



Case Study

Public Consultation in the Rulemaking Process in Mexico¹

October 2009

Introduction

Public consultation (or consultation with interested parties) is a key component for providing transparency and accountability in a regulatory system. It is also a key way to make regulation more effective and efficient. Along with other elements, such as standardized processes for making and changing regulations, the use of plain language in drafting, and making regulations readily accessible, public consultation is a key dimension of transparency. Consultation provides the necessary 'checks and balances' on the discretion exercised by regulators and provides accountability. Finally, it enhances the legitimacy and fairness of regulatory processes and outcomes.

During the past 20 years, the Mexican federal government has undertaken a thorough transformation of its regulatory regime.² The government has increased its administrative capacity for making new, high-quality regulations and made enormous progress in setting up a more transparent rule-making process (OECD, 1999 and 2004). As one of the elements of the transformation, Mexico has introduced new public consultation mechanisms, mainly through a Regulatory Impact Assessment (RIA) system.

After a brief summary of the background of Mexico's introduction of modern regulatory consultation tools, this paper will set out the current legal framework for public consultation in the rule-making process; section 3 will describe the practice of public consultation; and finally, the last section presents some concluding remarks and suggests ways to refine the mechanisms to further reduce excessive discretionary powers in the decision-making process in Mexico.

I. Background: Building of Regulatory Consultation in Mexico

Until the end of the 1980s, the Mexican economy was heavily regulated and protected from foreign and domestic competition.³ As in other countries, the only type of regulatory consultation consisted in occasionally sharing draft laws for a very limited time with key social partners such as heads of chambers of commerce and unions. Overall, rule-making was opaque and easily controlled by 'insiders'.

The series of massive economic crises that hit the country in the 1980s revealed the need for the government to 'open up' in terms of its external relations through better integration with the world economy, in terms of its politics and public governance and through more

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² This paper focuses on the regulatory powers of the federal government. In recent years, some of Mexico's states and municipalities have been improving their own regulatory practices. This paper does not analyze these efforts and initiatives.

³ For instance, in 1985 92.2% of national production of tradable goods was protected through import permits (Lustig, 1994). Other forms of protection included high import tariffs and regulatory constraints to foreign investment. Obsolete regulations also limited competition in domestic markets (Martínez and Fárber, 1994).

transparency and accountability of the government's activity in particular in its way of making laws and regulations.

As an initial reaction to deal with the economic crisis and appease the prevailing social and political environment, the government inaugurated a consultation model where representatives of the business community and trade unions participated in exclusive and high-profile "social pacts" in which economic policy decisions and reforms were agreed. This was still a corporatist consultation model built on discussion between employers, unions and government representatives behind closed doors, but the system provided a more open mechanism for discussions and for balancing the views of different stakeholders.

After a highly-criticized election and a new economic crisis in 1988, the government decided to accelerate reforms in order to regain economic and social trust. The approach was to deepen the strategy based on three main pillars: i) consolidation of trade liberalization, ii) expansion of the privatization program, and iii) gradual implementation of a government-wide regulatory reform program. The last pillar was meant to speed up adjustment, eliminate bottlenecks in the economy, and increase the transparency of the public sector (Cordova and Haddou-Ruiz, 2009).

Transparency and public consultation was slow to take root. At the beginning, the government focused on a strong centralized 'deregulation program' run by the Economic Deregulation Unit (UDE) under the umbrella of the Ministry of Trade and Industrial Development (SECOFI). The UDE embarked on selective 'top down' deregulation of some economic sectors such as road freight and maritime transportation.

However, by the early 1990s, members of the government realized that transparency could become a central element to make the regulatory regime more efficient in particular as an antidote against pervasive 'regulatory capture'. Hence the UDE started to work on regulatory reforms of key regulatory areas where the voices of consumers, SMEs and citizens had been dimmed compared to those of producers. Quickly important new laws emerged in areas of consumer protection, technical standards and competition policy. In each one of the areas, the government improved transparency in general and consultation in particular. For example, the 1992 Federal Metrology and Standards Law (*Ley Federal sobre Metrología y Normalización*) represented a milestone in the development of public consultation mechanisms in Mexico as it established the first regulatory process, including drafting and publication obligations, with a detailed consultation procedure (see Box 1).

Box 1: Introduction of Public Consultation in the Technical Standards Preparation

Technical standards, known in Mexico as *Normas Oficiales Mexicanas* (NOMs), is a type of mandatory regulation that aims to control health, safety and environmental risks and provide consumer protection for products, services and processes sold or provided in Mexico. All NOMs must be drafted within one of the 24 national technical standards consultative committees (*comités consultivos nacionales de normalización*). Each committee is specialized in a regulatory area such as pesticides and risk related chemicals or health and safety at work, etc. The committees are chaired by the lead regulatory agency and are composed of government and private sector experts. Preparation of a NOM follows four steps:

1. A Ministry prepares a pre-project and presents it to a consultative committee (since January 1998 the pre-project must be accompanied by a RIA) and must also be presented to the COFEMER.
2. Having obtained COFEMER and committee approval, the Ministry publishes the NOM proposal in the Federal Official Gazette and seeks comments.
3. After a consultation period of 60 days, the Ministry publishes, in the same gazette, an official response to any comment.

4. Finally, not less than 15 days after this last publication, the Ministry can publish the NOM in its final form.

Importantly the new system has been harmonized and made compatible with Mexico's WTO obligations and commitments.

Parallel with these efforts, the government consolidated a second block of reforms to modernize the regulatory and administrative procedures through the enactment of the Federal Administrative Procedure Law (*Ley Federal de Procedimiento Administrativo – LFPA*) in 1994. This law established a set of principles and criteria for the interaction between authorities and citizens. Some of its main contents related to improvements in regulatory procedures including: clarification of the requirement for publication of all regulations in the Federal Official Gazette; a clearer administrative appeal mechanism; time limits for authorities to respond to a public request for information or authorizations; and minimum criteria to be followed by public officials during an inspection (OECD, 1999).

Despite these advances, another macroeconomic crisis was required to accelerate further the improvement of the Mexican regulatory framework. In December 1995, a year after the collapse of Mexico's financial system, the President published the Agreement for the Deregulation of Business Activity (ADAE) which made the regulatory reform program more systematic and transparent. In particular, for the first time, a clear review process incorporating RIA criteria for new regulatory proposals and existing formalities was set up. A powerful Economic Deregulation Council (CDE) comprising government, business, labor and academic representatives was created to assist the UDE in overseeing the regulatory process. Specialized *ad hoc* working groups of the CDE started to scrutinize and discuss individual regulatory proposals and technical issues. This consultation mechanism was no doubt instrumental in further opening up the decision-making process for regulations and overcoming ministerial reluctance.

These emergency actions were progressively consolidated between 1996 and 2000 into a fully-fledged RIA system. First, the government amended the LFPA establishing a formal RIA system managed by the UDE and public consultation requirements. In 1997, the government reformed the Federal Metrology and Standards Law to bring the procedures for technical standards into line with those managed by the UDE. Here, too, a RIA system replaced the old benefit-cost analysis and the review was also entrusted to the UDE. A five-year sunset clause, requiring all technical standards to be ratified and reviewed every five years was also included. Finally, in May 2000, a new reform of the LFPA institutionalized new rule-making procedures based on RIA and public consultation. With these changes, the LFPA replaced the 1995 ADAE as the main legal support of regulatory policy, and the Federal Regulatory Improvement Commission (COFEMER) replaced the UDE.⁴ It also transformed the CDE into a standing Federal Council for Regulatory Improvement (CFMR).

II. The Current Legal Framework for Regulatory Consultation

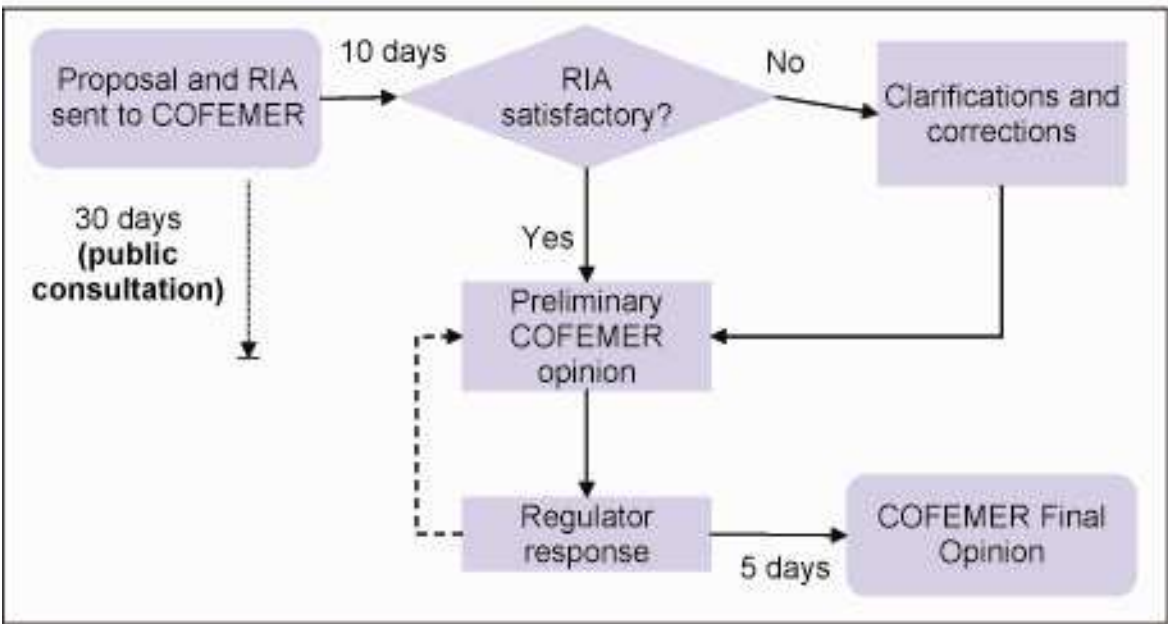
Compared to other countries, Mexico does not have a general and comprehensive law, measure or policy requiring the use of public consultation in the policy-making process. Its main transparency and public consultation disciplines and practices are related to its recent modernization of the basic rule-making process based on RIA.

⁴ COFEMER's mandate is to "promote transparency in the design and implementation of regulations, assuring that their benefits exceed their costs and the maximum benefit to society" (article 69-E of the LFPA). Thus, COFEMER imposes quality and transparency disciplines on the public sector, in particular in the rule-making process, and makes sure that interested parties can access existing regulatory information and key regulatory proposals before their entry into force.

At the core, is the requirement that federal ministries and government agencies need to prepare a RIA for all new regulation, including technical standards.⁵ This system, described in the LFPA, is based on the following general procedure:

- Federal Ministries and government agencies must submit their draft regulatory texts with a RIA report to COFEMER, at least 30 working days before officially issuing the regulation or submitting it to the President (article 69-H).
- Federal ministries and government agencies may apply for a RIA report waiver if they consider that the proposed regulation does not imply compliance costs to citizens (article 69-H).
- Upon arrival at COFEMER, the draft regulatory text and the **RIA report must be made available to the public**. This is so unless COFEMER determines, upon request by the Ministry or agency, that their publication might hinder or jeopardize the intended effects of the proposed regulation (article 69-K).
- If the draft regulatory text and the RIA report do not comply with the existing regulatory quality criteria, COFEMER may ask the regulators to clarify and/or to correct those parts of the RIA report deemed to be of insufficient quality (article 69-I).
- Within 30 working days since the reception of the draft regulatory text and the RIA report (or the corrections/ additional information) COFEMER may issue a preliminary or final opinion, which will in any case take into account the comments received from all stakeholders (article 69-I).
- The Federal Official Gazette will not publish any regulation without the final opinion of COFEMER or the waiver granted in terms of article 69-H (article 69-L).

Figure 1. Process of the Mexican Regulatory Impact Analysis System since 2000¹⁶



Source: Taken from (Cordova and Haddou-Ruiz, 2009).

To assist in the preparation of the submission, COFEMER published a RIA manual advising how to complete the official RIA template through a ‘state-of-the-art’ electronic RIA management system.⁶ The template and its manual specifically ask public authorities

⁵ The RIA system has, however, some explicit and implicit exemptions though. Thus, the consultation mechanism required by the LFPA does not cover policy areas, such as fiscal policy, exempted from the regulatory review process. In addition, the rule-making discipline and transparency imposed by the LFPA is only applicable to regulatory proposals from the Federal Executive branch of government.

⁶ See the RIA website at <http://www.cofemermir.gob.mx>

to report on whether the draft proposal being submitted for review was subject to public consultation.⁷ Although the filling of the template is mandatory, so far COFEMER has not enforced any quality control over the responses given in the public consultation section as Ministries and government agencies are not legally required to consult before submitting the RIA to COFEMER. In other words, public consultation is mandatory but not at the early stages of the regulatory process, only during the regulatory review process carried out by COFEMER.

During the 30 working days consultation period, COFEMER can issue a preliminary or final opinion on the quality of the RIA report and its substantive elements. In 2002, the Federal Law of Transparency and Access to Public Information (LFTAIPG) strengthened the consultation requirement but shortened the time. It stipulated that federal ministries and agencies needed to make publicly available all draft regulations on their websites for at least 20 working days for public consultation.⁸ However, Ministries and government agencies can comply with this obligation by using COFEMER's website, requesting COFEMER to certify their fulfillment of the public consultation requirement before proceeding to the next stage in the rule-making process. In practice, COFEMER almost never issues a preliminary or final opinion on a RIA before 20 working days.

In sum, the LFPA created a 'notice and comment' mechanism of public consultation, whereby all draft regulations and RIA reports have to be made publicly available. The system was further improved by embedding the mechanism into an electronic submission system, based on an internal (intranet) and an external (internet) website to post all draft regulatory texts, RIA reports and public comments, as well as COFEMER's own opinions.⁹

The mandatory RIA consultation mechanism is reinforced further by mandatory consultation requirements in specific sectoral laws. For example, the Environment Protection Law stipulates that the Ministry needs to solicit comments and inputs during the preparation of its policies, regulations and technical standards.

III. The Practice of Regulatory Consultation in Mexico

Mexico relies on a series of mandatory and voluntary consultation mechanisms, some of them quite innovative, which often are used in a complementary way. Some tools can be considered 'passive' and others 'active' according to the intensity of rule-maker's efforts to obtain inputs from stakeholders. For the former, the instruments do not explicitly seek inputs from stakeholders. In the case of the latter, the regulator is concerned about getting inputs and information that might help him/her to regulate better.

Passive Tools

Publication of regulatory programs: the use of regulatory "forward planning"

The 2000 LFPA reform established that each Ministry and agency has to prepare and submit to COFEMER at least every two years a **biennial regulatory improvement program** (article 69-D). Conceived as a planning and transparency tool, the purpose of a ministerial or agency program is two-fold: (i) to assess and report on regulatory reform progress and accordingly (ii) to plan in advance the new regulatory reform measures to be

⁷ The RIA manual underscores the importance and the benefits of consulting, and lists potential stakeholders that can be consulted, encouraging in particular taking into account the opinions of consumers and small enterprises.

⁸ See article 10 of the *Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*, and articles 24 and 25 of the LFTAIPG's regulations (*Reglamento de la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*).

⁹ The public at large can download draft regulations, RIA reports and opinions at <http://www.cofemer.gob.mx/BuscadorAnteproyectos/busqueda.aspx?estatus=1>

taken. The publication of the consolidated regulatory improvement programs should allow the private sector and citizens to prepare for public consultation in the next two years. COFEMER is in charge of enforcing and coordinating the integration of these regulatory programs across the Federal government. To that end COFEMER has set up a specific procedure, through an electronic submission system,¹⁰ that requires the draft programs sent by ministries and government agencies to be posted on its website during 20 working days in order to get comments and opinions from citizens and interested parties. These comments are then sent back to the different ministries and agencies –along with COFEMER’s own comments– which then have to prepare a final version and send them to the Federal Official Gazette for publication.¹¹

The Federal Metrology and Standards Law also mandates that the National Standards Office (Dirección General de Normas) publish annually in the Federal Official Gazette the National Standardisation Plan (Programa Nacional de Normalización), which is a list of all technical standards to be considered during the coming year by each of the 24 consultative committees. The list includes, for each standardization committee, the name, address and telephone number of its president, who is responsible for disseminating information and organizing the activities of the committee. The timeframe for the consideration of each proposed standard must be clearly indicated to give all participants and the general public an idea of when the corresponding technical standard might be issued, and to provide early opportunities for public input.

Public ‘Notice and Comment’ of the RIA

As pointed out in section II, the LFPA established a ‘notice and comment’ mechanism of public consultation, whereby all draft federal regulations are made publicly available during the COFEMER review. In practice, this mechanism works through the public interface of the RIA electronic submission system, which allows the public at large to download RIA reports and draft regulations, and send their comments to COFEMER. As part of the regulatory review procedure, COFEMER sends out all the comments received to the regulatory entity proposing the regulation, which is bound to take into account each comment individually or justify why it cannot incorporate it into the regulatory proposal.

Box 2. Public Consultation of Regulatory Proposals in COFEMER

Between January 1st 2007 and August 31st 2009, COFEMER received:

	2007	2008	2009*
Draft regulatory proposals:	1,082	1,281	785
with compliance costs	431	370	187
without compliance costs	651	911	598

*Information to the end of August.

During the same period, COFEMER received 2,017 comments from citizens, businesses and stakeholders on draft regulatory proposals (and RIA reports). In addition to the online

¹⁰ The system is very similar to the RIA electronic submission system, in that it works as an intranet through which ministries and government agencies send the drafts of the biennial programs and allows them to interact with COFEMER to reach a final version of the programs.

<http://www.cofemer.gob.mx/reportestrimestrales/wwwroot/Default.asp>

¹¹ The preliminary and final versions of the programs as well as the public and COFEMER’s comments are available at

http://www.cofemer.gob.mx/index.asp?tipo_nav_bar=1&contenido=2&menu_id=15&content_id=121

system of 'notice and comment', COFEMER also receives comments in writing by postal service, fax or email.¹² The draft regulatory proposals that received the most comments were:

1. The draft Executive Agreement setting the legal bio-security rules to frame the Special Regime for the Protection of Maize. These rules set the permits regime to liberalize into the environment genetically modified breeds of maize. 479 comments were received (2008).
2. The draft Regulations of the General Law for the Control of Tobacco received 179 comments (2008).
3. The draft Resolution of the telecomm regulatory authority (COFETEL) regarding the Interconnection and Interoperability Technical Plan received 74 comments (2008).

Source: COFEMER

When the government proposed to establish this public consultation requirement in 2000, many ministries and agencies tried to oppose it arguing that it would create a bottleneck delaying the adoption of important regulations, even hindering regulatory improvement, and that Mexican regulatees would be passive and un-participative. However, time and the development by COFEMER of clear procedures and ICT mechanisms have shown increasing public support for the 'notice and comment' mechanism (see Box 2) transforming it in a significant safeguard against 'regulatory capture', and producing a shift in the conduct and perception of the Federal public administration in Mexico (Cordova, 2007).

Moreover since 2003, the online system has an interesting feature: after registration with an email address and specifying policy areas or economic sectors of interest, COFEMER sends to any stakeholder alert messages informing them about new draft RIA reports and regulations being reviewed.¹³

Active Tools

Passive consultation mechanisms are necessary but not sufficient. Early active public consultation can lead to better understanding of the problems intended to be solved by the government, delimit the objectives to be achieved and select the better policy option (including no action). Compared to other advanced countries, Mexico still lacks disciplines for active public consultation and particular disciplines to guarantee the fair and transparent participation of interested parties during the earlier and preparatory phases of the draft regulation. However, in the past few years, Mexico has made also some significant progress in this area too.

Bilateral Consultations

Given that COFEMER has no mandate to oversee or enforce consultation mechanisms outside its regulatory review process, it is difficult to assess a general pattern on how the government has encouraged regulators to engage interested parties during the preparatory phases of a regulation. Nevertheless, COFEMER has assisted ministries and agencies in this endeavor through a RIA template following a checklist approach and a RIA manual inciting them to consult as early as possible during the rule-making process.¹⁴

¹² http://www.cofemer.gob.mx/index.asp?tipo_nav_bar=1&contenido=2&menu_id=23&content_id=2

¹³ <http://www.cofemer.gob.mx/BuscadorAnteproyectos/pasos.aspx>

¹⁴ The RIA template asks whether the draft proposal submitted for review was subject to public consultation, those who were consulted, and whether their opinions were included in the draft.

COFEMER has not yet appraised and consolidated the ministries' responses in the RIA electronic template concerning the consultation efforts undertaken before submitting the RIA report to COFEMER. However, anecdotic evidence indicates that some regulators are increasingly consulting stakeholders both before and after the formation of regulatory proposals and later when the draft regulation is ready.

For major reforms, ministries have reported undertaking rounds of formal assessment/negotiation meetings with key stakeholders. For example, the Ministry of Finance reported that in order to draw up the draft proposal of the Securities Exchange Act (*Ley del Mercado de Valores*) it set up a technical/expert team that consulted different stakeholders, including specialists (individuals), private and social institutions, and civil associations, and even organized seminars/conferences but without giving more details on when or where these consultations took place.¹⁵ The same occurred with the formulation of the Executive Agreement for the Convergence of Telecomm Services (*Acuerdo de Convergencia de Servicios Fijos de Telefonía Local y Televisión y/o Audio Restringidos*), where the Transports and Communications Ministry intensively consulted representatives of the telecoms industry.

Advisory Bodies

Consultation with official advisory bodies is a frequent mechanism used in Mexico, even before the setting up of a RIA system a decade ago. Their main role is to provide an independent and technical opinion to the regulators. Though, in theory, their membership represents academics, experts and possible affected interests, neither an inventory of such bodies nor a set of standards and criteria regulating their composition and governance exist.

The most preeminent one is probably the CFMR, mentioned above, which has been overseeing the regulatory reform program since 2000. The CFMR has an Executive committee and *ad hoc* technical working groups made up of business sector representatives in charge of advising and overseeing regulatory reform proposals in order to improve the competitiveness of the Mexican economy. The CFMR has no doubt improved the openness of the rule-making process.

A particular area where advisory bodies have played an important role is during international negotiations. In the early 1990s, during the NAFTA negotiations, the Mexican government implemented a "side room" approach whereby the private sector – through the Council of Foreign Trade Business Organizations (COECE) -- presented the positions of each productive sector to the chief negotiator. They also participated actively through 'shadow side rooms' in all negotiation sectoral groups. To complement and institutionalise this ad hoc setup supporting all trade bilateral negotiations, the government decided to establish a standing Commission of External Trade (*Comisión de Comercio Exterior—COCEX*). According to the Law on Foreign Trade (*Ley de Comercio Exterior*), COCEX must assess any proposed regulation which may impact on international trade.¹⁶

As well some ministries and agencies have relied on advisory bodies to guide their policy-making and policy enforcement process. The Consultative Commissions convened by the Environment Ministry, for example, are in charge of fostering and managing comments from government agencies, academic institutions, and social and business organizations on the design and evaluation of environmental policy.¹⁷

¹⁵ RIA report submitted to COFEMER in December 2004. See the historical archive at http://www.cofemermir.gob.mx/inc_lectura_regioncontentall_text.asp?submitid=6141

¹⁶ Article 6 of the *Ley de Comercio Exterior*.

¹⁷ <http://www.semarnat.gob.mx/participacionsocial/mecanismosdeparticipacion/Paginas/inicio.aspx>

Public Hearings

Another approach to public consultation in Mexico has been the undertaking of public hearings organized by the government (including local governments). As in the case of the advisory bodies, this type of approach is not regulated and consequently is not mandated. However, in recent times it has become more and more frequent for the Executive and Legislative branches of government, and even Federal states, to organize public hearings (or *consultas públicas*) on matters that they consider to be particularly relevant.

For example, a few years ago, in 2003, the Federal government organized the National Fiscal Convention with a view to overhaul the fiscal and budgetary capacities of the Mexican State overall and the respective competencies of the Federation and the Federal states. In the same vein, in 2008, the President sent to the Congress an extensive reform proposal for the energy sector, in particular the oil industry. Given that this is a very sensitive sector in Mexico, the Senate decided to organize a series of public hearings to take into account the diverse viewpoints regarding this important issue, and advertised it on the radio, TV, newspapers, etc. On this same issue, the Mexico City government also organized its own '*consulta pública*' on the energy sector reform.

Many critics have considered on the other hand that despite the fact that 'public hearings' tend to raise awareness of the problems under discussion, public hearings can become quickly politicized and prone to populist claims. For example, the three cases mentioned above on fiscal and energy policy were perceived more as a political move to conceal previous political arrangements or to gather support for a particular ideological position rather than a genuine process to reach an acceptable and needed reform.¹⁸

Concluding Remarks

In the past decade, the degree of quality control exercised on Mexican regulators' discretion when preparing regulation has increased. These mechanisms have contributed to a more effective, transparent and accountable regulatory framework. Overall, Mexico has continued to move forward in bringing its regulatory system up to international standards.

In 2000, the implementation of RIA created a 'notice and comment' mechanism of public consultation that is building traction as shown by the number of inputs received from stakeholders. The public consultation procedures stipulated by the Federal Metrology and Standards Law have also detailed the rights and obligations of regulators, improving predictably for foreign trade and investment. Other initiatives such as COFEMER's encouragement to regulators to consult earlier or the use of advisory bodies has also strengthened the public 'voice' in regulatory affairs in Mexico.

Building on these foundations, Mexico's efforts, however, can be further improved. Active consultation with stakeholders (and the quality of consultation events) is still considered optional. This is probably where the next area of progress is in terms of public consultation.

For this, Mexico could on one hand enforce more thoroughly the use of active consultation mechanisms as those suggested in the RIA manual of the RIA template and second consolidate in a stand-alone legal document existing and new consultation disciplines. This way, the new framework would approximate the more comprehensive public consultation policies which have been developed and are currently enforced by the European Union, Australia, UK or Canada encompassing principles and obligations around:

¹⁸ See for example, A. Villagomez in El Universal, February 4, 2009.

European Commission ¹⁹	Australia ²⁰
<ul style="list-style-type: none"> • Clear content • Target groups • Publication • Time limits for participation • Acknowledgement and feedback 	<ul style="list-style-type: none"> • Targeted • Timeliness • Accessible • Transparent • Consistent and flexible • Evaluated and reviewed

Of course, this new legal framework regulating consultation in Mexico – which could be part of a new amendment to the *Ley Federal de Procedimiento Administrativo* – should be assessed through RIA, amply consulted and broadly communicated across society and accompanied by training efforts across the government.

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¹⁹ See the EU public consultation policy:

http://ec.europa.eu/civil_society/consultation_standards/index_en.htm

²⁰ See Australian public consultation policy; <http://www.finance.gov.au/obpr/consultation/gov-consultation.html>