**Courts, Regulators, and the *s*crutiny of Economic Evidence in Latin America**

Exploratory Workshop co-organised by UCL Laws and FGV Brazil

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Abstract

We live in the era of ‘regulatory capitalism’ where one witnesses ‘the penetration of regulation as an institutional design, as a practice and as a discourse to all spheres’ (Levi-Faur 2005; Braithwaite 2008). This is also true in the Latin American context, where decades of reform in the infrastructure sectors have transformed the landscape of regulation. Economic regulators overseeing infrastructure services play a vital role in supporting economic activities and growth in energy, e-communications, water, and transportation. Operating in evolving technological, institutional, and financing environments, regulators need to ensure that consumers have access to safe and quality services, to guarantee that network operators and service providers receive a reasonable rate of return on their investment and to uphold competitive outcomes. In doing so they increasingly rely on economic evidence and analysis. Such evidence derives mostly from industrial organisation economics and is employed to give effect to a number of rules concerning, amongst other matters, access to networks and price regulation. However, courts are usually staffed with generalist judges who have not been trained in economics but in law, leading thus to a situation of an ‘epistemic asymmetry’ between the latter and the regulatory agencies. Yet courts have a crucial role to play in making sure that regulatory agencies promote the interests of consumers and effective competition in essential services. Though this unequal epistemic position has been the focus of much scholarly and policy debate in mature jurisdictions (EU, US, UK) less attention has been paid in the context of Latin America. This exploratory workshop aims at addressing this gap by exploring the interaction of both courts and regulators with economic evidence in 4 key jurisdictions in Latin America: Brazil, Chile, Colombia, and Argentina. In doing so it will undertake an institutional analysis of the reception of economic evidence by both regulators and courts to generate fresh region-specific insights that can inform the design and evolution of regulatory institutions in Latin America.

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## Introduction

* 1. This document was prepared to serve as background material for the “Workshop on Courts, Regulators, and the Scrutiny of Economic Evidence in Latin America”. The explanatory workshop was co-organised by UCL laws and FGV Brazil, and took place on 13 September 2022.
  2. The workshop sought to discuss the interaction of courts and regulators with economic evidence in three key jurisdictions: Brazil, Chile, and Argentina.
  3. In the first panel, moderated by Prof Caio Mario da Silva Pereira Neto (FGV Brazil), Mariana Mota Prado (University of Toronto Faculty of Law) and Lucas Sierra (Universidad de Chile) discussed the transformation of the Regulatory State in Latin America with insightful presentations covering novel theoretical approaches and recent institutional developments. In the second panel, moderated by Dr Despoina Mantzari (UCL), Lucas S. Grosman (Universidad de San Andrés) and Javier Tapia (former Judge at the Chilean Competition Tribunal, 2014-2020) discussed the scrutiny of economic evidence in Latin America, commenting on the political and structural challenges and presenting their own experience as regulators.
  4. This workshop will support future research on the interaction of legal and economic rationalities and the integration of economic evidence in regulatory and adjudicative decision-making processes in Latin America.

## Panel 1: The Transformation of the Regulatory State in Latin America Research Question: How macro-level (historical, institutional, constitutional, socio-economic considerations) affect and shape regulatory policy and judicial review?

* 1. Courts and the Brazilian Regulatory State” by Mota Prado offers a political economy analysis of litigation involving regulatory policy and IRAs. The book’s main research question is: who is going to court and why? The book’s main finding: there is a lot of litigation involving IRAs, but with varying characteristics, depending on the regulated sector.
  2. There are also differences with respect to the litigants:
  3. Litigation by companies against independent regulatory agencies (IRAs): mostly collective claims and mostly rulemaking (disputes about the rules that regulators impose on regulated companies).
  4. Litigation by consumers against IRAs: mostly individual claims about specific disputes. In any case, due to the number of claims, these disputes may have a relevant impact on later regulation.
  5. Discussion of possible theoretical contributions, specifically exploring the literature on Law and Development as a framework. Discussion of the concept of “legal irritants” as a tool to understand the consequences of reforms in Latin America. To what extent did “legal irritants” change courts and regulations? Have IRAs “irritated” judicial review of regulation, regulatory policy, or economic evidence?
  6. Discussion of institutional innovations created by IRAs when faced with challenges, such as judicial delays and unpredictability. Concept of “institutional bypass” may explain some alternative institutional regimes created to deal with the challenges faced by IRAs in Latin America.
  7. In addition to the concept of "legal irritants", it is also important to highlight Susan Rose Ackermann's criticism in her book Democracy and Executive Power, on the use of regulatory tools based exclusively on an economic analysis, such as the cost-benefit analysis (CBA) or regulatory impact analysis (IA). This could deprive regulation of considering other objectives, such as fairness and poverty alleviation - which are particularly sensitive in the context of Latin America.
  8. Importance of putting this discussion into the Latin American context: what is the role of economic evidence considering there is a powerful distributive perspective in the Global South? In many Latin American countries, there is also a “conflict” between two different legal traditions: administrative law was mostly inspired by continental legal systems, while judicial review and, more recently, IRAs were influenced by US legal tradition: How does this conflict impact the reception of economic evidence in courts?
  9. Discussion of paper by Lucas Sierra on the judicial review of the competition authority’s ruling on the Chilean 5G auction. The paper illustrates the complexity of the relationship between courts and regulators in Latin America. In this case, three State bodies were involved: the Supreme Court, Tribunal de Defensa de la Libre Competencia (TDLC, the competition tribunal), and Subtel (the regulatory body overseeing telecommunications - it is not, strictly speaking, independent from the government).
  10. Decision by the Supreme Court on June/18 on the reallocation of 5G bands. Sierra argues that it is a very questionable decision for its lack of deference to the specialisation of regulatory bodies; the Court has stepped into matters that are outside its realm of competence.
  11. Discussion on the tension between specialised bodies and generalist ones. Sierra argues that tension is further aggravated by the activist character that the Supreme Court has shown. Sierra also argues that the solution is legislative: the law should expressly set forth that the Supreme Court should only review the TDLC decisions with respect to due process matters and should not review the merits of the decision.

## Panel 2: The Judicial scrutiny of Economic Evidence in Latin America: A Comparative Institutional Analysis Perspective Research question: Which factors determine the reception of economic evidence in court?

* 1. How economic evidence is presented before the courts and how judges interpret the economic evidence in cases of indirect influence of economic evidence?
  2. Understanding economic evidence and applying economic concepts into legal terms are still challenges for judges.
  3. Discussion whether judges being trained in economics would allow the cases to be dealt in a more efficient way by the courts. All participants acknowledged the general lack of training in economics, however even if judges had some level of economic training they would still need to rely on economic experts as the discussions can get very technical and complex. In Brazil, the courts go further - judges have the option to appoint an expert assistant to do part of the economic analysis.
  4. Decisions of the national competition authorities are subject to judicial review. The path to review varies, as does the destination. The reviewing court may be a court of general jurisdiction, or it may be a tribunal that specialises in the review of competition decisions.
  5. Discussion on whether specialised courts would be able to contribute to the efficiency of the enforcement of antitrust law by courts, both as a way to improve the understanding of the economic content of the decisions, and make sure that the courts are able to grasp the issues - as many times competition cases involving cartels can be treated as criminal cases; also concern about reducing delays. Chile has a specialised competition tribunal, which has proved to be faster than the regular courts. However, the decision of the Tribunal can be reviewed by the Supreme Court, that is a generalist court with broader powers to review due to the principle of inexcusability. Countries like Brazil and Argentina, generalist courts will hear the matter in both first instance and on appeal levels.
  6. There is a trade-off in countries that provide a right of action for an antitrust violation through specialised courts: the cases are shorter, and the decision is faster, however there are less layers of review. In Argentina and Brazil, the judicial review of competition decisions is more burdensome and lengthy but provides much more layers for discussion of a matter.
  7. The three countries seem to be experiencing similar challenges. There was a shift in political and institutional thinking, from a pro-market perspective to a general culture of distrust in economics, mostly due to the distrust in their own political institutions.