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Better Regulation in Latin American Countries: A tool for accountability?

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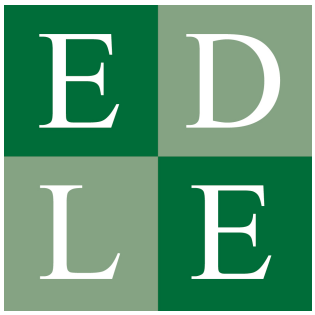

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To my family,
To my past and future self

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Doing a PhD is certainly more about the journey than the destination. It is a journey in which I got the opportunity to study in depth something that I am passionate about; and at the same time I got to test, break and adjust the limits and frontiers of my knowledge, of my research capabilities, and, most importantly, of myself as a person.

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Finalizing a PhD Thesis feels a lot like a beginning, because I am overwhelmed by a sense similar to the one I have when I see the ocean: An endless world open with new opportunities and new challenges ahead to discover, but now with a set of new skills and knowledge acquired during the process.

BETTER REGULATION IN LATIN AMERICAN COUNTRIES: A TOOL FOR ACCOUNTABILITY?

LIST OF ABBREVIATIONS

EU	European Union
IA	Impact Assessment
IRA	Independent Regulatory Agency
OECD	Organisation for Economic Cooperation and Development
PEC	Policy Evaluation Cycle
RA	Regulatory Agency
RIA	Regulatory Impact Assessment
ROB	Regulatory Oversight Body
SCM	Standard Cost Model
US	United States of America

INTRODUCTION

Often, academic research is prompted by the personal interest of the researcher on a topic or an area of study. This is not the exception. A few years ago, I began studying policy assessment, a set of instruments used by some countries as a part of their policy-making process. This entails the identification of a policy problem and the assessment of potential regulatory or non-regulatory solutions to identify the benefits, costs, risks and other effects that the solutions would create. It also entails consultation with stakeholders; as well as the monitoring and assessment of regulations after their entry into force, to determine whether they are still producing the desired effects that motivated their enactment. I refer to this set of stages as the Policy Evaluation Cycle (PEC). The aim of the use of these instruments or stages is to inform the decision-making process of regulators in order for them to be able to enact regulations that are efficient, effective or serve specific goals. Lastly, policy assessment also concerns the governance of the aforementioned instruments and processes. All of these, the PEC and the governance of the instruments and processes, are referred to as the better regulation agenda.

It is known that countries use laws and regulations as a means to achieve specific goals or as correctors to the undesired results of a self-operating market, to inequality, to unbalanced distribution of resources, and in general, to endogenous and exogenous factors that pull countries away from their objectives. In this sense, unassessed regulations can produce undesired adverse results, can clash with other existing regulations, can be incompatible with current market trends, or with preferences of the population or with technological improvements. They can even produce effects directly opposite to those needed to address the problem for which they were enacted.

The use of scientific instruments to assess regulatory problems and regulatory proposals before their enactment, and afterwards through various points of regulations' lives, however complex, seems to align with the overall normative goal of regulations and government intervention. From that stance, the adoption of a system or policies for assessing regulations is justified and, some may argue, desirable for most legal systems.

Since these policies have been developed, adopted, and implemented by European countries, the United States, and other developed countries, I began researching on whether other regions were following the same steps. In that sense, in the last few years, a steadily increasing number of Latin American countries have been adopting instruments for policy assessment as part of their regulatory policy. I had a particular interest in researching this trend in this region, because it struck me as interesting why a group of countries, the majority of which are developing countries with similar constitutional structures, decided in a short period of time to adopt a complex, and resource-consuming,

set of instruments and policies for regulatory evaluation as part their regulatory-making process.

Going back some decades, during the 1990s and the early 2000s, the Latin American scenario regarding regulatory production was characterized by an explosive growth of regulations and regulatory agencies. Arguably, this shift from the centralized provider-state to the regulator-state represented a considerable rise in the rate of delegation in the regulatory-making process. To some degree, this increase in the legislative work and also on regulatory agencies has also favored opportunities to improve regulatory efficiency, address identified market failures, and take the decision-making process closer to those affected.

Therefore, this new trend that I observed in the Latin American region of adopting policy evaluation instruments seemed to respond initially to some of their regulatory needs. However, it could potentially also be explained by other rationales closer to the specific needs of the region. As with any important regulatory topic, whether to adopt or not policy evaluation instruments is not a binary question, or at least it should not be. It implies the consideration of several elements and changes to the decision-making process, to the legal culture, and to the regulatory governance of a country, which in turn means the use of already limited resources. Therefore, the desired and undesired effects that the adoption and implementation of a new process within the decision-making machinery of a country should also be considered. This requires more in-depth understanding, to be able to comprehend its inner workings, the elements that compose it, and the potential that they might have to address certain regulatory goals, as well as their shortcomings.

Digging deeper into the rationales that countries may have to adopt these administrative arrangements into their decision-making processes, due to the necessary delegation that happens in the regulatory-making world, there is a rationale that comes forward: the need to have transparency and accountability measures in place. It could be argued that achieving these goals is desirable for Latin American countries as well, as in the last decade there has been a surge of demand for accountability, transparency and less corruption in the region.

The literature argues that because of the inherent characteristics of policy evaluation and of the processes that need to be undertaken for assessing regulations, one of their features is that they contribute towards accountability (Ogus, 2004; Radaelli, 2010; Renda, 2015). However, is it that straight-forward that adopting a better regulation agenda can contribute to accountability in the regulatory-making process of a Latin American country? In this Thesis, I argue that even though this could be true, there are many considerations to

incorporate when answering this question, particularly related to the legal system, the decision-making process, and regulatory relationships that exist in those countries. Therefore, I embarked on this research.

1. Research Questions

Considering the foregoing, in this Thesis the research concerns the policy assessment arrangements recently adopted and implemented in the Latin American region, and specifically the potential for accountability that these arrangements may have. This prompted a main research question:

Why are Latin American countries adopting better regulation agendas? Can this contribute towards accountability, and if so, in which conditions?

On the road to answering these over-arching research questions, several other research questions arise. For this, in each Chapter of this Thesis the aim is to answer a particular set of sub-questions that are divided as follows:

Chapter 1

1. What are the rationales behind the adoption of policy evaluation systems within the regulatory-making process of a country?

Chapter 2

1. Which are the composing elements of a regulatory evaluation structure?
2. Which are the options that a country or administration can choose from to compose its regulatory evaluation structure?
3. Which type of regulatory evaluation arrangement has the potential to create the conditions and incentives for the actors in a legal system in order to achieve specific regulatory goals?

Chapter 3

1. Which are the policy assessment goals and structures set by Latin American countries for their better regulation agenda?
2. Do the elements chosen by Latin American countries for each component of the structure correspond to the goals previously set by selected countries?

Chapter 4

1. Which accountability relationships exist in the regulatory-making arrangement of Latin American countries?
2. Which accountability problems can be identified in the regulatory relationships of a country with a presidential system?

Chapter 5

1. Could the Policy Evaluation Cycle contribute towards accountability, and if so, in which conditions?
2. Considering the type of relationships that exist in this regulatory-making system, is it possible to address those problems with a better regulation agenda?

2. Academic Relevance

The study of all of the sub-components necessary to answer the main research question set for this Thesis, can be done from many areas of study. However, there are some that are evident, and not necessarily usually studied together. The first one is the literature on policy assessment; the second one is administrative law; and the third one is public law and economics. Granted, initially for the more skeptical reader the connection between these areas of study might not be evident; therefore, an explanation is needed.

First, the link between policy assessment and law and economics has been previously explored by Renda (2011). He explained that *ex ante* assessment procedures would benefit from establishing arrangements that would consider how incentives affect the behavior of participants, and not merely the cost and benefits of the regulations. This left a whole set of questions to be answered in that field, some of which will be addressed in this research. The study of the instruments used for policy assessment, the scope of the assessment, its governance and the interaction between the combinations of all these elements, need to be researched using the literature on policy assessment in its intersection with public law.

As indicated previously, the creation of regulations and the need for more efficient regulations are one of the main motivators for the existence of policy assessment procedures. Thus, how regulations are made, and more particularly, the legal and constitutional system in which this process is introduced, also plays a role in the eventual result of the assessment. In this sense, since the countries being considered for this study are Latin American countries, all of which have a presidential constitutional system, legal systems based on civil law, and a specific decision-making structure, the study of this needs to be done with the instruments that the public law and economics, and public administration literature provide. That is, the analysis of the actors that exist in that system

and that participate in the decision-making process; their appointment and removal; the interactions between these actors; the set of rules that this specific legal system sets to follow; and the incentives, costs, externalities, and risks that they generate to the participants of this complex web.

Lastly, the focus of this research is mainly the potential for accountability that a regulatory evaluation structure could have, considering the relationships identified within a presidential constitutional system. Therefore, it is necessary to use the tools provided by the administrative law literature, specifically the literature on delegation and accountability. For a more complete analysis of this topic, the concept of accountability is considered; its components; the interaction that might make a person accountable in the state-individuals relationship that this branch of law focuses on, as well as other concepts.

Considering the foregoing, the novelty of this work is neither the analysis of the existing policy assessment methodologies nor of the governance structures by themselves, but rather their interaction. It provides a holistic perspective which integrates public law, administrative law, particularly accountability, into policy assessment and law and economics. Academically, these areas of the law are often treated as separated, but here the aim is to integrate them.

In addition to bringing together these streams of literature, the main contribution of this Thesis is providing a framework with which it is possible to measure the contribution of the Policy Evaluation Cycle to accountability, considering the specificities of the relationships that are present in a typical presidential constitutional system of a Latin American country.

Furthermore, the contribution of this Thesis might be relevant not only to Latin American countries but also to other countries with presidential constitutional systems that are adopting or have implemented a regulatory evaluation structure. This is intended to fill an important gap in the literature, but it could also open the door for further research and be useful in practice.

3. Societal Relevance

Societies evolve in their preferences, and such changes are often reflected in the demands that the population has towards their politicians and governments. Likewise, these changes should reflect on the responses of their governments to satisfy those demands. Responding to a societal demand of perhaps regulations that are more efficient or less burdensome, of more transparency and accountability in regulatory-making process, or just responding to

external pressure, Latin American countries are increasingly adopting and implementing regulatory evaluation arrangements as part of their decision-making processes.

There has been a growing tendency of citizens demanding higher transparency, sanctions, and accountability from their politicians and decision-makers. The results of these demands have ranged from removing seating presidents from office through impeachment; to incarcerating public officials; to demanding accountability and transparency from their bureaucrats and politicians. When politicians depart from these preferences, and the citizens are aware of this departure, they might react with their votes. This might explain why governments and politicians are willingly adopting tools that are bound to decrease their discretion in decision-making, and that would make them accountable to the population. Regardless of that motivation, Latin American countries are implementing these arrangements and moreover, some are doing so with the explicit goal of increasing accountability in their regulatory production.

This relatively new phenomenon is bound to change the decision-making process of Latin American countries to some degree, and, perhaps the relationships between the government and its stakeholders. In the current stage that the region is at, this study gains timely relevance. Particularly, the identification of the different forms that the regulatory policy structure can adopt to respond to various regulatory goals; and more importantly if and how the use of the Policy Evaluation Cycle can contribute towards increasing the accountability of the actors within regulatory-making process.

4. Scope and Methodology

The topic of this Thesis can be explored from multiple angles, and thus, several questions arise. This makes it necessary to limit the scope for the research. On the one hand, this Thesis focuses on policy assessment policy structures and the better regulation agenda at the strategic and administrative level. It does not explore the policy assessment of a particular market, economic or legal area, but instead it pays attention to the organizational components of these arrangements. Nevertheless, the eventual findings and conclusions of this Thesis could be later applied to specific sectors.

On the other hand, the countries examined in this Thesis are all Latin American countries; therefore, the research is geographically limited. Specifically, it collects and analyzes data from Mexico, Peru, Chile, Colombia, El Salvador, Ecuador, Brazil, Costa Rica, Argentina and the Dominican Republic, which are the countries of the region that have adopted some type of instruments for policy assessment as part of their regulatory policy, up to June 1st, 2019. The common features of these countries, such as their presidential constitutional

system, type of government and collaborative work regarding their regulatory policies, allow for a joint analysis of their better regulation agendas. It is granted that the eventual findings may also apply to other countries with similar characteristics or constitutional systems; however, they are not considered for this research. The same might also hold for other constitutional systems such as parliamentarism, which could be the subject of further research.

Just like with the scope of the research, this topic can be researched using a variety of methodologies. In that sense, first, Chapter 1, relies on theoretical analysis, by utilizing combined strands of literature such as public law, accountability and policy analysis. Chapter 2 gathers information about the different policy assessment instruments and regulatory policies that European countries and the United states have used, by analyzing their existing regulations, policy documents and publications on the topic. It uses law and economics and policy analysis literature, to examine how the different elements are structured, to determine the goals they are set to achieve as well as the incentives they create, and to organize these elements into a framework centered in the goals that they seek.

Chapter 3 studies the policy assessment structures that Latin American countries have adopted. It first collects the data from the legal instruments that contain provisions regarding their regulatory policy, through the reading and analysis of the constitutions, laws, decrees and other legal documents enacted in the researched countries. In addition to desk-research, it contrasts the structures adopted by these Latin American countries with the framework developed in Chapter 2. This allows for the analysis of the structures and identification of patterns in the better regulation agenda of the region.

In turn, for Chapter 4, the methodology is theoretical analysis, relying on the existing literature on accountability to analyze the governance arrangements of Latin American countries and eventually apply it to the analysis of the Policy Evaluation Cycle. Lastly, Chapter 5 synthetizes the insights from the accountability literature and the policy assessment literature to develop a framework for assessing the accountability of the policy evaluation cycle, within particular regulatory relationships. Scorecards were designed to assign a score to the stages of the policy evaluation cycle based on their contribution towards accountability in a specific regulatory relationship. These scorecards are based on the characteristics of the PEC and the relationships, as defined by the theory, empirical studies, and practice in their best-practice scenario that are analyzed and researched in this Thesis.

Referring to both the scope and the methodology, it is relevant to point out that the findings of this Thesis are not tested empirically in a country or an agency, and this could be done in further research.

5. Structure of the Thesis

In the light of all of the foregoing considerations, there is now an explanation of how this Thesis is divided and structured, as well as the content of each Chapter, in the course of answering the research questions.

In Chapter 1, the intention is to provide an initial general theoretical framework. So it discusses the approaches from the literature towards policy assessment, beginning by understanding its basic concepts. Likewise, it examines the rationales for the adoption of the better regulation agenda and policy assessment structures. As the Thesis progresses, it uses that theoretical framework to analyze from a Law and Economics approach the implementation of policy evaluation by Latin American countries, as well as the goals that these countries aim to meet as a result. This Chapter answers the following research question: What are the rationales behind the adoption of policy evaluation systems within the regulatory-making process of countries?

After providing an understanding of the different rationales that a country may have to adopt policy evaluation into their policy-making process, Chapter 2 discusses the practical terms of policy assessment, and what the implementation and use of the better regulation agenda entails. It examines the different elements to be considered when adopting and implementing a policy evaluation arrangement, as well as the intended goals of the different choices within the legal system. This Chapter considers specifically the scope of the policy assessment; the use of the PEC to assess regulations at several points of their lives; the different evaluation tools that are commonly used; and the governance and oversight of the regulatory evaluation process. In this sense, in this Chapter the aim is to identify whether the different choices to build the assessment structure could lead to the attainment of specific regulatory goals. For that, it analyzes the potential incentives that the choices concerning each element might generate. These findings are helpful in two ways: First, they facilitate understanding of the trends and provide a clearer road map for the adoption by a country of policy assessment structures and governance; and second, they serve as a guide to compare with existing arrangements to determine whether there is coherence between the structure and the goals. The research questions that Chapter 2 aims to answer are (i) Which are the composing elements of a regulatory evaluation structure? (ii) Which are the options that a country or administration can choose from to compose its regulatory evaluation structure? and (iii) Which type of regulatory evaluation arrangement

has the potential to create the conditions and incentives for the actors in a legal system in order to achieve specific regulatory goals?

Because the research focus of this Thesis is on Latin American countries, two important research questions rise: (i) Which are the policy assessment goals and structures set by Latin American countries for their better regulation agenda?; (ii) Do the elements chosen by Latin American countries for each component of the structure correspond to the goals previously set by selected countries? In this sense, Chapter 3 evaluates the better regulation agenda in Latin America to understand which goals these countries are pursuing with the adoption of this agenda; the scope and time of the assessments, the evaluation tools being used, as well as their governance. Bringing together the findings from Chapter 2, it contrasts the better regulation agenda of selected countries with the policy assessment structures discussed, to analyze whether the structure chosen is oriented towards achieving their chosen goals, whether it has the potential to generate the incentives and create the effects expected from it to achieve the regulatory goal chosen, and/or whether there are discrepancies.

The policy assessment structure required for goals such as an accountability and efficiency, particularly considering the use of the PEC and its different stages, can be analyzed further by first studying what the goals entail in practical terms, how it operates within a presidential constitutional system, and eventually how the assessment itself is designed, or, not towards the chosen goal. In Latin America there is a social requirement of more transparency and accountability in the regulatory-making process, and thus it seems to be set also as a goal for having a better regulation agenda. Considering the foregoing for the rest of this thesis, there is a focus on the use of policy assessment systems as an accountability tool.

The literature holds that policy assessment can enhance the accountability of the policymakers towards their forum. Here it is argued, however, that this potential to enhance accountability is not necessarily a default. How these policy evaluation systems are designed is relevant to whether they can address the accountability issues that exist within the different relationships of the policy-making realm. But to be able to know that, it is first necessary to understand what exactly accountability is, and more specifically, what accountability looks like in the relationships that exist in the decision-making arrangements of a Latin American country, since they have a presidential constitutional system. Therefore, in Chapter 4 the aim is to answer the following research questions: (i) which accountability relationships exist in the regulatory-making arrangements of Latin American countries? And (ii) which accountability problems can be identified in the regulatory relationships of a country with a presidential system?

Finally, Chapter 5 joins two relevant streams of literature, accountability and policy evaluation, to determine if, as claimed by the literature, policy evaluation instruments are set to increase accountability in the regulatory-making process of a country. While the PEC, as a combination of policy evaluation stages, might contribute to accountability, the claim is that its contribution, compared to a scenario where such stages are not in place, might be different in the various stages of the cycle, and for different regulatory relationships. Therefore, there is an analysis of how accountability plays out throughout the various stages of the PEC, and how it plays out differently throughout these stages within the diverse types of regulatory relationships that exist in the presidential constitutional system that Latin American countries have. In this Chapter the aim is to answer the following research questions: (i) considering the type of relationships that exist in this regulatory-making system, is it possible to address those problems with a better regulation agenda? And finally, (ii) can the Policy Evaluation Cycle contribute towards accountability, and if so, in which conditions?

CHAPTER 1

ADMINISTRATIVE LAW & ECONOMICS: ORIGINS AND RATIONALES FOR THE ADOPTION OF POLICY EVALUATION AND THE BETTER REGULATION AGENDA

Policy evaluation is a household term in most developed countries. It is also referred to as policy assessment, regulatory assessment, impact evaluation, and other terms. Assessing regulations prior to and after their enactment to determine their cost, benefits, and widespread effects is a practice that has been adopted at an increasing rate by developed countries, and in the last two decades by developing countries (Radaelli, 2005). It has even progressed into an agenda that considers not only how these evaluations are to be performed, but also which agencies of the government are to participate and oversee these assessments (Baldwin, 2010). This is known as the Better Regulation agenda. However, how did that come to be? Why have countries taken this route? In other words, what are the rationales behind the adoption of policy evaluation systems within the regulatory-making process of countries? This is the main question that this Chapter seeks to answer.

This is intended to provide an initial general theoretical framework for this thesis. Here, the different approaches that the literature has had towards policy assessment are discussed, as well as its functioning inside the policy-making process of countries. And, as the thesis progresses, it will use this theoretical framework, and build on it, to analyze from a Law and Economics approach the adoption and implementation of policy evaluation by Latin American countries, as well as the goals that these countries aim to meet as a result. However, before the analysis of the theoretical framework, it is necessary to first understand the common concepts of the subject that is studied in this thesis.

Therefore, the remainder of this Chapter is structured as follows: The first Section provides a short general overview of the regulatory work of the state, as it transformed from a provider to a regulator. This serves to understand how countries have been forced to pay more attention to their regulatory functions and to how regulations are made, as it is an undeniable function for any country in this day and age. The second Section explains and analyzes the concept policy evaluation and the Better Regulation agenda. The purpose is to have a common theoretical understanding of the main subject being discussed, and to identify how they arrived at their current stage. In particular, that Section explains how the Better Regulation agenda was developed and its diffusion, as well as explores the criticisms regarding the adoption and implementation of regulation assessment policies and tools. From that Section, it is clear that this agenda is complex, costly, not universally accepted and requires a whole-of-government approach for it to deliver the desired results. Therefore, the question that follows is why nearly all of the countries which are members of the Organisation for Economic Cooperation and Development (OECD) (OECD, 2009), and a steadily growing number of developing countries, have decided to adopt this agenda into their policy-making process? Or, reiterating the research question for this Chapter,

which are the rationales behind the adoption and implementation of policy evaluation in this large number of countries?

The third Section identifies and discusses the rationales for this adoption, considering the goals pursued by it, the collateral or additional effects that it may produce, and its costly nature. Even though only three rationales are identified and analyzed, this is by no account an extensive list, since there are other reasons behind the decision of a country to adopt and implement this agenda. However, this Chapter analyzes three of the rationales that seemed more relevant in the context of developing countries, such as Latin American countries, and this will become self-evident in the analysis.

The first rationale analyzed is the need for countries to have efficient or effective regulations, which is the main goal of introducing evidence-based decision-making (Pattyn, van Voorst, Mastenbroek, & Dunlop, 2018, p. 577). For the purpose of this thesis, a regulation is considered efficient when it maximizes social welfare; and a regulation is effective when it allows policymakers to reach the goals that they have set.

Secondly, because of the steps that need to be followed to produce evidence-based regulations, decision-makers are required to be more transparent during the process of producing regulations, which might increase accountability in this realm (Ogus, 2004, pp. 114-115; Renda, 2015, p. 39). Accountability is defined as the relationship between and "*actor and his forum, on which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor can be sanctioned*" (2007, p. 450).[1] This is especially relevant in legal systems where part of the regulatory work is delegated to non-elected public officials such as in countries with presidential constitutional systems. This is the case of Latin American countries. Therefore, the second rationale analyzed is the need to improve regulatory accountability.

Lastly, the third rationale is third-party influence, a rationale explained by the policy transfer literature. This transfer refers to a process in which the knowledge of a country about institutions, policies, and regulations is used to develop institutions, regulations and policies in another country (Dolowitz & Marsh, 1996, p. 344). The motivation for a country that does engage in policy evaluation may range from merely understanding the benefits of this new regulation to coercive pressure to adopt the regulation. Therefore, the influence of international organizations, as well as the country's desire to be at the same level as their

[1] This term will be discussed in depth in Chapter 4 of this Thesis.

counterparties and compete as equals might play a role in the decision to adopt a regulatory evaluation policy.

The fourth Section explains which of the analyzed rationales might explain why Latin American countries have adopted and implemented their regulatory policies. This section approximates initial conclusions on the topic; nevertheless, this is a topic that is developed and analyzed throughout the thesis. The fifth Section presents the conclusions for this Chapter and explains how the concepts and rationales discussed will be used in the remainder of this thesis.

In the light of the above, the overall aim of this Chapter is to add to the debate on the rationale behind the adoption and implementation of a policy evaluation system, and in particular, in the Latin American scenario.

1. AFTER THE REGULATORY STATE

The initial legal, political, and economic institutions greatly influence the present set up of a country (Acemoglu & Robinson, 2012). However, most of the countries have followed the same path in their function as states. The state first served as a provider of services and goods. As the population grew, resources became scarce, and the private markets emerged. Countries went from providing to regulating the provision of goods and services. Services that were normally provided by the state, such as electricity, communications, banking, were privatized and, in turn, regulated by the state. The process of privatization created the conditions for the rise of the regulatory state to replace the welfare state, which meant a dependence on state regulation, instead of public ownership and directed provision of public services (Majone, 1994, p. 212). As explained by Osborne and Gaebler (1992), the role of the state changed from rowing to steering.

Most scholars agree on the defining characteristics of the regulatory state, explaining that the regulatory state governs at a distance, with less discretionary control via command, and assigns a greater deal of reliance to oversight, using rules and previously specified standards (Majone, 1994; Pildes & Sunstein, 1995; Yeung, 2010). Since the state is no longer able to solve its issues with internal management, it is forced to rely on the formalization of control and rules that would apply to it as well, to govern the markets of the products and services that it would no longer be providing.

The need of intervention of the government in the supply of the products and services in the form of economic regulation is evident. However, the motivation for this regulatory

intervention has prompted a myriad of theories to explain the behavior of the state and of the regulators.

1.1 Economic Theories for Regulatory Intervention by the Regulatory State

The change of focus regarding the purpose and role of the state also meant the expansion of the areas of legal study, particularly public law, which turned its focus on the study of the operation of the regulatory state. Public law initially had a scope limited to criminal law and constitutional law, to secure the institutional arrangements necessary both for the exercise of that power and for the formulation, adjudication, and enforcement of private rights (Ogus, 2004, p. 26). As regulation was a topic for deeper study, several theories have been advanced to explain the observed patterns of economic regulation. These include the Public Interest Theory, Private Interest Theory that was followed by the Capture Theory, and Public Choice Theory.

1.1.1 Public Interest Theory

Economic regulation seeks to explain who will receive the benefits and costs of regulation, what form regulation will take, and the effects of regulation upon the allocation of resources (Stigler, 1971, p. 3). One of the theories that explains for whom regulations are made is the Public Interest Theory, which holds that regulation is supplied for the correction of inefficient market practices (Arrow, 1969; Shubik, 1970). The Public Interest Theory justifies regulation for the achievement of collective economic and non-economic goals. Ogus (2004, pp. 30-54) makes this distinction between economic and non-economic goals for purpose of organization, but the economic inefficiencies in market practice that justify the need for regulatory intervention are the market failures normally identified by economists: monopolies, asymmetry of information, public goods, and externalities. These economic goals pursue allocative efficiency directed to the maximization of social welfare. The non-economic goals that justify the state's regulatory intervention include distributive justice, when regulation is not inspired by an efficiency motor, but by a desire to achieve fair or just distribution of resources (Rawls, 1991). Another reason for intervention following the public interest theory is making corrections when individuals fail to make decisions that concern their own well-being. Some people claim that this intervention may be justified when, different from the economic intervention that seeks allocative efficiency, individuals are negatively influenced by their biases at the decision-making moment (Thaler & Sunstein, 2003).

If regulations are understood as being enacted with the purpose of solely responding to public interest, as the Public Interest Theory proposes, then a regulation that is enacted

not pursuing public interest should be considered just an exception or an unintended failure in the process of regulatory-making. This is however not an exception, and other theories explained what motivates the production of regulations. For instance, Hayek argued that these failures are to be attributed to limited human knowledge, and that the constructivist rationalists err when basing their argument "on the fiction that all the relevant facts are known to some one mind, and that it is possible to construct from this knowledge of the particulars a desirable social order" (Hayek, 1973, p. 14).

1.1.2 Public Choice

However, when it was evident that regulations were not being enacted following public interest nor that the failure was not due to an involuntary lack of knowledge, different theories were put forward. Departing from the above, the Public Choice approach from the Virginia school analyzed the situation further. Its proponents argued that regulations may be seen as a response of politicians to the demands of interest groups. In this framework, the production of a regulation would be the supply-side of a market for regulations. Such a market would behave as any market would, and the regulation produced would be the result of the interplay between supply and demand. Agents on the demand-side would lobby to promote regulations that maximize their utility, while regulators (the supply-side) would pass regulations that maximize their utility (e.g. maximize their chance of being re-elected) (Buchanan & Tullock, 1962).

1.1.3 Private Interest Theory & Capture Theory

Then the Private Interest Theory put forward by the Chicago school originated from the public choice theory. It holds that regulations are not a response to public interest, but a response to private interest, where interest groups influence the formation of regulations in order to seek rents for themselves (Shen & Philipsen, 2016, p.194). In this sense, for an interest group to have the power to influence regulations it needs to have low organization costs and homogeneity of interests (Olson, 1965), which is characteristic of professional associations and concentrated industries. These actions which are intended to use resources to transfer wealth towards these interest groups, instead of towards the general public, are contrary to the goal of maximizing social welfare that the Public Interest Theory assumes (Philipsen, 2007, p.116).

A further contributing theory to justify this departure from public interest goals is the capture theory, which adds to the Private Interest Theory, and argues that regulations are the result of the capture of the regulator by interest groups that solely promote their agenda, through a lobbying module. This capture is generally carried out through

punishment (e.g. reputational sanctions) or reward (e.g. revolving doors) (Dal Bo, 2006). But there are also "softer" forms of capture, for instance when the regulator accepts biased information from the firms it seeks to regulate (Agrell & Gautier, 2017). This could be a win-win for the regulator and the regulated. The former reduces its costs of gathering information, the latter controls the information available to the regulator. This theory rests on the idea that the lack of expertise of the agencies makes them prone to seek the information (basis for regulation) from the regulated industries, who in turn provide the information that serves their purposes (Ogus, 2004, p. 58). Likewise, the agencies recruit their officials from the regulated industries, producing an inside-job effect.

All these theories seek to explain why and for whom regulations are enacted. In this Chapter, Public Interest Theory and Rational Choice approach are used to explain the rationales of countries to adopt policy evaluation systems and the Better Regulation agenda into their policy-making processes. This Chapter adds to the debate on the rationales behind the adoption and implementation of a policy evaluation system.

2. ORIGIN, DIFFUSION AND CRITICISMS OF POLICY EVALUATION AND BETTER REGULATION

The rise of the regulatory state also brought with it the birth of regulatory bodies to supply the regulations that the new markets and the growing needs of society demanded. It was no longer the function exclusively of the legislative branch to produce the legal norms that would now guide the privatized and liberalized markets, but also of the executive branch. This institutional feature prevailed across the world in any country, both developed and developing, that stepped into its regulator role. (Levi-Faur & Jordana, 2006).

One of the regulatory responses from countries facing these new functions was to include policy evaluation into their decision-making process. However, before entering into the reasoning behind this decision, and even before analyzing the use of policy evaluation as a tool to achieve specific regulatory goals, it is necessary to have a common understanding of the terms that are studied throughout this thesis. In that sense, the next two subsections define the concept of policy evaluation, and explain what the Better Regulation agenda is, both its composing parts and its aims.

2.1 Defining Policy Evaluation

Nowadays, laws are expected to result partly from a complex intellectual and scientific process. If this is held as the norm, then the process to create a law is to be undertaken with the help of tools that analyze available data and information under certain criteria, to

determine the potential effects of the intended regulation, consider revealed preferences and pay attention to this result. This is referred to as "policy evaluation". Even though there is not a fixed definition for what policy evaluation is, it is possible to identify some key common elements in it.

For some, policy evaluation is a set of systematic procedures that can be used to address policy problems. It breaks up the policy problem into its component parts, analyzing them and developing ideas about what to do (Patton, Sawicki, & Clark, 2016). Alternatively, policy evaluation exists to provide scientific evidence to decision-makers and potentially counter interest-based regulatory making (Adelle & Weiland, 2012, p. 25).

Notwithstanding these differences, all the definitions share a number of common features, broadly speaking. Policy evaluation identifies the potential forms of addressing a policy problem, whether there is a need to solve that problem through regulation or not, and then assesses the impacts (both positive and negative) that the identified policy options may have, before a final decision on the chosen policy is made. This process normally follows a formal procedure; and results in a formal report or statement. Its purpose, nonetheless, is not to make the decision, but to inform decision-makers of these effects, for them to have more complete, evidence-based, and scientific information for the production of regulations.

It is useful to know that the literature, and government officials, may use different terms to refer to this process, such as policy assessment (Adelle & Weiland, 2012), evaluation of legislation (Larouche, 2009), regulatory assessment, impact assessment (Wiener,2006), policy evaluation (Pattyn et al., 2008), regulatory evaluation, regulatory appraisal, policy analysis (Patton et al.,2016), or a number of combinations of those words.

To some extent, the differences and variations respond to the differences in disciplinary concerns. On the one hand, whilst some are more technical in the use of words such as "appraisal", "evaluation" and "assessment", the words that are synonyms for evaluation are used indistinctively here. On the other hand, when it comes to the object of the evaluation some precisions are in order. Therefore, here are defined the terms policy and regulation in their different denotations, as they are to be understood for the rest of this thesis.

Policy

The definition of the term "policy" is not easy, as it is broader and even more abstract than for instance the term "regulation". It is said to represent "a decision, made by a publicly elected or designated body, which is deemed to be in the public interest" (Torjman, 2005,

p. 18). This term conveys a meaning of a wider range of decisions, not always in the regulatory domain. It is used to refer to the broader concept of state intervention through its public bodies with a broader statement of intention.

Regulation

The use of the term regulation, legislation, or policy when referring to the object of the evaluation is partly due to differences in the field of study (Koop & Lodge, 2017). In the legal field, and law and economics, there are also differences. Selznick's definition of regulation refers to the "sustained and focused control exercised by a public agency over activities that are valued by the community" (Selznick, 1985, p. 363). Baldwin, Calve and Lodge suggest the use of the term in different senses. They refer to regulation as (i) "the promulgation of a binding set of rules to be applied by a body devoted to this purpose"; (ii) "all state actions that are designed to influence business or social behaviour"; and (iii) "all forms of social or economic influence, where all mechanisms affecting behavior, whether these be state-based or from other sources (e.g. markets)—are deemed regulatory." (2012, p. 3). The more critical define regulation as "any threat-backed governmental directive aimed at fixing a defect in "private ordering" (…) where the defect causes total social welfare to be lower than it otherwise would be" (Lambert, 2017, p. 4).

All these definitions share the common core of intentional intervention in the activities of a target population "where intervention is typically direct (…) and exercised by public-sector actors on the economic activities of private sector actors" (Koop & Lodge, 2017, p. 105). Where there is reference to regulation in a broad term, this former definition is the one that is being considered. In addition to the above, another conception of regulation that is of relevance for this work is a strict definition used to identify the intervention made by public regulatory agencies, either dependent on or independent from the executive power of a country. In this thesis, the strict term of regulation is used when referring to delegated regulation or secondary regulation, or in other words regulation that is produced as a result of either a constitutional or a legislative delegation by the executive branch, its agencies or independent agencies. Related to the term regulation, the term legislation is used as an alternative to regulation in the literature but can also refer to legal norms produced by the legislative body.

Having clarified those relevant terms, it is possible to continue to discuss policy evaluation as a whole term. In this sense, this type of evaluation is not the result of a new or creative exercise created for the sole purpose of examining regulations. It has its origins in the type of evaluations or assessment previously performed for potential projects, businesses, and programs. The broad structure of policy evaluation borrowed from the private and public

sectors includes a particular set of common characteristics, such as: (i) Determining which is the problem to be solved; (ii) Searching for alternatives that can solve the problem; (iii) Evaluating these alternatives, considering the costs, benefits and effects that each might have; (iv) Choosing which alternative addresses the problem more efficiently or effectively; and (v) Preparation of a draft of the report or resulting legislation (Patton, Sawicki, & Clark, 2015, p. 43). The same principles and steps are used for the evaluation of regulations.

2.2 Better Regulation: Origin and conceptualization

That previous description refers to the early stages of the introduction of policy evaluation. In the 1970s, some countries started adopting this type of process into their policy-making procedure. The first country was the United States, through the early adoption of one of the most famous tools for policy evaluation, which is the Cost-Benefit Analysis (CBA). During the Nixon administration, after firms were complaining about how the costs of complying with regulations were cutting a hole into their profits, the government created the Quality of Life Review (Renda, 2011, p. 18). This memorandum expected agencies that were going to propose new regulations on specific areas to consider the objectives of the regulation, the alternatives to the proposed actions, a comparison of the expected benefits and costs associated with the alternatives considered, and the reasons for selecting the alternative proposed (OMB, 1971).

Each administration that followed Nixon's added to the requirements that their agencies had to follow to enact a new regulation. For instance, Ford's administration introduced an *ex ante* assessment of the expected impact on the inflation rate of a new regulation. Carter's administration singled out the ten most relevant new regulations for an extended *ex ante* assessment. And Reagan's administration adopted what has been considered as the most meaningful change to policy evaluation, which was the Regulatory Impact Assessment (RIA) (Renda, 2011, p. 20). Existing regulations had to be evaluated in order to determine whether they should be removed or simplified. Additionally, the Office of Information of Regulatory Affairs (OIRA) had the mandate to evaluate the policy evaluations previously performed by agencies, and send them back when the Cost Benefit Analysis performed was not satisfactory (Renda, 2011, p. 20). Fast-forward to the Obama administration, he required the agencies to "develop and submit plans for reviewing, modifying, streamlining, and repealing unnecessarily burdensome regulations" (Raso, 2017), which was referred to as Retrospective Review. And more recently, Trump required agencies to remove two existing regulations for each new regulation that was introduced, and for the total costs of new regulations to be zero at the end of the year (Executive Order, 2017).

At the other side of the Atlantic, other countries also adopted other methods for evaluating their potential or existing regulations, beginning in the early 1990s. Its intensification in the early 2000s was a response to a lethargic economy from years before (Wiener, 2006, p. 10). For instance, The Netherlands began using the Standard Cost Model (SCM), an assessment tool which measures the burdens of regulations by considering the cost of the activities that an individual or a company must undertake to comply with an existing or proposed regulation (Coletti & Radaelli, 2013, p. 1059). In the case of the United Kingdom, they had the Deregulation Unit in the 1990s, that evolved into the Regulatory Impact Unit, and ultimately into the UK Better Regulation Executive. The guidelines of the government required, among other things, risk assessment, analysis of market failure, assessment of both monetary and non-monetary impact of regulations and CBA of alternative regulatory response (Wiener, 2006, p. 21). Germany also started taking steps before the mid-2000s by appointing a minister to lead a program called "Scaling Back Bureaucracy". This program used SCM and Regulatory Impact Assessment (RIA) to evaluate existing and potential regulations with the goal of reducing administrative burdens (Wiener, 2006, p. 22).

In this sense, the legal literature has identified various reasons for the rise of policy evaluation in European countries for national primary legislation and legislations made at the European supranational level (Van Gestel, 2007; Verschuuren & Van Gestel, 2009):

> 1. Reducing uncertainties in the complex legislative process conformed by national parliaments and European institutions in a multi-level law-making process;
>
> 2. Increasing attention to output parameters and monitoring of policy results, as the public becomes more interested in the effectiveness of regulations. This translates into more attention to government accountability and good governance;
>
> 3. Avoiding the over-production of legislations and the enactment of superfluous legal norms, which might increase the evasion of legislation;
>
> 4. Having standards for the process of policy production, which in turn could make the legislative process more transparent.

Countries have learned from each other and agreed to some extent that having evidence-based policies improved not only the policy-making process but improved the end result: the effects of the regulation over the population and the economy. Therefore, the promotion and diffusion of policy evaluation instruments in the world have grown considerably in the last three decades (Wiener, 2013). Not only have countries decided to adopt it unilaterally, but also international organizations such as the World Bank, Inter-

American Development Bank, OECD and European Commission have championed it (European Commission, 2002; OECD, 1995; OECD, 2012; OECD, 2015; OECD, 2018). Particularly, these last two have promoted a specific agenda to promote a structured policy assessment process referred to as regulatory policy or Better Regulation.

"Better Regulation" can be broadly defined as an agenda for regulatory quality and policy evaluation that focuses on applying a series of policies and policy assessment instruments. In doing so, "it identifies specific problems, the actors that should care of these problems, the tool-kit to use, the institutional design and the set of rules to follow in order to achieve the aims" (Radaelli, 2007, p. 2). This agenda, primarily born inside the European Union (EU), borrows from the United States' approach to regulatory review using tools such as CBA and RIA, and from European member states' initiatives on a standardized approach to measuring administrative costs and simplification, such as SCM (Wiener, 2006). This hybrid is considered a "conscious exercise of legal borrowing" (Wiener, 2006, p. 449). And even though the formula that comprises the Better Regulation agenda is not unique, this has not been a deterrence for other countries to borrow the structure themselves.

It is a policy for the structure and process of making regulations. Some may argue however that it is just another administrative procedure for making regulations (Radeaelli & Meuwese, 2008, p.6). More than that, it is a comprehensive procedure that comprises not only the process of the creation of the regulation, but also how the regulations are evaluated, implemented, monitored and eventually modified, if needed. Likewise, it comprises the design of the institutions that would intervene in each of those steps previously mentioned; an architecture, that, in the view of the author, should be aligned towards the regulatory goals of the country adopting the Better Regulation agenda. In a nutshell, the Better Regulation agenda is a "modern" administrative term that represents both the regulatory-making process that spans through the life of the regulation; as well as the governmental institutions involved.

2.3 Criticisms to policy evaluation

It is undeniable that the international adoption of regulatory evaluation policies, specially RIA is growing. Nevertheless, this does not mean that everything about assessing regulations before their enactment is convenient in absolute terms. The criticisms are many and they range from the adoption of the system, to the motivation of the adoption and the use of these assessments techniques for deciding which regulations to adopt.

Regarding the use of policy assessment to develop regulations, some scholars argued that for instance, tools such as cost-benefit analysis are used as an anti-regulation devise (Revesz

& Livermore, 2008), and in fact studies shows that – at least in United States – it has almost always had an anti-environmental impact (Driesen, 2006). The key issue would be that the numbers contained in this type of assessments would give excessive precision, instead of being transparent about uncertainty, without differentiating between plausible estimates and expected values (Hassenzahl, 2006) and would crowd out ethical and moral considerations from the political debate (Kysar, 2011). In this case, this would ultimately mean that these assessments systematically favor specific lobbies. From this perspective, one could argue that cost benefit analysis is introduced exactly to facilitate the implementation of regulations that protect such lobbies. Some scholars also agreed that these tools might not be used to craft the best regulation possible but suggested that its goal would be facilitating rent-seeking (Croley 1998).

Another possibility is that policy assessment is merely a tool of neoliberalism, and the related concept of scientism in policy making. Scientism is "*the believe that all valid knowledge is science.* [It] *says (…) that rational knowledge is scientific, and everything else that claims the status of knowledge is just superstition, irrationality, emotion or nonsense*" (Hutchinson 2011, p.1). In this sense, policy assessment allows researchers to produce knowledge that resembles that produced by natural scientists, and in doing so it plays into a neoliberal ideology that according to some is leading to environmental degradation, rising inequalities and less democratic societies (Moore et al. 2011).

In addition, other criticisms relate to the actual implementation of the policy assessment systems in a country. In that sense, it is argued that the adoption of these tools does not immediately translate into conceptual and practical knowledge of the instrument at the level of the agencies expected to conduct such analyses (Kirkpatrick et al., 2004; Peci & Sobral, 2011).

A particularly relevant critique is that any assessment is ultimately a prediction, and predictions are bound to be imperfect. This is especially true for predictions that are grounded on limited data. Moreover, impact assessments are generally long-term predictions. Clearly the longer one extends the forecasting horizon, the higher is the uncertainty associated with the predictions, and hence policymakers face deep uncertainty (Walker et al., 2010). Despite this, scholars suggested that often assessment can be subject to the *ex ante* fallacy, i.e. the tendency to confuse predictions with actual effects (Parker, 2010). They argue that this causes two negative consequences. It creates a false sense of precision and it leads to systematically underestimate the unquantifiable benefits of regulations (Parker, 2010).

Furthermore, even though policy assessment and policy evaluation tools (such as RIA) seem to be very straightforward on paper, when adopted by different countries, the practice looks different. In order words, what country A claims as RIA is different than what exists in country B as RIA. This can be explained in part to the differences in legal systems, policy processes, preferences, political contexts, etc. (Radaelli, 2005). At first glance, this is not a problem. Nevertheless, when a country adopts as RIA, for instance, a checklist that consists of doing a qualitative assessment of whether a regulation has negative effects on businesses based on perception, this differs from the textbook definition of RIA. This means that even when it might be assumed that this country conducts RIA for the development of regulations, and in consequence its regulations are "efficient and evidence-based", this is not the case. This, however, creates the problem that this believe that regulations in this country are "evidence-based" might backfire and reduce other legal or societal checks that the regulation might have gone through, had it not been "evidence-based". Moreover, there are more contingent problems like the fact that impact assessment might not always be well integrated with the policy development process or that there might be insufficient data to carry out meaningful assessments (Carroll, 2010).

There are other things to criticize of policy assessment that are not directed to the adoption or overall use of policy assessment as a part of the policy-making process, but to the use of specific tools or processes to conduct the assessments. Those criticisms will be developed when each one of the processes and assessment tools are analyzed.

Notwithstanding all these criticisms, and the many more that will be developed along this work, regulatory evaluation policies are adopted and continue to be adopted world-wide, including Latin America. Therefore, it is relevant to understand why, despite the negative criticism, what is the rationale for countries to continue adopting and implementing policy evaluation agendas.

3. RATIONALES FOR THE ADOPTION OF POLICY EVALUATION

Understanding the rationale of actions and decisions is a task on its own. Although it is the broader task of this thesis to understand and analyze why and how Latin American countries have chosen to adopt and implement a certain structure for their policy evaluation framework, a smaller and more immediate task is explaining why a country might choose to adopt a policy evaluation framework at all. Few authors have studied the rationales behind policy evaluation (Coletti & Radaelli, 2013; Dunlop, Maggetti, Radaelli, & Russel, 2012; Larouche, 2009), whilst the majority have focused on the practice and effects of policy evaluation. This Section discusses the theoretical framework that might explain

why countries, and in particular developing Latin America countries, choose to include into their legal system a scheme for the evaluation of their regulations.

The first most evident answer might be that a country wants to have the most efficient regulation that is possible given its current situation. The literature in the political economy realm and administrative law and economics field, which can be analyzed and applied to this phenomenon in the search for an explanation, has been identified. In this sense, the Public Interest Theory can explain the efficiency motivation indicated before as a main reason for a country to adopt this structure. However, the inclusion of the evaluation of regulations in the policy-making process has trade-offs and creates externalities. It forces more oversight, transparency, and potentially less room for regulations that might, for example, answer to pressure groups. There are also high costs for the adoption, implementation, and adaptation (Radaelli, 2005).

Additionally, in the specific case of Latin American countries, not all legislations are made with the purpose of maximizing social welfare, and at times interest groups or political self-interest might have a bigger say in the regulatory-making process, than in other countries (Boehm, 2005), as explained by the Private Interest Theory. Therefore, the inclusion of a system for regulatory evaluation in the policy-making process of one of these countries only for efficiency purposes does not seem like the straightforward or self-evident answer. Thus, the question remains of which other reasons might explain the decision of a Latin American country to adopt and implement a policy evaluation system, such as the Better Regulation agenda, into their policy-making process?

When it comes to regulatory production, one of the core study subjects is the government level at which policy should be made, which concerns partially those whose interests are to be responded to. On the one hand, when policy is produced at the legislative level, the resulting legislation might respond to the interest of the members of the Congress (Ogus, 2004, p. 63). On the other hand, when the Congress chooses to delegate the regulatory-making job to the executive power, regulations are made by individuals normally appointed by the head of the executive, which might not respond to the interest of the Congress, or might respond to the industries that they are in charge of regulating (Ogus, 2004, p. 106).

The choice to delegate and its complexities are not costless, and the choice between directly legislating and delegating might mean changing one inefficiency for another, generating costs on either end; or what has been referred to as transaction cost politics (Epstein & O'Halloran, 1999). In any situation of delegation, and according to agency theory, the delegating principal needs to create a system in which it can supervise the actions of its agent or create the right incentives for the agent to act aligned with the interests of the

principal (Ross, 1973). In other words, the principal would want the agent to be accountable. Therefore, the need to increase accountability in the policy-making realm might explain the adoption of such a complex agenda.

Another possible explanation for the decision of introducing and implementing a policy evaluation system is provided by the legal transfer literature. This literature might explain why a country, that might be receiving lower benefits than costs from the adoption of a new legislation or process, might still choose to adopt it. The transfer literature explains the different degrees to which a legal transfer might be determined by third-party influence, and whether this third-party influence might be enough to coerce a country to adopt a structure that could disrupt and significantly change one of its main legal processes (Berkowitz, Pistor & Richard, 2003; Dolowitz & Marsh, 1996), such as policy-making.

Furthermore, when analyzing how international organizations define *ex ante* policy assessment, an evident rationale for its adoption is the improvement of the quality of decision-making. For instance, the European Commission explains that "Better regulation is about regulating only when necessary and in a proportionate manner. High quality policy proposals are built on a clear definition of the problem and its underlying causes." (European Commission, 2017, p.18). Another rationale identified by the literature is that policy evaluation serves as an evidence collector for decision-making. In this sense, policy evaluation is a "repository for all the input that went into a decision" (Larouche, 2009, p. 42), a rationale that according to the same author does not hold but can be understood as complementary to other rationales. This is the case of the use of policy evaluation to cover information deficiencies. These assessments could be seen as a learning process, that serves to identify where information is needed and prompt its gathering; and that can also correct cognitive biases (Larouche, 2009, pp. 52-53).

In addition to these legal and economic rationales sketched here, there might be other rationales of a social, political or other nature. However, the following subsections will develop and discuss in more detail three of these rationales that have just been generally described, to wit: (i) Social welfare maximization; (ii) Accountability; (iii) Third-party influence. The first two rationales appear as a constant in the motivations of Latin American countries when introducing policy evaluation into their policy-making structure. The last one might serve as an explanation seeing the involvement in the process of international organizations such as the OECD, European Commission, and World Bank, as well as the growing number of countries in the same continent that have joined the trend.

3.1 Social Welfare Maximization as a Rationale

Policy evaluation is mainly created to enhance the understanding of the causes and effects of policy proposals both before and after their enactment. The importance of the use of policy evaluation and the adoption of the Better Regulation agenda for this purpose has been pointed out by several studies published by international organizations such as the OECD (1997; 2012; 2015; 2018), the World Bank (Jacobs & Ladegaard, 2010), and the European Commission (2002). Dunlop et al. (2012) refer to this type of usage of policy evaluation as an "instrumental usage". This usage points to evidence-based policy-making, as well as the correct identification and assessment of all costs, benefits, widespread effects of a regulatory proposal, and problems before regulating (Allio, 2013). The purpose is to use policy evaluation as the means to determine whether the proposed regulation meets the criteria previously chosen by the regulator. These criteria are the "goal" of the regulation, be it efficiency, effectiveness or any other goal. Let us assume that a country adopts a Better Regulation agenda for an "instrumental usage". This country is expected to have specifically identified regulatory goals, and thus to adopt those policy evaluation instruments that are able to make more or less precise assessments to identify the chosen criteria.

In this sense, the most prominent law and economics scholars have largely discussed efficiency as an economic goal for society in the allocation of resources. For a recount of these discussions, it is better to take a few steps back, and trace the progress of the analysis to arrive to its current state.

The Coase Theorem has to be, without much argument, the most famous and well-known theorem by Law and Economics scholars and enthusiasts, and the one that is referenced by non-law-and-economists when referring to this interdisciplinary study. As the story goes, when requested to provide his opinion on the allocation of property rights for radio frequency spectrum in the United States Coase's response, in short, was that it did not matter how property rights were allocated, since a voluntary transfer of individual rights could correct any non-optimal allocation. The example he used to explain his conclusion was the following:

> "Whether a newly discovered cave belongs to the man who discovered it, the man on whose land the entrance to the cave is located, or the man who owns the surface under which the cave is situated is no doubt dependent on the law of property. But the law merely determines the person with whom it is necessary to make a contract to obtain the use of the cave. Whether the cave is used for

> storing bank records, as a natural gas reservoir, or for growing mushrooms depends, not on the law of property, but on whether the bank, the natural gas corporation, or the mushroom concern will pay the most in order to be able to use the cave."(Coase, 1959, p. 25)

In other words, in this article he suggested that the use of the radio frequency spectrum should be determined, not as a result of regulations, but by the pricing mechanism (1993, p. 248). This was on the assumption that transaction costs are zero or close to zero. In such a "frictionless society", transactions will keep occurring until no one can be made better off without making someone else worse off, which is a result of the definition of Pareto optimality. When considering the world with transaction costs, Coase recognizes that legal rules matter, and that one of the purposes of the legal system is to establish a clear delimitation of rights on the basis of which the transfer and redistribution of rights can take place through the market (1993, p. 251). Therefore, Coase argued that legal rules should be formulated so that they minimize the impact of transaction costs on the final allocation of rights.

Later, Calabresi & Melamed (1972) added that

> "economic efficiency standing alone would dictate that set of entitlements which favors knowledgeable choices between social benefits and the social costs of obtaining them, and between social costs and the social costs of avoiding them; (...) that this implies, in the absence of certainty as to whether a benefit is worth its costs to society, that the cost should be put on the party or activity best located to make such a cost- benefit analysis" (1972, p. 1096).

They added that such a distributional goal, and perhaps a long run efficiency goal, could be a reflection of an ultimate justice goal to protect expectations at the moment of the allocation of resources (1972, p. 1123). The hint that it might be preferable to consider justice instead of efficiency as a goal was a different approach at that moment.

The concepts of efficiency and justice, or in a more correct term "efficiency as justice" was later explored and explained by Richard Posner. Posner assumed wealth maximization as a corollary of efficient rules and explained that, especially in the common law setting, the average person would give their consent to wealth maximization and that in turn, consent to efficient solutions can be presumed (1980, p. 488). For Posner, this also meant that a change in the allocation of resources would be Pareto superior if it was possible to

demonstrate that everyone affected by the change consented to it. The underlying logic to this was that initially everyone would agree to an efficient allocation of resources, regardless of its position in society, but with even more certainty if the individual's position in society was unknown (notice the Rawlsian influence). This notion of consent, Posner explains, is based on what economists refer to as "*ex ante* compensation". The example used to explain this view is the following: Assume that A and B buy a lottery ticket, and A loses and B wins. Then as long as there is no question of fraud or duress, it is assumed that A consented to the loss *ex ante* (1980, p. 492). He states that many of the non-compensated and involuntary losses that happen in the market or that are tolerated by institutions that substitute the market are fully compensated *ex ante* and therefore are consented to. This was the idea of justice and happiness as wealth maximization developed by Posner, which additionally justified the Kaldor-Hicks principle on ethical grounds, since the consent would be given *ex ante* to wealth maximization through the reallocation of resources.

Posner's wink to the *ex ante* grant of consent could be extended to policy evaluation as well. When performing a *ex ante* policy assessment, some of the tools used consider the costs for society of either engaging in an activity or the opportunity cost of engaging in an alternative activity. Or, in regulatory terms, the opportunity cost of enacting a new regulation compared to the baseline alternative or any other regulatory option. When considering the costs of one of the options to individuals, it is assumed that the individuals had already considered and internalized the private costs of the chosen option.

For instance, recently the National Institute for Public Health and the Environment of The Netherlands published the results of a Social Cost Benefit Analysis performed for the reduction of alcohol consumption in The Netherlands, which considered the social costs and benefits of consuming alcohol (de Wit et al., 2016). Among the list of social costs accounted for were costs such as early death, loss of quality of life, and reduced labour, explaining that these were costs borne by the consumers. However, one of the criticisms to this analysis was precisely that even though certainly those costs were borne by individuals, those costs were already accounted for and discounted by individuals when considering whether or not to consume alcohol, and therefore had already been taken into account in the study in the consumer surplus (Hummel, Jacobs, & Oosterveen, 2016, p. 769). As a result, considering these costs in the consumer surplus and as separate costs resulted in a duplicity of the costs calculated. Additionally, some of these social costs are relative and might not exist; in other words, if everybody is consuming the same amount of alcohol, then there is no "reduced" opportunity, just the same opportunity for all.

Drawing from Posner's efficiency explanation, rational individuals, when deciding the activity in which to engage, already discount for the future and its costs and if the person

decides to engage in the activity, the decision is efficient, at least for him. At a society level, the aggregate of consumers' surplus would indicate the efficiency of the baseline option. However, one of the drawbacks to having this as a parameter for assessing regulations is the problem of revealed preferences and stated preferences. Regarding the revealed preferences, there are certain goods for which the population does not have a way of showing the value that it attaches to it, which are mainly intangibles ones (e.i. the environment). Regarding stated preferences, it is a tricky business to obtain this information from a person without making the preference salient and then causing the person to attach to it a higher value than it would in a normal scenario where the person would have to consider several goods at once (Dolan & Fujiwara, 2016).

Continuing with the efficiency discussion, Kaplow and Shavell (2001) argued, but not without criticisms (Craswell, 2003; Kornhauser, 2003; Waldron, 2003), that social policies should be assessed based solely on their effects on individuals' well-being without according any independent weight to notions of fairness, such as corrective and retributive justice. The thesis is supported on the demonstration that notions of fairness perversely reduce welfare and general well-being. This is a more utilitarian approach than the others previously discussed. The authors explain that it is necessary to first determine how a policy affects each individual's well-being and then make an aggregate judgment based solely on the information pertaining to the welfare of the individual (Kaplow & Shavell, 2001, p.977). The highlight is that the definition of individuals' well-being considered by the authors is quite inclusive and comprehensive, as it includes not only the direct benefits that individuals obtain from consumption, but also the individuals' aesthetic fulfilment, including their feelings and whatever they value. This means that the definition of well-being includes the taste or preference for fairness that individuals may have. Considering this, the authors clarify that this view, under which preferences for fairness are accounted for (and weighted) "must be sharply distinguished from the view of notions of fairness as independent evaluative principles" (Kaplow & Shavell, 2003, p.333). The consideration of these notions of justice and fairness in addition to the already revealed preferences should be avoided when it comes to policy assessment, since they will reduce society's well-being, and therefore welfare (and not fairness) must be maximized.

However, one concern with these criteria is that none of them account for the distributional effects of regulations. In this sense, the mere possibility of a transfer from winners to losers is not a sufficient condition to rely on efficiency criteria regularly used for policy evaluation purposes. These regulations would create disproportionate distributional effects towards the poorer part of the population compared to the wealthier group.

Even though determining the correct choice of goal for a country or for a regulated sector is not the subject of this work, it gains relevance when assessing the policy evaluation framework chosen by a country to achieve one of these particular goals. When Better Regulation is adopted for an instrumental usage, the structure is expected to have as focus to assess potential regulations seeking social welfare maximization, through one of the criteria explained, to provide evidence-based information to policy makers that will allow them to enact regulations that respond to these goals. In this sense, policy evaluation tools such as Cost Benefit Analysis, Cost Effectiveness Analysis and the Standard Cost Model, serve to render this type of assessment information to the policy makers. This provides them with the tools to make decisions that respond to the criteria previously chosen by the country.

All this analysis does is demonstrate how complex it is to choose a goal and even more to achieve it through regulatory means without the appropriate analyzes and resources. The Better Regulation agenda offers a set of tools for evaluation that aids the achievement of said goals. Therefore, the need to navigate this complexity would justify on its own the adoption by a country of such an arrangement of instruments.

3.2. Accountability: A Response from Administrative Law

The second rationale that could justify countries adopting a policy evaluation system is the need to enhance accountability within the policy-making process.

Administrative law studies the relationship between the state and individuals and is, in essence, a search for a theory of how public policy should be made in the broad sense (Stewart, 1974, p. 1670). The literature in administrative law addresses, among other topics, the position of administrative agencies within the government; the procedures that those agencies must follow for decision-making; and determines the possibility and scope of judicial review of administrative actions (Rose-Ackerman, 1988). It provides the general principles and procedures that cut across various substantive fields of the administration and regulation (Stewart, 2003).

In this connection, the domain of administrative law and economics consists of two related approaches: the allocation of power and control of behavior. As explained clearly by Ogus, when determining how the aforementioned tasks should be allocated in different institutions, structural issues arise since the allocation of power is two-dimensional (2004, p. 99). Horizontally, the extent of the authority that should be conferred to regulators and agencies; and vertically, the control to be exercised over these institutions. The allocated powers give room for the performance of the regulatory-making activity. However, these

activities must be undertaken within a regime, this is the second main subject of study for administrative law and economics, the control of bureaucratic behavior. The goals of the policy-making regimes are translated into these principles and rules that control the agencies' behavior through procedures explaining and enforcing these principles, and rules to assure coherent behavior with regards to the goals of the state and the protection of private rights (Stewart, 2003, p. 438). Additionally, internal controls are necessary within the administrative agencies through a proper set of incentive mechanisms (Weingast & Moran, 1983).

As explained by Rose-Ackerman,

> "administrative law imposes constraints on authority delegated to government agencies, and it gives the courts a tool to monitor the exercise of that authority. All representative democracies face the need to balance democratic accountability against the competent implementation of complex statutes. The legal manifestations may differ, but the underlying tension remains the same" (2007, p. 1).

Likewise, Epstein & O'Halloran considered that administrative law aimed to make agencies appear as enterprises open to the public and to the review of higher courts (1999, p. 11); thus, the focus of the literature turned to the role of the public and courts as watchdogs to check that administrations would act as instruments for the implementation of legislative directives in particular cases.

This prompted a steep rise in the scope and intensity of administrative regulation. In principle, the new issues that the administration was dealing with were to be resolved by the use of standards and laws that already existed, particularly from private law and criminal law. Given the revealed inadequacy of "conventional law" to respond to fast moving societal needs, the legislature gave way to administrative rule-making to directly address the problems. With this delegation, there was a surge of command-and-control legislation, the settings of administrative standards and rules in almost every economic or social area of society.

Agency-made regulations were supported by the literature early on, particularly in the US, claiming that Congress should restrict its labour to constituency service, leaving detailed regulations to policy experts in the bureaucracy (Huntington, 1984). The restriction of the Congress work meant that the regulatory work had to be supervised. This supervision was initially assigned to the courts. However, a congressional supervision was also studied by the literature as it developed. McCubbins and Schwartz (1984) referred to the ability (or

lack thereof) of Congress to supervise when it did not have a benchmark or expertise to evaluate the work of agencies that had a higher level of information or control in a specific policy area. They explained that for Congress to acquire the knowledge needed for that type of supervision would be as, or more, costly as producing the regulation itself, which meant going back in the cycle on the problem of not having enough time and expertise to produced detailed legislation.

An analysis made by Weingast and Moran (1983) earlier on explained that when the incentives, put in place by the Congress for the agencies to align to its preferences, were sufficient, any derailing from those preferences would be evident to the Congress, and that would have repercussions on the agencies (McCubbins & Schwartz, 1984). Therefore, it was in the best interest of the executive to stay aligned, which in turn meant that the Congress did not have to strictly supervise. Unfortunately, the access to information on the regulatory-making process or the results of a regulation were not as readily available to rely on as a bell that would not ring. A different solution analyzed by the literature was the installment of administrative procedures, to gain congressional control (Epstein & O'Halloran, 1999; McCubbins, Noll, & Weingast, 1987; 1989).

When the Congress specified the procedures that agencies must follow to produce a regulation, the review of the process and the results might be less time consuming than when done in the absence of a benchmark. Additionally, other interested parties (interest groups, individuals, other branches of the government) can follow up on the given procedure as well. The literature and practice suggested two types of controls in order to prevent or limit regulators exercising their own preferences and agendas: *ex ante* and ongoing controls (McCubbins & Schwartz, 1984). The *ex ante* controls are the procedures that must be followed to enact a regulation; the standards that the agency must follow in its policy-making process; the participation of the stakeholders; the location of the agency; and the appointment of its incumbents. Parts of those *ex ante* controls refer specifically to the decision-making process of the creation of the policy as well as to the goals to be pursued. The literature is inclined for those specifications to be already given by the legislator and not to be determined by the executive discretionally (Epstein & O'Halloran, 1999; McCubbins et al., 1987). The ongoing controls refer to the administrative procedures that allow the legislator or the interested branch of the government to oversee the actions of the regulator by monitoring, having judicial oversight, or controlling the renewal and removal of appointed officials (McCubbins & Schwartz, 1984).

This strand of the administrative law literature fortifies the idea of having administrative processes to structure policy evaluation practices and oversight of the policy-making exercise as a limit to the discretional acting of the administration, and in lieu of the

legislative direct oversight. Likewise, these administrative procedures allow for a balance between not moving far away from the revealed goals of the state, and allowing the agencies to adjust and incorporate their expertise in sensible regulated areas.

There is no longer a discussion of the impossibility of centralizing all decision-making in one branch of the government, and that delegation is necessary for the proper functioning of the state. The discussion is centered now on how to delegate, from the constituents to the legislature and from the legislature to the agencies, and how to properly oversee such a complex delegation.

As Coase stated when referring to the implications of his theorem in different areas of research:

> "It is my belief **that economists, and policy-makers generally, have tended to over-estimate the advantages which come from governmental regulation**. But this belief, even if justified, does not do more than suggest that government regulation should be curtailed. It does not tell us where the boundary line should be drawn. This, it seems to me, has to come from a detailed investigation of the actual results of handling the problem in different ways." (Coase, 1960, p. 18)

The capacity to create secondary legislation or regulation itself exists because of the delegation made by the legislator; and in turn, the ability to create primary legislation is a constitutional delegation made to the legislator. The Congress delegates its discretionary authority where the legislative process is least efficient compared to agency or central government decision-making (Epstein & O'Halloran, 1999). Without going too deeply into this discussion, critics of the delegation from the Congress of its norm-producing job argue that it is an abdication of a prerogative that was constitutionally granted to the legislative branch, and this branch is surrendering their law-making powers to unelected bureaucrats (Esch & Lowi, 1969).

How much discretionary authority the Congress delegates to executive agencies is a decision made by the Congress itself (Epstein & O'Halloran, 1999). Legislators can enact detailed laws that regulate every aspect of the activity at hand or can enact general laws and delegate to the administration and agencies the detailed regulation of the activity. This presents trade-offs and could create inefficiencies in both streams (Epstein & O'Halloran, 1999). When legislators enact legislation directly, they have to take into account the usual congressional costs of their procedures, which include bicameralism and majorities, important constraints in time, flexibility, and consensus. They face as well the costs of

specializing or performing a due diligence to deliver the required piece of legislation (Epstein & O'Halloran, 1999, pp. 36-40). On the benefits side, they are able to make policies that maximize their political goals, securing acceptance from the population or stakeholders and eventually securing re-election, as explained by the public choice theory (Ogus, 2004, p. 106). On the contrary, when legislators choose to delegate their authority to the administrative branch, they might trade their own inefficiencies for the agencies' inefficiencies. Also, the agency or its officials may make decisions that depart from the choices that the Congress or the President would have chosen had they not delegated their functions. The fundamental premise is that bureaucrats have preferences that might conflict with those preferences of society, the Congress, and the central executive branch. The actions and regulatory choices of both the President and the Congress are to some extent disciplined by the electorate, through their ratification or their dismissal, which is not the case for regulatory agencies, that lack democratic accountability (Majone, 1999).

This leaves the Congress with a specific problem to solve, which is delegating the right amount of authority in the right dose. Restrictive and constrained delegation can deny the benefits of agencies' expertise and not have any impact on the reduction of the workload for the legislature. On the other side of the card, excessive delegation and the results of regulation might be far from the preferences of the legislators and their constituents. As Epstein and O'Halloran put it, "[i]t is this trade-off between expertise and control, informational gains and distributive losses, that lies at the heart of this view of administrative procedures" (Epstein & O'Halloran, 1999, pp. 35-36). Additionally, the literature has identified other short-comings and negative traits of this delegation and lack of accountability, such as runaway bureaucracy or corruption (by allowing or actively seeking private capture) (McCubbins et al., 1987), as a result of a classic principal-agent problem. This can thus be addressed with the typical principal-agent solutions: oversight and/or incentives to align the preferences of the agent with those of the principal. However, none of these are costless and there is the decision to monitor confronted with the decision to command.

To give a proper name to all of this, this is an accountability problem. By delegating their regulatory-making powers, elected public officials lose control over the resulting regulation; but also, the population loses power to hold accountable democratically elected officials. In this sense, a person is accountable when he has the obligation or is expected to explain his actions to a forum, offer an evaluation of his actions, and face the consequences (negative or positive) for his actions (Bovens, 2007).

3.2.1. Agency Theory

There is, of course, a theory that describes the interaction between two parties, when one of the parties delegates its functions to an agent, in order for the latter to fulfil them as if it were the delegating party. In that sense, agency theory analyzes which problems come from these agency relations. In a nutshell, an agency relationship can be defined as "a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision-making authority to the agent" (Jensen & Meckling 1976). The problem emerges from the fact that in some instances the interests of the agent and of the principal are bound to diverge, and the contract between them cannot regulate all these circumstances.

In that sense, agency relationships create costs that can broadly be grouped in three categories: (i) the monitoring expenditure by the principal; (ii) the bonding expenditure by the agents; and (iii) the residual loss. Monitoring expenditure is the costs borne by the principal to limit self-interested behavior by the agent. The bonding expenditure is the costs borne by the agent to guarantee to the principal that he will not engage in self-interested behavior. Lastly, Jensen and Meckling (1976) define the residual loss as the reduction in the principal's welfare due to the "divergence between the agent's decisions and those decisions which would maximize the welfare of the principal".

When those agency problems arise, in line with the agency theory, the person who delegates needs to foster a system where he can supervise the actions of his agents or create the right incentives to align the acts of the agent with the interests of the principal (Ross, 1973).

3.2.3 Addressing agency problems?

As explained by Strøm, one of the most important assessments towards the accountability of a political arrangement is whether it addresses agency problems, such as moral hazard and adverse selection (2000, p. 270). On the one hand, moral hazard arises when the principal cannot see the actions of his agent, which might create the incentives for the agent of taking actions that are not aligned with the principals' interests. On the other hand, adverse selection problems come when the principal does not know the preferences or interests of the agent, or even the demands of the tasks that the agent will undertake. This leads the principal to select in one or repeated occasions agents that cannot fulfil the required task (Strøm, 2000).

These problems have expanded the administrative law and economics study in search of theoretical analysis to respond to the different outcomes of the options, especially the methods for the supervision of the decision-making process faced with the still necessary delegation. One of the responses in administrative law and in practice is the appraisal of the potential regulations to be enacted by the executive branch in execution of their delegated powers; and also, of the rule-making process of the legislative branch in their constitutionally earned capacity.

As explained in the Second Section of this Chapter, policy evaluation processes and the Better Regulation agenda require the policy-maker to comply with certain mandates: 1. Undertake a public consultation, which allows the public to comment on the proposed work of the regulator; 2. Perform an *ex ante* evaluation (e.i. CBA, RIA, CEA, SCM) which allows the regulator to provide evidence to ultimately justify his decisions; 3. Monitor existing regulations (i.e. retroactive assessment, ex post evaluation), which allows the decision-maker to follow up on the life of his regulations, and the delegator, both the legislator and the public, to monitor the work of the regulator. This provides, in principle, the structure to supervise and eventually hold accountable a regulator that deviates from the preferences of its electorate or delegator.

Therefore, a rationale for countries to adopt a Better Regulation agenda is the need to increase accountability in the regulatory making-realm, which was watered-down as a result of the necessary delegation. This can be explained by the Public Interest Theory, as politicians would adopt this for accountability purposes as a response to the public's concern of the loss of democratic accountability. There is also the possibility that this does not come from a selfless desire of politicians to be more accountable, but from a demand of the citizens of more accountability. Then politicians are forced to provide what the electorate demands. This can further be explained by the Private Interest Theory. Elected politicians might want to have a better grip on the officials to whom they delegated the regulatory-making powers, in order to ensure that the regulations that they produce are aligned with the interests of the elected politicians, and not with their own interests.

In addition to the Public Interest reasoning of social welfare maximization and accountability, and the Private Interest explanations for accountability, there is another explanation that does not come from within the country nor from the demands of the citizens, which will be discussed in the following section.

3.3 Third-party influence as an explanation

The third and last possible rationale that is analyzed for adopting and implementing a policy evaluation structure or the Better Regulation Agenda is the influence from a third-party. Normally, not all countries are pioneers when adopting new regulations or institutions; they stand on the shoulder of giants. In that sense, jurisdictions learn from others, either to adopt or to improve their legal norms, processes, and institutions. The policy transfer literature explains it as the "process in which knowledge about policies, administrative arrangements, institutions, etc. in one time and/or place is used in the development of policies, administrative, arrangements and institutions in another time and/or place." (Dolowitz & Marsh, 1996, p. 344). The policy transfer literature can be contrasted with the policy diffusion literature. The diffusion literature suggests that "policy change occurs by osmosis; something that is contagious rather than chosen" (Stone, 2012, p. 484), and may overlook the different agencies and political interests involved in the transfer (Weyland, 2009). Conversely, the transfer literature argues that "the way in which the policy transfer occurs is important in understanding its nature and outcome" (Hadjiisky, Pal, & Walker, 2017, p. 5).

Dolowitz & Marsh have particularly explored policy transfer in depth and the different elements that compose the process. The main questions answered in their research are: "Why do actors engage in policy transfer? Who are the key actors involved in the policy transfer process? What is transferred? From where are lessons drawn? What are the different degrees of transfer? What restricts or facilitates the policy transfer process? How is the process of policy transfer related to policy "success" or policy "failure"?" (2000, p. 8). For the purpose of this Chapter on the adoption of policy evaluation, it is useful to examine in particular the following questions: (i) What is being transferred? (ii) What are the different degrees of transfer? (i) Who are the actors involved in the transfer? And finally, (iv) why transfer?

The first question, "what is being transferred?" is straightforward. The literature explains that transplants can be policy goals, policy content, programmes, procedures, policy instruments, institutions, ideologies, justifications, ideas and attitudes and negative lessons (De Jong & Mamadouh, 2002, p. 21; Dolowitz & Marsh, 2000, p. 12). The relevance of identifying this element is closely related to the next question as well. What a country chooses or is required to transfer might have a minor or major impact on its legal system, depending on the importance of the subject of transfer. Transferring an institution or even a policy program into a different legal environment can radiate and have an impact on how processes are conducted and even what the population expects from certain processes. The implementation of policy assessment as a mandatory requirement in the process of

decision-making, and in particular, in the process of enacting a new regulation, acts as a transforming element in one of the most important processes that a country has: making regulations.

For instance, in the last years, one new trendy word is "cryptocurrency", which in short is digital cash (Narayanan, Bonneau, Felten, Miller, & Goldfeder, 2016). Several countries have started regulating the commercialization, exchange, and purchasing power of this new type of currency (although not all countries recognize it as such). Mexico is one of the countries to identify a need to regulate this area. Had this happened 20 years ago, the process of creating and enacting this regulation would have consisted of its drafting by the competent authority and then its enactment. The expectation of a new regulation in this area would have come to the knowledge of the consumers sometime at the end of the process.

Today the story is different. Mexico is one of the countries that have transferred Better Regulation as a "policy program" or even as a new "institution" into its process of making regulations. In the third quarter of 2017, the news was that the draft of the law regulating financial technologies had been filed to the National Commission for Better Regulation and that it was in the stage prior to being an enacted law (Groenewold, Ruíz, Martín, & Mosqueira, 2017). This can have many different interpretations, but one attracts attention: Policy evaluation is an integral and organic part of the policy-making structure in Mexico, and the consumers, as well as the authorities, know to expect it as a part of the regulatory making process. The transfer of this agenda has affected the process that interested parties look for when a new law is to be enacted. The expectation on the evaluation of the potential legislation is as valuable and important for the waiting consumers, as the legislation itself.

The second question refers to what the different degrees of transfer are. A country can embark on a transfer process in four different degrees. (i) copying, which is a complete and direct transfer of the program or policy as it is; (ii) emulation, where the ideas behind the program or policy are transferred; (iii) combinations, which is the simultaneous transfer of several different policies to create a new one; and (iv) inspiration, where, as the name suggests, the transferred policy just inspires a policy change, but the end result is not drawn from the original (Dolowitz & Marsh, 2000). There is no single answer to this, since this would depend on the country or group of countries that are being considered. However, Latin American countries that have totally or partially adopted and implemented the Better Regulation agenda, have chosen to emulate and adopt the process as used by other countries (for example, other Latin countries have emulated Mexico), or from what international organizations, such as the OECD and the World Bank have proposed. The transfer has not been total, it has been partial or through stages; however, from the study

of the laws and presidential decrees that integrate these practices, it is not far-fetched to assume that the end goal is to emulate the agenda in its entirety.

Lastly, the last two questions "who participates in the policy transfer?" and "why transfer", in this particular topic have answers that might overlap with each other, since the participation of an actor in this process usually has an explanation that might contribute to explain why ultimately the country chooses to adopt the policy assessment arrangement. Many actors are active or passive participants, including elected officials, interest groups, business groups, corporations, think tanks, political parties, consultants, supra-national governmental and non-governmental institutions and international organizations. In that sense, the motivation that each one of these actors might have to participate or promote the adoption and implementation of policy assessment arrangement might have a private interest explanation or might respond to one of the other rationales explained above, closer to public interest.

For instance, non-governmental institutions and business groups might lobby in favor of the adoption of a policy assessment systems because they believe that having such an arrangement in place will improve the quality of regulations. Better or less regulations could translate into less regulatory burdens, a safer society, increased welfare and/or more profit for businesses. Nevertheless, the influence that these groups may have to successfully lobby in favor of the adoption and implementation of these policies will depend on their ability to organize as a group.

There are also other private groups, such as corporation and well-organized industries that might lobby in favor of the adoption of some assessment tools, when those tools facilitate the capture of the regulation through data. Industries have more information on the costs that an activity or a regulation might create in their sector; they usually also have more resources to dedicate to participate on public consultation processes (compared, for instance, to small businesses and the general population), thus dominating the conversation and in turn feeding the information that benefit them to policymakers.

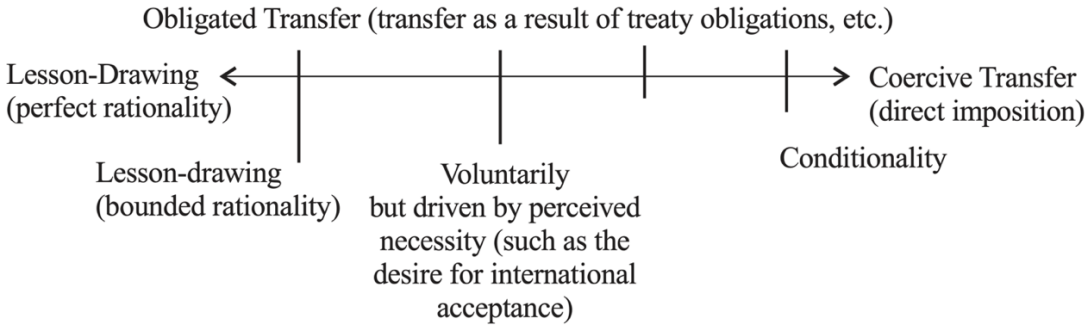
Nevertheless, regarding the adoption of policy assessment arrangements international organizations, such as the World Bank, the European Commission and OECD play a leading role by proposing ideas, programs, and best practices that influence policy makers. The influence of these organizations can be direct when it is, for example, through the imposition of policies or as a condition for a loan; or indirectly by conveying convincing information through their reports and written policy recommendations (Dolowitz & Marsh, 2000).

Specifically with the Better Regulation agenda there has constant indirect influence from the OECD, the Interamerican Development Bank (IADB) and the World Bank, since they are firmly championing this agenda through publications, studies, recommendations, best-practices and guidelines that highlight the importance of having a better regulations agenda, and at the same time portrait it as a "must-have" for any country (see Jacobs & Ladegaard, 2010; OECD, 1997; OECD, 2012; OECD, 2015; OECD, 2018). In addition to this, these international organization provide in-location training for the adoption and implementation of a better regulation structure and facilitate lesson sharing across member countries, which reinforces the "must-have" message.

These international organizations have in some cases a more direct participation on the transfer process, or more specifically, in motivating and persuading countries to transfer these legal instruments. For example, the evaluation of their member states to determine whether they comply or not with the requirements of the Better Regulation agenda, by establishing rankings based on indicators of the regulatory governance of each country (i.e., OECD, 2015; OECD, 2018); recommendations to member of the next steps to be taken in order to comply with the Better Regulation agenda (i.e., OECD; 2012; OECD, 2016a; OECD, 2016b; OECD, 2019a; OECD, 2019b); and studies made to accession countries and non-member states regarding their current regulatory policy and how to improve it by adopting better regulation tools. These actions send a message to countries of this being a requirement to be a member of these organizations.

All of the above contributes to the "why" a country would transfer. This question comes close to our general question "which are the rationales for adopting and introducing a policy assessment process?" This can range from the genuine aspiration of a country of drawing lessons from a successful practice to the direct influence by a third party (See Figure 1).

Figure 1. Reasons for legal transfer



Source: (Dolowitz & Marsh, 2000, p. 13)

Even when politicians might have good intrinsic reasons for the adoption of these arrangements, it is likely, and probably undeniable, that a voluntary transfer is largely motivated by, on the one hand, a perception of necessity for international acceptance; and on the other hand by direct and indirect pressure both internal and international.

The decision to transfer, nevertheless, is done by a specific group which are the politician and decisionmakers in a country. Politicians may argue in favor of adopting these tools and actually actively participate in their adoption and implementation. As discussed previously, it could be argued that their participation is motivated by the gains that they could have from granting the population (public choice), as it has been argued that these procedures can be used to "*enfranchise important constituents in the agency's decision-making, assuring that agencies are responsive to their interes*t" (McCubbins et al., 1987, p.224). Conversely, they might be motivated the need of a more efficient regulatory framework (public interest), or heavily influenced by regional or international third parties.

4. RATIONALES OF LATIN AMERICAN COUNTRIES

The literature has not addressed the particularities of Latin American countries in this context of policy assessment. Even though there has been some academic work done addressing the implementation of some evaluation tools in developing countries (Kirkpatrick, 2014; Kirkpatrick, Parker, & Zhang, 2004; Peci & Sobral, 2011; Rodrigo, 2005), the academic work on regulatory governance and evaluation tools in Latin American countries separately is scarce (Levy & Spiller, 1994). Moreover, to date the different evaluation tools, regulatory governance structures, and their feasibility for Latin American countries have not been studied.

Possibly, this lack of focus on Latin American countries may be because researchers have assumed that it is possible to transfer the experience of other countries and assimilate them to the Latin American context without further discussion. Or, that the solutions proposed for these problems in developed countries could work also in developing countries. However, these are not ideas that can or should be taken lightly. Laws are easily written down, but institutions that make them effective must develop through time (Cooter & Schäfer, 2011, p.242). Many countries borrow from different legal systems, not infrequently in an attempt to signal to foreign investors from different countries that they comply with their domestic legal standards and that they also belong to the community (Berkowitz et al., 2003, p. 164). Nonetheless, when adopting an existing legal structure, the correct legal code, implementation, and the situation of the receiving country are relevant (La Porta,

Lopez-de-Silanes, Shleifer, & Vishny, 1997). This hypothesis is also appropriate for Latin American countries, which are all developing countries with a history of colonialism, dictatorships and extractive institutions (Acemoglu & Robinson, 2012). Therefore, to categorically maintain that what works in a developed country or in other types of developing countries, would work in a Latin American country, would be fallacious.

However, considering what has been explained in the previous Sections, it is more plausible to venture the explanation that the implementation of policy evaluation has been done either voluntarily or conditionally by Latin American countries.

If the implementation has been voluntary, then the rationales of maximizing social welfare and increasing accountability find a safe harbor. On the one hand, as explained by the public interest theory, governments are motivated to adopt this policy as in order to produce regulations that are efficient or effective, because this investment potentially maximizes social welfare. Likewise, this theory explains the establishment of administrative procedures that have the potential to save the accountability distance created as a result of the necessary multiple delegations that the regulatory state requires.

4.1 What is driving the adoption and implementation of the better regulation agenda in Latin American countries?

Nevertheless, because the adoption of this agenda creates costs and trade-offs in the form of increased forced transparency, public interest theory does not seem to suffice to explain this choice in the case of Latin American countries, especially in the face of the criticisms that exist against the adoptions of these tools. Then, the private interest theory explains this adoption in two forms. The first one is that politicians might want to respond to the demands of the public for more transparency and accountability, because responding to these demands still serves their own self-interest. The second one is that elected politicians in these countries want to increase accountability to ensure that the regulations enacted by the regulators appointed by them are aligned with their own preferences, instead of having regulators regulating following their own self-interest.

Still, in addition to these two rationales, the adoption of the better regulation scenario in Latin America countries might be influenced by third parties. Even though these motivations are explored in more depth in Chapter 3 of this Thesis, this voluntarily adoption could also be explained by a desire of the countries to signal that they belong to the current international trend and that they comply with international standards. In that sense, Mexico was the first country to adopt a tool for policy assessment and by 2019 was

the leading country in the region regarding regulatory evaluation practices.[2] In addition to developing its own regulatory policy, Mexico provides guidance to other Latin American countries on how to adopt and implement their policy assessment arrangements. Thus, it can be said that Mexico's lead influences the transfer of these policies into other Latin American countries.

Furthermore, Latin American countries have created a Better Regulation Network for knowledge sharing, which also feeds the shared compromise of adopting these policies as a perceived necessity for regional acceptance. Lastly, a mix of voluntary and conditional adoption might explain it as well, considering how international organizations such as the IADB, OECD and World Bank have been promoting the agenda in Latin American (OECD, 2016a; OECD, 2016b; OECD, 2019a; Querbach & Arndt, 2017), in a way that seems almost as an unspoken requirement. An explanation is certainly that it might be a response to third-party influence, either from other countries in the region or international organizations. It is not however argued that conditional transfer is an explanation by itself, but that it has an important influence on the decision of a country to adopt the Better Regulation agenda.

These are preliminary assumptions that can be reinforced or denied once there is a specific analysis of the situations that lead each Latin American country to the adoption of their policy assessment arrangements and the motivations and goals that they had to do so.

5. CONCLUSION

The decision of a country to adopt a new process is of course not a fortuitous event. It is either the product of the careful consideration of the decision-makers of the country and their constituents, a third-party imposition, or a reason in between. This Chapter aimed to identify and discuss the reasons that prevailed for the adoption of a policy assessment structure or the Better Regulation agenda and adds to the debate on the rationale behind the adoption and implementation of a policy evaluation system, and in particular, when in the Latin American scenario.

An analysis of the meaning of the concept of policy evaluation was useful to understand the extent to which it affects the policy-making process of a country. It serves as a toolkit to guide evidence-based decision-making. Therefore, countries are able to use policy

[2] This is discussed in Chapter 3 of this Thesis.

evaluation tools to produce regulations that help their societies to achieve their defined goals. The definition of said tasks is not an easy tasks, and it was evident that many law & economics theories explain that even when goals such as efficiency are put forwards, they are not always motivated by a wish to benefit the public (public interest), but also by a strategic motivation of politicians for self-gain (public choice).

When a country is able to decide, for example, that it prefers efficient or effective regulations to maximize social welfare, the better regulation agenda provides tools for the *ex ante* and *ex post* evaluation of regulations. These assessment tools evaluate the potential or existing effects of regulations and inform the decision-maker of the most efficient options to address the economic or social problems at hand. There are of course limitations (and criticism) to the forecasting ability of these tools. Nevertheless, this is one of the main rationales for adopting this complex agenda.

Another characteristic of the policy evaluation system is that in principle it seems to tackle accountability requirements. In order for a regulation to be evaluated a certain organizational structure needs to be in place. Once it is in place, as part of the assessment process, the evaluator presents reports of the results of the assessment performed and the decision-maker is supposed to adhere to the regulation recommended by the assessment, unless there are other reasons to justify a departure from it. This feature is relevant when regulations are made as a result of delegation because it allows the delegator to oversee and supervise the work of the delegated regulator without needing a higher level of expertise in the regulated area.

Those two reasons however do not seem to always justify the adoption of these complex systems. There is also third-party influence for countries to align to what its peers have adopted. This influence comes from internal actors, other countries as well as from international organizations. There is a need for some countries to signal that they too "belong", as a way of assuring investors that they comply with already existing international standards.

All of the previous rationales are also reflected in Latin American countries. In particular, the accountability and the third-party influence rationales. These countries have a presidential constitutional system, which means that there is a considerable degree of delegation in their regulatory-making process. Therefore, installing a system that provides administrative processes to check, coordinate and oversee how regulations are made can contribute to reducing agency problems that these countries face. In addition, it is undeniable that the indirect (and sometimes direct) influence of other regional and international actors towards the adoption of policy assessment instruments has also played

a role into the decision of Latin American countries of adopting these systems. Even though the author recognizes that these are not the only reasons why a Latin American country might adopt such complex instruments, they do serve as a partial explanation.

This Chapter has identified and studied the rationales behind the decision of a country to adopt policy evaluation and the better regulation agenda and has provided a theoretical framework that explains this decision. However, it is not the broader goal of this thesis to analyze which explanation fits best, as they might all in some way or another, or in combination play a role in the reason why Latin American countries might have adopted this trend; they are not exclusive. This thesis aims at studying the feasibility of the use by Latin American countries of policy evaluation as an instrument for accountability. Nonetheless, this Chapter provides the groundwork for the following chapters of this Thesis.

Therefore, after discussing the rationales identified for implementing a better regulation agenda, the following two chapters will study the execution of the decision to adopt the agenda. In other words, moving from what motivated the countries to adopt the agenda, it will study what it looks like in practice. First, the uses of the different policy evaluation instruments that have been implemented by countries and their governance are examined; and second, extending from the finding of this Chapter, there is an evaluation of whether and how the various regulatory evaluation arrangements that can be found in these countries can be arranged based on the goals they pursue (or the rationales that led to their adoption).

CHAPTER 2

POLICY EVALUATION STRUCTURES: DIFFERENT MEANS FOR DIFFERENT PURPOSES

The implementation of a new legal and administrative procedure in a country should in principle entail the arrangement of this procedure in a way that it fulfils the societal or economic goals for which it is intended. Then, the adoption and implementation of policy evaluation arrangements should not be the exception. However, as it was evident from Chapter 1, policy evaluation systems and the Better Regulation agenda are not simple administrative procedures, but a complex web that involves not only policy assessment instruments, but also the participation of public officials, entities and society. Because of this, the fulfilment of the goals for which policy evaluation is intended, is unlikely to be accomplished by following a straight line. Therefore, it is appropriate to revise the experience of jurisdictions that have already implemented it and have had years of experience in using policy evaluation in their policy-making process, in order to obtain insights on how their uses have served different regulatory goals; as well as the literature that analyzes these topics.

This Chapter digs deeper into what policy evaluation implies for a country in practical terms, and into the implementation and use of the better regulation agenda. It examines the different components to be considered when adopting and implementing a policy evaluation arrangement. It studies the intended goals of the different choices within the legal system and analyzes the potential incentives that these choices might generate and how different arrangements for policy assessment respond to different regulatory goals, as well as the pros and criticisms to their use or adoption. These findings are helpful in two ways: First, they foster an understanding of the trends and provide a clearer road map for the introduction in a country of policy assessment structures and governance; and second, they serve to create a critical framework and guide to different assessment arrangements to determine whether there is coherence between the structure and the goals. mpare the principles and theories with existing

In order to achieve this, the first Section of this Chapter explains in more detail what the Better Regulation agenda is, considering the internationalization of policy evaluation, and gives an overview of the composing elements of a policy evaluation agenda. These elements are: (1) the scope of the assessment; (ii) the moment(s) for the assessment; (iii) the tools used for the assessment; and (iv) the governance of the assessment. The author argues that the choice of the composing elements that are going to be part of a country's policy evaluation structure is relevant for the country in achieving the goals previously set with its adoption. In that sense, it is relevant to understand first what each of these elements consist of; and second, the content of the different options that a country or administration can choose from. This analysis is performed in the subsequent sections using a law and

economics perspective. It is not a normative analysis, but a theoretical analysis that considers the incentives, costs, pros and cons that each one of those options entail.

Considering the foregoing, the second Section begins by discussing the possible scopes for policy assessment, comparing international experiences when choosing which regulations are to be assessed, whether it applies only to secondary legislation or also to primary legislation, or whether there are limitations depending on the potential economic impact of the regulation, the area that it regulates, or any other criteria.

Section three discusses the different moments for the assessment, considering a fundamental component of the policy assessment which is the Policy Evaluation Cycle. The PEC is a set of systematic procedures for evaluating and predicting the potential impacts of proposed regulations and assessing the effects and consequences of said regulations. The combination of the evaluations that compose the PEC is intended to have a constant view of the effects of potential and existing regulations enacted at their different life-stages. These assessments are performed using a variety of policy evaluation tools, each of which has its own methodology and different criteria for assessing regulations. In that sense, Section four discusses some of the most commonly used policy evaluation tools, with the objective of understanding the scope of each one, their use, methodology, and whether they serve a particular regulatory goal.

Both the PEC and the evaluation instruments used to execute it are bound by the scope of the assessment in a legal system, but also operate within a governmental environment. This means that there is a need for more or less governance, depending on the complexity of the assessment structure created, the scope of the structure and the tools used. Therefore, Section five discusses the different governance structures, focusing particularly on the governmental bodies that participate in the assessment, their coordination and the oversight of their work, including criticisms and analysis of their virtues and flaws.

Lastly, Section six brings together the findings of the previous sections to arrange the different elements examined based on their potential to attend to specific regulatory goals previously identified. Particularly, the arrangements that have accountability potential, those that are intended to maximize social welfare, with goals such as efficiency or reduction of regulatory burden, and those that are the result of the adoption of the Better Regulation agenda proposed by international organizations. The Section aims at identifying which type of arrangement has the potential to create the conditions and incentives for the actors in a legal system in order to achieve a desired regulatory goal.

1. THE INTERNATIONALIZATION OF POLICY EVALUATION AND THE BETTER REGULATION AGENDA

Policy assessment policies differ worldwide in scope, purpose, methodologies used for the quantification of the potential or existing impact, goals, and governance. As explained in Chapter 1, in the 1970s the US was the first country to officially adopt a form of policy assessment into their regulatory-making process, prompted by the need of reducing the costs of complying with regulations. This practice later evolved to its current stage[3], which is analyzed in the next subsection, and throughout it inspired other countries to adopt similar instruments to address analogous problems. In that sense, the diffusion in European countries began through individual countries looking to reduce administrative burdens (Netherlands and Denmark), quantify the net cost to business of regulating (UK); but also at the supranational level, by the European Commission adopting a legislative assessment policy, and through the OECD, which has played a 'mediative' role (De Francesco, 2012, pp.1296-7) that has helped the diffusion of the Impact Assessment (IA) procedures through Europe (Lianos, Fazekas & Karliuk, 2016, p.288). The trend has spread over other countries and continents such as New Zealand and Australia (Carroll, 2016), South Korea (Kim & Kim, 2016), and of course, Latin America.

There is no contesting that policy assessment is an administrative tool with diffusion across the world, regardless of countries' economic, social or legal systems (Meuwese & van Voorst, 2016), even if the dissemination has not been uniform, standard or consistent (Radaelli, 2005). However, the Better Regulation agenda itself does not have a clean-cut definition of what makes regulations better, and even though there have been notable academic and governmental efforts to identify such benchmarks (see Baldwin, 2005; Garben & Govaere, 2018; Meuwese, 2008; Radaelli, 2010b), it is still not a unified work, nor should it be. Nonetheless, these efforts have managed to be consistent around a relatively small number of benchmarks, such as "the adoption of lowest cost, least intrusive, methods of achieving regulatory aims; the application of informed (evidence-based) expertise to regulatory issues; the operation of processes that are transparent, accessible, fair, and consistent; the application of accountability systems that are appropriate; and the use of regulatory regimes that encourage responsive and healthy markets where possible." (Baldwin, 2010, pp. 262-3).

In addition to these general benchmarks, the Better Regulation agenda has been given different meanings by those who adopt it, based mainly on the problems that they need to

[3] See Chapter 1 for a count of the evolution of regulatory policies in the US.

fix in their regulatory-making process, which might explain these divergences. Table 1 shows a summary of some views of what Better Regulation is, based on the problems it addresses.

Table 1. Different meanings of Better Regulation

Regulatory Problem	**Meaning of Better Regulation (Goal)**
Regulation will always have side-effects and trade-offs, but "Better Regulation" might offer one way to reduce the extent/impact of these effects	Reduction of unintended effects of regulation
Regulation seen as "last resort" and needs to be limited; alternatives, such as "benchmarking", market-type mechanisms, and naming and shaming, offer superior solutions	Reduction of regulatory "burden" via de-regulation and "alternatives to regulation"
Regulation suffers from knee-jerks, "Better Regulation" slows down process, enriches information, and leads to better expert judgement on the costs and benefits of different proposals	Reduce inconsistency, unpredictability and lack of expertise
Regulation seen as lacking professional conversation and institutional memory; requiring mechanisms that encourage exchange of knowledge and experiences	Reduce distance and lack of professional conversation in regulation

Source: (Lodge, 2015, p. 15)

In that sense, these clear divergences contain lessons to be drawn. This following subsection will examine some of the most prominent country practices regarding policy assessment in order to identify convergences, common elements, and those that set them apart.

1.1 From the U.S. model to the mainstreaming of Better Regulation in OECD countries

The US has had mandatory policy assessment for new regulations enacted by regulatory agencies that respond to the president's office for almost 50 years. Its model has evolved under each presidential administration with changes that reflect the direction of each president, but after it was introduced none of them have removed the requirement of policy assessment. The introduction of the first mandatory CBA required agencies to consider the objectives of new regulations, compare their benefits to their costs, and consider alternatives, aiming at having the most efficient regulation to solve the problem at hand. This has evolved to include a full-fledge Regulatory Impact Assessment that additionally looks at alternatives to regulating, at what governmental level the problem should be addressed (OMB, 2003) and the retro-active review of existing regulations (E.O. 13563, 2011). The assessment itself emphasizes quantitative evaluation (Carey, 2014).

This model does not limit the assessment only to regulations enacted by regulatory agencies that depend on the central government, but the assessment is only mandatory for regulations that are "economically significant"[4], have an adverse effect on the economy or a specific of the economy area, or for other reasons is considered "significant". The assessment of future regulations is performed by the agency that is planning to enact it and this assessment results in a report that is later reviewed by the OIRA. The OIRA is a form of watchdog that ensures the assessment considered the criteria required regarding cost, benefit and other principles, and that they are aligned with presidential priorities (Balla, Deets & Maltzman, 2011, p.152). When the reports or regulations fail any of these tests, then the OIRA, as an office located inside the office of the president, has the authority to return them for additional consideration (E.O. 12866, 1993).

The US model served as a reference for the current models used by other countries and international bodies and organizations (Dunlop & Radaelli, 2016, p.3). It provides standards for the whole process of policy formulation, as it shows how consultation, cost and benefits, and trade-offs in policy choice are taken into account when assessing regulatory proposals (Radaelli, 2005).

In Europe, it is possible to pinpoint the start of this revolution to back in 1990, where the pressure was in the European Commission to adopt a management strategy to assess the quality of EU legislation. The response from the Commission came when it adopted a systematic approach to legislative management. This assigned the Commission a mandate to propose a strategy for coordinated action on legislative reform that rendered as a result the White Paper on Governance in 2001 (Meuwese, 2008). Among other requirements, it called for a simplification of community legislation and Better Regulation through a greater diversity of policy tools and their combined use (European Commission, 2002). This was one of the early references to Better Regulation at the EU level. The Commission required a formal IA to all regulatory proposals and negotiation guidelines for international agreements, and distinguished this IA from a simple *ex ante* assessment by explaining that "[i]n contrast [to *ex ante* assessment], impact assessment is policy driven, it focuses on examining whether the impact of major policy proposals is sustainable and conforms to the principles of Better Regulation" (European Commission, 2002, p. 3).

Another characteristic of the Better Regulation approach of the Commission is its declared commitment to transparency through explaining the necessity of legislative actions. Likewise, it has made public participation a central feature of the IA, which has the double

[4] This means that the impact of the proposed regulation in any year is over US$100 millions and it includes benefits, costs or transfers. (OMB, 2011)

purpose of serving as a communication channel between the Commission and the stakeholders and of making stakeholders aware of upcoming changes (Bäcklund, 2009, p.1078). This last part serves also as a legitimizing instrument.

At the time, the Commission considered that for their legislative assessment to be efficient at the supranational level it had to be complemented "by equivalent practices in the Member States" (European Commission, 2004). This came with a recommendation for the member states to establish national Better Regulation strategies with a scope similar to the impact assessment system of the Commission (Lianos, Fazekas & Karlinuk, 2016, p.289). At the European national level policy assessment efforts began before the Commission's call, though it is possible to say that this requirement served as a point for convergence.

In that sense, the UK experience on Better Regulation is quite different from the US model. The United Kingdom's Better Regulation Task Force, an independent advisory body created in 1997 within the UK's Cabinet Office, published in 1998 a set of principles of Better Regulation that indicated what a good regulation should look like: it should be proportionate, accountable, consistent, transparent and targeted (Baldwin, 2010, pp. 261-263). It focused initially on primary legislation, instead of only on agency-made regulation, like the US. With time, the UK relaunched its Better Regulation agenda with a purpose of cutting red tape and reducing regulatory burdens for businesses. In 1999 Ireland joined in publishing a similar list of benchmarks, which the Canadian and Australian governments had already done with their own benchmarks, and different processes to achieve them. Among the most followed lines where the reduction of red tape, administrative simplification and "quality" regulation (Allio, 2007). In the Netherlands the system applied predominantly to primary laws of the government. They created the Standard Cost Model as an instrument to evaluate the costs generated for an individual or business to obey with a particular legal requirement, which was later partially adopted by the UK. These countries have lead initiatives for the Better Regulation agenda in Europe to be focused on the identification and reduction of administrative burdens for business, instead of policy evaluations with more complex structures, such as the US RIA.

However, the aim of this Section or even this thesis is not to perform a thorough account of the country differences, but to show the variety of approaches and practices that can provide enough background for the analysis in the rest of the chapter. To finalize this account, it is advisable to make use of empirical studies that have been undertaken to identify the differences among some EU countries and the European Commission when it comes to their impact assessment structure and the instrumental purpose of the assessment (See Table 2).

Table 2. Comparison of assessment structures in some EU countries and the EU

	EU	**Germany**	**Sweden**	**UK**
Main assessment procedure	Impact Assessment	Regulatory Impact Assessment (`assessment of the effects of law')	Committees of inquiry	Regulatory Impact Assessment
Main purpose of assessment	Aid to political decision making; participatory	To identify best policy option; rationalist and expert based	Aid political decision making; closely linked to political process	To identify the most cost-efficient option; expert and stakeholder based

Source: Hertin et al., 2009, p.1197

At the same time as this was happening in Europe, the OECD issued its first recommendation regarding the Quality of Government Regulation in 1995; and in 2005 produced a document with the revised Guiding Principles for Regulatory Quality and Performance, both of which are set as mandatory for any OECD member country. That 2005 report explained that good regulation should

> "serve clearly identified policy goals and be effective in achieving those goals; have a sound legal and empirical basis; produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental, and social effects into account; minimise costs and market distortions; promote innovation through market incentives and goal-based approaches; be clear, simple, and practical for users; be consistent with other regulations and policies; and be compatible, as far as possible with competition, trade, and investment-facilitating principles at domestic and international levels" (OECD, 2005, p.3)

From then to now, the OECD has invested in promoting a Better Regulation agenda that includes the use of public consultation, *ex ante* assessment, retroactive review and the use of several evaluation instruments. It has pushed for an integral, instead of partial, adoption of the strategy with a whole-of-government approach, which has all of the powers of the state and public administrations involved in and supporting the process (OECD, 2012; OECD 2015). Likewise, it has recommended countries to pay attention to the oversight of the assessments that are being undertaken (OECD, 2015; OECD, 2018).

It is indisputable that there has been diffusion of policy evaluation and the Better Regulation agenda throughout Europe and OECD countries, as there is enough evidence indicating the adoption of some form of policy evaluation (OECD, 2015; OECD 2018). As posed by Radaelli (2005), the international promotion gives the idea that it is a fairly common tool of regulatory governance, with standardized properties among adopting

countries. He explains that however, there is no standardized approach to Better Regulation, even when the same discourse and agenda are being promoted.

Nevertheless, the same conclusion can be made here: the idea of Better Regulation or even the adoption of impact assessment is asymmetrical, with countries ranging from the implementation and use of a full-fledge Regulatory Impact Assessment (the case of the US); to countries using policy evaluation to reduce regulatory burdens for businesses; to countries adopting a policy evaluation toolkit just as a check-list that legitimizes their policy-making process. This does not mean, however, that is not possible to learn from these experiences. The following subsection identifies the different elements that all of these jurisdictions have repeatedly taken into account when building their policy assessment systems, in order to analyze the different incentives and outcomes that their individual and combined use provide.

1.2 Composing parts of the Policy Evaluation structure

These multiple benchmarks were set up for divergent approaches to the pursuit of Better Regulation within and across jurisdictions to develop in practice. From the general descriptions of international practices previously discussed, it is possible to identify the elements that are to be considered for a policy evaluation structure. Specifically, to a higher or lesser degree the following are considered: (i) scope of the assessment; (ii) the moment(s) for the assessment; (iii) the tools used for the assessment; and (iv) the governance of the assessment. It is rational to consider that each of these elements, and how they are executed, have a comparative relevance to the overall effect that policy evaluation has in a country. Even more, they might have an effect on whether and how the regulatory goals that a country has set for the adoption of the policy evaluation structure are achieved. In that sense, it is relevant to understand first what each of these elements consist of, and second, which are the different options that a country or administration can choose from, as well as the incentives, costs, and pros and cons that each one of those options entail.

The scope of the assessment refers to which legislations and regulations are to be assessed to consider their potential or existing effect on society. The policy evaluation agenda of a country can include all legislations and regulations enacted by the state and its regulatory agencies, or just a selected group of regulations. This choice might consider the expected economic impact of the regulations, the sector that they operate in, the interests that they affect, or any other criteria the country or government deems relevant.

Once the scope is decided, the next step is to determine when these chosen regulations are going to be assessed. When policy assessment was first introduced in the US, as previously explained, regulations were assessed before their enactment. Other countries later chose to assess regulations that were already enacted to determine their current effect and to decide whether they should continue to be part of the legal body of the country (Jacobs & Astrakhan, 2006). Additionally, regulations that were initially assessed before their enactment were later re-assessed during their lives to determine whether the effects that were predicted were actually materializing (Coglianese, 2013). There is also the option of following the behavior of the regulation throughout its life with the use of the Policy Evaluation Cycle, which is the combined assessment of the potential and real-life effects of regulations at different point of their lives, through a systematic organization of evaluation stages. The choice of when to assess regulations on the one hand is expected to depend on the availability of data for what is being assessed and resources for the assessments; and on the other hand, is also expected to respond to the initial regulatory goals. Together with how the regulations are assessed, the point at which they are assessed has gathered the most attention of the literature (Larouche, 2009; Hoppe, 2008; Aldy, 2014). There are arguments in favor and against, but mostly there are legal examinations as to which goals the timing of the assessment serves. There is more or less a consensus on the benefits of assessing regulations at various stages of their lives, considering that it increases the chances of achieving regulatory goals such as efficiency and effectiveness (Adler & Posner, 1999; Deighton-Smith, Erbacci & Kauffmann, 2016; Radaelli, 2016; Renda, 2011), reduction of regulatory burdens (Boeheim et al., 2006; Torriti, 2007), regulatory accountability (Fernández-i-Marín, Jordana & Bianculli, 2015; Koop & Hanretty, 2018; Renda, 2011), among others.

The international practices discussed before also show that even in a relatively straight-forward task as assessing regulations, there are not only options regarding which regulations are assessed, and when they are assessed, but also how they are assessed. Regulations are assessed with the use of tools, instruments or methodologies that consider a specific type of data and make a quantitative or qualitative evaluation of a predetermined criterion. The myriad of tools or instruments for assessing a regulation is constantly growing. It grows because there is an intent to develop tools that can assess and predict outcomes considering different criteria and resources, with the most precision possible (De Smedt, 2010). Then the decision of which tools to use, when to use them, and what to use them for is to be a reflection of the scope chosen for the assessment, and what the expected result is. For instance, if the goal is reduction of administrative burdens, the assessment instrument to be used is one that is able to quantify these burdens and consider the costs that they have for society. Like this, then each tool responds to a different need.

These elements are all immersed with more or less depth in the regulatory-making process of a country. The choice within each element will add complexity to the policy assessment, and the more complex a structure is, the more there is a need for governance. Which governmental bodies participate in the assessment? Is there coordination across them? Do they operate with or without oversight? If they do, who oversees them and what powers does the oversight body have? Again, the choice of one or the other will create incentives, costs and present trade-offs. Overall, each of these elements plays a role in the structure for policy evaluation in a legal system. Furthermore, each of the options within each element has a different function in different scenarios. In order to understand the reach of each element, as well as of its options, incentives, costs and trade-offs, the next sections will analyze each one in depth.

2. SCOPE OF POLICY EVALUATION: INTERNATIONAL DIFFERENCES

The policy evaluation agenda of a country can include all legislation and regulations enacted by the state and its regulators, or just a selected group of regulations. There is a double dimension to this choice, which is referred to as the vertical dimension and the horizontal dimension. The vertical dimension refers to whether the country assesses primary legislation, secondary regulation or both. The horizontal dimension refers to which group of policies are evaluated within the same level, whether all primary legislations or all secondary regulations are subject to assessment; if only specific sectorial regulation; regulations that might have an economic impact of a previously determined percentage of the national budget; or any other criteria determined by the country. The author argues that the decision on the scope of the policy evaluation program is closely related to the objective for which the country is adopting and implementing it.

The decision of a country on the scope of the policy evaluation structure should thus in principle depend on the goal previously chosen, as well as on the usage that it requires out of the policy evaluation structure. For instance, a country that wants to use policy evaluation to reduce legislative or regulatory burdens for business, will include in the scope those regulations that create burdens for businesses. This also suggests that the country uses its policy evaluation structure as a means to communicate with businesses, and project a business-friendly climate through its legislative choices. However, this decision might be influenced by political factors and legal factors, such as how the agenda is introduced in a country. For instance, if policy evaluation is introduced by a presidential decree, it follows that it cannot include legislations that are enacted by the legislative body, as it falls outside of its sphere of action.

2.1 Primary Legislation vs. Secondary Legislation

When determining the scope of the policy assessment plan of a country, one of the decisions is which regulations are going to be included, and more specifically, which organs of the state are going to have their regulations assessed. This was referred to previously as a vertical dimension in the choice of the scope, since it refers to regulations based on the hierarchy of the organ that has the power to enact them within the legal system. A country or government then chooses whether to include legislation enacted by the legislative body or regulations that result from a delegation made by the legislative body or the constitution to the executive branch. In that sense, the inclusion of legislation or regulations entails, among other things, that the mandate for assessment of a set of regulations should come from a legal norm of equal or superior hierarchy to the one being assessed. This inclusion requires the support of the level of government in the chosen scope, support that in principle will be granted if the goals pursued with the adoption of the agenda are aligned with the preferences of the level of government. Also, the choice of the hierarchical level of regulations that is included is sometimes related to the recipients of the regulations.

Primary Legislation

Primary legislation is the legislative production of the congress or parliament. The mandate to produce this type of legislation originates directly from the constituent and is not delegated by another power of the state (Burrows, 2011; Duncan, 2017). The rationale of including primary legislation in the policy evaluation structure is not straight-forward. This inclusion can be explained from both public interest and private interest theories, previously discussed in Chapter 1 of this thesis, for different motives. First, public interest theory holds that governments intervene through regulations to fix market failures. Following this theory, legislators would subject primary legislation production to policy evaluation to assess legislative proposals that would address these failures. In this sense, the legislators would provide the legislative evaluation agenda as a policy to improve the quality of decision-making and of laws and/or to produce efficient and effective legislation. Notwithstanding, as explained by Larouche, this intervention may be also driven by private interests (2009, p.58). Legislators want to show that the legislation they are producing complies with and caters for the preferences of particular interest groups.

At the EU level, the European Commission established in 2003 an *ex ante* appraisal system under which all "major initiatives" adopted are subject to an evaluation of the potential economic, social, and environmental impact. The scope of application of this system covers legislative and non-legislative proposals, and the purpose of the assessment is generally for informing the legislator of the potential effects of the existing legislative options.

The inclusion of this level of legislation requires the commitment of the congress or parliament, because it is only possible to implement it through the enactment of a law. Moreover, its effective implementation also requires the commitment of the legislative power, which is highly determined by its preferences, and not necessarily by the goals pursued with its adoption. For instance, it would be the case if the goal is improving the quality of legislation (efficiency/effectiveness) or rendering themselves accountable towards their constituents by justifying their legislation.

However, the formal adoption without an appropriate implementation is a sign of a lack of commitment that means that the country complies with the requirement of having policy evaluation for its legislation only on paper (Radaelli, 2005, p.929). It has a perfunctory use (Dunlop et al., 2012, p. 28). This scenario is less likely to materialize in this scope because it requires the agreement of a majority of the legislative power. Notwithstanding, in case it does, it could be explained by the public choice theory. Congress members may use it to give the impression of satisfying the demands of pressure groups, by adopting a policy that is used in other jurisdictions for legislative improvement.

Considering the foregoing, the inclusion of primary legislation in the policy evaluation scope suggests in principle that the country is interested in the specific result of the legislation or at least to convey such message. Therefore, it is expected that a country that has regulatory goals such as efficiency or quality of legislation includes primary legislation into the scope of the assessment.

Secondary Legislation

Secondary legislations, subordinate legislation or simply "regulations" are legal instruments that result from the exercise of regulatory powers of the executive or other agencies as a consequence of the delegation of this power from the legislative or the constitution.

The inclusion of regulations into the policy assessment scope is common across jurisdictions; it is actually more common than the inclusion of primary legislation (See OECD, 2015 and OECD, 2018). The introduction can be done either by law or by decree, because of the hierarchy of the rules to be assessed. In the case of a presidential constitutional system, for instance, it is common for the Better Regulation agenda to be introduced via a presidential decree. For instance, in the case of the United States, since 1981 its policy evaluation scope is limited to regulations enacted by regulatory agencies (Fraas & Lutter, 2011; OMB, 2003); which means that there is a limitation in the vertical dimension, and that primary legislation is excluded from evaluation. Since the executive

does not have the authority to extent its mandate to other powers of the estate, the scope of the agenda is limited to secondary legislation that is enacted by regulatory agencies that depend on the head of the executive. This leaves out, initially, regulations made by regulatory agencies that do not depend on the executive.5 This choice seems to fit a presidentially-based decision that did not have the support of the Congress. The design of this system responds, on the one hand, to a limitation on the mandate of who introduced the structure itself, in this case the executive; and on the other hand, to the need of the executive to oversee the regulations enacted by the regulatory agencies to which it delegated its regulatory powers. Therefore, it is likely to be related to the accountability rationale previously discussed in Chapter 1.

Compared to the incentives that the administrative agencies, judges or congressional committees have, it has been argued that the president in a presidential constitutional system has stronger incentives to take into account general well-being or preferences of its electorate, because of the nationwide electoral base that he has (Adler & Posner, 2009). The motivation to have direct oversight of the regulatory-making work of the agencies that depend from the executive power, responds to a classic principal-agent solution, on which the principal (in this case the president) exercises its control over the agent (the regulatory agency) to guarantee that the agent's actions respond to the principal's interests and not to the agencies' own interests. Taking from the private interest theory, it can be argued that the president creates this structure to guarantee that the regulations enacted by his agencies respond to the preferences of his electorate (or at least are perceived as such), in an attempt to maintain his voters' favor. Then it is arguable that when the intended use is for the head of the executive to excise control over the central regulatory agencies, the policy evaluation scope would only include those agencies that have powers that result from delegation, and those that are under the control of the president for any other reason.

Another scenario is when legislators delegate directly the regulatory power to regulatory agencies and these agencies do not report to or depend on the executive power. The establishment of policy assessment in this scenario could respond to a need to increase the transparency of the work of the regulatory agencies, or part of the country's plan to achieve other economic or non-economic goals. Under this scenario the policy evaluation scope would include secondary regulations, differentiating only on the horizontal dimension of the regulations, and depending on the sensitivity or interest of the regulated areas.

[5] Chapter 4 of this thesis discusses the differences between regulatory agencies and independent regulatory agencies that do not depend from the executive.

2.2 General Regulations vs. Special Regulations

Once the vertical dimension of the scope is determined, then within the same hierarchical level of regulations, there is the choice to include all of the regulations enacted at that level, or only specific ones. Because of the costs that assessing a single regulation might entail, it is not always efficient for all regulations to be assessed, regardless of their content, scope, reach or audience.

In that sense, within a hierarchical scope (primary or secondary legislation), countries may decide to include only a certain type of regulations on the assessment scope and exclude others, based on specific characteristics of the regulations. It could be argued that these characteristics are related to the potential economic impact of the regulations, the area of the economy or the regulated sector that it might affect, the public towards which the regulations are addressed, among others.

As an example, in the United States only "significant regulatory actions" are subjected to impact assessment. This term was included and explained in the Executive Order issued by president Bill Clinton (E.O., 1993) which is still in force, and refers to regulatory actions that are likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the president's priorities, or the principles set forth in the executive order. This is an example of a limitation on the scope regarding the content of regulations, since it limits the type of secondary regulations that are required to undergo an assessment before their enactment.

Other inclusions or limitations to the scope may result from the goals of the country. In that sense, a country that is seeking to reduce regulatory burdens for business, would include in the policy evaluation scope regulations that affect business or that create administrative procedures. In a nutshell, the choices in this part of the scope reflect the preferences and goals of the country or agency; and conversely, the exclusion of a certain type of regulations can also signal a preference or motivation from the government.

2.3 Individual assessment or taking stock of regulations

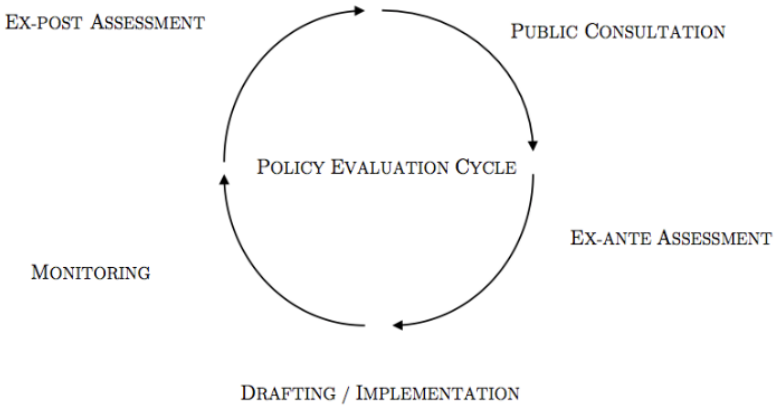
Lastly, when considering the scope of the policy assessment agenda, the government has the choice to assess regulations individually, as they are enacted; or to take stock of existing regulations. The first scenario needs no further explanation, as is the one discussed and analyzed normally in the literature and here in this thesis. The second scenario is when the scope of the regulatory evaluation is not limited to one agency, it is mandatory for a wide range of regulatory agencies and sometimes even the legislative body. Taking stock of regulation happens when a country aims at having an inventory of all the regulations that are currently in force. This has different purposes: to determine which ones are still necessary and which have become obsolete; to assess the general costs that a group of chosen regulations amounts to, which is often done to assess and later reduce regulatory burdens (Jacobs & Astrakhan, 2006, p.14). This option of assessing the stock of regulation, because of its motivation and end result, is not a continuous or systematic assessment, but normally a one-time occurrence. It can serve also as the starting step of the regulatory evaluation policy, and it is often the case with countries that are adopting this agenda for the first time as a structure.

3. POLICY EVALUATION CYCLE: DISCUSSION OF THE ROLE OF THE STAGES

The Policy Evaluation Cycle is a systematic and coordinated arrangement for the assessment of regulations throughout their life. The arragement and organization of the assessments that compose the PEC is intended to have a constant view of the effects of regulations at different stages of its life. To do so, the evaluation is carried out using a variety of assessment tools throughout the life of regulations, which is before it is created, during its existence, and its eventual modification or end. The stages that form the PEC are (i) public consultation; (ii) *ex ante* assessment; (iii) drafting and implementation; (iv) monitoring; and (v) *ex post* evaluation (See Figure 2). Each stage of the PEC is intended to assess and follow the regulatory work at different moments and in some cases their functions overlap. This is because the stages for assessment develop individually and their arrangement into a "cycle" is a subsequent event. The cycle is meant to convey that the stages follow a logical sequential path, but also that the assessment can begin at any point during the life of the regulation and continue from there. For example, it is possible that the regulation is first drafted and implemented and then monitored without an *ex ante* assessment. Likewise, it is possible that a country chooses to assess their regulations only

at some and not at all of the stages of the PEC, for instance, limited to public consultation and *ex ante* assessment.

Figure 2. Policy Evaluation Cycle



Source: Author's own depiction inspired by Renda (2015)

Each stage provides its own assessment of a regulation with different outcomes, as the regulation is considered at a different moment of its life. Also, they differ in function, requirement, costs, and in the incentives that they create towards the individuals that intervene in the policy-making process. The choice for a regulation to be subject to the whole cycle or just a few stages is not usually straight-forward (Allio, 2013). Some countries begin by introducing *ex ante* assessment as a first step of their policy evaluation plan, and later introduce ex post assessment (the US). Other countries already have public consultation in place as a part of their regulatory-making process, but only when they introduce policy assessment it becomes a part of the assessment and not only a stage in which information is gathered (Germany). Another option is for countries to begin with the review of their stock of regulations, which supposes that it begins with an ex post assessment (Jacobs & Astrakhan, 2006).

The rest of this Section will explain each stage of the PEC, according to the literature and best international practices, examine the criteria that must be met in each of these stages, consider the costs, incentives and risks involved with the use of each of them as a part of the PEC.

3.1 Public Consultation

Public consultation consists of a dialogue between the public and regulators regarding a regulatory problem, a regulatory proposal or another document which is part of the regulatory-making process, in which the public provides its opinion, questions, and feedback on the document in question.

Without entering into the specificities of a public consultation process in a particular sector or jurisdiction, public consultation consists of two parts. In the first part, when a regulatory-making authority has a regulatory problem, has drafted a new regulation, or has prepared a report of an *ex ante* or *ex post* assessment, the regulator makes this document available to the public, with an invitation to provide comments, questions or feedback on the document during a specified period. It can be undertaken in the form of face-to-face meetings or by making it available online for people to provide their feedback on the issue (Shipley & Utz, 2011). Certain types of regulations require specific members of the public to be informed of the project, which is the case of sectorial regulation. In that scenario, the regulator must send these parties specific notification of the proposed regulation. For example, if it is a new regulation on telecommunications, then telecommunication companies, consumer groups, and other actors of the sectors must be notified and given a period of time to provide their comments. The second part of the interaction consists of the regulator providing a response to the comments received. In principle, the regulator is required to respond to the comments, either by modifying the proposed regulation so it reflects the feedback or by dismissing them with the rationale for doing so.

From the described process, there are two features that are relevant for this research: (i) The participation of the public; (ii) The response of the regulator to the comments received.

Regarding the first one, public participation makes the rule-making process democratic and deliberative (Mendelson, 2010, p. 1345; Sunstein, 2017, p. 135), since the public has the opportunity to know the content of upcoming rules and provide comments, which adds legitimacy to the regulatory process. Clearly, this is true only if the following two conditions hold. First, the information has to be truthful and conveyed in an understandable manner. Second, the general public must be sufficiently sophisticated to understand, and eventually react to, the information provided. This part of the process is especially relevant since one of the criticisms to delegated policymaking is that the people did not elect the individuals making regulations; thus, their ability to make regulations lacks legitimacy. As Mendelson (2010) explains it, the legitimacy provided by public consultation comes from the visibility of the agency's action and the involvement of the public as a check before the enactment of the rule. Therefore, involving the public in the decision-making process partially

addresses this criticism provided that the two conditions just mentioned hold. Particularly, Kochan (2017) analyzed a decision by the U.S. Court of Appeals for the D.C. Circuit which explained that "*there must be an exchange of views, information, and criticism between interested persona and the agency*" (U.S. Court of Appeals for the D.C. Circuit, 1977) in order to legitimize agency rulemaking.

Additionally, this feature of public participation serves to discipline the rule maker. In this sense, knowing beforehand that the public will scrutinize the regulation requires agencies to analyze in depth and reconsider their proposed rules before enacting them (Weinberg, 2012), which serves as a pre-emptive form of discipline. In other words, if the regulatory-making authority knows that the alarm will be rang if there is a problem with the regulation, it will make an effort to avoid the sound. Therefore, the use of public consultation serves as deterrence for agencies from proceeding with regulations that would not withstand scrutiny (Kochan, 2017), and thus fits into the category of policy evaluation stages that serve the government goal of accountability.

Another important aspect of the feature of public participation in the use of public consultation as is the individuals providing comments to the proposed regulation. As Hayek (1945) explained, knowledge is spread in society, as it is not centralized. Therefore, the rule-making authorities benefit from the dialogue with experts on particular areas, be it consumers, people that intervene in the chain of production, actors in the market, and in general expertise that is out there. This form of acquisition of information is one of the positive traits of public consultation.

Regarding the second feature of public consultation, the response from the regulator to the comments received, and its fulfilment, also allow public consultation to work as an accountability method for the work of the agency. Even though agencies are not expected to respond to all comments, they are expected to respond to all "significant" or "relevant" comments received, either by modifying the regulation or by explaining why the comment is rejected. The D.C. Circuit's decision previously mentioned, explains the term "significant" as follows:

> "*In determining what points are significant, the "arbitrary and capricious" standard of review must be kept in mind. Thus only comments which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule cast doubt on the reasonableness of a position taken by the agency. Moreover, comments which themselves are purely speculative and do not disclose the factual or policy basis on which they rest require no response. There must be some basis for thinking a position taken in opposition to the agency is true*."

In this sense, rule-making authorities could be held accountable if they ignore substantial and relevant comments provided by the public on the proposed regulation during the public consultation process. However, this function is only effective if there are mechanisms to check the performance of the agencies regarding the comments presented by the public. The determination of to whom the oversight of the performance of the regulator will be extended, will follow later in this Chapter.

The moment when the public consultation is undertaken plays a role in the resulting regulation. The consultation can be performed when the problem to be solved is identified, that is, before the regulation is drafted (Woodford & Preston, 2001). The advantage of having the consultation at this stage is that the knowledge, inputs, feedbacks and ideas on how to solve the problem come before a regulatory option is chosen. Insights from consumers, the industry and the population in general have the potential of enriching the assessment at a very early stage.

The public consultation can also be undertaken after the regulatory proposal is drafted. In this scenario, the public and stakeholders are providing their opinion and feedback on the chosen regulatory option. At this point the solution to the problem has already been framed (Alemanno, 2015, p.130); therefore, the feedback that the public and stakeholders provide might be limited to the option already provided.

Of course, there are costs and risks to having public consultation. Even though in theory comments should come from any citizen that cares about the functioning of the government, in practice, comments normally come from well-organized and often powerful interest groups that can afford experts to analyze regulations that might affect them. This might lead to capture of the regulation by those interest groups. As Sunstein puts it "*public officials learn from who speaks, and those who speak are likely to have both money and self-interest at stake*" (2017, p. 10). This risk of capture is not to be taken lightly. Another risk is that of the biases that the population may have, that may lead them to request a regulation that is not necessary or not give the support to an efficient regulation (Sunstein, 2018a, p.30). These choices can be also based on political beliefs and personal preferences. Another problem arises from the misuse of the public consultation stage to advance a particular agenda, by systematically and massively opposing a particular regulatory proposal and giving the appearance that the public at large does not approve of the regulation (Weinberg, 2012, 161). This is more likely to happen when public consultation is held online, as it commonly is (Fishkin, 2009). Therefore, these costs and risks are to be considered when including public consultation as a part of the policy evaluation agenda of a country.

Considering what has been previously discussed, this tool is expected to be used when the goal of adopting a form of policy evaluation is either regulatory efficiency, because of the amount of information that can be collected and used to properly asses a regulation, or agency or government accountability, because of the transparency and discipline features of the stage.

3.2 *Ex Ante* Assessment

An *ex ante* assessment is "[f]uture oriented research into the expected effects and side-effects of potential new legislation following a structured and formalized procedure, leading to a written report. Such research includes a study of the possible effects and side-effects of alternatives, including the alternative of not regulating at all." (Verschuuren & Van Gestel, 2009, p.5). In this sense, regulators are expected to evaluate the relevant regulatory options that exist to solve a specific problem, including the potential effects of not intervening. Once the evaluation is performed, a report indicating the findings of the assessment is prepared. This stage could be considered as the core of the policy evaluation, because it is when the first "scientific evaluation" of a proposed regulation is performed. This assessment informs citizens of the inner-workings of the decision-making process, providing transparency and some argue, creating democratic legitimacy (Popelier & Verlinden, 2009, p.22).

There are many instruments for the assessment of potential regulations, such as Cost Benefit Analysis, Regulatory Impact Assessment, Standard Cost Model, Cost-Effectiveness Analysis, Multi-criteria Analysis, among others that will be analyzed in this Chapter. Each one of these tools is designed to evaluate the potential effects of regulations in the light of different criteria, but to produce the same end result: evidence-based information for the decision-maker to weigh when deciding the appropriate governmental response to a problem. This will be, or should be, the basis for the chosen regulatory response.

Regulators handle a set of assumptions about how the recipients of the rules are going to react to changes in regulations, very often without very much empirical evidence to support these assumptions (Bohne, 2009). To undertake any form of *ex ante* assessment, it is necessary that there is enough data available to be assessed, otherwise the assessment might not reveal useful or trustworthy information for the decision-making process. In that sense, when there is no data available, but it is possible to obtain it, the evaluator needs to weigh the costs of collecting this data versus the costs of enacting the regulation and assessing it ex post; that is, after the regulation has produced its effects (Harrington, 2000). This could also be the scenario when there is uncertainty on the possible effects of the regulation, because it is not possible to properly assess the existing information or quantify

the potential effects of the regulation (Aldy, 2014). All of these are trade-offs to consider when determining whether to include or not this stage of the PEC in the assessment of a particular set of regulations.

3.3 Drafting and Implementation

Within the framework of the PEC, after the public consultation and *ex ante* assessment of potential regulations is performed, the form of regulatory intervention is decided. The next step is then the drafting and implementation of the chosen regulatory intervention. The regulation is expected to be drafted in a way that reflects the regulatory choice of the regulator (Hill & Hope, 2003), and should account for the recommendations of the *ex ante* assessment. For example, if one assumes that the number of car accidents in a city has been determined to be too high, then the goal of a new regulation may be specifically to reduce the number of car accidents. It can be assumed also that the *ex ante* assessment determined that the most efficient way to address this issue would be by improving the collection of fines. The drafted regulation should specify how the system of collection of fines will be improved, which agencies will be involved, what the new procedure will be, and any other procedural issue needed for improving the collection of fines. One issue that might arise here is that the regulation is drafted usually by a different set of officials than those that performed the assessment itself. This distance between the evaluator and the drafter could end up being reflected in the regulation (Hill & Hope, 2003).

The implementation literature goes back to 1975, with Erwin Hargrove's "Missing Link" (1975), that showed there was a very limited amount of literature in social sciences addressing and analyzing the implementation of regulations. The link between creating a policy and the results of this policy, that political and bureaucratic part of implementing the policy in practice, was missing. After that, a vast literature on policy implementation highlighted the difficulties of drafting and implementing the text of the regulation that was chosen or advised (Hargrove, 1975; Hill & Hope, 2003; Wildavsky, 1979). The main concern was thus the extent to which the policy goals initially announced were actually achieved (i.e., was the chosen policy actually 'implemented'?) (Howlett, 2018). This question opened a whole area of research, which is the assessment of regulations. Therefore, the implementation of the regulation refers not only to the enactment of the regulation, but also to the setting of performance indicators, a system to monitor and undertake ex post evaluations.

It is often likely that a regulation goes directly to the drafting and implementation stages, without *ex ante* assessment and without public consultation. In that case, this would be the first stage of the policy cycle. It is probable that in that scenario, the regulation does not

contain indicators for its monitoring or for its ex post assessment, and thus both of the later stages are set to evaluate an active regulation.

3.4 Monitoring

In principle, regulations are enacted with a purpose or a goal. Therefore, it is increasingly more frequent for recent regulations to contain in their text the specific goals that they are seeking, including the time period and indicators for reaching these goals. This is the input necessary to monitor the regulation at the times it requires and provides information on whether the policy goals were fulfilled, and the eventual accountability of the actors involved. However, it is also important to account for the costs of monitoring a regulation and consider whether its benefits are justified. Monitoring requires a structure for the collection of data through several points in the life of the regulation. This, in turn, implies the use of resources, human or monetary, to collect this data and then analyze it.

Additionally, the regulatory body that enacts the regulation is usually the same body in charge of monitoring whether the regulation reaches its milestones. On the benefits side, it is the body that is better informed and, in principle, best equipped to assess the regulation at this point. On the costs side, this body might be biased towards not revealing data that is not aligned with the expected results from the regulation.

Finally, it is relevant not to confuse this monitoring stage of the PEC with the ex post assessment that follows it. The main difference is that monitoring is about systematically tracking the progress and effects of the regulation, whilst the *ex post* assessment (or retrospective review), utilizes scientific evaluation to understand the effects of the regulation and propose potential changes.

3.5 *Ex Post* Evaluation

An ex post evaluation is performed after the regulation is enacted and implemented. It is designed to determine whether the regulation is achieving or has achieved the goals for which it was created, or whether it has rendered itself obsolete. According to what has been proposed for developed countries for *ex post* evaluation, the regulation at hand should contain a specific metric of what should be expected from it; sources of data that can be analyzed to examine the effects of the regulation, either existent or to be collected during the implementation of the regulation (Allio, 2015, p.193). Likewise, it should indicate when the regulation should be re-evaluated, including the time frame within which it should have achieved, or should be on course to achieve, its purpose; as well as in which cases an evaluation is in need of a re-evaluation (cases of uncertainty, extensive initial costs)

(Coglianese, 2013). This is all covered in the previous stages of drafting, implementation, and monitoring.

An exclusive *ex ante* evaluation is supposed to foresee every aspect of the application and enforcement of the regulation, even when there is a considerable degree of uncertainty. However, if an *ex post* evaluation of the regulation is included, then the burden and costs of the assessment can be shifted or at least distributed. The inclusion of an *ex post* stage of evaluation takes pressure off the *ex ante* evaluation. The fundamental value of assessing regulations after they have come into force stems from the fact that their full impact, including direct and indirect consequences can only be appreciated after their implementation (OECD, 2015).

Because assessing the costs is costly in itself, or sometimes it is simply not possible, some jurisdictions have introduced what is referred to as experimental or sunset regulations, which are regulations that are enacted with a time horizon in them to revise whether they achieved the intended goals (Fagan, 2011). The regulation itself contains the indicators that should be evaluated after the specified time has passed.

Another scenario, which is the most common in new adopters of the PEC or policy evaluation agendas, is that their regulations have all been enacted without a previous scientific or economic assessment, and only a legal assessment. In those cases, the cycle begins with the ex post assessment stage.

Ex post assessment of regulations can also be used as an administrative mechanism to manage the risk of the agent deviating from the principal's preferences (Blom-hansen, 2007; Curtin, 2007; Zwaan, van Voorst, & Mastenbroek, 2016). This is because it is possible for the principal to verify the end result of the work of the agent, as it is revealed by the ex post assessment.

Finally, even though the purpose of the ex post evaluation is to determine whether the regulation has worked for the intended purpose (Coglianese, 2012; Stufflebeam & Shinkfield, 2007), it has been proven that in practice ex post evaluation is used to find out how the regulation can be improved and to make future policy plans, instead of evaluating the regulation itself (Zwaan et al., 2016).

4. USE AND SCOPE OF POLICY EVALUATION INSTRUMENTS

After analyzing the scope and time of the assessments, the next step is to understand how the assessments themselves are performed. An assessment is the systematic gathering of

information for purposes of decision making, for which it is possible to use quantitative methods, qualitative methods and value judgments (Richards & Schmidt, 2002). Then impact assessment is the gathering of information of a proposed or existent policy and the consideration of its merits or significance, using criteria governed by a set of standards previously defined. The process of assessment itself is referred to differently across the literature and jurisdictions.[6] One of the most popular terms is Regulatory Impact Assessment (RIA), which has its origins in the United States that performs its assessment only on secondary legislation (or regulations, thus the word regulation in the acronym) (Radaelli & De Francesco, 2010). However, since the assessment can be performed not only on regulations, but also on primary legislation, the terms policy evaluation, policy assessment or Impact Assessment (IA) have an equivalent meaning.

Several instruments or tools have been devised to perform such evaluations. These policy appraisal tools can be analyzed through many lenses, such as their structure, their design, their use and their complexity. They can be analyzed considering how their use is a reflection of the scope of the policy evaluation structure, which is what will be followed in this Section. As the literature has pointed out, the usage of these instruments is at times steered by the theories they contain (Dunlop et al., 2012; Hertin et al., 2009; Salamon & Elliot, 2002) and what they are responding to. Evaluation instruments comprise normative ideas about public policy and their ultimate goal. This suggests a possible match between evaluation instruments, a country's regulatory goals and the scope of the assessment.

The choice of which evaluation tool to use to assess the regulatory problem will depend on the available data, the expected outcome of the regulation, the problem that needs to be solved, the scope of the assessment, etc. Similarly, which criteria are relevant depends on the society, country and goals involved. For instance, when it comes to Latin American countries, where income gaps tend to be larger than in developed countries, assessing the distributional effects of regulations plays a more important role. Thus, goals such as poverty reduction call for different considerations, for example whether the regulation is pro-poor, or whether the costs borne by those vulnerable populations are justified by the benefits that they might receive.

In this Section, some of the most used policy evaluation instruments are discussed. In addition to understanding the differences among them, the discussion is aimed at two things: First, the main arguments in favor of, and against, the use of the analyzed tool; and second, for which uses the evaluation instrument is advised. Ultimately, this will add to the

[6] See Section 2.1 of Chapter 1 of this Thesis.

classification that is aimed at with this Chapter, that is the arrangement of the policy evaluation structure according to the regulatory goals that the adopting country pursues. Even though currently there is an extensive and growing number of assessment tools, for this study it has been narrowed down. The choice of the tools analyzed here is based firstly on the popularity of each tool, whether it is more frequently adopted by countries; and secondly on the potential usage of each tool, in order to have a sample and an understanding of the tools to be used in the *ex ante* and the *ex post* stages of the policy evaluation cycle, and tools that perform qualitative and quantitative analysis. In that sense, the tools discussed are Regulatory Impact Assessment, Cost-Benefit Analysis, Cost-Effectiveness Analysis, Multi-criteria Analysis and the Standard Cost Model, all of which are reviewed in turn in the following sub-sections.

4.1 Regulatory Impact Assessment

Regulatory Impact Assessment is a policy tool used for identifying the different ways to address policy problems and for assessing comprehensively the potential impacts that the identified policy solutions might have on society and businesses. It is a tool for the *ex ante* assessment of regulations. Through the use of RIA, government and regulators are also able to assess the potential impact of proposed regulators in specific areas of the economy, such as in competition, environment, labor; or even the impact that a regulation might have on specific groups, such as small businesses.

In order to conduct RIA, regulators are expected to following steps for the assessment to be comprehensive:

1. Definition of the problem: The social or economic problem is identified and defined.
2. Identification of optional responses to the problem: Once the problem is identified, then the regulatory and non-regulatory options are identified.
3. Identification of the level of government intervention: Identify from what level of government should the regulatory information come (legislative, regulatory, guidelines).
4. Collection of data: The data regarding the possible costs, benefits or effects is collected.
5. Assessment of alternative options: All the regulatory and non-regulatory options are assessed in order to identify which one or ones are preferred to address the identified problem.
6. Assessment of preferred policy option: Once the preferred option has been identified, then it is assessed following the methodology of the chosen assessment tool.

7. Mechanisms and indicators: Identification of mechanisms and indicators that will be used to evaluate the regulation after it is enacted.
8. Report of assessment: There is a report that explains how the regulatory option was assessed and contains the result of the assessment. This serves as a recommendation to the regulatory-making authority.

The adoption of this tool is widespread as it has been adopted by a large number of developed countries. In that sense, 34 OECD members have adopted this tool, as well as the European Commission (OECD, 2018). In Latin American countries its adoption is starting.

Nevertheless, most countries that have adopted RIA for the development of their regulations, do not go through all of these steps when assessing a regulation, nor use it systematically for the development of their regulations. In some countries, RIA is used as a check-box exercise to validate a regulatory option that has been previously chosen (Reyes, Romano, & Sottilotta, 2015).

The use and the promotion of use of this tool for the development of regulations is subject of criticism. Some scholars have questioned the usefulness of regulatory impact assessment and suggested that its benefits are very limited (Carroll, 2010). According to the critics, there are some issues that could undermine the effectiveness of RIAs. To begin with, it has been suggested that RIA is used as a tool to promote pro-market ideas and de-regulation (Heinzerling, 1998). This would explain why the benefits of RIA are supposedly very limited. In fact, in this view, RIA would be used to implement pro-market ideals and not to pass the best regulations. Arguments of this kind were not advanced only by US scholars like Heinzerling. For instance, Kelsey (2014) notes that in the past New Zealand introduced regulatory impact assessments biased towards light-handed regulation.

RIA, however, has been criticized also on other grounds. For example, Carroll (2010, p.121) notes that often there is "rigidly positivist approach to assessment on which they are based, with little recognition of its inherent weaknesses". Other problems range from omitting relevant but unquantifiable costs and benefits (Ackerman and Heinzerling, 2002) to the fact that *ex ante* estimates are necessarily imperfect (Parker, 2010). Regardless of these criticisms, this is the assessment procedure that is more widely adopted (not necessarily implemented or used) in countries that have a regulatory policy in place.

When conducting a RIA, policymakers might consider especial interest and develop spefic tests to assess whether proposed regulations affect those interest in particular. That is the case of the SMEs test, an assessment of the impact that a regulation might have on small

and medium enterprises; competition assessment, an assessment on whether the proposed regulation will have an adverse effect on competition; environmental assessment; and other depending on what is relevant to the country.

Likewise, the type of RIA to be carried out, or even if a RIA is carried out at all, will depend on the expected impact of the regulations. Some countries, such as Mexico, have low, medium and high impact RIA, which regulates the depth of the RIA depending on the expected impact of the regulation. Other countries and the European Commission carry out proportionality tests to determine whether a regulation requires a RIA, or whether the costs of performing a RIA would be larger than the benefits that the regulation itself will create.

Finally, the assessment of the possible regulatory options (including the option of not regulating) when conducting RIA can be done using the any of the qualitative or quantitative assessment tools analyzed in this Chapter (CBA, CEA, MCA, SCM, etc.). Nevertheless, not all countries adopt a full-fledge RIA that would contain those tools for assessment, and just use separately these tools for the assessment of proposed regulations. Considering this, it is relevant to analyze separately in the following sub-sections the use of each of the assessment tools, as is done.

4.2 Cost-Benefit Analysis and its limits

Cost Benefit Analysis is an economic technique used for the quantification of the benefits and costs associated with a project, policy or regulation. It requires the monetization of all the costs and benefits that could result from the implementation of a regulatory alternative and it deems efficient a regulation on which benefits outweigh costs (Persky, 2001; Adler & Posner, 2006). It is the policy assessment tool most frequently used when assessing a regulatory proposal and it is the one that has the highest rate of acceptance amongst governmental agencies (Sunstein, 2018a). The development of modern welfare economics supplied the scientific principles supporting the use of economic concepts to rationalize government policies (Adler & Posner, 1999). This, combined with the growing governmental need of supplying more efficient regulations, helped the expansion of the use of this tool.

As indicated, the main criterium used by CBA is efficiency, a concept that has been widely discussed and adjusted when it comes to regulatory practice. It is known that it is virtually impossible that a new regulation does not affect anyone, whilst making another group of the population better off, as the Pareto optimality of allocative efficiency proposes

(Chipman & Moore, 1978). The use of Kaldor-Hicks as an efficiency criterion, where a change in society is acceptable if the winners could, in theory, compensate those who lose, even though it is possible when producing a regulation, comes with moral shortcomings. Recalling the discussion on efficiency as a goal for regulation on Chapter 1, Posner relied on previous consent to justify an efficient decision (Posner, 1980, p. 488). The discussion here can be broadened by inviting Rawls' "veil of ignorance", which supported the idea that these evaluations should be made with the individuals not knowing which role they would get to play in society (Rawls, 1971). In this situation, those who are risk averse would agree on the allocation of resources that yields the lowest probability of harming those in the lowest bracket.

A fair critic of this criterion was Hicks, who did not take his criteria as an absolute for policy evaluation. He explained that when it came to policy evaluation, the job of an economist was to:

> "estimate, so far as he can, the gains and losses that are likely to accrue, to various classes, or sections of the population, from the proposed action(…) It is not his business, I would now maintain, to weigh up those gains and losses against each other. He can, nevertheless, most usefully, take advantage of his estimates to suggest improvements in the proposal with which he is confronted. Formally, that is to say, he can suggest a second plan, which he thinks will have a prospect of offering smaller losses, and larger, or not much smaller gains, so that in comparison with the first, it has some claim to be more attractive. He cannot prescribe this second plan; arts of persuasion will still be required; but he has some grounds for his persuading." (Hicks, 1983, p. 366)

CBA assumes that individuals act rationally, and also that incomes always have marginal return (Renda, 2018, p.52); therefore, it does not assign importance to the distributional effect of resource allocation, a feature which is of relevance in developing countries. In these countries, the income gap and inequality make the distributional effects of the regulations even more critical than in developed countries. In this sense, as explained in Chapter 1, the sole possibility of a transfer from winners to losers is not sufficient to rely on this efficiency criteria regularly used in CBA.

For instance, let us assume that a country wants to attract more high-level investment and to do so it is thinking of enacting a regulation by which people who own luxury cars are exempted from paying road fees (tolls) in Region A. This would also require the creation of other tolls in Region B to compensate for the costs necessary for the maintenance of the roads in Region A. The CBA shows that among the costs to consider there are the costs for

road maintenance that existed regardless of the exemption, but that would be compensated by the potential gains from new investments that the regulation would attract. The CBA showed that the benefits of the regulation outweigh the costs. In practice, the majority of the population in Region B is close to the poverty line, and this would be the population that would have to pay for additional tolls to compensate for the toll exemption in Region A, that was intended as a tactic to attract high-level investors. In theory, rich investors could compensate the poor inhabitants for their losses, but in practice, they do not. Then in practice, the costs are assumed by the part of the population that is worse off.

Academics have suggested some solutions to the problem of distributional effects of regulations. One of the solutions is to separate the distributional concerns when performing a CBA (Harberger, 1971; Mishan, 1976). However, instead of being a solution itself, it is a way around the problem while not addressing the problem itself. It ignores again the presence of distributional concerns when using CBA. Another proposal that has gained more supporters has been that of adding weights to offset the distributional concerns (Adler 2013; Adler, 2017).

One further criticism of CBA is more of a practical nature, but in an even more basic matter. It tends to be difficult to obtain the relevant information to monetize and assign a value to the elements, cost, and benefits involved. In order to determine how much an activity (or the lack thereof) is worth to a society, it is necessary to know how much it is worth to an individual, and then aggregate those values. Economists use information from the preferences revealed by individuals or their Willingness to Pay (WTP) to undertake an activity or to accept a change in that prerogative (Kenkel, 2003; Viscusi, 2007). From that information it is then possible to determine the consumer's surplus for a given activity and identify the societal benefits from it. Assume that a person is willing to pay $2 to ride the metro, and the price of the metro ticket is $1.5; when the person decides to use the metro, there will be a consumer surplus of $0.5. In order to determine that value of $2, the rational individual took into account the opportunity costs of this alternative versus the other ways of getting from point A to point B. Any change in the transport regulation that improves or does not affect that person's (or society's) well-being for more than $0.5 would be acceptable. That is an easy scenario. The difficult scenarios happen when it is not so easy to determine what is the WTP of the individual for a given change in an activity, or when the regulator cannot determine with certainty whether or not individuals have the ability to internalize all the costs of the activity while making their decision or revealing their preferences. Likewise, when the WTP is considered without income constraints, then it is only considering those who end up participating in the market and not the rest of the curve (Boadway, 2016). It is also especially controversial when the use of the tool looks to

rationalize inherent value trade-offs or to monetize "goods" that are not traded in the market, such as lives, environment, and health.

Considering the above, CBA has limitations that reflect on the use that is required from the instrument. If the goals of a country are efficiency-based, the country might adopt CBA for the assessment of its potential regulations. However, the reason why this tool may be chosen or not chosen may be related to the difficulties and high costs that it represented for its correct functioning. Therefore, countries that do not have sufficient resources (manpower, data, etc.) to correctly identify the benefits of potential regulations are not expected to adopt this tool. Likewise, countries where distributional effects of regulations are of relevance, which is the case of most Latin American countries, are expected to use this tool complemented with correcting weights or with careful awareness of its limitations.

4.3 Cost-Effectiveness Analysis

Cost-Effectiveness Analysis (CEA) seeks to determine how a given goal can be achieved at the least cost. In contrast to CBA, the concern in CEA is not with weighing the merits of the goal, since the goal is previously defined and fixed. The concern is identifying and comparing the costs of the alternatives to reach that goal, for example dollars per life year gained or per life saved. In the United States, this tool identifies "options that achieve the most effective use of the resources available without requiring monetization of all of relevant benefits or costs." (OMB, 2003). Since the focus here is that the regulatory proposal is "effective", an important element is how this effectiveness is measured. This depends on the objective of the intervention; however, the measurements of effectiveness should be defined in appropriate natural units and, in an ideal scenario, expressed in a single dimension (Robinson, 1993, p. 793).

Just as with CBA, one criticism for CEA is that even though it can rightly be used for decisions regarding resource allocation, its application to a heterogeneous population is very unlikely to result in a Pareto-optimal resource allocation (Garber & Phelps, 1997). CEA is thus normally used for the evaluation of regulations related to health, environment, accidents, risks, lives and in general areas that contain benefits difficult to quantify. There is still a problem with the assessment of the costs and more specifically indirect costs, even though that is not a problem exclusive toCEA. For a short definition, indirect costs are the secondary impact created along the other areas of the economy that are not targeted as a result of the implementation of the regulation. For example, the earnings resulting from an extended life consequence of a life-saving regulatory intervention should count as reduced indirect costs or indirect benefits. The counter-argument for that is that because the effective measure already accounted for the value of living longer, counting this again

would be double counting the reduced costs (Garber & Phelps, 1997, p.3). The difficulties of accounting for the indirect costs, and not having straight-forward standardized methods, are present as well for the CBA, as explained before, when accounting for costs, if it is not possible to determine whether the individual or society internalizes the indirect costs of their conduct before revealing their preferences.

Some argue that there are no differences between CBA and CEA. In particular they claim that they are mathematically equivalent, since when CEA supports a decision it makes the same assumptions that the CBA requires (Phelps & Mushlin, 1991). However, the choice between the use of CBA and CEA depends mainly on the type of regulation that is being assessed. CBA is the preferred option for most regulations, except for health and safety rules, where CEA is advised, unless it is possible to monetize the expected outcomes for the potential health and safety rules, then CBA is still preferred (Carey, 2014). In these decision-making criteria regulatory agencies should choose policy options that maximize net benefits "including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity" (Renda, 2011, p. 40).

According to the literature and empirical work analyzed, the use of CEA should be considered when a goal and its benefits are clearly stated and do not need to be assessed. However, it does require capacity for the collection and analysis of the data regarding the costs.

4.4 Multicriteria Analysis

Multi-criteria analysis (MCA) is an assessment instrument that allows a comparison of alternative policy options against a set of previously established criteria, and can be used to "identify a preferred option, to rank options, to short-list a limited number of options for subsequent detailed appraisal, or simply to distinguish acceptable from unacceptable possibilities" (Dodgson, Spackman, Pearman, & Phillips, 2009, p. 19). MCA techniques provide a defined relative weighing system for different criteria, assigning a numeric score on a strength of preference scale for each option of each criterion (Dodgson et al., 2009, p.22). To do so, the decision-maker or the government previously sets the objectives, and measurable criteria are needed to assess whether the objectives would be or were achieved. The process itself, of identifying objectives and criteria for measuring the objectives in some cases, is enough for the decision-making body to arrive to a decision.

Let us assume that a country is evaluating potential regulatory proposals and has the goal and priority of protecting women's rights. When comparing positive and negative effects of the proposals (not necessarily monetizing them), a MCA determines whether any of the

proposals negatively affect women's right. If that is the case, those proposals are discarded as viable options. It is possible to use the same example for a country that has poverty reduction as priority. During the assessment, the evaluation will seek to identify the affected individuals (winners and losers) and determine the impact that a change in regulation might have on the "protected" part of the population.

On the one hand, the proponents of MCA claim that it provides a systematic, transparent approach that increases objectivity and generates results that can be reproduced (Bonte et al., 1997; Janssen, 2001). They also claim that it is likely to capture and acknowledge distributional effects of regulation, and can be useful when there are specific policy objectives (Renda, 2015). On the other hand, the criticisms against this methodology are that it is prone to manipulation (Stirling, 2006), it is highly technocratic, and offers a false sense of accuracy (Janssen, 2001, p.101). Another feature than can be considered as a negative feature by welfarist economists is the fact that MCA does not show if the change in regulation increases welfare more than it reduces it (Dodgson, 2009).

4.5 Standard Cost Model

SCM is a regulatory evaluation instrument designed to assess the administrative burdens imposed by regulations to businesses and individuals. The focus of the tool is not the objective of each regulation, but only the administrative activities that must be undertaken to comply with regulations, and not whether the regulations themselves are reasonable or not (Torriti, 2007, p.84). In other words, SCM measures the burdens of regulations by considering the costs of the activities that an individual or a company must undertake to comply with an existing or proposed regulation. This includes the costs of obtaining the information and requirements of the administrative obligation, as well as the time invested by the average individual for complying with the administrative requirements, measured in man-hours. The identification of the activities to be undertaken to comply with the potential regulation and of the costs related to these activities are relatively easy to identify, which means that the complexity of this tool, compared to others previously discussed, is relatively low.

One of the main objectives of the Better Regulation policy is to make sure that the government does not issue regulations that are not strictly necessary (Force, 2005), and to pursue this objective, the Standard Cost Model is considered an essential evaluation instrument. Aside from the capacity of the tool of identifying excessive administrative burden, it captures the attention of the business community, and allows the government to make claims about the reduction of red tape.

This methodology was created in The Netherlands and began with a commitment to reduce administrative burdens (Torriti, 2012, p.90). It came as a potential substitute to other *ex ante* evaluation tools, as it did not call for an assessment of the costs and the benefits, which is one of the most difficult tasks that the evaluators face. As a quantitative methodology, it can be used to measure a single regulation, a selected area or to perform a baseline measurement of the stock of regulation of a country. It is normally used for administrative simplification, taking care that neither old nor new regulations impose unnecessary administrative burdens (Network, 2005).

However, the criticism over this tool have addressed the lack of specificity on the definition of its scope. In particular, Radaelli, who is a critic of the use of the tool, indicates that there is no specific definition of what a "burden" is, and that there is no evidence showing that red tape is the major regulatory problem for business. Additionally, he doubts that it is possible to remove burdens without removing the benefits of a regulation. Finally, he argues the difficulty of prioritizing the reduction of burdens to make sure that the exercise does not contravene cost-effectiveness (2007, p. 198).

The implementation of this tool requires a significant investment of resources by the government, as it requires resources for coordinating units and government departments, and for collecting quantifiable available data from stakeholders and government agencies.

5. POLICY EVALUATION GOVERNANCE

The adoption of a policy evaluation system or the Better Regulation agenda entails not only the choice of the set of tools that are going to be used to assess regulatory proposals or existing regulations, but also their governance. This governance is to consider the branches of the government, agencies and administrative bodies that are involved in the assessment process, the work of the bodies that are performing the assessment, their coordination, and the oversight of the work performed as well as the necessary training for it. As a result, governments have created systems and institutions for the organization, coordination and oversight of the regulatory evaluation.

The idea of evidence-made policymaking assumes that governments use evaluation tools to improve regulatory quality or achieve a predetermined goal according to instructions and in the pertinent moment of the life of the regulation. However, such collective effort requires sustained commitment from the government, involvement from external stakeholders and a set of incentives to influence the work of the individuals performing the assessment (Castro & Renda, 2016; Renda, 2015, p. 102).

In that sense, it is undeniable that the regulation-making process suffers from some deficits. One of them is the lack of consistency over time and across regulatory actors, which leaves those exposed simultaneously to different regulatory regimes to deal with inconsistent or contradictory regulatory demands (Lodge, 2015). There is a lack of coordination. Another problem is precisely one of the reasons that motivates the adoption of the arrangement in the first place, which is the problem created by the delegation of regulatory powers from one power of the state to another or to agencies.

Therefore, the arrangement and incentives should address the issues pre-emptively identified, either because they were the motivators of adopting the arrangement, or because they exist as a result of the adoption of the policy evaluation system. These deficiencies can be addressed with increased coordination and oversight on the regulatory evaluation process (Castro & Renda, 2016). Stronger coordination and oversight might address the incentives towards civil servants who perform the regulatory evaluations; align the incentives within administrations to achieve agreed goals; and advance a whole-of-government approach to regulations, to avoid inconsistencies. Then, which agencies perform these functions and how they do it is of main concern in the governance. As previously argued in this Thesis, different arrangements of governance are bound to create different incentives for the participating actors; therefore, it is important to understand which incentives the different coordination and oversight arrangement create, as well as which goals they serve better, which is done in the following subsections.

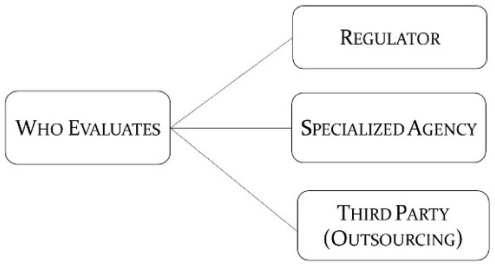
Moreover, not all adopting countries might be in a position to sustain a particular coordination or oversight structure, which may affect the end result of the policy evaluation. Therefore, the following subsections also analyze the trade-offs from the different assessment, coordination and oversight arrangements. The first one explains the different possibilities that are to be considered regarding who performs the assessment itself. The second subsection deals with the coordination of the assessment, and the third one with the oversight.

5.1 Performance of the Assessment

In practical terms it is not enough for the policy evaluation agenda to exist in a country, but it also needs to be executed. Therefore, after knowing what needs to be executed, the next step is to know who is going to execute it. Who performs the assessment as every other element of policy evaluation is a question closely related to the scope of the assessment previously dealt with. In other words, which agency is in charge of undertaking the policy evaluation of the existing or proposed regulations of a regulatory agency? There are three

existing options so far: (1) the decision-maker; (ii) a specialized body; or (iii) third-party (outsourcing) (See Figure 3).

Figure 3. Body that performs the assessment of regulations.



Source: Author's own depiction

The first option is that the assessment, as well as every other stage of the policy evaluation cycle, is performed by the regulatory agency or the legislative body that is in charge of enacting the regulation itself. In this scenario, there is usually a department within the regulator in charge of performing the technical parts of each stage of the PEC, in order to provide the decision-maker with enough information that allows her/him to make the regulatory decision. The assessment is directly done at and by the same entity that is in charge of the regulation, therefore the proximity means that there is more expertise in the subject being evaluated. Conversely, this means that if, for instance, the scope of the assessment includes all regulatory agencies of the executive power, and the assessment is performed by each agency in particular, each one needs to have the proper training for performing policy assessment, as well as the personnel to do so. This then entails higher costs. This issue is less salient in the case of primary legislation, because of the concentration of the legislative body. There are only one or two legislative bodies, therefore the personnel are more concentrated in numbers than it would be with administrative agencies, just based on their average numbers. This is one of the most commonly used arrangements.

The second option is that the assessment is performed by an agency dedicated exclusively to performing policy assessment. In this scenario, every regulatory agency or legislative body provides this body with the necessary information about the potential regulation or regulatory problem to be addressed, or existing regulation, and this body performs the technical work of policy assessment. The pros of this choice are that there is certainly specialization in the use of assessment tools, and it is in principle only necessary to train one group of professionals. However, unlike in the previous arrangement, this distance from the regulatory body or the legislator means also a distance from the subject being

assessed. Expertise on a specialized subject is not entirely possible. This is not necessarily a negative feature, but it does need to be examined in the light of what is of more relevance or necessity to a country. For instance, this arrangement could be useful when the stock of regulations is being assessed, as this agency could require specific data from regulators and later just perform the technical assessment. This does not require in principle a particular knowledge of the sectors of which regulations are being assessed. However, let us assume that a particular regulation is being assessed, for example a regulation on telecommunications. It is valuable to have technical knowledge of the sector to identify costs, behavior, benefits, and even to be close to the stakeholders and obtain their input. Doing this could prove more difficult when there is a single agency.

A third option is for the assessment to be performed by a private firm, which means that the process is being outsourced. This requires fewer resources, training and expertise on policy assessment from all the regulators and legislators. However, in addition to the same issues explained previously with a centralized agency for policy assessment, another issue to consider is that this is an extra layer of delegation that is not even within the public sphere. There is a private party performing evaluations for a public entity, with the purpose of providing information to the decision-maker to assist on the production of the end regulation. This type of public-private arrangements is not unusual; however, because of this added layer of delegation outside of the public domain, it is likely that closer oversight might be required.

Each of these options present their pros and cons, and seem more suitable for different scopes or conditions of the policy evaluation of a country. It is evident, however, that whichever the option, once the policy assessment scope includes more of one agency or power of the state, there is a need for coordination between them. Likewise, when there is delegation, additional to the incentives for aligning preferences, there is a requirement for oversight.

5.2. Coordination

The coordination function of the policy evaluation governance serves to follow up on the interaction between regulations from different regulatory agencies. Likewise, it serves to follow up on the plan for policy assessment that the country has set up, in the sense that it allows a centralized management of the regulatory goals across agencies and powers of the estate.

In the first case, the coordination between regulations is advisable to control the regulatory spill over because different regulations might have a direct or indirect impact on related

areas of the economy. It helps the government to manage the stock and the flow of regulations in order to guarantee policy coherence (Renda, 2015). Depending on the choice of regulatory evaluation tool, the need for coordination might increase. For instance, if a country decides to undertake a comprehensive evaluation of its stock of regulations, it will require coordination for the collection of information on the existing legislation to systematize and organize them, to determine which regulations should be amended, and which expulsed from the system.

It also entails coordination inside the state for the consistent and systematic use of the tools on the defined scope. To have such complex web work is time consuming, requires the use of resources and depends on consistency across government, which requires in turn extensive information-sharing across branches and agencies of the administration, and places more responsibility, accountability, and work load on the civil servants (Castro & Renda, 2016).

5.3 Oversight

Individuals and the technical body that performs the regulatory evaluation are expected to follow a due process and produce high quality documents that serve as an aid for the decision-making process. However, empirical studies have shown that it is frequent that policy evaluation requirements are treated as a checklist instead of a serious process that is expected to reveal information (Dunlop et al., 2012, Radaelli, 2010a). Therefore, mandating that the evaluation process is undertaken properly is not sufficient for that to happen. The lack of follow up on the results of the policy assessments might render useless their function of, on the one hand, producing efficient regulations, and on the other hand, remedying the drawbacks of delegation.

Therefore, as most delegation exercises require, the set-up of an oversight process is of help to create the incentives and guidance to guarantee that the processes are undertaken as required. The oversight of the regulatory production and specifically of the policy evaluation process, addresses two of the problems of incentives that come with the implementation and follow up of a policy evaluation process. It addresses the incentives problem regarding the individuals that are in charge of undertaking the assessment, and of the incentives for the administration to follow up on the country's stated goals.

Notwithstanding, as suggested by Ogus (2004), whether or not, and to what extent, the government should have power to oversee the rule-making process is not that clear. One may argue in favor that this power is necessary to guarantee that the decisions of the rule-making authority are compatible with the government's goals; but one also may argue

against it, since this might create uncertainty and remove the traditional benefits of the speed of regulatory rule making compared to legislative work (Ogus, 2004). Strong oversight can create the incentives for policy-makers to be accountable for their policy-evaluation results. However, it is important to consider what is been supervised. There are two main areas for oversight, which are the process of assessment, and the result of the assessment. Therefore, this needs to be considered when creating and granting the powers to the oversight bodies.

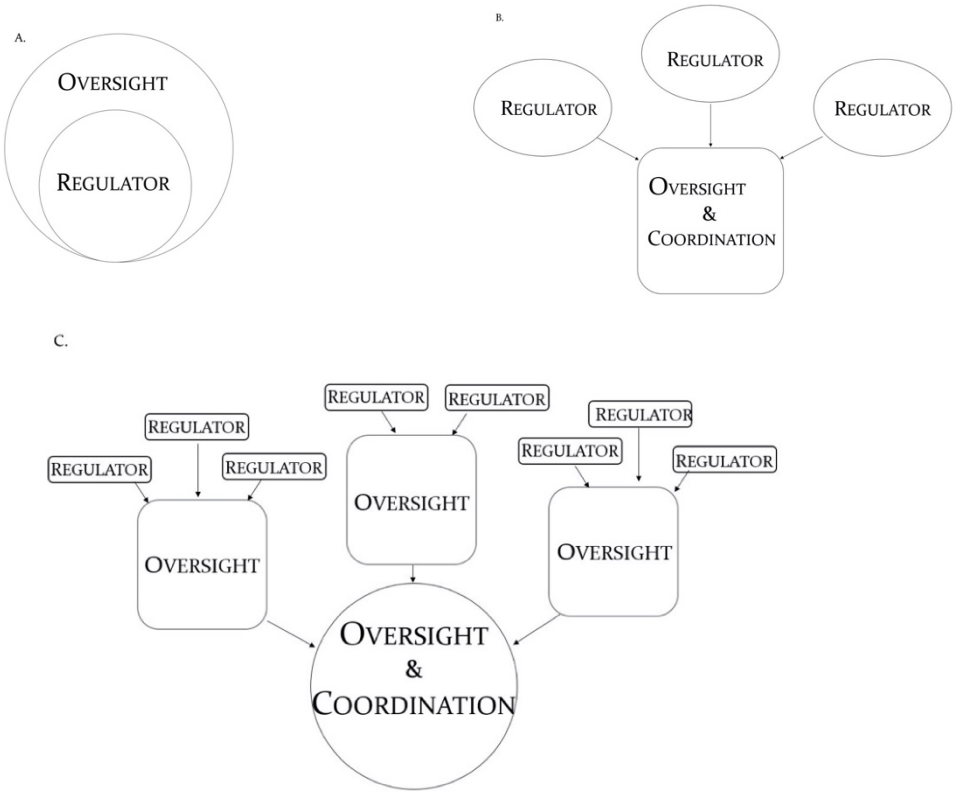
5.3.1. Regulatory Oversight Bodies (ROB)

These functions previously discussed need to be assigned to an entity. To provide such a level of coordination and institutionalization the functions of oversight and coordination have consistently been granted to one body, normally referred to as Regulatory Oversight Body (ROB). Comparative studies show that these oversight bodies must be designed to fit the constitutional framework within which they are embedded, and also match the usages of the policy evaluation that motivated their existence (Wiener & Alemanno, 2011, p. 316).

The most common main functions are the following: coordinating regulatory policy and the use of regulatory evaluation tools; scrutinizing the quality of assessment tools; reviewing and analyzing the assessments resulting from the use of the evaluation tools; providing consultation and guidance on the use of the evaluation tools; and assessing the legal quality of proposed regulations (Castro & Renda, 2016). Other functions that can be attributed to the ROB are the training of the officials and the performance of regulatory evaluation themselves. Considering this, in practice several forms of setting up the oversight of policy assessment functions have been created.

In the first archetype, a department within the agency performs the policy evaluations and a higher-ranked department or its hierarchical superior oversees that the evaluation was performed according to standards (See Figure 4a). The criticism of this structure is that even though it provides the oversight, it might be biased or compromised, understanding that both the regulatory evaluation and the oversight are being undertaken under the same roof. It is not advisable for the same entity to be judge and interested party at once. Additionally, the coordination function is not present in this scheme.

Figure 4. Oversight and coordination



Source: Author's own depiction

In the second structure, after each regulator or administrative agency performs its own assessments it submits it for review by the ROB, which provides its assessment on whether the policy evaluation was performed according to the lines previously traced (See Figure 4.b.). The need to reduce transaction costs and to have an effective Principal-Agent relationship, could point towards having oversight functions centralized in the administration. The third model has multiple ROBs (See Figure 4.c.). This model is a response to the need for specialized knowledge that can correctly assess evaluations that were previously performed by specialized regulators. The multiple ROBs can cooperate with the main ROB, in order to have centralized coordination, or work in a parallel structure with little cooperation among them, when the priority is the oversight and not the coordination. As explained by the literature, "the comprehensiveness of the policy cycle, the complexity of oversight and the need to ensure the achievement of a wide variety of goals can determine the "optimal" number of oversight bodies." (Renda, 2015, p. 67)

The functions of the regulatory oversight body thus differ and depend on the intention with which it was created. As explained, they might be limited to quality control of the

regulatory evaluation; it might have the authority to inhibit undesirable policies or promote desirable regulations; or to undertake ex post evaluations. It might look over a large span of the policy-making function, or only attend to a selected area. For example, in the case of the US, policy evaluation is mandatory and OIRA acts as the watchdog: it oversees the rules and reviews the assessment performed, with the power to vet and return for revision (OMB, 2003). At the EU level evaluations are reviewed by the European Commission's Impact Assessment Board with the purpose of improving more than vetting (Wiener & Alemanno, 2011, p.318).

One of the main oversight powers that the ROB can be granted is the ability to review the policy assessment work of a regulator. The ROB can check if the evaluation process was undertaken as required by the pre-established procedure. It also can check the content of the assessment and determine whether it is correct. If the ROB determines that the assessment was not satisfactory it informs the regulator. Here, depending on the powers legally granted to the ROB this feedback might have a mandatory nature or can be just a recommendation.

Whether the request to amend the assessment has a mandatory nature or not can determine the incentives that this creates towards the actors that intervene in the policy assessment process. In that sense, if the ROB has the authority to veto a proposed regulation because the assessment was not undertaken correctly (for instance, no public consultation, the costs were not assessed correctly, etc.) then the regulator might have an incentive to perform the assessment according to standards, as this would avoid the regulation being halted or vetoed. Conversely, if the feedback of the ROB is just a recommendation, these incentives will not be generated. However, a public feedback to the regulator from the ROB, even when not mandatory, can create pressure with "naming & shaming"[7], to the regulator, nudging it towards adopting the recommendations of the ROB or pre-emptively being mindful of how the assessment is undertaken.

As with the choice of the scope and the policy evaluation instruments, these functions should be chosen based on the intent with which the ROB is created and embedded within the country and the Better Regulation agenda. It is likely that, in a country where the Better Regulation agenda was adopted by a decree enacted by the president, and where the support by independent agencies and other branches is yet to be gained, the scope is limited to the oversight of the assessment performed by the ministries that directly depend

[7] Naming and shaming are the public disclosure of offenders by making public the results of inspection results or any type of evidence or information that reveals a non-compliance with an existing rule (See Van Erp, 2007; Van Erp, 2011)

on the president. This could also influence the location of the oversight body, whether it depends on the office of the president, like the US, or it is an independent body.

Problem of window-dressing oversight

The existence and proper functioning of an oversight body provide coordination and control to the regulatory policy of a country. Nevertheless, when the oversight body exist only as window dressing, that is when the functions are not really carried out, its presence might create more problems than it solves.

In that sense, when there is no oversight body, the actions of the policymaker might get informally supervised by businesses, citizens and potentially affected parties. Even though policymakers might not have an obligation to report directly to those actors, their actions might get scrutinized and eventually challenged. When an oversight body is in place, those actors that would previously scrutinize and challenge the acts of the policymaker might take a backseat and not have such an active role. This makes sense, because there is already an assigned entity in charge of reviewing, accepting or rejecting the assessments conducted by the policymakers. There is an embedded trust to the functions that the oversight body is supposed to carry out.

However, when this oversight body exist but does not perform these functions in practice, on the one hand, it creates a false sense of security that causes actors that might have been previously paying attention to the assessment, to relax their oversight activities; and on the other hand, there is a legitimization of the assessment conducted by the regulator and subsequently of the regulation that is approved as a result of a favorable review from the oversight body. In other words, having a not-functioning oversight body is worse than not having an oversight body at all.

Quis custodiet ipsos custodes?

Oversight bodies are also not immune from the risk of capture. Calabresi and Terrell note that "[t]oday, we realize how easy it is for special-interest groups and factions to capture the so-called independent regulatory agencies just as it is easy for them to capture the oversight committees" (2019, p. 1703). Therefore, in itself, the presence of an oversight body might not suffice to guarantee that the policy assessment process is immune to regulatory capture. If anything, a captured oversight body might give an aura of legitimization to a given regulation, thus facilitating its approval even when it is against the interests of society at large.

Considering this, the question remains *quis custodiet ipsos custodes?* Which entity can provide the checks to balance the authority of the oversight bodies? In political systems with separation of powers into executive, legislative and judiciary, such as presidential systems, each power has specific and separate functions. These functions do not overlap with each other, and at the same time are designed to provide checks and balance to each other.

Since these oversight bodies are largely located in the executive power and perform executive functions, it is not useful for them to be accountable to, or for their acts to be checked or approved by, another oversight body with higher rank. This will create a longer chain of oversight that would still not resolve the question of who watches the watchers. Nevertheless, the judiciary could have the authority (provided that it is habilitated by law) of reviewing the legality or constitutionality of the acts enacted by the oversight body. In this case, the courts could serve as the watchdog of the oversight bodies.

For courts to judge the content of those acts, there needs to be an active participation from an interested party, who would challenge the approval or dismiss from the oversight body of an assessment conducted by a policymaker. One important flaw in this control is the expertise that a court my lack on the subject being assessed (discussed in the next subsection). Likewise, it is likely that only very gross violations will be challenged. However, the possibility of the acts of the oversight body being challenged might provide incentives to mold the behavior of the oversight body.

5.3.2. Courts

Another form of oversight is through courts. Courts can be granted the power to review and overturn legislations, regulations or administrative processes in cases where they do not comply with specific procedures, do not respect legal principles, violate the law or Constitution, among others (Alemanno, 2016, p. 130). In that sense, courts might have specific powers to assess regulatory outputs when they are the result of the use of policy evaluation tools or go through a policy assessment process.

Depending on who produces the legislation or regulation, the process of policy evaluation can be considered an administrative procedure that the regulator has to undertake at specific points of the life of the regulation; or can be considered as part of the legislative process. Therefore, in principle, it could be possible for an interested party to challenge a regulation for which either the required procedure was not followed; or that, while followed, the contents or results of this procedure were not in accordance to what the legal instrument required. For instance, in the US there have been several cases in which a given

rule has been revoked because it did not consider comments provided as a part of the public consultation stage. [8]

Notwithstanding the above, this is a power that courts need to be granted by a legal instrument. That is, the power to revoke or void regulations that did not either follow the policy evaluation process established by decree or law; or that had a flaw in the procedure, that had it not happened, the resulting regulation would not had been enacted or would have been enacted differently. This depends in substantial part on the weight of the legal instrument by which this procedure was introduced. The power of a court to oversee both the procedure and the result may vary depending on whether policy assessment was introduced by law, by a presidential decree or just by administrative guideline. This is closely related to the scope of the assessment previously discussed.

When courts function as oversight bodies their decisions will always be mandatory for the regulators. Therefore, the incentives created towards the regulators would depend not on the mandatory nature of the decision, but on the probability that a legal action is brought before the court by an interested party. It could be argued that the more embedded the policy assessment procedure is in a country, the more likely the population is to bring an action before a court against a regulatory initiative that had a faulty assessment procedure. Likewise, the more public the procedure is, the higher the chances of a regulation being challenged if faulty.

However, one key attribute, whichever the structure, is an expertise that allows undertaking technical evaluation of the results from the regulatory evaluation previously performed by the assigned body of the administration. This is one of the criticisms of having the oversight on the judiciary, where judges who are experts in administrative law, may not particularly be experts in a specific regulatory topic. Some jurisprudence has stated a judicial deference to the administration on the interpretation of the law in the regulatory-making process, precisely because of the expertise of the later compared to that of the former (Scalia, 1989).

6. MATCHING THE GOALS WITH THE STRUCTURE: WHAT GOES WHERE?

Considering the complexity of each one of the elements that compose the structure of policy evaluation, it is not far-fetched to assume that when a country is first introducing

[8] See Section 3.1 of this Chapter.

this arrangement into their policy-making process, it would respond to a goal, even if it is not the case in practice. After all, from the characteristics that each option of the composing element presents, it is evident that the consequences of adopting one or the other will vary, because they create different incentives, costs and risks. Therefore, the choice is not (or should not be) a light one. This Section brings together the findings from international experiences and the contributions of the literature previously analyzed, to arrange the elements based on their potential to attain different regulatory goals.

The purpose is to set the type of arrangement that has the potential to create the conditions and incentives for the actors in a legal system to achieve specific regulatory goals. This does not mean that necessarily each one of the elements only caters to one goal, or that they would even fit into a goal, or that these are the only possible regulatory goals that a country could have. However, it is an attempt to identify the potential of the structures, based on their common characteristics, the incentives they create and the goals that they reportedly pursue.

The elements that have been analyzed in this Chapter are: (i) Scope of the policy evaluation; (ii) Timing of the Evaluation; (iii) Regulatory evaluation tools; and (iv) Regulatory coordination and oversight. Considering this, the goals that more often are pursued after are (1) regulatory accountability, (2) the maximization of social welfare through more efficient regulations, (3) the reduction of red tape through administrative simplification, and (4) other regulatory goals.

Accountability

Countries that use policy evaluation for oversight of regulatory agencies that have been delegated regulatory powers from the legislative are expected for their policy assessment scope to include secondary legislation enacted by regulatory agencies of the central government and in some cases extend it to independent regulatory agencies. As explained previously, in Section 2.1 of this Chapter, secondary regulations result from the exercise of a delegation of the regulatory power of the legislative or the constituent.

Therefore, having a policy assessment structure that includes mainly secondary regulations might be a response to the need of the delegator to oversee the regulatory work of the delegated regulator.

These regulations are then expected to be assessed through every stage of the PEC, using RIA, SCM or CBA as evaluation tools. As Section 3 of this Chapter explains that the Policy Evaluation cycle is a coordinated arrangement for regulations to be assessed throughout their lives, thus having a constant feedback of how regulations (and regulators) are performing. Because the regulation or proposal of regulation is evaluated at different stages, each stage provides different information on the regulation, but also the regulator is aware that his work is being constantly monitored. This double function might contribute towards the accountability of the regulator and of its delegated work.

Likewise, Section 4.1 of this Chapter describes RIA as a tool for a comprehensive *ex ante* assessment of the potential options to solve a policy problem, as well as of the chosen policy option, which allows for a thorough and documented assessment of potential regulations. In addition, Section 4.2 explains CBA as an economic tool used for the quantification of the benefits and costs associated with a project, policy or regulation, and Section 4.5 describes SCM evaluation instrument used for the administrative burdens imposed by regulations to businesses and individuals.

All three of these tools perform objective and quantifiable evaluations of the performance of the regulation, which could be later connected to the performance of the regulator when the regulation is assessed for a second time (for instance, *ex post* assessment). Therefore, it is expected that a country that has accountability as a goal, would assess their regulations using the type of instruments that can provide objective and quantifiable evaluation of the performance, that would in turn shape or preemptively orient the actions of the regulator.

Finally, in line with agency theory, oversight of the regulator is necessary both regarding the process of evaluation and the resulting regulation. Following up on the results of the assessments could remedy the drawbacks of delegation[9], a function provided by having oversight of the work of the regulator, through assessing the quality of their regulatory evaluations. Likewise, to know that their work would be assessed, could on the one hand provide the incentives to the individuals that are in charge of undertaking the assessment, to align their actions to either receive a reward or avoid punishment. On the other hand, redirect the actions of the regulator to follow up on the countries stated goals as they would be assessed following a specific criterion.

Table 3 shows a summary of what has been explained in this subsection.

[9] See Chapter 1. Section 3.2: Accountability: A response from Administrative Law

Table 3. Regulatory Evaluation governance structures with accountability as a goal

Scope	**Hierarchy**	**Primary**
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

Source: Author's own depiction

Efficiency

As previously explained in this Thesis,[10] one of the expressly intended use of assessment policies is an instrument to evidence-based policymaking. Regulators achieve this by the correct identification of cost, benefits and sometimes of the distributional effects of a regulatory proposal or existing regulation, for solving a problem (Allio, 2013). The goal of the regulation is thus to maximize social welfare, and, as a big part of the literature has discussed, this can be done through having efficient regulations. Therefore, the instrumental use of impact assessment policies is to evaluate regulations to inform regulators of the most efficient options to address the problem at hand. In that sense, a country with efficiency as a goal or rationale is thus expected to adopt instruments that are able to precisely assess cost and benefits of regulations.

Furthermore, if it is a Latin American or developing country it would use tools that considered distributional effects. In that sense, these countries are expected to use as evaluation tools such as RIA, CBA or CEA. These are instruments for quantitative

[10] See Chapter 1. Section 3.1: Social welfare maximization as a rationale

assessment of regulations, and that are intended to identify the most efficient or effective options.[11]

Table 4. Regulatory Evaluation governance structures with efficiency as a goal

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

Source: Author's own depiction

These assessments are expected to be performed both *ex ante* and *ex post*. The former, to provide an evidence-based opinion on the possible effects of the intended regulations;[12] and the later, to verify whether regulations are attaining their predictive objective.[13] Additionally, for assessing regulations, these countries are expected to engage in public consultation, to obtain sufficient and accurate information from the public.[14]

The scope of the assessment would extend to the secondary regulations and primary legislations, as the efficiency of a regulation is closely related to the efficiency of those regulations that it interacts with.[15] Therefore, the country is expected to have a whole-of-government approach in which all regulations are assessed. Likewise, precisely because of the potential and predictable interaction between regulations, the country is expected

[11] See Chapter 2. Section 4.2: Cost-Benefit Analysis and its limits; and Section 4.3: Cost-Effectiveness Analysis
[12] See Chapter 2. Section 3.2: *Ex ante* Assessment
[13] See Chapter 2. Section 3.5: *Ex post* Evaluation
[14] See Chapter 2. Section 3.1: Public Consultation
[15] See Chapter 2. Section 2: Scope of policy evaluation: International differences

there oversight and coordination of its regulatory evaluation policy through a Regulatory Oversight Body (See Table 4).

Administrative Simplification

Another goal related to the rationale of maximizing social welfare is the reduction of administrative burdens, also known as administrative simplification. Regulations are evaluated to identify their costs and determine which regulations create or impose unnecessary administrative burdens on citizens and businesses. This could be related, for instance, to a need of signaling to investors the good business climate of the country and that it is a good place for investment.[16]

These countries are expected to adopt the Standard Cost Model or other evaluation tools that serve to account for and to reduce administrative burdens.[17] This evaluation should be performed *ex ante* for individual regulations, so as to avoid the enactment of regulations that could already be burdensome. However, an initial inventory of existing regulations is first necessary,[18] in order to have an assessment of existing regulations and eliminate those that are unnecessary or simplify complex ones.

Because normally this goal is linked to businesses and citizen, it refers regulations and rules that operationalize or execute the law, such as secondary regulations. In that sense, the scope of the regulatory evaluation is expected to include secondary regulation, and specifically regulations that might affect businesses or create new administrative procedures. [19]

The regulatory oversight body would act predominantly as coordinator among the different agencies that enact and assess this type of regulations. This is to ensure a uniform and systematic assessment of regulations that affect this targeted group of the population and the economy.

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[16] See Chapter 1. Section 3.3: Third-party Influence as an Explanation; and Section 4: Rationales of Latin American countries
[17] See Chapter 2. Section 4.5: Standard Cost Model
[18] See Chapter 2. Section 2.3: Individual assessment or taking stock of regulations
[19] See Chapter 2. Section 2.2: General regulations vs. Special regulations

Table 5. Regulatory Evaluation governance structures with Administrative Simplification as a goal

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

Source: Author's own depiction

Other Goals

Another goal also related to the rational of maximizing social welfare is the protection of non-quantifiable rights or objectives. This not always an expressly established goal but is often considered when performing the assessments. For instance, countries might want to protect minorities or vulnerable groups and for that they seek to guarantee that new or existing regulations will not affect them negatively or disproportionately. When this is the motivation for policy assessment, countries are expected to use tools that can assess regulations by comparing regulations against previously set criteria, instead of evaluating their cost or benefits. In that sense, the country is expected to adopt tools such as Multi-Criteria Analysis.[20]

Because in this scenario the country is dealing with specific rights or vulnerable groups, public consultation is expected to be an integral part of the assessment process. In this case, obtaining information from those closer to the problem, can assist the regulator on the one hand, to first define more specifically the criteria against which the regulation will be

[20] See Chapter 2. Section 4.4: Multicriteria Analysis

assessed; and on the other hand, to obtain information and data for those that are closer to the problem which can guide their decision-making process. The scope of the assessment is expected to include both primary and secondary legislations, when they might have a possible effect on the protected goals, groups or rights.[21] Lastly, there should be a coordinator who ensures that regulations are examined in conformity with the determined goal.

Table 6. Regulatory Evaluation governance structures with non-quantifiable Goals

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

Source: Author's own depiction

Finally, there is a possibility that a country does not have a defined regulatory goal but seeks to commit to a particular international standard or requirement. When this is the case, it is unlikely that this will be expressly stated by the country, but it can be deducted from concrete actions from the country during the adoption process.

In that sense, the intensity (or lack thereof) of the implementation of the better regulation agenda, as well as the simplicity of it, might signal that their country is adopting the agenda to check some boxes, or comply with some prerequisite.[22]

[21] See Chapter 2. Section 2.2: General regulations vs. Special regulations
[22] See Chapter 1. Section 3.3: Third-party influence as an explanation

Table 7. Regulatory Evaluation governance structures based on International Commitments

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

Source: Author's own depiction

In that sense, it is expected that this country will have public consultation as part of its decision-making process and basic CBA. Because in these cases the regulatory policy would have a short reach and might not have the support of other powers of the state, it is expected that the obligation to assess is limited to some of the agencies that depend on the executive branch. These agencies might adopt some evaluation tools to assess their regulation, but there is no expectation for there to be a whole of government approach or a coordinated effort across administrations. Therefore, there is no expectation for there to be a regulatory oversight body for coordination among agencies nor for overseeing the assessment.

7. CONCLUSIONS

Decisions concerning the regulatory-making process are not made by a single individual nor through a single process. On the contrary, it is a complex aggregation of societal preferences represented through a scientific and thorough analytical process; preferences advocated by interest groups; the reflection of the interests of the bureaucrats; or a mix of all of the above.

To analyze this intricate complex, this Chapter organized and dissected the different elements that intervene in the policy evaluation arrangement of a country. The composing elements identified were (1) the scope of the assessment; (ii) the moment(s) for the

assessment; (iii) the tools used for the assessment; and (iv) the governance of the assessment. The study of each one of these elements revealed that there are various options within each one, and that each option has its own intrinsic characteristics, that in occasion present trade-offs, and each cater to a variety of regulatory goals.

Among the regulatory goals that had more prominence were regulatory accountability, the maximization of social welfare through more efficient regulations, the reduction of red tape through administrative simplification, and then regulatory goals that aimed at non-quantifiable rights, and even the goal of just complying with international requirements. These goals served to arrange the different elements that compose the policy evaluation agenda into different structures. In that sense, the results from this Chapter add structure to the literature on policy evaluation. On the one hand, it arranges the complex elements into workable structures. On the other hand, it serves as a comparison framework to potentially identify whether the policy evaluation structures implemented by countries are serving the regulatory goals that the country has declared or is trying to pursue.

This last use is of relevance for the next Chapters of this thesis. Chapter 3 explores the current situation in Latin American countries regarding the relatively new introduction of the Better Regulation agenda into their policy-making process, to understand the objectives pursued by those countries, and whether their structure matches what is expected for their specific regulatory goals.

CHAPTER 3

BETTER REGULATION IN LATIN AMERICA: REGULATORY EVALUATION STRUCTURES AND GOVERNANCE IN SELECTED COUNTRIES

A considerable number of Latin American countries have been adopting and implementing policy assessment structures since the early 2000s and even more during the last few years. As previously discussed, there are many reasons that might explain this trend, including the need to produce more efficient regulations, increasing accountability, or even responding to third-party pressure and the need to conform to international standards.[23] Regardless of the motivation or rationale, the fact is that these instruments have been adopted and are being implemented as part of the policy-making process of these countries. In that sense, there has been some academic work done addressing the implementation of some evaluation tools in developing countries (Kirkpatrick, 2014; Kirkpatrick, Parker, & Zhang, 2004; Peci, 2016; Peci & Sobral, 2011; Rodrigo, 2005); nevertheless, the academic work on regulatory governance and evaluation tools in Latin American countries separately is scarce. Moreover, to date the different evaluation tools, regulatory governance structures in Latin American countries, and their feasibility the region have not been studied, thus the relevance and contribution of this particular Chapter.

Chapter 2 of this Thesis showed that structures for regulatory evaluation process, its governance and the institutional framework are important for the process of developing regulations and the goals pursued with the adoption of the better regulation agenda. Thus, two important research questions rise: (i) Which are the policy assessment goals and structures set by Latin American countries for their better regulation agenda? (ii) Do the elements chosen for each component of the structure correspond to the goal set by these countries?

The Latin American countries that have adopted regulatory evaluation tools for their regulatory-making process and have a better regulation agenda are Mexico, Peru, Chile, Colombia, El Salvador, Ecuador, Brazil, Costa Rica, Argentina and the Dominican Republic (See Figure 5). Each country has done so at different times, and with different degrees of depth and commitment. Besides their geographical proximity and common language, these countries share political, constitutional, historical, cultural and other characteristics. This allows an initial common analysis of their better regulation and regulatory evaluation attempts.

[23] See Chapter 1: Administrative Law & Economics: Origins and rationales for the adoption of policy evaluation and the Better Regulation agenda

In this sense, this Chapter aims to describe the better regulation agenda in Latin America, to understand which goals Latin American countries are pursuing with its adoption. It also aims at analyzing their scope and moment of the policy assessments that these countries have chosen, the evaluation tools being used, as well as their governance. This can show, for instance, whether the goals chosen by Latin American countries are similar to those of European countries or the US, and whether they have adopted different policy assessment structures to achieve their set goals. In addition, this Chapter will contrast the better regulation structures of selected Latin American countries with the structures previously identified and discussed in Chapter 2, to analyze whether the structure chosen by said countries has the potential to generate the incentives and create the effects expected from it to achieve the chosen regulatory goal.

Figure 5. Countries with Better Regulation agendas in Latin America[24]

Source: Author's own depiction

[24] Country labels follow the ISO 3166-1 alpha-3 standard that defines codes for the names of countries.

This Chapter is divided as follows: The first Section analyzes the constitutional and administrative structures of Latin American countries. Since the production of regulations is influenced by the constitutional arrangement and institutional factors (Levy & Spiller, 1994), this thesis deals with a particular set of countries in the context of regulatory production, all of which have a presidential constitutional system. Thus, it is necessary to understand the development of their existing constitutional and political institutions, including the functions, interactions, and independence and interdependence of the branches of the government within a presidential constitutional system and the roles of these actors within the decision-making process. Additionally, this will provide context to the administrative structure, the current organization and functions of the executive power, administrative agencies, their independence, delegation, and supervision processes.

The second Section presents an overview of the regulatory-making evolution of Latin America. It begins with an analysis of the state-owner structure, followed by the transition to the regulatory state and privately-managed public services, which increased the number of regulations as consequence of the number of regulatory agencies. It then discusses the current trend by Latin American countries of adopting a better regulation agenda. This overview serves to understand the motivation behind the changes in regulatory production, which in turn is relevant to analyzing the goals for the adoption of their new and future regulatory governance structures that include policy assessment as the main part of the process.

Section three discusses and analyzes the policy assessment structures adopted by the Latin American countries studied in this Chapter and their similarities and differences, considering how they are expected to be aligned to a specific regulatory goal. In that sense, the Section first identifies the different goals that Latin American countries have revealed for adopting their policy assessment structures, based on the content of the legal rules through which they have adopted their instruments; and also determines whether there are common goals across countries. Moreover, Section three also compares the structures chosen by these countries to the incentives, risks and costs of the different structures previously analyzed in Chapter 2 of this thesis. This Section builds on information obtained from the review of existing legal provisions in each country; therefore, it is the result of analyzing the laws and regulations that have been enacted in those countries. In that sense, just like Chapter 2, this Section begins with an analysis of the scopes for the assessment chosen by the analyzed countries; it follows with an analysis of the stages of the Policy Evaluation Cycle that are most commonly undertaken. Then it analyzes the assessment tools used to evaluate the regulations; and finally, the governance of this assessment

structure, considering the institutions involved, the coordination among them and whether or not there is oversight.

This serves thus to answer the first research question set for this Chapter, which are the policy assessment goals set by Latin American countries for their Better Regulation agenda?, and serves as a bridge to the rest of the Chapter, to answer the second research question, do the elements chosen for each component of the structure correspond to the goal previously set by the country?.

Finally, Section four focus the analysis on three countries: Mexico, Chile and the Dominican Republic. It analyzes more in detail whether the structure adopted by those three countries for their better regulation agenda are aligned with the regulatory goals that they have set for themselves. This Section contrasts the findings from Chapter 2, where the choices of the elements that conform regulatory evaluation structure were classified based on the goals with which they have more affinity.

There is one important caveat for this Chapter: the information collected and analyzed has as a cut-off date June 1st, 2019. Therefore, new regulations enacted or amended after that date are not included.

1. CONSTITUTIONAL AND ADMINISTRATIVE CONTEXT

Knowing the constitutional context of a country is vital to understanding how the state is structured, the function of each government branch, and how the state's powers interact. The administrative context, in turn, helps to understand how the government functions in its relationship with its citizens, the degree of involvement that is expected from the government, and how power is delegated and supervised. Summarizing the defining features of the constitutional structure of Latin American countries is beyond the scope of the Chapter. However, to understand why institutions developed in a certain manner, it is important to know where they came from and what differentiates them from other environments (North, 1991).

The legal systems of Latin American countries have their roots in the French, Portuguese and Spanish laws; because France, Portugal and Spain were the countries that first colonized Latin America and established their legal institutions. In addition, all of these countries have a Romano-Germanic legal system (civil law) (Robalino-Orellana, 2007), which means that the written law and legal codes play a fundamental role. Furthermore, the initial political ideas on which the first constitutions of these countries rely are derived from the French Age of Enlightenment, the Constitution of the United States (1787) and

the Spanish Constitution of Cadiz (1812), with notions of popular sovereignty, independence, guaranteed freedom and rights, division of power, popular representation, and limits to power. This all converged into presidential constitutional systems.

Even having those political ideas and ideals as starting point, the political history of Latin America countries includes periods of dictatorships, anarchy, *caudillos*[25] and strong presidential figures, which were facilitated by having the president as a main figure of the government. By the mid-1980s, most Latin American countries returned to a political system in which they could freely choose their governments. After these experiences, they introduced stronger rules to balance the legislative and executive powers, with the strengthening of the executive power together with the creation of control mechanisms for it (Castro, 2007; Gargarella, 2015). This meant new Constitutions or amendments to the old ones. Despite all the different influences, political problems, and changes to the constitutions, these countries ended up with similar political structures: A clear division of the three powers of the state (legislative, executive, and judicial) and a presidential constitutional system.

1.1 Presidential Constitutional System

In a presidential constitutional system, there is a chief executive with constitutional powers that include control over administrative agencies, that is independent from the legislative power (either congress or parliament) and is directly elected by the people (Brewer-Carias, 1996, p.30; Linz, 1990). The president has political powers, including the authority to appoint and remove ministers, and the head of regulatory agencies that depend on the executive branch (Mainwaring & Shugart, 1997). Additionally, the president has ample constitutional powers and is one of the main actors in the drafting of legislative proposals and, as the head of the executive, on the enactment of regulations or secondary legislation (Casal, 2010). The constitutional system determines how and by whom legislations and regulations are drafted and where the legislation that is enacted.

1.2 Administrative Organization

Another factor to consider is the political division of the state. Some of the countries analyzed, for instance the Dominican Republic, opted to develop as unitary states, which means that the power of the state is concentrated in a central government (Prats, 2011, p.604). Others, such as Mexico and Brazil have federal states. A federal state is the union under a central government of self-governing states or provinces (Prats, 2011, p.588). These

[25] A *caudillo* is a Latin American military authoritarian leader or dictator.

constitutional and administrative divisions concern how both the legislative and the executive powers operate, and the reach of the legislations once they are enacted. Likewise, it concerns the powers, autonomy and independence of the agencies that enact regulations. The political-administrative decentralization has occupied a prominent position in the agendas of Latin American countries. This decentralization has not only been geographical and political, but also administrative, with some countries implementing administrative deconcentration with autonomous public agencies (the case of Colombia, Brazil and Mexico).

Normally, a lower level of centralization within a government allows for the creation of agencies independent from the executive branch (Gilardi, 2002), that, in principle, enact regulations not influenced by political parties, the president, or other state pressures.[26] In Latin American regulations are also enacted by the executive power, or by authorities and agencies linked to the executive power (Pardow Lorenzo, 2018). These are normally regulatory agencies that respond directly to the president. In most cases a true decentralization cannot be identified, since agencies of the public administration are directly or indirectly subject to the oversight of a ministry, which in turn depends directly on the President (Pavón, 2018). In this sense, an institutional characteristic that emerged in many regulatory agencies in the region was the significant concentration of responsibilities directly on the agency head, which responds to the presidential mentality (Jordana, 2011).

2. EVOLUTION OF REGULATORY CREATION AND POLICY ASSESSMENT IN LATIN AMERICAN COUNTRIES

Before those agencies were formed and began to be part of the decision-making process of the government, Latin American countries did not have a very active regulatory life. This Section explains how these countries began to increase their regulatory production and their progress towards their current state where most of them have a better regulation agenda.

2.1 From the Owner State to the Regulatory State

In the period comprised between 1933 and 1980, most Latin American countries chose Import Substitution Industrialization (ISI)[27] as their principal method to achieve economic

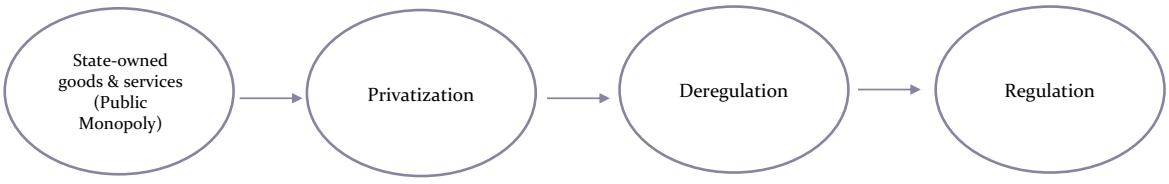
[26] This topic is extended in Chapter 4 of this thesis.
[27] ISI is an economic model based on the production of goods domestically to compete with imports or compensate for the lack thereof.

growth and socio-economic modernization (Franko, 2007). The wearing out of this model[28] set up the base for future structural reforms on the continent that allowed for a change in its economic path.

The existence of dictatorships before that period meant for Latin American countries that the means of production of goods and services were in the hands of a few actors controlled or approved by the dictator. There were strong barriers in place forbidding the ownership of production means; or, in the best of cases, regulations were conveniently enacted when a new entrepreneur showed signs of economically overpowering the monopoly in turn. At the same time, between 1982 and 1990 more than 15 countries of the region transitioned from dictatorships to democracy; and, at the same time, they transitioned to a market economy (Béjar, 2004).

After the end of that period, the countries of the region started a series of structural reforms that responded to their generalized economic crisis. A high level of indebtedness prompted these countries to undertake transformations in the functioning of their markets, as well as economic reforms regarding regulatory production. The next two stages were deregulation and privatization. With these changes the provision of public services was transferred to the private sector through concessions, permits or external contracts, and regulatory agencies were created to provide the new oversight function of the administration. With privatization, the shift of management of services went from the state to private companies; with deregulation, the markets were open for competition and instead of competing against the system and the government, they competed in the market. It was the entrance to a market economy. The government had a new responsibility: to regulate and supervise the provision of services in a market context, having the public interest as a priority.

Figure 6. Evolution from owner to regulatory state



Source: Author's own depiction.

[28] It was both unsustainable over time and produced high economic and social costs (See Franko, 2007).

For Latin American countries opening the market was purely motivated by an economic reason: the growing external debt and scarcity of investments. Therefore, it mainly meant opening the market to attract foreign investors (Gorstenko, 2012). Both of those economic measures, privatization and deregulation, required an improvement of the regulatory and institutional framework. However, that process was not standardized neither between countries nor economic areas (Levi-Faur & Jordana, 2006, p.346). In some cases, there was improvement on the reform of the financial market, in most more attention was paid to tax reforms and privatizations at different rates (Levi-Faur & Jordana, 2005).

Nevertheless, the transfer of goods and services to the private market required at the same time the strengthening of the ability to regulate and oversee the market, and to control the privatized public services. There was still a risk of those state monopolies transforming into private monopolies. As a result, it was a priority for governments to duly regulate the newly created and privatized markets (Manzetti, 2000).

From the 1980's to the late 1990's, Latin American countries introduced a number of regulatory reforms to address the problems of the debt crisis and hyperinflation with the liberalization of the national economies and integrating the Latin American region's economy into the world economy (Armijo & Faucher, 2002; Correa-Cabrera, 2012; Edwards, 1996; Levi-Faur & Jordana, 2003; Mariscal, 2004). These regulatory reforms resulted mainly in the enactment of new regulations aimed at the newly liberalized sectors, deregulation, the creation of regulatory agencies, and independent agencies, with different degree of autonomy across agencies, sectors and countries (Levi-Faur & Jordana, 2003). In the early 2000s, however, other obstacles hindered the economic performance of Latin American countries which was evidenced by the overall low scores in the indicators of their institutional development, public sector performance, goods market efficiency, labour market efficiency, and financial market development (see World Economic Forum 2010, 2011, 2014).

Even when there had been changes at that point, namely the creation of new regulations and regulatory agencies, there was a valid concern in the region pointing out that there was an opportunity to improve the regulatory production.

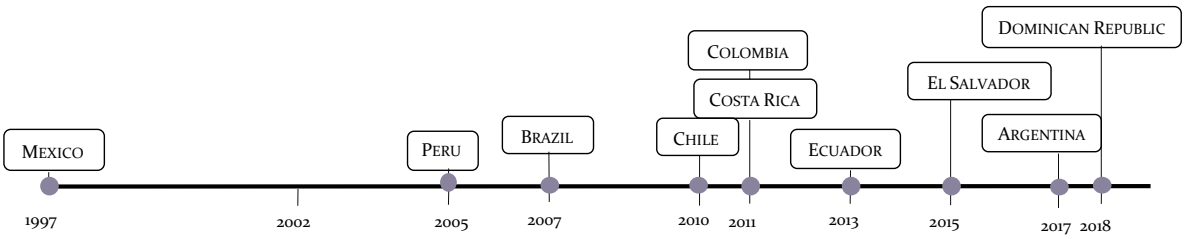
2.2. The Road to the Better Regulation agenda in Latin America

The ranking on the indicators of economic performance of Latin American countries were attributed to regulatory obstacles that persisted and that were to be addressed by each

country, including the existence of a fragmented policy process, lack of attention to regulatory quality, the heterogeneity of institutional and organizational regulatory models adopted in different sectors of the economy, and the complexity of their regulatory instruments (Peci & Sobral, 2011; Santos, 2009). Maybe motivated by that, by an actual concern for regulatory efficiency or by advice of and influence of third parties,[29] these countries have been moving from the deregulation discourse to the implementation of a better regulation policy.

In the last decade, the number of Latin American countries that have adopted or announced the adoption of a regulatory evaluation tool as a part of their better regulation policy has risen (See Figure 7). The Latin American countries that have adopted and implemented a better regulation agenda or assessment policies are Mexico, Costa Rica, El Salvador, Chile, Perú, Ecuador, Brazil, Colombia, Argentina and Dominican Republic.

Figure 7. Timeline of the introduction of the first Better Regulation legal instrument by Latin American countries.

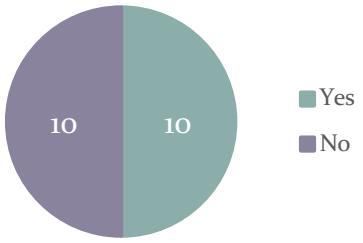


Source: Author's own depiction.

Currently, not all Latin American countries have introduced policy assessment structures into their legal system, while others are ahead (See Figure 8). This is not to be considered as a problem for this research, but on the contrary it already provides information on how the movement is prominent in the region.

[29] See Chapter 1. Section 4: Rationale of Latin American countries, of this Thesis for the discussion on this topic.

Figure 8. Number of Latin American countries that have policy assessment agendas



Source: Author's own depiction

Considering the important number of countries in the region that have adopted a better regulation agenda, here is a description of the path pursued by most of those countries towards including the use of regulatory evaluation tools as part of their regulatory-making process. This will provide an overview on how the region has acted in order to later examine in detail what these steps have entailed in practical terms; likewise, what has influenced this decision.

Mexico

When radical reforms, such as the introduction of a better regulation agenda, are to be implemented, countries normally evaluate whether to implement a deep, wide, and fast reform, known as big bang or shock therapy, or whether to do it gradually (Popov, 2007). Both options have pros and cons. This institutionalization of better regulation as a state policy in Mexico was introduced through a modification of the Federal Law of Administrative Procedure and as a big bang, because it needed to be wide and deep, especially in the federal public administration. Another factor that added to the choice of the big bang approach was the imminent change of government that was approaching, and the fear that what had been accomplished to that point might be lost with a new administration if there was no legal obligation to continue it (Carballo Pérez, 2012).

Mexico was the first country in Latin America to direct its regulatory governance agenda to a better regulation policy. It adopted the recommendations put forward by the OECD (1995) in its Recommendation of the Council on Improving the Quality of Government Regulation, which advised countries to establish institutional mechanisms and institutional balances to improve regulations by adopting a Better Regulation policy. The country worked on the construction of a sustainable institutional frame that included: (i) filters for new regulations to positively impact society; and (ii) programs to periodically review and improve the stock of regulations (Carballo Pérez, 2012, p. 26).

During the deregulation phase in Mexico, selected governments agencies[30] were requested to present all formalities necessary to open a business together with a RIA, that included a legal and economic justification, an impact analysis, and the human and budgetary resources necessary for its enforcement, and that was inspired by and followed the checklist proposed by the OECD in its 1995 recommendations. The Unit for Economic Deregulation (UDE, for its Spanish acronym) was in charge of reviewing all of these processes, and after 5 years of receiving and analyzing, it managed to either eliminate or simplify 50% of the administrative processes submitted (Jacobs & Astrakhan, 2006). This was the first attempt by Mexico at simplifying its regulatory burden, and at the same time the first time in the region that this tool was used.

Then in 1996, the Federal Law of Administrative Procedure established as a recommendation for administrative agencies to subject their new regulations to a RIA checklist. Since it was not mandatory, the impact of this suggestion was minimum and had limited effectiveness (Carballo Pérez, 2012). The challenge was thus to establish a generalized mandatory impact assessment system for regulations. This would mean a structural change and a change in the vision and culture of the administration, because it involved transparency on the production of regulations, performing public consultation during the drafting and enforcement of regulations, evaluating, and being evaluated.

The amendment to the Federal Law of Administrative Procedure of 2000, not only made regulatory impact assessment mandatory for new secondary regulation, but also created the Federal Commission for Better Regulation (COFEMER). In 2010, COFEMER created new processes for evaluating draft regulations, based on the level of impact that potential regulations might have. Together with this there was widespread training that promoted a change on attitudes towards the agency, and that strengthened the technical capacities of its personnel. At that time, Mexico performed a second review of their stock of regulation, but in this case to reduce federal regulatory burdens by using the Standard Cost Model (SCM)[31]. All of these innovations and first steps positioned Mexico as a pioneer in Latin America and as a case-model in the implementation and use of RIA world-wide (OECD, 2015).

[30] Ministry of Commerce and Industry, Ministry of Foreign Affairs, Ministry of Health, Ministry of Labor and Security, Ministry of Tourism, Ministry of Environment and Ministry of Education and Agriculture.
[31] See an in-depth explanation of the SCM in Chapter 2.4.4 of this Thesis.

Peru

After Mexico was well set in the first wave of their Better Regulation agenda, other countries in the region began taking their first steps (See Figure 7). For instance, in 2005 Peru developed its first policy that was aimed at avoiding the creation burdensome regulations, simplifying administrative procedures and standardizing these processes. This has been the focus and scope of Peru's policy assessment arrangement. Later, Peru introduced the assessment of the quality of regulations (different from regulatory impact assessment), also with the scope limited to those regulations that create administrative procedures. More recently, in 2018 Peru established the need to use RIA for the assessment of regulations in order to improve the quality of regulations, but the country has not yet made this part of their regulatory-making process.

It is important to highlight that the OECD (2016, p.3) recommended that Peru "*should introduce a system of regulatory impact assessment for draft regulations and regulations that are subject to modifications, as part of its administrative procedures*". Later, in 2019, it monitored the adoption of these recommendations and provided others to further the adoption of these arrangements (OECD, 2019b).

Brazil

Brazil, after its privatization stage and the creation of new regulatory agencies, created in 2007 the Programme for the Strengthening of the Institutional Capacity for Regulatory Management (PRO-REG) for the evaluation of regulatory processes (Cunha & Rodrigo, 2012). In 2008, the OECD recommended the adoption of RIA to improve the regulatory system (OECD, 2008), but the attempts to implement it have been dispersed through the federal executive branch.

Currently, Brazil is attempting to restart its policy assessment programs, by transferring the oversight and coordination functions to the Ministry of Economy, and enacting a set of new regulations that include mandatory RIA with a scope limited to secondary regulations enacted by the federal public administration. Likewise, Brazil has introduced the *ex post* assessment of existing regulations that were not assessed previous to their enactment.

Chile

Chile has the oldest history of regulatory agencies and was the only country in the Latin American region to have regulatory agencies for the financial sector as early as 1920. By the 1990s, the Chilean regulatory structure was underway and suffered little change during the

process of deregulation and privatization that occurred through the continent, maintaining highly centralized administrative agencies. In 2010, Chile became a member of the OECD, and in the same year adopted two of the regulatory evaluation tools that are currently in force, but also scattered. It implemented through law an *ex ante* impact evaluation for new secondary regulations that might have an impact on small businesses, and at the same time created a process of *ex post* evaluation for primary legislation. The Chilean government has however made public commitments to adopt the Better Regulation policy recommended by the OECD (Gobierno de Chile, 2016). By mid-2019 was set to introduce several reforms that included the adoption of RIA for legislations initiated in the executive power and for secondary regulations enacted by the president. It was also planned to include different types of RIAs depending on the expected impact of the regulation.

Colombia

In 2011, Colombia softly introduced burden reduction and administrative simplification in its policy making process with a program for rationalizing regulations and businesses procedures. Nevertheless, it was not until 2014 that the National Development Plan presented more concretely the use of policy assessment tools and the introduction of a policy that attempted to make this an integral part of the regulatory-making process of the executive power. Later in 2017, Colombia adopted impact assessment as part of their regulatory-making process and the scope of the assessment is limited to secondary regulations that create or modify administrative procedures.

In addition, Colombia has the National Planning Department, an oversight and coordination body, that coordinates how regulators assess regulations, the use of the assessment tools and provides the corresponding guidance. According to this body's website "*in the context of Colombia's accession to the OECD, the government has prioritized the characteristics for current regulations and create clear policies for the improvement of regulations*" (DNP, 2019). This hints at the influence of the organization on the decision of the country to actively adopt and implement these arrangements.

Costa Rica

In 2011, as a first step Costa Rica established a National Strategy for Simplification of Processes and Direct Improvement. It set a mandatory CBA (and later RIA) limiting the scope to new secondary regulations that establishes new administrative procedures. More recently, since 2016 Costa Rica makes these RIAs available for public consultation (Law 8220, 2016).

Ecuador

Ecuador started in 2014 with a coordinated approach to better regulation as part of a state policy. Among the reforms introduced in the country in the last decade, the most important one has been the National Plan of Buen Vivir 2013-2017, which orients policy to the implementation of a new development model and allows the establishment of strategies, projects and programs that are results oriented. This National Plan established and set out six strategic guidelines, including promoting regulatory improvement. The program included the introduction of a new model for regulatory planning and design based on impact analysis.

El Salvador

In December 2015, El Salvador created by presidential decree the Organism for Better Regulation (OMR) a directorate attached to the central government that has as main function the creation of a program for administrative simplification and to establish the guidelines for the better regulation agenda. This was followed by a very ambitious Better Regulation Law in 2019 which, among other things, established mandatory *ex ante* impact assessment for all new regulations or amended regulations enacted by agencies of the executive power and mandatory *ex post* evaluation for regulations that are older than five years. This law is very similar to that enacted by Mexico, which attest to the collaboration within the region in this area.

Argentina

Argentina did not have instruments for policy assessment until recently. From the region, it is one of the most recent countries to join this trend. First, it went through a process similar to the Mexican guillotine of assessing part of its stock of regulations and eliminating those that were obsolete. In addition, since 2017 Argentina has started introducing *ex ante* assessment for the development of secondary regulations; and adopting measures for reducing regulatory burden.

The OECD (2019) published a country study of Argentina where it recommended that the country develops a regulatory policy that includes the use of regulatory evaluation tools for the *ex ante* assessment of regulations; as well as promoting public consultation for the development of regulations. As a result of this study, some regulators in Argentina have regulations under public consultation that seek to establish the procedures for impact assessment and public consultation.

Dominican Republic

The Dominican Republic went through substantial changes in their sectoral regulations from 1998 until recently. Nevertheless, policy assessment is not an intrinsic part of the policy development process of the country. In 2018, the Dominican Republic enacted two presidential decrees ordering the assessment of existing regulations to determine their economic impact, as a first step of a larger agenda for better regulation. The assessment of the first batch of regulations was done with the assistance of the Mexican government, which points to another instance of regional cooperation in the subject.

The foregoing provides an overview of how Latin American countries for the last decades have been slowly, and recently more steadily, entering the better regulation trend, at different speeds. Likewise, it shows that countries have collaborated and shared knowledge, specially Mexico with the rest of the region; and that international organization like the OECD have been at the forefront of the promotion of the adoption and implementation of these arrangements in several of these Latin American countries.

3. POLICY ASSESSMENT STRUCTURES: SIMILARITIES & DIFFERENCES

After understanding the constitutional and legal environment of Latin American countries, as well as how they arrived at adopting policy assessment into their decision-making process, this Section provides a comparative account of the different structures chosen by these countries. The data contained and analyzed in this Section is the result of a thorough research and analysis of the legal instruments enacted by Latin American countries regarding policy assessment done solely by the author.[32]

First, there is an analysis of the different goals that Latin American countries have revealed for adopting their policy assessment structures, and whether there are common goals across countries. Then, there is a discussion of the components of the policy assessment structures adopted by the Latin American countries as well as their similarities and differences. These composing elements are the ones previously analyzed in Chapter 2 of this Thesis concerning the scope and time of the assessment, the tools used for evaluating regulations, and the governance of the coordination and oversight of the agencies involved. This provides an overview of the similarities and differences across countries, considering their particular goals and chosen structure; and it is intended to answer the first research

[32] The information collected and analyzed has as a cut-off date June 1st, 2019. Therefore, new regulations enacted or amended after that date are not included.

question set for this Chapter: Which are the policy assessment goals and structures set by Latin American countries for their Better Regulation agenda?

Because this is a relatively new phenomenon to the region, the contribution of this Section though partly descriptive, remains relevant. It is useful not only for the purpose of the analysis performed but serves also as a base for future research. In each subsection, some countries are used as example and reference, explaining the incentives and costs that the choice entails, as analyzed in Chapter 2; and also provides a general overview of the trend in the region in the specific topic being analyzed.

3.1 POLICY EVALUATION GOALS OF LATIN AMERICAN COUNTRIES: WHICH ARE THE MOST COMMON GOALS?

This Section looks into the goals that some Latin American countries have put forward for adopting the Better Regulation agenda, in order to determine whether there are similarities in the goals adopted or a goal that stands out more than the others. This is done based on what is established in the laws or decrees by which each country adopted their policy evaluation instruments and on which they have set their current policy assessment agenda. The aim is to determine first which are the goals pursued by each country, as they declare them; and second, to determine whether there are common goals across these countries.

Table 8. Policy assessment Goals of Latin American countries

Country	Goals	Legal Instrument
Argentina	• Administrative simplification • Transparency • Regulatory coordination • Increased social welfare	Decree 891
Brazil	• Improve the quality of regulation and regulatory governance • Promote transparent and efficient institutions • Achieve coordination across regulatory agencies, promote standardized regulatory practices.	Decree no. 6062
Chile	• Limit the burdens that regulations impose on small businesses • Efficient • Simplify regulatory framework	Law 20416 Presidential Instructive 3/2019
Colombia	• Reduction of administrative burdens • Improve regulatory quality	National Development Plan 2018-2022

Costa Rica	• Promote transparency on the drafting and implementation of regulations and administrative procedures. • Reduce administrative burden	Law 8990, 2011
Dominican Republic	• Improve government efficiency and regulatory quality • Foster economic growth and social development • Promote competition • Coordination and accountability within government agencies	Decree 258-18 Decree 229-18
Ecuador	• Promote regulatory improvement and reform in the Ecuadorian public administration • Create institutions that use its normative power to maximize social welfare	Executive Decree 372
El Salvador	• Increase transparency and accountability in the process of creating regulations • Increase regulatory predictability, democratize the decision-making process • Facilitate interinstitutional coordination • Maximize social welfare by having more efficient and effective regulations • Reduce regulatory burden for businesses, to improve trade and commerce	Better Regulation Law 2019
Mexico	• Maximize social welfare • Provide legal certainty • Simplify the enactment of regulations • Transparency • Accountability • Efficient and effective regulations • Reduce barriers to international trade and competition • Improve business climate	General Law of Better Regulation 2020
Peru	• Reduction of administrative burdens and administrative simplification	Law 30506, 2016 Supreme Decree Nº 061-2019-PCM

Source: Author's own depiction

From Table 8 it is possible to gather that all of the considered countries have as goals either the reduction of administrative procedures, transparency or accountability. The third most common goal is the enactment of efficient regulations, and to improve regulatory quality through the use of better regulation instruments. The goals pursued, though various, are contained within a limited number of more general goals and therefore are very similar to those discussed in the previous chapters. There are no new goals, only different approaches and different orders in priority. In principle, this means that the instruments and structures

adopted to achieve those goals are expected to be similar to those pointed out in Chapter 2.

The following subsections look into the elements chosen by the Latin American countries for their regulatory evaluation structure. Moreover, it will be assessed whether the chosen structure contributes towards the goals that these countries have set, based on the framework previously discussed in Chapter 2 of this Thesis.

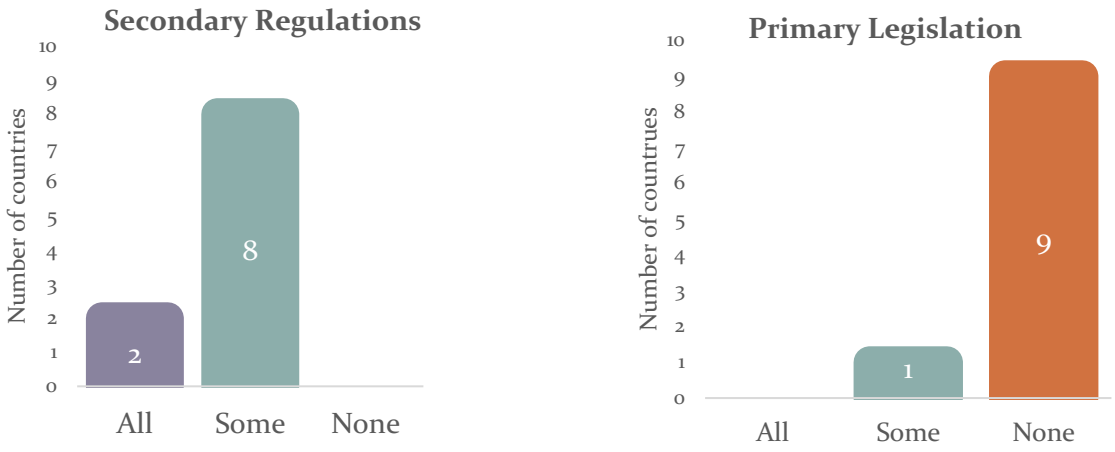
3.2 SCOPE FOR ASSESSMENT IN LATIN AMERICAN COUNTRIES: LIMITATIONS AND DIFFERENCES

The scope of the regulatory policy refers to the group of regulations that are to be assessed. The scope can include primary legislation, secondary regulations or both. Within that scope it is also possible to have only a subgroup of regulations, based on some of their key features, such as the economic impact they have or the group of stakeholders that the regulation might affect.[33] Most Latin American countries have limited the scope of their policy assessment mainly to secondary regulations (See Figure 9). Within this scope, countries can be divided into two groups: i) countries that assess all of their secondary regulations; and ii) countries that assess only some of their secondary regulations.

Only two Latin American countries, Mexico and El Salvador, assess (or require the assessment of) all their secondary regulations. In both countries the scope includes all secondary regulations that are enacted by agencies of the executive branch. Additionally, according to a law recently enacted, El Salvador will extend the scope to regulations enacted by the legislative branch and the judicial branch (Legislative Decree 202, 2019). The scope for assessment chosen by these countries is aligned with regulatory goals such as efficiency and accountability. Since regulations do not operate in a vacuum, but by interacting with each other, assessing all regulations of the same level contributes to the efficiency of each one as it less likely that the effects of a seemingly efficient regulation will be negatively affected by a regulation that was never assessed. Regarding the accountability goal, it is held that a known assessment of the regulations enacted by an agency might create the incentives towards producing regulations that are backed by more than just an arbitrary choice of the regulator, and that follows a pre-established procedure. Even more, if the effects of the regulations are wide-spread and affect a large audience, the accountability forum is larger, and the probability of a claim is likely to increase.

[33] See Chapter 2.2 of this thesis.

Figure 9. Do Latin American countries assess all, some or none of their secondary regulations and primary legislations?



Source: Author's own depiction

Conversely, the rest of Latin American countries only assess some of their secondary regulation. Within secondary legislation or regulations assessed, the scope is limited to those that contain administrative procedures, create administrative burdens or affect businesses. In that sense, in Costa Rica the scope includes draft secondary regulations that create new administrative procedures including authorizations, licenses and permits as well as the amendment of existing regulations, when the amendment contains procedures to be followed by citizens (individuals or business). This evaluation is mandatory for regulations enacted by the public administration, including central administration, decentralized administration, semi-autonomous agencies, municipalities, non-state public entities, entities with universal autonomy and public companies (Asamblea Legislativa de la República de Costa Rica, 2012). However, since the evaluation is limited to secondary regulations that create new burdens or procedures, it therefore excludes primary legislation and other regulations that do not create new procedures for the citizens to comply with.

Likewise, in the first stage of its better regulation agenda, the Dominican Republic limits the scope to regulations enacted by a selected number of agencies that create administrative procedures or processes (Decree 258-18, 2018). Peru has adopted regulatory *ex ante* evaluation for secondary regulation with multi-sectorial impact and for initiatives of primary regulations. Ecuador has limited the scope to regulations enacted by entities of the central public administration or that depend on the Executive Branch. Since this process was established by a presidential decree, it is not binding on other branches of the state or on independent agencies. However, the other powers of the government are also encouraged to assess their regulations prior to their enactments (Executive Decree 149,

2013). Within this last group that only assesses some secondary legislation, Chile is the one with the narrower scope.

In the case of Chile, its regulatory policy only concerns secondary legislation enacted by ministries or agencies of the executive branch that might have an effect on small businesses. According to the Economy, Promotion and Tourism of Chile, the motivation to include this evaluation on this law, was to adjust the regulatory burdens for small businesses for it to be consistent with their compliance capacity and for the regulations that apply to small businesses to be cost-effective. Such a limited scope has likewise limited reach towards efficiency, accountability or other substantial economic or regulatory goals.

This second group of countries might not cater to efficiency as a regulatory goal, because of the reasons that the first group did. The interaction between efficient and possibly inefficient regulations might mitigate the effects of the former. However, this scope of assessment does refer to a specific subgroup of regulations, which is secondary regulations that affect businesses or create administrative burdens. In that sense, this caters to that specific goal of attracting investors and improving business climate. It might also contribute towards transparency, accountability and the reduction of corruption, since it is known that the existence of red tape contributes to higher levels of corruption (Bozeman, 2000; Guriev, 2004; Mauro, 1995).

Exceptionally, two countries include in their scope primary legislation. Peru, that assessed the stock of primary legislations and eliminated those that were obsolete; and El Salvador that has enacted a new law that extends the scope of the impact assessment to primary laws and judicial regulations, but this has been postponed until the year 2021.

3.3 POLICY EVALUATION CYCLE IN LATIN AMERICAN COUNTRIES

This Section analyzes at which stages the regulations are evaluated.[34] Not all countries assess their regulations completing the cycle, either because they do not consider it necessary, because they are just beginning their policy assessment journey, or any other number of reasons. However, the moment at which regulations are assessed and their systematic assessment contributes to the timely identification of problems with the performance of regulations, allows for input from stakeholders, and serves as oversight of the regulatory work, among other features.

[34] See Chapter 2. Section 3: Policy Evaluation Cycle: Discussion of the role of the stages

3.3.1 Public Consultation

Public consultation is the dialogue between the public and the regulators regarding a regulatory problem or a regulatory proposal in which the public and the stakeholders provide their opinions and feedback on the document.[35] All of the countries analyzed undertake public consultation for their regulations; however, public consultation is not part of the policy assessment process in all cases. In some instances, it is part of the legal assessment, which has a narrower scope. In that sense, this refers here only to those countries that have a public consultation process within their policy assessment process.

Latin American countries can be divided into two groups: i) those countries that undertake public consultation when a new regulation is going to be enacted or an existing one will be amended; ii) those countries that open public consultation to receive feedback on the stock of regulations. Some countries belong to both groups.

In the first group, for instance, there are Mexico and El Salvador. Mexico subjects all of its secondary regulations to public consultation before their enactment. For this reason, the draft of the regulation, as well as the report of the impact assessment performed are made available online to the public for their feedback. The public is given a period of at least 20 days to provide its feedback, and this feedback is to be taken into account by the regulators when drafting the final version of the regulation. As part of the process, the report of the impact assessment must include the results of the public consultation undertaken, which should explain how the regulator incorporated or rejected the received feedback. Because these processes are overseen by the ARBs, the regulatory oversight bodies, if the public consultation process is not undertaken, the impact assessment is not approved, and the regulator is asked to follow the administrative procedure. Likewise, if the ARB considers that the feedback provided by the public was not included or taken into account by the regulator, it can also require the regulator to do so. However, the regulation is not clear on which type of comments have to be included, whether only substantial comments or all comments.

El Salvador establishes in its new law for better regulation that regulators should have a public consultation period and then provide a summary of the consultations undertaken for the regulatory project (Legislative Decree 202, 2019). As in the case of Mexico, the report of the impact assessment must include the opinion of the stakeholders and the general public, as well as the considerations of the regulator regarding the received

[35] See Chapter 2. Section 3.1: Public consultation

feedback. The law delegates to the oversight body, which is the Organism for Better Regulation (OBR), the review of this report, and the authority to determine whether it is acceptable or not, and to recommend changes to it. The law also delegates to the OBR the task of establishing the mechanisms on which the public consultations are to be undertaken in a way that allows the receipt of the feedback from the public and the response of the regulator to them. Since this is a recent delegation, the OBR is still to set the guidelines.

In countries like Ecuador, Colombia, and the Dominican Republic, public consultation that relates to regulatory assessement is intended to identify regulations that create administrative burdens, and which the public considers should be simplified. Both countries assess whether the public considers a regulation too complicated using online surveys. In Ecuador, the public gives a score to the regulation and proposes a solution to simplify the administrative process. In the Dominican Republic, the public explains why the regulation is burdensome. They are thus using the public consultation as a tool for the democratization of the decision-making process, limiting it so far to the simplification of administrative burdens.

3.3.2 Ex Ante Assessment

The *ex ante* assessment is the evaluation of the regulation performed before its enactment.[36] Countries can be divided into two groups. The first group is composed of countries that perform *ex ante* assessment, and includes countries like Mexico, Costa Rica, Chile, El Salvador; and a second group includes countries that do not have *ex ante* assessment, such as the Dominican Republic.

According to Mexican law, all dependencies and decentralized agencies of the public administration are required to perform a regulatory impact assessment on regulatory proposals. Mexico has the most complex *ex ante* assessment process of all Latin American countries, as it has not only implemented known evaluation tools, but has also developed its own. This will be examined in Section 3.4 of this Chapter. Chile also undertakes *ex ante* assessment, for new or amended regulations that might have an impact on small businesses; and Peru undertakes an *ex ante* assessment process by which regulations must be evaluated to determine whether it complies with the principle of legality, necessity, effectiveness and proportionality looking to reduce administrative procedures that are unnecessary, unjustified, disproportionate or redundant.

[36] See Chapter 2. Section 3.2: *Ex ante* assessment

The only country in the second group is the Dominican Republic that does not evaluate its regulations *ex ante*.

3.3.3 Drafting and Implementation, Monitoring, and Ex post Assessment

The other stages of the PEC are drafting and implementation, monitoring and *ex post* assessment. Drafting and implementation is the stage during which the regulation is drafted by the regulator reflecting regulatory choices made following the results of the public consultation and *ex ante* assessment. The text of the regulation is also expected to explain how it should be implemented.[37]

Only Mexico and El Salvador have so far established drafting and implementation as a part of the policy evaluation cycle. It was established for regulations that were assessed prior to their enactment and contain references on how and when they ought to be assessed in the future. Both countries specifically established in their laws the obligation to analyze the mechanisms for implementations of the regulations to be enacted. The rest of the countries do not make a specific reference to this stage in their laws. The drawback of not having this stage is that there could be a gap between what the regulator intended and the actual content and effect of the regulation. For this reason, the implemented regulation might fail to produce the desired effects.

The next stage, monitoring, refers to checking whether the indicators set for the success of the regulation are being met. Likewise, only Mexico and El Salvador mention monitoring in their laws. In this sense, they require the identification of mechanisms and indicators that will be used to assess whether the objectives of the regulatory proposals are being attained. The rest of the countries do not expressly establish an obligation to monitor legislations, which does not necessarily mean that they do not pursue it.

Finally, all countries assess their regulations *ex post*, even if they do so for different purposes and in different manners. Also, in this case, countries can be divided into two groups: i) countries that assess individual regulations *ex post* as a last stage of the PEC; ii) countries that assess the stock of existing regulations. There is, however, some overlap between the groups as some countries, like Mexico, carry out both assessments.

Mexico and El Salvador are in the first group. In Mexico, it is mandatory for regulations that generate compliance costs to be subject to an *ex post* impact assessment five years after their enactment. Likewise, El Salvador has established a mandatory *ex post* assessment

[37] See Chapter 2. Section 3.3: Drafting and implementation.

for regulations no later than 10 years after the regulation has been enacted, to determine whether the regulation still corresponds to the economic and social needs that prompted it, and whether it should be kept, amend or revoked (Legislative Decree, 202).

In the second group, regulations are assessed after they become part of the legal system. This is the case for most Latin American countries. In fact, the first process of policy assessment in Latin America was the *ex post* evaluation undertaken by Mexico of its existing regulations in 1995. In 2011, a second wave of stock evaluation was performed in order to reduce administrative burdens and reallocate to the country's productivity those economic resources that were allocated to the unnecessary enforcement of regulations.

Likewise, since 2009, Peru has been carrying out a process of normative cleansing in order to eliminate from its stock of regulations all primary legislations that are not necessary, that are obsolete or that have been declared unconstitutional by the Peruvian Constitutional Court. Since then, more than ten thousand primary legislations have been removed from the Peruvian legal system.[38] In 2011, Colombia enacted the Decree-Law No. 19 which explained that its objective was to eliminate or modify unnecessary existing processes and regulations of the public administration, in order to facilitate the relationships between businesses, individuals and the authorities and contribute to efficiency and efficacy. Before enacting the Decree, there was a public consultation undertaken during 2011 and instead of having a proposal on how these processes and regulations were to be evaluated and eliminated, the Decree directly eliminated and modified them accordingly, which resulted in a Decree with 237 articles. Likewise, Argentina eliminated more than 100 regulations that affected SMEs, public administration and other areas, since they were considered obsolete.

3.3.4 PEC in Action?

This Section has presented an overview of the different stages at which Latin American countries evaluate their regulations, in order to determine whether they have implemented a PEC or used specific stages during their policy assessment.

In this sense, Mexico has an established practice that includes all stages of the PEC, with explicit guidance on the assessment of regulations at each stage. Another country with a similar system is El Salvador, since it has a law that contemplates every stage of the PEC.

[38] This has been done through Law No. 29477, Law No. 29563 and Law No. 29629 enacted by the Congress of Perú.

This law is, however, new and does not have the regulations or guidelines that can assist in understanding how the processes should be carried out by the administration.

The rest of the countries in Latin American, perform either *ex ante* or *ex post* assessment when it comes to single regulations. In other words, single regulations are assessed either *ex ante* or *ex post*, but not at both stages. Additionally, it should be noted that *ex post* evaluation is mainly done when the countries are evaluating their stock of regulations and are interested in eliminating regulations that create high administrative burdens.

In that sense, if regulations are assessed only *ex post*, the effectiveness of the regulatory evaluation to act as an accountability tool might be reduced. However, having *ex post* assessment is in line with the goal of administrative simplification. When regulations are assessed only *ex ante*, they serve the efficiency goal since the regulations enacted are, in principle, designed to address a particular problem. Likewise, it might serve the accountability goal as the process of assessing regulations can be a tool to preemptively monitoring the regulatory work of the regulatory agencies.

3.4 REGULATORY EVALUATION TOOLS USED BY LATIN AMERICAN COUNTRIES

As explained before, a vital part of any policy assessment structure is the evaluation tools chosen to integrate it, which should be closely linked to the regulatory goals stated by each country. This Section examines the evaluation tools that Latin American countries have incorporated into their regulatory evaluation structure.

3.4.1 The recently growing adoption of RIA Regulatory Impact Assessment and CBA

Since Regulatory Impact Assessment it a set of steps, the regulatory problem and the eventual regulatory solution are assessed thoroughly.[39] Some Latin American countries such as Mexico, El Salvador and Peru have chosen to undertake their *ex ante* assessment using RIA which include, among other steps, a CBA. Others, such as Costa Rica and Chile use only CBA; and a third group that does not use this evaluation tool at all, with countries such as the Dominican Republic. One relevant factor to consider when it comes to impact assessment and developing countries, is whether or not distributional effects of regulations are considered. Since the efficiency of a regulation is determined in part by those who bear the costs and who receive the benefits, and by whether the impact affects in the same

[39] See Chapter 2. Section 4.1: Regulatory Impact Assessment

degree (obviously in opposite directions) both winners and losers. However, not all countries that use IA and CBA consider distributional effects.

In the case of Mexico, CONAMER created Impact Calculator that measured the impact of a regulation, which was added to the impact assessment to differentiate regulations by their expected level of impact (moderate or high). This Impact Calculator presents the agency with questions regarding the following aspects of the proposal: (i) Economic process related to the regulation; (ii) Number of consumers or users of the product or services: (iii) Frequency at which the product or service is consumed; (iv) Number of economic units subject to regulation; (v) Frequency with which the regulated subjects must comply (interact) with the regulation; (vi) Economic activity that the regulation affects; (vii) Type of costs that the regulation entails; (viii) Type of legal rule of the proposal; (ix) Impact on competition and free trade; and (x) Potential impact on some regulated sectors. Furthermore, regulators are requested to analyze whether the proposed regulation entails risks for animals, humans or plant health, humans safety, or the environment (COFEMER, 2010).

Mexican guidelines establish that the groups that will be affected by the regulation need to be identified. Moreover, the CBA '*must consider the impact on stakeholders or agents indirectly involved in the regulation. In particular, indirect effects are identified by a distributional analysis, which aims to allocate all costs and benefits generated by the regulatory action to each agent or economic sector indirectly affected*.' (COFEMER, 2014, p. 62). Additionally, the guidelines recognize that it is not always possible to monetize the benefits of a regulation. In this case, they recommend using any other available measure unit (i.e. hours, incidence rate of disease, death rate, etc.). Likewise, the guidelines point out that whenever benefits are hard to quantify with precision, it might be sufficient to provide an ordinal ranking of the alternatives. In any case, these guidelines do not give a primary role to the evaluation of non-monetary costs or benefits and ultimately suggest that '*qualitative information that backs up the affirmation that the benefits are higher than the cost can be included*.' (COFEMER, 2014, p. 11) Finally, no guidance is offered on how the expected rate of compliance should be calculated.

El Salvador requires all regulations to undergo RIA that uses CBA, and to select the most efficient regulation. Moreover, there is no express mention regarding the distributional effects of potential or existing regulations.

In the second group, there are countries like Costa Rica and Chile. In the case of Chile, the Ministry of Economy, Promotion and Tourism created a form for the evaluation of the impact that a new secondary regulation might have for small businesses. The form

evaluates the territorial impact of the norm (national or regional), the moment during the lifecycle of the business when the regulation is enforced (creation, operation or closing), the activities and the number of businesses that the new regulation will affect. Likewise, it has questions regarding the administrative processes created and or/modified by the new regulation, as well as its administrative costs (fees, permits, authorizations, investment in new machinery, training, new personnel, etc.). Last, it asks whether the new regulation will have an impact on the market of the final goods or services (prohibition to sell or produce a product, new quality standards), on the market of providers of goods and services or impact on the labor market (change in the number of workers, improvement to the working conditions).

Costa Rica has chosen CBA for the *ex ante* evaluation of regulations that create or modify existing procedures. According to the guidelines, the CBA of a regulation looks to assess the economic and administrative impact of the regulatory proposals with the purpose of ensuring that these proposals are efficient and that they meet the objective for which they were intended, without creating unnecessary measures or requirements (Ministry of Economy CR, 2014). The costs to be quantified are administrative costs like the salary of all the employees needed to enforce the regulation and their training, the equipment required, and so on. Moreover, the costs for individuals and businesses such as the costs of any new fee, new waiting periods, etc. are also considered. These are all quantifiable and monetizable costs, as are the benefits. Instead, the distributional costs of the regulations are not considered, and hence they aim at achieving Kaldor-Hicks efficiency. Moreover, in the form they focus on whether the regulation improves the protection of "*legitimate objectives*", which are the protection of human life or health, protection of the environment, protection of social or citizens' security, protection of animal life or health and protection of the vegetation. Even though these goals are listed, there is no mention of the criteria that should be followed to determine whether these objectives are being reached.

This brief overview shows that while all the countries considered attempt to achieve efficiency, only one considers distributional effects.

3.4.2 Standard Cost Model (SCM)

One of the most prominent goals pursued by Latin American countries is the reduction of administrative burdens, directed at increased transparency and accountability in administrative processes, at reducing costs for businesses and at attracting more investment. To achieve this goal some of the countries adopted the SCM, to measure the costs that an individual or a company, and the state must incur to comply with a regulation.

Instead, other countries adopted other tools to achieve this goal. This subsection analyzes the countries that use the SCM and in the next one those that are using other tools for administrative simplification.

In that regard, in 2010, Mexico adopted the SCM to measure the federal regulatory burden as a part of its better regulation agenda. The Mexican authorities consider that knowing in detail such elements gives the designers of the regulatory policy more chances of reducing red tape and simplifying administrative processes. In fact, SCM allows the regulator to identify the key components to make a regulatory reform more efficient and effective (COFEMER, 2012a). The Mexican regulatory oversight body, CONAMER, designed a methodology for the SCM to identify the common activities that must be undertaken to comply with a federal regulation, which are determined by the hours invested by type of activity and are monetized to the average cost per person per hour. The methodology developed by CONAMER considers the life cycle of businesses (opening, operation, closing), and the processes undertaken normally by citizens and companies. Likewise, the classification is made considering the existing processes that the administrative agencies and dependencies have previously registered in a nation-wide processes database called the Federal Registry for Processes and Services (RFTS for its acronym in Spanish).

The last step of the SCM process is the identification of the simplification measures. Once the areas where costs are relevant have been identified, a series of measures are proposed for the simplification of the process of compliance of the regulation at hand. This tool was used by the CONAMER to identify the administrative burden of all federal regulations. In this case CONAMER did not function just as an oversight body, but was in charge of performing the evaluations. After the administrative costs and burdens of existing regulations were identified, the tool is being used as both an *ex ante* and an *ex post* evaluation tool by the federal administration.

The Dominican Republic is the other country using the SCM. It began with taking stock of their regulations by ordering the evaluation of all the secondary regulations enacted by a selected number of administrative agencies using the SCM. These agencies needed to present a report of the regulations that created administrative procedures, assessing: (1) the time invested and processes undertaken to collect the documentation and requirements needed from the citizen to request the services (license, permit, etc.) from the administration; (2) time and procedure undertaken internally by the administration to grant or deny the request. This was assessed by the coordinating agency to determine the social cost of each regulation, and then used to provide to each regulatory agency recommendations to reduce their administrative burden (Decree 258-18, 2018).

3.4.3. Other Evaluation Tools for Administrative Simplification

Other countries have adopted other tools seeking the same goal of simplification of the burdens of regulations. Ecuador started by introducing a tool that it calls "Simplification of Processes", which has as its purpose to rationalize the processes that individuals undertake before the Public Administration; to improve their efficacy, pertinence and usability, to achieve celerity and functionality; obtain budgetary savings; and improve the relationship between the Public Administration and citizens. It is defined as a set of actions that allow for the analysis, identification, classification, drafting and implementation of proposals that improve the complete cycle of a process making it simple, efficient, agile, direct and timely for citizens, business, organizations and for the administration itself (Comité de Simplificación de Trámites, 2015).

The evaluation is performed for the reduction of the excessive number of administrative processes and each administrative entity of the central administration, or that depends on the central administration, is required to review their existing processes and simplify or eliminate those that are unnecessary, either because they are duplicated or because they impose inefficient burdens. This process started in 2014 and each year there is a national plan to identify the administrative processes of each administration and determine its inclusion in the plan, prioritization and the strategy for simplification led by the Commission for Simplification of Processes. To determine this, the Commission makes an inventory of the processes and sub-processes, alongside the norm that enables them, to later evaluate each process following the chosen parameters and determine the feasibility of implementing the tool. For the inventory of processes, the Commission obtains information from the GPR[40], the complaints posted through medias (social media, press, tv), complaints received in the agency, and the results of *Tramitón*[41].

For 2016, the criteria for the prioritization of processes to be simplified was focused on those for which their impact was widely perceived by the citizens. To determine this, a list of criteria was created and a value was assigned to each element, to which: 1. cost for the citizen (15%), 2. impact on productive activities (30%), 3. citizens' demand (20%), 4. number of complaints (20%); and 5. time for response (15%). The higher the score, the higher in the priority list for simplification. Additionally, to be included in the National

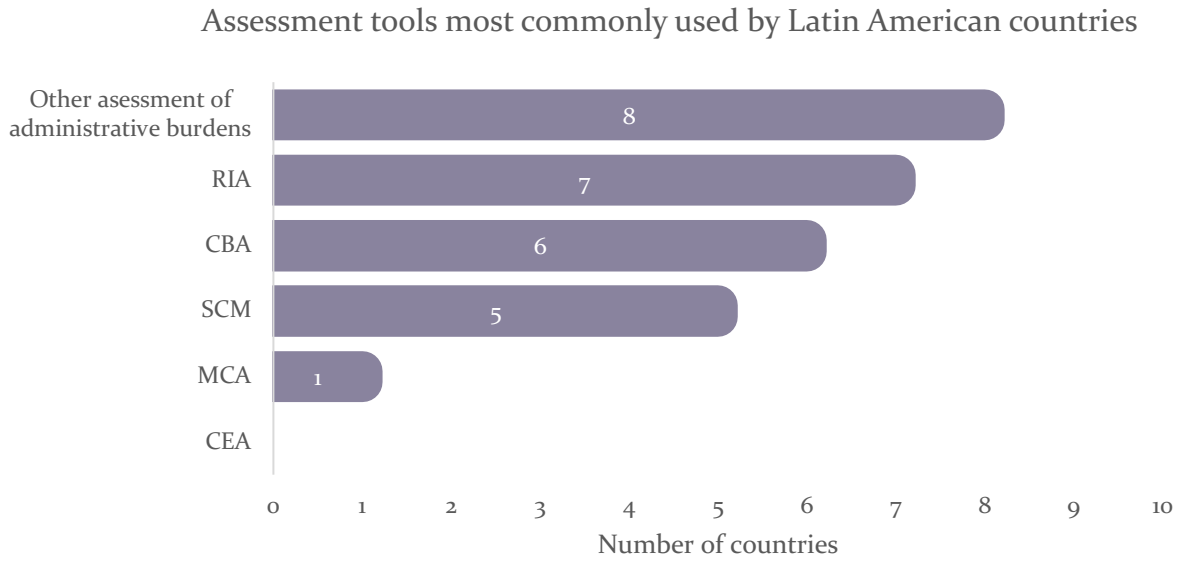
[40] GPR is a tool that guides the actions of the government and its institutions towards the fulfillment of national objectives and concrete results that improve the execution of the government budget through a Balanced Scored Card.
[41] "*Tramitón*" is an on-line project by the Commission of Processes Simplification on which citizens, public servants and businesses can point out processes that, in their opinion, should be simplified. With this public participation tool, the participant should not only provide information on the process that is problematic, but also must grant a qualification to it and propose a solution to simplify the process.

Plan for Simplification, the economic and technical feasibility of the proposal was also considered, following also a specific criterion.[42]After this information is provided to the administrations with processes to be simplified, each administration undertakes a process to either reduce or eliminate the burdensome procedures. In 2015 more than 400 processes were simplified throughout 50 entities for accumulated savings of more than 33 million US dollars (Secretaría Nacional de Planificación y Desarrollo, 2016).

3.4.3. Most Commonly Used Evaluation Tools

Considering the foregoing, the majority of Latin American countries are using evaluation tools, such as the SCM and other administrative simplification tools (See Figure 10), which are aimed in principle at reducing the administrative costs that regulations create, but also at increasing transparency in regulatory procedures, accountability and reduction of administrative corruption. Additional to that, only three countries are using impact assessment, CBA or other form of evaluation to determine the potential impact of a regulation. This is of relevance because the goals that were previously declared by these countries were not limited only to administrative simplification, and included efficient regulations, accountability, and maximization of social welfare.

Figure 10. Evaluation tools used by Latin American countries for policy assessment.



Source: Author's own depiction

[42] Each year the Commission for Simplification of Processes publishes the criteria and plan.

In that sense, it seems like goals and structures do not fully match. This could be due to an overstatement of the goals, to an under adoption of tools or just to an incompatibility between goals and structure.

3.5. REGULATORY GOVERNANCE CHOSEN BY LATIN AMERICAN COUNTRIES: AGENCIES, FUNCTIONS AND MANDATES

Once the scope, timing and tools for policy assessment have been analyzed and discussed, it remains to analyze the governance chosen by these countries for their better regulation agenda. The governance of the regulatory evaluation concerns the government actors that participate in the coordination, execution and oversight of the assessment.[43] Each of the arrangements that are possible for governing policy assessments come with its own costs and create different incentives. In that sense, who performs the assessment, and whether or not there is coordination among the agencies that assess or have oversight over the evaluation process may cooperate to whether the regulatory goal set for their policy assessment agenda by these Latin American countries are achieved.

This Section looks into the most common governance arrangements that these countries have chosen and analyzes the incentives they might create and their drawbacks to pursue the particular regulatory goal the country has set.

3.5.1 Where are the assessments performed?

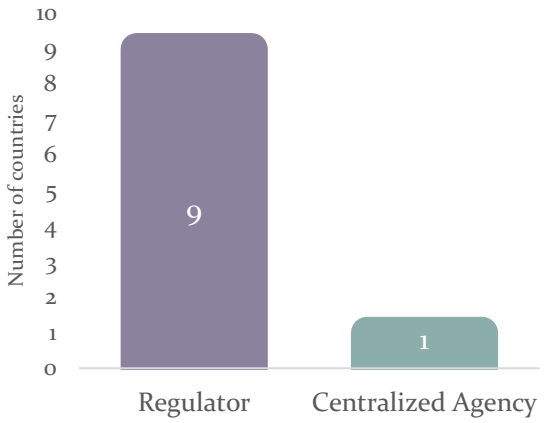
The assessment of the regulation can be performed either by the government body that created the regulation, an agency designated to this end, or a third party. Most Latin American countries delegate the assessment of the regulation to the regulatory agency that is proposing the regulation. The main advantage of this choice is that the regulatory agency will have relatively good information on the regulation and the context in which it is implemented. At the same time, however, the regulatory agency might have incentives to overstate the efficiency and the effectiveness of the regulation, in order to show that it is proposing and enacting good regulations. Instead, in just one country the assessment of regulations is performed by the agency that acts as a coordinator of the better regulation agenda (See Figure 11).

In the first group, each agency is required to undertake each stage of the policy evaluation cycle regarding the regulations that it will enact or amend. That is, undertake the public consultation, *ex ante* assessment, drafting, implementation, monitoring and *ex post*

[43] See Chapter 2. Section 5: Policy evaluation governance

evaluation. In Costa Rica within each public administration there should be one person appointed to act as Simplification Officer and in Ministries, the Vice-minister is the Simplification Officer (Law 8220, 2002), this is the person in charge of directing the evaluation of regulations. In Chile, the evaluation is performed directly by the administration that enacts or amends the regulation; and since there is no oversight body or coordinator, each agency performs the assessment following its own criteria.

Figure 11. Agency that performs the policy assessment in Latin American countries.



Source: Author's own depiction

In the second group, there are a few countries, such as Ecuador and Dominican Republic that took a centralized approach to public consultation and the collection of feedback regarding the administrative procedures that created unnecessary burden and had to be simplified. Additionally, in the Dominican Republic there is one assigned agency that undertakes the *ex post* evaluation to determine the social costs of each existing regulation. The agency then recommends to each regulatory agency how to reduce its regulatory burdens.

3.5.2 Coordination and oversight: Both or neither?

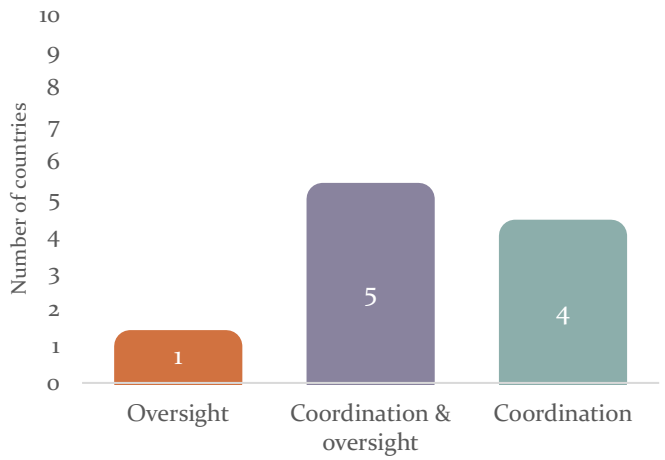
Having a whole of government approach policy requires that the government has the support and coordination within itself and throughout its agencies and the rest of the powers of the state regarding policy assessment. This is because even when a regulation is properly assessed, determining which are its expected costs and benefits, that regulation is not isolated from the legal system. The effects of the regulation might be different from what is previously foreseen for it, if other regulations, with which the first regulation interacts, are not considered. Therefore, it is advised, that the policy assessment goals and

system are coordinated so that all participants are following a similar path to their goal. In addition to that, it necessary not only for there to be a mandate on how to proceed, but also oversight to assure that the process is being undertaken according to what has been mandated.

Depending on whether there is coordination or not, and whether there is oversight or not, the initial goals might be affected. For instance, as was explained in Chapter 2, coordination is desired when the goal is efficiency. Since regulations are interconnected and do not operate in an isolated way, coordination is desired to prevent the efficiency of a regulation from being negatively affected by another regulation that was not assessed. Therefore, coordination would contribute to efficiency across the system. Likewise, oversight is expected when the goal is accountability, because in addition to the obligation to make their decision-making process transparent, regulators get additional incentives from an expected review of their work.

This Section looks into the different arrangements that countries have chosen. First, to determine whether they have coordination and/or oversight and where these functions are undertaken; and then to be able to understand if those arrangements are compatible with their chosen goals. Latin American countries have bodies that act as coordinator of the better regulation agenda, others have agencies that act as oversight bodies and in some cases bodies that act both as coordinator & oversight bodies (See Figure 12).

Figure 12. Function of the Regulatory Oversight Bodies in Latin American countries.



Source: Author's own depiction

Mexico, for instance, has a coordinating body and multiple oversight bodies. It created the Federal Commission for Better Regulation, which now is the National Commission for

Better Regulation (CONAMER, for its Spanish acronym); it is an administrative agency with technical and operative autonomy, deconcentrated from the Ministry of Economy. This agency is responsible for leading and coordinating the national policy of better regulation, promoting transparency in regulation making, establishing the indicators that need to be followed for the assessment and measurement of the better regulation agenda and administrative simplification, among others. In addition to CONAMER, there are Authorities for Better Regulation (ARB), which are administrative bodies in charge of implementing the better regulation strategy in their respective areas of responsibility, and act as regulatory oversight bodies.

Once the regulator has performed the impact assessment on a proposed regulation, it is required to send it to its corresponding ARB, who will make publicly available both the proposed regulation and impact assessment report, a step intended to ensure a transparent process and to provide a space for consultation and debate. The ARB, after reviewing the impact assessment, the regulation, and comments from the public, will provide its opinion to the regulator, either accepting the assessment or suggesting changes and returning it to the regulator for amendment, in which case a new version of the regulation and the assessment must be drafted and submitted. The ARB will scrutinize this final version accepting it or again suggesting amendments. From the foregoing it can be gathered that in Mexico there is coordination of the overall better regulation policy undertaken by CONAMER, and oversight of the actual assessment of the regulations by the ARBs.

The second group, those countries with both coordination and oversight, include Costa Rica, Ecuador, El Salvador and Peru. In December 2015, El Salvador created the Organism for Better Regulation (OBR), which is the head and coordinator of the better regulation agenda. Likewise, it oversees the results of the *ex ante* and *ex post* assessments performed by the regulators, and its opinions are binding for the regulators. Costa Rica created a Directorate of Better Regulation, which is a part of the Ministry of Economy, Industry and Commerce that in turn depends on the central government. This Directorate acts as an oversight body regarding the conducted assessments, and as a coordinator regarding the better regulation policy. It has as its main function to evaluate the CBAs reports and the pertinence of the regulations. Once the regulation and CBA have been drafted, they must be submitted to the Directorate for review, and once the Directorate has reviewed the documents it will provide its evaluation and recommendations. If the regulation and evaluation is performed by the central public administration, the opinion of the Directorate, as the oversight body is binding on the administration. However, if the regulation or amendment of regulation is drafted by a decentralized administration, the opinion of the oversight body is just a recommendation. This could lead to a potential lack

of enforcement for the decentralized administration, since the incentives to either perform or acknowledge the recommendations provided by the oversight body on the quality of the regulation are not enough.

Ecuador created the Commission for Simplification of Processes.[44]The Commission is a dependency of the National Ministry of the Public Administration. It coordinates, promotes and cooperates with the elimination, reduction, optimization and simplification of administrative processes that are enacted by the central public administration, by other public agencies, and by other branches of the government. Each administrative entity of the central administration or those which depend on the central administration is required to review their existent administrative processes following the criteria set by the Commission. Once the Commission determines and prioritizes the processes to be simplified, each administration must undertake a procedure for their simplification. The Commission serves as a coordinator to identify and determine the processes to be simplified. There is no indication in the law that the Commission should review afterwards the simplification procedure undertaken by each administration.

In Peru, the assessments performed by the regulator, both *ex ante* and *ex post*, are reviewed by the Multisectoral Commission for Regulatory Quality (MCRQ), that is under the presidency of the council of ministries (Legislative Decree 1310, 2016). The opinion of the MCRQ is binding on the regulators, and it functions as an oversight body as well as a coordinator. Within this group, the Dominican Republic is an exception. It has no oversight but has a coordinating body. The Directorate of Regulatory Assessment, a department of the Competitivity Agency (attached to the president) is coordinating the better regulation agenda of the country; and according to its future plans, this directorate will undertake the role of oversight of the *ex ante* assessment that will be performed by regulators (Decree proposal, 2019).

The structures of both the first and second groups of countries discussed contribute towards efficiency and other welfare maximization goals, such as the reduction of administrative burdens. On the one hand, coordination between the actors that intervene in the regulatory evaluation process can assist in the convergence towards a common goal and identify possible mismatches between interacting regulations. On the other hand, it also contributes towards accountability because there are clear guidelines on how agencies should proceed, but also there is oversight by an agency different from the one that

[44] Interinstitutional body conformed by a board formed by the Minister of Planning and Development, Minister Coordinator of Production, Employment and Competitivity, and the Minister of Telecommunications and Society of Information.

produced the assessment, which is able to identify, call on and possibly challenge an assessment that does not comply with the established procedure. The possibility of the assessment being revised and observed acts as a preemptive incentive towards the regulator. Thus, the relevance of the binding nature of the opinion of the oversight body towards the regulators. Lastly, the only country that currently has neither oversight nor coordination is Chile. Therefore, each agency performs the CBA following its own criteria, and there is no supervision on the result of this assessments. This last group with no oversight or coordination has limitations towards the accountability goal and possibly the efficiency goal, because it does not provide the same incentives as the previously discussed structure does.

4. ANALYSIS OF THE REGULATORY EVALUATION STRUCTURES: INCENTIVES, COSTS AND COMPATIBILITY BETWEEN GOALS AND STRUCTURES

This Section aims to analyze whether the regulatory evaluation structures chosen by a few selected Latin American countries match their previously stated country goals. For this analysis, for this the focus is narrowed down to three Latin American countries: Mexico, Chile and Dominican Republic. These countries were chosen based on particular characteristics, lifespan and plans of their better regulation structure.

Mexico has one of the most developed and complete better regulation structure among all the OECDs countries (OECD, 2015), which allows for an in-depth examination of its policy evaluation structure. Chile is the only country in South America that is an OECD member country; and in 2010 it pledged to adapt itself to all of OECD recommendations for its members, which included the better regulation agenda. Lastly, the Dominican Republic is the country that has most recently adopted a better regulation agenda, thus it provides the opportunity to examine the birth and plans of a newly created policy assessment agenda, which is likely to have been influenced by the more than 20-years of experience of the region. Chapter 2 of this Thesis discussed the different arrangements that can be achieved through a combination of the choices of the elements that form a regulatory evaluation structure. Each of the structures responded to a specific regulatory goal, and it is held that depending on the regulatory goal that a country had, it was expected to form its regulatory evaluation structure with the elements that were oriented towards that goal.

This Section first situates each country in one or more of the assumptions of the patterns presented in the previous Chapter based on their revealed regulatory goal; and second, determines whether the chosen regulatory evaluation tools, scope for policy evaluation, and oversight structure matches the pre-set assumption. This is intended to answer the research question “Does the current BR Agenda adopted by selected Latin American

countries match their regulatory goals?" Finally, while examining the policy evaluation structure in place in each country, it analyzes the incentives, costs and risks that the choices entail for the particular country.

4.1 Mexico

In Mexico, the institutional frame for better regulation was initially established by the Federal Law of Administrative Procedure, and now is contained in the Federal Law for Better Regulation. Since it is established by law, in principle, the regulatory governance policy has to be executed regardless of the changes that can eventually happen in the executive branch. As indicated previously in this Chapter, Mexico has more than one revealed or stated goal. In brief, its legislation indicates that by having a better regulation agenda in place the country aims to reduce the administrative and regulatory burden; to improve the quality of their stock of regulations; to produce more efficient regulation; and to increase transparency in the regulation-making process. It is possible that the regulatory evaluation agenda is used to address several goals at once, and when doing so the structures overlap and operate simultaneously. Therefore, it is not possible to make a vis-à-vis comparison with all of the structures at the same time. In consideration of that, there follows an assessment of whether the current structure of the regulatory policy agenda in Mexico addresses at least two of their revealed goals: efficiency and increased transparency in the regulation-making process which are here referred to as accountability in the regulation-making process.

Table 9. Governance structure of policy assessment in Mexico

Scope	**Hierarchy**	**Primary**
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

Source: Author's own depiction.

Regarding its existing structure, Mexico has limited its scope to secondary regulations, which means that primary legislations are not assessed. Regulations go through public consultation, *ex ante* assessment, drafting and implementation, monitoring and *ex post* assessment, which means that they go through every stage of the Policy Evaluation Cycle. It has chosen CBA, Impact Assessment and SCM as policy evaluation tools. Additionally, the drafting and the evaluation of regulations are delegated to the regulating agencies, and once the corresponding impact assessment report has been prepared by the responsible agency, it must be submitted to the corresponding ARBs that has the duty to oversee that it complies with the existing guidelines.

Regarding the governance of the policy assessment process, the country has in place a regulatory oversight body that oversees and coordinates the better regulation agenda (CONAMER), and other regulatory oversight bodies (ARBs) that have an oversight function towards the policy evaluation work of regulatory agencies within their jurisdiction, whose opinion is binding on the regulatory agencies (See Table 9).

Efficiency

Table 10. Comparison of the Efficiency governance structure and Mexico's existing policy assessment governance.

a. Efficiency Regulatory governance structure

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

b. Mexico's Regulatory Governance structure

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

Source: Author's own depiction

Countries that use policy evaluation having efficiency as a goal are expected to engage on public consultation, *ex ante* and *ex post* assessment of their regulations, and use evaluation tools such as RIA and CBA. The scope of the evaluations should extend to the executive and legislative branch, and there would be oversight and coordination within the administration through a Regulatory Oversight Body. These requirements are matched by the regulatory governance structure of Mexico. According to their Better Regulation Law, all subordinate regulations must be assessed previous to their enactment, and also every certain period the stock of regulation is assessed. In addition, their policy assessment process includes every stage of the PEC that have been identified in this work, using tools for policy assessment such as RIA, SMC and CBA. Lastly, there is an oversight body that acts as coordinator of the Better Regulation agenda, as well as several oversight bodies that oversee the reports of the mandatory assessments produced by the policymakers.

Accountability

For countries that use regulatory evaluation for accountability purposes the scope of their policy assessment is expected to include secondary legislation enacted by regulatory agencies of the central government and in cases extends to independent agencies. Likewise, it is expected that the regulations are assessed through every stage of the PEC, using SCM and CBA as evaluation tools. Finally, oversight of the regulator is necessary both regarding the process of evaluation and the resulting regulation.

Table 11. Comparison of the Accountability governance structure and Mexico's existing policy assessment governance

a. Accountability Regulatory governance structure

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

b. Mexico's Regulatory Governance structure

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

The side by side comparison on Table 11 of Mexico's policy assessment governance structure with the framework proposed on Chapter 2 for accountability shows that the scope of the assessment, the stages for the assessment and the tools use for evaluations set by Mexico match the criteria set for accountability as a goal. More particularly, the supervision structure installed in Mexico is set to address the typical principal-agent problem that arises from delegation in the public administration. There are indeed various instances of oversight. In this arrangement, the supervision comes first in the form of guidelines that must be followed by the agencies assessing the regulations.

The first principal towards the regulatory agency is the CONAMER that requires the regulation to meet certain criteria and for that has set the guidelines; and the second principal are the ARBs who assess the work of the regulatory agencies. In that scenario, the regulatory agency is the agent towards both the CONAMER and ARB, but also towards the public. In that sense, the regulatory agencies are accountable to, and are subject to oversight, for the evaluation of regulations first from the public, during the public consultation stage; and then a second layer of oversight by the ARBs that assess the content of the evaluation performed, with the authority of rejecting the assessment if it does not comply with the preconceived guidance. When this is also made available to the public, there is a third layer of supervision and potential accountability. Then, the oversight agency reviews the work of the regulatory agency. At the same time, the oversight bodies- the ARBs- are agents towards CONAMER that acts as a supervisor and coordinator towards the work of the ARBs.

4.2 Chile

In 2010, Chile became a member of the OECD and in the same year adopted two of the regulatory evaluation tools that are currently in force. Chile enacted Law 20416 that establishes that all ministries or entities that enact or amend secondary legislation of general application have the obligation to perform a simple assessment of the social and economic impact that the new regulation will have for small businesses. The goal is to reduce the regulatory burden faced by small businesses, to be consistent with their compliance capacity and for the regulations that apply to them to be cost-effective. It is noticeable that there is no specific indication on what the "compliance capacity" of this type of businesses is, rendering this particular goal ambiguous.

The evaluation is performed directly by the administration that enacts or amends the regulation that may affect small businesses, and each agency performs the CBA following its own criteria. For instance, the Ministry of Economy prepared a form and guidelines for

performing the CBA of regulations that affect small or medium businesses, and a department within the Ministry of Economy is in charge of undertaking it (See Table 12).

Table 12. Governance structure of policy assessment in Chile

Scope	**Hierarchy**	**Primary**
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	Yes
		No

Source: Author's own depiction.

Administrative Simplification

According to the framework proposed in Chapter 2, countries that seek to simplify their administrative burden are expected to adopt Standard Cost Model. This evaluation should be done *ex ante* for individual regulations, but also initially on the stock of existing regulations. The scope of the regulatory evaluation is expected to include secondary regulation, and specifically regulations that might affect businesses or create new administrative procedures. The regulatory oversight body would act predominantly as coordinator among the different agencies instead of as a supervisor.[45]

Chile has a timid policy evaluation structure. According to the country's revealed goal, it seeks to have effective and efficient regulations for small businesses. It has chosen to have a non-mandatory and soft Cost Benefit Analysis, limited to secondary regulation that affects medium and small businesses. The country does not have a regulatory policy that groups all the different evaluation tools under a common framework to systematize the

[45] See Chapter 2. Section 6: Matching the goals with the structure: What goes where?

procedures, to establish precise guideless, or to assign governmental agencies in charge of its implementation. According to the law, only municipal orders are exempted from complying with this obligation; however, it also establishes that the non-compliance with this obligation from other administrations that "must" comply will not affect the validity of the norm. If there are no negative consequences to the non-compliance with the law, this begs the question of the incentives for compliance and its eventual dissemination for other administrations. There is also no oversight body or control of the function that has been delegated to these administrative bodies for the policy assessment. Likewise, there is no supervision from any other branch of the government to determine whether these regulatory evaluations are being undertaken or not. Considering the foregoing and the side by side comparison shown in

Table 13 of Chile's regulatory evaluation governance, in the case of Chile, it does not seem to match any of the criteria indicated in the matrix for this particular goal.

Table 13. Comparison of the Accountability governance structure and Chile's existing policy assessment governance

a. Administrative Simplification Regulatory governance structure

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

b. Chile's Regulatory Governance structure

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	Yes
		No

Source: Author's own depiction

International Commitments

The above raises an additional question; could the Chilean structure more closely match other policy assessment goals? In that sense, it was previously held that countries that do not have a defined regulatory goal but seek to commit to a particular international standard or requirement, are expected to use public consultation as part of their decision-making process and basic CBA. The scope is expected to be limited to central agencies that depend on the executive branch, without creating a regulatory oversight body for supervision or assigning these functions to other agencies.[46] As shown in the side by side comparison of Table 14, the structure adopted by Chile seems to more closely match the hypothesis for this goal.

Table 14. Comparison of the governance structure for International Commitments and Chile's existing policy assessment governance

a. International Commitments Regulatory governance

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

b. Chile's Regulatory Governance structure

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	Yes
		No

Source: Author's own depiction

4.3 The Dominican Republic

The Dominican Republic's stated goals for their better regulation agenda are efficiency, regulatory quality, and coordination and accountability within government agencies. As with Mexico, and many other countries, there are multiple goals pursued with the adoption

[46] See Chapter 2. Section 6: Matching the goals with the structure: What goes where?

and implementation of the better regulation agenda; thus, here there is a need to look into two of the goals: efficiency and accountability, and compare the structure currently implemented by the country.

The Dominican Republic has limited the scope of its regulatory policy to secondary regulation enacted by a selected number of regulatory agencies, both dependent and independent from the executive power. It is doing a public consultation and an *ex post* assessment of the stock of its regulations, to determine their social costs and later simplify them, using the Standard Cost Model. There is no *ex ante* assessment, nor monitoring of regulations, therefore the country does not use all of the stages of the PEC. [47] Unlike other countries, the assessment is not done by the regulators, but by the Directorate of Regulatory Analysis, a department within an agency attached to the president's office. This Directorate does the *ex post* evaluation, and coordinates the national better regulation agenda; it does not act as an oversight body during this first stage of the better regulation agenda (See Table 15).

Table 15. Governance structure of policy assessment in the Dominican Republic

Scope	**Hierarchy**	**Primary**
		Secondary
	Sectorial	All
		Sector
	Assessment	Stock
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

Source: Author's own depiction.

[47] The Dominican Republic: a draft for a Decree that expands their better regulation structure, especially regarding the scope and the tools to be used. However, at the cut-off date of this research (June 1st, 2019), this Decree is still undergoing its Public Consultation phase, and since its final version is not yet known, it is not included here.

Efficiency

One of the revealed goals of the country is efficiency. Therefore, their existing structure will be contrasted with that suggested in the framework for a country with efficiency as a goal.[48] The structure chosen by the Dominican Republic engages on Public Consultation and *ex post* assessment, but so far does not assess regulations *ex ante*. The drawback is that potentially inefficient regulations are enacted, and their inefficiencies are only known of after they have been implemented, negatively affecting those that have been already assessed. The country is also not using CBA nor CEA and the scope is limited to secondary legislation that create administrative procedure. Finally, there is no oversight because no part of the assessment is done by the regulators, and the entity that performs the assessment is not supervised by any other agency. However, there is coordination, that contributes towards the compatibility of existing regulations and might reduce duplication of procedures, making them more efficient.

Table 16. Comparison of the Efficiency governance structure and the Dominican Republic's existing policy assessment governance

a. Efficiency Regulatory governance structure

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

b. Dominican Republic's Regulatory Governance structure

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Assessment	Stock
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

Source: Author's own depiction.

[48] See Chapter 2. Section 6: Matching the goals with the structure: What goes where?

Accountability

As proposed, countries that use policy evaluation for regulatory accountability are expected for their policy assessment scope to include secondary legislation enacted by regulatory agencies of the central government and in cases to extend it to independent agencies. Likewise, it is expected that the regulations are assessed through every stage of the PEC, using SCM and CBA as evaluation tools. Finally, oversight of the regulator is necessary both regarding the process of evaluation and the resulting regulation.

Regarding this goal, the Dominican Republic does have the matching scope regarding the regulations to be assessed, as it includes regulations enacted by regulatory agencies and independent regulatory agencies. Likewise, the evaluation tool used is the SCM, which is one of the tools that contribute towards the accountability goal. However, regulations do not go through every stage of the PEC, nor there is oversight of the assessment. Therefore, the match is only partial as shown on the side by side comparison of Table 17.

Table 17. Comparison of the Accountability governance structure and the Dominican Republic's existing policy assessment governance

a. Accountability Regulatory governance structure

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Stock	All
		Individual
PEC	Yes	
	Individual Stages	
Tools	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

b. Dominican Republic's Regulatory Governance structure

Scope	Hierarchy	Primary
		Secondary
	Sectorial	All
		Sector
	Assessment	Stock
		Individual
PEC	Yes	
	Individual Stages	
Tool	RIA	
	CBA	
	CEA	
	SCM	
	MCA	
Governance	Evaluator	Agency
		External
	Coordinator	No
		Yes
		Multiple
	Oversight	No
		Yes

Source: Author's own depiction.

In spite of all this, even though there is no full match for the previously analyzed goals, there is a match with the goal of reducing administrative burden, explained in the Chilean case. The structure adopted by the Dominican Republic ticks most of the boxes required for this goal.

5. CONCLUSION

The current debate in regulatory reform deals mostly with each individual tool, how they are used and their indicators, and misses their integration to the regulatory governance or management and how the evaluation tools are connected among themselves (Radaelli & Fritsch, 2012). In particular, how these two elements, the tools and their governance, interact in Latin American countries has not being studied.

This Chapter firstly described which goals Latin American countries are pursuing with the adoption and implementation of their regulatory evaluation agendas. This allowed us to see whether there are similarities to the goals explored in the first Chapters of this Thesis. Secondly, this Chapter studied the different arrangements that these countries have chosen for their policy assessment structures, discussing the scope of the assessment, its stages, tools, and governance. It contrasted the better regulation structure of Latin American countries with structures discussed in Chapter 2 and analyzed whether the structures chosen had the potential to produce the effects expected from it and to achieve their chosen goals.

To achieve the foregoing, it studied the legal instruments and country reports that are pertinent to the better regulation agenda of Latin American countries that have introduced it into their regulatory-making process. Because this is a relatively new phenomenon to the region, the contributions of this Chapter, though partly descriptive, are also relevant. It is useful not only for the purpose of the analysis performed but serves as a base for this and for future research.

This Chapter showed that all the countries studied went through the same process: State monopolies, followed by a process of privatization and deregulation, completed with the creation of regulatory agencies for the regulation of important areas of the economy of each country. Then, after 1997, Latin American countries began adopting different regulatory evaluation tools as part of their better regulation policy, through “legal transplant”, either from European countries, the US, or from Mexico, the first country of the region that had a better regulation agenda. Likewise, the influence of international organizations such as

the OECD in the adoption of these arrangements by Latin American countries is more than evident. It showed the rate at which Latin American countries have adopted and implemented their policy assessment agenda, which pointed to a real trend in the region, making this a relevant topic to study and discuss.

The first research question that this Chapter aimed at answering was: which were the goals that Latin American countries were pursuing with the implementation of a better regulation agenda? The analysis of the legal instruments enacted by these countries showed that several of the goals explored are common across countries, such as maximization of social welfare, efficiency, accountability, the reduction of administrative burdens and administrative simplification. Following that, it analyzed the choices that each country had made for the different elements that conform their policy assessment structure, to answer the second question regarding whether those structures were directed at the established goals.

The findings regarding that second research question of the Chapter showed that Latin American countries limit the scope of the assessment mainly to secondary legislation; and that only very few go through all of the stages of the PEC. Additionally, the evaluation tools that are used to assess regulations are oriented mostly towards identifying the administrative costs that regulations produce, and at minimizing these costs. Nevertheless, some countries use impact assessment as their tool for evaluation, which has a broader reach regarding the assessment of the regulations. Lastly, and regarding governance, in most of the countries, regulators assess their own regulations before their enactment, and then the oversight body evaluates whether the assessment conforms to the guidelines previously established. The overall analysis was useful to identify the trends, as well as to make general conclusions regarding the incentives, costs and risks that the choices provided.

In the last part of the Chapter it was possible to zoom in on three countries to verify whether their specific policy assessment structures for their better regulation agenda were compatible with the goals they had set for themselves. Of the analyzed countries, Mexico is the only country that has a structure compatible with its regulatory goals; whilst the other countries examined did not. This could be the result of the overstatements of goals, the under-adoption of tools or just an incompatibility between goals and structure.

The policy assessment structure required for goals such as accountability and efficiency, particularly considering the use of the PEC and its different stages, can be analyzed further by first studying what the goals entail in practical terms, how they operate within a presidential constitutional system, and eventually how the assessment itself is designed, or

not, towards the chosen goal. In Latin America there is a social demand for more transparency and accountability in the regulatory-making process as a goal of their better regulation agenda. Considering the foregoing aspects, for the rest of this thesis the focus will now be on the use of policy assessment policy as an accountability tool.

CHAPTER 4

ACCOUNTABILITY AND POLICY ASSESSMENT

Policy evaluation systems serve to assist policymakers in their decision-making process, by providing scientific information on the potential effects, cost, and benefits of proposed regulations or existing regulations; whilst also improving the policy-making process. In addition to these goals, part of the literature deems policy evaluation as a tool for government accountability (Ogus, 2004; Radaelli, 2010; Renda, 2015). Although the latter observation may appear accurate, it can be argued that regulatory evaluation is not by default a tool for accountability and that in order for it to function as such, it needs to be structured and designed with this purpose. The main argument of this Chapter is that the design of the regulatory evaluation system is relevant with regard to its use as a tool to address the accountability issues that exist in the relationships within the policy-making realm. This design needs to respond to the particularities of the decision-making process of the country, or even sector, at hand in which regulatory evaluation is installed.

From all the elements of a regulatory evaluation structure analyzed in this Thesis, there are some that gain more relevance when discussing accountability as a goal. In this sense, the assessment of the regulation and the systematic continuation of the assessment is of relevance. This refers specifically to the PEC and its stages. Additionally, who is involved in the decision-making process and who they might respond to is a staple of this goal. Thus, it is necessary to consider the scope of the assessment, that is, which regulations are assessed, which entities are in charge of performing the assessment and who do those regulations affect. A final element of importance is the governance and oversight of the evaluations, and which entities intervene in that part of the process and their diverse interactions.

This Chapter addresses a number of questions related to this matter. The first one is which accountability problems can be identified in the regulatory making process of a country with a presidential system? Accountability is a complex term and its definition and limits are still being discussed by the public law literature (Bevir, 2010; Bovens, 2007; Bovens, Schillemans, & Hart, 2008; Considine & Afzal, 2012; Jordana, Bianculli, & Fernández-i-Marín, 2015). There is agreement, however, that accountability refers to the relationship between an actor and a forum to whom the actor is expected to respond.

However, there is more than one type of accountability relationship as the participants in these relationships which might interact differently among them, and that would mean that the actor might be expected to respond in different manners to its forum. Considering that, it is safe to say that the accountability relationships are context dependent. Therefore, to be able to analyze the relationships that are relevant for this research, the scope of the study of accountability relationships is limited to the relationships that exist within a presidential system. This is because, all of the Latin American countries researched in this Thesis, have a presidential constitutional system.

In a country with a presidential system the president is the head of the government. He enacts part of the secondary regulations, and the public administration is mostly directed and accountable to him. This means that there is, in principle, a principal-agent

relationship between these public administrations and the president. However, decisions are also made by other bodies that are elected by the public, such as the congress, and by other administrations that are not elected by the public, nor directly appointed by the president. In the latter cases, the accountability relationship might be different from that presented by the principal-agent theory, as these agencies could be accountable in other ways.

After analyzing the type of relationships and accountability problems that exist in this regulatory-making system, this Chapter will advance some answer to a question that will be fully answered in Chapter 5. That is, whether the policy evaluation cycle can address these accountability problems. In this Chapter, the aim is to explain the complexity of the relationships in the policy-making structure of a country with a presidential constitutional system and identify its different accountability scenarios that should be addressed. At the same time, it aims at identifying the pieces that need to be considered when building a framework that highlights the use of policy evaluation systems for accountability purposes.

To address all these concerns, Section 1 explains the concept of accountability, analyzing and dissecting its dimensions. As indicated previously, an accountability relationship is one in which an actor has to explain or justify his actions, the forum can ask questions on the actions and later the actor can be rewarded or sanctioned for his actions. Thus, I analyze these three dimensions of accountability: information, discussion and consequences (Bovens, 2007, p. 450). Using what the literature has explained regarding this dimension, the intention is to contribute to the literature by analyzing and determining which characteristics of each dimension are present in, and should be considered during, the policy assessment process.

After analyzing the dimensions, the other elements of the accountability definition left to analyze are the actors, the forum, and the interactions between these two parties in the relationship. Therefore, Section 2, will explain how the decision-making process of a presidential system is structured, to understand who the actors and the forum are, how these players interact, and where accountability problems might arise.

These relationships would normally fit into one of the categories of accountability relationships that the literature has identified: upward accountability relationship, a downward accountability relationship and a horizontal accountability relationship (Jordana et al., 2015; Scott, 2000; Verschuere, Verhoest, Meyers, & Peters, 2006). These categories are based on how the actor is, or can be, accountable to his forum. In that sense, Section 3 puts in one of this three categories the identified relationships in a presidential system based on how the participants on this relationship interact during the regulatory-making process.

This Chapter combines the learning from the accountability literature that divides accountability into dimensions and the learnings from the accountability literature that classifies the relationships based on who the actor is accountable to and how he is

accountable. With this combination, it intends to further the literature on the one hand by using this to analyze and explain the problems and challenges of aligning the incentives of the participants in the relationships in a presidential system considering how they interact with each other during the regulatory-making process. And on the other hand, by formulating a hypothesis on how these interactions would reflect in the different stages of the policy evaluation cycle when a regulation is beings assessed within one of the analyzed relationships.

That last part will serve as a stepping-stone for building the framework that combines the use of policy evaluation tools tailored to the specific accountability relationship that is being dealt with in Chapter 5.

1. UNDERSTANDING ACCOUNTABILITY

Accountability has seized the attention of both scholars and the public over the last years (Dubnick, 2014; Yang, 2012). It is a term used by many, desired by most, but usually just expressed as a symbolic word to encompass other meanings. The difficulty of the term lies on the fact that it can have different meanings depending on the context in which it is analyzed. It is a complex concept with a definition which has been narrowed down by the literature over time, depending on the field.[49]

The term "accountability" is commonly used as a rough synonym for transparency, democracy, integrity, or responsibility. Because of this, part of the literature has focused on defining the term itself. In plain English language, accountability is the "liability to account for and answer for one's conduct, performance of duties, etc." (Oxford Dictionary, 2018). There are even some languages, like Spanish, that do not have this word in their vocabulary, and instead a definition or combination of words is used to express the meaning of the word.[50] In legal English, some authors have been more specific on the definition of the term indicating, for instance, that accountability refers to any "mechanism that makes powerful institutions responsive to their particular public" (Mulgan, 2003, p. 8).

In addition to a straight-forward definition, another important feature to consider when one comes across this type of ambiguous term is the composing elements, and how to identify them. Accountability is not a term with one definition.

The definitions that relate more to the line of work pursued here is that proposed by Bovens and narrowed down by Jordana et al. (2015), who also takes as base that of Bovens. On the one hand, Bovens defines it as "*actor and his forum, on which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment,*

[49] For a historic account of the origins of the term accountability, see: Dubnick, 2002, p. 7-9 and Bovens 2007.
[50] Fun fact: Back in 2005, the Center for Latin American Development and Administration (CLAD) discussed for a long time an appropriate word to translate "accountability" into, which they could not find nor agree on. With the lack of an appropriate word, they settled to use the English word "accountability".

and the actor can be sanctioned" (2007, p. 450). On the other hand, Jordana et al. define it as "*a relationship between power-holders and those affected by their actions. It comprises two key elements: 'answerability' – making power-holders explain and justify their actions – and 'enforceability', allowing the participants in the forum to judge and punish poor or criminal performance*." (2015, p. 3). The differences lie on the dimensions considered. Bovens considers three dimensions of accountability: information, discussion, and consequences; while Jordana considers two: answerability and enforceability. The latter reduces the dimensions of the definition by joining the *ex ante* considerations of accountability (information and discussion) and the *ex post* (discussion and consequences); while the former, considers separately the information and discussion dimensions. A more detailed definition of accountability allows for a more dynamic and specific contrast with the multiple activities that are encountered in the policy assessment process. Furthermore, it allows for the analysis of the behavior and incentives that actors might have when interacting in the multiple stages that a regulation goes through.

1.1. Deconstructing and clarifying accountability

The composing elements of the definition proposed by Bovens are (1) the actor; (2) the forum; (3) the obligation to explain; (4) the possibility of posing questions and discussing; and (5) the ability to pass judgement and eventually to sanction.

The actor can be either an individual or an organization. In public accountability, the actor will often be a public institution or a government agency, or the heads and members of such agencies and institutions. The accountability forum, can be a specific person, such as a superior, a minister, or a journalist, or it can be an agency, such as parliament, a court, or the audit office. Likewise, the forum can be the general population, the specific population to be affected either negatively or positively by the action of the actor, its stakeholders namely interest groups, regulated agencies, and the like.

The relationship that exists between the actor and the forum can adopt many forms. It can be a natural principal-agent relationship, where the forum is the principal of the actor (picture the relationship between a President and his electorate, which results from a democratic delegation). It can also be the case that there is no such hierarchical relation between the forum and the actor, which is the case of the relationship between a regulatory agency and court that controls the legality of its acts.

The other elements are determined by how this relationship is intended to function in order to be understood as an accountability relationship. To explain this with an example, the actor will be a regulator, the forum will be the affected population, and the action is a new regulation. With this, one can explain when, according to the definition previously provided, the regulator is accountable to the affected population. In this sense, there is accountability when the regulator **informs** the affected population of the proposed regulation, by presenting, for instance, a draft of the said proposal. Then, the affected population has the opportunity to **discuss** the regulatory draft with the regulator, asking

questions and receiving answers. Once the regulation is enacted, the affected population has the possibility to **reward** the regulator, in the scenario of a job well done; or **punish** the regulator if the regulation does not reflect the preferences or interests of the affected population.

This approach to accountability is still superficial, as it does not yet explain what should be understood by "inform" the population, or "discuss" with the population; or even "sanction" when there are disparities of interests. This is mainly because the proxy for measurement of these actions is not clear. It does not explain either in practical terms who the actors and the forum are, nor how they interact with each other.

Considering the foregoing, the coming subsection will address the dimensions mentioned above to understand their inner content and forms to identify them

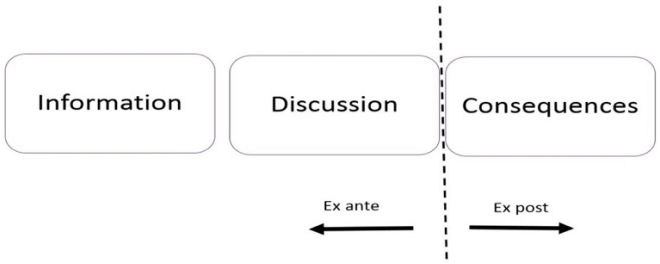
1.2. Accountability Dimensions: Information, Discussion and Consequences

Dimensions refer to the pieces that form a puzzle, the elements to be considered and analyzed when referring to a term. In this case, the accountability puzzle. Some authors such as Koppell (2005), have identified up to five dimensions of accountability including transparency, controllability, responsibility and responsiveness each of which is in itself an umbrella concept. Others, such as Jordana et al. (2015), consider only answerability and enforceability as dimensions of accountability. However, as indicated before, Bovens' definition divides the concept into manageable dimensions that are of use when confronting the term accountability, with the different stages of the policy evaluation cycle.

As a reminder, Bovens defines accountability as a social relationship between an "actor and his forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor can be sanctioned"[51] (Bovens, 2007, p. 450). The dimensions that this definition identifies are: (1) information, (2) discussion, and (3) consequences. "Information" is the unilateral provision of information from the actor to his forum. "Discussion" is the phase in which the forum poses questions and the actor can explain his current and proposed actions. "Consequences" refers to the moment when the actor faces the results of his actions, be they positive or negative. From this definition, it can be gathered that the information and discussion dimensions refer to an ex ante stage that occurs prior to and during the actions of the author; whilst consequences refer to an ex post moment, after there is a "result" or final action (See Figure 13).

[51] Highlight by the author.

Figure 13. Accountability Dimensions



Source: Author's own depiction

The purpose of this part of the research is to be able to identify the characteristics of each dimension, to be able to later determine in which stages of the policy evaluation cycle these dimensions of accountability can be found. This has not been previously done by the literature, and thus is a contribution of this Thesis. This is also a first step to later building a framework to measure the contribution of these stages towards accountability.

In that sense, so far, the literature has not studied in depth the deficit or presence of accountability in a process or a system. The focus has most of the time been on what accountability is, and on whether people or systems can be held accountable. For instance, Bransman & Schiellmans (2013) created an instrument with which they analyze the intensity of accountability processes. They referred to this as the Accountability Cube. For designing this instrument, they analyzed the dimensions of accountability and then they explained how they reflected on an accountability system.

When one brings this to the regulatory-making process, and more specifically to the regulatory evaluation realm, these accountability dimensions seem to have a role in each stage of the regulatory activity. For instance, it is possible to identify the information dimension during the public consultation stage, when the regulator makes the proposed regulation available for the public to review. The discussion dimension can be identified in the stage of drafting the regulation, when the regulator explains the feedback that he decided to include or exclude from what he obtained during the public consultation phase. The consequences dimension can be identified, for instance, when an oversight body rejects a regulation based on the fact that the regulator did not follow the legal procedure for its assessment. These are all examples of the role that these dimensions have within the policy-making process; however, a part of this Chapter and the next will determine how each of these dimensions are present during the policy evaluation cycle. To be able to do that, it is necessary to first understand what each one of the dimensions entail, and how they can be identified.

Therefore, the following subsections analyze each of the dimensions separately and initially identify a potential match of their definition and characteristics with the different stages of the policy evaluation cycle.

1.2.1. Conceptualization of the Information Dimension

However, how to provide the information, which information to provide, and when to provide it, depend on who is the forum for this actor. The literature has not yet linked these nuances, which are considered in this research. The identity of these subjects in some cases might shift the answers to those questions. For instance, in the relationship between a regulatory agency and the general population, the regulatory agency is the actor and the general population is the forum. Therefore, the medium, frequency, and timing of the information to be provided differs from when the president of the country is the forum to the regulatory agency. It can be argued that one of the reasons for this difference is the incentives and motivations that the regulatory agency might have when presenting, for instance, a proposal of a regulation.

On that example, the motivation that the agency might have for providing the information to the general population could be to obtain their cooperation with the regulation. Thus, this need to obtain relevant information from stakeholders to be able to produce a regulation that addresses the problems, or to get the involvement and commitment of the stakeholders towards the resulting regulation, creates the incentives for the regulator to first provide this information to its forum. However, there, the regulator faces sensitive situations. One situation is regarding the balance between the quantity and quality of information to satisfy the "information dimension" of accountability and risk communication.[52] This might create negative incentives for the regulator which would prompt the regulator to reveal less information to his forum.

However, when the forum of the regulator is the president, the motivations that the regulatory agency head might have when providing information might be different than with the other forum. In that sense, this relationship functions as a classical principal-agent relationship where, according to the agency theory, the principal is to create a system to align the preferences and minimize the costs of oversight. Thus, the regulator, as an agent of the president, might have positive incentives to provide information to his forum (the president), in order to preemptively get his support or approval for his actions. This would,

[52] The public at large might perceive some risks differently from others for a series of reasons such as degree of control, catastrophic potential, and familiarity. Therefore, how and when information is conveyed when risks are involved poses particular challenges. The "risk communication" literature discusses the flow of information and risk evaluations back and forth between academic experts, regulatory practitioners, interest groups, and the general public. This discussion is relevant when the subject of the potential or existing regulation is related to natural hazards (ie, floods, diseases, etc.) and technological hazards (ie:. chemical plants, GMO's, food, etc.). For more on this topic see Bostrom & Löfstedt, 2003 and Lofstedt, 2006.

for instance, increase the chances of the agent to remain in his function as the head of the regulatory agency or even to obtain a promotion.

It is thus evident that the incentives and motivations for this dimension of accountability depend on how the relationship between the actor and the forum functions. This has not yet been explored by the literature. This is why, later on this Chapter will identify the different actors and forum to be able to match their incentives in each dimension of the dynamics of the relationship.

In addition to the above, there are certain minimums requirements that should be met to consider that in an accountability relationship the information dimension is met. The information provided needs to be adequate, and informal information on potential plans would not suffice for this dimension to be covered (Brandsma & Schillemans, 2013, p.964). The actor is called on to provide information to the forum normally through available media, posting it either online or in a high circulation newspaper. The publication can be done in the website of the regulator or the public agency that is promoting the regulation; or in a unified website where all proposals of regulations that are being discussed are published.[53] Additionally, in case the information is not published, the actor should provide the information as per the request of the forum.

Considering all of the above, and summarizing from the literature and empirical work available, a few indicators signal the strength of the information dimension in an accountability relationship and would serve to eventually measure it. In particular: (1) The quality of the information; (2) the frequency of the information; and (3) the accessibility and source of the information.

The quality of information can be rated based on the following indicators: 1. The information is sufficient for the forum to have an opinion on it, make an informed decision or provide feedback. 2. If it applies, the documentation provided indicates how the decision was made, who voted, what was the vote, and the motivation for it (Brandsma & Schillemans, 2013, p. 964). 3. The information presented is readable and understandable to the forum. 4. The information indicates who it came from (i.e. feedback from other stakeholders, studies from interested parties, research done by the regulator, etc.).

The frequency of information can be measured by how often the forum was informed of the issue. Finally, the availability of information can be determined by the media through which the information is provided (own website, unified government website); and by how soon it is made available when requested.

[53] This the current practice of countries such as Mexico, United States and Sweden.

All of these elements are to be considered when assessing accountability during one of the stages of the policy evaluation cycle.

1.2.2 Understanding the Discussion Dimension

One of the main purposes of the discussion dimension of accountability is to a get a message across through an exchange of opinions and views. To determine whether this exchange is happening or not, some minimum requirements should be met. Even though this might seem obvious, the discussion needs to be two-sided. The available information is assessed by the forum, and the actor responds to this assessment. It is an opportunity for both sides. First, it is an opportunity for the forum to assess the reliability of the information provided, understand the actor's actions and how and if they are compatible with the forum's interests and preferences (Carman, 2009). Second, it is a tool for the actor to provide reasons for his actions, to clarify his choices and explain his results (Ashworth, 2000). But even before that, it is an opportunity for the agent to understand which are the specific preferences and interests of his principal or his forum. The discussion is also an advance warning of what is coming up to the principal, who might be the beneficiary or affected party of the regulation.

The discussion dimension is reflected in several stages of the policy evaluation cycle, since according to its definition, it allows for feedback and the exchange of opinions that are necessary, for instance on the public consultation stage and the monitoring stage of the PEC; and may be less evidently necessary in other stages of the cycle.

Together with the information dimension, the discussion happens as an *ex ante* event to the final action of the actor. Some authors study both dimensions together because of their similarities and interactions. One of the recurring themes is the purpose of informing and discussing this information. Depending on who the forum is and on the stage of the PEC, the actor might have different motivations and incentives when addressing this dimension. The discussion dimension serves also for the actor to obtain feedback from the forum on the content of the regulation, since the forum might have experience, information or expertise that the regulator might be lacking. One draw-back here is the risk management, since as Lofstedt (2016) explains, one of the most relevant tasks is to separate reality from emotion, what type of information is given to the public for discussion and how this information is discussed. Once that hurdle has been crossed, then the other specifications are considered.

The discussion does not need to be highly formal, as it can take place in a variety of manners, depending on who and where the forum is. It can be an open hearing at the regulatory agency or the legislative offices; the opportunity to provide input through an online platform; an open conversation between the actor and the forum; among others. The main indicative requirements are that the forum can provide their input on the information provided by the actor during the information phase; that the actor is able to explain, justify or change his actions; and that the input from the forum is accounted for

(Brandsma & Schillemans, 2013). Therefore, to determine whether these criteria have been met, some indicators can be checked. First, if both parties are able to express their views on the issue at hand. Second, the content of the discussion, and whether it merely covered formal issues, or the forum could discuss the core and fundamental principles of the issue. Third, if the actor explained which inputs he included/excluded. Fourth, if the results from the discussion were made available. These last two parts could overlap with the information dimension; however, it is still considered as a response to the discussion dimension.

1.2.3 Explaining the Consequences Dimension

By definition, consequences are the result of one's actions, either negative or positive. In this particular context, consequences are how the forum can ultimately express approval or disapproval of the actor's actions or behavior, by sanctioning or rewarding him. It is the *ex post* stage of an accountability relationship. These consequences are not meant solely as a punishment or as a reward, but they are intended to mould future behavior, deter certain actions, create incentives and align preferences.

The potential of receiving a carrot (promise of reward) or a stick (sanction or punishment) in certain scenarios motivates human behavior and influences the decision between following a rule or not (Dari-Mattiacci & De Geest, 2005; Wittman, 1984). The consequences dimension of accountability happens to some extent after the actor performs his actions. For instance, if the telecommunication regulator chooses to ignore a feedback provided by a consumer group during public consultation and enacts a regulation that neither includes the requested changes nor motivates the exclusion, it is possible for the consumer group to challenge the enacted regulation based on this violation of procedure. This would of course require that the public challenges the regulation. If the regulation is challenged, then a court would have the power to void the regulation, based on the fact that it did not follow the required procedure for enacting a regulation. The sanction here is for the action of the regulator, and the regulator gets the message that a regulation that does not follow a specific procedure will be overturned.

In the previously described case, it is an *ex post* reaction. However, it is *ex post* only to some extent because it is not necessary for the punishment or reward to actually materialize for the actor to be incentivized to act one way or another. Just a reasonable expectation of an action is enough for a person to be positively or negatively influenced.

In this sense, when the actor complies, the sanction does not need to be executed, since the threat of the "stick" itself can give enough incentives. As explained by the literature, the peculiar characteristic of the stick, compared to the carrot, is that the same stick can be used in multiple occasions to produce the same incentives, as long as the actors behave non-cooperatively (Dari-Mattiacci & De Geest, 2005; Wittman, 1984). Therefore, a regulatory-making procedure that contains the potential of sanctioning the action of the actor, of revoking, or not accepting, a regulation that did not go through the specific steps of the policy evaluation process, can be used as a tool to align these incentives.

One of the reasons why an actor might choose to respect the forum's or principal's preferences is precisely because it is in his best interest to avoid sanction or punishment, and if possible, to earn a reward. Other reasons might be that the action will satisfy interest groups' agendas.

The extent to which this mechanism works in practice will depend to a large extent on the relationship that it is applied to. For example, if the president has the power to appoint and remove the head of a particular regulatory agency, then it is more likely that this person has the incentives to follow the instructions of the president. This is, of course, if the preference (self-interest) of the head of the agency is to remain in his position, and the president can credibly threaten to remove the agent from his position if he does not follow its instructions. Then this credible threat will create the right incentives for the agent. It is more much difficult when it comes to the relationship between the head of an independent regulatory agency and the population, where the consequences might not be applied directly by the people because there is not a credible direct threat of removal that could create those incentives for the regulator in that specific scenario.

Also, another aspect to consider when discussing consequences of actions is the time that passes between the action and the time when the forum understands the effects of the action and can effectively apply the carrot or the stick. Because of the difference in relationships and the special characteristics that the rewards and sanctions possess, the range of sanctions and rewards available which can have the effects described before, is not as wide as expected. The literature is limited when it comes to proposing options, and these limitations are reflected in practice as well. Rewards can be either material or immaterial, such as financial rewards or a verbal congratulation. Sanctions can also be material or immaterial, and even indirect. These might include removing the actor from office, redistributing power, blocking or amending the decision made by the actor, etc. (Strøm, Müller, & Bergman, 2003). However, not all of them can be successfully used in all relationships in a regulatory-making process.

When it comes to evaluating the effectiveness of the consequences or punishment system that exists in a country or in regulatory arrangement, it is not enough to only look at the cases for which a person or entity has been punished. If the evaluations were limited to that, then it would mean that regulatory procedures that went by smoothly or that followed the right steps would be deemed as having "low accountability", which would not be the case. Therefore, what should be considered is whether the forum is able to sanction or reward the actor (Brandsma & Schillemans, 2013, p.965).

Considering the above, the relevant indicators depend on the capacity of the forum to apply sanctions or rewards to the actor for his actions. Specifically, first whether there are available means, legal or otherwise, for the forum to express its disagreement/agreement with the actions of the actor. Second, the range of consequences available for the forum to impose to the actor (Brandsma & Schillemans, 2013, p.965; Strøm, Müller and Bergman, 2006, p.34). Third, the accessibility that the forum has to such instruments. In contrast

with the previous two dimensions, it is difficult to measure this dimension based on the intensity of the indicators.

Table 18. Characteristics of accountability dimensions

Dimension	Definition	Characteristics/Indicators
Information	Actor provides account of his conduct and behavior to the forum.	One-sided Communication to the forum Not necessarily direct Readily available Means of access Sufficient information to provide feedback. Readable and understandable. Indication of the source of the information. Information on the making of the regulation (votes).
Discussion	The forum assesses the conduct/actions and may ask for additional information/clarification	Two-sided Both parties able to express their views on the issue at hand. Discussion on the core and fundamental principles of the issue. Motivation of which inputs are included/excluded. Results from the discussion are available (Overlap with information).
Consequences	The forum expresses approval or disapproval of the actor's actions or behavior, by sanctioning or rewarding him.	One-sided Possibility to impose sanctions or rewards. Range of consequences available. The actor directly or indirectly experiences positive/negative consequences.

Source: Author's own depiction based partly on Bovens (2007); Brandsma & Schillemans (2013); and Jordana et al. (2015)

2. RELATIONSHIPS IN A PRESIDENTIAL CONSTITUTIONAL SYSTEM

After analyzing the dimensions of public accountability, the other elements left to analyze are the actors, the forum and the interactions between these two parties to the relationship. As indicated before, the relationship that exists between the actor and the forum can adopt many forms. It can be a natural principal-agent relationship, where the forum is the principal of the actor. It can also be the case that there is no such hierarchical relation between the forum and the actor.

Because of the focus of this work, it will analyze the relationships that arise in a specific political and regulatory-making context. As previously explained, the regulation-making process of a country depends on its government system; on whether it is parliamentarian, presidential, a monarchy, dictatorship, or a combination thereof. Since Latin American countries all have presidential systems, this is the system to focus on.

A political democracy is a set of political institutions, principles and norms that define and guide how a country is governed. The presidential system has two main characteristics: (1) The citizens of the country elect both the President[54] and the members of the Congress; (2) Their terms are fixed. The president has the authority to appoint and remove ministers, and the head of regulatory agencies that depend from the head of the executive branch (Mainwaring, Shugart, & Lange, 1997).

These characteristics have numerous implications, but the one that concerns this research is how does this reflect onto the accountability of the public officials. To clarify, this work does not compare the effectiveness of either of these constitutional systems, nor face them off to determine which is "better" structured to provide more accountable officials. What is relevant for the purpose of this research is how accountability is structured in a presidential system and analyzing this from a law and economics perspective. Having clarified that, this Section identifies and explains the different relationships that exist in the regulatory-making process of this system, and how the actors and forum of each of these relationships interact among themselves. The aim of this Section is to identify which relationships are relevant in the regulatory-making process and regulatory evaluation arrangement of a country with this system, determining who is the actor and who is the forum and how these interests can potentially align.

2.1. Accountability in the Relationships within a Presidential System

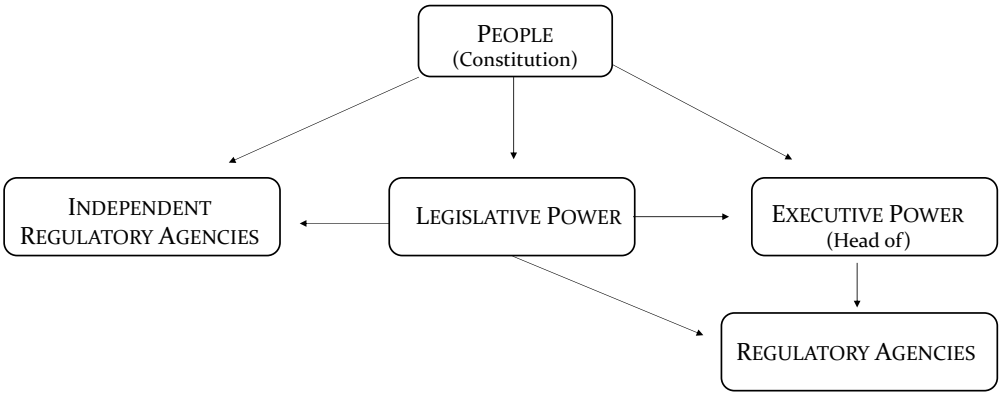
The relationship between economics and elections, and even how the configuration of political institutions and party systems handle this connection has been explored by the literature (Nadeau, Lewis-Beck, & Bélanger, 2012; Remmer, 2002). However, research on the connection between accountability and the configuration of the political institutions has just started to grow in recent years. The main idea put out is that presidentialism enhances identifiability, which allows voters to hold presidents and legislators accountable for their specific work (Linz, 1990). In this line, empirical work shows that there is a linkage between the likelihood of voters punishing or rewarding officials and whether there is "clarity of responsibility" (Powell & Whitten, 1993). Following this logic, the decision-making structure in presidential systems allows for a higher degree of "clarity of responsibility", as it is possible to make more transparent to the population who is in charge of making which decisions. In addition to this, a sanction and reward system is readily available, because of the seemingly direct influence that the people have on electing their decision-makers.

To understand how and if it is possible for the population to directly connect the decision to the decision-maker, and to punish/reward this conduct, what follows will explain how the decision-makers are elected, appointed, and removed in a presidential system.

[54] There are presidential political systems, such as in the U.S.A., where the citizens do not directly elect the president, but delegate this power to electoral colleges, which in turn choose the President. This does not significantly differ from the characteristics of a popular election.

Likewise, it will analyze where their decision-making power comes from. According to the supreme law or the Constitutions of countries with this political system, the Congress has the power to enact primary legislations as well as to delegate this power to the executive power through a law. The Constitution also gives authority to the executive power to enact secondary legislation, and to delegate part of this power to its administrative agencies. Finally, there is a delegation made from the people or from the legislative power to independent regulatory agencies that do not report to or depend on the head of the executive power. *(See Figure 14)*

Figure 14. Regulatory Delegations in a Presidential System.



Source: Author's own depiction.

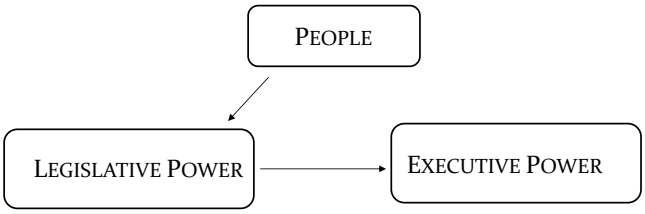
The next section will analyze each one of these relationships that arise from the delegation organization just explained. The aim is to dissect the different interactions that converge in these relationships, on the one hand, considering how the "actor" is appointed and removed from office; and on the other hand, who is the forum affected by the actions of the actor, because not in all cases is the forum the same as the appointing entity. This determines who the actor should be accountable to, if it is one or more entities or a group of people. It is an indicator of whether there is a principal-agent relationship and who is/are the principal(s), or if there is some other type of accountability relationship.

2.2. First Relationship: People, Legislative Power and Executive Power

The first relationship examined is the relationship between the people and the legislative power or congress (See Figure 15). The general population elects the members of the congress to represent them and delegates to them a legislative-making power to create the laws that best serve the interests of the electorate. The population elects specific legislators at regular pre-defined intervals, whilst the population previously delegated its power through the Constitution to the legislative power, not to those particularly elected legislators. The delegation is made from the population to the Congress, for the same reasons that any other delegation is made: it is costly for the principal to handle all the functions, there is lack of expertise and there is a trade-off between the time invested on performing all these tasks and attending to other matters (Epstein & O'Halloran, 1999).

The main function of the congress is the legislative function, which is to create, interpret, reform, and revoke legislation. These legislations are intended to address the social, economic, and otherwise problems that society faces, and particularly to address in an efficient manner the market failures that exist in the society. It is expected that once these functions are delegated, the congress-persons make all the decisions to comply with the interests and preferences of the people. Following the language and logic used so far, the forum of the action is either the general population or a specific group when the regulation is sectorial or specialized.

Figure 15. Delegation on first relationship



Source: Author's own depiction.

Another function that the population delegates to the congress is the power to delegate its legislative-making functions to the executive power. In that scenario, the congress becomes the principal to the executive power, though it remains the agent to the people that delegated this power to it and appointed them. This last delegation is also done for the sake of specialization and a more hands-on approach to solving the population problems.

When it comes to regulatory production, one of the core study-subjects is the government level at which policy should be made, which concerns in part those whose interests are to be responded to. As the literature has explained at length, the congress members might have other interests to comply with, which are different from those of the people that elected them, such as their own or those of the interest groups that might have an influence on the eventual re-election of the congress-person (Buchanan & Tullock, 1962; Ogus, 2004; Persson & Tabellini, 2002). Nevertheless, when the congress chooses to delegate the regulatory-making job to the executive power, regulations are made by individuals normally appointed by the head of the executive, who might not respond to the interests of congress, or respond to the industries that they are in charge of regulating. The choice to delegate creates transaction costs, as delegation often entails oversight (Epstein & O'Halloran, 1999).

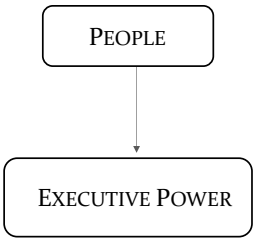
However interesting this sounds, the question is still, would a politician voluntarily place himself in a situation in which he will be accountable for his actions as opposed to a situation where he is free to act without consequences? The public choice theory does not need to be understood as a closed-off limitation to the actions of these actors, but as a positive explanation of the direction of their actions, that serves to study how to redirect them.

The relationship between the electorate and the legislator is a hierarchical relationship that is enclosed in the classical principal-agent problem. To address this problem, the interests need to be aligned either by stick or carrots. A carrot is the interest of supplying to the accountability demand of the population to remain in power through re-election, as the public choice theory suggests. The stick would be the possibility for the population to remove the incumbents from power. In addition to how they are appointed, their function and their motivation/incentives, how they are removed is also of relevance. In this sense, the people have the power to re-elect (or not) congresspersons during the next congressional elections. Other than that, during their elected term the very few methods available to remove a sitting congressperson do not depend directly on the population that elected him, but from the other powers of the state, mainly the judiciary. However, the motivation to avoid not being re-elected is of relevance in that particular relationship.

2.3. Second Relationship: People and Executive Power

The second relationship that exists in this presidential legal arrangement is that of the people with the head of the executive power, which is the president of the country (See Figure 16).

Figure 16. Delegation on second relationship



Source: Author's own depiction.

In a presidential system, the president is not only the head of the government, but also the head of the executive power. According to the constitution and the law, the head of the executive has the mandate and power to operationalize those laws made by the legislator and regulate through the office and the ministries the areas of the economy entrusted to the office (Mainwaring, 1993, p.202). This means that the regulatory and policy production of the head of the executive is wide and frequent. It also means that there is a direct line between the actions of this actor and their consequences that can be visualized by its forum. The forum is formed by the complete electoral base, and more specifically includes interest groups and stakeholders that are the beneficiaries of the regulatory actions.

The head of the executive is not accountable to the legislative powers as it is in a parliamentarian system. Therefore, their actions are expected to be received and judged in principle solely by the indicated forum. This is by definition a classical principal-agent relationship, a hierarchical relationship on which the principal is the electorate and the agent is the president.

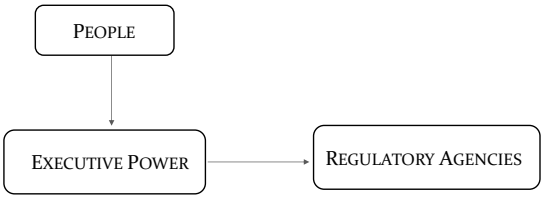
As the literature explains, "voters use the past performance of the government to predict future performance and see the government as responsible for that performance" (Stokes, 2001, p. 13). In other words, there is a possibility for the electorate to impose consequences on the actions of the head of the executive. This ability correlates directly to the "clarity of responsibility". When voters can discern where responsibility for the government's performance lies, the ability to reward or punish the incumbent increases and vice versa.

2.4. Third Relationship: President and Regulatory Agencies

According to the mandate of the constitution and the law, the president executes his duties through his office and through administrative agencies that depend on and report to him (Jorge Prats, 2011). These powers of administrative agencies to produce regulation and enact other administrative acts of a non-regulatory nature are delegated by the president (See Figure 17).

The tricky situation to determine the nature and accountability of their existing relationship comes with their appointment. The heads and members of these agencies are not elected by the people, but normally appointed by the head of the executive, the president. However, by the definition of their roles, the results of the work of the agencies benefit or harm the population that elected the president. Additionally, these outcomes have an impact on the perception that the population has on the work of the head of the executive. Therefore, the third relationship is twofold: that between the agencies and the president; and, because of the effect of the outcomes of the work, the relationship between the agencies and the people.

Figure 17. Delegation on third relationship



Source: Author's own depiction.

Citizens keep the president and executive power "accountable" through the results of their decisions, and these decisions include the regulations made by the regulators he appointed. On the other side of the table, if the president (as an actor), seeks a positive response from his citizens (the forum) it seems logical that he would expect his agencies (actions) to act according to the preferences of the main principal (the forum). In the presidential system, the president acts as principal to the agencies that depend on the head of the executive; and s/he acts as an agent towards the citizens that elected him/her, who act as the principal. In this situation, this actor, which acts as a principal and an agent at the same time, is both concerned with the performance of its agents and with the "carrots" from his principal. Then how does the president keep his agencies accountable? The agent has no

intrinsic motivation to perform optimally. The costs of the agent's bad performance are not fully internalized; when the agent does not perform well, the principal will bear these costs. In the classical Principal-Agent problem, the aim is to align the incentives of the agent towards the preferences of the Principal, which presents trade-offs between investing in oversight and creating the correct incentives.

By identifying that this is a hierarchical relationship where there are clear principals and clear agents, the approach with policy evaluation systems is less cumbersome than with other relationships. However, it does bring a problem of its own, since the entity that appoints the head of the regulatory agency is not the only recipient of the "actions" of this actor. In this sense, the head of the executive, as both actor and forum, can partially transfer its "oversight" function to other participants of the policy-making process, such as stakeholders, citizens and other bodies of the state. In this case, the hierarchical relationship no longer holds.

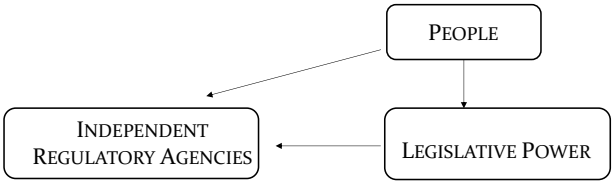
2.5. Fourth and Fifth Relationships: People & IRAs and Legislative Power & IRAs

Majone (1997) explains that elected politicians have difficulties with communicating credibility. This is in part is due to the time-inconsistency of their policies, because of the short-term horizons that democratic processes suppose (Kydland & Presscott, 1977; Gilardi, 2002). Additionally, they lack technical expertise in specific regulatory matters (Bawn, 1995). One of the solutions that the state has presented to these problems has been delegating the regulatory powers to independent regulatory agencies. The rationale behind this is that elected officials forego their discretion and time-inconsistency regarding policy-making and commit to more or less fixed rules (Gilardi, 2002), because the ultimate creation and application of the policies does not depend on them.

Therefore, in addition to the regulatory agencies that depend on the head of the executive discussed before, other types of administrative agencies that exist in a regulatory state are independent regulatory agencies (IRAs). These are bodies that regulate, have public authority and are not hierarchically subordinated to elected politicians (Thatcher & Sweet, 2002), which gives them functional and institutional independence. IRAs are created either by the constitution or by the legislator to regulate a specific sector. This independence of the personnel is understood, structure-wise, in terms of how the agencies heads are appointed and removed, the fixed terms of their office, and their legal mandate. In this sense, the heads or decision-making boards of these agencies are appointed by either a legislative body, a committee, the executive, or a combination thereof. They are appointed for a fixed term, and can be removed before the term is over only for specific causes.

This contrasts with the previously discussed regulatory agencies which depend on the executive, and which can be removed and appointed at the president's discretion at any point.

Figure 18. Delegation on fourth and fifth relationship



Source: Author's own depiction.

From this, it can be gathered that IRAs enjoy functional independence, as they are the sole decision-makers in their sphere of regulatory action. This functional independence is protected by the distance that the IRAs have from the executive institutions (Scholten, 2014), that creates the described personnel and institutional independence.

This isolation from the executive power, even though the IRAs have executive functions, responds to the desire to separate their work from political pressure. The main rationale is that these officials would provide credibility to their policies, because they are not "bound" by other interests, which would enhance investors' and citizens' confidence. Likewise, since they do not suffer from a short-term horizon, unlike elected officials, their decisions and policy planning are not affected by time inconsistency, as their policy commitments can remain constant (Estache & Wren, 2009; Gilardi, 2002).

These delegations of regulatory competences from the legislative and executive towards independent agencies are considered as a core characteristic of the governance system of the regulatory states (Yeung, 2010). "The reform of autonomous regulatory institutions was seen as the main strategy to develop regulatory reform in the region, as they could help to renovate bureaucracies, to introduce updated regulatory frameworks, to supervise the behavior of actors in private markets, and also to open regulatory policymaking to more democratic procedures." (Jordana, 2011, p. 161)

However, this delegation questions principal-agent predictions. In contrast with the regulatory structures and relationships previously analyzed in this Section, these independent regulatory agencies are not subject to direct control from the head of the executive power, nor the legislative power, and are not elected by the public. Therefore, their legitimacy and potential accountability are questioned. Maggetti argues that "factual independence [of IRAs] produces a net loss of legitimacy for a political system", and that the "political decision of delegating public authority to independent agencies has quite fragile normative foundations" (2010, p. 6), which is counter-intuitive to the aspiration of surrounding them with the credibility that the politicians lack. At the same time, the author recognizes that there is a possibility for the regulatory network to offer tools that can reconcile the trade-offs present between delegation, independence, and accountability.

Because of this lack of inherent legitimacy of independent regulatory agencies, the expectation is that they would intend to signal their long-term policy commitment to the

public and to political powers. Whilst still maintaining the independence from other political powers, it is still desirable for these agencies to showcase the transparency and account rendering that other accountable entities provide. Consequently, the literature has turned recently to discuss the necessity and relevance of the accountability of these type of agencies (See Maggetti, 2010; Samsonova-Taddei & Turley, 2017). However, the rationale is different than for other agencies, since these agencies are not subject to direct governmental control of their activities and therefore are not bound by the logics of the principal-agent relationship.

It is important to bear in mind that these entities are independent for the executive power; therefore, it would be counter-productive for them to be accountable to the same forum that there are independent from. However, there are other forums, such as the stakeholders and the general public, from which the only independence that these agencies need is functional independence. In other words, the need to be independent to make their regulatory decisions without being captured by interest groups.

With the independent regulatory agency, the forum is not concentrated in one group or individual, but divided because of the nature of the agency itself. The first forum of the independent regulatory agency is the legislative power that delegated to them their regulatory power. However, that is the only relationship that these two have, since the legislative does not appoint or remove the head or board of the agencies, nor is a direct recipient of the work of the agency. Nevertheless, since they delegated their legislative power with the intention of having more specialized, credible and independent decision-making, they still are interested, and affected by, the work of the agencies.

The second forum are the interest groups or stakeholders that are the direct recipients of the regulations of the agency. Because these agencies are created to regulate specific sectors (eg., telecommunications, banking, securities, energy) the recipients of their regulatory work are concentrated, identified or at least identifiable; and these groups are the main and most important forum for the purpose of accountability of this actor. Even though this forum of the regulation does not have a direct say on the permanence or not of the agencies' heads or boards and their functions, there are other dimensions of the accountability relationship that can be enhanced for this duo by tapping on the need of the agency to convey credibility and independence.

Either by a legal norm hierarchically equal or superior to the one that gives legal stance to the independent agency or voluntarily by the agency it is possible to introduce policy evaluation measures, structured to cater for the limitations that these relationships inherently present.

3. ANALYSIS OF ACCOUNTABILITY RELATIONSHIPS IN A PRESIDENTIAL SYSTEM

The previous Section identified some of the most prominent regulatory relationships that exist in a Presidential political system, namely: (1) People with the Legislative Power and

the delegation from the latter to the Executive Power; (2) People and the Executive Power; (3) President and Regulatory Agencies; (4) People and Independent Regulatory Agencies; and (5) the Legislative Power and Independent Regulatory Agencies. The study explained how the actors in each one of these relationships interact with each other, particularly the power that each has and the direct or indirect incentives that they have to act in benefit of each other. It determined that not all the actors interact the same way with each other, as in some cases there as a direct control of the forum over the future career or permanence of the actor, whilst in others the forum just receives the effects of the actions of the actor without any power or control over the actions of the latter.

These entities previously analyzed are the ones that enact legislations that are to be assessed depending on the scope of the assessment chosen by the country. In other words, the regulations that are chosen to be assessed by an entity, be it the legislative power, the executive power, a regulatory agency or an IRA. Therefore, how these entities are held accountable in both their regulatory-making process and their regulatory evaluation process is of main interest to this research.

Having understood the different regulatory relationships that exist in a presidential system, it is now possible to analyze how accountability is reflected specifically these relationships when it comes to the regulatory-making process.

In that sense, the accountability literature has studied the subjects that intervene in an accountability arrangement and has also identified characteristics of the interactions between the subjects. The most well-known relationship is the one explained by the principal-agent theory. Depending on how direct or indirect is the relationship between an actor and a forum, the relationship qualifies or not as a principal-agent scenario; which means that the treatment on how the forum holds the actor accountable varies. The literature has identified and explained three types of accountability relationships: Upward Accountability, Downward Accountability, and Horizontal Accountability depending on who is the forum of the relationship. In this sense, Upward Accountability refers to mechanisms in hierarchical relations; Downward Accountability refers to accountability mechanisms in non-hierarchical relationships with interest groups, stakeholders and citizens; and Horizontal Accountability refers to the mechanisms that exist between parallel institutions (Jordana et al., 2015; Scott, 2000; Verschuere, Verhoest, Meyers, & Peters, 2006).

Using those types of accountability relationships as a reference, I include each one of the regulatory relationships in a presidential system previously discussed in one of these categories. This serves to understand how the actors in those relationships can be held accountable by their forum in the regulatory-making process and through which mechanisms.

This Section also considers in the mix the dimensions of accountability explained and discussed in Section 1 of this Chapter (information, discussion and consequences) when

analyzing accountability in these relationships. Thus, it furthers the research in this area by identifying these dimensions specifically during the policy assessment process within the specific relationships; and furthermore, during the specific stages of the policy evaluation process. This will contribute to the literature by analyzing and determining which characteristics of each dimension should be considered during the policy assessment process when it has accountability as a goal.

As an end result, the author formulates a hypothesis on how these interactions would reflect in the different stages of the policy evaluation cycle when a regulation is beings assessed within one of the analyzed relationships. This, in turn, serves as a stepping-stone to building the framework that combines the use of the PEC tailored to the specific relationship that is being dealt with.

3.1. Upward Accountability: Principal-Agent Problem & the Problem of Multiple Principals

Upward accountability concerns hierarchical relationships that respond to the principal-agent logic. From the relationships previously explained, the ones that conform to this vertical arrangement are: (1) People-Legislator; (2) People-President; (3) President-Regulatory Agencies.

In these arrangements, there can be conflict between personal interest and professional obligation. Therefore, a suggested solution has been to align the interests of the "agent" with those of its "principal", and not with those of a third party. In a typical principal-agent situation, there are two recommendations for aligning those interests. First, to create the right incentives for the agent to act in accordance to the principal's interests; and second, to create an oversight scheme in which the principal oversees every action of the agent in order to keep his work aligned with the principal's interests. Or a balanced combination of the two.

In this sense, to address the accountability problems that arise in this spectrum, the upward mechanisms are directed towards the political principal. However, in this myriad of relationships, the recommendation seems abstract and does not address one particular case. The political principal in all of these cases is the entity or group that appoints: The people and the president. Therefore, the agent is in principle called to render account to that principal. However, these relationships are complex and in some cases there is not a clear line between the action of the agent and his responsibility in the outcome for the principal to evaluate and eventually sanction or reward.

This line has to be theoretically created, through a clear thread that illustrates how the actions are produced, the results that they are seeking, and the consequences that arise. *Ex ante* and *ex post* policy evaluation instruments can be used upwards as part of the control system (Verschuere et al., 2006). However, how each of these instruments are used and how the results are presented should respond to the dimension that is intended to be

addressed as well as the forum that is receiving the action. The common trend when it comes to multiple accountability is that they refer to multiple binary relationships between public officials and diverse audiences or forums, and the agent faces various and occasionally interconnected forums. How the regulatory agencies are accountable to the president, is different from how the legislators or the president are accountable to the people.

In Latin America, the executive branch has a prominent role as the principal, as oppose to the parliament in developed countries; therefore, agencies are accountable to the executive power as a whole or to the president directly (Fernández-i-Marín, Jordana, & Bianculli, 2015). The incentive that regulatory agencies and their heads might receive from the president is in the form of consequences (carrots/stick), and can be as simple as a public congratulation on a job well done; a recognition of exemplary work that the rest of the ministries or regulatory agencies should follow; permanence in the job; or, on the negative side, removal from the function. "If political power-holders such as regulatory agencies may be tempted to misuse and abuse their public authority, if these activities are associated with worse performance, and if accountability mechanisms may provide incentives not to engage in these activities, we shall expect higher degrees of accountability to be associated with higher quality of [regulatory] decision-making" (Koop & Hanretty, 2018, p. 45) .

All considered, how the accountability dimensions are complied with when using policy evaluation instruments needs to be related to the use that the forum may have of the dimension itself. Even though the next Chapter builds a framework for a specific scenario, it is not ill-advised to advance some normative assumptions on how each dimension could be addressed.

On an upwards accountability scenario, the information dimension is of utmost importance since the relationship in most cases moves vertically to the recipient of the actions, or to the entity that is called to reward/punish. The empirical work done regarding public consultation and governance, evaluates how information is transferred by the regulator, accepting any public transfer of information as valid. However, in this research it is argued that for accountability purposes, the information that should be available in each case depends on who the principal is. When the principal is the people, information should be made available through mass media, it should be readable, and understandable. It should explain how decisions are made, not only in form but in content, making it possible to the interested population to examine and understand the rationale behind the decision-making process, including who voted against or for each decision. This is useful information, not only for being able to give feedback on the decision, but to being able to make a direct connection between action and result, "clarity of responsibility". When the principal is the president or the executive power as a whole, the information should in practice have the same content, but should be proactively provided in frequent reports that answer the eventual questions that this principal may have.

The discussion dimension is more evident in the public consultation process when the principal is the public. It is the opportunity for the public to ask questions, to receive answers, and, as explained before, for the agent to justify and adjust its positions. This process does not need to be held face to face, but it should nonetheless be available for a reasonable time on an easy-to-access platform. Likewise, when the regulation is being monitored, the participation of the public is paramount to the accountability of the agent. In this sense, if the regulation indicates which goals it was aiming to reach, with the feedback of the recipient of the regulation, the regulator can collect enough data to evaluate these indicators. At the same time, it is a signal to the public of the willingness of the agent to correct its actions. This last part causes this dimension to partially overlap with the consequences dimension, since this is a stage for the principal to gather information to reward or sanction the incumbent. None of these stages represent a direct action of the principal to sanction the agent, but nonetheless, they offer the opportunity to sustain and inform a future vote. As explained before, voters use past performance to hold governments responsible and predict future wanted or unwanted performance.

Table 19 depicts some normative assumptions on which dimensions of accountability might be present at each stage of the PEC in the relationship between the president as an actor and the people as forum.

Table 19. Upward Accountability: People (Forum) and President (Actor)

Upward Accountability (Principal: People)	**Information**	**Discussion**	**Consequences**
Public Consultation	✓	✓	✓
Ex ante Assessment	✓		
Drafting/Implementation	✓		
Monitoring	✓	✓	✓
Ex post Evaluation	✓		✓

Source: Author's own depiction

When the principal is the president, then the discussions happen at several stages of the PEC. Because the agencies may need prior approval to actually go through with the regulation, both *ex ante* and *ex post* assessment processes serve as discussion scenarios between these characters. The agent is expected to be proactive when initiating the discussions, to justify its actions and eventually obtain positive consequences from them. The consequences dimension is direct when the president is the principal, since s/he is in a position to directly remove, confirm, or admonish the agent when a regulatory evaluation process is not adhering to its preferences. At the same time, it is a signal from the president as an agent, to the people (as principal) that the president is taking action to correct or sanction the errors of a regulatory agency that directly depends on his office.

Table 20 reflects which stages of the policy evaluation cycle are assumed to have an impact on each dimension of accountability, when the principal is the president, and the agents are the regulatory agencies. Considering the foregoing, the following hypothesis are proposed:

Hypothesis 1: *The Policy Evaluation Cycle has characteristics that can enhance accountability within the relationship between the President and Regulatory Agencies, particularly in the stages of* Ex ante *Assessment and* Ex post *evaluation.*

A negative aspect of this accountability set-up, is that it adds to the workload of the agent, possibly creating red tape. In the case of multiple principals, some of these requirements may overlap with the obligations that the same entity might have in other relationships; for example, with the obligation that a regulatory agency might have on a downward relationship towards its stakeholders. Nonetheless, the compliance with those overlapping obligations might also signal higher accountability from the public entity or politician, and even reduce asymmetry of information (Schillemans & Bovens, 2011).

Table 20. Upward Accountability: President (Forum) and Regulatory Agencies (Actor)

Upward Accountability (Principal: President)	**Information**	**Discussion**	**Consequences**
Public Consultation	✓		✓
Ex ante Assessment	✓	✓	✓
Drafting/Implementation			✓
Monitoring	✓	✓	✓
Ex post Evaluation	✓	✓	✓

Source**:** Author's own depiction

3.2. Downward Accountability: Independence vs. Accountability

As explained before, regulatory independent agencies are created either by the Constitution or by the legislator. However, their members and heads are not elected or removed by any democratic process. As from the development of the regulatory state, there is a "democratic deficit" produced by how political participation seems to be undermined (Bakvis, Rhodes, & Weller, 1998; Lodge, 2004; Majone, 2001; Scott, 2000), particularly because these independent agencies are not responsible nor accountable to voters or elected officials (Gilardi, 2016).

The delegation from the legislator to the independent agency means that this principal transfers its powers, but not its legitimacy; and therefore, these agencies are called to transmit this sense of legitimacy through other means (Majone, 1999). According to Maggetti, this is done by showing "that they are more proficient in producing qualitatively better policy outputs than democratic institutions"; and by having a higher procedural accountability which assumes that "they operate more lawfully, transparently, openly, and fairly than ordinary bureaucracies can do" (2010, p. 3).

Autonomy from direct political control does not mean immunity from other sources of institutional accountability (Majone, 1999). The assumption was that these agencies would want to implement downward accountability mechanisms to communicate directly with their forum, to signal that their legitimacy is stronger than other non-independent

administrative agencies and empower them as public institutions. Unlike when the principal is the legislative power or the head of the executive, here there is a lack of principal and just a downward relationship towards the potentially affected parties. Considering the accountability dimensions explained in the first part of this Chapter and taking into account that downward accountability refers to a relationship with the forum to which there is no hierarchical nexus (interest groups, citizens and stakeholders), the adopted mechanisms are expected to address this forum. Knowing the forum, then the specific obligation for there to be accountability is that the information and discussion are addressed to these groups.

In the information dimension, it is expected that the information is provided publicly and is easily available, namely, availability of minutes of discussions of the decision, reports of *ex ante* evaluations, reports on the monitoring of the regulation, available data used for decision making, among others. Since independent agencies are usually regulating sensitive sectors, it is assumed that the amount of information that they handle is higher than more complex sectors. Thus, they are expected to invest in sharing and receiving information than can assist in a more efficient decision-making process.

This could help also overcome the asymmetry of information problem that both the agency and the public face (Fernández-i-Marín et al., 2015). The presence of public hearings is largely evident across countries and sectors in Latin America, intended in most cases as an apparent transparency mechanism. This helps with the problem of asymmetry of information that the regulator faces, because the forum is providing it with information. The information that the agency is required to provide as part of the process of the public consultation, or after the *ex ante* assessment, gives enough signals to its stakeholders of the decision that is about to be enacted. This allows the stakeholders to detect early initiatives that are not aligned with the sectors' preferences and provide enough evidence for an early intervention (Radaelli, 2010; Samsonova-Taddei & Turley, 2017).

In the discussion realm, it is expected that open public consultations are undertaken at several points in the life of the regulation, that these discussions are made public, and that their inclusion or exclusion is explained. Open consultation allows the agency to promote open discussion and receive information. The exchange of information is vital for accountability and legitimization purposes. Evidence however shows that this exchange in Latin American countries is not widespread in practice. The issue of consequences remain difficult, since there is no direct saying of the forum regarding the removal or sanctioning of the actor. However, it is possible for the forum to challenge the legality of the regulations that do not comply with the steps explained above, through one of the other accountability mechanisms, particularly using courts or oversight bodies.

Table 21. Downward Accountability: Independent Regulatory Agencies (Actor) and Stakeholders (Forum).

Downward Accountability	**Information**	**Discussion**	**Consequences**
Public Consultation	✓	✓	
Ex ante Assessment	✓		
Drafting/Implementation			✓
Monitoring	✓		✓
Ex post Evaluation			✓

Source**:** Author's own depiction

Table 21 reflects which stages of the policy evaluation cycle are assumed to have an impact on each dimension of accountability, when the forum are the stakeholders, and the actor is the Independent Regulatory Agency. Considering the foregoing, the following hypothesis is proposed:

Hypothesis 2: *The Policy Evaluation Cycle has characteristics that can enhance accountability within the relationship between Independent Regulatory Agencies and their Stakeholders, particularly in the stages of Public Consultation and Ex post Evaluation.*

Notwithstanding the above, in practice, the dissemination of downward accountability mechanisms seems to remain limited (Fernández-i-Marín et al., 2015). It is remarkable though that both politicians and scholars are arguing in favor of including independent agencies in the list of agencies that should undertake *ex ante* and retro-active evaluation of their regulations, in order for them to increase their legitimacy (Bertelli & Whitford, 2009; Koop & Hanretty, 2018; Samsonova-Taddei & Turley, 2017). Because of the arguments presented in this Chapter, it is agreed that this inclusion would increase even more their accountability. However, the literature has shown that there is concern on whether these tools are used to collaborate with accountability and transparency, or "simply to maintain an image of good governance and justify policy decisions that would have been made even in the absence of a [policy evaluation cycle]" (Samsonova-Taddei & Turley, 2017 p. 1).

3.3. Horizontal Accountability with Oversight

These relationships are characterized by the fact that there is no hierarchical relationship between the actor and the forum, nor are the actions of the actor intended to directly or indirectly affect the forum. This relationship is artificially created, in the sense that it does not derive naturally from the description and scope of functions of the actor. It is a relationship that is intended to check and balance the actions of the actor considering the potential power-asymmetry between the actor and the population that receives the consequences of the actor's actions. Picture, for instance, the relationship between a company and a private independent auditor, for an example within the private sector. In the public sector realm, one equivalent would be the relationship of the courts with the executive and legislative powers; particularly when it comes to their regulation-making job.

Since this is not a hierarchical relationship of any sort, the question is, how can this be an accountability relationship?

As previously stated, for there to be an accountability relationship, there needs to be the stages of information, discussion and consequences within the relationship. At first sight, it seems that only the consequences dimension is present. However, the other two are present within the definition of a legal judicial procedure. In this relationship, the court can hold the regulator accountable when the actions of the regulator are not compatible with its legal or constitutional mandate, in a broad sense. The job of administrative or constitutional courts, when presented with a legal claim is to examine whether the actions of the regulator are unconstitutional or illegal. For this type of court intervention to reach the actions of the regulator, it is necessary that the courts' competences reach as far as the specificity of these actions, which should be done by the legal norms.

To make it more understandable, one can refer to a real case. Mexico, within its better regulation agenda and policy evaluation cycle has public consultation embedded as a necessary step before a regulation is enacted. In 2013, the Ministry of Economy enacted a regulation for banning the sale of analogue television sets. During the policy evaluation process, the proposed regulation went to public consultation, where it heard the stakeholders and general public and performed a Regulatory Impact Assessment. The regulation was enacted exactly as in the first draft presented to the public, even though there were comments against the regulation, mainly based on the costs that the regulation had.[55] At first sight, all the steps and stages were complied with, and therefore if taken to a court the decision would be deemed both legal and constitutional. Notwithstanding, there was no clear explanation of why those comments and feedback were not considered.

How can a court hold accountable a regulator when it has complied with all the formal steps of the policy evaluation cycle? As held throughout this Chapter, one of the motivations to have these policy evaluation systems in place is the possibility of holding the regulator accountable. In this sense, for there to be accountability, the court needs to be able to analyze not only the formal aspects of the policy evaluation cycle, but if the regulator respected the intent of each of the stages. As established earlier in the chapter, the discussion phase involves not only the exchange of ideas between the parties, but also the publication of the motivations to either include or exclude the feedback. If a court is able to revoke a regulation based on the lack of compliance with these steps, then the logical action from the regulation is to comply with the step before the siren is sounded.

There is criticism of this possibility, to the extent that a court interferes with the decision-making ability of a specialized regulatory body. Judges might be experts in judicial remedies, but do not have the expertise of a regulator in its specific subject. In the US, the Supreme Court stated early on a judicial deference to the administration on the

[55] For more detail on the regulation and the costs involved in this case, see Reyes, Romano & Sottilotta, 2015.

interpretation of the law in the regulatory-making process, precisely because of the expertise of the latter compared to that of the former (Scalia, 1989). However, this does not forbid a court from examining whether the stages were completed with the intent they were designed for.

Table 22 depicts which stages of the policy evaluation cycle are assumed to have an impact on each dimension of accountability, when the Forum are the courts, and the actor is the Regulatory Agency. Considering the foregoing, the following hypothesis is proposed.

Hypothesis 3: "*The Policy Evaluation Cycle has characteristics that can enhance accountability within the relationship between Courts and Regulatory Agencies, in the stages of regulatory implementation, monitoring of the regulation and ex post assessment, but limited to the consequences dimension of accountability*"

Table 22. Horizontal Accountability with Courts (Forum) and Regulatory Agencies (Actor)

Horizontal Accountability (Court)	**Information**	**Discussion**	**Consequences**
Public Consultation			✓
Ex ante Assessment			✓
Drafting/Implementation			✓
Monitoring		✓	
Ex post Evaluation			✓

Source**:** Author's own depiction

Another instance of these horizontal relationships, and one that is more prominent in the better regulation world, is that between the regulator and the regulatory oversight body. This administrative agency can be located as a dependency of the executive power or as an independent agency. Just like courts, it does not have a hierarchical relationship with the regulators that are under scrutiny, since they do not appoint or delegate to them, nor are they affected by the results of their regulations. Nonetheless, they are set to be the "first responders" in the case of an irregularity on the policy evaluation cycle of a regulator. For this scenario to materialize, the Regulatory Oversight Body needs to have a mandate and power to receive and request information from the regulator, facilitate a discussion and have consequences for a misconduct or compliance with the norms.

In most of the cases, these ROBs only oversee the policy evaluation work of the regulatory agencies that depend on the executive.[56] Therefore, both legislators and independent agencies are out of their reach, which means that the accountability relationship for these two needs to come from elsewhere. A form of increasing accountability for these

[56] This is explained by the fact that these Regulatory Oversight Bodies are commonly created by a decree of the executive power, and because of the jurisdiction of the president, it cannot make this oversight mandatory through a decree to the Legislative Power or IRAs.

independent agencies is to make it mandatory for them to adhere to the policy evaluation plan, and that it is possible for ROB to supervise their work.

Table 23. Horizontal Accountability with ROB and Policy Evaluation Instruments

Horizontal Accountability (ROB)	**Information**	**Discussion**	**Consequences**
Public Consultation		✓	✓
Ex ante Assessment	✓	✓	✓
Drafting/Implementation			
Monitoring			
Ex post Evaluation			✓

Source**:** Author's own depiction

When overseeing the work of the regulatory agencies, the ROB is in a position to verify that the regulatory agency complies with all the steps of the policy evaluation, and when it is not the case, the consequences dimension enters into play. This requires that the ROB is able to observe the regulation by requiring the regulator to modify the regulation, to complete the missing steps, or better to explain its decision. However, if the ROB cannot veto the regulation, then its work is more illusory than real (See Table 23). Take the case of Costa Rica. The Directorate of Better Regulation is the oversight body with the function of evaluating the policy evaluation reports that the regulatory agencies submit. However, first, it is not mandatory for all regulators to submit their policy evaluation report, if it does not pass the "information" test. Second, after the Directorate of Better Regulation assesses the report, it can give recommendations, but cannot veto the enactment of the law under any circumstances. This does not pass the "consequences" test either. When both tests are run in this policy evaluation arrangement, it is likely that it is not built for accountability.

4. CONCLUSIONS

"Accountability and transparency are not just a good thing of which we should have more" (Lodge, 2004, p. 142). In fact, accountability is a matter of adequacy, not of quantity, and dosage which may vary in different settings and contexts (Jordana et al., 2015). The main argument of this Chapter is that policy evaluation systems have characteristics and properties that can enhance the accountability of the policymakers towards their forum; but the structure needs to address the particular relationship that exists in the specific decision-making setting.

Since the research subject of this Thesis are Latin American countries, the analysis of this Chapter focused in the accountability relationship exist that exist in presidential systems and their particularities. In addition, because for there to be accountability it is required for there to be information, discussion and consequences to the actions of the actor, it was relevant to determine how these relationships operated in the Latin American system.

In these systems decisions of the executive, which in a great part are regulations, are made in most cases by the head of the executive or by an agency that is part of the executive power. In addition, the public administration is largely directed and accountable to the president, which creates a vertical and upwards accountability relationship between regulatory agencies and the president. In addition, there is also delegation from the constituent (the population) either directly or through the legislative to independent regulatory agencies. These agencies are not accountable to the president, but they have a vertical, but downwards, accountability relationship with the people and their regulated stakeholders. In addition, there are other relationships that are artificially created to allow for a space of evaluation and control of the actions of these agencies. Those horizontal accountability relationships exist between regulatory agencies and the courts, as well as with oversight bodies.

Nevertheless, those were not the only accountability relationships identified, even though they could all be classified as either upward, downward or horizontal accountability relationships. The actors do not interact with their forums in only one manner, and one actor can be accountable to many forums, and for instance, provide information to the public, but be accountable to the courts.

While analyzing which is the context where accountability might be desired, it is evident that the regulatory relationships present in the Latin American presidential system are complex, multifactorial and cannot be boxed into one category. Therefore, it is necessary to build an arrangement even more complex than anticipated. Each type of accountability relationship requires a different approach to how the stages of the policy evaluation cycle are used. Not all of the stages of the cycle seem to address accountability concerns and one size does not fit all.

In that sense, this Chapter was able to put forward a series of hypotheses regarding how the different stages of the PEC impact each dimension of accountability (information, discussion and consequence), considering the accountability relationships that were identified in a presidential system. These hypotheses resulted in a preliminary framework on the interaction of the PEC and accountability dimensions in several relationships that will be further develop in the last Chapter of this Thesis.

CHAPTER 5

A FRAMEWORK FOR ASSESSING ACCOUNTABILITY WITHIN THE POLICY EVALUATION CYCLE

This Chapter joins two relevant streams of literature, accountability and policy evaluation to determine if, as claimed by the literature, policy evaluation instruments are set to increase accountability in the regulatory-making process of a country. While the PEC, as a combination of policy evaluation stages, might contribute to accountability, compared to a scenario where such stages are not in place, I claim that its contribution might be different in the various stages of the cycle, and for different regulatory relationships. Therefore, this Chapter analyzes how accountability plays out throughout the various stages of the Policy Evaluation Cycle, and how it plays out differently throughout these stages within diverse types of regulatory relationships. Additionally, I investigate the nature of the spillover in terms of accountability from one stage of the PEC to the other.

Next it synthesizes the insights from the accountability literature and the policy evaluation literature in a unified framework and examine the contribution towards accountability that each stage of the Policy Evaluation Cycle has on specific regulatory relationships. The proposed framework shows how, and under which conditions the Policy Evaluation Cycle contributes to accountability. Considering the foregoing, this Chapter aims at answering the following question: Which stages of the Policy Evaluation Cycle contribute to accountability for regulatory relationships within a presidential constitutional system?

To answer this question, one relationship of each category of the ones that can be found in a presidential constitutional system is chosen, to study the interaction of the actor and its forum within the Policy Evaluation Cycle, namely: (1) the Relationship between the President and his Regulatory Agencies; (2) the Relationship between Regulatory Independent Agencies and their Stakeholders; and (3) the Relationship between Regulatory Agencies and the Courts. Score-based statements are applied to each stage of the PEC, which evidences whether a specific stage of the PEC has an impact on one or several dimensions of accountability. The results allow the identification of the stages of the PEC that have an impact on a dimension of accountability, considering the type of regulatory relationship being analyzed. In turn, this allows the creation of multiple frameworks that can be used to customize the Policy Evaluation Cycle depending on the regulatory relationships where accountability needs to be enhanced in a particular country. To be clear, this Chapter makes no normative statements on where accountability should be preferred within a regulatory relationship. This determination is to be made by the government, the decision-makers, the voters or the architect that designs the PEC within the Better Regulation system of a country. Instead, this Chapter provides a framework for making this choice.

The rest of the Chapter is structured as follows: The first Section presents the methodology used to develop the framework and applies it to the stages of the PEC. It also explains the methodology followed for the analysis performed in the Chapter. The following sections combine the insights of the accountability and policy evaluation literature, for specific accountability relationships. In this sense, Section 2 refers to the relationship between the President and Regulatory Agencies and assesses how each stage of the Policy Evaluation Cycle contributes towards accountability within this relationship and provides a final weight of the aggregated results. Section 3 repeats the same exercise as before for the relationship between Regulatory Independent Agencies and their Stakeholders, providing different results for the contribution that each stage of the PEC has on accountability for this relationship. Section 4 then analyzes in the same manner the relationship between Courts and Regulatory Agencies. Finally, Section 5 discusses the different effects on accountability that affect each type of regulatory relationship, the spillovers of these effects, as well as their interactions.

1. METHODOLOGY

The measurement of accountability and its dimensions in a system is lightly studied by the literature and in many cases is just left implicit. A notable exception is the work from Bovens, Schillemans & Hart in which they develop a tool for systematically assessing public accountability arrangements joining different perspectives of accountability (democratic, constitutional and learning). Their tool "*facilitates a systematic and nuanced assessment of a given accountability arrangement*" (2008, p. 237). Later on, the scholarly work of Bransman & Schiellmans (2013) in this aspect is of notice. After disentangling various meanings of the concept of accountability, they proposed a three-dimensional mapping instrument that they named the "Accountability Cube", that included the three dimensions previously identified by Bovens: (1) information dimension, (2) discussion dimension, and (3) consequences dimension. They refer to it as a heuristic device to analyze the complex concept of accountability, as it helps to measure and locate the intensity of accountability processes.

Building upon the "Accountability Cube" and the accountability assessment tool developed by Bovens, Schillemans & Hart, a framework was developed in this work for assessing accountability in the different stages of the PEC within particular regulatory relationships.

The framework assesses whether a stage of the Policy Evaluation Cycle contributes to all or only some of the dimensions of accountability, in the specific regulatory relationship that is being considered; and, to compare this assessment across different regulatory relationships. For the evaluation, all five of the stages of the PEC are considered, namely (i)

public consultation; (ii) *ex ante* assessment; (iii) drafting and implementation; (iv) monitoring; and (v) *ex post* evaluation.

Likewise, this identified and discussed various types of regulatory relationships in which accountability is desired within the regulatory-making realm of a presidential system. However, for this assessment, only one relationship was chosen where the accountability travels upward, one downward, and one horizontally. Evidently, this assessment could be extended to the other relationships that were discussed in Chapter 4, such as the relationship between Independent Regulatory Agencies and Regulatory Oversight Bodies. It could also be potentially extended to relationships in other constitutional systems that are not discussed in this research, for instance the regulatory relationships that exist in a parliamentarian system. Nevertheless, as a starting point, these relationships were chosen as representative of the regulatory relationships that are considered by the author as more salient in the presidential systems that currently operate in Latin American countries, and which are the focus of this research.

Scorecards

For this assessment, customized scorecards were created.[57] Each scorecard contains statements regarding every stage of the PEC, and these statements reflect the stages of the PEC as defined by the theory, empirical studies, and practice in their best-practice scenario. The drafting of the statements for the scorecards is done solely by the author and is based on the concepts studied and the analysis performed throughout this thesis. In order to be able to measure each accountability dimension within the stages of the PEC separately, within the scorecards, the statements are in turn divided depending on whether they belong to the information, discussion, or consequences dimension of accountability.

Three scorecards were developed in order to examine three different regulatory relationships within the presidential constitutional system. Since the interactions of the actors within these relationships are different depending on the relationship they are in,[58] the statements in each scorecard are customized for the specific regulatory relationship examined, and consequently the analysis is performed separately in different sections of this Chapter.

[57] See the Appendixes to this Chapter
[58] Chapter 4 analyzes in depth these interactions.

Scoring

Even though at this point it might seem obvious, it is important to clarify that these assessments in the scorecards are not applied to a Policy Evaluation Cycle of a specific country or of an agency[59], but to the stages of the PEC themselves. As indicated above, the aim is to identify which stages of the PEC contribute to accountability or have accountability potential and within which regulatory relationships.

Therefore, the next step was to score the statements contained in each scorecard. Each dimension within a stage of the PEC has the same weight, as each one is of equal importance on its contribution towards accountability. With that in mind, there is a more or less proportional distribution of statements for each dimension in a given stage, in a way that the average of the score is not disproportionately affected by the scoring of one question. I assigned a score from 0 to 2 to each statement, depending on whether the statement contributes or not towards the specific dimension of accountability in the relationship being considered, based on the incentives it creates for the actors and its forum. In that sense, 0 = no contribution to the accountability dimension; 1= low contribution to the accountability dimension; 2= moderate or high contribution to the accountability dimension. A higher average score on the statements for each dimension in a specific stage of the PEC reflects a higher contribution of that PEC stage towards this accountability dimension. Likewise, a higher score on the sum of dimensions reflects a higher contribution by the PEC stage towards accountability.

As with the drafting of the statements, the weighting and the scoring of each statement is done solely by the author and is based on the concepts studied and the analysis performed throughout this thesis. Because of this, in the analysis performed in this Chapter, the reasoning behind the scoring for each statement is explained, for the purpose of guiding the reader through it, but also of facilitating future corrections or replications.

Limitations of the Methodology

Admittedly, the statements contained in each scorecard might be an over-simplification of reality and are also limited to the research on the relevant topics. However, the statements can be modified to better reflect the legal instruments and administrative procedures that are available in a specific country or agency. Likewise, the scoring might be somewhat subjective, since is also done solely by the author. However, the framework can be used to

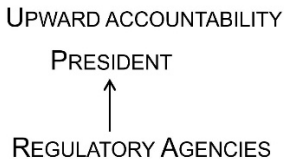
[59] This is a task for further research and is indeed the intended use of the instrument here developed.

score the statements using other methods, such as Delphi[60] to get a less subjective scoring. The main advantage of the Delphi method is that it uses a tested and well-structured process to ensure that the information provided by the experts is cross-checked and exposed to regular feedback (Dalkey & Helmer, 1963; Linstone & Turoff, 1975). Additionally, this framework it can be used to score the specific accountability reality of a country or an agency that has already implemented the PEC.

This is a first modest step to assess accountability within the Policy Evaluation Cycle that could be potentially useful to both scholars and policy makers.

2. ONE SET-UP: UPWARD ACCOUNTABILITY RELATIONSHIP BETWEEN REGULATORY AGENCIES AND PRESIDENT.

The first accountability relationship analyzed is that between the President and Regulatory Agencies (RA). In countries with presidential constitutional systems, the President executes his duties through his office and through administrative agencies that depend on and report to him (Mainwaring & Shugart, 2009). It is an upward accountability relationship because there is a hierarchical relationship between the forum (President) and the actor (Regulatory Agency), that allows the forum to have a direct control over the actor, as in a classic principal-agent relationship.



The hypothesis presented for this relationship in Chapter 4 is the following: *Hypothesis 1: The Policy Evaluation Cycle has characteristics that can enhance accountability within the relationship between the President and Regulatory Agencies, particularly in the stages of ex ante Assessment and Ex post Assessment*.

To theoretically test this hypothesis, this Section first presents a short overview of the particularities of this accountability relationship, as well as its defining characteristics.[61] Afterwards, it analyzes the impact that each stage of the Policy Evaluation Cycle might have on the accountability within the relationship. For instance, it analyzes if the elements and

[60] Delphi is a forecasting method that relies on the opinion of experts. See Linstone & Turoff, 1975; and Dalkey & Helmer, 1963.
[61] Chapter 4 discusses more in depth this relationship and its accountability characteristics.

activities that normally converge in the Public Consultation stage of the Policy Evaluation Cycle, have an impact or not on either the information, discussion or consequences dimension of accountability for the relationship between the President and the Regulatory Agencies. Then, it repeats the same analysis for *Ex ante* Assessment; Drafting and Implementation of the Regulation; Monitoring; and, *Ex post* evaluation. Finally, in the last part of this Section, it summarizes in which of these stages a higher convergence with accountability is found. This results in the concluding framework for this relationship, to prove or disprove the previously stated hypothesis.

2.1. Particularities of the Relationship President-Regulatory Agencies and its Defining Characteristics

The President, or in some cases the legislative, delegates to these administrative agencies the power to regulate and to enact other non-regulatory administrative acts in execution of the law. The head of these agencies is not elected by the people but appointed by the President. As a result, these agencies depend on and report to the President, and therefore are accountable to him (Mainwaring & Shugart, 2009). In some countries, these agencies are ministries (i.e., Ministry of Economy, Ministry of Labor, and Ministry of Environment), in others, they are sectorial agencies (Institute of Telecommunications; Superintendence of Electricity). Regardless of their denomination, they qualify as regulatory agencies as long as they have the power to enact regulations and depend financially, institutionally and to some extent personally on the head of the executive.

The President has an upward accountability relationship with these administrative agencies. The actor is accountable to his hierarchical superior, who appoints him. In other words, it is a classical principal-agent relationship.

The regulatory production of RAs is an extension of the work of the President. Thus, the consequences of their work affect the eventual decision that the electorate may have in the re-election of the President or continuation of the party. Therefore, the principal has an interest in ensuring the quality of the actions of the agent.

The agent is not a mere executor of the mandates of his principal, but has also criteria for his decision-making, discretion, and expertise. As explained by the jurisprudence,[62]

[62] The United States of America is a country with a presidential system that has a longstanding tradition of regulating through the executive power. The interpretation of their jurisprudence of the accountability relationship that developed from a delegation from the congress to the executive provides important guidance to the study of the topic.

> "[...] an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to **be resolved by the agency charged with the administration of the statute in light of everyday realities**" *(US Supreme Court, 1984, p.866)*.

Therefore, there are trade-offs between, on the one hand letting the RA work according to its expertise knowing that the agent might have incentives to make decisions and take actions that are not aligned with the interests of the principal; and, on the other hand, close control over the RA in order to make sure that its work is aligned with his principal's preferences.

However, in a presidential democracy, the President requires the regulatory efforts across RA to be consistent, and to respond to the priorities and issues that he has set. This does not necessarily translate into favoring the preferences of the administration over the public's, since this is against the idea of democracy; nor into serving only popular demands, as they might not always serve the public interest. It does, however, require safeguards that increase the accountability of the RA, as agent, towards the President as its principal. One of the safeguards against agency losses is the various forms of oversight, including administrative procedures and institutional checks, which tend to increase scrutiny instead of the principal retaining too much residual power (Kiewiet & McCubbins, 1991; Strøm, 2003).

These oversight controls are established in order for the principal to have mechanisms to sanction behavior that departs from his stated preferences. The President, as the hierarchical superior of the head of the RA, is in a position to impose soft and severe sanctions, such as a call of attention or removal from office, accordingly; as well as to grant rewards, such as promotions or public recognitions. The agent rationally would avoid being sanctioned, and could seek to be rewarded, even if not as readily. Focusing on the topic of the Chapter, the principal is interested in the regulatory production of the agent. Thus, the Regulatory Agencies are to be accountable to the President on their regulatory function, its process and the results.

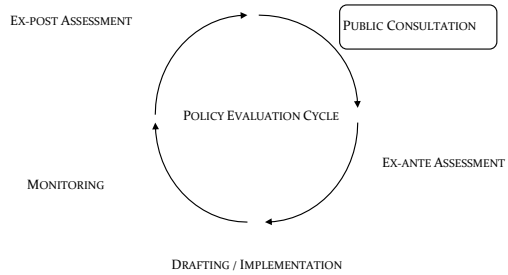
2.2. Identification and Analysis of Accountability in the Stages of the Policy Evaluation Cycle

This arrangement on which a democratically legitimized principal, the president, has a set of regulatory agencies that depend and respond to him, creates initially a structure for overcoming some of the agency problems. [63] In particular, problems of moral hazard. However, it also requires that the agent has enough incentives (or mandate) to be committed to the oversight of his principal, the president (Bovens et al., 2008).

After understanding the particular characteristics of the relationship between Regulatory Agencies and the president, this Section analyzes how accountability is reflected throughout the different stages of the PEC. The PEC is implemented for, among other goals, evaluating the potential effects of regulations and increasing accountability in the policy-making process (Adelle & Weiland, 2012). Each stage of the PEC has a different function for the evaluation of a potential or existing regulation;[64] however, it is debatable whether each stage of the PEC also has a function towards accountability. Even more, it is unclear whether the PEC serves as an accountability tool when implemented in the regulatory-making process that involves the President and his Regulatory Agencies.

The rest of this Section analyzes which stages of the PEC contribute towards accountability in the relationship between the President, as a principal (or forum), and the Regulatory Agencies, as agents (or actor). Each stage of the PEC is briefly explained as defined by the theory, jurisprudence, and best international practices,[65] and it examines to what extent it has an impact on either one or all of the dimensions of accountability, namely information, discussion, and consequences. Appendix I to this Chapter contains the statements that were considered, scored, and analyzed in this Section.

2.2.1. Scoring Public Consultation



[63] See Chapter 1. Section 3.2.1: Agency theory
[64] See Chapter 2. Section 3: Policy Evaluation Cycle: Discussion of the role of the stages
[65] This is done in detail in Chapter 2: Policy evaluation structures: Different means for different purposes

Preliminarily, it is evident that the President does not have a direct influence on the Public Consultation stage, since the interaction happens between the RA and the people or stakeholders. This suggests that the accountability score might be low. However, the process itself might have an impact on the accountability of the regulator towards the President. Since the President, and not the RA, is ultimately accountable to the People agency, in this stage it could be argued that he hands over his "overseeing" power to the people, who act as "informants" of the actions of the regulator to the President.

Information

Within the information dimension of accountability, the actor informs its forum of his actions. In this relationship, the forum is the President, and the RA does not directly inform the President of their actions through the public consultation stage. As argued previously, the interaction between the public and RA in this stage, serves as an indirect means to provide information about the actions of the Agency to the President. Nevertheless, the existence of this interaction does not imply that it has the same impact on the accountability as if there were a direct interaction.

In this sense, the public consultation process is to be available to the public, and it must provide the public with sufficient information to offer feedback (Shipley & Utz, 2011). In the public consultation stage, the public should be able to understand what the goals of the potential regulation are (Coleman & Gotze, 2001). When these criteria are met, the public is in a position to properly receive the information regarding the work of the RA. However, the President is not directly being informed about the work of the agency through this process. Only if as a result of obtaining this information, the public becomes publicly vocal about its agreement or disagreement with the content of the evaluated draft, the President receives information from the public. Therefore, the impact of the public consultation stage on the information dimension of accountability is low.

Discussion

The discussion dimension of accountability refers to the bilateral interaction between the actor and his forum, where he can justify and explain his actions.

In particular, once the regulator receives the feedback from the public, he needs to respond to the feedback provided. Not every item of feedback merits a response, but the jurisprudence has somehow narrowed it to determine that all "significant" or "relevant" comments received should be granted a response (Kochan, 2018). The response by the

Regulator takes different shapes, as it is given verbally if the discussion is happening in person; it can be given in written in the website where the draft is being discussed. The obligation is to either include the comment or suggestion in the text of the draft version, or provide a public explanation of why the comments were not included in the final text (Sunstein, 2017).

However, these actions do not allow the President to discuss, either directly or indirectly, the actions of the Regulator. It has the potential to provide the President with information that could be useful for him in the consequences dimension of the accountability relationship. Therefore, the Public Consultation stage has none to low impact on the discussion dimension of accountability for the Regulator *vis à vis* the President.

Consequences

The consequences dimension is where there is a positive or negative reaction by the forum to the actions of the actor (Bovens, 2007). This dimension is not necessarily about imposing sanctions or granting rewards, but about the existence of the sanctions or rewards and the possibility to impose them (Brandsma & Schillemans, 2013). Some of the characteristics of the public consultation stage previously described are relevant for the President to be able to act at the consequences stage, particularly those obtained in the information stage. Additionally, there are certain indicators of the Public Consultation stage that are relevant for the consequences dimension. Particularly, the document made available for consultation indicates who drafted it; and how the regulation presented for consultation was made, or in other words, if there were votes (in the case of boards) and who voted. This makes those responsible for the positive and negative content of the draft identifiable to the public.

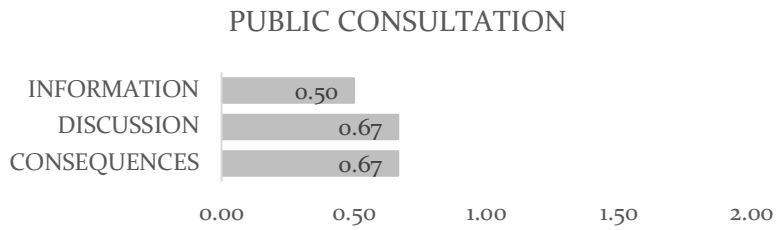
As argued before, if the public is able to communicate to the President its agreement or disagreement with the work of the Agency, the President could use this information to either order the modification of the regulation, revise with the Regulator the claims of the population, or take other measures to align the preferences of the agent with his. Although it is the Regulator, and not the President, who has control over the public consultation process and the opinion of the public in this process, the public can also express its opinion through other means (media, social media, etc.) to reach the attention of their democratically elected incumbent, who is, at the same time, the principal of the Regulatory Agencies. In this scenario, the agencies can foresee or expect any type of consequences for their actions from the President.

Because of the nature of the relationship, the President is in a position to identify the actor, connect the actor to the action, and apply sanctions or rewards, as they readily exist.

Therefore, when the public consultation lacks a main component, for example, the RA does not make public the draft of the regulation or does not take into account the comments provided by the public, and the President is made aware of this, then this dimension is met. However, sanctions are imposed only for "relevant", widely publicized, controversial or "important" regulations. As for the rest, it has a lower probability of being met.

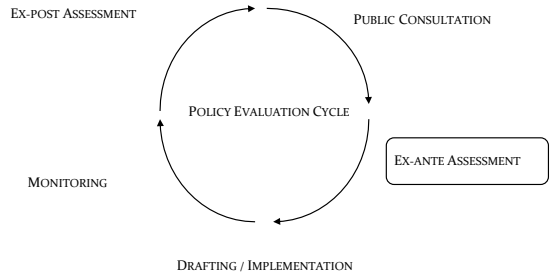
On the aggregate, the Public Consultation stage seems to have a low contribution towards accountability in the relationship between the President and the Regulatory Agencies (See Figure 19). The consequences dimension is the one with a higher impact on accountability, due to the direct hierarchical relation between the actor and the forum.

Figure 19. President - Regulatory Agency: Accountability on Public Consultation.



Source: Author's own depiction

4.2.2. Scoring Ex ante Assessment



This analyzes the potential contribution on accountability of both the performance of the *ex ante* evaluation itself, and the report of the *ex ante* evaluation that is presented by the RA to the President as a validation of its regulatory choice, prior to the enactment of the regulation.

Information

The information provided by the regulator to the President justifying its decision should provide evidence of how and why the decision is made. Because Regulatory Agencies are

not democratically elected, they know that their mandate is more fragile than those that might take time or consensus to elect and remove. This might cause them to enact regulations that are popularly acclaimed, to respond to the requirement of the population (Sunstein, 2018a). This could be done, as the private interest theory explains, looking after their own self-interest of maintaining the support of the interest groups that can either remove or maintain the President in office and themselves by extension. The public may want a regulation based on the saliency of a problem or on the perception of a risk. In this sense, performing an *ex ante* evaluation is an aide to identify the real magnitude of a problem, and the need of a response to it from the RA.

For instance, an interesting case comes from the United States in the late 1980's during the Reagan administration. At the time, there was a concern about the depletion of the ozone layer, and its effect on the planet and humans. Many solutions and regulatory interventions were considered, including regulations to slowly ban chemicals that affected the ozone layer, and cost benefit analysis were performed on each of the proposals. The cost-benefit analysis showed that the costs of these regulations on chemicals would be low compared to the high benefits on avoiding skin cancer, cataracts and damage to the environment. Sunstein, when referring to this famous case at the early ages of CBA, explained that, had it not been for the scientific evidence of the saved costs and gained benefits of the regulation presented to Reagan by his advisors, he would not have adopted said regulation (2018, p. 136).

By performing the assessment and presenting a report of the assessment performed, the Regulator informs the President of the reasoning behind his choice, which in cases might even be counter-intuitive or counter to the population's demands. This requires the regulator to have considered and assessed the viable options to solve the problem at hand; and to ensure that the evaluation is performed before the regulatory option is chosen.

The RA works in the interest of the President, as it aligns with his own private interests (i.e., remaining in office). An *ex ante* assessment "*forces the [Regulatory Agency] to spell out its knowledge and its assessment of the various options, so that the [President] is not only well informed, but can also control the work of the [Regulatory Agency] and hold it accountable*." (Larouche, 2009, p. 9)

The impact of the stage on this dimension of accountability is considerable, as the information is readily available to the President and contains the motivation and explanation for the actions of the agent.

Discussion

Even when there is a risk of capture or bias in the decision, the information provided facilitates the discussion and analysis by the President of the results of the *ex ante* assessment. The regulator can justify, or not, his adherence to the results of the *ex ante* report.

This discussion or evaluation of the assessment performed by the RA happens either directly with the President, or through an office or body in charge of determining whether the assessment was done correctly, that is considered the correct measurements and indicators, that data was assessed according the pre-set standards, and that the proposed regulation is justified. In the case where it is not, the RA can be required to either justify its departure from the recommendation or to reassess the regulatory problem.

Ultimately, even though the principal is the President, there are scenarios in which he benefits from allowing the public to perform part of the oversight. In this sense, since the public is directly affected by the regulation, it is likely that a flaw in the assessment is detected by a potentially affected party and made public. In this scenario, it is the public, and not the principal's own analysis, which can enhance this dimension of accountability.

Consequences

One of the main requirements for the consequences dimensions to be met is that the forum is able to impose a sanction or reward to its actor, and that there is also the availability of this response; in other words, that the sanctions exist (Brandsma & Schillemans, 2013).

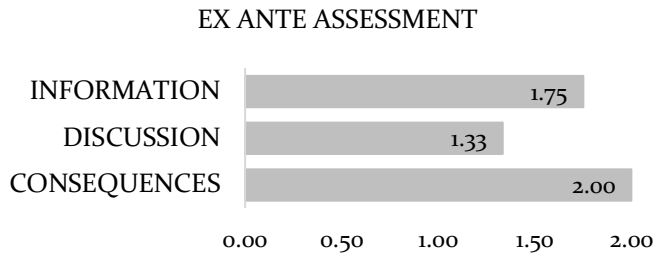
As explained before, it is likely that the assessment is evaluated by an oversight body that, in many cases, is located inside the administration or close to the President[66]. These bodies are set precisely to check that the assessment undertaken by the Agencies complies with the requirements previously established by the oversight body or by law. When the *ex ante* assessment does not comply with the requirements the oversight body can have the prerogative to return it to the agency or not approve it. The possibility that this sanction is applied to the work of the RA, by a body that is mandated by the President, reinforces the consequences dimension of accountability in the relationship between the President and the Agencies.

[66] Many countries with Presidential systems limit their policy evaluation to regulations enacted by agencies that depend on the President. In addition, these agencies are supervised by Regulatory Oversight Bodies that are frequently located inside the administration or close to the President. This is the case of the United States, Dominican Republic, El Salvador, etc.

But even before that, when the President states clearly defined goals, the RA has strong incentives not to propose regulations that do not comply with these standards.

Additionally, the President can remove and appoint the heads of the Regulatory Agencies; therefore, it is evident that the President is able to impose high sanctions. At this stage of the PEC, one more element comes into play, and it is the identifiability of the author or promotor of the regulatory choice. Both the information and discussion dimension of accountability on this part of the Policy Evaluation Cycle, set the stage for the President to have enough information to link the action to the actor; and if needed, to impose sanctions. This translates into a high accountability impact on the information and consequences dimensions of accountability, and moderate in the discussion dimension (See Figure 20).

Figure 20. President - Regulatory Agency: Accountability on ex ante assessment



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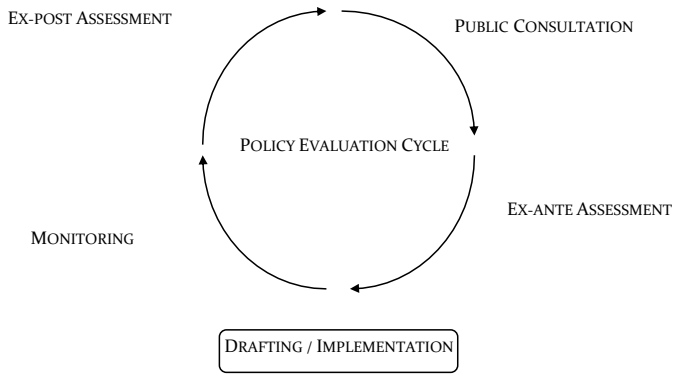
2.2.3. Scoring Drafting and Implementation



Information

The extent to which the superior is informed about the content of the discussion, about the vote results, and about the input of the agent during the meeting, is relevant to the fulfilment of this stage. Because to a great extent, information comes to the principal via a third party rather than from the agent directly (McCubbins & Schwartz, 1984).

Through the implemented draft of the regulation, the RA indirectly provides the President and the rest of its stakeholders with the relevant information regarding his actions at this stage. In this sense, the regulation indicates, either implicitly or explicitly whether the recommendations of the *ex ante* assessment were taken into account (Radaelli, 2018).

This enactment reveals how the preferred option advised by the *ex ante* assessment is reflected in the final text; and whether all of the content of the final text actually went through an *ex ante* evaluation (Radaelli, 2018). For example, in the drafting of the traffic regulation that has been used as an example, some exceptions or qualifications can be made. The text could include an exception on the payment of certain fines to people that are committing an infraction for the first time. If this exception was not assessed during the *ex ante* stage, it will be indirectly revealed with the enactment of the final text. All this will reveal how wide is the gap between the proposed policy and the drafted regulation.

Additionally, the regulation includes the indicators that are to be examined, the system to monitor the regulation and the times and milestones that the regulation has to meet.

Discussion

At this stage, there is no required bilateral exchange of information or discussion of the text of the regulation. The regulator unilaterally drafts the texts and implements the regulation. Though there are many questions that arise and that could be discussed (explained in the information dimension above), it does not necessarily happen at this stage.

However, in practice, the final text of the regulation is often published for public consultation, in which case, the information and discussion stages are met in the terms explained previously. Likewise, the RA may present the final text of the regulation to the President, which allows the agency to justify and explain how the policy was drafted into a text, and how, in practice, it will be implemented.

The foregoing shows a very low impact of this drafting and implementation stage of policy evaluation on the discussion dimension of accountability.

Consequences

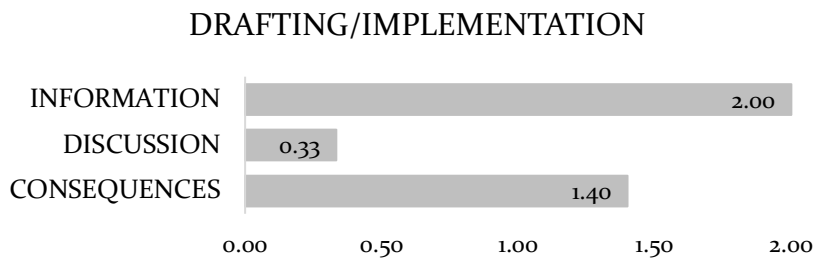
This stage of the policy cycle reveals who is responsible for the enactment of the regulation. At this point in time, the regulation is either ready to be enacted or already enacted. Most likely the person who "drafted" the regulation is not the same person that enacted it, however, and following the same logic of delegation and its consequences, the official or

group of officials enacting the regulation are ultimately accountable to the President for the content of the regulation. Therefore, there is the question of identifying the author, which translates into a direct responsibility to either impose a sanction or grant a reward.

The sanctions available from the President to the head of the Agency are the same as previously discussed, which means that there are consequences available to impose if the regulation drafted and implemented is distanced from the preferences of the principal, which in principle would be the recommendations collected through the public consultation and the *ex ante* assessment.

In the overall analysis, the information dimension is high in this stage, followed by the consequences dimension. However, the discussion dimension is very low, due to the fact that there is no mandatory exchange of views during this stage (See Figure 21).

Figure 21. President - Regulatory Agency: Accountability on Drafting and Implementation



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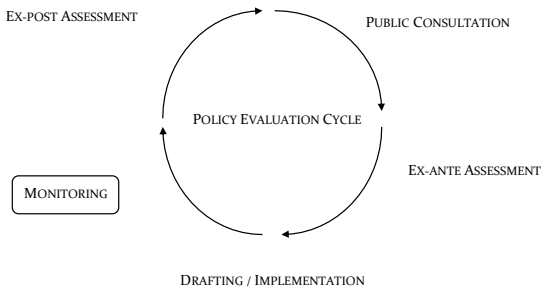
2.2.4. Scoring Monitoring the regulation



Information

This dimension is looking to find out whether the President is informed about the conduct of the RA. The regulation itself or a complementary document to the regulation contains the specific goals of the regulation, and the performance indicators, in a way that in a

specific time period, the regulation can be monitored. Therefore, during the life of the regulation, the RA tracks the progress of the regulation, following the indicators and milestones previously defined.

Thus, returning to the previous example, the regulation, should indicate by how much the number of car accidents could be reduced with this measure (indicators) and by when this reduction is expected (time frame). During the monitoring phase the regulator collects the data on the effects of the regulation to verify whether the goals are met.

This is done unilaterally, and in principle, the agency does not have the obligation to make this information publicly available. It can be assumed, though, that if the data collected reveals that the regulation is reducing traffic accidents at the rate projected, the regulator will publicise this information. Additionally, the RA could be required to meet regularly with the President (or representatives) to inform him of the performance of the regulation.

Discussion

The RA informs the President of the progress and performance of the regulation at several points in the life of the regulation (i.e. during implementation, during *ex post* evaluation, etc.). During these sessions, the President (or his representative) is able to determine whether the regulation is being implemented as intended, and if it is yielding the results that are compatible with the President's preferences, as the forum to this actor.

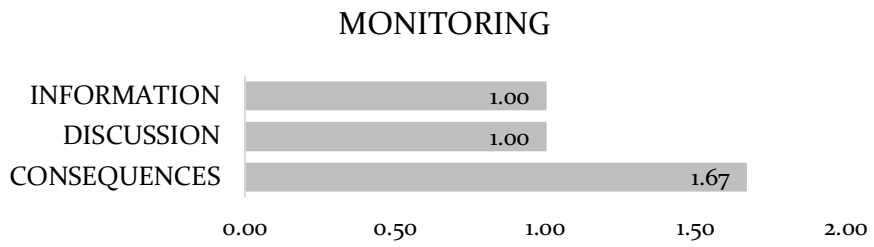
Consequences

Even though the RA is not required to make public the data revealing the performance of the regulation, the performance indicators to be assessed and times of evaluation are in the public domain. Therefore, in cases of public importance and in times of elections or political distress, this information is likely to be made salient by the public, opposing parties, or relevant stakeholders.

Additionally, under the assumption of a requirement by the President, as the forum to the RA, to receive updates on the progress of certain regulations, he would have enough elements to reward or punish the actor. For the consequences dimension to be met, the principal "*should be able to exercise a credible 'deterrence' vis a vis the [agent]*" (Bovens et al., 2008, p. 238). In this case, the consequences exist, as well as the identification of the agent, and the possibility to impose a sanction or "exercise a credible deterrence". However, the consequences dimension is diminished as long as there is no mandatory requirement to provide the information.

The information dimension of the monitoring stage is the lowest, because there is normally no requirement to inform, which trickles down and affects the other two dimensions (See Figure 22). Nevertheless, there is a moderate to high contribution on the discussion and consequences dimensions.

Figure 22. President - Regulatory Agency: Accountability on Monitoring



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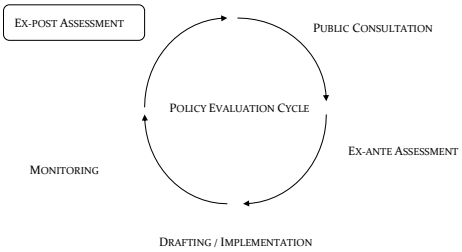
2.2.5. Scoring Ex post evaluation



Information

The report of the *ex post* evaluation must state what is being evaluated in the regulation, must indicate whether the goals established for the regulation were met, and must explain the effects of the existing regulation. This report is made available to the public, and is also provided to the President or his representatives. If an *ex ante* assessment was carried out, then the results of the *ex post* evaluation, should be linked to the assumptions of the *ex ante* evaluation, and the differences encountered should also be explained.

This allows the President to be informed of the effects of the actions of his agent, and of potential deviations from the stated preferences, which might have happened during the implementation stage. Even so, at this moment of the life of the regulation, the information coming from the *ex post* evaluation might not be the only information received by the principal regarding the effects of the regulation, as its consequences, at least the apparent ones, are now of public domain. This type of results often competes with other sources of information (Zwaan et al., 2016).

Although it is mandatory for agencies to make public the reports of their *ex post* evaluations, they also have positive incentives to do so. On one hand, when it is the first stage of their policy evaluation, it shows a departing point to improve existing regulations, and signals to the principal that the agent is aiming towards the latter's objectives. On the other hand, when it is an existing regulation, the agent wants to show the success of its regulation, or like in the previous case, wants to use it as a guide to improve the regulatory quality.

Discussion

Having a public report invites discussion, and particularly this stage benefits from the feedback of affected parties, because they hold the most information on the effects of the regulation. Aside from that the report is intended to allow the President to discuss the effects of the regulation and to receive an explanation of the results that departed from his preferred track.

However, when it comes to regulations, it is expected that the head of the RA that initially enacted the regulation might not be the same one that is doing the *ex post* evaluation. In this case, the *ex post* evaluation might serve as an opportunity for the new incumbent to showcase how the regulation could be improved, and the new steps following, even though that is not the main objective of the *ex post* evaluation.

Consequences

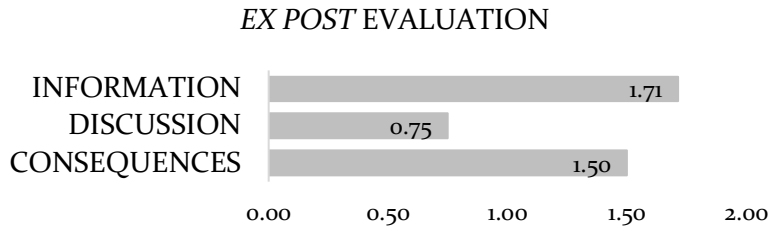
The Regulator is in charge of evaluating the existing regulation, because whether the evaluation is meeting its goals or not is not always self-evident. The ultimate purpose of performing an *ex post* evaluation is determining whether or not the regulation at hand is meeting its regulatory goal and if it continues to be the best way to address the initial problem. This indicates the effects of the work of the actor, on which the President can rely to reward or punish.

As indicated before, a negative performance of the regulation does not necessarily reflect on the present incumbent of the RA, because of the time inconsistency (Kydland and Presscott, 1977; Gilardi, 2002). However, it could be argued that the actions of the Regulator after the results of the assessment are important. And because he knows that his actions could be a determining factor for his principal (forum) to take actions, he might have incentives to act according to the results of the assessment.

At this stage, there is a relatively high effect on all dimensions of accountability, especially on information and discussion (See Figure 23). At this stage, the agent seems to have

enough mandatory requirements and incentives to provide information and to receive feedback. There is however a time inconsistency drawback when it comes to the consequences dimension.

Figure 23. President - Regulatory Agency: Accountability on Ex post Assessment



Source: Author's Own Depiction

2.3. Discussion of the Results

By graphically bringing together how accountability reveals itself in the different stages of the Policy Evaluation Cycle, there is a better view of accountability on the PEC stages when it comes to the regulatory relationship between the President and the Regulatory Agencies (See Figure 24).

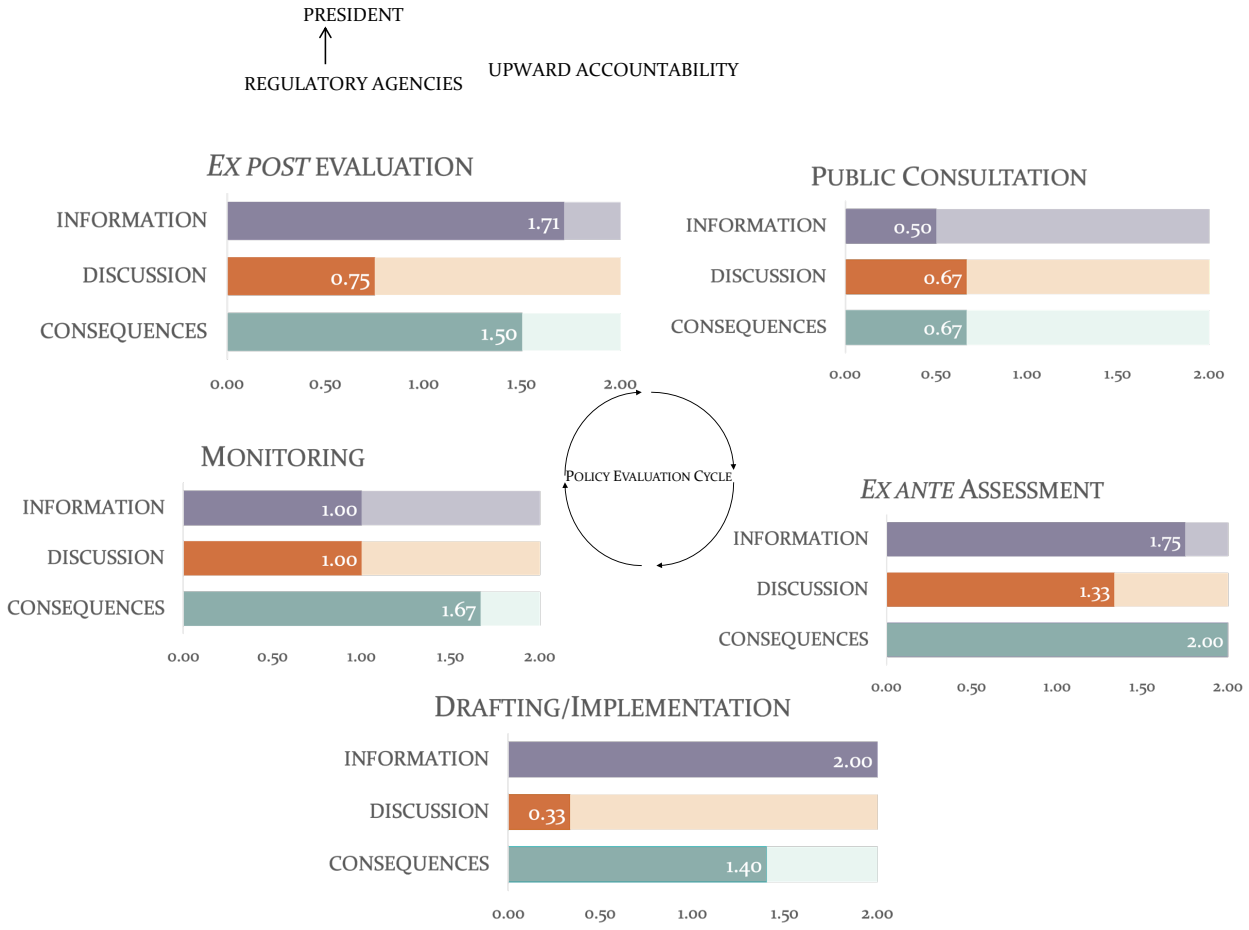
The public consultation stage does not have a high impact for accountability within this relationship. This stage does not provide the President, who is the principal in this relationship with relevant information, nor discussion with the agent. Nevertheless, it does contribute to the consequences dimension of accountability. When an actor is accountable to multiple forums, these interactions could be relevant to bridge the gaps that would exist if they were accountable to only one forum.

On the aggregate, the Public Consultation stage seems to have a low effect on accountability in the relationship between the President and the Regulatory Agencies. The consequences dimension is the one with a higher impact on accountability, based most likely on the direct hierarchical relation between the Actor and the Forum, as a typical principal-agent relationship.

In the *ex ante* assessment stage, there is a high impact of accountability of the regulatory agencies towards the president on this stage. It allows the agency to unilaterally inform the President of the reasoning behind the regulatory choice, through evidence-based data. Both the information and discussion dimension of accountability on this part of the Policy Evaluation Cycle, set the stage for the President to have enough information to link the action to the actor; and if needed, to impose sanctions. This translates into a high

accountability impact on the information and consequences dimensions of accountability, and a moderate one in the discussion dimension (See Figure 20).

Figure 24. Accountability in the Policy Evaluation Cycle in Upward Accountability: President and Regulatory Agencies



Source: Author's Own Depiction

During the Drafting and Implementation stage, the information dimension is high, followed by the consequences dimension. The discussion dimension is very low, probably due to the fact that there is no mandatory exchange of views during this stage. The existence of a possibility to challenge the regulation increases the effects of the consequences stage on this dimension of accountability. These consequences do not fall directly on the agency, but on the product of the agency; nor are these consequences an action from the President to the the RA. However, frequent challenges of the regulatory work of a RA, can signal to its principal deficiency in the work of the agent, thus creating incentives for the agency to align its work with the President's preferences.

The information dimension in the monitoring stage is the lowest, because there is normally no requirement to inform, as it trickles down and affects the other two dimensions. Nevertheless, there is a moderate effect on the discussion dimension and the consequences dimension. In the *ex post* assessment stage, there is a relatively high effect on all dimensions of accountability, especially on information and discussion. At this stage, the agent seems to have enough mandatory requirements and incentives to provide information and to receive feedback. There is however a time inconsistency drawback when it comes to the consequences dimension.

The initial hypothesis was "The Policy Evaluation Cycle has characteristics that can enhance accountability within the relationship between the President and Regulatory Agencies, particularly in the stages of *Ex ante* assessment and *Ex post* evaluation."

The analysis partially confirmed the hypothesis, because it did show that the *accountability is enhanced in the stages of Ex ante Assessment and Ex post Assessment*. However, it also showed that the drafting and implementation stage is relevant for accountability, and that the Public Consultation stage has no effect on accountability in this relationship.

3. A SECOND SET-UP: DOWNWARD ACCOUNTABILITY BETWEEN INDEPENDENT REGULATORY AGENCIES AND THEIR STAKEHOLDERS

Figure 25. Downward Accountability

In addition to the classic form of direct delegation previously discussed, there are other types of delegation where the delegated entity does not depend on or respond to the delegator. With these agencies, the delegator does not intend the agency to be controllable, and on the contrary, increases its autonomy (Gilardi, 2006). They are referred to as "non-majoritarian institutions" and as Independent Regulatory Agencies (IRAs).

Independent Regulatory Agencies are the staple of the current regulatory state (Jordana, Levi-Faur, & Gilardi, 2006). The transformation from the provider state to the regulatory state meant a shift in the main function of the state, which crossed over to overseeing the provision of goods and services instead of providing them (Majone, 1994b). This oversight took the shape of regulation, and instead of the legislative body keeping all the regulatory power, it chose to delegate these powers through law to the executive power. The

development of this new task of the executive, eventually proved to create its own difficulties. Some of the problems were the short-time horizons imposed on the executive by democratic processes (Majone, 1997b); the reduced credibility that politicians have regarding the future permanence of their policies, as they can be shaped and captured by the interests of those they serve (Becker, 1983; Stigler, 1971); and the lack of specialization, as, just like the legislative, the executive as a central unit is not truly a specialist on the specific and ever more sophisticated subjects that have to be regulated (Coen & Thatcher, 2005).

A solution to this was to create regulatory agencies that did not suffer from these drawbacks. To create institutions that were isolated from political influence (Gilardi, 2002); that could be experts on the areas that needed specific regulations (Majone, 2001); and that could signal more credibility than elected politicians had (Gilardi, 2002). Therefore, the international tendency has been to create Independent Regulatory Agencies, which, as their name suggests, are independent from the executive and the legislative. This independence means that these agencies regulate without intervention from other powers (Elgie, 1998); the appointment and removal of their boards or head does not depend directly on the executive(Thatcher, 2011); they have their own budgets (Majone, 1997a); and other characteristics that countries have included to enhance this independence. Examples of this type of agencies are the delegation to Central Banks for monetary policies; the Federal Communications Commission, in the United States for communications.

3.1. Particularities of the relationship between Independent Regulatory Agencies and Stakeholders and its defining characteristics

As indicated, one of the reasons for their creation, is to enhance the credibility of the state regarding their policies. The logic behind it is that if the commitment is made by law, and the implementation and regulation of the specifics do not depend on the executive, but on an Independent Regulatory Agency, it is less likely for a short-term or last-minute change to occur (Elgie & McMenamin, 2004). Therefore, with these delegations there is an increase of the perceived credibility on the policies of the State, which is what the credibility hypothesis explained (Majone, 1997b). This delegation brought credibility to the policies because it removed the uncertainty factors previously explained.

The main characteristic, and reason for the creation, of Independent Regulatory Agencies is their independence. This characteristic questions whether these agencies can be accountable, since these terms are contradictory by definition. Part of the literature has argued that these concepts are not opposite, but complementary, for example when Majone states that "*independence and accountability should be seen as complementary and mutually*

reinforcing rather than mutually exclusive" (1994a, p. 6). However, others have more recently argued that there is indeed a negative correlation between the terms, and explain that "*the more independence there is, the less available accountability channels and accountability instruments become*"(Scholten, 2014, p. 197).

Nevertheless, the degree of independence and of accountability that an IRAs holds depends on many factors, for example, who is it independent from, and who and what is it accountable for. Research that shows that administrative procedures that enhance accountability diminish independence, also considers accountability as a universal term, and not as a relationship-dependent term (Scholten, 2014), unlike that proposed in this research.

IRAs have functional, personal, institutional and financial independence.[67] Functional independence refers to the ability to make the regulatory decisions that in first place were delegated to them, without the intervention of other entities. Even though this is not an independence inherent solely to IRAs but to all regulatory agencies, it is part of its defining independence.[68] Additionally, as explained in Chapter 4, personnel, institutional and financial independence are stablished to break the command & control or principal-agent relationship that would normally exist between a Regulatory Agency and the executive.

This research suggests that the argument against the possibility of accountability and independence coexisting within IRAs, refers only to part of the elements of independence mentioned before, and not to all of them. In this sense, the literature does explain that personnel, institutional, and financial independence exist to maintain the functional independence of the agency vis a vis other powers of the state that would otherwise be able control the work of this agency (Majone, 1997b). For regulatory agencies, this is normally the executive power, because they are appointed by the head of the executive and are accountable to it, in all four counts.

However, as indicated before, whether or not IRAs can be accountable depends on what they are accountable for, and who they are required to be accountable to and independent from. Therefore, here there is a limitation set to this. Here it is argued that under the analysis and limitations explained and analyzed in this thesis, IRAs could be held accountable for delivering regulations that are the result of evidence-based decision-making, and that follow a process that their forum, which are their stakeholders, can keep track of. That answers the question of what they could be accountable for. Furthermore,

[67] See Chapter 4. Section 2.5: Fourth and fifth relationships: People & IRAs and legislative power & IRAs
[68] This is also referred to as a "functional discretion" instead of financial independence. See Scholten, 2014.

because of the institutional independence, which implies that the appointment and removal of the head or board of the IRAs does not depend on the executive and the legislative, the relationship examined here is not towards those powers of the state. It is a downwards accountability, directed towards the stakeholders of the agencies, which are the recipients of the regulations that the agencies enact (See Figure 25). This resolves the second part of the question, which is who they are accountable to and independent from.

The forum to which IRAs are accountable is outlined and limited, because of the relationship evaluated in this Section. This does not mean that these are the only forum that could potentially be affected by their actions. On the contrary, it means that when an entity is independent, it is never fully independent, even when the democratic accountability element is removed. Nor is there a fully unaccountable entity.

In this sense, when IRAs are required to use the PEC as part of their regulatory process, it is expected for this instrument to enhance their accountability. It is feasible that the PEC might foster accountability in the relationship between the IRAs and their stakeholders. The main argument in this work is that it is likely that accountability is not fostered in every single stage of the PEC, but only in some, because of the particular characteristics of the relationship. Therefore, this is the hypothesis proposed:

Hypothesis 2: The Policy Evaluation Cycle has characteristics that can enhance accountability within the relationship between Independent Regulatory Agencies and their Stakeholders, particularly in the stages of Public Consultation and Ex post Evaluation.

Taking into account the forgoing, the following Section now proceeds in the same manner as it did for the first relationship.

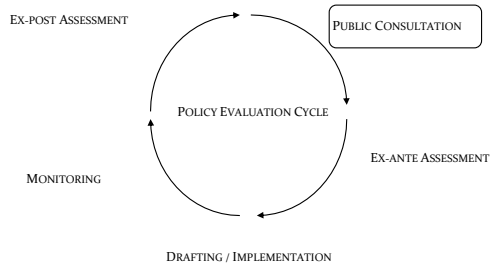
3.2. Identification and analysis of accountability in the PEC

Appendix II is a scorecard based on statements related to each of the stages of the Policy Evaluation Cycle in their optimal state as explained by the literature, empirical work and reports by international agencies. These statements are made within each dimension of accountability explained before. The statements were scored depending on whether they are relevant or not towards that dimension of accountability in the relationship between IRAs and their stakeholders, considering the characteristics of the relationship that were explained in the previous Section.

Next, it explains the results of the scoring on each stage of the Policy Evaluation Cycle; and afterwards it discusses the resulting framework. The explanation of the stages of the PEC is summarized, and reference is made back to the analysis previously done in Section 3.1

for each stage. There are only extended explanations in the cases where a clarification or specification is required, because of the particularities of the relationship being studied.

3.2.1. Public Consultation



As much as public consultation is about receiving input from the public about the potential or existing regulation, it requires that the IRA provides information to its stakeholders. However, how much information and which type of information is shared with the public is also a sensitive decision, in areas that regulate risk for instance.

The public at large might perceive some risks differently from others for various reasons such as the degree of control, catastrophic potential, and familiarity. Therefore, how and when information is conveyed when risks are involved poses particular challenges. The "risk communication" literature discusses the flow of information and risk evaluations back and forth between academic experts, regulatory practitioners, interest groups, and the general public. This discussion is relevant when the subject of the potential or existing regulation is related to natural hazards (i.e. floods, diseases, etc.) and technological hazards (i.e. chemical plants, GMO's, food, etc.) (Bostrom & Lofstedt, 2003; Lofstedt, 2006).

Notwithstanding the foregoing, it is relevant to remember what the regulator is being held accountable for when it comes to policy evaluation. Is it the resulting regulation? Is it the process? Or is it the success or not of the regulatory solution? This is relevant, because if the regulator is being held accountable on whether or not he revealed information to the public, then in the case of sensitive information (i.e. risk regulation where the shared information is limited), he might not meet the standard. However, when it comes to the ability of the Policy Evaluation Cycle to be a sensible tool for accountability, what the regulator is being held accountable for is the fulfilment of the requirements of the stage of the evaluation itself. In other words, the regulator is being held accountable on whether he complied with the process designed to provide the decision-maker with scientific information to produce informed regulations.

Information

There are many studies on the transparency aspect of the regulatory and political work (Lodge, 2004; World Bank, 2016), and it is considered as an indicator for appropriate regulatory governance (World Economic Forum, 2016). At the same time, certain indicators of transparency regarding public consultation can be pooled as indicators of the information dimension of accountability.

As obvious as it may seem the information provided should be available to the stakeholders, as well as easily accessible (Shipley & Utz, 2011). The current international standards for this availability require the information for the public consultation to be posted on a website. This website is normally a centralized website where all public consultations are posted or a website of the IRA. Additionally, the information provided, which is either regarding the regulatory problem to be solved or the draft of the regulation, should be readable or understandable to the audience. If the information is available, but its complexity or technical level makes it difficult for the stakeholders to understand, it is equivalent to the information not being available. When those requirements are met, the information dimension of accountability scores high in the Public Consultation stage.

Discussion

Stakeholders may pressure the IRA for stronger regulation on a certain topic that the public believes of relevance. In that sense, there is empirical work that shows that those interest groups "*who voice their preferences during the notice and comment period of rule-making are able to change government policy outputs to better match their preferences*" (Yackee, 2005, p. 119).

A negative origin for this is when stakeholders are biased towards a salient event (availability bias) (Tversky & Kahneman, 1974); or because it is more convenient for the stakeholders to have a certain type of regulation (private interest) (Becker, 1983). However, precisely because the PEC contains several stages in which information to produce the final regulation is gathered, there are other shields to prevent this type of bias or pressure to be the sole determinant of the actions of the IRA.

Most of the international indicators regarding public consultation focus on this part of the process, the discussion. In this sense, in the Public Consultation the IRA solicits comments on the proposed regulations from the stakeholders on their website, through public meetings or through targeted outreach to stakeholders. Depending on how the comments are required, there is a higher chance of receiving such comments, and of course, the discussion dimension would score higher.

In addition to that, the IRA is required to respond to the stakeholders regarding the feedback provided and the response should be publicly available. The IRA should explain which feedback of the stakeholders was considered and which was not, and present these responses in a consolidated manner or directly and customized to the stakeholders (Sunstein, 2017), as explained in the previous Section. The difference here is that in this dimension these actions do have a direct effect on the relationship between the IRA and the stakeholders. This is because stakeholders are directly affected by the actions or inaction of the IRA.

For instance, the Occupational Safety and Health Administration (OSHA) of the US Department of Labor subjected to public consultation a proposal to interpret the term "feasible administrative or engineering controls", as part of the OSHA's noise standards. Later on, it withdrew the proposal because "it [was] clear from the concerns raised about this proposal that addressing this problem requires much more public outreach and many more resources than we had originally anticipated. We are sensitive to the possible costs associated with improving worker protection and have decided to suspend work on this proposed modification while we study other approaches to abating workplace noise hazards." (US Department of Labor, 2011).

The discussion effectively happens between these actors when these criteria are met, and the accountability is thus high in this dimension.

Consequences

The stakeholders know who drafted the regulation that is up for discussion, in a way that the subject to which the sanction or reward should be granted is evident. Likewise, the person, agency or department knows that identification is possible.

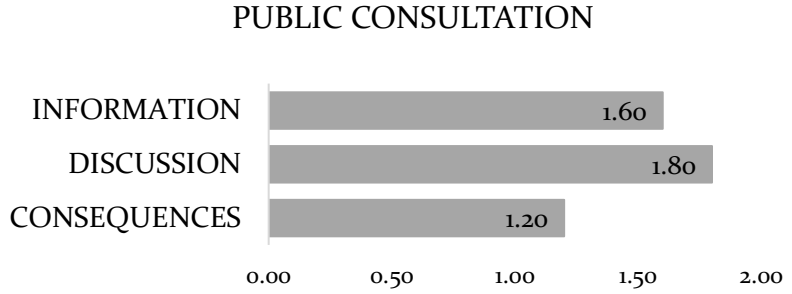
A downside of the consequences dimension that is constant in each stage that is scored in this work is the inability of the stakeholders to impose formal sanctions and rewards on the IRA. It is not possible for the stakeholders to remove from office the head of the IRA, or to give him a promotion or maintain him in his position. Therefore, the lack of this type of direct action reduces the scoring of the consequences dimension across stages of the PEC.

However, it is possible for the stakeholders to challenge a regulation that was not subject to public consultation, which, depending on the legal dispositions of the country, could annul or void the regulation. Likewise, a regulation could be challenged if it did not motivate the exclusion of feedback provided by the stakeholders (Kochan, 2018). Because stakeholders for sectors that are regulated by IRAs are normally consumer groups or interest groups, their level of organization is usually high, which increases the chances of a

regulation being challenged when missing one of these criteria. The possibility of this challenge can be interpreted by the IRA as the possibility of a sanction, of which the imposition is not necessary to align the behavior towards the desired preferences, which in this case is having a Public Consultation or receiving a response on the exclusion of the feedback. This stage has a medium accountability score on this consequences dimension, based on the positive and negative statements previously analyzed.

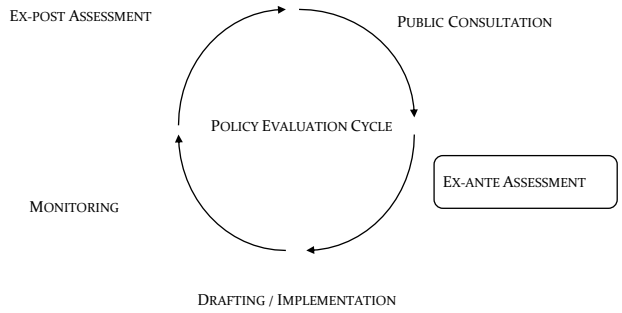
In summary, it can be seen that Public consultation scores high across all dimensions of accountability, especially the information and discussion dimension (See Figure 26).

Figure 26. IRA-Stakeholders: Accountability on Public Consultation



Source: Author's own depiction

3.2.2. Ex ante Assessment



The *ex ante* assessment is meant to be a guidance for decision-making. If there is pressure from society to adopt a regulation because there is a perception of a need for this regulation, regulators might be inclined to satisfy the public's request. However, technocratic tools are intended as natural correctives to behavioral flaws from the population, such as the availability heuristic, since they focus attention on the actual effects of regulations (Sunstein, 2018a).

In principle, this type of assessment should prevent industry capture, because the results are based on the analysis of objective data normally collected by the regulator. However, the risk of capture persists if the information and expert analysis is provided by the industry (Reyes, Romano, & Sottilotta, 2015). Therefore, in this stage there is a delicate balance between capture and accountability that should be considered when imposing certain types of requirements on IRAs. Their independence, in principle, should prevent the capture; however, even though they are independent from other powers of the state, the same is not true when it comes to stakeholders, and this should be accounted for.

Information

The reports of the *ex ante* assessment are available to the stakeholders with sufficient time before the regulation is enacted. This is intended to give time to the stakeholders to analyze and give feedback or challenge the assessment. As with the public consultation, the reports are to be available and accessible.

Because of the technical level that would characterize an *ex ante* assessment report, the report should explain the methodology used for the evaluation of the regulation, as well as the scope and content of the evaluation. The stakeholders are then able to understand the results of the *ex ante* assessment, even when they refer to a technical subject. Finally, the report should contain the assessment of other government intervention options to fix the regulatory problem at hand, including the zero option.

At this stage, the information dimension scores medium. The technical characteristics of this stage might make the transfer of information lower than expected, even when the information is readily available.

Discussion

The *ex ante* evaluation does not contain by itself a space for discussion. However, the IRAs are expected to consider the information received during the public consultation stage as input for the assessment, and include this in the *ex ante* assessment report. Likewise, regulators could for instance explain how the feedback received was considered for the *ex ante* assessment, even though this is something that the literature or practice has reported on.

Additionally, once the *ex ante* evaluation report is published, stakeholders could ask questions regarding the evaluation performed. This possibility is often not available, unless the IRAs assessment is to be subject mandatorily to the evaluation of a Regulatory Oversight Body (ROB). Therefore, in the scoring, this does not greatly affect this dimension

of accountability. Overall, the discussion dimension of accountability is medium in this stage, and could potentially be improved by interactions with a different forum, such as a ROB that could have a direct conversation with the regulator.

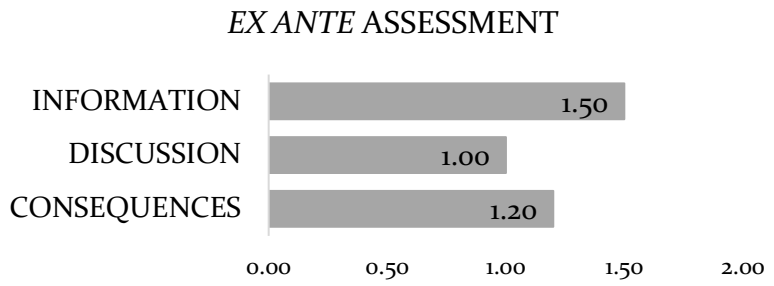
Consequences

The stakeholders know who performed the *ex ante* evaluation, and if it is not possible to identify the individual or department, it is possible at least to identify the agency. During the performance of the *ex ante* assessment, the stakeholders are not able to impose any type of consequences on the IRA; however, there are certain *ex post* administrative and judicial procedures that allow for it. In this sense, it is possible for the stakeholders to challenge a regulation for which an *ex ante* assessment was not undertaken, when the existing legislation required so. More uncommon is to challenge a regulation that did not consider the results of the *ex ante* evaluation or just to challenge the results of the *ex ante* evaluation. These challenges are more common when the *ex ante* assessment goes through an assessment itself, normally before a ROB, which is not the case here.

It is unlikely that stakeholders can impose direct sanctions, but they might be able to impose indirect ones. Such sanctions can be a public expression of disagreement with the assessment and other forms of affecting the reputation of the IRA. It is relevant to remember that stakeholders are normally competitors in the regulated market, business associations, trade unions and consumer associations. Therefore, their uniformity and organization as groups, allow them to have higher impact on their position and expressions of disagreement (Olson, 1965). This type of consequences would require, nonetheless, interest in the regulation being evaluated, and to awake the interest and actions of the stakeholders. This interest is likely since IRAs are sectorial regulators, and each regulation is bound to affect a specific organized interest group. Considering the above, the consequences dimension of accountability on the *ex ante* assessment stage of the PEC scores medium.

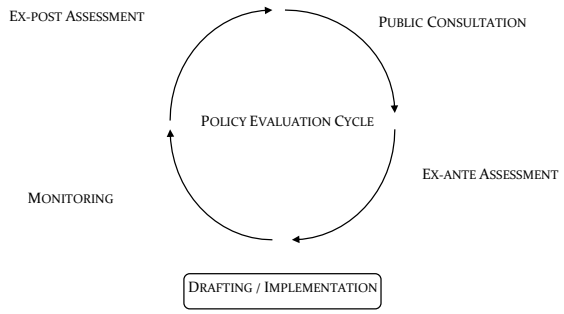
Summing up, the information and consequences dimensions of the *ex ante* assessment score medium to high , whilst the discussion dimension scores medium (See Figure 27). This is due to the fact that the *ex ante* evaluation does not contain by itself a space for bilateral exchange of opinion or conversation. However, because of the information that the IRA makes available, the stakeholders are able to at least indirectly act on the consequences dimension.

Figure 27. IRA-Stakeholders: Accountability on Ex Ante Assessment



Source: Author's own depiction.

3.2.3. Regulatory Drafting and Implementation



Information

The regulatory draft is clear and explains the goals of the regulation, and these goals are aligned with the ones provided in the *ex ante* assessment. It also indicated how these goals are going to be met, and monitored, indicating the moments in time when the indicators should be checked.

The regulation expressly indicates the agencies, government officials, and authorities in charge of implementing the regulation. These measures are intended to bridge the gap between the idea of the policy and its implementation. Likewise, providing information on these issues through the enacted regulation serves as a means to hold the IRA accountable later on for failing to meet or actually meeting the goals of the implemented regulation. The regulation also indicates how it will achieve the stated goals. It explains the costs and administrative procedures that it would entail, in case it is a regulation with a new administrative requirement. It also clearly indicates the costs (financial and otherwise) that the implementation of the regulation will entail for the stakeholders. Finally and most importantly, the enacted regulation is public and available to all citizens and stakeholders.

Because of the normally mandatory publicity of new regulations, this dimension of accountability is relatively high. Likewise, because this gap between the creation of the policy and its actual implementation has received a lot of attention in the last decades, regulators are now more often aware of the necessity to explain and inform how the enacted regulation will be implemented.

Discussion

At this stage, there is normally not an official bilateral exchange of opinions nor is there a space where the stakeholders can ask questions to the IRA regarding the drafted or implemented regulation. Thus, the discussion dimension in this stage scores very low.

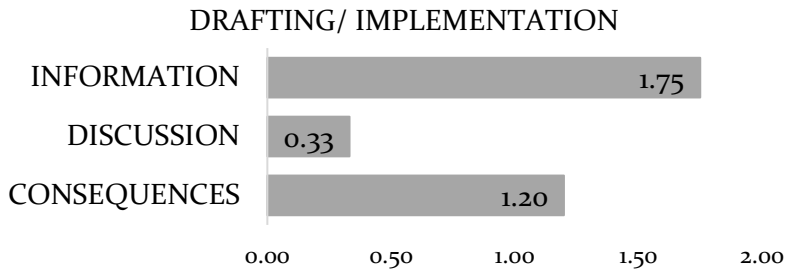
Consequences

It is possible to identify who is responsible for enacting the regulation, because in this case the enacted agency is the IRA, and thus the public is able to connect the action to the actor. Likewise, it is possible to know how the decision was reached, who approved it or who voted for it, in case the decisions are made by a board. Even though that identification is possible, it is not possible for the stakeholders to vote in favor or against the decision-maker.

Notwithstanding the foregoing, it is always possible for the stakeholders to legally challenge the enacted regulation either before an administrative body or before a court. Therefore, the information provided by the IRA at this stage, and at previous stages (public consultation and *ex ante* assessment), are the basis for the stakeholders to challenge a regulation that is not explicit on how it is going to be implemented. Additionally, and depending on the existing requirements for the content of the regulation, it could be challenged for not containing the measurement or indicators to monitor later the effectiveness of the regulation. For this stage, the consequences dimension score is medium.

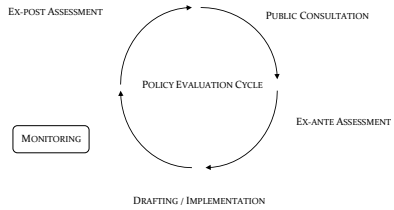
Overall, accountability scores very high in the information and consequences dimensions of the Drafting and Implementation stage, but very low in discussion (See Figure 28). It is evident that the information dimension is high, because of the mandatory publication of the regulation. Consequences, on the other hand, is likely to be high because of the possible organizational structure that interest groups might have and the pressure that they are able to exert.

Figure 28. IRA-Stakeholders: Accountability on Drafting and Implementation



Source: Author's own depiction.

3.2.4. Monitoring the regulation



Information

There is a plan to track the progress of each indicator that was previously set during the drafting stages. The indicators are monitored as indicated and the results are gathered in a report. Even though this information would normally exist, the challenge is for the information to be public. It is likely, because IRAs want to spread the news of the success of their regulations, that regulations that meet their set goals are more publicized than those that are not. Therefore, the information that is voluntarily made available by the IRA could be partial. Notwithstanding, if there is a mandatory requirement for this information to be available, then this dimension would report a higher score.

A particularity in this relationship is that normally the effects of the regulation are felt by the stakeholders and are likely to be monitored by the stakeholders as well. Therefore, this information might be available to the stakeholders even if the IRA does not always provide it.

Discussion

The regulator consults with the stakeholders at several points in the life of the regulation to obtain data, information and feedback on the effects of the regulation. The stakeholders provide information to the IRA regarding the effect of the regulation, whether the IRA

requests this information or not. There is a response from the IRA on these feedbacks and questions.

Consequences

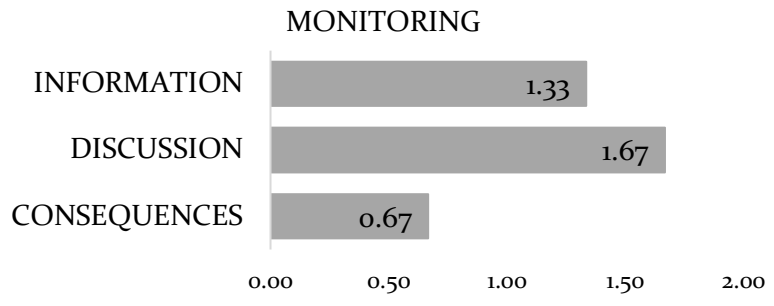
In this stage there is a clear link between the IRA and the regulation, but not necessarily so clear between the IRA and the effects of the regulation. However, the stakeholders will hold the IRA accountable for the effects even when there could be other factors that hinder the success of the regulation.

It is not likely that the stakeholders are able to challenge a regulation because it is not meeting the scheduled goals, since so far, and to the best of my knowledge there is no jurisdiction that provides such legal resource. Adding to that, as repeated before, it is not possible for the stakeholders to remove or confirm in office the IRAs head, because this independence is the staple of the IRA.

Therefore, stakeholders have only public outlets to express their disagreement with the regulation and its effects. However, this is not a resource whose effect should be taken lightly. Because of the influence of stakeholders, they could be able to promote changes in regulations of which the ineffectiveness has come to light during the monitoring stage of the PEC, by exerting public and private pressure on the IRA (Becker, 1983; Olson, 1965).

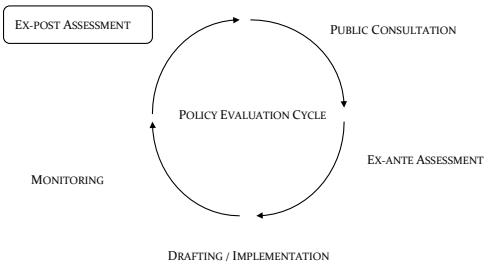
In the monitoring stage, the discussion dimension is high unlike in the other stages, and this scoring is only repeated in the Public Consultation stage. The information and consequences dimension score is medium. (See Figure 29)

Figure 29. IRA-Stakeholders: Accountability on Monitoring



Source: Author's own depiction.

3.2.5. Ex post evaluation



The literature about regulatory independence is constant at indicating the trade-offs faced between independence and accountability (Maggetti, Ingold, & Varone, 2013; Scholten, 2014). It suggests that since the internal independence of IRAs makes their accountability difficult, there are opportunities to have external instruments to address this issue, and normally the instruments suggested are for *ex post* accountability (Maggetti et al., 2013).

The *ex post* assessment stage of the PEC provides the classical accountability instrument to verify whether the IRA performed the work that was entrusted to it. However, this is only true when the *ex post* assessment is carried out as a last stage of the PEC, and not when the IRA is new to assessing its regulations, in which case the *ex post* assessment stage might be the first one of the cycle.

Information

If the *ex post* evaluation is the last stage of the PEC, the IRA considers the goals that were set out during the previous stages to assess whether or not they were met. Likewise, it evaluates the other effects that the implemented regulation had, according to the regulatory evaluation tool previously chosen by the regulator. The usefulness of the information, however, depends in part on the clarity of the results that are provided to the forum (Cousins & Leithwood, 1986, p. 347). Therefore, once the assessment is undertaken, the IRA makes public the methodology, process and results of the evaluation, and the *ex post* assessment report clearly indicates what aspects of the regulation are being evaluated. Aside from the readability, both availability and accessibility to the report are relevant, therefore the stakeholders are able to easily access the report of the *ex post* assessment, as it is available on the website of the IRA.

This information helps accountability as it allows the stakeholders to examine whether the goals and promises previously stated actually materialized, and also to know the reasons why they didn't (European Commission, 2013). This type of transparency when providing information, also helps to increase trust, "as institutions that are transparent and self-critical tend to be more trusted than institutions which do not produce realistic and

objective, detailed, and full assessments of the performance of their actions" (Smismans, 2015, p.16).

A downside to accountability in this stage is that authorities are prone to use the information gathered in the *ex post* assessment, not as a learning tool but as a way to promote new regulation or put forward new political plans (Zwaan et al., 2016, p. 688). Therefore, how the IRA frames these *ex post* results to the stakeholders might shape whether the stakeholders hold the IRA accountable to previous promises and to expected results. Or if, instead of seeing it as having failed to meet the goals, stakeholders support the story of the need of new regulations. This choice would reflect later during the consequences dimension of this stage.

Considering the foregoing and the potential limitations on the use of the information by the IRA, but not the stakeholders, this stage scores medium-high on the information dimension.

Discussion

The IRA consults the stakeholders on the effects of the existing regulation, in order to gather data for the assessment. The IRA organizes and makes public the results of the *ex post* evaluation, and even though there is not a specific setting for dialogue among the IRA and key stakeholders, the IRA uses this stage to conduct an exchange of opinions with the stakeholders, regarding the effects of the regulation and the possible amendments to the regulation in the future.

On the one hand, this approach of forward planning contributes to accountability as it creates new commitments for the IRA facing the stakeholders. This operates when the *ex post* evaluation is the first stage of the PEC. On the other hand, when it is the last stage, then this performance feedback can fuel the commitment of the IRA with the goals, and this stage can be used to address the flaws in design or previous assessment of the regulation, together with the main stakeholders. Even though this is not a mandatory requirement for the *ex post* assessment stage, IRAs might be positively incentivised to address it as mandatory, as it increases their transparency and subsequent trust from their stakeholders (Lind & Ardnt, 2016).

Consequences

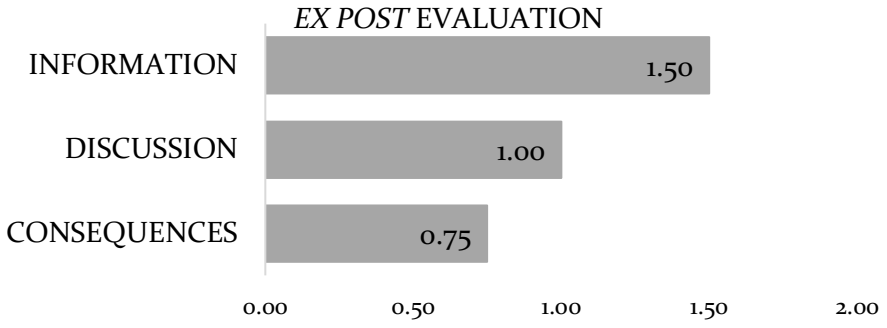
It is clear to the stakeholders who performed the *ex post* assessment, and there is a direct link between the agency that enacted the regulation and the existing regulation. This part is relevant because when the *ex post* assessment is the first stage of the PEC, it is possible

that the assessment is performed on an old regulation for which the current IRA bears no responsibility, and time inconsistency might play a role. If this is the case, it does not always create incentives for the IRA to act in anticipation of the consequences of their actions.

As indicated before, a direct sanction is not possible; however, the stakeholders might be in an organized position to demand from the IRAs actions to amend the existing regulations, having evidence already of the effects of the regulation and their causes. This combination of factors causes this dimension of accountability to score low.

An overview of the scoring of the three dimensions of accountability in the *ex post* stage shows that the information and discussion dimensions are relatively high. However, the consequences dimension scores low. (See Figure 30)

Figure 30. IRA-Stakeholders: Accountability on Ex post



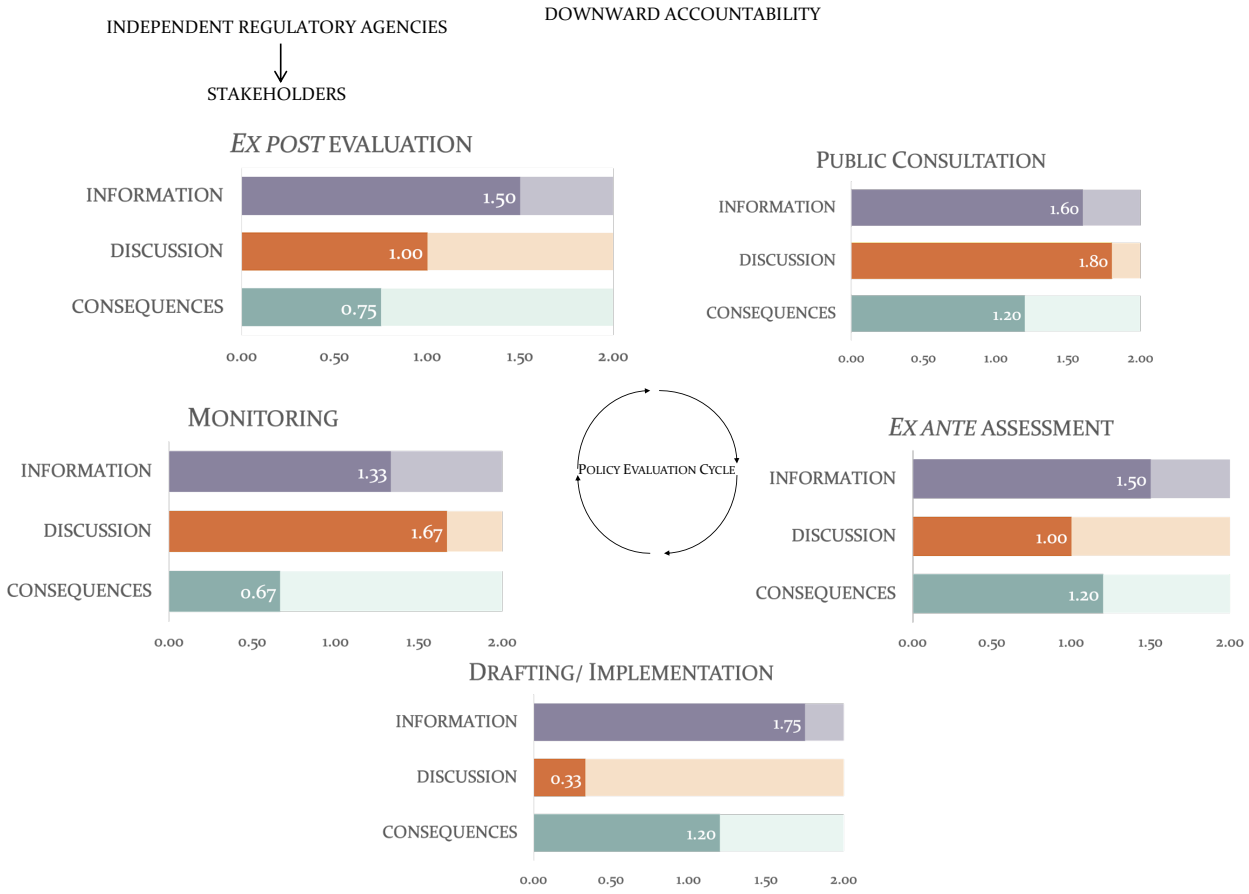
Source: Author's own depiction.

3.3. Discussion of the resulting framework

As done with the previous relationship, there now follows a graphic presentation of the scoring results for all the stages of the PEC, in order to have a visual guide of the resulting framework. (See Figure 31)

As the overview shows, the Public Consultation stage scores high across all dimensions of accountability, especially the information and discussion dimension. The fact that the stakeholders are directly involved in the Public Consultation and undertake direct conversations in the discussion dimension contributes to this score. The information and consequences dimensions of the *ex ante* assessment score medium, whilst the discussion dimension scores lower. This could be attributed to the lack of a bilateral exchange of opinion or conversation at this stage. However, the score in the consequences dimension improves because of the information that the IRA makes available, which allows the stakeholders to act, at least indirectly, on the consequences dimension.

Figure 31. Accountability of the Policy Evaluation Cycle in the Downward Relationship: Independent Regulatory Agencies and Stakeholders



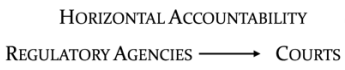
Source: Author's own depiction

Accountability scores very high in the information and consequences dimensions of the Drafting and Implementation stage, but very low in discussion. It is evident that the information dimension is high, because of the mandatory publication of the regulation. Consequences are also high probably because of the possible organizational structure that interest groups might have and the pressure that they are able to exert. In the monitoring stage, the discussion dimension is high unlike in the other stages, and this scoring is only repeated in the Public Consultation stage, whereas the information and consequences dimensions score medium. Finally, the *ex post* stage shows that the information and discussion dimensions are relatively high. However, the consequences dimension scores very low.

The initial hypothesis was the following: *"The Policy Evaluation Cycle has characteristics that can enhance accountability within the relationship between Independent Regulatory Agencies and their Stakeholders, particularly in the stages of Public Consultation and Ex post Evaluation."*

The analysis partially confirmed the hypothesis, because it did show that accountability is enhanced in the Public Consultation stage. However, it also showed that the monitoring stage is relevant for accountability, and that there is not much discussion between the stakeholders and IRAs in the *ex ante* and drafting and implementation stages. Likewise, it showed that the consequences are medium to low across stages, which is important to consider for the final accountability impact of the Policy Evaluation Cycle, as least in this relationship.

4. A THIRD SET-UP: HORIZONTAL ACCOUNTABILITY BETWEEN REGULATORY AGENCIES AND COURTS



The third and last accountability relationship that is examined is that between Regulatory Agencies (RAs) and the Courts. Admittedly, there is a more salient horizontal relationship studied by policy evaluation literature, which is that between RAs and Regulatory Oversight Bodies. However, for this relationship to exist, the country needs to create a ROB either through a presidential decree or a law, and depending on the legal instrument that creates it, it would have more or less authority over RAs[69]. Since the existence of this relationship implies more legal and administrative costs for a country that is in the early stages of the adoption of the PEC, as might be the case of several Latin American countries, it is thought appropriate to analyze first an accountability relationship that is already available in these countries. Nevertheless, the framework developed here could be used as well for the analysis of the horizontal relationship between RA or IRAs and ROBs, and assess how accountability performs between those governmental bodies.

One of the interesting things about this relationship in this context is that it is not a natural administrative relationship, in the sense that their interactions are artificially created to serve some purpose. As explained in Chapter 4 of this thesis, this relationship fits in what the literature has referred to as horizontal accountability, in which there is no hierarchical relationship between the actor and the forum, nor are the actions of the actor intended to directly or indirectly affect the forum. Therefore, they are in principle, not bound to each other, as they are located in an equal level within the constitutional setting. They are both legal authorities without authority over each other.

[69] See Chapter 2. Section 5.3 for an analysis of Regulatory Oversight Bodies, their creation and functioning.

However, it is possible to artificially create such a relationship by legally granting to the Courts the ability to evaluate the constitutionality and legality of the actions of RAs, as organs of the executive branch. This ability is dormant, in the sense that for it to come to life it needs to be activated by an affected party (i.e. citizen, stakeholder, another agency). Indeed, the power to revise administrative acts and regulations is one that Courts are normally granted. The extent to which this power can be used, and which administrative acts can be challenged, falls under the exclusive jurisdiction of the legal system of the country.

In this sense, each country sets the competences of the Courts to evaluate the constitutionality or legality of acts enacted by the executive branch, normally referred to as administrative acts or regulations. These acts are enacted in the exercise of the discretional power of the administration, which means that that agency decides the most appropriate way of addressing the problem at hand after a careful weighing of the options. Both the literature and the jurisprudence have questioned whether an intervention by the Courts on these acts goes beyond the public interest and division powers (Alemanno, 2016, p. 136; Cecot & Viscusi, 2014; Larouche, 2009; Scalia, 1989; Sunstein, 2017).

4.1 Analysis of the Interaction between Courts and Regulatory Agencies and its Accountability Effect

However challenging this dilemma is, the Courts might have a different power to evaluate the regulations produced by RAs when policy evaluation instruments are involved. In this sense, the process of policy evaluation can be considered indeed as an administrative procedure that RAs have to undertake at specific points in the life of the regulation. Therefore, in principle, it could be possible for an interested party to challenge a regulation for which either the agency did not follow the require procedure; or that, while following it, the contents or results of the procedure were not in accordance to what the legal instrument required.

Notwithstanding the above, this is a power that in principle Courts need to be granted by law. That is, the power to revoke or void regulations that did not either follow the policy evaluation process established by decree or law; or that had a flaw in the procedure, such that had it not happened, the resulting regulation would not had been enacted or would have been enacted differently. This depends in substantial part on the legal weight of the legal instrument by which this procedure was introduced. Depending on whether the PEC was introduced by law, by a presidential decree or just by administrative guideline, the power of a Court to oversee both the procedure and the result may vary accordingly.

Therefore, there is indeed an accountability relationship between two parties, because Courts are potentially able to hold accountable RAs, not always on the content itself of the regulation, but also on the procedure that was undertaken to choose that regulatory option.

As explained by Bovens et al.,

> "the key question is whether the arrangement contributes to rooting out executive corruption and the abuse of powers. [The forum] must be able to withstand the inherent tendency of those in the executive branch to evade or subvert external control. The major issue from this perspective is whether accountability arrangements offer enough incentives for officials and agencies to refrain from abuse of authority. Accountability forum should have enough investigative powers to reveal corruption or mismanagement, and their available sanctions should be strong enough to send shock waves throughout the system and make potential transgressors think twice before acting" (2008, p. 33).

Considering the above, for the analysis of the stages of the Policy Evaluation Cycle and their effect on this accountability relationship, it is assumed that the country already has in place this form of judicial control; however, we now consider how the weight of the legal instrument that introduced the possibility of review might affect the potential oversight of the Court. Therefore, the upcoming analysis focuses on the incentives that the possibility of an eventual judicial control creates for the regulator, knowing beforehand that if there is a flaw on the process or content, the regulation could be challenged.

The hypothesis presented in Chapter 4 was: "*The Policy Evaluation Cycle has characteristics that can enhance accountability within the relationship between Courts and Regulatory Agencies, in the stages of regulatory implementation, monitoring of the regulation and ex post assessment, but limited to the consequences dimension of accountability*"

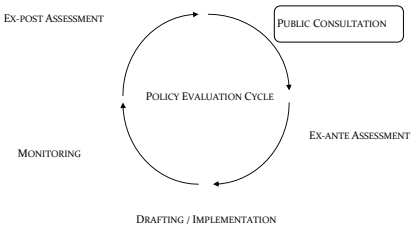
In the upcoming parts of this Section, as has been done previously with the other relationships, it examines how these two subjects interact at each stage of the Policy Evaluation Cycle and how this reflects on the three dimensions of accountability (information, discussion and consequences), within the stage.

4.2 Identification and analysis of indicators

Appendix III is a scorecard, and as with the other two relationships examined, the statements are based in the optimal state of each stage as explained by the literature, empirical work and reports by international agencies. The scoring follows the same logic

as the other two as well, and reference is made back to the analysis previously done in Section 3.1 of this Chapter for each stage of the PEC. There are only extended explanations, in the cases where a clarification or specification is required, because of the particularities of the relationship being studied.

4.2.1. Public Consultation



Information

The regulatory proposal is publicly available, and the goals of the regulation are explained either on the proposal or in an accompanying document. Even though this information is not made available for the benefit of the court, it is available for the public who can potentially activate the participation of the court in the process.

Discussion

The RA holds meetings with the public and stakeholders or has other means available for them to provide their opinion on the regulatory proposal. Likewise, the RA makes public this feedback obtained from the public and is required by a legal norm to respond to the feedback provided.

Consequences

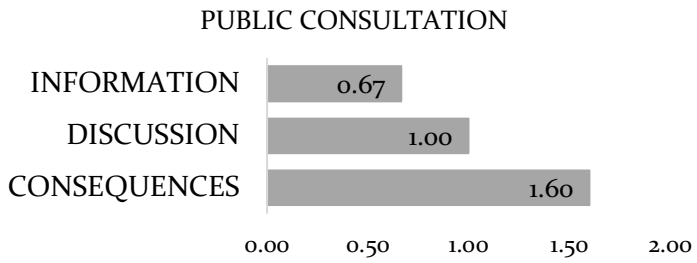
Even when RAs are not required to respond to every single feedback received from the public, they are to consider "substantial and relevant" comments. When they fail to do that, the decision-making process itself can be challenged, as the procedure was not followed. However, this function is only effective if there are mechanisms to check the performance of the agencies regarding the comments presented by the public. In other words, an interested party challenges the Public Consultation process before the Court in order for the former to require the RA to respond to the feedback provided by the public or to explain why they were not responded to. This should only be done however after the period established by the law for the Public Consultation process to be open, and a reasonable time has passed without the RA responding. This is more likely to happen either when the

ex ante assessment report is made public and it is evident that the feedback was not considered, or when the regulation is enacted and the same is noticed by interested parties.

Additionally, the Court can order a RA to undertake a Public Consultation process when a regulation is enacted, or announced to be enacted, without having been subjected to the consultation. Likewise, the Court can revoke a regulation that was not subjected to public consultation.

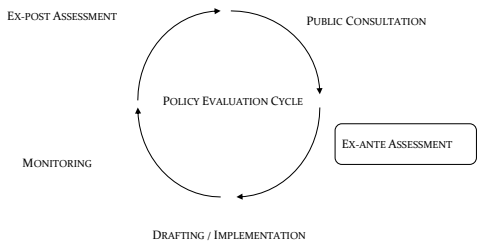
Public consultation has a medium-low score in both the information and discussion dimension. However, the information dimension might be positively affected by other stages of the PEC, such as the *ex ante* assessment, when the RA is likely to be called to reveal or present this information. The consequences dimension scores high, mainly because of the power of the court to order the RA to subject the regulation to public consultation or to motivate the exclusion of the feedback from the regulatory proposal. (See Figure 32)

Figure 32. Court-Regulatory Agency: Accountability on Public Consultation



Source: Author's own depiction

4.2.2. Ex Ante Assessment



Information

The *ex ante* assessment reports are made available to the public and have a level of technical complexity that allows the public and stakeholders to understand them. This allows

interested parties (i.e., stakeholders) to revise them and determine whether there is an error in the assessment that lead to a mistaken recommendation. Courts cannot intervene at this stage and RAs are not obliged to volunteer this information to the court as a part of the administrative process. If there is a legal procedure that challenges the *ex ante* assessment, then the information is made available to the court.

Discussion

This is a sensitive matter, because the court could evaluate the content of the *ex ante* assessment itself; and, as explained, this is usually an evidence-based document, that could be highly technical, which is distant from the expertise of the judge. Here the discussion in the literature centers on whether this type of power should be granted to a judge, because of the conflict this could bring considering the division of powers (Scalia, 1989; Sunstein, 2018b). It could be seen as a direct intervention of the judiciary into the executive arena, or it could be also seen as another extension of the checks and balances.

It is not highly probable that once the *ex ante* assessment report is out and before the regulation is enacted, an interested party would challenge the assessment. However, if this challenge does occur (assuming that the law contemplates this option) then the Court can evaluate the procedure for the assessment and require the RA to explain the analysis performed. It can inquire, for instance, on why the feedback and information obtained from the Public Consultation period were not considered for the *ex ante* assessment (Alemanno, 2016, p. 129).

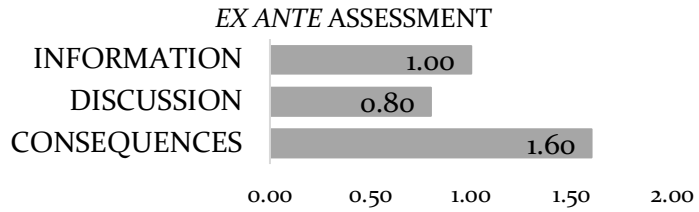
Consequence

When the RA does not make public the report of the *ex ante* assessment, the Court can order it to do so, prompted by the requirement of an interested party. However, as indicated before, it is less likely that a document that is part of the administrative process of producing a regulation would be challenged by an interested party. This reduces the possibility of the Court being able to evaluate it. Under the scenario that the *ex ante* assessment is challenged then the Court can order the RA to perform a new *ex ante* assessment following the legal procedure established for it. This requires however that the legal procedure is established by law or by a legal instrument that can be held by the examining Court.

In the *ex ante* stage of the PEC the Courts are less likely to be able to intervene because this administrative procedure is not equal to the final regulation. However, the information dimension can provoke an interested party to challenge the *ex ante* assessment in a Court. Given this scenario, then both the discussion and the consequences dimension have a

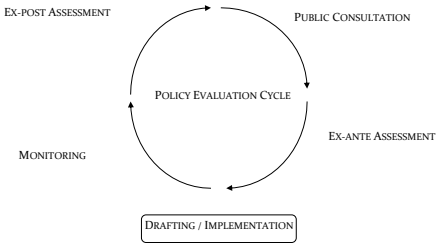
medium-high score. The score in the consequences dimension increases because even in the absence of information Courts can order the RA to produce this information (See Figure 33).

Figure 33. Court - Regulatory Agency: Accountability on Ex Ante Assessment



Source: Author's own depiction

4.2.3. Drafting and Implementation



When the regulation is drafted and implemented and its text has been made public, this is the time when Courts are more likely to be asked to intervene. There are two forms on which the regulation would be challenged by an interested party: 1. By challenging the regulation because it was enacted without undertaking either the public consultation stage or the *ex ante* assessment stage; or 2. By challenging the content itself of the regulation, based on the assessment that was previously performed.

Information

In this stage regulation is made public, which allows interested parties to know the content of the law. Here it becomes evident whether or not the regulation was drafted in alignment with the policy goals first set, considering the feedback obtained during the public consultation process, and considering the results of the *ex ante* assessment. Even though this information is not to be evaluated by the court *motu proprio*, it allows interested parties to know whether the regulation can be challenged or not. Also, once a judicial procedure in underway the information made available to the public can be used.

Likewise, the Court can request the RA to provide information that was not made public, in order to sustain its argument regarding the legality of the regulation implemented.

Discussion

The discussion dimension in this stage requires that a judicial process is open. Therefore, it will only be met if the existing legal norms allow for a regulation to be challenged either when it did not undertake one of the stages of the PEC or when there are discrepancies arising from a faulty assessment. In this scenario, the RA is required to explain either why it did not fulfil the Public Consultation or the Ex Ante stages of the PEC, or actually go into the explanation of the faults of the ex ante assessment that was reflected in the challenged regulation.

The Courts have by default the power to review the legality of enacted regulations. Therefore, they can consider the assessment performed by the RA prior to enacting the regulation, to verify, for instance, the proportionality of the regulation (Alemanno, 2016, p. 130). In this scenario, the RA might be required to explain the lack of coherence between the goals previously stated in the ex ante evaluation, and the enacted law. Particularly, the Court can consider the other options that were as well evaluated by the RA when analyzing the proportionality and rationality of the enacted regulation.

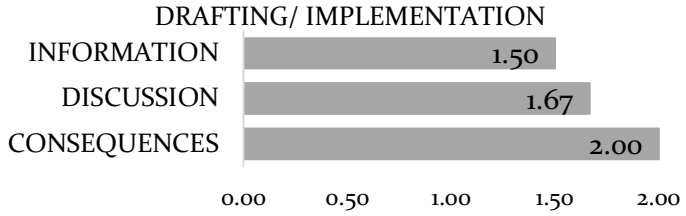
Consequence

The RA is being evaluated here on the output of its work. Specifically, on whether the regulation enacted followed the required procedure or has a legality problem that affects is proportionality or rationality. In both of these cases the Court has the authority to overturn the regulation. In the United States, Courts have revoked regulations that did not consider substantial comments from the public (Kochan, 2018), and other cases were dismissed because the comments were not substantial.

As with other consequences, the sanction does not need to be applied to work as an effective deterrence from the action of the RA. The threat of having a regulation overturned based on a flawed procedure or because of it not meeting legality principles, such as proportionality or rationality, is enough positive incentive to the RA. Likewise, the possibility of judicial overview of the regulatory-making process of a RA may preemptively increase the amount of information that the agency produces when performing the *ex ante* assessment (Alemanno, 2016, p. 133), foreseeing that it eventually may have to justify its actions. That is, there are spillovers from the consequences dimension of the drafting and implementation stage to the information dimension of the *ex ante* assessment stage.

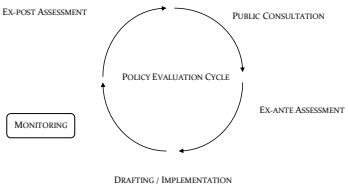
Overall, in the implementation stage of the PEC each dimension of accountability scores very high. The explanation may lie in the fact that once the regulation is made public, interested parties have enough information to challenge the regulation, and then the Court has enough power to analyze, to require documentation, and to sanction a deviation from the procedure or from the expected results. (See Figure 34)

Figure 34. Court - Regulatory Agency: Accountability on Drafting and Implementation



Source: Author's own depiction

4.2.4. Monitoring



Information

As with the other stages of the PEC, for the information dimension to be met, the information needs to be available either voluntarily or at request. This availability is what allows an affected or interested party to challenge the acts of the RA. This requires the regulation that contains the procedure for the PEC to mandate the RA to make available the results of the monitoring.

Another scenario is when the regulation itself indicates when it should be monitored and which indicators should be looked at. For instance, a regulation that aims at reducing teenage pregnancy might establish that in three years the percentage of pregnancies should be monitored, as it aims for it to have been reduced by 2%. When the three-years period is past, the RA has the obligation to perform the monitoring. In principle, the results should be publicly available, as for any administrative act that a RA performs. But if it is not, then there is a violation of the regulation itself that can later be challenged. However, even in the eventuality that this challenge happens, the information will be presented to the Court only as proof of an action undertaken.

Discussion

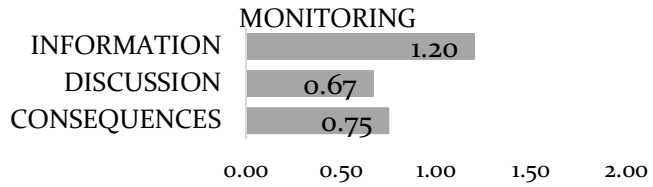
The discussion dimension during the monitoring is limited to the RA explaining to the court, in the midst of a judicial review initiated by an interested party, if and how it performed the required monitoring. It is less likely that a court has the power, or even is able to evaluate the content itself of the monitoring report, unless it contains a procedural or gross error, as it is, after all, an administrative act.

Consequence

When the agency does not comply with the legal dispositions of either the procedural regulation or the regulation itself about monitoring it, the Court can order the RA to monitor the regulation, at the request of a party. As indicated before, exceptionally if the monitoring report contains procedural or gross errors, the court might be able to review it and order the Regulatory Agency to monitor the regulation again. Therefore, the power of the court is limited to mandating the RA to obey the law in the procedure, not in the content or extent of its performance.

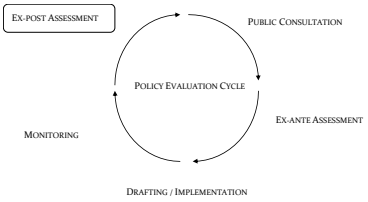
In the monitoring stage, accountability scores on medium for information and low for discussion, mainly due to the limitations that the courts have on the extent of their power when these reports are challenged. The consequences dimension scores medium low, because it is able to produce credible threats to the work of the agency. (See Figure 35)

Figure 35. Court - Regulatory Agency: Accountability on Monitoring



Source: Author's own depiction

4.2.5. Ex post Evaluation



Information

The information regarding what is being evaluated is clear, and the report of the *ex post* evaluation is publicly available. Just like with the *ex ante* assessment report, the level of its technical complexity will allow the public to understand it, or not, and eventually challenge the report. Courts do not intervene at this stage, as regularly there is not a legal norm for which the court can order its execution.

Discussion

Even though this stage does not contemplate a bilateral exchange between the RA and the Courts, this dimension is met when there is a challenge to the *ex post* assessment report. In this case, the RA is required to justify its actions to the Court, by indicating, for instance, why it did not consider the feedback from stakeholders in the *ex post* assessment; or why they indicators assessed are different from those first stated in the *ex ante* assessment.

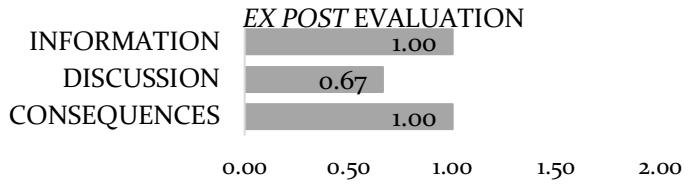
Consequences

The Court can order the RA to make available to the public the report of the *ex post* assessment. Likewise, once the retroactive review is performed, it is possible for courts to assess the procedure undertaken by the agency. This happens when an interested party challenges the report on the basis of an error in the administrative procedure, or even in the content of it. If, for instance, the RA did not consider the goals initially set for the regulation, or if those evaluated are different from the ones initially set, the Court has the power to review the assessment. Additionally, if the report shows procedural mistakes, or if the feedback from the public, or if stakeholders was not considered when making the assessment, or if the data collected (or its interpretation) is flawed, then the Court has as well the power to revoke this administrative act and order the RA to perform it again.

It is not possible however to challenge a regulation because the *ex post* evaluation report shows that the goals were not met, unless this is due to illegal or unconstitutional acts of the RA. Since that would be another legal matter, it is not explored here.

In summary, in the *ex post* assessment stage the information dimension scores medium, and the discussion scores a little lower. However, because of the possibility to challenge the actions of the RA, and the ability of the Courts to oversee or even revoke the assessment, the consequences dimension scores higher than the other two dimensions. (See Figure 36)

Figure 36. President - Regulatory Agency: Accountability on Ex post Assessment

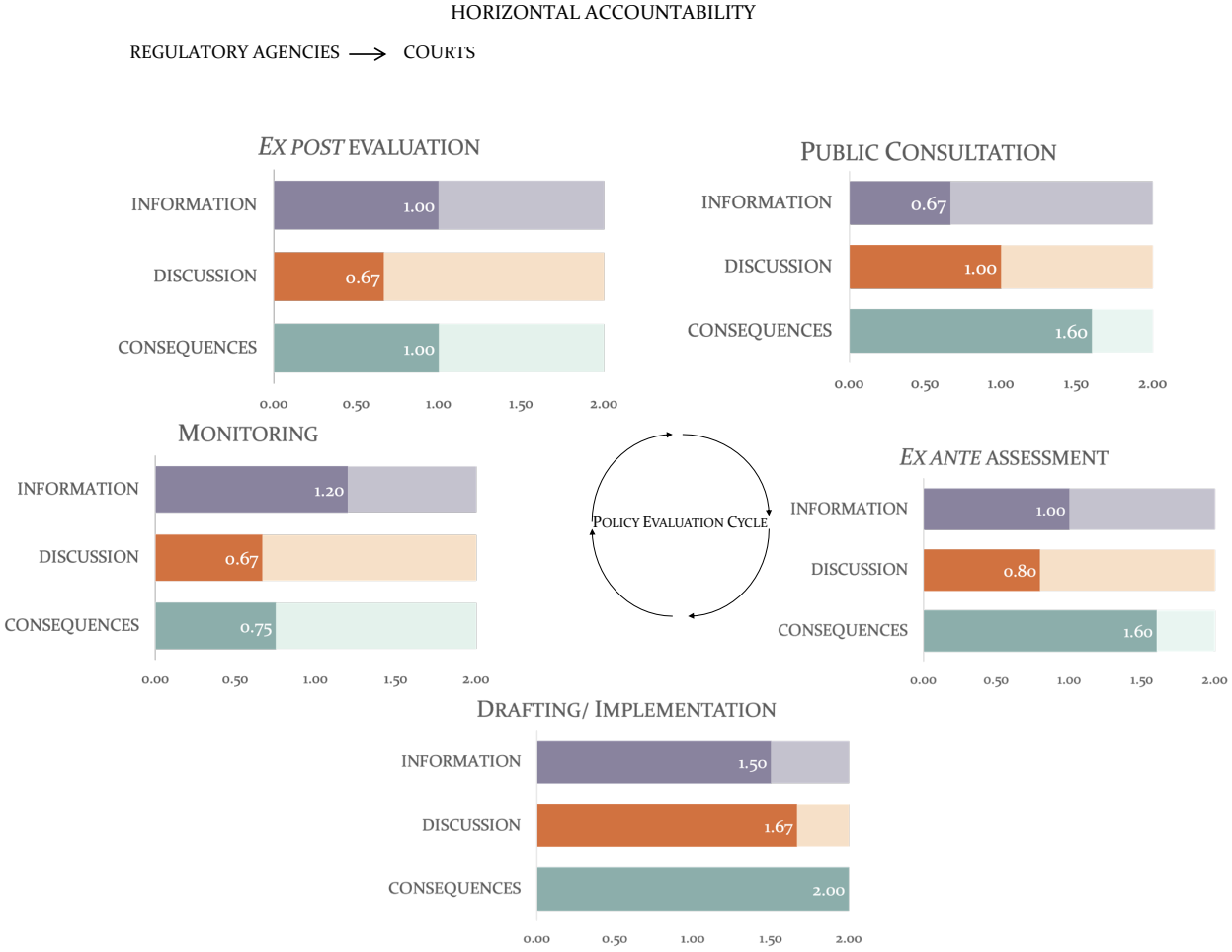


Source: Author's own depiction

4.3 Discussion of the Results in Horizontal Accountability

As previously done, we now bring together in graphic form how accountability reveals itself in the different stages of the Policy Evaluation Cycle. This provides a panoramic view of accountability in the PEC stages when it comes to the regulatory relationship between the Courts and the RAs. (See Figure 37)

Figure 37. Accountability in the Policy Evaluation Cycle in Horizontal Accountability: Regulatory Agencies-Courts



Source: Author's own depiction

It seems that overall accountability runs relatively high in the horizontal accountability relationship between the RAs and the Courts cycle. As held by the accountability literature, in this type of relationship what needs to be verified is if the supervisor has enough investigative powers and can process the existing information to credibly evaluate the actions of the forum. Likewise, the forum has incentives to ask the actor relevant questions; and has the ability to impose credible sanctions (Bovens et al., 2008). According to the evaluation performed in this Section, this relationship seems to meet those criteria.

Going into an overview of each stage, the public consultation has a medium-low score in both the information and discussion dimensions. The consequences dimension scores high, mainly because the power to the Court to order the RA to subject the regulation to public consultation or to motivate the exclusion of the feedback from the regulatory proposal. In the *ex ante* stage the information dimension scores medium because it can prompt an interested party to challenge the *ex ante* assessment. Both the discussion and the consequences dimension score medium-high, because once the assessment is challenged, the Court can request explanations from the RA and even order it to follow procedure. The score in the consequences dimension is higher because even in the absence of information the Courts can order the RA to produce this information.

In the implementation stage of the PEC, each dimension of accountability scores very high, and as in the other stages, the consequences dimension has the highest score. This might be explained by the fact that once the regulation is made public, interested parties have enough information to challenge the regulation, which allows the Court to analyze, require documentation, and sanction a deviation from the procedure or from the expected results.

In the monitoring stage of the PEC, accountability scores on the low-side for information and discussion, mainly due to the limitations that the Courts have on the extent of their power when these reports are challenged. The consequences dimension scores medium. It is the stage of the PEC that scores the lowest in this relationship, together with the *ex post* assessment stage. In that stage, the information dimension scores medium, and the discussion scores a little lower. However, because of the possibility to challenge the actions of the RA, and the ability of the Courts to oversee or even revoke the assessment, the consequences dimension scores higher than the other two dimensions.

Perhaps a different horizontal forum, such as Regulatory Oversight Bodies, could produce similar or higher results. ROBs have a closer oversight of several stages of the PEC that might create a louder “alarm” illusion for the RA. The innate authority to supervise and question the contents of the *ex ante* and *ex post* assessments reports, and the requirement

to submit these reports for review before they are definite are elements that would count towards a higher score.

The initial hypothesis was "*The Policy Evaluation Cycle has characteristics that can enhance accountability within the relationship between Courts and Regulatory Agencies, in the stages of regulatory implementation, monitoring of the regulation and ex post assessment, but limited to the consequences dimension of accountability*"

The analysis partially confirmed the hypothesis, because it did show that accountability is enhanced in the stage of drafting and implementation. However, the scoring for the monitoring and the *ex post* assessment stages were low, contradicting the initial hypothesis. Additionally, it also showed that accountability was not limited only to the consequences dimension, since it also scored high in other dimensions in various stages. For instance, both the information and discussion dimension scored high in the *ex ante* assessment and drafting and implementation stage.

5. OVERALL DISCUSSION

As explained by the literature, "[t]he design of accountability mechanisms involves the alteration of individual and institutional incentives to assure their compatibility with other policy objectives." (Jordana et al., 2015, p. 8). In order for those characteristics to be salient, it is necessary for the policy evaluation process to be designed to enhance particular stages of the PEC. Those stages should be the ones that have an effect on accountability within the specificities of the regulatory relationship, by considering the incentives that are created.

The scoring of accountability within each stage of the PEC revealed information about the intensity of the different dimensions of accountability within each stage of the PEC. Additionally, it was evident that it also operates differently depending on the regulatory relationship that is being considered. Further to these evident differences that surfaced once the scoring and analysis was done, there are other takeaways from these findings that can be even more useful for policymakers. Those are especially related to how the dimensions can potentially interact among themselves in practice, considering the positive and negative spill overs; and how the PEC stages complement each other to potentially reinforce accountability across them.

5.1 Differences across Relationships

A comparison shows that in both the relationship between the President and Regulatory Agency and the relationship between the Court and Regulatory Agency the Public Consultation stage has a very low accountability score. On the contrary, the score at the same stage is on aggregate high in the relationship between IRAs and Stakeholders. It also revealed that in the relationships between the President-Regulatory Agency and IRAs and Stakeholders accountability in the drafting and implementation stage of the PEC scores similarly (low on discussion, high on information and consequences); even when the behavior, incentives and explanation behind the scoring are different. However, accountability scores very high in that same stage of drafting and implementation in the relationship between Courts and Regulatory Agencies. Additionally, the *ex post* assessment stage does not score high on accountability for the relationship between IRAs and Stakeholders, nor RA and Courts. Conversely, this same stage scores higher in the President-Regulatory Agency relationship.

5.2 Interaction among dimensions: Synergies and Trade-offs between dimensions

One important factor to consider is the interactions among accountability dimensions and their indicators. To begin with, regarding the effectiveness of information, the rationale is that information can improve when there is a threat of accurate sanctions. Thus, a synergy between two dimensions can be observed. An investment in information has a direct effect on the information but also a positive indirect one on consequences.

Similarly, regarding the effectiveness of discussion, again, the basic idea is that discussion is likely to be more informative when there is a real threat of sanctions. In fact, agents will be compelled to reveal more information and be more accurate in their statements. Thus, again a synergy between two dimensions can be observed. An investment in discussion has a direct effect on the discussion but also a positive indirect one on consequences.

On the effectiveness of consequences, the idea is that when the information available to the forum improves, they will be better able to minimize the risk of false positive (i.e. sanctioning when it is not warranted) and false negatives (e.g. not sanctioning when it is warranted). In other words, increasing the effort to improve discussion and information also has a positive influence on the effectiveness of consequences. This is an important insight because it reveals that there are important synergies between the three dimensions.

Besides synergies, there are also trade-offs between dimensions. The reason is obvious. Improving one of the scores has a cost, and therefore with a limited budget a dollar invested in one dimension cannot be invested in the others. Thus, when deciding how to shape the

three dimensions in a stage it is fundamental to account for the trade-offs and the synergies among them.

Two possible approaches

In the light of the trade-offs just discussed, two possible strategies appear possible. First, the country or agency could decide to concentrate its efforts on the dimension of accountability that constitutes the strong point of the system (i.e. the dimension with the highest score). The idea would be that investing in the strong dimension would have positive spillovers on the others. For instance, a very transparent and accurate discussion might facilitate sanctioning of wrong behavior to the point where few resources would be needed in the consequences dimension. Second, it could be assumed that the investments in each dimension produce decreasing marginal benefits, that is, the first dollar invested in consequences will improve sanctions more than the n-th dollar will. The corollary of this assumption is that the country should concentrate efforts to improve the weakest link in the chain (i.e. the dimension with the lowest score). It is unlikely that one of these two approaches would be invariably superior. For instance, it is possible that marginal improvements of the discussion dimension will not produce any benefit when discussion is almost absent. That is, the benefits from investing in improving discussion might only produce some effects after a certain threshold. At the same time, however, when the quality of discussion is above a certain threshold it is likely that its improvements produce decreasing marginal benefits.

In summary, even though the three dimensions of accountability are equally relevant (Bovens, 2005), as they each serve a purpose, the lack of a consequence to an action, either positive, or even more relevant, negative, could render accountability useless. Therefore, country X could invest in strengthening the consequences dimension of accountability for Public Consultation, by, for example, making it possible to revoke a regulation that did not undergo a Public Consultation process, or did not consider the feedback of the stakeholders.

5.3. Interaction among stages of the PEC

While the framework developed in this Chapter analyzes the stages separately, in the analysis it is clear that they are in constant interaction, as they are part of a cycle. This Section discusses the effects of these interactions and how they should be accounted for by policymakers. To begin with, the five stages identified can be divided into pre-implementation and post-implementation. The former includes public consultation and *ex ante* assessment, whereas the latter includes drafting/implementation, monitoring, and *ex post* assessment. When deciding how much resources to allocate to increase the

accountability in each phase a policymaker should carefully consider how the investment in pre-implementation phases will influence the post-implementation phases, and vice versa.

For instance, it is likely that better public consultation and *ex ante* assessment will ensure that better regulations are approved, and that better information is available about their effects. In turn, this reduces the cost of monitoring. Assume for example that a regulation aims at reducing the number of car accidents. A comprehensive discussion dimension among the relevant stakeholders and a careful *ex ante* assessment will provide a relatively more solid basis for estimating the effects of the regulation. This will allow the President to better target and tailor its monitoring efforts to maximize accountability at a relatively low cost. At the same time, better monitoring might indirectly increase accountability during the pre-implementation stage.

Assuming now that it is required that the goals (indicators) to be met by the regulation are required to be clearly set in the *ex ante* stage, this would ensure that the monitoring can be done not only by the regulator, who is required to do it, but also by the public. The public's feedback is a tool at the disposal of the President at relatively low cost, thus this could translate into lower monitoring costs for the President to ensure that the regulation is producing the desired effects. Therefore, there could be a high probability that discrepancies between what was declared in the pre-implementation stages and what happens in the post-implementation stages are caught and sanctioned. This will discourage the dissemination of false or inaccurate information during the pre-implementation stages, and hence improve accountability during the public consultation and *ex ante* assessment.

Dividing the PEC stages in pre-implementation and post-implementation it helps to understand how the stages interact in a group at different moments of the life of the regulation. This grouping is made only for practical purposes of the analysis, since they share a common characteristic: they either happen before or after the regulation is enacted. Nevertheless, it is thought relevant to see how the stages in the pre-enactment interact among them, and how the stages in the post-enactment interact with each other.

To begin with, it is possible to hypothesize that there are positive spillovers between the public consultation and the *ex ante* stages. In fact, it is clear that a public consultation stage where the information and discussion dimensions score high, increases the quality and the clarity of the *ex ante* assessment, thus enabling accountability. Similarly, a better *ex ante* assessment might incentivize stakeholders to engage in more extensive and detailed discussion, thus providing better quality input to the IRA to incorporate into the *ex ante* assessment.

5.3 Implications for Countries and Policy Makers

Considering how the dimensions of accountability score on the stages of the PEC, as well as the overall accountability score for the stage, governments or agencies could use this information to determine which dimension(s) and stage(s) should be given primacy in their system, considering, among other things, the resources available to invest, the regulatory relationship that is relevant for that country/agency, the legal norms that are currently in force and the interaction of the stages among themselves and within.

This is not suggesting necessarily that the cycle should be broken, or that a stage should be excluded from the process. As explained, even when specific stages of the PEC have a low score on accountability, it is possible that the information gathered in the stage or the discussion undertaken are useful in other stages that do score high on accountability. After all, the PEC is a structure where the stages benefit from each other, and the same is true for its accountability effects.

Because of the different outcomes that they might have, there are two potential uses for these findings. First, countries could invest in strengthening or building up those stages that reveal higher accountability potential and that are compatible with the countries' accountability goals. For instance, assume that Country X has a presidential system, where most of the regulatory decisions are made by Independent Regulatory Agencies (that is a downward accountability relationship). Assume also that X is recently planning to adopt the PEC as part of its policy-making process, motivated, among other things, by the accountability potential of this tool. X could begin by investing in the establishment of Public Consultation and *Ex ante* Assessment, considering that they have a relatively aggregate accountability high score (See Figure 26 and Figure 27). However, X should consider the consequences dimension of these stages, as individually they scored medium.

Alternatively, governments could invest in strengthening the accountability potential of the stages that scored lower on particular dimensions of accountability. This would require an intra-stage analysis where the score of the accountability dimensions of each stage is considered separately accounting for the deficiencies that the stage may reveal across accountability dimensions. Keeping with the same example of a medium or low consequences dimension, because of the diminishing marginal effect of investing in sanctions, it would have a higher effect to invest on strengthening the consequences dimension of an evaluation stage that scores low on this dimension and relatively high on the other dimensions.

6. CONCLUSIONS

At least for the last two decades, Policy Evaluation has been seriously discussed as a fundamental part of the policy-making process of governments. The main goals point at producing more efficient regulation, improving the quality of regulations, and increasing transparency and accountability. Among Latin American countries, this last one, accountability, shows up in almost every motivation to adopt policy evaluation into the decision-making process of these countries. This Chapter aimed to answer the following research question: *Which stages of the Policy Evaluation Cycle have an effect on accountability for regulatory relationships within a presidential constitutional system?*

For this, a framework was developed for scoring each stage of the Policy Evaluation Cycle considering how it played out vis a vis the dimensions of accountability. The analysis deepened by considering these interactions in different regulatory relationships that are common in presidential constitutional systems. The scoring obtained from the framework showed that indeed accountability operates differently in each stage of the Policy Evaluation Cycle. It showed furthermore that accountability also operates differently depending on the regulatory relationship that is being considered.

Therefore, it is possible to extend the previous literature findings that affirmed that policy evaluation can be used as a tool for accountability, by adding that it can be used as an accountability tool considering the stages of the PEC and the regulatory relationships of the given country.

An important caveat is that the scoring reflects accountability at each stage providing that the criteria utilized for scoring are met by the country or agency using it. If the PEC is implemented in a country which does not meet those criteria, has higher standards, or changes, for instance, the sanctions or rewards administered at a given stage, then the accountability scoring of the stage will be affected accordingly. Then the adjustment of the criteria for scoring accountability on the PEC considering the existing or missing conditions of the specific country would reveal how accountability plays out on the different stages of the PEC in that specific jurisdiction.

In addition to the differences that surfaced once the scoring and analysis was done, there were other takeaways from these findings that can be even more useful for governments and policymakers. In particular, how the dimensions can potentially interact among themselves, considering the positive and negative spill overs; and how the PEC stages complement each other to potentially reinforce accountability across them.

The results from this Chapter open up the avenue for further research. In this sense, the framework could be used by governments to evaluate accountability in their current policy evaluation arrangement; it could be used by international organizations to assess accountability across jurisdictions that have implemented the PEC, or to promote the PEC in jurisdictions that are planning to adopt it, considering the possibility of adapting it or not to the jurisdiction at hand. Likewise, it could be extended to other forms of government and regulatory relationships, including the parliamentarian system, to analyze the accountability dynamics in which the policy evaluation cycle participates.

Conclusion

This research started with two complementing research questions: Why are Latin American countries adopting a better regulation agenda? Can this contribute towards accountability, and if so, in which conditions?

The answer to the first question initially identified three rationales that might explain why Latin American countries are adopting and implementing regulatory policies: to enact more efficient or effective regulations; to increase accountability in the regulatory-making process; and as a result of policy transplant or third-party influence. These rationales were explained by the literature on public law and economics, administrative law, and transplant theory, respectively.

The answer to the second research question required, however, a more complex and lengthy analysis. Based on the existing literature and international practice, I studied in detail the components of a regulatory policy and their governance. This included the scope of the assessment; when are the assessments performed; the tools used for the assessments; and the governance of the assessments. I organized these components into several matrices based on the rationales previously identified. It served to understand how these conditions could be created in a way that the intended goals that countries had for implementing a better regulation agenda could be achieved.

With this part of the research, I saw that the interaction between regulatory evaluation tools and their governance is generally under-studied and that Latin American countries are not the exception. Since these countries have been adopting and implementing different forms of a regulatory evaluation policy over the last decade, they were the focus of this research. In this Thesis, I presented an updated detailed description of the policy assessment arrangements of the Latin American countries that have either adopted or implemented them. In turn, I studied the different arrangements that these countries have chosen for their policy assessment structures, as well as their governance, and identified common trends.

Most of the Latin American countries studied expressly stated regulatory accountability as one of the goals for adopting their better regulation agenda. In other words, the adoption of a regulatory evaluation policy was also aimed at increasing accountability in their regulatory-making process, in addition to efficiency and reduction of regulatory burden. Therefore, I focused on accountability to answer the second research question.

Even though accountability is not a natural Law and Economics term, it is used in the regulatory field. According to the leading literature, a regulator is accountable to its forum when it informs them of his actions; there is a space for discussion of the actions; and lastly,

when there are consequences, either positive or negative, to the actions of the regulator. These are known as the accountability dimensions: information, discussion and consequences.

To be able to apply the lessons from the accountability literature to the particularities of regulatory evaluation, I first examined how the decision-making process is structured in presidential systems. This is because the researched Latin American countries have this constitutional system, and thus their accountability relationships are framed within the particularities of this system. In Latin American countries, most of the regulatory decisions are made by a body of the executive power, and the public administration is mostly directed and accountable to the president. This means that there is a principal-agent relationship between these public administrations and the president. However, there are other bodies of the public administration that are independent and are not directly accountable to the president, which are independent regulatory agencies. These agencies are thus accountable in other ways, and to other forums, such as their stakeholders, oversight bodies or courts.

This showed that accountability is expressed differently depending on the relationship and interactions between the actors and their forum. Consequently, this means that the contribution on accountability that a regulatory policy might have would be closely linked to the relationship being considered.

Going back to the topic of regulatory evaluation, the different stages of assessing regulations are public consultation, *ex ante* assessment, drafting and implementation, monitoring and *ex post* assessment. I referred to those stages as the Policy Evaluation Cycle. Each one of the stages have a different function. They generate different incentives for the regulator, depending on the relationship on which the stages are executed.

The main contribution of this Thesis is thus bringing together these strands of literature and building a framework that assesses the contribution towards accountability of each stage of the Policy Evaluation Cycle on different regulatory relationships. The framework scores each stage by evaluating them on each dimension of accountability. It shows to which degree the stages and the cycle as a whole contribute towards accountability in a specific relationship of a presidential constitutional system. The results showed that even when a policy assessment structure might contribute towards accountability, this contribution is not absolute as it only operates in specific relationships, and even more, in particular stages of the Policy Evaluation Cycle and at different degrees.

Main findings and contributions to the literature

The first research question was "why are Latin American countries adopting a better regulation agenda?". This question arose from a simple and verified observation: In the last two decades Latin American countries have been increasingly and steadily adopting a better regulation agenda. This agenda is composed of instruments for assessing their existing and potential regulations, and of governance structures for the use of these instruments and for oversight of the assessments. By 2019, ten Latin American countries, namely, Mexico, Colombia, Chile, Costa Rica, Ecuador, Chile, Dominican Republic, Peru, Argentina and Brazil had adopted a better regulation agenda at different degrees and at different points in time. Enough to make it a trend.

With the lessons from the literature in public law & economics, policy assessment, public law, accountability and transplant theory, I identified three rationales that might explain this trend. In that sense, the first identified rationale for adopting this agenda is the main normative use of policy assessment tools: to improve the quality of regulations. This entails the evaluation of the effects of existing or future regulations that serve to inform the decision-maker of the most efficient or effective (depending on the country's or regulator's goals) options to address the economic, regulatory or social problem at hand.

The second rationale I identified is enhancing regulatory accountability. The enactment of primary legislation or secondary regulations comes always from a delegation done by either the people or from one power of the state to another or to a body within the same power. As held by the Agency Theory, the principal, who delegates, needs to foster a system where he can monitor the actions of his agents or create the right incentives to align the acts of the agent with the interests of the principal (Ross, 1973). Thus, the governance of a policy assessment structure, that provides for transparency, oversight and reports, as well as the systematic evaluation of the regulations enacted could contribute towards enhancing accountability. This would overcome one of the main downfalls of delegation, which is that the delegating party does not have sufficient expertise or time, or it could be costly to have, to oversee the actions of the delegated party. Certainly, in that case, it would require that the reports and information provided are understandable to the delegator. At the same time, having a regulatory evaluation structure might provide positive and negative incentives to the agents to align their actions with the preferences of their principals.

The third rationale is third-party influence, which can be partly explained by the transplantation theory. In that sense, Latin American countries might be influenced by the practices of other countries in the region, as well as by the recommendations of international or regional organizations. From the research it was evident the cooperation

between Latin American countries, led by Mexico; as well as the active promotion of the agenda by the OECD in the region. Countries often respond to the need of signaling that they conform to standards and international practices. This could be to attract investors or signal reliability. At other times this action can be motivated by the countries' self-interest when the adoption of a policy is a requirement to be a member of an organization or group. Likewise, the motivation might be to give the appearance that the government or politicians have a system that responds to accountability or to efficiency and give the impression that they comply with the internal requirements of the population or demands of the international community. Of course, most likely these rationales did not operate in isolation and a combination of them might accurately explain the trend in the region. One of the contributions of this Thesis is the identification and initial analysis of these rationales, using different strands of literature. In that sense, each one of these rationales can be the subject of individual research to determine whether the adoption and implementation of a better regulation agenda or a regulatory policy is justified by the chosen rationale.

In the topic of policy assessment, international practice has pushed the literature to study the phenomena and to analyze from different points the use of certain instruments, or the organizational and governance structures into which these instruments have been adopted. Even in this topic, there is the old question of the chicken and the egg. The practice may have come first; however, it is deeply guided by the literature, the educated analysis of previous experiences, and the adaptation of the practices that have not worked and those that have. In that sense, after understanding the rationales for the adoption of a better regulation agenda, it was essential for my research to understand what that adoption and implementation looked like in practice. Thus the relevant components to be considered for a regulatory evaluation policy that I identified from the literature on policy assessment and international practice were (i) scope of the assessment; (ii) the moment(s) for the assessments; (iii) the tools used for the assessments; and (iv) the governance of the assessments.

For each one of those components, there were different options to choose from. This was a stepping-stone to arrange each of the options based on the goal that they potentially serve. I based these arrangements on the common practices from international experience, the findings and interpretation of the specialized literature in the field of policy assessment, public law, administrative law and agency theory. The result of this merge was the second contribution of this research: A workable framework or matrix that contains several proposed arrangements of the options of each element that compose a regulatory evaluation policy arrangement. Each arrangement is based on the rationales previously

identified, in a way of understanding how these conditions could be created for those goals to be achieved.

It showed, for instance, that when accountability is one of the goals of adopting a regulatory evaluation policy, the structure of the regulatory policy is expected to include in its scope secondary regulations enacted by regulatory agencies. Likewise, regulations are expected to be assessed through all stages of the Policy Evaluation Cycle, using regulatory evaluation tools such as SCM and CBA. Regarding oversight, it is expected that the process of evaluating regulations as well as of enacting regulations is properly assessed by an oversight body, to address the issues drawn out by the Agency Theory.

Up to this moment, neither the literature nor international practice had organized the different elements of the governance of policy assessment to focus or follow a specific goal. In that sense, the proposed framework provides structure to the different findings of the literature on policy assessment, by arranging the complexity into manageable categories. It also serves as a framework to contrast with the existing regulatory evaluation governance of a country or a sector. This could serve, for instance, to assesses whether the regulatory governance arrangement implemented in a country is serving the goal that it is intended for.

The framework, however, does not intend to be a fixed statement on how the elements should be arranged nor does it propose that one arrangement only fits one goal. It is, however, an attempt at identifying and organizing common practices into replicable structures, based on their inherent characteristics and the goals they pursue. Certainly, this proposal presents its own limitations, that can also be seen as opportunities. For one, it has not been tested empirically, and without a doubt it is something interesting for further research.

So far, this Thesis has shown on the one hand the different rationales that countries, and particularly Latin American countries, may have to adopt regulatory evaluation agendas; and on the other hand, what the international practice and various literature strands have shared regarding the governance and use of regulatory policies. This allowed me to build the aforementioned framework and to provide the base to look at the main subject of the research: Latin American countries.

I presented the content of the legal instruments on policy assessment of Latin American countries organized and analyzed based on the common components expected from a regulatory evaluation structure, with its strengths, weaknesses and potentials. Because this is a relatively new phenomenon to the Latin American region, this particular contribution,

though partly descriptive, was first useful for the analysis performed, and can also serve as the base for further research.

I used my framework to contrast it to the regulatory evaluation structures of Mexico, Chile and the Dominican Republic. This exercise revealed that Mexico's governance structure matches what is expected for a country with efficiency as a goal, and partially matches what is expected for a country with accountability as a goal. This could be explained by the fact that Mexico was the first country to implement a regulatory policy, which has been in constant change and improvement. This could have led to the gradual adaption of the system to the needs of the country. On the contrary, it showed that both Chile and the Dominican Republic have structures that do not match some of their revealed goals, mainly when it comes to accountability (in the case of the Dominican Republic) and administrative simplification (in the case of Chile).

Some of the countries examined have accountability as a goal for their policy assessment agendas. One thing that still holds from the initial findings of this Thesis, is that the introduction and implementation of policy evaluation systems in Latin America can be used as a bargaining chip for politicians, as they can respond to the demand for accountability of their population in exchange for fulfilling their own preferences, to remain in power. Considering that, and also considering that all of the Latin American countries studied have a presidential Constitutional system, for the rest of the research I focused on studying accountability as a rationale and a goal for assessing regulations. Thus, getting closer to answering the second part of the research question which was "can the implementation of policy assessment systems contribute towards accountability, and if so, under which conditions?"

Since an accountability relationship requires there to be information, discussion and consequences to the actions of the actor, it was relevant to determine how these relationships operated in the Latin American system. One of the findings of this Thesis was that in the Latin American presidential systems there are many and different regulatory relationships. The actors do not interact with their forums in only one manner. Therefore, there are various accountability relationships. These relationships are complex, and so are their interactions.

Thus, another contribution of this Thesis is bringing together the literature on accountability with the literature on policy assessment. More specifically, when doing so, analyzing policy assessment as a whole, as a structure, and not only particular aspects of it. This exercise aimed at identifying the common grounds between these two areas of study. This is because the literature on policy assessment held that this tool was useful for

accountability purposes. However, the complexity identified on the regulatory accountability relationships of the presidential system needs to be considered when analyzing how the different aspects of a policy assessment policy play into accountability.

It was initially evident that even when it was possible that regulatory evaluation structures could contribute towards accountability, it was unlikely that all stages of the evaluation would contribute equally. Therefore, there were certain conditions to be met. Also, depending on the regulatory relationship where the policy assessment was being performed, different conditions need to exist for the regulator to be accountable to his forum. Consequently, I aimed to answer the last part of the last research question, which asked under which conditions can the implementation of policy assessment structures contribute towards accountability.

I thus created the main contribution of this Thesis: A framework to assess the contribution towards accountability that each stage of the policy evaluation cycle has, considering the particularities of the different regulatory relationships that can be found in a presidential system. I applied the framework to the current practices of policy assessment to determine whether and how public consultation, *ex ante* assessment, drafting and implementation, monitoring and *ex post* assessment, as stages of the policy evaluation cycle, contributed towards the different dimensions of accountability. I adjusted the framework even further to assess the contribution of these stages on different regulatory relationships of a presidential system.

For instance, I assessed the contribution of the PEC to the relationship between independent regulatory agencies and its stakeholders. It showed that in this relationship one of the stages that contributes the most towards each dimension of accountability is public consultation. In this relationship, the regulator cannot be directly punished (e.g. removed) by its stakeholders; however, it relies on its reputation and collaboration of its stakeholders for a good performance. Therefore, its high score in this stage can be explained by the fact that this is the moment where stakeholders can interact directly with the regulator, undertake direct conversations and eventually agree or disagree with a proposed regulation.

Just as with that example, the scoring showed that indeed different stages of the Policy Evaluation Cycle contribute to different degrees of accountability, and some do not contribute at all. Furthermore, it confirmed that this contribution towards accountability is different, based on the regulatory relationship that is been considered.

In addition to this, other findings came from this assessment. The dimensions of accountability can potentially interact among themselves creating spillovers, both positive and negative. Likewise, the stages of the PEC can complement each other and have the potential of mutually reinforcing their contribution towards accountability.

These findings answer the final research question and add to the existing literature when they show that indeed policy assessment structures have the potential to contribute to a greater or lesser extent to the accountability of the regulatory-making process and its actors. However, the contribution of each stage will depend on the stage of the evaluation and on the relationship that exists between the actors that participate in the regulatory process.

Finally, another contribution of this Thesis to the literature is bringing together strands of literature that were previously studied separately. It shows that different types of literature can influence each other in a fruitful way. Even though accountability is not a law and economics concept, this Thesis showed that, on the one hand, its principles and composing parts can be combined with the literature on policy assessment, particularly in the environment of a presidential constitutional system, which can be extended to other systems. On the other hand, they can be used to evaluate the different stages for assessing regulations in a regulatory evaluation framework, considering the incentives that the actors have when interacting with their forum in that realm.

Policy implications, practical uses and further research

From the main findings of this Thesis there are some policy implications that can be drawn, as well as practical uses. In that sense, the first framework developed in this Thesis can be used for countries to assess whether their current regulatory evaluation structure is aligned with the goals that they are pursuing. It can also serve as a guide for which tools, scope or governance a country is expected to have depending on the goal that it is pursuing.

More importantly, the framework developed in this Thesis for assessing the contribution towards accountability of a particular policy assessment set-up could be tested in practice. Latin American countries can assess whether their structure is oriented towards accountability and if so, how well they are doing. In other words, governments or regulatory agencies could use it to assess the contribution of accountability of their current regulatory structure. Depending on which regulatory relationship within their political set-up is important to have higher accountability, and depending on the score that the framework shows, the country could choose where and how to improve its regulatory evaluation structure.

Additionally, the framework can be used by international organizations that study and advise countries on their regulatory policies such as the World Bank and the OECD, to assess accountability across jurisdictions that have implemented one or more stages of the policy evaluation cycle. This assessment could be even used to promote the adoption of these assessment tools considering their functions as accountability instruments.

Since this is a first attempt at creating this framework, it can be of course refined and improved. This could be done, for instance, by adjusting the scoring methodology to better reflect the importance (or lack thereof) of a statement or of a practice.

It is relevant to point out that the framework is designed to evaluate regulatory relationships within a presidential system in Latin American. Evidently, it can also be used by other countries that have the same government system, perhaps adjusting the statements and possibly the scoring. Nevertheless, even though it is designed for a presidential system, this framework can be modified and extended to other forms of government, such as a parliamentarian system or to international organizations. This will of course require further research. First, it will be necessary to identify the regulatory relationships that exist in the chosen system, how the actors and forums interact with each other, to determine their accountability dynamics; and second, to adjust the framework to reflect this.

This is a contribution towards the fields and literature on policy assessment, accountability and public administrative law and economics. The avenue is open for improvements and new research in the field. It is open to improve the use of the framework to assess the contribution on accountability of regulatory policies.

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APPENDIXES

Appendix 1

Scoring of the Accountability Indicators on the Upward Accountability Relationship President- Regulatory Agencies

CRITERIA	SCORE
PUBLIC CONSULTATION	
INFORMATION DIMENSION	
Proposed regulation is made public (website or otherwise)	0.00
Information provided is sufficient for the public to provide feedback	0.00
The goals of the regulation are clearly defined by the regulator	1.00
The information available on the ex ante evaluation allows understanding of the main content, scope and methodology of the evaluation conducted	1.00
Total	0.50

DISCUSSION DIMENSION	
The feedback requested refers to the main issues of the regulatory proposal.	0.00
There is an obligation to make public the comments and feedback from the public.	1.00
The public obtains response from the regulator regarding the opinion provided during the information stage (regarding its inclusion/exclusion).	1.00
Total	0.67

CONSEQUENCES DIMENSION	
The comments and feedback from the public are published or publicly accessible	0.00
It is clear how the decision regarding the final draft of the regulation was made (who voted/ how they voted)	1.00
It is clear who drafted the text of the regulation and/or the support documentation that is available for consultation	1.00
Total	0.67

EX – ANTE ASSESSMENT	
INFORMATION DIMENSION	
Ex ante reports are available to the President	2.00
Ex ante evaluation contains enough information regarding the expected impact of the regulation	2.00
The information available on the *ex ante* evaluation allows understanding of the main content, scope and methodology of the evaluation conducted	1.00

The *ex ante* assessment presents the alternatives to address the problem, other than the evaluated regulation.	2.00
Total	1.75

DISCUSSION DIMENSION	
The feedback provided by the public is included as a part of the *ex ante* evaluation	1.00
Ex ante impact assessment explains whether and how the opinions expressed were considered	1.00
The *ex ante* assessment report informs the President of the reasoning behind the choice of the Regulator and the President can challenge this information.	2.00
Total	1.33

CONSEQUENCES DIMENSION	
It is clear who performed the evaluation (which department/individuals/agency).	2.00
It is possible to remove or change the persona responsible	2.00
It is possible for the President to reject or object the contents of the *ex ante* assessment	2.00
Total	2.00
CRITERIA	SCORE
DRAFTING / IMPLEMENTATION	
INFORMATION DIMENSION	
The Regulation indicates (directly/indirectly) whether the recommendations of the *ex ante* assessment were considered.	2.00
The regulation indicates how it was approved (votes / feedback considered / accepted and rejected input)	2.00
The regulation indicates the goals that it pursues and how they will be achieved	2.00
The regulation includes the indicators that are to be examined in the future.	2.00
Total	2.00

DISCUSSION DIMENSION	
The Regulation (or the agent) explains when there is a departure from the recommendations of the *ex ante* assessment	0.00
The Regulator presents the final text of the regulation to the president for approval or discussion.	1.00
The regulator explains how the regulation will be implemented	0.00
Total	0.33

CONSEQUENCES DIMENSION	
The Regulation is made public	1.00
The Regulation indicates its goals and they match those assessed in the *ex ante* evaluation	1.00
It is clear who is responsible for enacting the regulation	2.00
It is possible to remove or confirm the decision-maker (person that enacted the regulation)	2.00
It is possible to legally challenge the regulation, either before an administrative body or a court	1.00
Total	1.40

MONITORING	
INFORMATION DIMENSION	
The indicators for the effectiveness of the regulation are clearly identified	1.00
There is a plan to track the progress of each indicator	1.00
The Regulatory Agency informs of the performance of the regulation.	1.00
Total	1.00

DISCUSSION DIMENSION	
The regulator informs the President of the progress of the regulation at several points during the life of the regulation (*ex ante*, during implementation, during *ex post* evaluation, etc.)	1.00
The regulator consults with the public regarding the performance of the regulation, and obtains feedback	1.00
Total	1.00

CONSEQUENCES DIMENSION	
The information on the performance of regulation is publicly available	2.00
The execution of the Regulation is assigned to an identifiable agency.	2.00
There is a connection between the regulation and the work of the Regulator	1.00
Total	1.67

EX POST EVALUATION	
INFORMATION DIMENSION	
It is clear what being is evaluated of the regulation.	1.00
The results of the *ex post* evaluation are available to the President.	2.00
The results of the *ex post* evaluation are available to the public (website or otherwise).	1.00
If the Regulation was subject to an *ex ante* assessment, the results of the *ex post* evaluation are linked to the assessment.	2.00
The results of the *ex post* evaluation clearly indicate whether the goals established for the regulation were met.	2.00

The report of the *ex post* assessment clearly indicates how the economic and other effects of the regulation performed.	2.00
The Regulatory Agency informs the President of the effects of existing regulations	2.00
Total	1.71

DISCUSSION DIMENSION	
The regulator presents a report on the performance of the regulation to the president	1.00
The regulator presents a report on the performance of the regulation to the public	1.00
The Regulator receives feedback from the public regarding the effects of the regulation	1.00
Total	0.75

CONSEQUENCES DIMENSION	
It is clear who implemented the regulation	2.00
It is possible to link the regulation assessed to the current Regulatory Agency's confirmation	1.00
It is clear who performed the evaluation (department/agency)	2.00
It is clear who assessed the regulation	1.00
Total	1.50

Appendix 2

Scoring of the Accountability Indicators on the Downward Accountability Relationship Independent Regulatory Agencies - Stakeholders

CRITERIA	
PUBLIC CONSULTATION	SCORE
INFORMATION DIMENSION	
The proposed regulation/regulatory problem is publicly available (website or otherwise) (availability)	2
The stakeholders can understand the text of the problem/proposed regulation enough to provide feedback (readability)	1
The goals of the regulation published on the website are clear to the stakeholders (readability)	2
The text is accessible to any stakeholder. (accessibility)	2
Feedback from stakeholders is available and visible to other stakeholders	1
Total	1.60

DISCUSSION DIMENSION	
Public consultations are open to all stakeholders	2
The stakeholders obtain responses from the regulator regarding the opinion provided during the consultation stage	2
There is an obligation to make public the comments and feedback from the public and stakeholders	2
Regulator invites the stakeholders to meetings to obtain feedback on the regulatory proposal	1
Regulator is required to respond to feedback received from stakeholders	2
Total	1.80

CONSEQUENCES DIMENSION	
The consultation is open to the public and stakeholders	1
The comments and feedback from the public are published or publicly accessible	1
It is clear who drafted the text of the regulation and/or support documentation that is available for consultation.	2
It is possible to remove/confirm the head (committee members) of the IRA	0
The regulation can be challenged if the public consultation was not undertaken	2
Total	1.20

EX – ANTE ASSESSMENT	SCORE

INFORMATION DIMENSION	
Reports are available to the stakeholders with enough time (before the regulation is final) to provide feedback	2
It is possible to access the *ex ante* evaluation of the proposed regulation (online or on request)	1
The *ex ante* evaluation contains enough information regarding the expected impact of the regulation	2
The information available on the *ex ante* evaluation allows understanding of the main content, scope and methodology of the evaluation conducted	1
Total	1.50

DISCUSSION DIMENSION	
The feedback provided by the stakeholders is included as a part of the *ex ante* evaluation	2
Stakeholders can comment and receive responses from the IRA regarding the *ex ante* assessment report	1
The *ex ante* impact assessment summarizes the main opinions, and explains whether and how the opinions expressed were considered	0
Total	1.00

CONSEQUENCES DIMENSION	
It is clear who performed the evaluation (which department/individuals/agency)	1
It is possible to challenge the results of the *ex ante* assessment	0
It is possible to challenge a regulation that did not consider the results of the *ex ante* assessment	2
It is possible to challenge a regulation that did not undertake an *ex ante* assessment	2
The forum is organized in a way that can make their opinion public and heard	1
Total	1.20

DRAFTING / IMPLEMENTATION	SCORE
INFORMATION DIMENSION	
The regulatory draft clearly explains the objectives of the regulation	2
The regulation indicates who will implement the regulation (agencies and officials in charge)	2
The regulation indicates how it will achieve the stated goals (involvement and costs to stakeholders	1
The enacted regulation is public and available to all citizens and stakeholders	2
Total	1.75

DISCUSSION DIMENSION	
The Stakeholders have an unofficial forum where they can have an exchange of opinions	1

The Stakeholders do not have an official forum where they can have an exchange of opinions, unless it is through a judicial procedure	0
Regulators are not required to reply to comments informally provided by stakeholders	0
Total	0.33

CONSEQUENCES DIMENSION	
It is possible to identify who is responsible for enacting the regulation	1
It is possible to vote in favor or against the decision-maker (person that enacted the regulation)	0
It is possible to legally challenge the regulation, either before an administrative body or before a court	2
The regulation indicates how the decision was reached (number of votes / who voted, etc.)	2
The indicators for the effectiveness of the regulation are clearly identified	1
Total	1.20

MONITORING	SCORE
INFORMATION DIMENSION	
There is a plan to track the progress of each indicator	1
The indicators are monitored at the indicated times and the results are checked.	1
The results of the monitoring are publicly available	2
Total	1.33

DISCUSSION DIMENSION	
The regulator consults with the public/stakeholders at several points in the life of the regulation (*ex ante*, during implementation, during *ex post* evaluation, etc.)	2
The IRA obtains feedback from the stakeholders regarding the effects of the regulation.	2
Stakeholders can provide information on the effects of the regulation to the IRA	1
There is response from the IRA on the feedback/questions from the stakeholders regarding the effects of the regulation.	2
Total	1.67

CONSEQUENCES DIMENSION	
It is not possible to challenge the regulation because it does not meet the set goals	0
It is not possible to directly remove the head (committee) from office	0
The stakeholders have public outlets to express their agreement/disagreement with regulation	2
Total	0.67

EX POST EVALUATION	SCORE
INFORMATION DIMENSION	
It is clear what is being evaluated of the regulation	2
The results of the *ex post* evaluation are publicly available on a website or in other form	1
The results of the *ex post* evaluation are easily accessible	2
The results of the assessment consider the implementation indicators as well as the *ex ante* assessment results (if performed)	1
Total	1.50

DISCUSSION DIMENSION	
The public is consulted on existing regulations	1
The public obtains response from the regulator regarding the opinion provided during the consultation stage	1
Total	1.00

CONSEQUENCES DIMENSION	
There is direct identification of who performed the *ex post* assessment.	1
There is a direct connection between the agency that enacted the regulation and the existing regulation	1
There is a possibility of public expression of agreement/disagreement	1
It is not possible to remove from office the person/board that performed the assessment	0
Total	0.75

Appendix 3

Scoring of the Accountability Indicators on the Horizontal Accountability Relationship between Regulatory Agencies and Courts

PUBLIC CONSULTATION	SCORE
INFORMATION DIMENSION	
The proposed regulation is published for consultation.	1
The goals of the regulation published for consultation are explained.	1
The Courts do not participate in this process	0
Total	0.66
DISCUSSION DIMENSION	
The Regulatory Agency holds meetings with the public and stakeholders	1
The consultation is open to the public	1
The comments and feedback from the public are published or publicly accessible.	1
There is a public response from the Regulatory Agency to the feedback provided	1
The Courts do not participate in this process	0
Total	0.8
CONSEQUENCES DIMENSION	
It is possible to challenge the public consultation process before the enactment of the regulation	2
It is possible to challenge the public consultation process after the enactment of the regulation	2
It is possible for an interested party to request a Court to order the Regulatory Agency to undertake a Public Consultation process if the Regulatory Agency has not undertaken it.	2
It is not possible to challenge the public consultation process before or after.	0
Total	1,5

EX ANTE ASSESSMENT	SCORE
INFORMATION DIMENSION	
Ex ante evaluation reports are available to the public.	1
The information available on the *ex ante* evaluation allows understanding of the main content, scope and methodology of the evaluation conducted.	2
Courts are not involved in this process	0
A Court can order the Regulatory Agency to make public the results of the *ex ante* assessment	2
Total	1,25
DISCUSSION DIMENSION	
Courts can revise the content of the *ex ante* assessment performed by the Regulatory Agency when there is an error in the assessment	1
Courts can revise the content of the *ex ante* assessment performed by the Regulatory Agency when there is an unjustified departure from the assessment recommendation	1
The Agency is required to explain the reasoning for departing from the assessment recommendation.	2
Total	1,33
CONSEQUENCES DIMENSION	

The Court can order the Regulatory Agency to make public the assessment report	1
It is known who performed the assessment	1
It is known which agency performed the assessment	2
It is possible to challenge the content of the assessment	2
The Court can order the Regulatory Agency to perform an *ex ante* assessment.	2
Total	1,6

DRAFTING / IMPLEMENTATION	SCORE
INFORMATION DIMENSION	
The regulation is public	2
The regulatory draft is aligned with the policy goals first revealed	1
The regulation indicates how it is going to be monitored and evaluated	2
Total	1,6
DISCUSSION DIMENSION	
Courts can revise the content of the *ex ante* assessment performed by the Regulatory Agency when there is an unjustified departure from the assessment recommendation	2
The Courts require the Regulatory Agency to explain the lack of connection between goals (defined or evaluated in the *ex ante* assessment) and content of the regulation when challenged	1
Total	1,5
CONSEQUENCES DIMENSION	
The regulation indicates how the decision was reached (number of votes / who voted, etc.)	2
It is possible to legally challenge the regulation, before court when illegal (disproportionate) or unconstitutional.	2
The Court can revoke a regulation that failed to undertake the public consultation or *ex ante* assessment stages	2
Total	2

MONITORING	SCORE
INFORMATION DIMENSION	
The indicators for the effectiveness of the regulation are clearly identified	1
The regulation indicates when it should be monitored	2
The results of the monitoring are public	1
The results of the monitoring are not presented to Court	0
Total	1
DISCUSSION DIMENSION	
The Court cannot evaluate regulation based on low or high performance	0
The Regulatory Agency is asked to explain when the monitoring is not undertaken	1
The Court can request the Regulatory Agency to explain the monitoring when there are flaws or errors in the administrative procedure.	1
Total	0.66
CONSEQUENCES DIMENSION	
Administrative Courts can order the Regulatory Agency to monitor regulation	1
The Courts can revoke an administrative act (monitoring report) that has gross flaws or procedural errors.	2

The Court cannot remove the head/members of the Regulatory Agency	0
The Court cannot revoke regulation for not meeting monitored indicators.	0
Total	0.75

EX POST EVALUATION	SCORE
INFORMATION DIMENSION	
The information regarding what is being evaluated of the regulation is clear.	1
The results of the *ex post* evaluation are publicly available	1
Total	1
DISCUSSION DIMENSION	
There is no bilateral interaction between the Court and the Regulatory Agency	0
Total	0
CONSEQUENCES DIMENSION	
It is not possible to challenge regulations which did not meet performance indicators	0
A Court can order the Regulatory Agency to perform an *ex post* assessment	2
Total	1

Better Regulation in Latin American countries: A tool for accountability?

In the last few years, a steadily increasing number of Latin American countries have been adopting policy assessment instruments and new governance structures for them, as part of their policymaking process. Even though the literature argues that these instruments serve, among other things, as tools for accountability, for this to be so, it is necessary to take into account the legal system, decision-making process, and regulatory relationships that exist in the adopting countries. This Thesis researches the policy assessment arrangements adopted and implemented in the Latin American region to understand why are these countries adopting and implementing tools for policy evaluation? Can this contribute towards regulatory accountability, and if so, in which conditions?

The Thesis first analyzes the rationales that these countries might have to adopt these regulatory policy arrangements. It then studies the various tools used for policy assessment, paying attention to the scope of the assessments, the times and the stages on which regulations are assessed, referred to as the Policy Evaluation Cycle (PEC), as well as to the governance of these processes. The Thesis develops a framework where each of these components are organized and classified based on which goals or rationales they serve. This can assist countries on deciding how to implement their policy evaluation arrangements, to serve their own goals.

Since all of the studied countries have presidential systems, this Thesis studies how regulations are made in this system, and the multiple needed delegations for policymaking, which results in various regulatory relationships. Thus, the desired accountability of policymakers towards their different forums makes relevant the adoption this agenda for regulatory accountability reasons.

Bringing to together the literatures on public law, accountability and policy evaluation, this Thesis builds a framework for assessing the contribution towards accountability that each stage of the PEC might have in a specific regulatory relationship. The framework shows to which degree the stages, and the cycle as a whole, contribute towards accountability in specific relationships of a presidential constitutional system. The results evidence that even when a policy assessment structure might contribute towards accountability, this contribution is not absolute as it only operates in specific regulatory relationships, and even more, only in some stages of the PEC contributing at different degrees. This framework can be used by governments or regulatory agencies as an instrument to assess the contribution to accountability of their existing or potential regulatory policy structures in order to improve it.

Betere regelgeving in Latijns-Amerikaanse landen: een instrument voor accountability?

In de afgelopen jaren heeft een gestaag groeiend aantal Latijns-Amerikaanse landen regelgevingsbeoordelingsinstrumenten en daarmee overeenkomende beleidsinstrumenten aangenomen als onderdeel van hun regelgevingsbeleidsagenda. Dit wordt een betere regelgevingsagenda genoemd. In de literatuur wordt gesteld dat deze instrumenten, onder andere, dienen als instrumenten voor accountability. Ik stel echter dat ook al zou dit waar zijn, het noodzakelijk is om in de desbetreffende landen eerst het aanwezige rechtssysteem, besluitvormingsproces en de regelgevingsrelaties in aanmerking te nemen.

In deze Thesis onderzoek ik de regelgevingsbeoordelingsinstrumenten die onlangs zijn aangenomen en ingevoerd in de Latijns-Amerikaanse regio en hun potentieel voor accountability. In die zin wil ik de volgende onderzoeksvragen beantwoorden: Waarom worden in Latijns-Amerikaanse landen betere regelgevingsagenda's aangenomen en ingevoerd? Kan dit bijdragen aan accountability en zo ja, onder welke voorwaarden?

Eerst analyseer ik de redenen waarom deze landen misschien een betere regelgevingsagenda zouden moeten aannemen, inclusief het argument van meer accountability in het regelgevingsproces. Vervolgens bestudeer ik hun diverse onderdelen en bepaal welke doelen of redenen deze onderdelen dienen. Daarbij besteed ik aandacht aan de reikwijdte van de beoordelingen, de fasen waarin regelgeving wordt beoordeeld, door mij genoemd de Beleidsevaluatiecyclus [Policy Evaluation Cycle (PEC)], en aan het beheer van deze processen.

Aan de interactie tussen regelgevingsevaluatie-instrumenten en hun beheer wordt doorgaans weinig aandacht besteed, vooral in Latijns-Amerika. Ik bestudeer de verschillende regelingen betreffende regelgevingsbeoordelingsbeleid die deze landen hebben aangenomen en het beheer daarvan. Daarnaast bestudeer ik, omdat al deze landen een presidentieel systeem hebben, hoe besluiten worden genomen in dit systeem en hoe dit leidt tot een belangrijk niveau van delegatie voor regelgevingsproductie. Aldus wordt de reden voor het aannemen van deze agenda voor regelgevingsaccountability relevant. Een regelgevende instantie is accountable jegens haar forum wanneer zij dit informeert over haar acties, er ruimte is voor bespreking van de acties en ten slotte, wanneer er gevolgen zijn, hetzij positief of negatief, van de acties van de regelgevende instantie. Daarom combineer ik als antwoord op de overkoepelende onderzoeksvraag van deze Thesis twee relevante stromingen in de literatuur, accountability en beleidsevaluatie. Hoewel de PEC een bijdrage zou kunnen leveren aan accountability stel ik dat deze bijdrage kan verschillen in de diverse fasen van de cyclus en zelfs kan variëren voor verschillende regelgevingsrelaties.

In deze Thesis bouw ik een kader voor beoordeling van de bijdrage aan accountability die elke fase van de PEC kan hebben in een specifieke regelgevingsrelatie en in het algemeen onder welke voorwaarden beleidsbeoordelingsstructuren meer bijdragen aan accountability. Het kader laat zien in welke mate de fasen en de cyclus als geheel bijdragen aan accountability in een specifieke relatie van een presidentieel constitutioneel systeem. De resultaten laten zien dat ook al zou een regelgevingsbeoordelingsstructuur bijdragen aan accountability, deze bijdrage niet absoluut is omdat deze alleen werkt in specifieke relaties en bovendien in bepaalde fasen van de PEC en in verschillende mate.

La Mejora Regulatoria en Latinoamérica: ¿Un instrumento para la rendición de cuentas regulatoria (*accountability*)?

Durante estos últimos años, cada vez más países de Latinoamérica han adoptado instrumentos para la evaluación de sus regulaciones como parte de su política regulatoria, así como las estructuras de gobierno necesarias para su manejo. Esto se conoce como una agenda de mejora regulatoria. La literatura argumenta que estos instrumentos de evaluación sirven, entre otras, como herramientas para la rendición de cuentas y responsabilidad regulatoria (accountability). Aún cuando esta afirmación puede tener mérito, para suscribirla es necesario considerar las condiciones del país que adopta este tipo de agenda, en particular su sistema legal, su proceso de toma de decisiones y las relaciones entre los actores que interactúan en la creación y evaluación de regulaciones.

En esta Tesis estudio los arreglos para evaluación de regulaciones que han sido adoptados e implementados por los países Latinoamericanos, la motivación para su adopción e implementación, y si estos tienen potencial para mejorar la rendición de cuentas durante los procesos de creación y modificación de regulaciones. Por tanto, el objetivo principal es responder estas preguntas: ¿Por qué los países latinoamericanos están adoptando e implementado agendas de mejora regulatoria? ¿Puede esto contribuir a la rendición de cuentas regulatoria, y en caso de que sí, bajo cuáles condiciones?

En esta Tesis primero analizo las razones que los países podrían tener para adoptar una agenda de mejora regulatoria, incluyendo tener regulaciones más eficientes, querer mejorar la rendición de cuentas regulatoria, entre otras. Luego estudio los varios elementos que componen una política regulatoria orientada a la evaluación de las regulaciones, e identifico a cuáles metas o bases lógicas sirven estos elementos. Para esto, presto particular atención al alcance definido para estas evaluaciones, los instrumentos utilizados para realizar dichas evaluaciones, el momento en el que las regulaciones son evaluadas, lo cual llamo el Ciclo de Evaluación Regulatoria (PEC, por sus siglas en inglés), así como el gobierno de todos esto procesos y relaciones que intervienen en los mismos. Como forma de sistematización de este análisis, presento un marco que muestra una serie de combinaciones de estos elementos, y cómo combinaciones particulares pueden servir para alcanzar objetivos regulatorios como eficiencia, rendición de cuentas, reducción de cargas administrativa, entre otros.

La interacción entre los instrumentos de evaluación regulatoria y el gobierno de estos instrumentos y procesos no ha sido estudiada a profundidad, particularmente cuando se refiere a América Latina. Por tanto, en esta Tesis estudio las políticas de evaluación regulatorias que estos países han adoptado, así como sus estructuras para el gobierno de

las mismas y sus interacciones. En razón de que todos estos países tienen sistemas constitucionales presidencialistas, estudio además el proceso de toma de decisiones en este sistema, considerando que, para el proceso de creación de normas y regulaciones, este sistema requiere un grado importante de delegaciones (por ejemplo, del constituyente al presidente como cabeza del poder ejecutivo, del presidente a las agencias regulatorias, entre otras). Por tanto, la adopción de una agenda de mejora regulatoria con el propósito de tener rendición de cuentas regulatoria y generar responsabilidad de los actores involucrados en este proceso toma especial relevancia.

En este sentido, se considera que un regulador es responsable y rinde cuentas (accountable) hacia su público o foro cuando el regulador informa de sus acciones, hay espacio discutir estas acciones, y cuando existen consecuencias, bien sean negativas o positivas, a las acciones del regulador. Por tanto, para responder a la pregunta marco de esta tesis, analizo de manera conjunta dos corrientes de literatura relevantes: la literatura sobre rendición de cuentas (accountability) y la literatura sobre evaluación regulatoria. El argumento que presento es que a pesar de que el ciclo de la evaluación regulatoria estructurada de las regulaciones puede contribuir a la rendición de cuentas regulatoria, esta contribución variará durante las diferentes etapas del PEC, y además podría variar dependiendo de la relación regulatoria de que se trate, es decir, dónde se esté creando y evaluando la regulación y la delegación que fue necesaria para esto.

En esta Tesis creo un marco para evaluar la contribución de cada etapa del PEC hacia la rendición de cuenta regulatoria de los actores que intervienen en el proceso regulatorio. Este marco considera las diferentes relaciones de delegación y jerarquía que existen en el proceso de creación y evaluación de regulaciones, y de forma general permite evaluar bajo cuáles condiciones los arreglos de evaluación regulatoria pueden ser útiles para la rendición de cuentas. El marco creado muestra qué tanto cada etapa, y el PEC en su conjunto, contribuyen a la rendición de cuentas regulatoria en relaciones que existen dentro de un sistema presidencialista. El resultado de la evaluación evidencia que aún cuando una estructura particular de evaluación de regulaciones podría contribuir a la rendición de cuentas regulatoria, esta contribución no es absoluta ni uniforme. Esta solo sucede en relaciones regulatoria específicas, solo en momentos específicos del ciclo de evaluación regulatoria, y la posibilidad de que haya una rendición de cuentas efectiva variará dependiendo la combinación que se dé de esos dos elementos.

Curriculum vitae

Renny Reyes

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Short bio	
Renny Reyes is a legal consultant and policy advisor on administrative law, public law and regulations for more than 15 years, for regulators and regulated sectors. Likewise, since 2008 she has taught Administrative Law, Administrative Sanctions Law, and Law and Economics at the Pontificia Universidad Católica Madre y Maestra, as well as given guest lectures on policy assessment and public law. She has a European Master in Law and Economics (2012) from Erasmus University of Rotterdam, University of Ghent and University of Vienna and as Master in Economic Regulation. Her PhD research and research interests are focused on regulations, regulatory governance, accountability, policy evaluation and administrative law.	
Education	
European Master in Law & Economics	2012
Master in Economic Regulation	2008
Law Bachelor Degree	2005
Program on Negotiation	2010
Work experience	
Consultant for the Measuring Regulatory Performance programme of the Regulatory Policy Division at the Public Governance Directorate of the Organisation for Economic Co-operation and Development (OECD)	2019-present
Constitutional Advisor - Constitutional Court of the Dominican Republic	2012-2015
Lecturer -Law School of the Pontificia Universidad Católica Madre y Maestra, Santo Domingo, Dominican Republic	2008-2015
Associate Lawyer in contracts, negotiation and regulated markets -P&A, Santo Domingo, Dominican Republic	2005-2011
Prizes and awards	
Erasmus Mundus Scholarship (European Commission) for the European Master in Law and Economics	2011
Becas Líder. Fundación Carolina. Spain - Portugal.	2005
Publications	
Reyes, R. (2020). Rationale behind the Better Regulation trend in Latin American countries. In *Public Law and Economics after the Financial Crisis*. World Economics Association.	2020

Reyes, R., Madi, M.F. & Bagnoli, V. (Eds.). *Public Law and Economics after the Financial Crisis.* World Economics Association.	2020
Reyes, R. (2020). El derecho a la huelga y los derechos de los usuarios a los servicios públicos. In *Conflictos entre los derechos fundamentales en la República Dominicana: Análisis y planteamiento para su solución*. CUEPS, Pontificia Universidad Católica Madre y Maestra.	2020
Reyes, R., Romano, A. & Sottilotta, Cecilia (2015). Impact assessment in Mexico: A story of interest groups pressure. *Law and Development Review*, 8(1), 99-121	2015
Reyes, R. (2006) "Unconstitutionality of the Decision of the Dominican Supreme Court on Nationality". Gaceta Judicial, No. 226. (Published in Spanish)	2006
Reyes, R. (2005) "Signing of International Treaties: Legal Consequences". Law Review Journal of the Pontificia Universidad Católica Madre y Maestra. PUCMM-RSTA. (2005). (Published in Spanish)	2005
Others	
Panelist at the VII Meeting of the Ibero-American Network for Better Regulation (Red Iberoamericana de Mejora Regulatoria). Presented: "Compatibility between Objectives and Better Regulation Strategies: Coordination and Oversight Bodies". Santo Domingo, Dominican Republic.	October, 2018
Presentation of the research project "Policy Evaluation Systems and Accountability in Latin American Countries". METRO Seminar of Maastricht University. Maastricht, the Netherlands.	April, 2018
Organiser of the Conference "Public Law and Economics: Economic Regulation and Competition Policies" of the World Economics Association. Held from June 1st to June 30th, 2017.	June, 2017
Presentation of "Relevance of ex ante policy assessment. Evaluation of recent decision of the Executive Power in the Dominican Republic". Pontificia Universidad Católica Madre y Maestra.	October, 2013

EDLE PhD Portfolio

Name PhD student : Renny Reyes
PhD-period : 2015-2019
Promoters : Alessio Pacces

Co-promoter : Andrea Renda

PhD training

Bologna courses	***year***
Microeconomics I	2015
Introduction to European Competition Law	2015
Experimental Economics (Methods)	2015
Theory and Empirics of Comparative Development	2015
Causal Inference	2015
Experimental Economics (Topics)	2015
Modeling in Private Law	2015
Experimental Economics (Topics)	2016
Behavioral Law & Economics Enforcement Mechanisms	2016
Game Theory and the Law	2016
The Political Economy of Growth	2016
Specific courses	***year***
Seminar 'How to write a PhD'	2016
Academic Writing Skills for PhD students (Rotterdam)	2016
Seminar Series 'Empirical Legal Studies' (Rotterdam)	2017
Modeling the Law (Hamburg)	2016
The Economics of Institutions and Organizations	2016
Economic Growth and Distributive Justice – Part I	2016
Seminars and workshops	***year***
Bologna November seminar (attendance)	2017
BACT seminar series (attendance)	2016-2019
EGSL lunch seminars (attendance)	2016-2019
Joint Seminar 'The Future of Law and Economics' (attendance)	2017, 2018 and 2019
Rotterdam Fall seminar series (peer feedback)	2016
Rotterdam Winter seminar series (peer feedback)	2017
ATLAS Summer Course	2017
Presentations	***year***
Bologna March seminar	2016
Hamburg June seminar	2016
Rotterdam Fall seminar series	2016
Rotterdam Winter seminar series	2017

Presentation of "Policy Evaluation and Better Regulation: Latin American Governance Cycle" at Queen Mary University, London, United Kingdom	2017
Presentation of the paper "Policy Evaluation and Better Regulation: Does the Structure Match the Goals?" at European Group for Public Administration (EGPA) Conference, Politecnico Milano, Italy.	2017
Bologna November seminar	2017
Joint Seminar 'The Future of Law and Economics'	2018
Presentation of the research project "Policy Evaluation Systems and Accountability in Latin American Countries" at the METRO Seminar in Maastricht University. Maastricht, the Netherlands.	2018
Presentation: "Compatibility between Objectives and Better Regulation Strategies: Coordination and Oversight Bodies". Santo Domingo, Dominican Republic. at the VII Meeting of the Ibero-American Network of Better	2018
Attendance (international) conferences	***year***
Conference: Public Law and Economics: Economic Regulation and Competition Policies	2017
Conference European Group for Public Administration (EGPA) – Milan, Italy	2017
Conference Unpacking the "accountability paradox"in expert-based decision making.	2017
Meeting of the Ibero-American Network of Better Regulation (Red Iberoamericana de Mejora Regulatoria), Santo Domingo, Dominican Republic	2018
Conference EUROPAL Jubilee Seminar: Assessing Better Regulation in the European Union. Radboud University Nijmegen, the Netherlands.	2018
Teaching	***year***
Cost Benefit Analysis at Dutch Academy for Legislation	2017
Practicum of Introduction to Law in the EMLE	2017
Practicum of Introduction to Law in the EMLE	2018
Others	***year***
Internship at the OECD Regulatory Policy Directorate for the Measuring Regulatory Performance programme	2019