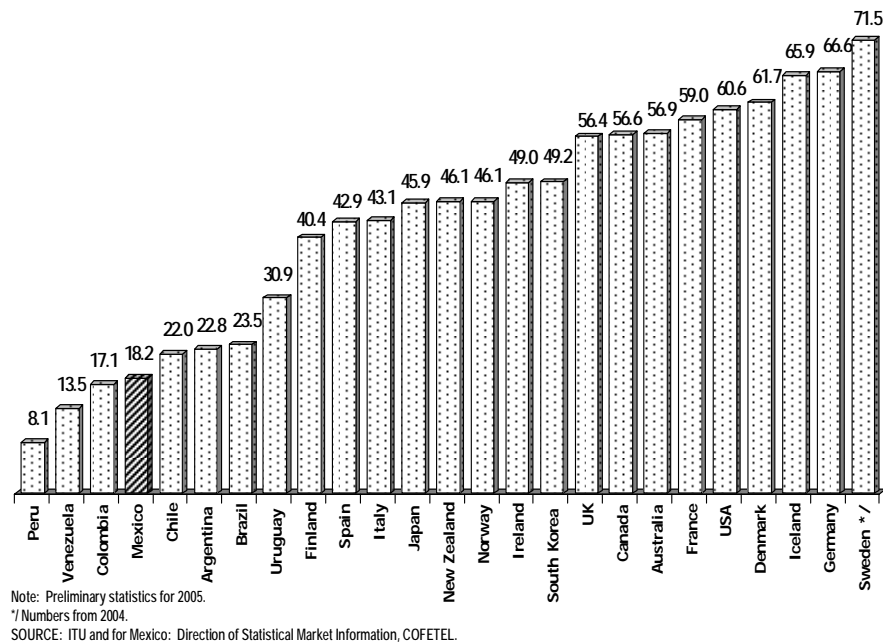
⁴⁴³ OECD (1999), *Id. Cit. Supra* 339, 6

⁴⁴⁴ § *Analistas de mercado y financieros --Inteligencia de Mercado --Estadísticas de Telecomunicaciones --Comparativos Internacionales --Comparativo Internacional de Densidad de Telefonía Fija 1999-2005 (Anual)*, Source: Cofetel with information from the ITU, http://www.cft.gob.mx/wb2/COFETEL/COFE_Comparativo_Internacional_de_Densidad_de_3 (Last viewed March 4, 2006). (“Comparative International Fixed Line Teledensity”).

lines/100 inhabitants), USA (60.6 lines/100 inhabitants), and Germany (66.6 lines/100 inhabitants)⁴⁴⁵.

Figure 6. International comparison of fixed local lines per 100 inhabitants (2005)

Fixed local lines/100 inhabitants in 2005



In the wireless market, service penetration has shown impressive growth in the past decade in Mexico⁴⁴⁶, which correlates to the exponential investment and growth in

⁴⁴⁵ Cofetel, Comparative International Fixed Line Teledensity, *Id. Cit. Supra* 444

⁴⁴⁶ Taking three measures of growth for Mexico in 1990, there were 0.1 mobile service users/100 inhabitants; in 1999, with the inclusion of new PCS providers, there were 8 mobile service users/100 inhabitants; in 2004 36.3 mobile service users/100 inhabitants; preliminary figures of Cofetel for 2005 and 2006, show 45.3 and 48.6 mobile service users/100 inhabitants, respectively.

Information for 1990 was obtained from § *Analistas de mercado y financieros--Inteligencia de Mercado --Estadísticas de Telecomunicaciones --Comparativos Internacionales --Penetración de Telefonía*

this market around the globe. For 2005, Mexico had a market penetration rate of 45.3 mobile service users (“msu”) per 100 inhabitants, which is statistically similar to Brazil (46.3 msu/100 inhabitants), Venezuela (46.7 msu/100 inhabitants), and Colombia (47 msu/100 inhabitants), but more significantly behind Argentina (57.3 msu/100 inhabitants), and Chile (67.8 msu/100 inhabitants)⁴⁴⁷. An international comparison for 2005, to the United States (67.6 msu/100 inhabitants), France (77.4 msu/100 inhabitants), Germany 96.8 msu/100 inhabitants), Spain (96.8 msu/inhabitants) and Italy (123.1 msu/100 inhabitants), also shows Mexico significantly lagging behind more developed economies in terms of penetration rates of mobile services⁴⁴⁸.

Móvil de los Principales Países de América Latina (Anual), http://www.cft.gob.mx/wb2/COFETEL/COFE_Penetracion_de_Telefonia_Movil_de_los_Pri_1.

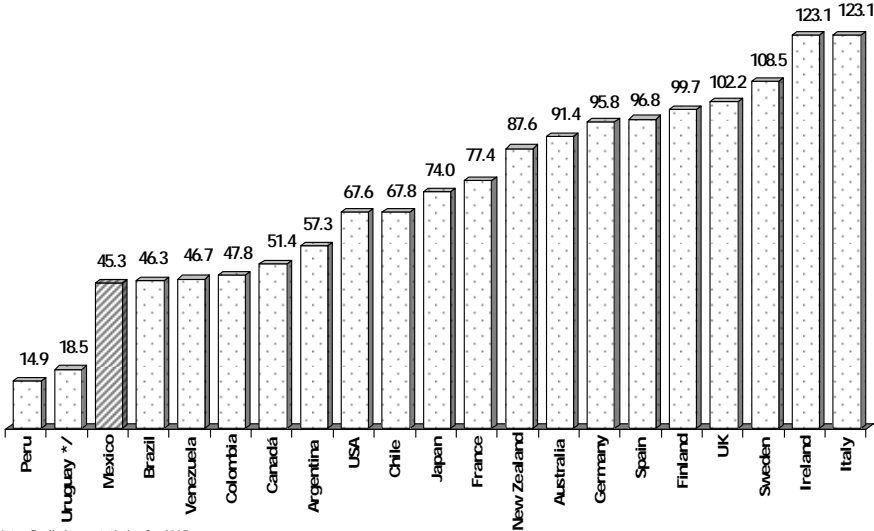
[viewed March 4, 2006] (“Comparative International Penetration of Mobile Telephony”). Note: Information for 2004 and 2005 is preliminary. */ Statistics for 2004. Source: ITU; for Argentina, Brazil, Chile, Colombia, Peru, Uruguay, and Venezuela data was provided by the regulatory agencies of each country and for Mexico by the Direction of Statistical Market Information, COFETEL. http://www.cft.gob.mx/wb2/COFETEL/COFE_Comparativo_Internacional_de_Penetracion_2 [viewed March 4, 2006]

⁴⁴⁷ Cofetel, Comparative International Penetration of Mobile Telephony, *Id. Cit. Supra* 446

⁴⁴⁸ Cofetel, Comparative International Penetration of Mobile Telephony, *Id. Cit. Supra* 446

Figure 7. International comparison of mobile service users per 100 inhabitants (2005)

Mobile service users/100 inhabitants in 2005



Note: Preliminary statistics for 2005.
 * Numbers from 2004.
 SOURCE: ITU; for Argentina, Brazil, Chile, Colombia, Peru, Uruguay and Venezuela data was provided by the regulatory agency of each country; and for Mexico: Direction of Statistical Market Information, COFETEL.

In 2007, the OECD determined that communications access path density measured by an aggregate of analog lines, digital (DSL and ISDN) lines, cable modem, and mobile subscribers raised Mexico to 65.5 access pathways/100 inhabitants. However, once again, this teledensity rate should be placed in the context of the OECD average of 130.6 access paths/100 inhabitants.

Table 18. International comparative teledensity levels per 100 inhabitants (2005)			
	Mexico	Arg/Bra/Chile	OECD
Fixed lines	18.2	22.7	38.4
MSU	45.3	53.6	79.6
Access paths	65.5	-	130.6
Source: Cofetel/ITU (2006); OECD (2007) for access paths			

For 2003, the OECD reported that Mexico had 92% population coverage of mobile networks⁴⁴⁹. However, the infrastructure growth rates in Mexico need also to be viewed in light of the digital divide among states to gain a more accurate picture of universal access at the national level. In 2005, mobile service user penetration rates for Chiapas, Durango, Guanajuato, Guerrero, Mexico State, Michoacan, Nayarit, Oaxaca, Puebla, San Luis Potosí, Tabasco, Tlaxcala, Veracruz, and Yucatán (which also have the highest levels of extreme poverty among the 36 States of Mexico) all fell below the national average of 45.3 msu/100 inhabitants⁴⁵⁰. Considered as a group, these states have a mobile teledensity rate of 31.2 msu/100 inhabitants, with states such as Chiapas at a low 18.8 msu/100 inhabitants and Oaxaca with 19.4msu/100 inhabitants⁴⁵¹. These figures contrast to the highest mobile teledensity levels in Quintana Roo (Cancun is located in this state) at 127.5msu/100 inhabitants; Federal District (Mexico City) with 71.3 msu/100 inhabitants; Michoacan with 69.4msu/100

⁴⁴⁹ OECD (2005), *Op. Cit. Supra* 437, 111

⁴⁵⁰ § *Densidad de Telefonía Móvil por Entidad Federativa 2000-2006 (Anual)*, Cofetel, (2006) at http://www.cft.gob.mx/wb2/COFETEL/COFE_Densidad_de_Telefonia_Movil_por_Entidad_Feder [viewed March 19, 2007].

⁴⁵¹ Cofetel, *Densidad de Telefonía Móvil por Entidad Federativa 2000-2006*, (2006), *Id. Cit. Supra* 450

inhabitants; Nuevo Leon 64.5msu/inhabitants; Baja California Norte with 64msu/100 inhabitants, and Baja California Sur, at 63.9msu/inhabitants⁴⁵².

In 2004, 52.6% of total households had fixed line telephone service, and a preliminary figure for 2005 reported 53.8% of households had telephone service⁴⁵³, which is slightly more than half the number of homes in the country. Furthermore, teledensity of fixed lines for 2005 viewed per state shows a great number of states falling below the national average of 18.8 fixed lines/100 inhabitants: Campeche, Chiapas, Durango, Guanajuato, Guerrero, Hidalgo, Michoacan, Nayarit, Oaxaca, Puebla, Queretaro, San Luis Potosí, Sinaloa, Tabasco, Tlaxcala, Veracruz, Yucatán, and Zacatecas have a group average of 12.8 fixed lines/100 inhabitants⁴⁵⁴. Chiapas (5.7 lines/100 inhabitants) and Oaxaca (7 lines/100 inhabitants) once again represent the lowest averages per state by comparison to the highest averages in the country, represented by the Federal District (Mexico City) (42.1 lines/100 inhabitants) and Nuevo León (29.7 lines/inhabitants)⁴⁵⁵. These statistics show growth and development to take place around states with the greater purchasing power, without resolving the digital divide within the country.

⁴⁵² Cofetel, *Densidad de Telefonía Móvil por Entidad Federativa 2000-2006*, (2006), *Id. Cit. Supra* 450

⁴⁵³ S.C.T., *Informe de Labores de la Secretaría de Comunicaciones y Transportes*, (2006), 83

⁴⁵⁴ See Cofetel (in partial use of ITU sources), §*Densidad de Líneas Telefónicas Fijas en Servicio por Entidad Federativa Líneas por cada 100 habitantes 1990 --2006 (Semestral)*, (2006), at http://www.cft.gob.mx/wb2/COFETEL/COFE_Densidad_de_lineas_telefonicas_fijas_en_serv

⁴⁵⁵ Cofetel, *Densidad de Líneas Telefónicas Fijas*, (2006), *Id. Cit. Supra* 454

5. *Universal service programs have a low penetration*

Traditionally, governments have some sort of mechanism for subsidizing infrastructure or service access in regions of a country which may not be attractive to market investors given the purchasing power of the population or the probable rate of return on investment. In Latin America, most countries have implemented policies to increase service access among rural or low income populations. 85% of Latin American countries have chosen to establish a universal fund to increase teledensity in these areas, in contrast to another 14% of countries (Cuba, Panama and Bolivia) which have opted to impose special obligations on service operators to increase universal access⁴⁵⁶. Chile and Mexico constitute their universal funds with public funds, while all other Latin American countries generated their universal funds by receiving a percentage of revenue from service operators⁴⁵⁷.

In Mexico, the 1995 FTL separates issues of universal access from issues of market development. Universal service is not regulated by the Cofetel, since Cofetel was construed exclusively as a market competition regulator and supervisor. The SCT, the line Secretary, controls a universal service fund to subsidize investment in infrastructure creation among marginated rural and urban communities, directly or through existing operators, in order to increase “social coverage” of telecommunications in Mexico⁴⁵⁸. The SCT has invested in installation of satellite terminals in small rural communities, and in public bid processes by which the

⁴⁵⁶ ITU, *Acceso Universal en Latinoamérica: Situación y desafíos*, (2006), 2, http://www.itu.int/ITU-D/ict/statistics/material/Acceso_universal_2006.pdf [Viewed March 19, 2007].

⁴⁵⁷ ITU, (2006) *Id. Cit. Supra* 455, 4-5.

⁴⁵⁸ S.C.T. (2006), *Op. Cit. Supra* 453: 89

government grants the winning service operator rights to use spectrum frequencies to deliver service, and complementary subsidies in order to install necessary lines and equipment to homes⁴⁵⁹. Nonetheless, in 2005, Mexico had a service coverage of only 27% of its rural population (in the understanding that rural population represents 25.4% of the entire population)⁴⁶⁰. Although there are worse cases of service coverage in rural areas in Latin America--such as Nicaragua with a 1.5% service coverage of a rural population representing 49% total population or Peru with 8.74% coverage of a rural population representing 27.37% total population--Mexico's universal service coverage falls behind Latin American economies most comparable to its own⁴⁶¹. For example, in 2005, Chile had achieved 100% service coverage of rural population (which represents 13.7% of the total population), while Colombia reached 83% service coverage of its rural population (representing 28% of total population)⁴⁶².

6. *Highest charges among OECD nations*

In addition to access to telecommunications services, consumers are primarily interested in direct benefits such as affordable pricing and quality of service. Basic telephone charges for consumers were and still are very high in Mexico. In 1998, at the start of competition, Mexico was the OECD country with the fourth highest commercial charges among the 28 member nations (44% higher than the average).

When said commercial charges are adjusted to purchasing power, rates in Mexico

⁴⁵⁹ S.C.T. (2006), *Id. Cit. Supra* 453: 89-90

⁴⁶⁰ ITU, (2006), *Op. Cit. Supra* 455, 6.

⁴⁶¹ ITU, (2006), *Id. Cit. Supra* 455, 6

⁴⁶² Other comparison include, for 2005, Uruguay with 100% rural service coverage with a rural population representing 6.52% population; Dominican Republic with 92% service coverage of rural population (representing 36% of the total population), and El Salvador with 30% coverage of its rural population (which represented 40% of total population). ITU, (2006), *Id. Cit. Supra* 455, 6

were the highest among OECD countries (100% higher than the average; and 6 times as high as Korean rates which were the lowest)⁴⁶³.

In regards to consumer prices, from 2002 to 2004, telephone charges for users improved slightly, with residential charges moving from the highest rate among OECD countries to the 8th highest rate; but business charges remained the highest among OECD countries⁴⁶⁴. High user mobile service basket charges dropped from 4th highest to 9th highest among OECD countries' and a very important drop took place in the low user mobile service basket price that made charges in that segment the cheapest among OECD countries⁴⁶⁵. However, the most recent report issued by the OECD in 2007 disaggregates telephone charges for fixed and mobile, residential and business services, into low, medium and high usage, and once again shows Mexican telephone prices to be among the highest in OECD nations by purchasing power. By these most recent calculations, Mexico has the 2nd *highest* low usage mobile rates, which includes the pre-paid phones or cards which are used by low income users in Mexico. Improvements in charges are now seen in medium and high mobile usage

⁴⁶³ Residential charges improved only slightly, placing Mexico 11th among OECD countries, but as the highest when adjusted to real purchasing power. In 1998, international commercial long distance charges placed Mexico with the 4th highest rates among OECD country, 2nd most expensive when adjusted to purchasing power. In 1998, international residential long distance charges placed Mexico with the 5th highest rates among OECD country, 3rd most expensive when adjusted to purchasing power. Leonardo E. Torre C. (2000) *Op. Cit. Supra* 316, 5-6

⁴⁶⁴ Cofetel in use of OECD information from OECD (2005), *Id. Cit. Supra* 437 as quoted in Cofetel, Informe de Labores, (2005), 15-17 http://www.cft.gob.mx/cofetel/html/13_transparencia/InformeWEB_2005.pdf [viewed March 11, 2007]; See also Cofetel, §Evolución de las tarifas telefónicas en México, Sector Telecomunicaciones, (August 2004) http://www.cft.gob.mx/wb2/COFETEL/COFE_Evolucion_de_las_Tarifas_Telefonicas_en_Mexico (Last viewed March 11, 2007)

⁴⁶⁵ Cofetel in use of OECD information (2005), *Id. Cit. Supra* 464: 15-17; See also Cofetel, (August 2004) *Id. Cit. Supra* 464

rates, but Mexico no longer is shown to have the “cheapest” rates in low end mobile user markets.

Type of charge	2002	2004	Decrease in charges shown as a percent
Residential charges (including LD and mobile)	Highest	8th highest	-10.3%
Business charges (including LD and mobile)	Highest	Highest	-11.6%
Basic basket charges for mobile users of: (a) low usage (b) high usage	(a) 6 th highest (b) 4th highest	(a) Cheapest (b) 9th highest	(a) -48.8%; (b) -29.4%

Source: OECD as cited by Cofetel, *Informe de Gobierno*, (2005)

Fixed-line basket (PPP)					Mobile-service basket		
Business		Residential			Business/Residential		
<i>SOHO</i>	<i>SME</i>	<i>Low</i>	<i>Med</i>	<i>High</i>	<i>Low</i>	<i>Med</i>	<i>High</i>
4th highest	4th highest	3rd highest	6th highest	7th highest	2nd highest	14th highest	10th highest

Source: OECD (2007)
SOHO: Small office/ Home Office; SME: Small and médium enterprises

7. Good quality of service and productivity indexes

In terms of service quality, number of faults per lines in Mexico went down from 14 faults/100 lines in 1990 to 1.2 faults/100 lines in 2003. This standard is among the best standards of OECD countries in 2003: Canada with 1.1 faults/100 lines and Korea

with 1 fault/100 lines have the least faults per lines among OECD countries⁴⁶⁶. In general, fault rates have become lower as fixed lines become substituted with fiber optics networks, which maintenance can be attended from remote locations by computers⁴⁶⁷. Similarly, in terms of percentage of faults repaired within 24 hours, Mexico boasted a 98.2% faults repaired/24 hours, which was among the highest service quality ratios in the OECD⁴⁶⁸. Mexico also has a very high percentage (98.7%) of public payphones in working order⁴⁶⁹. In terms of answer seizure ratios (ASR)⁴⁷⁰, which affects long distance service revenue, Mexico was the OECD country with the greatest improvement (20% increase in ASR between 2002-2003), however, Mexico and Turkey with less than 50% ASR, were still the worst OECD performers in 2003⁴⁷¹. The OECD ASR average was 60.5% for 2003⁴⁷². Nonetheless, these indicators are overall positive in terms of Quality of Service indicators in Mexico⁴⁷³.

⁴⁶⁶ OECD (2005), *Op. Cit. Supra* 437, 233, *see also* associated link at http://ocde.p4.siteinternet.com/publications/doifiles/932005011P1_ch8-e.xls

⁴⁶⁷ OECD (2005), *Id. Cit. Supra* 437, 233, *see also* associated link at http://ocde.p4.siteinternet.com/publications/doifiles/932005011P1_ch8-e.xls

⁴⁶⁸ OECD (2005), *Id. Cit. Supra* 437, 240

⁴⁶⁹ OECD (2005), *Id. Cit. Supra* 437, 241

⁴⁷⁰ “Answer seizure ratios measure the percentage of incoming foreign calls that actually seize a circuit in the domestic market. A circuit is seized when the line is picked up and the connection established. [...] Answer seizure ratios are valuable statistics since they indicate the percentage of connected international calls on the network. ASRs are important to operators since they usually charge for a call only when a circuit has been engaged even though the operator still incurs costs in attempting to connect a call when no one answers or the line is busy. This could imply that the higher the ASR, the higher average revenue per attempted call.” OECD (2005), *Id. Cit. Supra* 437, 234-235

⁴⁷¹ OECD (2005), *Id. Cit. Supra* 437, 235

⁴⁷² OECD (2005), *Id. Cit. Supra* 437, 246

⁴⁷³ In its 2005 Communications Outlook report, the OECD anticipated that in future reports there will be a need to include a new Service of Experience measurement, in order to adequately measure the ability of providers to meet user requirements or preferences in relation to broadband services. OECD (2005), *Id. Cit. Supra* 437, 235-237

Among other promises of telecommunications liberalization, opening markets to competition promised to raise productivity, and employment in the sector. Productivity in terms of access paths generated per employee⁴⁷⁴ as an OECD average rose from 180 access paths/employee in 1993 to 469.6 access paths/employee in 2003 (160% increase)⁴⁷⁵. Mexico showed a raise in productivity from 160.7 access paths/employee in 1993 to 553.2 access paths/employee in 2003 (244% increase), which placed its productivity, in terms of access paths generated per employee above the OECD average⁴⁷⁶. This productivity level should be tempered by reading the number of “pathways” that actually exist in the country, and employment levels in the country. Employment levels dropped in the last decade among OECD countries, but in 2003, finally recovered their mid-1990 levels: the OECD average for telecommunications employment as a total percentage of employment in 1993, was 0.60% and in 2003, 0.57%⁴⁷⁷. Telecommunications employment as a total percentage of employment in Mexico represented only 0.16% in 1993, and 0.23% in 2003; (thus, ranking Mexico as the OECD country with the lowest average)⁴⁷⁸. Nonetheless,

⁴⁷⁴ “In the past, it has been common for analysts to use the number of fixed lines (access lines) per employee or, more recently, the number of mobile subscribers and access lines per employee as an indicator of partial labour productivity. Recently, however, there has been considerable development of new access technologies. Consequently, the OECD uses “access paths” instead of lines, where access paths is the sum of all forms of access – including traditional fixed lines, mobile subscribers, ISDN channels (64 kbit/s voice equivalents) and DSL broadband subscribers. While the uses and capabilities of different access paths clearly vary, their provision by the carriers is indicative of telecommunication carrier productivity.” OECD (2005), *Id. Cit. Supra* 437, 249

⁴⁷⁵ OECD (2005), *Id. Cit. Supra* 437, 250 and related link <http://dx.doi.org/10.1787/844676635376>

⁴⁷⁶ OECD (2005), *Id. Cit. Supra* 437, and related link <http://dx.doi.org/10.1787/844676635376>

⁴⁷⁷ OECD (2005), *Id. Cit. Supra* 437, 248

⁴⁷⁸ OECD (2005), *Id. Cit. Supra* 437, 248 and related link for figure 9.3 http://ocde.p4.siteinternet.com/publications/doifiles/932005011P1_ch9-e.xls

Mexico was among the few OECD countries in which telecommunications as a percentage of total employment in the country was maintained from 2000 to 2003⁴⁷⁹.

8. *Conclusions on overall sector performance post-liberalization*

The promise of privatization in this sector was to resolve underdevelopment in telecommunications, and raise the country's competitiveness. However, paraphrasing René Villareal's description of late ISI policies, the telecommunications market economy has shown growth without a significant correlation to development⁴⁸⁰. A rise in productivity of the telecommunications sector of Mexico is led by the dominant incumbent. By 1999, Telmex had not only maintained its position as the dominant carrier of the telecommunications sector, but it had become "[...] the 12th largest telephone company in the world (by revenue), [and] Telmex's stock market capitalization place[d] it second in the world, next only to BT"⁴⁸¹. In 1999, Telmex was also ranked the 18th top fixed line operator by domestic telephone lines in the World⁴⁸², and 17th top international telecommunications operator by outgoing minutes⁴⁸³. Grupo Carso, which at the time owned Telmex and Telcel, had also become "the largest company listed on the Mexican Stock Exchange"⁴⁸⁴. These results

⁴⁷⁹ OECD (2005), *Id. Cit. Supra* 437, 248

⁴⁸⁰ See René Villareal (1997) *Op. Cit. Supra* 63, 97-116

⁴⁸¹ OECD (1999), *Id. Cit. Supra* 339, 257; An ITU study ranks Telmex as the 19th top operator by revenue in the World. ITU, *Top 20 Telecommunication Operators --Ranked by revenue 1999*, (2001) at http://www.itu.int/ITU-D/ict/statistics/at_glance/topptor_1999.html [viewed March 19, 2007].

⁴⁸² ITU, *Top 20 Fixed Telephone Line Operators 1999: Ranked by number of 1999 domestic main telephone lines*, (2001), at http://www.itu.int/ITU-D/ict/statistics/at_glance/ptof99 (Last viewed March 19, 2007)

⁴⁸³ ITU, *Top 20 Telecommunication Operators 1999: Ranked by 1999 outgoing minutes*, (2001), at http://www.itu.int/ITU-D/ict/statistics/at_glance/topptoi_1999.html (Last viewed March 19, 2007)

⁴⁸⁴ OECD (1999), *Id. Cit. Supra* 339, 79; see also Says Philip Peters, Vice President of the Lexington Institute in Virginia and a telecom expert, "Cofetel bought the idea that high interconnection charges are

need to be evaluated within the context of the country's lagging development. Information about *grupos* in Mexico in Chapter III also show that América Móvil which owns Telcel, has been significantly increasing its value on stock exchanges after market liberalization.

Raised levels of productivity in Mexico are not impressive when compared to results among OECD countries, and furthermore, can partially be explained by the choice to regulate Telmex (since 1990) through a price-cap mechanism. The price cap regulatory mechanism creates an incentive for incumbents to cut costs, since they cannot raise prices over a cap to increase profits⁴⁸⁵. However, as Noll points out, since the regulator cannot adequately estimate future industrial productivity, surges in productivity--as was the case of the telecommunications sector from the mid-1990s to early 2000s--can lead to a situation in which the incumbent is "a de facto unregulated monopolist, earning monopoly profits and finding that the price cap no longer constrains its pricing behaviour."⁴⁸⁶ Furthermore, the price cap is reviewed in Mexico every 4 years, leading to a "[...] regulatory lag" or a period during which, if the firm cuts costs, it can keep the savings as long as the regulator chooses not to audit its costs⁴⁸⁷.

needed to cover Telmex's investments in phone network expansion, but the money all went to Telmex general revenues. There was no segregated fund, much less an accounting of expenditures."

⁴⁸⁵ As Noll explains, in price-cap regulation, the regulator determines an initial price index (PI) and estimates future increases in productivity within the industry (X), and then adjusts the PI by subtracting X. Average annual price changes cannot exceed the price cap, which is represented as (PI-X). Roger G. Noll, "Telecommunications Reform in Developing Countries" in *Economic Policy Reform: The Second Stage*, ed. Anne O. Krueger, (The University of Chicago Press, 2002): 218-219

⁴⁸⁶ Roger G. Noll, (2002), *Id. Cit. Supra* 485, 218

⁴⁸⁷ Roger G. Noll, (2002), *Id. Cit. Supra* 485, 219

If we consider the incentives for Telmex, which then and now represented an overwhelming market share in local and long distance services, Mexico's productivity rates could well respond to the incentive structure, which led Telmex to further seek to cut costs and sustain highly profitable monopoly rents, particularly when faced by initial competition. In this sense, increasing the answer seizure ratio is also a form of lowering costs for a carrier, who otherwise is burdened with the cost of trying to complete calls without actually being able to charge for a service. What the productivity rates tell us is that the incumbent has become very efficient at cutting costs, while maintaining a minimal level of growth in lines, which by no measure is impressive. Furthermore, Telmex had obligations in its Concession Title to improve service quality ratios by 2000, in which technological efficiencies dropped costs; which once again, brings to light that the 1990 Modified Concession Title is a significant regulatory governance structure in the market.

This section also reviewed dysfunctions in sector performance in terms of infrastructure development and access to services. Measurements in terms of (a) number of lines, mobile users or pathways per 100 persons, (b) rural telephony development by percentage of rural population with access to services, and (c) service pricing for commercial and residential users, all show Mexico lagging behind as the last or among the last countries within the OECD members; and within Latin America, Mexico maintains a mediocre standing after more than 15 years of reform, often

falling behind Argentina, Chile, Colombia and Brazil, which are comparable economies in the region.

This information would lead to conclude that although institutional reform has introduced competition, and telecommunications companies (particularly Telmex) have improved their productivity, the liberalization of competition is not leading to significant development improvements in access to services, nor increasing Mexico's competitiveness in relation to other OECD and Latin American countries. As Noll points out, "performance of telecommunications entities has improved almost everywhere, regardless of whether reforms were undertaken², but noting that "improvements have been greater for reformed companies."⁴⁸⁸" In light of this general acknowledgement, a raise in teledensity would not be a sufficient measure of development unless those increases are resolving digital divides within the country and raising the country's competitiveness vis-à-vis developed and developing economies. In other words, the privatization and liberalization policies which led to establishing a market and allowing for increased competition have not improved welfare statistics for end users in a competitive manner. Nor have they allowed the country to leapfrog the digital divide between developed and developing nations, as achieved by other developing countries such as Hong Kong and South Korea in the same period.

⁴⁸⁸ Roger G. Noll, (2002), *Id. Cit. Supra* 485, 199-200

Significant breakthroughs in mobile service pricing in Mexico, even by comparison with other OECD countries, as well as fast rising mobile user penetration rates, can by contrast be explained by a sector in which there has been competition and a diversity of providers since 1990. The mobile service sector is also the focus of impressive technological advances that make mobile phone services the cheapest way to access low-income users in the country. Considering Mexico's low line per 100 persons ratio, mobile services are well on their way to becoming the means to tap into an underdeveloped market, for incumbent and entrants alike. This is an example of a sector in which the costs of development have been cut for all competitors. The evident regulatory challenge is management of future spectrum allocation and uses.

VIII. THE INSTITUTIONAL MATRIX OF THE COMMUNICATIONS CONVERGENCE REFORM (2006)

This chapter contains the case study related to the *Decree to reform, add, and derogate diverse norms of the Federal Telecommunications Law and the Federal Radio and Television Law* approved by the Mexican Federal Congress in early 2006 (referred to as the “2006 Convergence Reform”; also known in the media as the “Televisa Law”).

This chapter explains the reform as a consequence of:

(1) incremental technological change that is (a) pushing the deployment of convergent communications networks (voice, internet, audio, and video); (b) changing the dynamics of economies of scale in television and telecommunications industries; and hence (c) provoking a worldwide reform of telecommunications regulatory designs; and

(2) a rent-seeking legislative system of government in an election year, at which time there was a real possibility of Executive power being taken by a populist left-wing candidate who promised to implement radical policies of wealth distribution.

This is the second case study under the institutional endowment of “a rent-seeking Legislative system.” The case study in Chapter VII addressed the liberalization reform of the telecommunications market and subsequent difficulties in enforcing market regulation. Moreover, it shows that efforts to improve the regulatory capacity of

Cofetel and enforcement capacity were blocked, especially in the Legislature. This second study shows a variation in which a legislative reform is carried out under the same institutional endowment. Under the guise of liberalization and technological advance, and in keeping with earlier results, this new law seeks to extend the monopoly rights over broadband spectrum of existing television companies, and secure the regulatory capture of the Board of Commissioners of Cofetel. Both case studies show the mobilization of clientelistic coalitions within the rent-seeking legislative system to protect existing selective property rights.

A. INCREMENTAL TECHNOLOGICAL CHANGE: GLOBAL TRENDS IN BROADBAND INFORMATION AND COMMUNICATIONS TECHNOLOGIES

During the period in which Mexico was carrying out privatization and liberalization reform, the telecommunications sector at a global level began to experience a technological revolution. This section explains the technological advances, which generated a worldwide demand for new regulatory governance and incentive structures that would allow increased economic performance in broadband wireless services. In keeping with North's institutional theories⁴⁸⁹, these technological changes exert pressure to adapt the institutional matrix governing the telecommunications sector in order for economic entrepreneurs to continue benefiting from technological change by establishing institutional structures that protect their existing property rights. As in other periods of reform, institutional choices for reform would be dependant on the dominant institutional matrix in force.

⁴⁸⁹ See North (1990) at *Supra Cit.* 3

1. Next generation networks (“NGN”) or the convergence of communications networks made possible by an evolution of IP and digital technologies

Current technological advances are oriented towards integrating formerly separate single-business service networks into multiservice networks. These new networks are known as “next generation networks” (“NGN”) because they use rapidly advancing digital technologies based on internet Protocol⁴⁹⁰ (“IP”). Through IP-based technologies, diverse services such as voice, data, audio, and video--traditionally offered by separate networks or providers, such as the public switched telephone network (PSTN), internet service providers (ISPs); or cable, satellite or open air

⁴⁹⁰ Definition of Internet Protocol:

“The Internet Protocol (IP) is the method or protocol by which data is sent from one computer to another on the Internet. Each computer (known as a host) on the Internet has at least one IP address that uniquely identifies it from all other computers on the Internet. When you send or receive data (for example, an e-mail note or a Web page), the message gets divided into little chunks called packets. Each of these packets contains both the sender's Internet address and the receiver's address. Any packet is sent first to a gateway computer that understands a small part of the Internet. The gateway computer reads the destination address and forwards the packet to an adjacent gateway that in turn reads the destination address and so forth across the Internet until one gateway recognizes the packet as belonging to a computer within its immediate neighborhood or domain. That gateway then forwards the packet directly to the computer whose address is specified.

Because a message is divided into a number of packets, each packet can, if necessary, be sent by a different route across the Internet. Packets can arrive in a different order than the order they were sent in. The Internet Protocol just delivers them. It's up to another protocol, the Transmission Control Protocol (TCP) to put them back in the right order.

IP is a connectionless protocol, which means that there is no continuing connection between the end points that are communicating. Each packet that travels through the Internet is treated as an independent unit of data without any relation to any other unit of data. (The reason the packets do get put in the right order is because of TCP, the connection-oriented protocol that keeps track of the packet sequence in a message.) In the Open Systems Interconnection (OSI) communication model, IP is in layer 3, the Networking Layer.

The most widely used version of IP today is Internet Protocol Version 4 (IPv4). However, IP Version 6 (IPv6) is also beginning to be supported. IPv6 provides for much longer addresses and therefore for the possibility of many more Internet users. IPv6 includes the capabilities of IPv4 and any server that can support IPv6 packets can also support IPv4 packets. “

Whatis?.com: The leading IT encyclopedia and learning center, <http://whatis.techtarget.com/wsearchResults/0,,sid9,00.html?query=internet+protocol>, Definition last updated Nov. 22, 2005; (Website visited Nov. 10, 2006)

spectrum broadcasters--can now be transmitted over any network, or offered by any provider using a variety of networks, access applications, and terminal equipment.

Next-generation services are also known as “broadband services” because the simultaneous provision of different services by one network or one provider requires greater transmission capacity from the networks, that is, higher bandwidth capacity. Next-generation or broadband services are also currently referred to as “triple-play” services because they imply the provision of (1) telecommunications, (2) internet, and (3) radio and television broadcast services (as currently transmitted and received) over one network or by one provider. At a most basic level, for example, consumers will be able to choose to answer the telephone through their television, check email and surf the internet by cell phone, or receive video programming or live video streams from callers on their kitchen line phone. These, moreover, are the most basic new applications that will be offered, since next-generation services imply entirely new services that are not limited to triple-play scenarios. The merging of technologies will allow new experiences in communication and interaction at a distance. They will allow communications to be customized to the preferences and requirements of each consumer, and will also allow things, and not only people, to freely communicate with each other.

The International Telecommunications Union (ITU) highlights that the technological switchover to packet-transmission technologies will change the way the world communicates, since communication will not only be between people, but between

people and things and between things and things. This will be made possible by the intersection of convergent communications technologies with nanotechnologies, material technologies, and other new technologies that will allow information and communication networks, equipment and applications to become ubiquitous to our everyday experience of living. All sorts of communications and content will be available to people and things anywhere they go. Discussing ubiquitous networks, the ITU asserts:

“Today, with mobile internet services and the deployment of higher-speed mobile networks such as 3G (IMT-2000), users can connect from almost *any location*. They can also access networks at *any time*, through *always-on* connectivity (wired and wireless broadband). The next step in this technological revolution is to connect inanimate objects and things to communications networks. This is the vision of a truly ubiquitous network-
“*anytime, anywhere, by anyone and anything.*”⁴⁹¹

Broadband services are expected to radically increase social and economic interactivity and business innovation, and due to their expected effect on human interaction are considered the “next level of economic value creation in many areas of commerce.”⁴⁹² The anticipated economic return from broadband products and services

⁴⁹¹ ITU, *Internet Report: The Internet of Things*, November 2005

⁴⁹² “Applying computer and communication technologies to enhance interactivity is fundamentally different from using them for consistent and efficient replication of a preprogrammed process. To use these technologies to enhance interactivity is to support ongoing *reconception* – making a thing different and *better* each time you return to it. The power of reconception is magnified when interactivity is qualitatively rich [...], and when it can occur at a distance and draw on resources that might otherwise be unavailable [...]. Collaboration at a distance becomes more similar to collaboration

is pushing the boundaries of technological and regulatory change in the communications sectors (telecommunications and broadcasting).

A recent RAND study states that countries best capable of acquiring and putting to use 16 new technology applications⁴⁹³ of what they term the “global technology revolution”--including biotechnology, nanotechnology, materials technology, and information technology--will be best suited to maintain or achieve high economic, political, and social development standards in the next 15 years. Four of those technologies are information- and communications-related: rural wireless communications; communications devices for ubiquitous information access; ubiquitous radio frequency identification (RFID) tagging of products and individuals; and wearable computers; all of which will require ubiquitous broadband access and efficient spectrum management. The United States, Canada, Germany, South Korea, Japan, Australia, and Israel are among the countries that RAND identifies as the most “scientifically advanced” in terms of being capable of securing these technologies⁴⁹⁴.

in person. This kind of collaboration underpins the most important forms of today’s knowledge work, and it is arguably the key to the next level of economic value creation in many areas of commerce.” Robert D. Austin and Stephen P. Bradley eds., *The Broadband Explosion: Leading Thinkers on the Promise of a Truly Interactive World*, (Harvard Business School Press, 2005), 10

⁴⁹³ The 16 technology applications that according to RAND compose the “global technology revolution” are: (1) Cheap solar energy; (2) Rural wireless communications; (3) Communication devices for ubiquitous information access; (4) Genetically modified (GM) crops; (5) Rapid bioassays; (6) Filters and catalysts; (7) Targeted drug delivery; (8) Cheap autonomous housing; (9) Green manufacturing; (10) Ubiquitous radio frequency identification (RFID) tagging of commercial products and individuals; (11) Hybrid vehicles; (12) Pervasive sensors; (13) Tissue engineering; (14) Improved diagnostic and surgical methods; (15) Wearable computers, and (16) Quantum cryptography. Richard Silbergliitt et al., *The Global Technology Revolution 2020: Bio/Nano/Materials/Information Trends, Drivers, Barriers, and Social Implications, Executive Summary, MG-475*, RAND (2006), 2-3

⁴⁹⁴ The report reviews and assigns 29 countries within four categories: scientifically advanced, scientifically proficient, scientifically developing, and scientifically lagging. RAND (2006), *Id. Cit. Supra* 493, 5

Mexico was ranked by RAND as a “scientifically developing” nation with a low capacity to acquire nine of the 16 technology applications--RFID tagging being the only information and communications technology that is predicted will be readily available in the country--by the year 2020⁴⁹⁵.

Many nations have been working on adapting their traditional networks, also referred to as “legacy” networks, to broadband requirements in order to ride the next wave of economic bonanza that will be brought on by the information and communication technology sectors. After a slump in telecommunications revenues during 2000-2002, telecommunications revenues in OECD countries showed a tendency to increase in 2003⁴⁹⁶. However, trends in revenue show a change in distribution consistent with a race to increase broadband capacity. Until recently, long-distance minutes accounted for the lion’s share of telecommunications revenue; today, however, even with a worldwide increase in long-distance minutes, service revenue in this market is falling considerably. This change is explained by, among other things: (a) increased competition between long-distance services over recent decades, which brought prices down closer to costs; (b) the overall comparative increase of mobile service revenues;

⁴⁹⁵ Mexico is expected to be in a position to attain the following technologies: (1) Cheap solar energy; (2) Rural wireless communications; (4) Genetically modified (GM) crops; (5) Rapid bioassays; (6) Filters and catalysts; (8) Cheap autonomous housing; (9) Green manufacturing; (10) Ubiquitous radio frequency identification (RFID) tagging of commercial products and individuals; and (11) Hybrid vehicles. However, according to the study, technologies that will provide the most advanced capabilities for economic development and quality of life, and that will only be significantly attainable by scientifically advanced nations, are: (3) Communication devices for ubiquitous information access; (7) Targeted drug delivery; (12) Pervasive sensors; (13) Tissue engineering; (14) Improved diagnostic and surgical methods; (15) Wearable computers; and (16) Quantum cryptography. RAND (2006), *Id. Cit. Supra* 493, 5-6

⁴⁹⁶ OECD (2005), *Op. Cit. Supra* 437, 68-70

and (c) increased use of substitute services such as voice over internet protocol or “VoIP” and email⁴⁹⁷. There has likewise been a decline in fixed line revenues, and a significant increase in mobile service and broadband access revenues⁴⁹⁸. In 2003, seven OECD countries derived more than 50% of their telecommunications sector revenue from mobile services, and another eight countries derived more than 40% of their telecommunications revenue from the same source⁴⁹⁹. In 2003, Mexico derived 35.9% of total telecommunications revenue from mobile services, which is a significant increase from 8.5% of revenue in 1998.⁵⁰⁰ Although telecommunications employment levels in the OECD countries are still low by comparison to former years, mobile services as a percentage of total telecommunications employment have been growing at an average of 10% per year since 2000, moving from 5% in 1993 to 17% in 2003⁵⁰¹.

The global technology revolution is pushing a feeling of necessity, in both developed and developing nations, to generate the broadband network capacity that can handle what the ITU calls “ubiquitous networks.” Governments are concerned that an inopportune entrance into next-generation communication services could diminish the world economic position of their countries or increase the digital divide⁵⁰² within their

⁴⁹⁷ OECD (2005), *Id. Cit. Supra* 437, 73-74

⁴⁹⁸ OECD (2005), *Id. Cit. Supra* 437, 68-70

⁴⁹⁹ OECD (2005), *Id. Cit. Supra* 437, 70-71

⁵⁰⁰ OECD (2005), *Id. Cit. Supra* 437, 80

⁵⁰¹ By comparison, fixed-line employment as a total percentage of OECD telecommunications employment has dropped 6.6% per year from 2000 to 2003. OECD (2005), *Id. Cit. Supra* 437, 246

⁵⁰² “[...] the lack of broadband access creates a chasm increasingly known as the ‘digital divide.’ When broadband access is limited to only a few, class distinctions widen as one group of citizens has at its

societies and with other developed countries. An opportune entrance, on the other hand, could remedy the digital divide and secure global economic positions.

2. *Current policy and regulatory trends for NGN deployment*

Regulatory reforms are carried out with the intent of making an industry prosper. In the past decade, due to technological changes, developed nations have subjected telecommunications regulation to scrutiny and reform. Deployment of NGN requires concerted public and private regulatory and policy actions because adapting legacy networks to broadband requirements is technically feasible but often problematic. In most cases, it is costly. The technology for building new core fiber optics broadband networks is readily available but once again costly. There is the added problem of spectrum scarcity: a lack of spectrum availability limits deployment of large scale ubiquitous networks. It also forces regulators to reorganize current frequency licenses, and allocate licenses according to more efficient spectrum management strategies, as well as to promote research and development that generates technologies capable of making more efficient use of spectrum for ubiquitous uses. Concerted regulatory and policy actions are also required because convergence increases the economies of scope of various networks, affecting existing market structures, competition, regulatory regimes, and new services and products⁵⁰³. Regulation of converging

fingertips access to services and information that others lack.” James Harry Green, *The Irwin Handbook of Telecommunications*, (1st edition 1989 by Pantel, Inc.), Mc Graw-Hill, Fifth Edition, (2006), 125

⁵⁰³ Convergence is “ [...] the process by which, due to underlying technological changes, economies of scope increase to the point where two or more products or services which were previously produced by separate firms are produced within the same firm. In other words, at root convergence is related to the effect of *technological changes on economies of scope*.

[...]

telecommunications, broadcasting, and internet markets needs to be revised to maximize the commercial opportunities of convergence while leveling the playing field between diverse agents from distinct markets that will now compete in the provision of equivalent broadband services.

In many ways, NGN regulatory issues⁵⁰⁴ are similar to those that have been traditionally faced by the telecommunications sector. These include: (1) maintaining fair, open, and competitive markets; (2) encouraging innovation and long-term investment; (3) adopting adequate telecommunications service policies, such as interconnection, unbundling and access to network features, and universal service obligations; (4) protecting consumers (including privacy and fraud safeguards, emergency services, law enforcement requirements, and network reliability); and (5) managing spectrum. There are also new policy and regulatory challenges concerning

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- First, convergence changes *market structures*. Existing firms in one of the converging markets, in order to compete effectively, seek to enter the other markets, through de novo investment or through mergers. One of the effects of convergence is, therefore, significant new investment and/or a significant wave of mergers. New firms entering the industry seek to do so in many or all of the converged markets.
 - Second, convergence can lead to changes in the *level of competition* in the converging sectors. When barriers to entry are low, convergence could be expected to enhance the overall level of competition, as firms [of] each of the converging markets are potential entrants into the other markets.
 - Third, convergence places pressure on existing *regulatory regimes*. In particular, convergence places pressure on line-of-business restrictions; highlights differences in regulation in the converging sectors; and leads to pressure for changes in the structure of the regulatory institutions that oversee the converging industries.
 - Fourth, convergence typically leads to *new products and services*, including products that combine features of existing products of the converging industries and entirely new products.”

Darby Biggar, “Background Note: on Regulation and Competition Issues in Broadcasting in the Light of Convergence, OECD CLP Roundtable”, *OECD Journal of Competition Law and Policy*, (Oct 1998): 33-34

⁵⁰⁴ OECD Working Party on Telecommunications and Information Services Policies, *Next Generation Network Deployment in OECD Countries*, DSTI/ICCP/TISP(2004)4/FINAL, (2005): 5

how to adequately regulate, deregulate, or avoid regulating emerging markets and technologies; how to allocate the commercial and public uses of spectrum; and how to regulate “content” of transmissions in a convergent communications environment.

Table 21. Policy issues or challenges of next generation networks	
Category of policy	Items
Overall policy challenges	Maintaining the open, fair, and competitive market
	Encouraging innovation and long-term investment, and removing barriers to the development of emerging markets
	Ensuring proportionality of regulation including forbearance
	Consumer protection
	Promoting partnerships or strategic alliances
	Different regulatory frameworks of ITC applications/services
Policy issues for open, fair and competitive markets (control points)	Identifying the controls points related to: - Network capabilities - Elementary services - User access capabilities - Individual user information, etc.
	The scope of competition policy will be expanded from competition among networks to services
	Allowing nascent markets to develop, while ensuring that competition is able to develop
Policy issues for telecommunication Services[...] provided over the NGN	Classification of new services over the NGN
	The division into local, long-distance, and international calls
	Location independence and emergency access
	Interconnection: the openness of services and networks to third party suppliers
	Access to NGN services and systems
	Future definition of Universal Service Obligations (USO)
	Numbering, Naming and Addressing (NNA)
Policy issues for consumer protection, privacy and security	Consumer protection: privacy and content issues
	Security and network resilience
	Lawful intercept
Other policy issues	Possible issues arising from extraterritorial service providers
	Intellectual property rights
	Efficient spectrum management
	Technical development and standardization
Source: OECD (2005) ⁵⁰⁵	

⁵⁰⁵ OECD, *Next Generation Network Deployment*, (2005), *Id. Cit. Supra* 504: 5

The ITU and OECD have both concluded that maintaining a fair, open, and competitive market will secure the best development outcome for NGN development⁵⁰⁶. Therefore, one pressing regulatory concern is related to “control points” of NGN deployment. Control points are those characteristics of NGNs that have the potential to become bottlenecks or sources of market dominance. Control points are related to how NGNs are being built. As mentioned previously, NGN deployment requires migration from circuit-switched to packet-routed networks. In order to achieve this migration, NGNs are currently being constructed according to a three layer architecture: (1) a “service” layer, which is the IP application network which provides service to customers, and which allows the Internet Protocol to become “a common unified network layer⁵⁰⁷” or common service application that unites transmission and reception across all networks; (2) a base or “network” layer, which is the physical infrastructure that will carry the broadband signal (generally a fiber-optic core network); and (3) a “control layer” that links the service layer to the network layer by managing both customer connections from any access technology (commonly an adapted legacy network)⁵⁰⁸ to the service layer and communication between the service layer and the high-speed core or backhaul network. The control

⁵⁰⁶ See Christian Wey, Pio Baake, and Sven Heitzler, “Ruling the New and Emerging Markets in the Telecommunication Sector Challenges: The Emergence of Next Generation Networks”, *Background Paper for the ITU Workshop, “What Rules for IP-Enabled NGNs?”*, (March 23-24, 2006), Document: NGN/02 ITU, (15 April 2006); and OECD, Next Generation Network Deployment (2005), *Id. Cit. Supra* 504

⁵⁰⁷ Christian Wey et al., ITU, (15 April 2006), *Id. Cit. Supra* 506: 7

⁵⁰⁸ Broadband “access” technologies are wired or wireless. Each existing access technology has various advantages and disadvantages with respect to becoming a broadband access network. By way of generalization, wireless broadband networks are cheaper to deploy and adapt; however, spectrum availability is limited. Wired networks have the potential for the highest-quality broadband capacity; but their deployment or adaptation is costly, which makes them commercially unattractive. Darly Biggar, (Oct 1998), *Op. Cit. Supra* 503, 26-27

layer also manages network functionalities such as numbering, quality of service distinctions, billing and customer information, and service specifications per client⁵⁰⁹.

Implicit in the layering system is the possibility of separating (1) the carrier from the service provider, (2) the service provider or the carrier from the access technology, (3) terminal equipment from the carrier network, and (4) network IP management applications from other NGN features. The control layer will allow services to become customized to exact client specifications through diverse uses of these NGN features or functionalities. The personalization of communications services is the business model of the future, likely leading to ubiquitous global communication systems that provide a personalized experience of interaction.

In order for such customized business models to exist, regulators will have to dissolve potential control points by deciding when and whether mandatory unbundling of NGN network functionalities will help or hinder NGN development. Control points are directly related to the following NGN functionalities⁵¹⁰:

- Network capabilities (access, interconnection, termination, quality of service, routing and signaling capabilities);
- Elementary services (Minimal quality of interconnection and standardized access among providers and carriers);

⁵⁰⁹ Christian Wey et al., ITU, (15 April 2006), *Id. Cit. Supra* 506, 8

⁵¹⁰ Christian Wey et al., ITU, (15 April 2006), *Id. Cit. Supra* 506, 12-13

- Service access (restrictions on types of services available both to customers and providers);
- Control and user information;
- Last-mile access (unbundling of last-mile access points is an old but still relevant issue).

Legacy network carriers oppose unbundling because they claim to carry the greater cost of investing in NGN adaptation; but they also oppose it because they hold an advantage in integrating all the NGN layers vertically to create control points of access to essential resources for new competitors. If carriers succeed in vertically integrating control points through their infrastructure layers, they will limit NGN development in an environment of fair, open, and competitive markets, as well as of business innovation.

The role of the regulator for NGN deployment has been described in the following manner:

“[...] the optimal regulator approach lies somewhere in the middle where market forces can unfold while the threat of regulatory intervention remains a viable option, which effectively constraints anticompetitive re-monopolizing of telecommunications markets. Thus, regulators and policy makers are facing a delicate and complex task in telecommunications markets. They have to keep

the threat of regulation and at the same time they should abstain from premature intervention.⁵¹¹”

The regulator itself has become a subject of convergence reform. Some countries, including the United Kingdom and Australia, have merged their formerly separate broadcasting and telecommunications regulators in order to facilitate a holistic approach to “convergence” or NGN deployment.

The regulator also holds a key role in managing spectrum allocation. Current regulatory trends advocate a reorganization of spectrum licenses according to greatest efficiency in allocation. The ITU defined the problem of efficiency in the following way:

“In managing spectrum, regulators are concerned with two forms of efficiency: technical and economic, which are pursued within the overall context of public policy.

The objective of technical efficiency principally relates to achieving the most intensive use possible of available spectrum within acceptable interference limits. It also seeks to promote the development and introduction of spectrum-saving technologies. Economic efficiency, on the other hand, involves ensuring that spectrum is allocated and assigned to uses that derive the highest economic value from it. Overall, the regulatory process of ensuring both

⁵¹¹ Christian Wey et al., ITU, (15 April 2006), *Id. Cit. Supra* 506, 2

technical and economic efficiency has to be sufficiently flexible and responsive to adapt to changes in market valuations and technologies.

Public policy goals also play an overriding role in determining spectrum management policies. Efficiencies may have to be sacrificed in order to safeguard the provision of certain public services such as defense, safety and public broadcasting services. In addition, the pursuit of technical and economic efficiencies are [sic] also constrained by international obligations related to spectrum use⁵¹².”

In order to increase spectrum efficiency, the US recently liberated the frequencies of the Department of Defense and auctioned the spectrum for commercial use⁵¹³. Likewise, regulators in many parts of the world are pushing for a digital television switchover that would allow public broadcasters to move from high-power to low-power frequencies, thereby freeing the former for auction or bidding for new NGN commercial uses⁵¹⁴. To facilitate a digital television switchover, regulators grant

⁵¹² ITU, *New Initiatives Programme: Radio Spectrum Management for a Converging World*, (2004), 16

⁵¹³ FCC, *Auction of Advanced Wireless Services Licences*, Public Notice: DA 06-1525, 28 July 2006.

⁵¹⁴ For example, starting a decade ago, the USA, the UK, and Australia have taken strong regulatory action to ensure a digital television switchover. Digital television is the broadcast transmission of content by way of a digital signal. Digital television operates at lower power than analog television; it is therefore possible to shift broadcasting uses towards low-power VHF channels. Digital television also allows a more efficient use of spectrum, because once digital switchover is complete, broadcasters may opt to liberate a certain amount of spectrum to provide auxiliary services such as datacasting (simultaneous bidirectional data transmission over broadcast channels). Digital television is further convenient for the broadcaster since it lowers operating costs. See FCC. *Digital Television. Implementation Plan*. <http://www.dtv.gov/> [Viewed 21 August 2006]; see OFCOM. *Spectrum Framework Review: Implementation Plan*. <http://www.ofcom.org.uk/radiocomms/sfr/> o DigitalUK <http://www.digitaluk.co.uk/> [Viewed 21 August 2006]; Ver Australian Broadcasting Authority.

temporary use of a parallel channel to broadcasters in order to begin the simultaneous transmission of both analog and digital signals and a gradual switchover from the analog signal. A gradual transition is required because digital television requires a change in user terminal equipment to a set capable of receiving the digital signal. Once switchover is complete, the high-power frequencies are returned to the State, for future auctioning towards commercial uses⁵¹⁵. More radical proposals for spectrum management suggest spectrum leasing, spectrum sharing, and open-access spectrum (whereby the concept of spectrum licenses shifts towards a model of nonexclusive spectrum use by licensees). In the case of spectrum leasing, the licensee who wins the use of spectrum frequencies is able to rent spectrum use out to other authorized service providers, since in theory, they could be more efficient than the regulator at allocating spectrum according to market demand. In the case of spectrum sharing or open-access spectrum, spectrum frequencies are assigned in a dedicated way to some users and the same frequencies are assigned on a temporary, per availability, or technically restricted (non-interference) basis to other users⁵¹⁶. All these solutions pose legal and technical challenges; however, these are some of the options being discussed and implemented as part of a more flexible spectrum-regulatory framework that will allow NGN services to prosper. In all these cases, the State is managing spectrum reallocation.

Conversion Scheme. <http://www.aba.gov.au/tv/licence/digitalTV/legislation/conversion.shtml> [Viewed 21 August 2006].

⁵¹⁵ See ITU, *DTTB Handbook: Digital Terrestrial Television broadcasting in the UHF/VHF bands* (Ed. 2002); ITU, *Deployment of IMT-2000 Systems* (Ed. 2003) and *Migration to IMT-2000 Systems -- Supplement 1 to the Handbook on Deployment of IMT-2000 Systems* (2005); and ITU, *Radio Spectrum Management* (2004), *Op. Cit. Supra* 512.

⁵¹⁶ ITU (2004), *Id. Cit. Supra* 512, 17-37

3. *Regulatory advances towards convergence (2004-2005)*

While debate over Cofetel's insufficiency as a regulator plowed forward up to 2006, industry interests advanced in a different direction with the SCT over two initiatives regarding network service convergence.

The first case relates to spectrum management and telecommunications service provision by public broadcasters. Under the 1995 FTL, public broadcasting (as distinct from pay radio and television services, which are provided by a telecommunications network) was governed by the 1960 Television and Radio Law and therefore remained outside the scope of the Cofetel as an activity regulated by the SCT⁵¹⁷. In July 2004, the Digital Terrestrial Television Accord ("DTT Accord") came into force in Mexico⁵¹⁸. The DTT was issued by the SCT to establish the A/53 ATSC Standard as the DTT Standard for Mexico. This standard would allow digital terrestrial television to evolve using the same 6MHz bandwidth channels currently used for analog television. The DTT Accord also states that signal transmission in Mexico must be High Definition Television (HDTV) or Enhanced Definition Television (EDTV)⁵¹⁹.

⁵¹⁷ Article 13, 1995 FTL.

⁵¹⁸ S.C.T., *Acuerdo por el que se Adopta el Estándar Tecnológico de Televisión Digital Terrestre y se Establece la Política para la Transición a la Televisión Digital Terrestre en México*, D.O. 2 July 2004 ("2004 DTT Accord")

⁵¹⁹

"According to the recommendations issued by the ITU, the following terms shall mean:
HDTV: Format 16:9 image quality comparable to movie theatre, resolution 1920 X 1080e
EDTV: Format 16:9 quality comparable to HDTV with resolution 1280 x 720p.
Format 16:9 ó 4:3 with resolution 704 x 480p, or 640 X 480p, similar to DVD.
SDTV: Format 16:9 ó 4:3 with resolution 704 x 480e ó 640 X 480e, similar to NTSC [similar to analogue signal].
e = interlaced line fields
p = progressive frames"

References to Standard Definition Television (SDTV) imply a digital signal comparable in quality to the analog signal. Both HDTV and EDTV provide a signal with display resolution at least six times better than analog transmissions, and although HDTV and EDTV often use the entire 6MHz channel for best transmission quality, efficiencies are still available that would allow subchannels or datacasting channels to be available over the same channel.

According to the DTT Accord, digital switchover in Mexico would take place in six triannual (revisable) periods that started in July 2004 and will end December 2021⁵²⁰.

S.C.T., § 2 Modelo de la TDT, 2004 DTT Accord, *Id. Cit. Supra* 518

⁵²⁰ Tri-annual periods of transition:

“First period (from entry into force of the Accord to 31 December 2006).

México, D.F., Monterrey, N.L., Guadalajara, Jal., Tijuana, B.C., Mexicali, B.C., Cd. Juárez, Chih., Nuevo Laredo, Tamps., Matamoros, Tamps. y Reynosa, Tamps., with at least the presence of two commercial digital signals.

“Second period (1 January 2007 to 31 December 2009).

Digital replication of commercial signals from first Period.

Presence of commercial digital signals in coverage zones with 1.5 million inhabitants and up.

“Third period (1 January 2010 to 31 December 2012).

Digital replication of commercial signals from Second Period.

Presence of non-commercial digital signals in coverage zones with 1 million inhabitants and up.

“Fourth period (1 January 2013 to 31 December 2015).

Digital replication of commercial signals from Third Period.

Presence of non-commercial digital signals in coverage zones with 1 million inhabitants and up.

Presence of commercial digital signals in coverage zones with 500,000 inhabitants and up.

“Fifth period (1 January 2016 to 31 December 2018).

Digital replication of commercial signals from Fourth Period.

Presence of non-commercial digital signals in coverage zones with 500,000 inhabitants and up.

Presence of commercial digital signals in coverage zones with 150,000 inhabitants and up.

Sixth period (1 January 2019 to 31 December 2021).

Digital replication of all analog channels, in all coverage zones served by analog television.”

§ 4. *Triannual Periods of the Process of Transition*, 2004 DTT Accord, *Id. Cit. Supra* 518

Given this time period, television broadcasters who were committed to investing in DTT could request and be granted an extension on their current Concession Titles until the end of the switchover phases⁵²¹. The broadcasting concessionaires belonging to Grupo Televisa, S.A. de C.V. and Grupo Azteca, S.A. de C.V. did so, and received extensions on their original Concession Titles until 2021.

The DTT Accord provided public commercial broadcasters with two other switchover advantages:

1) Initially, transmissions on the parallel channels granted to concessionaires for digital switchover must at least comply with Standard Definition Television (SDTV). However, by the end of the third period (2010-2012), 20% of all transmission time must be either HDTV or EDTV, with at least one hour of that percentage to be transmitted during peak audience times⁵²². This limited the quality of transmissions that public broadcasters were initially obliged to transmit to SDTV quality, and implied that in using SDTV transmission quality, broadcasters were not using the entire 6MHz channel for television transmission in the first years of switchover.

2) Public broadcasters authorized under the DTT Accord may request to provide telecommunications services on the DTT broadcasting channels pursuant to the 1995 FTL, on the understanding that DTT signal transmission on those channels may not be interrupted and that authorization to do so must be requested pursuant to the 1995

⁵²¹ §6. *Necessary modifications to concessions and permits*, 2004 DTT Accord, *Id. Cit. Supra* 518

⁵²² §2. *Modelo de la TDT*, 2004 DTT Accord, *Id. Cit. Supra* 518

FTL.⁵²³. Nonetheless, the DTT Accord was constitutionally problematic, since this administrative ruling attempted to modify the intention of a legislative act, the 1995 FTL, by stating that broadcasters could gain special entry into the telecommunications market under terms unequal to those offered other new entrants or others seeking to obtain a spectrum license to provide telecommunications services. In the end, this privilege was blocked by language stating that in order to provide telecommunications services, broadcasters required to obtain a concession title in terms of the 1995 FTL.

The second case relates to telecommunications service provision by cable television companies and began prior to the DTT Accord. The SCT, as line Secretariat of Communications and Transport, is the authority in charge of granting Concession Titles to establish public telecommunications networks. Therefore, the SCT can establish general administrative rules regarding requirements over Concession Titles. On October 7th and December 8th, 2003, the SCT published accords that allowed pay television concessionaires (with cable or wireless networks) to provide bidirectional data transmission services⁵²⁴. On November 17, 2004 and January 5, 2005, the SCT

⁵²³ Under those terms, the concessionaires are obliged to request a new telecommunications concession to provide services under the 1995 FTL and operate a telecommunications network. However, the DTT Accord attempted to bypass spectrum bidding procedures for new entrants established in the 1995 FTL, by stating that the government “may” request payment for the use of broadcasting channels to provide telecommunications services. §2. *Modelo de la TDT*, 2004 DTT Accord, *Id. Cit. Supra* 518

⁵²⁴ S.C.T., *Acuerdo por el que se modifica el Anexo A y se adiciona, según corresponda, el Anexo B o C a los títulos de concesión para instalar, operar y explotar redes públicas de telecomunicaciones que comprenden el servicio de televisión restringida a través de redes cableadas, para incluir el servicio de transmisión bidireccional de datos*, D.O. 7 October 2003; and S.C.T., *Acuerdo por el que se adiciona, según corresponda, el anexo B o C, a los títulos de concesión para instalar, operar y explotar redes públicas de telecomunicaciones que comprenden los servicios de televisión y/o audio restringidos por microondas terrenal a través de bandas de frecuencias del espectro radioeléctrico para uso determinado otorgadas a los concesionarios mediante el título respectivo, para incluir el servicio fijo de transmisión bidireccional de datos*; D.O. 18 December 2003.

published two other accords that granted pay television and audio concessionaires (with cable or wireless networks) the option of modifying their Concession Titles in order to provide local telecommunications services⁵²⁵. These accords were the first to allow pay television companies to provide telecommunications services alongside pay television services. Nonetheless, the SCT did not release the modifications to the Concession Titles to allow interested cable companies to provide local service transmission until after the 2006 Convergence Reform was officially in force.

4. Mexico's broadband capacity (2003-2006)

Access to a telephone is no longer considered a sufficient measure of telecommunications development, and new development measures must consider access to broadband services delivered by next-generation networks.

In 2003, Mexico ranked low (26th out of 28) among OECD countries in broadband⁵²⁶ per household deployment⁵²⁷. That same year, South Korea had achieved a 74%

⁵²⁵ S.C.T., *Acuerdo mediante el cual se adicionan el numeral A.1.3. al acuerdo primero, un segundo párrafo a los acuerdos segundo, tercero, cuarto, quinto y sexto, el anexo C o D, según corresponda, para incluir el Servicio de Transporte de Señales del Servicio Local, y el formato de aviso de inicio de la prestación del Servicio de Transporte de Señales del Servicio Local, al Acuerdo por el que se modifica el Anexo A y se adiciona, según corresponda, el Anexo B o C a los títulos de concesión para instalar, operar y explotar redes públicas de telecomunicaciones que comprenden el servicio de televisión restringida a través de redes cableadas, para incluir el servicio de transmisión bidireccional de datos, publicado el 7 de octubre de 2003*, D.O. 17 November 2004 D.O. 5 January 2005.

⁵²⁶ The OECD report uses the following broadband definition:

“In this report the approach adopted by the FCC is used with some slight modifications. In their first *Inquiry Concerning the Deployment of Advanced Telecommunications*, the FCC defined ‘broadband’ as having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, ‘bandwidth’) in excess of 200 kilobits per second (Kbps) in the last mile. This rate is approximately four times faster than the Internet access received through a standard phone line at 56 Kbps or 64 Kbps. The FCC chose 200 Kbps because, in their view, it is enough to

broadband penetration rate of all households; Hong Kong had a 42% household broadband penetration rate; and the United States a 24% penetration rate.⁵²⁸.

In 2001, Mexico achieved 100% digitalization of telephone plant⁵²⁹, which implies that the transport layer across networks has capacity or near-capacity to provide broadband services; but access networks still require adaptation. Broadband access networks must be deployed to the home or end user either by installing new networks or by adapting legacy networks such as the public switched telephone system, local mobile networks, or pay television networks to broadband service provision.

The pay television market is seen as a future alternative for increasing both teledensity levels and broadband access. From 1995 to 2002, a trend existed in the OECD area for growth of satellite and cable television over households with only terrestrial

provide the most popular forms of broadband – to change Web pages as fast as one can flip through the pages of a book and to transmit full-motion video.

This report raises the threshold, for a service to be considered broadband, in respect to downstream access to 256 Kbps. This is solely because this is the most basic speed being offered by DSL providers in OECD countries. On the other hand the threshold for upstream speeds has had to be lowered. This is because only a small number of the asymmetric digital subscriber line (ADSL) offers, aimed at residential users, exceed 200 Kbps for their upstream connection. The most common upstream speed offered with DSL options aimed at residential users is 128 Kbps. Moreover a large number of basic ADSL options only include upstream access at 64 Kbps.”

see “*Box 1. How Broad is Broadband?*” in OECD, *The Development of Broadband Access in OECD Countries*, DSTI/ICCP/TISP(2001)2/FINAL, 6

⁵²⁷ Pursuant to OECD measurements for overall broadband penetration per households in June 2001, Korea, Canada, Sweden, USA, Netherlands, Austria, Denmark, Belgium, Iceland, Luxembourg, Germany, and Japan were, in that order, the top 12 ranking OECD countries. see “*Table 4. Broadband Status (June 2001)*” in OECD, *Id. Cit. Supra* 526, 14

⁵²⁸ Robert D. Austin and Stephen P. Bradley (2005), *Op. Cit. Supra* 492, 42

⁵²⁹ In 2001, the entire telephone plant achieved 100% digitalization. Cofetel, (with information provided by carriers), *§Porcentaje de Digitalización de la Planta Telefónica*, http://www.cft.gob.mx/wb2/COFETEL/COFE_Digitalizacion_de_la_Planta_Telefonica_1990

television⁵³⁰. For that same year, the average in the OECD (excluding the United States) was 35.8% cable subscribers as a percentage of TVHH (households with televisions); 20.5% satellite antennas as a percentage of TVHH, and 43.6% of TVHH with terrestrial television only⁵³¹. In 2005, ninety-one percent of households in Mexico had a television⁵³². Cable subscribers represented 10.7% as a percentage of TVHH; satellite antennas represented 4.2% as a percentage of TVHH, and 85% TVHH were equipped only with terrestrial television in Mexico⁵³³. These statistics once again place Mexico in a delayed deployment stage of broadband capacity by way of television networks. Furthermore, in order for pay television providers to become telecommunications carriers significant technical upgrades are required. In 2003, 73% of pay television networks were coaxial cable, while only 27% were fiber optics cable networks, which are more easily adapted to broadband transmission⁵³⁴.

⁵³⁰ 1.95% annual increase in households with television (TVHH); 4.25% annual increase in cable subscribers; 12.63% annual increase in home satellite antennas; and a (-) 3.35% decrease in TVHH not relying on cable or satellite. OECD (2005), *Id. Cit. Supra* 437, 217

⁵³¹ The average in OECD countries (with the USA) was 44.7% cable subscribers as a percentage of TVHH; 19.5 satellite antennas as a percentage of TVHH, and 35.7% of TVHH with terrestrial television only. OECD (2005), *Id. Cit. Supra* 437, 218-219; For 2002, Cofetel reported that 18% of households in Mexico subscribed to some sort of pay television (cable or DTH); while the average in Latin American countries for households with pay television services in 2002 was 21%. Cofetel (April 2003), *Op. Cit. Supra* 428, Slide/page 7

⁵³² Cofetel (with information from the 2005 INEGI census), *Porcentaje de Viviendas Particulares Habitadas que disponen de Televisión*, http://www.cft.gob.mx/wb2/COFETEL/COFE_Porcentaje_de_Viviendas_Particulares_Habi_3 [Viewed March 13, 2006].

⁵³³ In 2002, 93.5% of Mexican households had a television (TVHH). OECD (2005), *Id. Cit. Supra* 437, 218-219

⁵³⁴ Cofetel (April 2003), *Op. Cit. Supra* 428, Slide/page 25

Other indicators related to internet use⁵³⁵ and computers per household⁵³⁶ are relevant to understanding Mexico's position in broadband development; all of them rank the country low among leading Latin American countries and developed nations.

Mexico's low broadband penetration is particularly problematic because Mexico's legacy networks, in the aggregate, do not provide universal service and require technological adaptation and investment to be capable for broadband services. The market will push service operators to adapt their networks to consumer requirements; however, once again, the regulatory institutional structures of the sector are not set up to guarantee universal access or widespread telecommunications development to solve the problem of digital divide between Mexican States, between Mexico and developed economies, or even between Mexico and other advanced developing economies.

⁵³⁵ In 2005 Mexico reached 17.4 internet users per 100 inhabitants, which placed the country's internet density levels above Venezuela (8.8 internet users/100 inhabitants), Colombia (10.4 internet users/100 inhabitants), Brazil (12.0 internet users/100 inhabitants), and Peru (16.5 internet users/100 inhabitants) but below comparable economies in the region such as Argentina (17.8 internet users /100 inhabitants), Chile (18 internet users/100 inhabitants), and Uruguay (21 internet users/100 inhabitants). However, in 2005, the entire Latin American region lagged behind countries such as Spain (35.4 internet users/100 inhabitants), Germany (45.4 internet users/100 inhabitants), Italy (48 internet users/100 inhabitants), South Korea (68.4 internet users/100 inhabitants), and USA (63 internet users/100 inhabitants). Cofetel (with information from the ITU), *§Comparativo Internacional de Densidad de Usuarios de Internet (Anual)*, (2005)

http://www.cft.gob.mx/wb2/COFETEL/COFE_Comparativo_internacional_de_densidad_de_usu2
[viewed March 4, 2007]

⁵³⁶ In 2004, Mexico had 10.7 computers per 100 inhabitants same as Brazil, which placed the country's computer density levels above Colombia (6.7 computers/100 inhabitants), Argentina (8 computers/100 inhabitants), Venezuela (8.2 computers/100 inhabitants), and Peru (9.8 computers/100 inhabitants) but below comparable economies in the region such as Chile (13.9 computers/100 inhabitants), and Uruguay (13.3 computers/100 inhabitants). In 2004, the entire Latin American region lagged behind countries such as Spain (26.6 computers/100 inhabitants), Italy (31.7 computers/100 inhabitants), South Korea (54.5 computers/100 inhabitants), Germany (56.1 computers/100 inhabitants), and USA (74.1 computers/100 inhabitants). Cofetel (with information from ITU), *§Comparativo Internacional de Penetración de Computadoras (Anual)*, (2004)

http://www.cft.gob.mx/wb2/COFETEL/COFE_Comparativo_Internacional_de_Penetracion_de_2
[viewed March 4, 2007]

5. Advantages of incumbents in the broadcasting and telecommunications markets for broadband deployment

This section provides information on the market situation in the telecommunications and broadcasting sectors at the time of the 2006 Convergence Reform.

In terms of broadband capacity, Telmex stated the following in its 2005 Annual Report⁵³⁷:

- (1) In 2005, 92% of the lines installed in the country had broadband service capacity (by way of a service called “Prodigy Infinitum”);
- (2) In 2003, Telmex completed the implementation of an NGN to allow long distance traffic to run on VoIP (Voice Over internet Protocol);
- (3) In 2005 the company finished installing an NGN for signaling functions of the processing network (i.e. the control layer);
- (4) In 2003, Telmex began installing a SDH (Synchronous Digital Hierarchy) NGN on its transport network to support IP based service delivery; and
- (5) In 2005 the company completed installing the IP/MLS (Multiprotocol Label Switching) NGN on its transport network, which will allow advanced IP-based data transport over its core network.

In short, given its dominant position as a local carrier with IP network technologies in place, as a dominant long-distance carrier, and as a dominant mobile-service provider

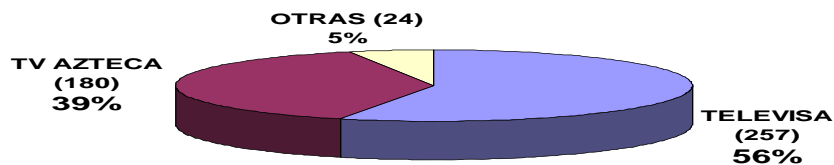
⁵³⁷ Telmex (2005), *Op. Cit. Supra* 262: 2, 5-6

by way of Telcel, Telmex is positioned to vertically integrate NGN layers and continue being the dominant carrier in a broadband service market.

Grupo Televisa by way of its subsidiaries, holds various regional and national operating broadcasting licenses granted by the Mexican Federal government. In the public broadcasting sector, out of 461 existing television broadcasting spectrum licenses in Mexico, Grupo Televisa holds 56%, and TV Azteca, S.A. de C.V. (“TV Azteca”) holds 39%. Although there exist other local and regional television stations, Televisa, along with TV Azteca, compose a national duopoly in the broadcasting sector.

Figure 8. Number and distribution of TV spectrum licenses in Mexico (2006)

TV Spectrum Licenses in Mexico (461)



Source: Generated with public information about television concessionaires on Cofetel y S.C.T. websites (2006)

As a content provider in Mexico and the Spanish-speaking world, Grupo Televisa is an undisputed dominant agent in the field. Grupo Televisa defines itself in the following way:

“We are the largest media company in the Spanish-speaking world and a major participant in the international entertainment industry. We produce the most Spanish-language television programs, and we believe we own the largest library of Spanish-language television programming, in the world. [...] We also own an unconsolidated 11.4% equity interest, on a fully diluted basis, in Univision, the leading Spanish-language television broadcaster in the United States. [...]”⁵³⁸

With respect to its Mexico audience, Grupo Televisa claims that:

“[...] The programs shown on our networks are among the most-watched programs in Mexico. In 2004 and 2005, approximately 69% and 68%, respectively, of all Mexicans watching television during prime time hours, 70% and 69%, respectively, of all Mexicans watching television during weekday prime time hours and 71% and 70%, respectively, of all Mexicans watching from sign-on to sign-off watched our networks or stations. Our television broadcasting operations represent our primary source of revenues, and those operations generated approximately 56.9% and 55.4% of our total revenues in 2004 and 2005, respectively.”⁵³⁹

⁵³⁸ See §Business Overview, Grupo Televisa, *SEC Form 20-F*, (SEC, 2005)

⁵³⁹ Grupo Televisa-SEC (2005), *Id. Cit. Supra* 538

Considering its investments in pay television through Sky Mexico and Cablevision⁵⁴⁰, and its right of use of high potency UHS/VHS spectrum, Televisa also has the potential to become a significant competitor in broadband services in the medium to longer term as it concludes a transition to digital television standards; but in the short term, Grupo Televisa holds significant competitive advantages in a convergent communications environment as a content provider and as a holder of spectrum rights, which it could potentially “lease” out or otherwise arrange for use by telecommunications service providers.

B. THE INSTITUTIONAL ENDOWMENT OF THE CONVERGENCE REFORM (2006):
THE RENT-SEEKING LEGISLATIVE SYSTEM IN AN ELECTORAL YEAR

The Congressional approval of the 2006 Convergence Reform would take place at the start of a presidential and federal congressional electoral year. During the 2006 presidential elections, 58% of voters turned out to generate a highly competitive result, in which the PAN candidate, Felipe Calderón Hinojosa, won by 0.58% of votes over the PRD party candidate, Andrés Manuel López Obrador (who is commonly referred to as “AMLO”)⁵⁴¹. Despite the fact that AMLO denounced fraud, refused to accept the results, and unilaterally declared himself President of Mexico, Calderón’s formal

⁵⁴⁰ See above Chapter VII herein, § D, 2. “Despite new competitors, market concentration characterizes the telecommunications”

⁵⁴¹ “Calderon, of the conservative National Action Party, won 35.89 percent of the vote compared with 35.31 percent for Lopez Obrador of the Democratic Revolutionary Party./ The difference between the two candidates was just 0.58 percent, or about 244,000 votes out of about 42 million cast, based on the Institute’s figures.” “Calderon wins disputed Mexico vote”, *CNN*, July 6, 2006, available online at <http://www.cnn.com/2006/WORLD/americas/07/06/mexico.elex/index.html>

legitimacy to the Presidency is supported by the Mexican population, which signals the high credibility of the IFE and electoral institutions, as well an expectation of a higher standard of rule of law even for conflict resolution by Mexican civil society. The Chamber of Deputies in Congress was split three ways between the PAN (41.2%), PRD (25.4%) and PRI (21.2%) parties, as well as the Senate: PAN (40.6%), PRD (20.3%), and PRI (25.7%).

The results of the elections are mentioned because at the moment of approval of the 2006 Convergence Reform there was no certainty about whether Calderón or AMLO would take office, and this was a very important uncertainty for elite economic entrepreneurs. In June 2006, *Letras Libres* magazine published an article in which it called AMLO the “Tropical Messiah” because he promised a return to “salvation” under government welfare policies, similar to those established under Echeverría, promising direct wealth redistribution through centralized state management⁵⁴². In the former authoritarian corporate state under the PRI, and even through the long-standing ISI policies, the entry of a new President was commonly accompanied by major ideological shifts from left to right in economic policy, depending on which interest group required favoring at that moment⁵⁴³. With the rise of a multi-party system, these

⁵⁴² Enrique Krauze, “Cover Story: El Mesías Tropical”, *Letras Libres*, June 2006, available at <http://www.letraslibres.com/index.php?art=11289> (Last viewed August 14, 2007)

⁵⁴³ The following table shows the main ideological lines represented by PRI factions in power. However, as shown in the first Chapters of this dissertation a long period of industrialization provided a steady policy of wealth accumulation by way of favored economic groups. Therefore, these ideological leanings may best be termed demagogies.

<u>Sexenio</u>	<u>President</u>	<u>Ideological leaning</u>
1940-1946	Avila Camacho	<i>Right</i> (conservative, began institutionalization of PRI corporatism)

policy extremes became represented by parties. The PAN has long represented conservative entrepreneurs in Mexico. The PRD capitalized on the defection of the representatives of popular sectors from the PRI, support from intellectuals, and the lower-income population to become a serious contender to the Presidency, and for increased presence in Congress.

AMLO offered a radical solution to wealth distribution, which also represented a reversal to democratic transition. His candidacy was reminiscent of the rise of President Hugo Chavez in Venezuela, and there was fear that AMLO would take expropriatory actions against the ruling economic elite once in power to satisfy his constituents. In the case of Hugo Chavez, in 2002, after commercial television stations refused to cover an attempted coup against him, he used oil revenue to fund a new

1946-1952	Aleman	<i>Right</i> (deepening of industrialization and institutionalization)
1952-1958	Ruíz Cortines	<i>Right</i> (continued industrialization and institutionalization)
1958-1964	Lopez Mateos	<i>Left</i> (expropriation from foreign ownership; pursued policy initiative to redistribute company profits to labor)
1964-1970	Díaz Ordaz	<i>Right</i> (conservative; continued pursuing industrialization; notorious for armed repression of student movement in 1968)
1970-1976	Echeverría	<i>Left</i> (populism, nationalism, and expansion of state intervention into economy through nationalization)
1976-1982	Lopez Portillo	<i>Started Right shifted Left</i> (formed an alliance for production that mostly benefited industrialists, but the oil crisis and massive capital flight forced an abrupt change in policy that led to political reform and to the 1982 bank nationalization)
1982--2006	De La Madrid (1982-1988), Salinas (1988-1994), Zedillo (1994-2000) and Fox (2000-2006).	<i>Right</i> . (conservative liberal market orientation in four consecutive <i>sexenios</i> , however all administrations have maintained a strong welfare system.)

Source: This listing “paraphrases” a list shown in Dale Story (1986a), *Op. Cit. Supra* 38, 42-43

state-owned television company called Telesur, which became known as “Chavez TV”⁵⁴⁴. In June 2007, President Chavez expropriated the television concessionaire, Radio Caracas Television⁵⁴⁵.

For Grupo Televisa and Grupo Azteca, the duopoly in the Mexican television sector, the electoral year presented immediate concerns about the protection of existing concession rights, as well as their ability to secure advantages in a future convergent market. The value of their concession rights over broadcasting spectrum was dropping, while that same spectrum was gaining value when defined as broadband spectrum. Rather than allow the government to relocate the television conglomerates to low potency digital spectrum in order to continue operating as broadcasters, the television operators would attempt to modify their concession rights over spectrum to gain preferential entry into the broadband telecommunications services market.

The television conglomerates would pursue a communications reform to secure their competitive advantages in a convergent telecommunications market. The television conglomerates had incentives to attempt to secure current and future property rights by way of a legislative reform, since it was unlikely that the PRD would control Congress, even if AMLO won the Presidency. Hence, preferential rights acquired by

⁵⁴⁴ Pascal Fletcher, “Chavez TV channel aims to be Latin American voice,” *Reuters*, April 13, 2005, <http://in.news.yahoo.com/050413/137/2kq1s.html>

⁵⁴⁵ “Supporters back TV closure,” *BBC Online*, <http://news.bbc.co.uk/1/hi/world/americas/6715955.stm>; “Thousands Protest Closing of Anti-Chavez TV Station in Venezuela,” *Associated Press*, May 29, 2007, <http://www.foxnews.com/story/0,2933,275832,00.html>; “Venezuela replaces opposition TV with state network,” *Reuters*, May 28, 2007, <http://www.reuters.com/article/worldNews/idUSN2723008820070528?feedType=RSS>

legislation would likely be maintained during the following *sexenio*. By way of a PRI congress member, they introduced a bill to reform the telecommunications, television and radio laws, at the start of an electoral year, when the PAN party, as the incumbent party in the Presidential office, was most vulnerable to an alternation and loss of control of the Executive branch. Unlike the 1990 privatization reform, the 2006 Convergence Reform would take place in a stable rent-seeking Legislative system, but the moment of reform is still important, since the television duopoly would seek to increase and gain selective rights on the market when parties faced greatest uncertainty about holding on to power. In this sense, reform would take place in a moment of instability and vulnerability of those seeking to gain or maintain control of the Presidency. An electoral year was also the time when the television duopoly held the greatest leverage over political parties, since it controlled electoral coverage.

Radio and television are the primary media of information for 75% of the illiterate population in the world⁵⁴⁶. In 2002, Mexico showed an absolute estimated illiteracy of 9.1% and an absolute estimated functional illiteracy of 57%⁵⁴⁷. During the Presidential and Federal electoral campaign of 2000, 84% of voters watched television, and two-thirds viewed news programs from four to five times a week⁵⁴⁸. Furthermore, the Ministry of Internal Affairs showed in its August 2006 “Third Annual Survey on

⁵⁴⁶ Figure 4-2. in Amit K. Maitra, *Wireless Spectrum Management: Policies, Practices and Conditioning Factors*, McGraw Hill (2004), 90

⁵⁴⁷ Sergio Aguayo Quezada (2002), *Op. Cit. Supra* 172: 82; En el quinto informe de gobierno del Presidente Fox sólo se reportó sobre el analfabetismo absoluto en el país con una cifra de 8%; por lo que se estima que el analfabetismo funcional continúa como mínimo en 50% de la población. See “Anexo Estadístico: Desarrollo Humano y Social: Principales Indicadores de la evolución de la educación”, Presidencia de la República (2005), *Op. Cit. Supra* 174.

⁵⁴⁸ Roderic Ai Camp (2007), 160, *Op. Cit. Supra* 123

Political Culture and Citizen Practices” that television is the main medium used by Mexicans to inform themselves about politics: 62% of Mexicans watch primarily television to inform themselves about politics, whereas only 17% listen to radio and 10% read newspapers for the same purpose⁵⁴⁹. An analysis of the influence of Televisa on voter preference in the 1997 election showed that more than half the voters viewing Televisa coverage of the debates swung their vote away from the PRI candidate⁵⁵⁰. The impact of television coverage by Televisa and TV Azteca of the elections was necessarily a substantial concern for all candidates leading up to the 2006 elections.

To complicate matters, Mexican electoral laws allows the IFE to establish maximum rates that television and radio operators can charge parties for commercial spots. These spots are purchased by political parties with funds allocated by the IFE. However, Televisa, TV Azteca, and other mass media communications companies have traditionally by-passed the intent of this regulation by negotiating discounts with political parties, which then allows the broadcasters to define the type of coverage each party will receive during elections⁵⁵¹. Etcétera online magazine shows that for the presidential electoral campaigns of 2000, the PRI was able to secure sixty-two

⁵⁴⁹ Secretaría de Gobernación, *Tercera Encuesta Nacional sobre Cultura Política y Prácticas Ciudadanas*, August 2006, available online at http://www.e-local.gob.mx/wb2/INAFED2006/INAF_Encup (Last viewed August 12, 2007)

⁵⁵⁰ Roderic Ai Camp (2007), 160, *Op. Cit. Supra 123*.

⁵⁵¹ The cost of the democratic process as well as the discrimination exercised by television and radio companies to favor or negatively affect political candidates is currently the subject of an intense debate in Congress for an electoral reform. “Busca reforma electoral abaratar costos, sin perjudicar: PRD: Señala el representante del sol azteca ante el IFE, Horacio Duarte, que las modificaciones plantean bajar el costo de la democracia y darle certeza a los comicios”, *El Universal.com*, September 8, 2007, <http://www.etcetera.com.mx/pag09ne25.asp>

percent of all commercial spots on television, and was able to do so at a cost 90% to 80% lower than the other two major political coalitions running for the Presidency⁵⁵². Since the 1994 elections to the recent 2006 elections, the expenditure of political parties for commercial television and radio publicity has increased twenty-fold⁵⁵³. In 2006, fifty-six percent of all campaign funds were directed to buying commercial radio and television spots⁵⁵⁴. The electoral process in Mexico generated excessive costs for democratization by increases in commercial publicity for elections, which represented a significant gain in income for broadcasters, particularly for the television conglomerates.

While electoral reform has successfully created a multi-party electoral system, which effectively allows alternation in the Presidency, and makes political parties responsive to pressure groups, these electoral reforms have not increased the accountability of Congressional members or parties to the broader population of constituents. The centralized party system of Mexico is based on a restricted monopoly of representation which differs from democratic pluralism or democratic representation⁵⁵⁵. The electoral

⁵⁵² The coalition “Alianza para el Cambio” represented by Cuahutemoc Cardenas paid approximately 89% more than the price paid by the PRI for each spot, and “Alianza para Mexico” represented by Vicente Fox, paid approximately 78% more for each spot than the PRI. As a consequence, the PRI secured a wider coverage (62% of all television spots) than Alianza por el Cambio (23.39% of all television spots) or Alianza para Mexico (26.94% of all television spots). “Elecciones 2000: Cuanto gastaron los partidos en la TV”, *Etcétera*, November 2002, available online at <http://www.etcetera.com.mx/pag09ne25.asp>

⁵⁵³ For the 2006 elections, the IFE detected 281,000 spots which were not reported by political parties. Alonso Urrutia, “Los partidos gastaron 4 mil 500 mdp en radio y tv en cuatro elecciones”, *La Jornada*, September 6, 2007, available online at <http://www.jornada.unam.mx/ultimas/2007/09/06/los-partidos-gastaron-4-mil-500-mdp-en-radio-y-tv-en-cuatro-elecciones/>

⁵⁵⁴ AP Latino America, “México: Radio y TV critican reforma electoral”, *El Nuevo Herald.com*, September 7, 2007, online at <http://www.elnuevoherald.com/256/story/88161.html>

⁵⁵⁵ See footnote on Schmitter (1974), *Op. Cit. Supra* 40

and party system in the country has yet to decrease incentives for elected and non-elected Congressmembers to favor rent-seeking coalitions of elite economic and political entrepreneurs during periods of legal reform. For these reasons, despite democratic advances, the institutional endowment is defined in this case study as a “rent-seeking” Legislative system.

The role of television in an electoral year, the power of television conglomerates to negotiate electoral coverage, the possibility of alternation in the Presidency in favor of AMLO, the incentive for television conglomerates to change the nature of their concession rights, and the capacity of political party leadership to control and exercise untransparent and unaccountable clientelism through Congress generated the necessary political environment for Televisa to successfully pursue the 2006 Convergence Reform.

Democratization in Mexico has been slow to permeate the process of economic policymaking, in order to increase positive redistributive effects of competition and development for the population. However, as this work was being concluded an initiative was approved in the Senate, to eliminate commercial media spots by political parties, in order to force them to use limited and regulated government broadcasting times to be equally assigned by the IFE⁵⁵⁶. This new electoral reform is an unintended

⁵⁵⁶ The electoral reform is also vying to introduce fixed and staggered terms for the Board of the IFE, to improve the independence and continuity of members. Jenaro Villamil, “Comisiones aprueban la reforma electoral”, Proceso.com, Septiembre 11, 2007, available online at <http://www.proceso.com.mx/noticia.html?sec=0&nta=53815>. If approved, the new electoral reform

consequence of the 2006 Convergence Reform that exposed the rent-seeking practices that prevail between political parties and broadcasters in Mexico, specially during electoral periods⁵⁵⁷.

1. The Congressional approval of the 2006 Convergence Reform

On November 22, 2005 Representative Miguel Lucero Palma presented the Chamber of Deputies of the Mexican Federal Congress with an *Initiative to reform, add, and derogate diverse norms of the Federal Telecommunications Law and the Federal Radio and Television Law* (the “Initiative”)⁵⁵⁸. The Initiative was turned over to the

would modify the terms of Article 79-A LFRYTV introduced by the 2006 Convergence Reform. Though it is not the focus of this telecommunications reform case study, the 2006 Convergence Reform also introduced an article 79-A in the LFRYTV that states that broadcasters must provide political parties with tariffs equivalent to commercial rates. The IFE would remain empowered to oversee the allocation of publicity, however, the wording “commercial rates” is broad enough to continue allowing different sorts of commercial plans which could be negotiated between broadcasters and parties. This article came into force on January 1, 2007. Thus, the 2006 Convergence Reform was also attempting to secure the continuity of income from and leverage during electoral campaigns of broadcasters. This article was not invalidated by the Supreme Court of Justice. *See* Article 79-A LFRYTV, and SCJN Resolution (2007). If approved, the new electoral reform would modify the terms of said Article 79-A LFRYTV; The new electoral bill faces organized opposition by broadcasters through National Radio and Television Chamber (CIRT), but this opposition has not change the terms of the initiative. Broadcasters claim that the bill is equivalent “to confiscation of advertising time and would put some 950 radio stations at risk of bankruptcy”. “Mexican Senate passes electoral reform bill”, *EFE News Service Via Thomson Dialog NewsEdge, TMCnet.news*, September 13, 2007, available online at <http://www.tmcnet.com/submit/2007/09/13/2936164.htm> (Viewed September 13, 2007)

⁵⁵⁷ Senator Santiago Creel from the PAN party, who is today a leading figure in the electoral reform to eliminate commercial spots for political parties, during May 2007, denounced the 2006 Convergence Reform (also referred to in the press as the ‘Ley Televisa’) as a law approved in a climate of pressure, and a top down imposition on political party members prior to elections by party leadership and from within the Executive power. Andrea Becerril, “Prácticamente se sometió a candidatos y partidos para aprobarla, insiste; La ley Televisa, una imposición previa a las elecciones de 2006, según Creel”, *La Jornada*, May 7, 2007, available online at

<http://www.jornada.unam.mx/2007/05/05/index.php?section=politica&article=005n1pol>

⁵⁵⁸ “Dictamen de las Comisiones Unidas de Comunicaciones, y de Radio, Televisión y Cinematografía, con proyecto de decreto que reforma, adiciona y deroga diversas disposiciones de la Ley Federal de Telecomunicaciones y de la Ley Federal de Radio y Televisión”, Antecedentes, Diario de Debates, Organo Oficial de la Cámara de Diputados del Congreso de los Estados Unidos Mexicanos, Correspondiente al Primer Periodo de Sesiones Ordinarias del Tercer Año de Ejercicio, Poder Legislativo Federal, LIX Legislatura, December 1, 2005, 158-172, <http://cronica.diputados.gob.mx/PDF/59/2005/dic/051201-1.pdf> (viewed December 6, 2006) (“Dictamen de las Comisiones Unidas de la Camara de Diputados”)

joint commissions of Communications and Radio, Television and Cinematography (the “Lower House Joint Communications Commission”). On November 29, 2005 the Lower House Joint Communications Commission issued a formal Opinion recommending approval of the Initiative by the Lower House of Congress without any changes⁵⁵⁹. On December 1, 2005, within seven minutes from the moment the Initiative was introduced on the floor, it was approved unanimously by the Chamber of Deputies (327 votes in favor, none against). This approval process was a significant contrast to the previous experience with the ConParTe Initiative. Most legal reforms approved in Congress are usually the result of pre-negotiations among political parties and pressure groups. However, in this case, the approval of the telecommunications reform without debate and with unanimous approval inspired widespread scandal, as an act of capture of the Legislature by the television conglomerates in an electoral year⁵⁶⁰. Thus, the reform became symbolic of the shortcomings of Congress and the electoral system of Mexico as a system of democratic representation.

⁵⁵⁹ Dictamen de las Comisiones Unidas de la Camara de Diputados, *Id. Cit. Supra* 558, 158-172

⁵⁶⁰ Ricardo Alemán, “Itinerario Político”, *El Universal online newspaper*, March 28, 2006, <http://www.eluniversal.com.mx/columnas/56664.html>,1 (Last viewed December 6, 2006). Translation by author:

“[...] The emissaries of Televisa not only lobbied, but were able to impose their law, the “Televisa law”, when in a suspicious unanimity of all parties -PRI, PAN, PRD, PT, PVEM and Convergencia--it was approved in only seven minutes. The first trap had been set. The television company was able to subjugate all of them.”

See also Marco A. Mares, “¡Sí! a ¿Ley Duopolio?”, *Fórmula online news*, March 28, 2006, <http://www.radioformula.com.mx/rf2001.asp?ID2=40453> (Last viewed December 6, 2006) Translation by author:

“[...] Almost since they were approved in the record time of seven minutes in the Chamber of Diputados, the controversial law initiatives were seen as as a safe passage for the duopolistic television interests [Televisa and TV Azteca].

“It’s a transadministration shield that protects [these interests] from any of the actual candidates who could become President of the Republic, accuse their opponents.

The Minute of the Initiative approved by the Lower House of Congress was sent to the Senate, and on December 8, 2005, the Senate turned the Minute over to a joint commission of the Communications and Transport, and Legislative Studies Commissions for review (the “Senate Joint Communications Commission”). By then, a widespread debate in the media and among the public had risen over the terms of the Minute. The Senate Joint Communications Commission held various sessions during January and February of 2006 to hear experts in the field. A group of opposing Senators from several parties expressed objections to the Minute of the Initiative. In a marathon Senate session that began on March 29, 2006 and ended at 3:30am the next day, the Minute was approved with 78 votes in favor and 38 votes against with one abstention. The approved 2006 Convergence Reform was then sent to the President of the Republic. Although there were rumors of a possible presidential veto action, none was taken, and the decree of reforms was officially published by the Executive in the *Official Gazette of the Federation (Diario Oficial de la Federación or DOF)*, on April 11, 2006, for entry into force the day after its publication.

“However, this shield could not have existed if it were not for a swift and surprising favorable consensus.

“Let’s remember that the Chamber of Deputies approved the modifications with 327 votes in favor and none against. The consensus was achieved with the vote of the three most important parliamentary fractions: PRI, PAN and PRD. [...]”

2. *The role of media, civil society & public scandal in the approval process of the 2006 Convergence Reform*

The debate in the Senate over the Minute became highly publicized, leading in some cases to public scandal. Perhaps the most relevant scandal was the evidence of cooptation of the independent experts who testified before the Senate, and of Senators themselves, by Televisa. The newspaper *El Universal* published excerpts of recordings in which officers of Televisa--specifically Javier Tejado Dondé, Information and Legal Counsel Director of Televisa--was heard: a) pressuring directors of the National Chamber of the Electronic Telecommunications and Information Technology Industry (*Cámara Nacional de la Industria Electrónica de Telecomunicaciones e Informática* or Canieti), particularly the President of said organization, María Teresa Carrillo, to modify their initial rejection of the Initiative [which she did by sending a letter revoking her initial position]; b) giving orders to instruct key senators--Enrique Jackson (PRI), president of the Senate; Héctor Osuna (PAN), head of the Commission of Communications and Transport, and Emilio Gamboa (PRI)--to act on a determined strategy for approval; c) reveals himself, and independent experts consulted by the Senate--specifically Federico González Luna and Eduardo Ruiz Vega--to be the authors of favorable opinion letters sent by national and international organizations to the Senate in regards to the Minute of the 2006 Convergence Reform; and d) exposes the subordination of the President of the Telecommunications Law Institute (*Instituto de Derecho de las Telecomunicaciones*) Gerardo Soria to the instructions of

Televisa.⁵⁶¹ Javier Tejado Dondé characterized the recordings as illegal invasions of privacy and defended his interventions as “lobbying”⁵⁶².

El Universal was not a disinterested party, since it had itself been lobbying the government to liberalize radio and television broadcasting concessions in the past years. However, faced with the fact that liberalization would take place under the rules determined by Grupo Televisa, *El Universal*--which traditionally was a conservative newspaper--became committed to exposing the process of approval⁵⁶³.

The Senate later approved the new Commissioner nominations sent by the President of the Republic, by which former Senator Hector Osuna, Head of the Communications Commission in the Senate, and who had supported the 2006 Convergence Reform, was made President of the Cofetel, and Eduardo Ruíz Vega--the independent expert whose close connections to Televisa were exposed in the recordings published by *El Universal* newspaper--a Commissioner of the Board. Both these officers were shown to have a lack of independence from Televisa through the published recordings.

⁵⁶¹ Recordings at *El Universal* Newspaper Online, <http://www.eluniversal.com.mx/notas/333445.html> or <http://www.eluniversal.com.mx/graficos/animados/EUOL/audios-rtv.html>

⁵⁶² “[...] I would tell you, that it is good that the calls are out, it is good that they be known, by which it is known how a lobbying job is carried out, that there was no pressure, that there was no – because they have mentioned that cars have been given, millions of dollars, that is. There is no such thing, it is a mere invention that they [*El Universal* presumably] have decided to say [...].” Interview Javier Tejado Dondé, Information and Legal Counsel Director of Grupo Televisa and President of the Legislative Committee of the Chamber of Radio and Television, Interview by Rosa María de Castro, 01 March 2006 at 1:57pm.

⁵⁶³ Raúl Trejo Delarbre, “Una Ley Para Televisa. Crónica De Una Regresión Política”, Centro de Competencia en Comunicación para América Latina, (2006) at <http://www.c3fes.net/docs/leytelevisa.pdf>, 12

Nevertheless, they both now sit in fixed-term positions as Cofetel President and Chairman, and member of the Cofetel Board of Commissioners.

Opposing Senators Corral (PAN) and Bartlett (PRI) made known that PAN and PRI exerted party discipline on their Senators during the approval process, in which they were instructed to support the reform in order to secure support for their respective presidential candidates from Televisa and TV Azteca as the main mass-media providers during the 2006 election year⁵⁶⁴. Senators Javier Corral (PAN), Manuel Bartlett (PRI), and Raul Ojeda (PRD) also condemned on the floor of the Senate the attacks against them being carried out by Televisa on prime-time television⁵⁶⁵. At one

⁵⁶⁴ On March 23, 2006 PAN held a meeting with its Senators, in which the President of the party, Manuel Espino, pressured Senators to vote informally at the meeting for the Minute and “recognized that to approve the Televisa Law on its terms would reap benefits in the electoral race for the Presidency of the Republic ... Espino insisted afore the Senators that they had to approve the Minute, due to the political conditions of the moment. This he argued, would allow them to ‘transition best in the electoral times’. Everyone understood that the intention was to position the Calderón campaign in the electronic media.” Andrea Becerril, “A petición expresa de Espino, el PAN acordó votar en el Senado la ley Televisa”, *La Jornada*, 23 de marzo de 2006; Senator Javier Corral confirmed the meeting: “Manuel Espino, president of the PAN, told us, the Senators of the party, that we had to approve [the Minute] as an issue of political-electoral nature. It was one of the saddest moments of my life within the National Action [Party]”, Fernando Figueroa, “*Javier Corral. ‘Le estoy preparando un libro a Fox’*”, Entrevista en *La Revista de El Universal*, 8 May 2006; Senator Manuel Bartlett also described a similar meeting of the PRI party that happened one day after the PAN meeting, albeit several weeks later: “In the fraction of the PRI, [...] without warning, in a routine meeting, the need to immediately approve the aforementioned Minute on its terms was argued, given that it was convenient to the candidacy of Roberto Madrazo. [...] The ‘machine’ entered into operation, the confrontation of different arguments for the democratic determination of positions was not allowed, the public interest was not evaluated, nor the vulnerability of the State, five years of discussions were ignored, as was the prior acknowledgement of all the Senators on the need to democratize broadcasting, the contrary opinions of the authorities: Cofetel an Cofeco were not paid attention to, nor the negative consequences for society that were described in detail by these authorities. Nothing --the uppermost interest was that of the candidates and only that of the candidates”, Manuel Bartlett Díaz, “*Cómo fue y será esa ley*”, *Enfoque*, Suplemento Reforma, April 9, 2006; Previous quotes are cited in Raúl Trejo Delarbre, (2006) *Id. Cit. Supra* 563.

⁵⁶⁵

“On prime time, the anchors of the nightly news of the companies Televisa, S.A. de C.V. and Grupo Azteca, S.A. de C.V. waged an open offensive against members of three parliamentary groups: Senators Javier Corral (PAN), Manuel Bartlett (PRI), and this writer [Raul Ojeda]

point in the approval process in the Senate, 111 Deputies attempted to save face by sending a communication to the Senate stating that in light of new evidence, they recommended amendments to the Minute of the Initiative, and that the Senate should proceed to incorporate said reforms and return the Initiative to the Lower House⁵⁶⁶. Notwithstanding, the Senate approved the reform.

After the 2006 Convergence Reform was officially published and opposing Senators had filed an unconstitutionality action against the reform, it became known that the Head of the SCT had sent a document on April 4, 2006 to the President of the Republic recommending a veto of the reform. The Minister of the SCT argued that the reform could be construed as illegal or unconstitutional because of several concepts

(PRD), due to opinions that we have upheld over the scope of the Minute that was sent by our Colegislator to the Senate this past December 8.

Although, we, the Senators mentioned, have only brought forward considerations that have been exposed by a diversity of government agencies – principally Cofeco, Cofetel, and IFE – academic institutions, and nongovernmental organizations, the news shows of those television broadcasters personally smeared us, to the extent that they presented us to the national public opinion as “false redeemers of the truth” and representatives of “a certain type of corruption”.

The position of those companies was so biased that they asserted that the senators critical of said proposal “are perverse and fallacious” (as the news on TV Azteca put it); in the case of Televisa, the enterprise “... cannot comprehend [...] those who suppose only their voice to be valid, only their point of view to be patriotic ... [...]

[W]e raise our demand to this Directive Board in order for this government organization, an expression of Chamber unity, publicly pronounce that these news organizations give us the respect and consideration that our office merits [...]”.

Letter to Senator Enrique Jackson, President of the Directing Board of the Senate House, March 29, 2006.

⁵⁶⁶ “Se recibió oficio del Diputado José Luis Medina Lizalde, con el que remite comunicación suscrita por diversos Diputados de los grupos parlamentarios representados en la Cámara de Diputados, en relación con la minuta proyecto de Decreto que reforma, adiciona y deroga diversas disposiciones de la Ley Federal de Telecomunicaciones y de la Ley Federal de Radio y Televisión”, *Diario de Debates*, Num. 9, 2 Marzo 2006, 14

therein, which would require modification⁵⁶⁷. The President's office responded that President Fox was not informed of this document and that control of the document was in the hands of the General Counsel to the President⁵⁶⁸.

There were several instances of public marches and resistance against approval of the Minute in the Senate. In particular, public radio broadcasters were not granted equal advantages for digital broadcasting under the DTT Accord or the Minute, and new restrictions on funding stating that "cultural," "experimental" or "educational" stations had to operate as non-profits would diminish their ability to operate. In this case, one of the most memorable moments of resistance was an initiative of the radio stations of the Mexican Radio Institute (Instituto Mexicano de la Radio or IMER) and its repeater stations, which on March 29, 2006, chose to play "a same old song" all day. Each station chose a song which they played all day long, and in between repetitions read this message on the consequences of lack of diversity in broadcasting content⁵⁶⁹:

"A country without plurality in communications media would be like hearing the same song all day long. Today, Wednesday March 29, we only broadcast one song. The reforms to the Radio and Television Law reduce the possibilities of creating options, and the Mexican Radio Institute manifests its disagreement. What do you think?"

⁵⁶⁷ Ricardo Gómez, "Fox ignoró 55 observaciones de SCT contra ley de medios", *El Universal*, 21 June 2006, at <http://www.eluniversal.com.mx/nacion/139697.html> [Last viewed March 21, 2007]; Javier Tejado Dondé, "¿Engañaron a Cerisola?", *Reforma*, 27 June 2006; see also <http://www.etcetera.com.mx/pag99ne68.asp>

⁵⁶⁸ José Luis Ruiz, "Aseguran que Fox no supo del informe de SCT", *El Universal*, 22 June 2006

⁵⁶⁹ Raúl Trejo Delarbre, (2006) *Op. Cit. Supra* 563, 15

IMER's email inbox was saturated with over 10,000 emails from supporters⁵⁷⁰.

Camp mentions that “[t]he fundamental transitions that have occurred structurally and ideologically in macroeconomic policy and political development since 1970 in Mexico are a product of both changing citizen attitudes and elite preferences.⁵⁷¹” The role of civil society in manifesting outrage against the manipulation of Congress to further the interests of economic elite was a reaction that did not impede the 2006 Convergence Reform, but which allowed a group of Senators to capitalize on popular support against the reform in order to disalign themselves with party politics.

C. REGULATORY GOVERNANCE STRUCTURES ESTABLISHED BY THE 2006 CONVERGENCE REFORM

The 2006 Convergence Reform consisted in modifying, adding or eliminating norms from the 1995 Federal Telecommunications Law (“1995 FTL”) and the 1960 Federal Radio and Television Law (“1960 FRTVL”) in order to allow carriers and public broadcasters to provide convergent communications services. The most controversial and significant change brought on by the 2006 Convergence Reform was an expedited process of authorization for public television broadcasters to gain a Concession Title to provide telecommunications services via their broadcasting spectrum. This reform of the 1960 FRTVL circumvented requirements mentioned in the 1995 FTL for all other parties interested in obtaining a telecommunications spectrum Concession Title

⁵⁷⁰ Raúl Trejo Delarbre, (2006) *Id. Cit. Supra* 563, 15

⁵⁷¹ Roderic Ai Camp, *Mexico's Mandarins: Crafting a Power Elite for the Twenty-First Century*, University of California Press, (2002),14-15

to provide telecommunications services, thereby providing existing public broadcasters with a competitive regulatory advantage for entering the telecommunications market over any other new entrants. The terms of article 28 reflected the terms of the DTT Accord, but in doing so, elevated the terms of the special authorization for broadcasters to provide telecommunications services from an administrative regulation to a law approved by Congress. Thus these new terms of law in the 1960 FRTVL, which by-passed authorizations required by the 1995 FTL, resolved the conflict of norms presented by the hierarchically inferior DTT Accord, and was now presented as an exception to the 1995 FTL provided to broadcasters as established by their primary law, the 1960 FRTVL.

Besides the authorization process mentioned above, the 2006 Convergence Reform modified the structure and range of powers of the telecommunications regulator and transformed Cofetel into a telecommunications and public broadcasting regulator. It did not change the legal nature of the Cofetel as an *órgano desconcentrado*, but it did provide that the Board of Commissioners would hence consist of five members (one more than before) with eight-year fixed and staggered terms, whose nominations could be rejected by Congress. The 2006 Convergence Reform also contained a transitory article that barred the Commissioners of Cofetel in office at the time of the approval from being nominated as Commissioners under the 2006 Convergence Reform, thus

forcing their removal from office without cause⁵⁷². The transitory article also established an exception for the staggered terms of first-time nominees after the entry into force of the reform, which had the effect of impeding the next President after Fox from nominating more than two new Commissioners towards the end of his *sexenio*, whereas the President in the next *sexenio* would be able to name up to four new Commissioners.

The 2006 Convergence Reform was oriented towards establishing a regulatory governance structure that could secure the concession rights over broadband spectrum, currently granted to the television conglomerates, as *de facto* property rights in the future. In addition to securing those rights, whereas the DDT Accord had continued to bind the television concessionaires to the 1995 FTL for approval to create a telecommunications network using the public broadcasting spectrum, the 2006 Convergence Reform granted television concessionaires rights in law to use that spectrum to provide pay telecommunications services. Furthermore, it established a regulatory agency that, although legally subordinated to the SCT (an Executive political body), would have a Board of Commissioners (a) whose members were nominated and assigned through party interests represented in the Senate, and (b) for which membership remained independent of manipulation in removal or nomination by the next President. Thus the regulatory governance structure assured a captured

⁵⁷² 2nd Transitory Article of Federal Telecommunications Law in *Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Federal de Telecomunicaciones y la Ley Federal de Radio y Television*, D.O. April 11, 2006. (“2006 Decree Reforming LFT and LFRTV”)

regulator, which benefited both television and telecommunications dominant incumbents.

In addition to the above, the 2006 Convergence Reform did not correct previously identified regulatory shortcomings related to market competition, the powers of authority of the telecommunications regulator over regulated firms, consumer rights, or development objectives. Under the 2006 Convergence Reform, the *status quo* of the currently dominant media and telecommunications conglomerates was favored in a future convergent market.

The 2006 Convergence Reform is a discriminatory regulatory reform, since new entrants in the broadcasting sector would first have to compete under spectrum bidding processes to obtain frequencies, and only after establishing themselves as broadcasters could they attempt to opt for a telecommunications concession to provide services⁵⁷³. New entrants who attempt these regulatory feats would then lose their broadcasting Concession Titles, which would be replaced by telecommunications Concession Titles under the 1995 FTL⁵⁷⁴. Televisa, TV Azteca, and any other broadcasting concessionaire authorized prior to the 2006 Convergence Reform would not lose their broadcasting titles, since they are not broadcasters that gained authorizations through the new spectrum bidding processes⁵⁷⁵. It should also be noted that Televisa and TV Azteca were not required to bid or pay for their spectrum

⁵⁷³ § 28, 1960 LFRTV, as modified by 2006 Decree Reforming LFT and LFRTV, *Id. Cit. Supra* 572.

⁵⁷⁴ § 28, 1960 LFRTV, as modified by 2006 Decree Reforming LFT and LFRTV, *Id. Cit. Supra* 572.

⁵⁷⁵ § 28, 1960 LFRTV, as modified by 2006 Decree Reforming LFT and LFRTV, *Id. Cit. Supra* 572.

frequencies under the old terms of the 1960 RTVL, but were granted a concession under rules of government discretion. Another discriminatory aspect of the reform is that telecommunications carriers currently authorized to provide telecommunications services by way of a network and/or a spectrum Concession Title, but that wish to provide public broadcasting services, cannot automatically request to be broadcasters but must apply for a new spectrum Concession Title in accordance to the new competitive public bidding process incorporated into the 1960 FRTVL by the 2006 Convergence Reform⁵⁷⁶.

The 2006 Convergence Reform did not take into consideration best spectrum-management practices to secure NGN deployment requirements so as to benefit the wider public interest. Rather, it allows the public commercial broadcasters to choose when to they will start using spectrum originally licensed for public broadcasting uses, to provide commercial telecommunications uses⁵⁷⁷. This is a loss of state policy management. Furthermore, the reform of the 1960 RTVL further restricts funding options for nonprofit radio and television stations of a cultural, educational, or experimental nature⁵⁷⁸. The SCT has also not issued any digital radio policy or

⁵⁷⁶ The 1995 FTL, since its original publication, has provided basic regulation whereby telecommunications carriers may request and obtain authorization to provide additional services such as pay television to their customers, or in the case of cable companies, to provide broader telecommunications services. Telecommunications carriers in Mexico are those service providers authorized with a Concession Title to establish their own network infrastructure in order to provide services. Cable (pay) television companies are legally considered telecommunications carriers. In the case of cable companies, they may request authorization to provide voice and data transmission services, and conversely telecommunications carriers may request authorization to provide pay broadcasting services.

⁵⁷⁷ § 28, 1960 LFRTV, as modified by 2006 Decree Reforming LFT and LFRTV, *Op. Cit. Supra* 572.

⁵⁷⁸ 1960 LFRTV, as modified by 2006 Decree Reforming LFT and LFRTV, *Id. Cit. Supra* 572.

standards by which radio broadcasters would be granted parallel channels in order to begin a digital switchover⁵⁷⁹.

D. REGULATORY INCENTIVES ESTABLISHED BY THE CONVERGENCE REFORM

This section contains a legal review of the arguments for and against the 2006 Convergence Reform during the approval process in Congress, since they best reflect the negative and positive incentives that would be generated under the reform. During the approval process, commentary to the Minute was provided by Senate members, independent experts called upon by the Senate, Cofetel (*Comisión Federal de Telecomunicaciones* or Federal Telecommunications Commission), Cofeco (*Comisión Federal de Competencia Económica* or Federal Economic Competition Commission), the SCT (*Secretaría de Comunicaciones y Transportes* or Secretary of Communications and Transport), and *Consejería Jurídica de la Presidencia* (General Counsel to the Presidency).

1. Arguments in favor of the 2006 Convergence Reform

During the approval process, the Joint Communications Commissions of the Chamber of Deputies issued a favorable Opinion (*Dictamen*) on the Initiative in which they set forth the principal benefits that the reform would produce if approved by Congress⁵⁸⁰. After the Minute of the Initiative was approved by the Deputies, it was turned over to the Joint Communications Commission of the Senate. The Joint Communications Commission invited diverse speakers to appear before the commission and provide

⁵⁷⁹ 1960 LFRTV, as modified by 2006 Decree Reforming LFT and LFRTV, *Id. Cit. Supra* 572.

⁵⁸⁰ Dictamen de las Comisiones Unidas de la Cámara de Diputados, *Id. Cit. Supra* 558, 158-172

commentary and opinion on the Minute. Pursuant to the final report for the LVIII and LIX Legislature from the Communications and Transport Commission (one of the two commissions composing the Joint Senate Commission), 56 experts in matters related to the Minute appeared in these hearings⁵⁸¹. Six of the speakers were identified as independent communications experts: Lic. Jorge Eduardo Arreola Cavazos, independent consultant in telecommunications, and former Commissioner of Cofetel; Federico González Luna, partner at the law firm González Luna, Deschamps y Álvarez del Castillo, external counsel to Televisa, whose partners are also former public officers of Cofetel; Ernesto Piedras Feira, General Director of Competitive Intelligence Unit, S.C., a consulting agency; Javier Lozano Alarcón, telecommunications consultant, and former President of Cofetel; Diego Tinoco Ariza, former General Counsel of SCT; and Jorge Nicolás Fisher, Comptroller of the Banco de México (*Mexican Federal Reserve Bank*) who participated as a specialist and former President of Cofetel. Although representing his organization in the hearings--CUDI (*Corporación Universitaria para el Desarrollo de Internet* or University Corporation for Internet Development)--Carlos Casaus, is best known as the first and former President of Cofetel. The majority of these independent experts defended the Minute, and it is notable that several of them are former Presidents or Commissioners of the Cofetel with current ties to the telecommunications industry. After concluding

⁵⁸¹ From another viewpoint, the report identifies by name 29 organizations and associations to which the speakers belonged; four of these were government agencies (Cofetel, Cofeco, Comisión Nacional para el Desarrollo del los Pueblos Índigenas, and Comisión Nacional de Derechos Humanos), and four were major universities (UNAM, IBERO, ITAM, and Politécnico). Other organizations included independent research centers, non-profits, labor unions, and industry chambers. It should be noted that not all of the experts listed spoke before the Commission, since several of the persons listed were companions to a speaker. *Reporte de Actividades de la Comisión de Comunicaciones y Transportes*, (2006), *Op. Cit. Supra* 389, 113-121

the consultation period, the final Opinion issued by the Joint Communications Commissions of the Senate likewise recommended approval of the Minute.

Favorable arguments of the Lower House and Senate Commissions are summarized below:

(1) *Advanced communication services: Convergence*: Once approved, the Minute would allow television broadcasters to provide additional telecommunications services that are complementary to their public broadcasting services. The Opinion emphasized that the Minute does not imply that broadcasters can retain the parallel channels assigned for digital terrestrial television transition under the DTT Accord (issued by the SCT in 2004), once digital transition is complete; rather, it creates opportunity for television broadcasters to take advantage of technological advances to provide new services. Said convergence is of “benefit to the population and in accordance to principal international recommendations”⁵⁸². Telecommunications, radio, and television legislation would be updated according to international standards, to avoid lagging behind the technological advances of “convergence” that electronic communications are manifesting, in the short, medium, and long term⁵⁸³.

⁵⁸² §7.IV *Exposición de Motivos*, Dictamen de las Comisiones Unidas de Comunicaciones y Transportes; y de Estudios Legislativos, el que contiene Proyecto de Decreto que reforma, adiciona y deroga diversas disposiciones de la Ley Federal de Telecomunicaciones y de la Ley Federal de Radio y Televisión, LIX Legislature, Senado del Congreso Federal Mexicano, (issued 17 March 2006, discussed in first reading in the Senate on 29 March 2006, and approved by the Senate on 30 March 2006). (“Opinión de las Comisiones Unidas del Senado”).

⁵⁸³ Specifically, the reform would be in line with the Digital Terrestrial Television Standard and Policy, which was issued by the SCT in 2004, which regulates the transition to digital television for broadcasters by granting them additional channels to make a switchover between analogue and digital transmission. The Digital Terrestrial Standard and Policy also allows broadcasters to provide additional services on the understanding that a general legislation such as the Minute was required to define the

(2) *Improvement of regulator*: Cofetel would assume the powers of authority previously granted to the SCT in radio and television matters, gain the administrative resources of the Director of Radio and Television of the SCT, and maintain its powers of authority over telecommunications matters. A unified regulator would guarantee that uniform rules would be applied in authorizing concession licenses related to all electronic means of communication and in regulating similar communications services⁵⁸⁴. The Board of Commissioners would change to a five-member body and Commissioners would be designated for eight-year fixed and staggered terms. The staggered terms would allow continuity of expertise and historical memory in Cofetel, and would allow the next Presidential administration to nominate two new Commissioners. Commissioner nominations would be subject to rejection by the Senate, thereby providing a filter to verify and guarantee the professional capacity of said Commissioners⁵⁸⁵

(3) *Public Bidding Process for Broadcasting Spectrum*: The new public bidding process would end discretionary decisions of the SCT in broadcasting spectrum

range of additional services that could be provided by broadcasters. §*Consideraciones-IV* and §*Valoración de la Iniciativa-2*, Opinión de las Comisiones Unidas del Senado, *Id. Cit. Supra* 582, 2-5; The 2006 Convergence Reform modified the 1960 FRTVL in order to define “additional services” broadly as “additional telecommunications services”. § 28, 1960 LFRTV, as modified by 2006 Decree Reforming LFT and LFRTV, *Id. Cit. Supra* 572.

⁵⁸⁴ Furthermore, according to the Opinion, a unified regulator was a regulatory trend recommended at the 2003 ITU Preparatory Convention in Geneva (no exact reference was provided in the Opinion). §*Valoración-2*, Dictamen de las Comisiones Unidas de la Cámara de Diputados, *Id. Cit. Supra* 558, 5.

⁵⁸⁵ The Opinion states, without providing references, that in consideration of ITU and OECD recommendations, the Minute proposes a common regulator for the telecommunications and broadcasting sectors. The Opinion states, that “[...] the proposal is in accordance to those promoted by a great majority of countries in the World”. §§*Exposición de Motivos IV-1*, Opinión de las Comisiones Unidas del Senado, *Id. Cit. Supra* 582

allocation and guarantee transparency and optimum conditions for the State, particularly in terms of obtaining adequate compensation for a State resource used for private profit⁵⁸⁶. In order to participate in the public bidding processes, participants must obtain a favorable Opinion from Cofeco (the Federal Economic Competition Commission), which would prevent spectrum frequency concentration in a few agents, at a national or regional level⁵⁸⁷.

(4) *Public Telecommunications Registry*: The Telecommunications Registry would now be accessible by internet and contain relevant information about the radio and television industry⁵⁸⁸. Information regarding permit and Concession holders in the broadcasting sector would be filed in the Telecommunications Registry of Cofetel, alongside information concerning permit and concession holders of the telecommunications sector; this supports recent legislative efforts to increase transparency and public access to government information⁵⁸⁹.

(5) *Incentives to use Independently Produced Programming*: An incentive is generated for broadcasters to use independently produced programming, which addresses a longstanding demand from production interest groups, particularly the film

⁵⁸⁶ §Exposición de Motivos IV-2, Opinión de las Comisiones Unidas del Senado, *Id. Cit. Supra* 582; see also §Valoración de la Iniciativa-3, Dictamen de las Comisiones Unidas de la Cámara de Diputados, *Op. Cit. Supra* 558, 5-6.

⁵⁸⁷ §Exposición de Motivos IV-4, Opinión de las Comisiones Unidas del Senado, *Id. Cit. Supra* 582.

⁵⁸⁸ §Exposición de Motivos IV-3, Opinión de las Comisiones Unidas del Senado, *Id. Cit. Supra* 582

⁵⁸⁹ §Valoración de la Iniciativa-3, Dictamen de las Comisiones Unidas de la Cámara de Diputados, *Op. Cit. Supra* 558, 6.

industry⁵⁹⁰. Any 20% of independent programming transmitted by the network would allow a broadcaster an increment of 5% of commercial advertising time⁵⁹¹.

(6) *Electoral publicity*: In the spirit of transparency and accountability, the Federal Electoral Institute (*Instituto Federal Electoral* or IFE) would be in charge of contracting electoral advertising, and broadcasters would be obliged to inform the IFE of air time purchased by political parties as well as guarantee rates equivalent to commercial rates commonly offered by broadcasters⁵⁹².

(7) *Foreign Investment*: The Minute would not change the foreign investment regime, which protects radio and television as an exclusive Mexican investment industry⁵⁹³.

2. Arguments against the 2006 Convergence Reform

On February 22, 2006, Jorge Arredondo, President and Chairman of the Board of Commissioners of Cofetel, spoke before Senate members recommending *against* approval of the 2006 Convergence Reform. Chairman Arredondo stated that the reform was “not only not an advance, [...] but constituted a regression” with respect to regulatory and convergence objectives stated in the same Minute⁵⁹⁴. The Chairman’s

⁵⁹⁰ §Exposición de Motivos IV-6, Opinión de las Comisiones Unidas del Senado, *Id. Cit. Supra* 582

⁵⁹¹ §Valoración de la Iniciativa-4, Dictamen de las Comisiones Unidas de la Cámara de Diputados, *Op. Cit. Supra* 558, 6-7.

⁵⁹² §Valoración de la Iniciativa-5, Dictamen de las Comisiones Unidas de la Cámara de Diputados, *Id. Cit. Supra* 558, 7.

⁵⁹³ §Exposición de Motivos IV-8, Opinión de las Comisiones Unidas del Senado, *Id. Cit. Supra* 582.

⁵⁹⁴ Javier Corral, “Nueva Simulación”, Editorial, El Universal Online, 28 February 2006, <http://www.eluniversal.com.mx/editoriales/33511.html> [visited January 9, 2006]. The conclusions in the Chairman’s Senate Presentation provided the following reasons for objection:

Senate presentation was backed by the Board of Commissioners, with a resolution issued on March 15, 2006 that presented the Board's analysis and reasoned opposition to the 2006 Convergence Reform⁵⁹⁵, including the following conclusions:

(1) *A regression in advanced communication (convergence) services*: The Minute contradicts the international tendency that seeks to resolve convergence by way of technological neutrality, and uniformity of rules for similar services. The Minute regulates telecommunications and broadcasting matters separately (1995 FTEL and 1960 FRTVL) with several consequences: First, it creates a privileged telecommunications regime for broadcasters by granting them special permission to provide telecommunications services foreseen in the 1995 FTL without complying with the entry rules foreseen therein. Second, the two laws continue to define two separate marketplaces: one for telecommunications services over general means of communications (network and spectrum), and the other for broadcasting services.

“[The Minute does not] [...] (-) provide a common regulatory framework for spectrum and networks, which would impede the evolution of convergence; (-) guarantee the authority of the State for regulating the efficient use of the spectrum; and (-) strengthen the regulator in favor of its viability and continuity for the benefit of development in the telecommunications sector and for guaranteeing the public interest [...]”

Presentation document, Jorge Arredondo Martínez, President of Cofetel, hearing of the Communications and Transport Commission, 22 February 2006, http://www.cft.gob.mx/wb2/COFETEL/COFE_Opinion_de_la_Cofetel_respecto_a_la_minuta_de_____, (Last viewed April 31, 2006).

⁵⁹⁵ Cofetel, “Opinión de la Comisión Federal de Telecomunicaciones respecto a la Minuta de Decreto que reforma y adiciona la Ley Federal de Telecomunicaciones y Ley Federal de Radio y Televisión”, P/EXT/150306/9, III Sesión Extraordinaria del Pleno de la Comisión Federal de Telecomunicaciones, 15 de marzo de 2006, http://www.cft.gob.mx/cofetel/pleno/res_2006/MARZO/150306/150306.shtml or http://www.cft.gob.mx/cofetel/pleno/res_2006/MARZO/150306/P.EXT.150306.9.pdf (Last visited January 9, 2006)

(2) *A regression in regulatory powers:* The Minute does not guarantee that the regulator will be capable of exercising the power of the State to plan an efficient and effective administration of the spectrum in the short, medium, and long term, in either sector. Spectrum is not treated as a scarce resource whose uses must be reallocated and programmed by the State as a mediator among parties. Instead, the reform of article 28 of the 1960 FRTVL allows the uses of the public broadcasting spectrum to be determined by the petition filings of broadcasters instead of by adequate planning. Under this framework the regulator will not be able to guarantee the efficient use of spectrum to benefit the public interest above and beyond private interests.

Furthermore with respect to Cofetel, the Minute: (a) by maintaining the telecommunications regulator as a subordinate agency to the SCT, does not allow it fully independent decisionmaking or full control of resolution procedures for authorizing agents to enter the market or for fining agents in the telecommunications and broadcasting sectors; (b) fails to transfer powers previously granted to Cofetel in secondary regulation into the 1995 FTL; (c) fails to update Cofetel's powers with respect to the amount which it may apply in fines; and (d) creates confusion between the jurisdictions of the SCT and Cofetel in regards to telecommunications and public broadcasting. The Minute, far from representing an improvement to the current relationship between the regulator and private parties, weakens the regulator and creates legal uncertainty for the private party with respect to the acts of authorities in the sector. The Minute further creates potential litigation hazards with respect to the constitutionality of the reforms, which will diminish the capacity of the State to

exercise its authority in telecommunications and public broadcasting to guarantee the public interest and the sector's development in an environment of convergence and competition.

(3) *A regression in market competition:* The Minute does not take into account that the 1960 FRTVL was *not* drafted in the spirit and principles of free and fair market competition, while the 1995 FTL was drafted in said spirit and principles. Public broadcasters authorized under the 1960 FRTVL to use spectrum and to provide services are not subject to the same obligations as telecommunications providers authorized under the 1995 FTL. Given that for over two decades the country has been oriented towards strengthening a development regime based on fair competition and the strengthening of independent regulating agencies, the Minute will cause structural disruption with respect to the legal framework of the rest of the economic sectors.

(4) *A regression in fair market place:* The establishment in the Minute of a distinct legal framework for broadcasting as a special telecommunications service to be regulated under the 1960 FRTVL, in contradiction to the general telecommunications legal framework in the 1995 FTL, will generate asymmetric rights and obligations among telecommunications service providers, depending on the legal framework under which each is regulated and the authorizations each has received prior to or after the entry into force of the reform. For obvious reasons, this creates distortions in the market, complicates the regulatory function, and impedes fair regulation.

On February 22, 2006 the President and Chairman of Cofeco also presented conclusions to the Senate included in an Opinion issued by the Board of Commissioners of Cofeco on November 8, 2005⁵⁹⁶. In summary, Cofeco's Opinion supports convergence; however, Cofeco notes that in order for the reform to take full advantage of the benefits of convergence it would have to: "(i) modify the traditional regulatory focus that differentiates telecommunications and broadcasting services and that therefore creates obstacles towards convergence, (ii) insure that all means of transmission are subjected to similar regulation and to be authorized to provide all technically feasible services under nondiscriminatory and efficient conditions of interconnection and interoperability, and (iii) adopt measures that avoid phenomena of anticompetitive concentration, monopolistic practices and other market distortions"

⁵⁹⁷ .

The opposing group of Senators in the final approval session provided detailed commentary, in similar terms.

⁵⁹⁶ Cofeco, "Dictamen de la iniciativa con proyecto de decreto que reforma diversas disposiciones de la Ley Federal de Telecomunicaciones y de la Ley Federal de Radio y Televisión" podría tener en materia de competencia y libre concurrencia, en caso de aprobarse, Oficio PRES-10-096-2005-148, November 8, 2005

⁵⁹⁷ Cofeco, Dictamen de la iniciativa, Noviembre 8, 2005, *Id. Cit. Supra* 596, 6

E. UNEXPECTED CONSEQUENCES OF INCREMENTAL INSTITUTIONAL CHANGE:
THE INVALIDATION OF THE 2006 CONVERGENCE REFORM BY THE NATION'S
SUPREME COURT OF JUSTICE

This section reviews the unexpected consequences of incremental institutional change by analyzing the role played by a minority group of Senators and the Nation's Supreme Court of Justice ("SCJN").

1. The filing of an "action of unconstitutionality" by a minority group of Senators

On May 9, 2006, a group of 47 Senators (36% of Senate members in office at the time that the 2006 Convergence Reform was approved) filed an action of unconstitutionality with the Supreme Court against the Reform⁵⁹⁸. The group of Senators is principally represented by Senators Javier Corral from the PAN and Manuel Bartlett from the PRI, who led the opposition movement in the Senate against the approval of the Minute⁵⁹⁹.

In contrast to the arguments presented in the Senate hearings, the arguments presented to the Supreme Court must show that the 2006 Convergence Reform breached the hierarchy of norms and principles established in the Constitution. The Senators claim that the 2006 Convergence Reform violates the Constitution for several reasons⁶⁰⁰. However, the final debate focused on the constitutionality of the following:

⁵⁹⁸ Jesús Aranda, "Emplaza al Ejecutivo a que responda a la demanda; cuenta con 15 días hábiles: La Corte da entrada a la controversia de los senadores contra la ley Televisa", Sección Política, *La Jornada*, 10 May 2006.

⁵⁹⁹ Jesús Aranda, 10 May 2006, *Id. Cit. Supra* 598

⁶⁰⁰ 1) The text of the Minute which was sent by the Chamber of Deputies to the Senate was illegally and arbitrarily altered in violation of the Constitutional articles that define the legislative procedures to be followed in such cases.

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- 2) Congress invaded the sphere of the Executive Power by establishing in a law that Cofetel is an *órgano desconcentrado* or deconcentrated administrative agency, which in terms of the Constitution and the Law of the Federal Public Administration is a type of agency which only the President is empowered to create in his role as administrative head of State.
 - 3) Congress violated the principles of division of powers and Constitutional supremacy by introducing a procedure into the 1995 FTL by which the Senate can object to Commissioner nominations made by the President: the Commissioners are public officers of an administrative agency subordinated to the SCT, which in turn is subordinated to the Presidency, and the President pursuant to article 49 of the Constitution is empowered to freely designate and remove officers of the public administration under his command.
 - 4) The transitory articles of the 2006 Convergence Reform violate the sphere of administrative powers of the Executive and the principles of legality set forth in the Constitution by instructing the President to issue specifically defined administrative regulations within a determined time frame, in order to reorganize Cofetel by transferring the resources and powers of authority of the former Department of Radio and Television of the SCT to Cofetel.
 - 5) Exit terms for the Commissioners were staggered in such a way that the President brought to power by the 2006 Presidential elections (July 2006) would exercise lesser rights to nominate Commissioners than the preceding President, and the next President would exercise greater rights in nominating a greater number of Commissioners. In this sense, the Reform violates principles of democracy, representation, and Republican government upheld by the Constitution.
 - 6) The reform violates the Constitutional principles of freedom to work and of equality, as well as the prohibition against issuing laws that specifically discriminate between individuals, because the 2006 Convergence Reform bars the Commissioners in office at the time it was approved from being renominated as Commissioners after the Reform's entry into force. Furthermore, Congress removed said public officers from office although they had been designated by and subordinated to the President, thereby once again violating the sphere of powers of the Executive.
 - 7) The 2006 Convergence Reform violates principles of equality and nondiscrimination, as well as principles of free market competition, because of a built-in contradiction: it authorizes economic agents from the broadcasting and telecommunications sectors to cross-provide a similar range of convergent services; however, it regulates each type of authorized service provider by a different law (FTL or FRTVL) depending on the origin of their authorization for telecommunications or broadcasting. In doing so, the 2006 Convergence Reform generates a series of discriminations that favor broadcasters in obtaining telecommunications service authorizations, such as allowing the regulator to determine the amount to be paid by existing broadcasters for the use of spectrum for telecommunications service provision, whereas any other telecommunications service providers previously authorized under the 1995 FTL or in the future authorized under the 1995 FTL or 1960 FRTVL must pay an amount determined through a competitive public bidding procedure. Furthermore, Cofetel is made a common regulator but must regulate by discriminating on the basis of which law applies to which carrier. Likewise, Cofeco will have difficulties in legally sustaining resolutions in which it determines that there is a common market, when the 1995 FTL and 1960 FRTVL do not define a common "convergent" market, but only authorize carriers to provide services regulated in the other law.
 - 8) Telecommunications concessionaires are discriminated against in violation of principles of equality and free competition upheld by the Constitution, because the 1995 FTL foresees that a telecommunications concessionaire can be subjected to special obligations set by Cofetel, whenever Cofeco finds that they are an economic agent with substantial market power. This obligation does not carry over to the broadcasters, since a competition regime is not foreseen by the 1960 FRTVL.
 - 9) The principles of legality and delegation of powers of the Executive are contravened by the 2006 Convergence Reform because Congress grants Cofetel powers (a) to receive payments due to government, when it is a specific power of the Secretary of Finance, (b) to intervene in international issues when it is a specific power of the Secretary of International Relations, and (c) in radio and television law which are exclusive to the Secretary of Communications and Transport, and which in any

(1) The *refrendo* rights strengthened in the 2006 Convergence Reform, which granted broadcasting concessionaires a right to automatically renew their rights without any substantive government review of their use of the spectrum under the expired Concession contract which expired or any requirement to participate in a competitive bidding process.

case, all of the above, should have been a decision to delegate of the Executive to a deconcentrated agency of the SCT.

10) State supervision over the use and management of spectrum – a national good – is overall diminished by the fact that the 2006 Convergence Reform allows broadcasters to change the use of their broadcasting spectrum by simply filing a petition to provide telecommunications services. Any other telecommunications provider must participate in a bidding process pursuant to the 1995 FTL, and under the FTL, the State has the ability to reject unqualified participants and impose conditions (rights and obligations) on commercial users of spectrum, including for renewal of licenses. The reform violates the constitutionally invested authority of the State over the use of public goods and emphasizes a discriminatory treatment in favor of broadcasters over any other spectrum user. In the wording of the reform, in the 1960 FRTVL, the State may require adequate compensation from broadcasters for new telecommunications uses of their spectrum, however, the 1995 FTL states that the State will require adequate compensation to be determined by the bidding process. The reform is not only discriminatory, but also diminishes the State's capacity to adequately determine adequate compensation for use of a public good by a commercial agent. Furthermore, broadcasters may exercise a right of renewal (a *referendo*) under the 1960 FRTVL by which the State must show preference to the previously licensed broadcaster in renewing their license for the use of spectrum, whereas the 1995 FTL determines a process by which the State will evaluate if the carrier has complied with previous license conditions in order to grant a renewal (*prorroga*).

11) The 2006 Convergence Reform ignores a Constitutional mandate to protect the indigenous culture and heritage of Mexico, which includes providing indigenous communities with adequate access to systems of broadcasting communication.

12) Human rights norms and treaties related to freedom of speech are likewise violated since the 2006 Convergence Reform does not guarantee equal opportunity for all individuals to disseminate their ideas, given the difficulty for obtaining access to broadcasting concessions and permits.

13) The new public bidding process in the 1960 FRTVL only requires that participants exhibit their Request for an Opinion from the Cofeco on their participation, which does not adequately impede a dominant broadcaster from participating in a spectrum bidding process to the effect of concentrating further spectrum. Hence, the reform violates the Constitutional mandate of protecting against monopolies.

14) In providing broadcasters with the option to provide telecommunications services, the door is opened for broadcasters to rent network capacity from established telecommunications carriers since they currently do not have said capacity. Public broadcasting is required by law to be 100% Mexican owned, and the incursion of broadcasting into the telecommunications sector generates a conflict of norms that violates the principles of legality in the Constitution.

15) The 2006 Convergence Reform states that broadcasters must report advertising bought by parties or candidates running for election to the IFE. However, electoral rules in the Constitution state clearly that only parties may buy advertising for candidates belonging to their parties. "Resumen sobre la acción de inconstitucionalidad", *Etcetera* online magazine, May 16, 2006, <http://www.etcetera.com.mx/pagresumen1ne67.asp> (last viewed 5 January 2006).

(2) The refusal without cause exercised by the Senate to consider the nominations sent by the Executive in relation to Rafael del Villar (a career public servant who established the 1995 FTL) and others who were first nominated by Fox to join Cofetel.

(3) The removal from office and barring from renomination, after the entry into force of the 2006 Convergence Reform, of the Commissioners in office at the time of the Reform by appointment of the President.

(4) The staggered terms of Commissioners, which grant unequal rights to the new President with respect to those of his successor in nominating and thus balancing out democratic choices and policy representation on the Board.

(5) Unequal treatment and discriminatory rights for radio and television broadcasters who are authorized by discretionary proceedings and who are barred from providing convergent communications services.

(6) The automatic authorization granted to broadcasting concessionaires in the radio and television law to provide pay telecommunications services over the broadcasting spectrum without allowing the state to procure spectrum management practices or gain a competitive rent for such new use of broadcasting spectrum, as had been secured by public bids in the 1995 FTL.

The interest of civil society in this case showed an avid support for the strengthening of the judiciary and the rule of law, to which the Court responded publicly. Two amicus curiae briefs were presented for consideration by the Supreme Court of Justice in its decision over the 2006 Convergence Reform. The first amicus brief was written and presented by public officers who resigned from office with the entry into force of the 1995 FTL⁶⁰¹, and the second amicus curiae was presented by a group of students and professors representing a public-interest legal clinic of ITAM university⁶⁰². The amicus curiae is not acknowledged under Mexican procedural law; however, the Court accepted and took into consideration arguments brought forward by members of civil society.

2. *The SCJN's partial reversal of the 2006 Convergence Reform*

In late May through early June of 2007, the Supreme Court of Justice of Mexico televised its hearings through the Court government channel and webcast the session through its internet site, in a gesture to civil society of transparency and inclusion. It was also a point well made in terms of the use of technology in disseminating public information. In the first segment of the hearings, the Court consulted with experts, and

⁶⁰¹ Clara Luz Álvarez González de Castilla, Beatriz Adriana Camarena Osorno, and Salma Leticia Jalife Villalón, Amicus Curiae to the SCJ, filed August 22, 2006, (this study provided an evaluation of technical, regulatory, and economic effects of the 2006 Convergence Reform). The brief can be seen at *Etcetera* online magazine, <http://www.etcetera.com.mx/amicus.pdf>

⁶⁰² Alberto Benítez, José Roldán y Martha Villarreal, Amicus Curiae, Public Interest Clinic of Instituto Tecnológico Autónomo de México (ITAM). The authors argue that by benefitting broadcasting commercial concessionaires with new transparent procedures for attaining new licenses and authorizing them to provide additional telecommunications services, legal conditions are established that violate the constitutional principles of equality and nondiscriminatory treatment of permissionary radio and television stations, a majority of which are nonprofit community and cultural broadcasters. Thus, these stations that provide an alternative option to commercial broadcasters will not be able to gain nondiscriminatory access to new concessions to provide telecommunications services.

then proceeded to discuss and vote on the constitutionality of each contested article of the reform. The Supreme Court invalidated all the articles of the 2006 Convergence Reform that supported the main aspects of the debate previously mentioned, except for the articles and transitory articles that established the current Board organization and staggered terms of the Commissioners⁶⁰³.

The unconstitutionality action does not suspend the effects of the 2006 Convergence Reform, and therefore from April 11, 2006 through August 2007, when the resolution was officially published, the reform remained in force. This implies that resolutions by the SCT and Board of Cofetel based on the reform during this period remain valid. This does not preclude submission of recourses by affected parties that may attempt to prove otherwise.

Nonetheless, by partially exercising a “veto” on the 2006 legislative Convergence Reform, the SCJN reversed main effects of the regulatory governance structure which attempted to secure property rights by Televisa. It did not reverse (1) the addition of a fifth Commissioner and (2) the staggered terms of the Commissioners. Therefore, a remaining negative impact is that the current Board of Commissioners remain

⁶⁰³ SCJN, *Sentencia relativa a la Acción de Inconstitucionalidad 26/2006 promovida por Senadores integrantes de la Quincuagésima Novena Legislatura del Congreso de la Unión, en contra del propio Congreso y del Presidente Constitucional de los Estados Unidos Mexicanos, así como los votos formulados por el señor Ministro Genaro David Góngora Pimentel (Continúa en la Tercera Sección)*, (Issued June 7, 2007) Effective D.O. August 20, 2007. Available at <http://diariooficial.segob.gob.mx/PDF/200807-MAT.pdf> or <http://200.38.86.53/NR/rdonlyres/86289019-526E-4A3E-89F4-15BDC8F0FECF/0/AccionInconstitucional262006v1.pdf> (Last viewed August 15, 2007)

unaffected in office, and thus continue to represent the interests that pushed the 2006 Convergence Reform.

The SCJN received widespread support from civil society. The reversal of the 2006 Convergence Reform is the most important example to date of enforcement of the formal system of checks and balances to protect the broader public interest against the newly acquired policymaking attributes of the Legislative branch and against the traditional acquisition of selective property rights by elite economic entrepreneurs in Mexico. This event could be construed as an institutional “tipping point,” but it is yet to be seen whether these incremental changes will lead to improved regulatory governance structures for the telecommunications sector, or alternatively, to a new equilibrium in the telecommunications institutional matrix which continues to selectively enforce property (monopoly) rights for elites.

F. IMMEDIATE ECONOMIC OUTCOMES OF THE 2006 CONVERGENCE REFORM

When the 1990 Modified Concession Title was issued, a restriction on communications services was placed on Telmex: it cannot directly provide public television broadcasting services; but it can provide pay television services if authorized by the SCT⁶⁰⁴. This restriction on broadcasting is feeble at this point given that pay television services are a growing industry of convergence that will probably all but take over public broadcasting markets. To this end, post approval of the 2006 Convergence Reform, on October 3, 2006, the SCT officially published the Accord for

⁶⁰⁴ § 9.1, *Modificación al Título de Concesión de Telefonos de Mexico (1990) Op. Cit. Supra* 288.

convergence of local services and pay television services by way of public telecommunications networks (“2006 Convergence Accord for local and pay television networks”)⁶⁰⁵. This Accord allows both cable or satellite television companies and local service providers to provide convergent telecommunications and television services with a few pre-operation commitments related to interconnection. The 2006 Convergence Accord for local and pay television networks conditioned Telmex’s entry into the pay television market to compliance to interconnection, interoperability and number portability obligations.

In February 2007, Telmex began providing internet Prodigy™ television services through its network; it had already been noted in the media that this had the potential to turn Telmex into the largest cable company in the world⁶⁰⁶. In August 2007, Telmex signed agreements with several cable companies in Mexico to begin providing triple play services in the country⁶⁰⁷.

⁶⁰⁵ S.C.T., Acuerdo de convergencia de servicios fijos de telefonía local y televisión y/o audio restringidos que se proporcionan a través de redes públicas alámbricas e inalámbricas, D.O. 3 October 2006.

⁶⁰⁶ Lanza Telmex Prodigy Media, televisión por Internet, Alambre online, <http://www.alambre.info/2007/02/06/lanza-telmex-prodigy-media-television-por-internet/> [Viewed March 21, 2007]; Marco Mares, “Telmex, ¿red de TV-cable más grande del mundo?”, *La Crónica de Hoy*, October 2, 2006, http://www.cronica.com.mx/nota.php?id_notas=264075

⁶⁰⁷ Oxford Analytica, “World's Richest Man Faces Scrutiny”, August 9, 2007, available at http://www.forbes.com/business/2007/08/08/mexico-slim-telmex-cz_0809oxfordanalytica.html; “Seeks to offer in less than five months video, data, internet, and telephony services in several states of Mexico [...] This type of contracts will allow a decrease in the lag of digital convergence in the country, said Héctor Slim”. *El Financiero en Línea*, “Firma Telmex acuerdo de interconexión con ocho empresas”, 9 de agosto de 2007, <http://www.elfinanciero.com.mx/ElFinanciero/Portal/cfpages/contentmgr.cfm?docId=73127&docTipo=1&orderby=docid&sortby=ASC>

In the aftermath of the 2006 Convergence Reform, Grupo Televisa and Grupo TV Azteca did not gain select entry rights into the telecommunications market. However, Telmex and Telcel remain lightly regulated with the added advantage of a politically captured regulatory Board, whose future vacant positions will be negotiated with the Legislature. Recently, the President of Cofeco announced that it would begin a new round of investigations into Telmex's and Telcel's market dominance, at the latest by November 2007⁶⁰⁸. In response to Cofeco's aired intents, Mr. Slim stated that the inquiry would "end badly"⁶⁰⁹. The result of previous inquiries would imply he would be right to think so. However, among the lessons of the 2006 Convergence Reform is that incremental change can have unintended consequences for furthering plurality and liberalization. Furthermore, the SCJN is willing to help advance economic competition regulation. As further proof, since the approval of the 2006 Convergence Reform, the Federal Law of Economic Competition was modified to include rules for discovery, but bound Cofeco to obtain a judicial order in order to require discovery or exercise inspection visits or order a divestiture of firms found to be infringing the antitrust law⁶¹⁰. An action of unconstitutionality was filed by the General Attorney of the Republic and granted by the SCJN to invalidate these "judicial" pre-requisites and

⁶⁰⁸ Ernesto Aroche, "Nueva investigación del órgano regulador a Telmex y Telcel", *La Jornada*, August 15, 2008, available online at <http://www.jornada.unam.mx/2007/08/15/index.php?section=economia&article=028n2eco&partner=rss> (last viewed August 15, 2007)

⁶⁰⁹ "It's curious that he is saying and making judgments before doing the study. He's prejudging," Slim said. "It will end badly.", AP Press, Slim Criticizes Antitrust Regulator, July 24, 2007, available online at http://biz.yahoo.com/ap/070724/mexico_carlos_slim.html?.v=1 (last viewed August 15, 2007)

⁶¹⁰ Reforms published D.O. June 28, 2006

barriers to the exercise of the new discovery powers⁶¹¹. A different outcome may be possible next time Cofeco issues a dominance resolution, independent of whether Cofetel proceeds to adequately issue special obligations for a declared dominant carrier or not.

⁶¹¹ SCJN, *Sentencia y voto particular formulado por la Ministra Olga Sánchez Cordero de García Villegas, relativos a la Acción de Inconstitucionalidad 33/2006, promovida por el Procurador General de la República, en contra del Presidente de la República y de las Cámaras de Diputados y de Senadores del Congreso de la Unión*, (D.O. June 12, 2007). Available online through the Congressional webpage at http://www.diputados.gob.mx/LeyesBiblio/ref/lfce/LFCE_sent02_12jul07.doc

IX. CONCLUSIONS: THE PATH DEPENDENCE OF TELECOMMUNICATIONS REFORM IN MEXICO

This final chapter contains two sets of conclusions and a postscript. The first set of conclusions summarizes evidence from the case studies of whether a regulatory governance system in the telecommunications sector exists, which selectively grants and enforce property rights on the market, and whether this governance system is a result of a path dependence of reform to a negative institutional endowment. The second set of conclusions summarizes contributions to the literature which frames these questions. Finally, a postscript is included to explore the implications of these conclusions to reform efforts for this current *sexenio* (2006-2012).

A. EVIDENCE OF A SELECTIVE PROPERTY RIGHTS GOVERNANCE SYSTEM FROM THE CASE STUDIES OF SUCCESSIVE REFORM

This dissertation proposed that the mixed economic performance of the telecommunications sector in Mexico could be explained as a result of path dependence of reform on a negative institutional endowment which reproduced regulatory designs that selectively grant or selective enforce property rights on markets. The economic outcome of such regulatory governance structure would be a monopoly-led telecommunications market, and wealth concentration without widespread redistributive effects. The following sections summarize results for each of the stages of telecommunications policy and reform analyzed herein.

1. State telephone company stage

In the baseline of reform, the institutional endowment is a rent-seeking Presidentialist system. It enforces a regulatory governance structure that guarantees a state-monopoly. At the baseline, prior to the reform period, a selective property rights system prevails in which the state has exclusive rights to extract profit from telephone company operations. The principal incentive structure of the firm is a tax regime aimed to extract taxes from profits, in order to satisfy financial needs of the state. There is no incentive to maintain a cost-efficient operation and though there is development and growth in service, it does not occur at a rate that overcomes underdevelopment in infrastructure or access to service. The labor union and business clients are the main constituents curbing the rent-seeking focus of the state. At the end of this period, Mexico remains among the higher ranking peer L.A. countries, but remains comparatively underdeveloped to more advanced economies.

The institutional matrix maintains a state monopoly whose main constituents are the labor union and industrialists in need of service for production. This coincides with the priorities of the rent-seeking Presidential system in other areas of the economy during this period.

2. Privatization reform

Privatization reform occurs in a moment of crisis for the rent-seeking Presidentialist system. In this stage, a regulatory governance structure similar to Haber et al.'s (2003) VPI coalition is established, whereby the government obtains a high price from the sale, the new asset-holders are guaranteed selective property rights through their

concession titles, and the labor union enjoys the benefits of rising prices of the stock exchange with a 4.4% ownership of L shares. This is the case study most closely resembling Haber et al's description of a VPI coalition regulatory governance structure, in which the labor union acts as a third party enforcer of a selective property rights system, granted by an authoritarian government, during reform in a time of crisis, to a favored business group.

The regulatory governance structure in privatization is based on a modified state monopoly concession title, which regulates Telmex as a private monopoly. It is granted formal protection from competition in long distance services for six year. A private monopoly under a protected exclusive concession by definition grants selective property rights to extract rents from the operation of company assets. Telmex is a regulated company subject to direct Secretary oversight. However, its monopoly rights are enhanced by the omission of the government to lay out rules of competition in local and mobile services.

The principal incentive structure of the firm is to rent-seek. The institutional matrix protects a private monopoly whose main constituents are the government and the labor union. In 1996, it will be obliged to compete, and furthermore there is no assurance of what will happen to the unstable rent-seeking Presidential system. The private management complies with its contractual commitments set out in the "concession", including a price cap and rate of growth in lines, but has no further incentive or regulatory restriction to keep a cost-efficient operation.

Expected levels of development and growth in infrastructure and service are met, which later diminish when formal commitments end. The operator is recognized as one of the most profitable enterprises in the world, showing a disproportionate rate of return and wealth concentration, against the development outcomes achieved. Mexico continues to rank among the higher ranking peer L.A. countries, but remains comparatively underdeveloped to more advanced economies.

3. Liberalization reform

Liberalization reform occurs when a new rent-seeking Legislative system is stabilizing. The President is still able to propose a legislative reform which introduces competition in telecommunications services by the start of 1997. This case study does not show a regulatory governance structure similar to an informal VPI coalition. Instead, a shift in political control from a one-party system to a multi-party system uncovers the formal policymaking powers of the Legislature. The Legislature appears as a stronger policymaker vis-à-vis the diminished role of the President in the policymaking process. High degrees of clientelism can be exercised by political party leadership through Congressmembers, with a low accountability to voters. These characteristics of the party system reinforce incentives to engage in undemocratic representation of interests in the Legislature. Thus, despite democratization, the system retains rent-seeking characteristics in which political parties attempt to retain control of the executive and legislative branches by representing a narrow range of elite interests in policymaking.

Although the 1995 FTL provides good rules for establishing a competitive telecommunications market, it fails to provide adequate enforcement mechanisms for such new commitments. The regulator in particular lacks independence from subordination to a political body, and commitment enforcement capacity. Telmex is forced to compete but its monopoly rights are still protected by the omission of the Legislature and the Executive to establish an independent regulator and/or to provide an efficient administrative structure for the regulator. Cofeco as the back-up regulator of competition lacks the capacity to formally declare the incumbents “dominant market agents”, in order for Cofetel to impose special obligations that would curb the power of the privatized incumbents.

As a result, pre-existing selective property rights are protected by a general (a) lack of independence of regulatory agents, (b) weaknesses in judicial performance, (c) legislative paralysis, and (d) executive division, all of which characterized the period of democratic and economic transition in Mexico. Furthermore, the regulatory governance structure in liberalization maintains a modified state monopoly concession title, which regulates Telmex as a private monopoly. Telmex’s concession title is an instrument differentiated in terms from all new concessions which are issued under the 1995 FTL, and its tariffs and charges continue to be calculated on a price formula which miscalculates the costs of the firm, as well as the growth of the sector.

The result of the liberalization period is selective entry of new competitors, and selective enforcement of commitments. Similar to the political system, the economy becomes more inclusive, but not open or accountable to the broader population. New competitors have an incentive to collude, break rules, litigate, cream-skim and find niche markets, as well as to take other actions that enhance their advantages and avoid the costs of regulation. They also have incentives to activate second best enforcement mechanisms of the OECD and WTO to negotiate increased domestic regulation of the incumbents. The principal incentive structure of the incumbent is still to reap rents for as long as the current system is stable, and capture political entrepreneurs in a position to introduce policy, whether in the Executive or Legislative branch.

In this case study, economic output is high from the incumbents, wealth concentration evident, but development in competition, fair prices, investment, infrastructure, and services low. Mexico does not overcome its position as a mid-ranking country in Latin America, at times falling behind comparable regional economies. It remains underdeveloped by comparison to peer OECD countries, except in middle and high usage mobile service prices, and productivity levels of firms.

4. Convergence reform

Convergence reform occurs under the same rent-seeking Legislative system of liberalization. However, in this case study the reform once again takes place in an electoral year, leading to an imminent alternation in power which could lead to the office of the Presidency being captured by a left-wing candidate offering to enact

drastic redistributive policies. Furthermore, the communication reform is being pursued by television conglomerates as a means to secure a future economic position in a market which decreases the value of analog broadcasting services, and increases the value of broadband spectrum. The television conglomerates capture the policymaking capacity of the Legislature to push a reform, which maintains and enhances their selective property rights over broadband spectrum, in order to allow them to provide both commercial broadcasting and telecommunications services in the future. In doing so, the reform also grants selective lowering of entry barriers to said television incumbents into the telecommunications market. In addition, it changes the regulatory structure of the Board of Commissioners of Cofetel to insulate the board from higher ranking Executive officers in the line Ministry, while securing regulatory capture of future nominations of Board members by subjecting these nominations to approval of the Senate.

In this case, unexpected results of incremental change in the institutional endowment of Mexico exact a toll on the *status quo*. Unexpected changes include:

(1) a change in values in the legal culture of Mexican citizens, who express outrage at the behavior of Congressmen,

(2) this change in culture opens incentives to political entrepreneurs in the Legislature who purport to have higher expectations for the rule of law in Mexico, similar to those of the Mexican citizenry, to divert from party lines,

(3) new judicial recourses available to minorities in the Legislature and other Constitutional bodies (*acción de inconstitucionalidad*) to be filed with the SCJN to rule on the unconstitutionality of a law. This recourse was part of a package of judicial reforms sent by President Zedillo to the Legislature in order to avoid bearing the costs of arbitrating electoral conflicts. The unintended consequence was a constitutional check against the Legislature by a more independent Court, and

(4) encouraged and legitimized by public opinion, the Supreme Court of Justice exercised procedural powers to reverse selective property rights acquired through a captured legislator. Notwithstanding, the Court did not dissolve the administrative organization which was established to protect those rights. A Board of Commissioners of the Cofetel installed by a captured Legislature continues in force into the foreseeable future. The new Board of Cofetel is an example of a misimplementation of a recommended regulatory structure for an “independent agency”. The Legislator also insulates the “captured” regulator from restructuring. This case study shows a path dependence in implementing regulatory reform in an unstable regime, which although it did not entirely succeed in establishing new selective property rights, it succeeded in enforcing existing selective property rights.

All things staying the same, the economic result is an increase in the value of Telmex’s and Telcel’s market position in a convergent market. The economic outcome of this reform will probably show high income accumulation from the incumbents, and fast development of new convergent telecommunications services. Possibly, market

agents will legally absorb into triple play service providers, to enhance market advantages but also with the effect of reducing competitors in the market. Eventually, a new television concession title may be granted to improve plurality in the broadcasting sector. Mexico will probably not overcome its position as a mid-ranking country in Latin America. However, it may show comparable growth in broadband services with respect to regional economies. With Mr. Slim's wealth under scrutiny there may be additional political forces acting to pressure him to acquiesce to reform in order to defend the social legitimacy of his wealth. The telecommunications sector of Mexico will probably remain underdeveloped by comparison to peer OECD countries, except in mobile service prices, and productivity levels of firms. Telmex and Telcel's concession titles remain unaffected by these reforms, but they have gained the benefits of a captured Board.

Factors which could significantly alter this outcome are the new powers of Cofeco supported by judicial resolutions. This case study shows that incremental changes can amount to significant reversals in the *status quo*. However, the sequence of case studies confirm that selective property rights are often granted under crisis, and that once granted they are very difficult to reverse and easy to enforce, except by drastic alteration to the institutional endowment. In that case, economic history could repeat itself as shown by Haber et al. (2003) with respect to the Mexican Revolution, and the analysis of the first section with respect to a repetitive business structure of wealth concentration through *grupos* shown in the first part of this dissertation.

B. CONTRIBUTIONS TO STUDIES OF THE PATH DEPENDENCE IN REGULATORY REFORM IN DEVELOPING COUNTRIES

This case study or sequence of case studies of the telecommunications sector of Mexico from the late 1970's to 2006, allowed a detailed inquiry into the institutional matrix of regulatory reform. This contributes the following conclusions about regulatory reform in a developing country:

(1) Reform by a government under crisis can often lead to implementing regulatory governance systems that grant “selective property rights” to industrialist. These need not necessarily be through the formation of a VPI coalition, but often requires some type of informal clientelistic network which resolves uncertainties in a weak rule of law. As a result, select business conglomerates or *grupos* in Mexico will invest and procure growth in a negative institutional endowment, but through rent-seeking and wealth concentration; instead of redistributing excess rents to re-investment and social development,

(2) As a consequence, this study sheds light on why growth in the developing world tends to centralize around principal *grupos* or business groups. A question for future research is whether the regime of concession titles, set forth in the Mexican Constitution as the principal instrument for protecting the public interest in strategic economic sectors of the country, is actually the main formal vehicle which allows selective entitlements to be granted to asset-holders over strategic resources of the country. In this same line of thought, the *amparo* processes in Mexico can be defined

as systems of selective access to justice, which among other things, encumber regulatory processes.

(3) once an unstable governance system resolves into a modified stable institutional equilibrium, path dependence will have recreated patronage-networks in some version of a rent-seeking government. The combination of a weak rule of law or weak limited government is protective of selective property rights acquired during instability, and which supports the ruling economic entrepreneurs. In this sense, the literature on path dependence is confirmed whereby once a system of selective property rights is established, reform tends to reinforce the *status quo* of development. This is most evident in the way best economic results of reform are in regions or sectors which already show higher development levels. In this sense, reform results are likewise understood as a consequence of the exercise of elite preferences; and

(4) incremental change in legal culture of the broader population and the “thin” definition of the rule of law will have unexpected effects on the *status quo*. This dissertation once again reaffirms the theory that the more limited a government, i.e the more sophisticated the systems of formal checks and balances on a government, the greater the possibility to eventually establish a system in which property rights are a collective good, which when used with accountability generate growth with wider spread redistributive effects. Though foreign governments watchful of their investors, trade agreement panels, intellectuals, labor unions, the judiciary, and other accountability enforcers may be effective from time to time in curbing the acquisition

of selective property rights, or even motivating a general enforcement of property rights, they are second best “enforcers” of commitments in a negative institutional endowment. They are “token” enforcers for a system which otherwise will perpetuate selective property rights, short of revolution or a takeover of a government with drastic redistributive policies.

C. MEXICO, LOOKING FORWARD ... TO A NEXT CRISIS OR CAN WE CHOOSE SOCIAL DEVELOPMENT?

Lorenzo Meyer, in comparing the type of political elite in government before and after the 1910 Revolution, writes:

“If our analysis is correct, the Mexican Revolution is not a negation of the political past but rather an impressive step forward in the modernization of the Mexican authoritarian state”⁶¹².

This dissertation shows a similar continuity between regulatory governance structures of the past and present. The telecommunications case study allows us to see how “shock therapy” reform modernized regulatory governance structures that nonetheless continued to favor selective granting and enforcement of property rights (concession rights). Weak regulatory structures prevailed and oligopolic *grupos* were renovated through reform, albeit in a more plural environment of economic actors and in the context of global trade. As a consequence, poverty and underdevelopment has likewise

⁶¹² Lorenzo Meyer, “Historical Roots of the Authoritarian State in Mexico”, in *Authoritarianism in Mexico*, Jose Luis Reyna and Richard S. Weinert (editors), Institute for the study of Human Issues, (1977), 19

been modernized in an interconnected world context. Jorge Basave summarizes the gains and losses of the reform years in Mexico in the following way:

- “a) it is a loss in terms of general economic growth and in terms of standard of living for the population. Thus, it is a backward movement in development;
- b) it does not represent a backward movement in absolute terms with respect to an indispensable change in direction in order to keep in line with worldwide tendencies, given that the first steps were taken towards its restructuring,
- c) it was won for financial capital.⁶¹³”

Despite these disappointing outcomes, the Mexican political system has become more plural and the economy is growing. In the advance of plurality, the rule of law has strengthened, both for markets and access to justice. A more sophisticated formal system of checks and balances has evolved, leading to surprising results such as the Supreme Court’s partial “veto” of the much mentioned ‘Televisa Law.’ The case was important because the Court ruled on a question of monopoly rights and development that was once considered to be *tabu* for judiciary.

There is still a long way to go to establish an effective and inclusive democratic and economic system in Mexico. This dissertation shows the fragility of Mexico’s institutional endowment (the legislative rent-seeking system) to radical pendular swings in economic policymaking. It is inadequate for investment in long-term

⁶¹³ His words are in reference to the “lost decade of the ‘80s, whose negative effects were prolonged through the end of the century”. Jorge Basave (1996):245, *Id. Cit. Supra* 146

economic development and increases the likelihood that elite economic actors will aim to protect monopoly rights and short-term rent reaping. As long as Mexico continues to have a significant gap in wealth distribution, the Presidency and the political system are at risk of being appropriated by extreme oscillation in redistribution policies from right to left, from one *sexenio* to the next⁶¹⁴.

At the moment, President Calderon is attempting to achieve a fiscal reform which President Fox failed to pass through Congress. Without this reform, a fiscal crisis looms ahead for the Mexican government, and the possibility of renovation of formal and informal governance systems that perpetuate property rights and wealth as selective benefits in the population. Despite the need of reform, if it is interpreted as a policy which threatens to reduce the income of the wealthiest or the poorest, the PAN Party may lose the ability to avoid crisis. This would increase the probability of alternation in the Presidency in a new moment of mobilization of powerful constituencies (political, economic or popular). Hope for avoiding a backlash to democracy and markets is in the sophistication of the Mexican citizenry to demand preventive reform during stability.

Studies on regulatory and economic performance mentioned in the literature review argue that institutional endowments with more complex systems of checks and

⁶¹⁴ For example, if a majority in Congress is appropriated by the left, then it has significant powers to retract regulatory commitments established over the past 20 years. Furthermore, under this system there is no accountability for Congress members to constituents; individual Congress members have no system of checks and balances on their performance as representatives of the broader population.

balances will allow the government to establish more credible commitments for investment and growth. The challenges for development in Mexico are therefore simultaneously political, social, and economic. Mexican civil society is much more sophisticated now in demanding that government address poverty, crime, and other disruptions of underdevelopment on their quality of life. It will take a careful game of institutional change and equilibrium to avoid widespread social disruption such as is evident today in Oaxaca, Guerrero, and Chiapas, and such as has led to major political consequences in Venezuela, Bolivia, and other parts of Latin America. The question remains whether economic and political elite in Mexico also see greater losses in maintaining the current institutional endowment, than in delegating power to a more limited democratic government, including independent regulatory governance structures. Reform remains intrinsically tied to the costs and benefits of reform for elite political and economic entrepreneurs, whose interests in an institutional context often override the goals of generating widespread development and national competitiveness.

Beyond the topic addressed by this dissertation, this thesis leads to an underlying question of how and when elite political and economic entrepreneurs reach institutional “tipping points⁶¹⁵” at which they may choose to delegate power and

⁶¹⁵ A tipping point is defined as “that magic moment when an idea, trend, or social behavior crosses a threshold, tips, and spreads like wildfire.” In the book by the same name, *The Tipping Point*, Malcolm Gladwell explains why some ideas spread and others don’t: “ideas and products and behaviors and messages spread much like viruses do”, he states. To create an epidemic contagion of an idea Gladwell suggests that three principles are involved: The Law of the Few, Stickiness Factor, and the Power of Context. Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference*, (Little Brown and Company, 2000, 2002): Back cover jacket; p. 7, 12, 46, 55, 69, 70, 74-86, 163, 173, and 182

redistribute wealth to formal long-term institutional endowments that provide: (1) predictable protection of property rights as a public or universal good; (2) long-term credible commitments to the broader basis of potential investors, which may also imply diversifying the tax rate and reducing the extraction of monopoly rents by ruling coalitions, and/or (3) increased accountability by public and private actors with monopoly control over national resources to citizens. Rosendorff offers insight into the problem of how to break path dependence on a negative institutional endowment by stating--in related terms--that the ruling elite may choose to negotiate a transition to democracy if it finds itself “in a model of economic cooperation and political conflict, [in which] the losses from ceding control over the tax rate may be lower than the costs of defending minority privilege”⁶¹⁶. Hopefully, economic and political entrepreneurs in Mexico are savvy enough to understand the costs and benefits of maintaining a system of selective wealth distribution in a more plural, yet poor and restless population.

With this context in mind, in the long run, the success of overcoming underdevelopment in the telecommunications sector seems dependent on:

(1) establishing long-term stability in the formal and informal institutional endowment favoring a system of limited government;

(2) establishing enforceable regulatory governance structures and incentives that provide guarantees to all private investors;

⁶¹⁶ B. Peter Rosendorff, “Choosing Democracy”, *Economics and Politics*, Volume 13, (March 2001): 1

(3) creating independent administrative bodies of expert civil servants with the capacities to exercise discretion in adapting and enforcing regulation and to achieve long-term economic goals according to social needs and changing technological circumstances,

(4) continuing institutional reform of government bodies to establish more sophisticated systems of checks and balances among Constitutional entities at Federal, State, and local levels, including a review of the *amparo* process, and

(5) reaching agreement with economic and political elites to delegate the distribution of economic and political power to formal legal institutions supportive of democracy, including through increased accountability of public and private parties to citizens.

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