

NÚMERO 48

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Design Matters: The Case of Mexican Administrative Courts

DICIEMBRE 2010



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Agradecimientos

*We are very grateful for comments, corrections and ideas to:
Nuno Garoupa, Tom Ginsburg, Sergio López Ayllón and
Alejandro Tello.*

Abstract

In a modern State administrative courts have an important task as guardians of the rule of law. Adjudicating cases where one of the parties is the state herself is a strong form of accountability. In Mexico up to this day there is a debate on which system better guarantees independence of these courts and accountability of the administration. In this paper we analyze the different schemes in which the local administrative courts in Mexico are designed and their relationship with the administrative courts outcomes. As a federation with federal and local jurisdiction, Mexico has 29 state administrative courts. The design of each of these courts varies depending on the State to which they belong. There are some courts depending of the judicial branch of the local government and there are others depending on the executive branch as "autonomous" courts, following the French model. Other differences can be found on the appointment, tenure and salaries systems. These differences arise two main questions: Does design of administrative courts as part of the judiciary or the executive have an impact on their outputs? Is there a design that assures a better protection of the rule of law and an efficient system of accountability of the administrative authorities? With the data used in this paper we found that those courts pertaining to the judicial branch and guaranteeing tenure to their judges are more independent than those courts that don't. The conclusion is that the branches, to which administrative courts pertain, whether they are part of the judicial branch or part of the executive power and the guarantee of tenure do affect their decisions, therefore design matters.

Resumen

En un Estado moderno los órganos de jurisdicción administrativa cuentan con la importante tarea de ser los guardianes del estado de derecho. Hasta ahora en México existe un debate, no resuelto, acerca de qué sistema garantiza de mejor forma la independencia de este tipo de tribunales y la rendición de cuentas por parte del gobierno. En el presente trabajo analizamos la relación entre el diseño de los distintos esquemas en los que los órganos locales de jurisdicción administrativa en México se organizan y el tipo de decisiones que emiten. México se organiza como una federación en la que existen materias federales y materias locales. La jurisdicción administrativa local corresponde a cada una de las entidades federativas y cada una decide la constitución y el correspondiente diseño de su órgano jurisdiccional administrativo. Existen algunos tribunales que dependen del poder ejecutivo y otros que dependen del poder judicial. Otras diferencias pueden encontrarse en el tipo de nombramiento de los jueces administrativos, su inamovilidad y el régimen regulatorio de sus salarios. Estas diferencias hacen surgir dos preguntas acerca del impacto de los distintos esquemas: ¿Son distintas las decisiones de aquellos tribunales que dependen del poder judicial? ¿Existe algún diseño que asegure una mayor protección del estado de derecho aumentando la rendición de cuentas por parte del gobierno? Con los datos analizados en el presente trabajo concluimos que el diseño institucional parece afectar las decisiones de los jueces administrativos. Cuando estos órganos pertenecen al poder ejecutivo existe una mayor probabilidad de que el juicio sea ganado por el gobierno a diferencia de cuando estos juicios son resueltos por órganos del poder judicial. De igual manera la inamovilidad parece afectar estas decisiones. Mientras que aquellos jueces con inamovilidad parecen favorecer menos al gobierno aquellos que no cuentan con inamovilidad parecen no hacerlo.

Introduction

A historical development of the administrative justice system in Mexico has been accompanied by a controversy as to whether administrative courts should belong to the judicial branch of government as the common law system does or the executive branch as independent courts following the French model; whether the executive branch should participate in the appointment of administrative judges; whether administrative judges should have tenure and whether the prohibition of diminishing judge's salaries should exist. The fact that the government is always a party in the administrative courts' trials intensifies this controversy. The dependence of the courts to the executive branch of government tend to affect the outcome in favor of the authorities rather than the citizen; nevertheless the general opinion of this courts is that belonging to the judiciary grants them less autonomy than when their design follows the French model.

As a federation Mexico has an administrative court in the federal level and 29 local courts. According to the Federal Constitution, states decide whether to have administrative courts and to which branch of government they should belong.

The object of this paper is to analyze the design of each of the above factors in order to conclude which of these designs achieves more independence in the administrative justice system in Mexico. The main premise is that courts that are more dependent on the executive branch are more likely to uphold government decisions than courts that are less dependent on the executive branch. Factors hypothesized to influence the likelihood of upholding government decisions are the type of branch with which a state court is associated (executive or judicial), the type of judges' appointments, the type of judges' tenure and the salary determination process.

We used a comprehensive data set consisting of the outcomes of administrative court decisions to test the hypotheses. We find strong empirical evidence suggesting that administrative courts that are part of the executive branch are more likely to uphold the lawfulness of government acts, which may suggest a presence of dependence of administrative courts on executive branch. The questions that lead this study are:

- Does design of administrative courts as part of the judiciary or the executive have an impact on their independence?
- Is there a design that assures a better protection of the rule of law and an efficient system of accountability of the administrative authorities?

The paper is organized as follows. Section 1 presents an overview of the comparative experience, history, structure and function of the administrative justice system in Mexico; section 2 discusses independence of the administrative justice system in Mexico; section 3 describes data; section 4 develops an empirical model and a set of testable hypotheses. Section 5 presents the findings. Finally, section 6 presents a discussion of the empirical findings.

1. Comparative experience, history, structure and functions of administrative justice system in Mexico

a. Comparative experience

In the comparative law experience we found two main models of administrative courts: the French system, product of the Revolution with special courts apart from the judiciary and the common-law system where the administrative matters are held before the ordinary courts. After the French Revolution the administrative courts were created not as a part of the judiciary, but of the executive branch of government as a result of the nobles' intervention of courts before the Revolution.

During the Napoleon period the administrative courts evolved into the *Conseil d'Etat*. The Napoleonic Constitution of the VIII year gave them power to solve disputes which arise in administrative matters, claims against intromission on economic rights and complaints from citizens deemed aggrieved by any administrative authority's arbitrary act.¹ The *Conseil* also functions as an advisor to the legislature in administrative matters. The performance of the *Conseil d'Etat*, as an abstract control of the rule of law (*excess pouvoir*) which until today has been careful not to interfere in the role of the executive branch, has been successful. Today France's system of administrative jurisdiction is composed by a set of courts with different geographical venue, as well as specialized courts like the one in charge of budget supervision, all of them governed by the *Conseil d'Etat*. The members of these courts enjoy a special status of independence. Although in France today there is no longer a distrust or struggle between the administration and the judges, it has been considered important to maintain the contentious courts separated from the judiciary because they have become specialized courts in administrative matters with an important recognition and authority.

Countries like Belgium and Italy followed the French model. In America, Colombia is the country with a very similar system.

The common law tradition has a different system that arises from the principle that authorities and citizens should be judge by the same rules and

¹ Eduardo García de Enterría, *Curso de Derecho Administrativo II*, 10 ed., Thomson, España p. 571.

in equal conditions, therefore any authority can be brought before the common courts and judged by the judiciary. It is the judicial branch who has the power to protect the rule of law and the Constitution² therefore any dispute on the law should be brought before her. Nevertheless the complexity of today's public administration has caused the creation of judicial procedures in various administrative agencies, for example in the United States at the federal level through the Federal Administrative Procedure Act and similar local regulations.

Even though administrative matters may be brought before a federal or state judge, the Administrative Procedure Act of 1946 (APA) regulates the existence of administrative law judges (ALJ). These officials preside at an administrative trial-type hearing in a particular subject, to resolve a dispute between a government agency and someone affected by a decision of that agency just like the French model. The ALJ is the initial trier of fact and decision maker; they can administer oaths, take testimony, rule on questions of evidence, and make factual and legal determinations. Administrative law judges controlled proceedings are comparable to a bench trial, and, depending upon the agency's jurisdiction, may have complex multi-party adjudication, as is the case with the Federal Energy Regulatory Commission, or simplified and less formal procedures, as is the case with the Social Security Administration.³ The types of procedures differ from the cases of the French model in the sense that ALJ judge upon the merits of the agency acts, while in the French case jurisdiction is limited to a legality standard.

In the federal level there are over 25 different agencies with ALJ such as Department of Housing and Urban Development, Department of the Interior, Department of Justice/Executive Office for Immigration Review, Department of Labor, Department of Transportation, Drug Enforcement Administration, Environmental Protection Agency, Federal Aviation Administration, Federal Communications Commission, Federal Energy Regulatory Commission, Federal Labor Relations Authority, Office of Personnel Management, this last agency can also lend other federal agency a ALJ for a particular case. This model differs from the French because the courts are not specialized by subject, and citizens can bring before them any case regarding an agency's act.

In American administrative law, ALJ are Article I judges, under the U.S. Constitution. Authors like Yoder, Hardwick and Morell have written extensively on the problems of independence that this causes.⁴ Unlike Article III judges, Article I judges are not confirmed by the Senate thus their degree of independence is sometimes questionable because of the fact that their

² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 140 (1803).

³ 5 U.S.C. § 556.

⁴ Ronnie A. Yoder and John Hardwicke, *Subject Matter Specialists —Yoder-Hardwicke Dialogue: Does Mandatory Quality Assurance Oversight of ALJ Decisions Violate ALJ Decisional Independence, Due Process or Ex Parte Prohibitions?*, 17 *J. Nat'l Ass'n Admin. L. Judges* 75 (Spring 1997).

appointment does not have a system of balances between branches of government as the article III judges have. Nevertheless, ALJ have absolute immunity from liability for their judicial acts. Federal administrative law judges are not subject to the supervision or direction of the federal agency. Agency officials may not interfere with their decision making and administrative law judges may be discharged only for good cause based upon a complaint filed by the agency with the Merit Systems Protections Board established and determined after an APA hearing on the record.⁵ The United States Supreme Court has recognized that the role of a federal administrative law judge is "functionally comparable" to that of an Article III judge.⁶ The question of ALJ independence has been subject to academic as well as judicial concern. Ronnie A. Yoder points out that ALJ enjoy absolute immunity for their quasi-judicial work product; it has the same constitutional protection under the first amendment from retaliation against the authors as is enjoyed by the judicial branch or the academic work.⁷

As for the state level, most U.S. states have a statute modeled after the APA or somewhat similar. Unlike federal ALJ, whose powers are guaranteed by the APA Federal statute, states ALJ have widely varying power and structure. Not all states ALJ are lawyers, and their prestige varies from agency to agency. In some state law contexts, ALJ have almost no power; their decisions are accorded practically no deference and become, in effect, recommendations. In some cities, notably New York, ALJ can be employees of the agency, making their decisional independence potentially questionable.⁸

Other countries such as Spain have a combined system where the judicial branch has the unique power to solve disputes and protect the rule of law (article 106.1 of the 1978 Constitution) including the conflicts between the citizens and the administrative authorities but the executive branch has jurisdiction on certain administrative matters. This two level system is composed of a proceeding before the administrative authority that can be appeal in court.

These two main models have had influence in the Mexican system at different points in history up to these days.

b. History of administrative justice system in Mexico

The first administrative court in Mexico was established in the first quarter of the XVI century and was referred to as the Royal Hearings of Indias. People could appeal every decision of the Spanish government that they considered

⁵ Butz v. Economou, 438 U.S. 478, 514 [1978].

⁶ *Federal Maritime Commission v. S.C. State Ports Authority*, 535 U.S. 743, 756 (2002).

⁷ Ronnie A. Yoder, Speech at the Seventh National Educational Conference for Social Security Administrative Law Judges (July 16, 1998).

⁸ Ackman, Dan. "The Price of Justice". New York Times, Feb. 12, 2006.

to be harmful. In 1812 specialized administrative judges were incorporated into the tax agencies as part of the executive power. These specialized judges survived until the Mexican Constitution of 1824, in which the administrative justice was established as part of the civil courts (judicial power) and no longer as part of the executive power.

Later, with the centralist model these specialized judges reappeared within the executive power. In 1853 an Administrative Justice Statute was enacted. In this statute an administrative court was created, and its main purpose was to solve tax disputes. This Statute was abolished by the Juarez Statute for considering it a specialized court prohibited by the Mexican Federal Constitution. Three years later the Mexican constitution of 1857 established the administrative justice as part of the judicial power with the amparo trial. This system was maintained until the present Federal Constitution of 1917.

In 1936 the Federal Administrative Court was created as an independent court which was part of the Executive power. Since that date it was recognized the possibility of the existence of this kind of courts that were not part of the judicial power. Subsequent amendments to the Federal Constitution tried to end the debate and established the possibility of the existence of administrative courts as independent courts. The aggrandizement of the executive power and the necessity of specialized administrative courts were the basis for subsequent amendments of constitutional articles 116 in 1988 and 122 in 1996, articles in which the current State's administrative courts are based.

The issue of whether administrative courts should be part of the executive branch or part of the judicial branch was captured by different amendments and statutes discussed above. The solution given by the current regulation of administrative justice is ambiguous; it allows the creation of administrative courts without any guidance on whether they should be part of the judicial power, or part of the executive power. Subsequent amendment proposals made by different political parties and by administrative courts show that this debate still exists.

c. Structure

The Mexican State is organized in the form of a federation integrated by the Federal District and 31 States. The federal system is established in the Federal Constitution and specifies that there are powers exclusively of the federation and others that are exclusively of the States. In the case of administrative justice, the Federation (for federal matters) and the States (for local matters) have the power to create their own administrative courts.

The Federal Constitution does not require each State to create an administrative court. If a State decides to create this court, it is this State's

decision whether the court will be part of the judicial branch or it will be an independent court belonging to the executive power, whether the executive branch should participate in the appointment of administrative judges or whether the judges should have tenure or salary protections.

The modern structure of the administrative justice system in Mexico includes a Federal Administrative Court, which is not part of the judicial power, and 29 local administrative courts. Some of them are part of the local judicial power, and some of them are independent courts that are part of the local executive power. "Independence" in this classification relates to the independence from the judicial system. However, given that these courts are part of the executive power; this creates some kind of dependence on the executive system, the effect that we aim to analyze in this paper.

Out of the total of 29 courts, 18 (62%) are independent courts that are part of the executive power and 11 (38%) are part of the judicial power.⁹ The states' administrative court systems, in addition to being different in terms of belonging to the judicial or executive power, differ in a number of other important dimensions as: the systems of judges' appointments and tenure, the procedure of judges' salary determination and hierarchical structures, the existence of appellate jurisdiction, the number of judges incorporated to the courts, the average wage per judge and the age, among others.

For the purpose of this paper the variables above described are referred to the following:

- **Branch:** this variable represents whether the court is incorporated to the executive branch or the judicial branch. The main consequence of this incorporation is the procedure to obtain the budget for the court. When a court is incorporated to the executive branch the budget has to be submitted and approved by the executive branch. When a court is incorporated to the judicial branch the budget has to be submitted and approved by the judicial branch.
- **Number of judges:** this variable represents the number of judges incorporated to a court.
- **Appellate jurisdiction:** this variable is referred to the existence of a second instance for the trial. We will classify courts in two categories: those with a second instance within the court and courts without it.
- **Structure:** this variable is referred to the number of judges that are incorporated to the court. We will classify courts in two categories: those with one judge and those with more than one judge.
- **Appointment procedure:** this variable is referred to the manners in which a judge is designated. For the purposes of this paper the two kinds of appointments will be the ones where the executive branch takes part in the procedure and those in which it doesn't.

⁹ In the states with no administrative courts, citizens are able to sue the government through the amparo trial.

- **Tenure:** this variable is referred to the period of time a judge is appointed. A judge has tenure when she is appointed for life.
- **Average salary:** this variable is referred to the average amount in pesos that a judge earns.
- **Regulated salaries:** this variable is to the existence in the normative system of a prohibition to decrease judges' salaries.

When an administrative court has appellate jurisdiction the number in the table will be 1; when an administrative court has more than one judge the number in the table will be 1; when the Executive branch participates in the appointment of administrative judges the number in the table will be 1; when administrative judges don't have tenure the number in the table will be 1; and when there is no prohibition of decreasing judges' salaries the number in the table will be 1. Table 1 describes these differences:

TABLE 1

| STATE | BRANCH | NUMBER OF JUDGES | APPELLATE JURISDICTION | STRUCTURE | APPOINTMENT | TENURE | AVERAGE SALARY | REGULATED SALARIES | AGE |
|---------------------|--------|------------------|------------------------|-----------|-------------|--------|----------------|--------------------|-----|
| AGUASCALIENTES | 0 | 1 | 0 | 0 | 1 | 1 | 109329 | 0 | 3 |
| BAJA CALIFORNIA | 1 | 4 | 1 | 1 | 1 | 1 | 83112 | 0 | 19 |
| BAJA CALIFORNIA SUR | 0 | 1 | 0 | 0 | 1 | 1 | 61351.2 | 0 | 4 |
| CAMPECHE | 0 | 3 | 1 | 1 | 0 | 0 | 60750 | 0 | 11 |
| CHIAPAS | 0 | 7 | 1 | 1 | 0 | 1 | 58639.81 | 1 | 1 |
| COLIMA | 1 | 2 | 0 | 1 | 1 | 1 | 91468.6 | 1 | 12 |
| DISTRITO FEDERAL | 1 | 22 | 1 | 1 | 1 | 0 | 143162.8 | 0 | 37 |
| DURANGO | 1 | 3 | 1 | 1 | 1 | 1 | 40614 | 1 | 4 |
| ESTADO DE MEXICO | 1 | 17 | 1 | 1 | 1 | 1 | 129505.8 | 1 | 21 |
| GUANAJUATO | 1 | 4 | 1 | 1 | 1 | 1 | 104175.36 | 1 | 22 |
| HIDALGO | 0 | 3 | 1 | 1 | 1 | 1 | 48000 | 0 | 26 |
| MICHOACÁN | 1 | 3 | 0 | 1 | 0 | 1 | 86402.34 | 0 | 0 |
| MORELOS | 0 | 3 | 0 | 1 | 0 | 0 | 65794.69 | 1 | 8 |
| NAYARIT | 1 | 3 | 1 | 1 | 1 | 1 | 63996.9 | 0 | 6 |
| NUEVO LEÓN | 1 | 3 | 1 | 1 | 1 | 1 | 76098 | 0 | 17 |
| OAXACA | 1 | 3 | 1 | 1 | 1 | 1 | 80911.53 | 1 | 2 |
| QUERÉTARO | 1 | 2 | 1 | 1 | 0 | 1 | 93625 | 0 | 23 |
| SINALOA | 1 | 7 | 1 | 1 | 1 | 1 | 43611.23 | 1 | 15 |
| TABASCO | 1 | 5 | 0 | 1 | 1 | 1 | 47547.9 | 0 | 11 |
| TAMAULIPAS | 1 | 1 | 0 | 0 | 0 | 1 | 38500 | 1 | 57 |
| TLAXCALA | 0 | 3 | 0 | 1 | 0 | 0 | 26830.33 | 0 | 6 |
| YUCATÁN | 1 | 1 | 0 | 0 | 1 | 0 | 31029 | 0 | 21 |
| ZACATECAS | 0 | 1 | 0 | 0 | 0 | 0 | 68564.38 | 0 | 8 |

As a result, currently there are multiple approaches to creating administrative courts in Mexico. Regarding the branch to which the court should be part of, the first approach is to create it as part of the judicial branch. When this happens, the administrative court can be incorporated as a court with a kind of autonomy from the ordinary courts or can be incorporated as a circuit or as a judge part of the ordinary courts. The second approach is to create an administrative court as an independent court which is typically part of the executive power. The states' constitutions establish these courts

as independent and autonomous courts. For the purpose of analysis presented in the paper, we refer to these courts as part of the executive branch with some level of independence, since they are not part of the judicial or legislative branch. Regarding the appointment system there are five different types of appointment depending on the participation of the three branches. We analyzed each of these systems and then divide the appointment system in two categories, those in which the executive branch participates in the appointment procedure and those in which the executive branch does not. As for the tenure system there are three kinds of tenure in the Mexican local courts structures. There are courts that guarantee judges with appointments for life, courts that appoint judges for specific periods of time and courts that appoint judges for specific periods of time with a reelection possibility. For the purpose of this paper we divide the tenure system in two main categories: judges with tenure (appointments for life) and judges without tenure (the rest of them).

d. Functions

Article 133 of the Federal Constitution establishes the principle of constitutional supremacy. This principle assumes that the Constitution is the parameter of measure of the whole normative system. The Federal Constitution establishes general principles that guide the solution of controversies. Regarding the first function, administrative courts, as other courts, are required to solve controversies with impartiality, promptness, independence, completeness and without charging for the service.

An important issue about this specific jurisdiction is that administrative courts have the power to verify the legality of the government actions avoiding abuses of power.¹⁰ Administrative courts are the guardians of the legality because they verify the compliance with the rule of law. The purpose of these courts is particularly important since administrative justice is the mechanism that defends people against arbitrary and unlawful actions of the government, and it is also a mechanism the government uses to monitor its own agents.¹¹

Every action of the government has to be ruled by the parameters of legality established in the Constitution and the specific laws that regulate its power. When an authority acts against a citizen, it has to do it within these parameters, otherwise its decisions should not be valid and the authority can be brought to trial. Administrative courts have two main functions: to solve disputes between the government and citizens by verifying the compliance of government acts with the law and to be “fire-alarms” monitoring government agents’ acts.

¹⁰ SCJN, Libro Blanco de la Reforma Judicial, México 2006, pp. 36, 37.

¹¹ (Ginsburg, 2008: 58).

To perform their functions, administrative courts use specific procedures called nullity trials. These trials are similar to civil trials; the main difference is that the government is always one of the parties in the trial. This specific difference results in some prohibitions that won't be explored in this paper but change in an important manner the incentives to sue. The standing required to sue an authority is less strict than the one required suing a citizen, and almost every citizen can sue the government when an authority acts against that citizen. After a proceeding which includes a hearing and the opportunity of showing evidence, the trial can be resolved by the court in three different ways:

1. *Declaration of no standing.* In this case the act is not reviewed by the court because of the lack of standing; the standing requirements are established in specific statutes and are referred to matters of procedural requirements.
2. *Declaration of the legality of the act* in which the government authority "wins" the trial.
3. *Declaration of the unlawfulness of the act* in which the government authority "looses" the trial. This declaration can have two different effects: (a) the administrative act/decision is reversed and returned to the authority for further consideration; or (b) the administrative act/decision is reversed and the court substitutes the authority's decision with its own judgment.

This paper focuses on empirical analysis of type #2 and #3 decisions.

e. Independence

The court's independence has been an important concern in the analysis of courts performance. Judicial independence as court's autonomy from other actors¹² has to be assumed in order to achieve the courts' main activity of judicial review. The problem with this characteristic is that it is very problematic to guarantee independence to a political agent that is not accountable to the people. In this sense courts might achieve decisions with potentially large political consequences without being part of the political elections.

To obtain a real analysis of the independence of courts, information is needed regarding the performance of courts and judges interacting with government. Ferejohn, Rosenbluth and Shipan¹³ suggest two ways to measure independence empirically: overturning of the decisions of government, and the manner that courts respond to government nationalization.

¹² Ferejohn, Rosenbluth and Shipan, *Comparative Judicial Politics*, in *Oxford Handbook of Comparative Politics* (Boix & Stokes ed) (2007).

¹³ *Op. cit.*

“If the judge is himself an officer of the crown and the dispute is in the form of Crown v. Doe, in what sense do we have a triads opposed to a simple inquisition?”¹⁴ Article 116 of the Mexican Federal Constitution specifically establishes the optional existence of administrative courts and article 17 of the Constitution establishes the principles applied to conflict resolution by courts. It is mentioned in article 17 that citizens have the right for a prompt, complete, impartial, free and independent justice. Therefore, independence is a characteristic established in the Constitution as a guarantee to the citizens.

It is well known that independence is a characteristic of the courts that helps achieve the fair resolution of conflicts. The administrative courts’ goal is to verify the rule of law by solving disputes between the government and private citizens in an independent way. In this regard, administrative justice has to be independent from the executive branch, since the government is always a party in this type of trials. If the court is dependent on the executive power, then the goal of an impartial decision can be obstructed.

As discussed above, one of the main obstacles to creating independent courts in Mexico (following the French model) is the lack of independence that being part of the executive branch is likely to create. This conflict arises when a court is part of the executive power because it seems to have more incentives to favor the executive branch (i.e. government) since their budget is influenced by the executive. This may imply that judges are not subject to negative consequences as the result of their decisions, such as (a) being dismissed, (b) being paid less, or (c) losing influence.¹⁵

Previous studies used different approaches to measure courts’ independence. Most of them focused on the approaches that courts use to decide cases. Some studies try to distinguish important cases from unimportant cases. This division always has a problem of arbitrariness because of a judgment that needs to be made in each particular situation. Furthermore, many studies have found that there are some other characteristics that are also important to achieve independence such as type of judge’s appointments, type of judges’ tenure and prohibition to diminish the judges’ salaries. For example, in a study of 75 countries’ constitutions¹⁶ the indicators used to measure independence were: the appointment procedure for judges, judicial tenure, the power to set judges’ salaries, accessibility of the court and its ability to initiate proceedings, allocation of cases to members of the court, competencies assigned to the constitutional court and publicity.

¹⁴ Martin Shapiro, *A Comparative and Political Analysis* (The University of Chicago Press ed) (1981).

¹⁵ (Voight, 2009:4) Stefan Voigt, *Mapping Constitutionally Safeguarded Judicial Independence – A Global Survey* (2009).

¹⁶ *Op. cit.*

This paper departs from the above described in the sense that we analyze the branch to which the court pertains, the appointment procedure for judges, the judicial tenure and the power to set judges' salaries as variables that might influence the independence of a court and we measure the court independence using a binary variable which indicates whether a particular government decision/act is upheld by the administrative court or not.

2. Data

The data used in this paper to study independence of administrative courts was collected as a result of a large scale survey of administrative court decisions conducted by a group of Mexican researchers in the "*Diagnóstico del Funcionamiento del Sistema de Impartición de Justicia en Materia Administrativa a Nivel Nacional*."¹⁷ The purpose of this study was to collect data of the local administrative courts in Mexico. The Federal District and 22 States participated in this study. They allowed the researchers to analyze a sample of cases in each court. The data collected from each case included: dates, subjects, parties of the trial, amounts (if there were), decisions and appeals.

The sample of cases reviewed was different in each court and it was based on the total number of cases concluded in the years 2006, 2007 and 2008.¹⁸ It is important to notice that not every court had cases which concluded in these three years because some of the courts were created after the years 2006 or 2007. The total number of cases reviewed was 5,400.

Using the approaches developed in existing empirical literature, this study develops the following proxy for the independence of the Mexican Administrative Courts. We measure court independence using a binary variable which indicates whether a particular government decision/act is upheld by the administrative court or not. This proxy will be used as a dependent variable in the regression analysis to be discussed below. Furthermore, using this proxy we calculated the percentage of cases in which the court has upheld government decisions (=government wins). Table 3 presents the distribution of this percentage across 22 states and the Federal District.

As can be seen there is a wide variation in this percentage. For example, the percentage is in the range of 0-1 in 6 out of 29 states (Aguascalientes, Colima, Hidalgo, Michoacán, Nayarit and Zacatecas), and the percentage is in the range of 30-43 in 5 out of 29 states (Baja California, Baja California Sur, Chiapas, Nuevo Leon and Tamaulipas). The hypothesis is that administrative courts are likely to be more dependent on the government in the states where

¹⁷ <http://justiciaadministrativa.cide.edu/>.

¹⁸ The methodology used is explained on page 13 of the *Diagnóstico del Funcionamiento del Sistema de Impartición de Justicia en Materia Administrativa a Nivel Nacional* (unpublished manuscript).

the percentages of cases where the lawfulness of government acts is confirmed are higher. Thus, in the first group of states where the percentage is in the range of 0-1, the courts are likely to be more independent from local government. In contrast, in the second group of states, the courts are likely to be more dependent on local government. However, this variation has to be more carefully analyzed by controlling for various court characteristics as suggested by the existing empirical literature. A summary of the courts outcomes used in this study is presented in Table 2.

**TABLE 2. INDEPENDENCE OF ADMINISTRATIVE COURTS IN MEXICO:
SUMMARY STATISTICS REGARDING LAWFULNESS**

| STATE | LAWFULNESS |
|---------------------|------------|
| AGUASCALIENTES | 1% |
| BAJA CALIFORNIA | 32% |
| BAJA CALIFORNIA SUR | 42% |
| CAMPECHE | 22% |
| CHIAPAS | 38% |
| COLIMA | 0% |
| DISTRITO FEDERAL | 13% |
| DURANGO | 9% |
| ESTADO DE MEXICO | 21% |
| GUANAJUATO | 11% |
| HIDALGO | 0% |
| MICHOACÁN | 0% |
| MORELOS | 22% |
| NAYARIT | 0% |
| NUEVO LEÓN | 32% |
| OAXACA | 7% |
| QUERÉTARO | 8% |
| SINALOA | 3% |
| TABASCO | 29% |
| TAMAULIPAS | 43% |
| TLAXCALA | 26% |
| YUCATÁN | 5% |
| ZACATECAS | 1% |

An econometric model that proposes a causal relation between the probability of upholding government acts and a number of factors representing administrative courts' characteristics and state-effect control variables is shown below.

3. Empirical Model and Hypotheses

a. Empirical Model

It was specified the following empirical model to evaluate the degree of independence of administrative courts in Mexico:

$$\frac{e^{\text{Lawfulness}}}{e^{\text{Lawfulness}} + 1} = \beta_0 + \beta_1 \text{Branch} + \beta_2 \text{Appointment} + \beta_3 \text{Tenure} \\ + \beta_4 \text{RegulatedSalaries} + \beta_5 \text{PoliticalParty} + \beta_6 \text{Plaintiff}$$

The dependent variable is a court decision outcome (lawfulness). It is equal to 1 if the administrative court final decision upholds the lawfulness of a government act, and it is equal to 0 otherwise. A number of explanatory variables included in the model that are hypothesized to explain the variation in the decision outcome are proxies for court independence. These are the type of the branch to which a court belongs (branch), the type of judges' appointment (appointment), the type of judges' tenure (tenure), and the system of the judges' salary protection (regulated salaries). These variables represent various degrees of independence of administrative courts. Also, the empirical model includes a set of other variables that intend for control for the state-specific and court-specific differences¹⁹. Within the control variables used to control for State effects there are: Political Party and Types of Plaintiffs.

We consider administrative courts to be more independent if they are less likely to be influenced by the executive branch of government. The overall hypothesis is that an administrative court is more likely to uphold the lawfulness of a government act if this court has a smaller degree of independence as compared to a court having a higher degree of independence. We used the Logit estimation procedure to estimate the empirical model. Table 4 presents a description of explanatory variables, and it summarizes the expected signs for the estimated coefficients based on the hypotheses discussed below.

¹⁹ The variables we used to control the differences among States are: the prevailing political party in a state and the type of plaintiff.

TABLE 3. EMPIRICAL ANALYSIS OF INDEPENDENCE OF ADMINISTRATIVE COURTS IN MEXICO: VARIABLES AND EXPECTED SIGNS

| VARIABLE | DEFINITION | EXPECTED SIGN |
|------------------------------|---|---------------|
| DEPENDENT VARIABLE | | |
| LAWFULNESS | BINARY VARIABLE | |
| | =1 IF A COURT UPHOLDS THE LAWFULNESS OF A GOVERNMENTAL ACT (= GOVERNMENT WINS) =0 IF A COURT OVERTURNS THE LAWFULNESS OF A GOVERNMENTAL ACT (= GOVERNMENT LOSES) | |
| INDEPENDENT VARIABLES | | |
| BRANCH | <i>A BINARY VARIABLE REPRESENTING THE SUPERVISING AUTHORITY</i> | |
| | =1 IF A COURT BELONGS TO THE EXECUTIVE BRANCH =0 IF A COURT BELONGS TO THE JUDICIAL BRANCH | + |
| APPOINTMENT | <i>A SET OF BINARY VARIABLES REPRESENTING THE TYPE OF JUDGE APPOINTMENT</i> | |
| | =1 IF THE EXECUTIVE PARTICIPATES IN THE APPOINTMENT =0 IF THE EXECUTIVE BRANCH DOESN'T PARTICIPATE | + |
| TENURE | <i>A SET OF BINARY VARIABLES REPRESENTING JUDGES' TENURE</i> | |
| | =1 IF JUDGE APPOINTMENT IS FOR A SPECIFIC PERIOD OF TIME; =0 OTHERWISE (TENURE) | + |
| REGULATED SALARIES | <i>A BINARY VARIABLE REPRESENTING THE JUDGE SALARY LIMITATION IN A STATE</i> | |
| | =1 IF A STATE DOES NOT PROHIBIT DECREASING THE LEVEL OF JUDGES' SALARIES; =0 IF A STATE PROHIBITS DECREASING THE LEVEL OF JUDGES' SALARIES | + |
| POLITICAL PARTY | <i>A BINARY VARIABLE REPRESENTING THE POLITICAL PARTY GOVERNING THE STATE</i> | |
| | =1 IF THE POLITICAL PARTY AT THE CREATION OF THE COURT IS THE SAME AS THE POLITICAL PARTY IN CHARGE WITHIN THE ANALYZED YEARS (2006, 2007 AND 2008) =0 1 IF THE POLITICAL PARTY AT THE CREATION OF THE COURT IS DIFFERENT FROM THE POLITICAL PARTY IN CHARGE WITHIN THE ANALYZED YEARS (2006, 2007 AND 2008) | + |
| PLAINTIFF | <i>A BINARY VARIABLE REPRESENTING THE NUMBER OF JUDGES INCORPORATED TO A COURT</i> | |
| | =1 IF THE PLAINTIFF IS AN INDIVIDUAL =0 IF THE PLAINTIFF IS A COMPANY | - |

b. Hypotheses

Branch (Branch affiliation) it is expected that the type of branch to which courts belong will influence the probability of upholding the lawfulness of government acts. We hypothesize that administrative courts that are part of the judicial branch are more independent than courts that are part of the executive branch, therefore, a court belonging to the executive branch is more likely to confirm the lawfulness of a government act than a court belonging to the judicial branch. The sign for the estimated coefficient for Branch is expected to be positive ($b_1 > 0$).

Appointment (Type of judge appointment) the judges nominations and appointment procedures differ across states. In general all three branches, government, executive and judicial may participate in these processes. The degree of participation of executive in nominating and appointing judges is hypothesized to be a factor influencing the independence of courts. We hypothesize that the probability of upholding government acts is higher when decisions are made by courts in which the executive branch is part of the appointment procedure. Therefore the expected sign of this variable is positive ($b_2 > 0$).

Tenure (The type of judge tenure) the states differ in terms of the rules relating to the tenure of judges. We hypothesized that the existence of a life-time appointment decreases the element of dependence on the executive branch. Therefore, the sign for the estimated coefficient for Tenure is expected to be positive ($b_3 > 0$).

Regulated Salaries. Some states have prohibitions on decreasing salaries of judges and some states do not have similar prohibitions, thus allow the executive branch to influence the level of judge salaries. The courts of states where that have such prohibitions are likely to be more independent of executive and legislative branches than those in states where there are no such prohibitions. Thus, we hypothesize that the probability of upholding the government action is likely to be higher in the states without prohibitions on decreasing the salaries, than in the states with these prohibitions. Therefore, the sign of the coefficient for Salary is expected to be positive ($b_4 > 0$).

Political Party. Some states have had governments from the same political party since the creation of the court until the time when cases were reviewed. We hypothesize that the probability of upholding the government action is likely to be higher in those states that have been governed by the same political party throughout the life of the court, than those that have been working under the government of different political parties. Therefore, the sign of the coefficient for Political Party is expected to be positive ($b_5 > 0$).

Type of plaintiff. This variable controls for the type of plaintiffs. The two types are: individual and companies. Our hypothesis is that the weaker the plaintiff the higher the probability of upholding government acts. The expected sign for the estimated coefficient for Age of Court is therefore expected to be negative ($b_6 < 0$).

IV. Findings

Preliminary results

Before analyzing the data with the control variables above described we ran the regression with the four independent variables. We used the four kinds of appointment and the three kinds of tenure to run the regression as follows:

TABLE 4

| VARIABLE | DEFINITION | EXPECTED SIGN |
|--|--|---------------|
| APPOINT#1 | =1 IF THE APPOINTMENT IS #1 DEGREE OF INDEPENDENCE – MOST INDEPENDENT - JUDICIAL BRANCH PROPOSES A CANDIDATE AND LEGISLATIVE BRANCH APPROVES; =0 OTHERWISE | REFERENCE |
| APPOINT#2 | =1 IF THE APPOINTMENT IS #2 DEGREE OF INDEPENDENCE – SOME JUDGES ARE NOMINATED AND APPOINTED BY LEGISLATIVE BRANCH AND SOME JUDGES ARE NOMINATED BY JUDICIAL BRANCH AND APPROVED BY LEGISLATIVE BRANCH; =0 OTHERWISE | + |
| APPOINT#3 | =1 IF THE APPOINTMENT IS #3 DEGREE OF INDEPENDENCE – JUDGES ARE NOMINATED AND APPROVED BY LEGISLATIVE BRANCH; =0 OTHERWISE | ++* |
| APPOINT#4 | =1 IF THE APPOINTMENT IS #4 DEGREE OF INDEPENDENCE – JUDGES ARE NOMINATED BY JUDICIAL BRANCH, AND ARE FURTHER SELECTED BY EXECUTIVE BRANCH TO BE APPROVED BY LEGISLATIVE BRANCH; =0 OTHERWISE | +++ |
| APPOINT#5 | =1 IF THE APPOINTMENT IS #5 DEGREE OF INDEPENDENCE – LEAST INDEPENDENT – JUDGES ARE NOMINATED BY EXECUTIVE BRANCH AND ARE APPROVED BY LEGISLATIVE BRANCH; =0 OTHERWISE | ++++ |
| <i>A SET OF BINARY VARIABLES REPRESENTING JUDGES' TENURE</i> | | |
| TENURE#1 | =1 IF JUDGE APPOINTMENT IS FOR A SPECIFIC PERIOD OF TIME; =0 OTHERWISE | REFERENCE |
| TENURE#2 | =1 IF JUDGE APPOINTMENT IS FOR A SPECIFIC PERIOD OF TIME BUT THERE IS A POSSIBILITY FOR RE-ELECTION; =0 OTHERWISE | + |
| TENURE#3 | =1 IF JUDGE APPOINTMENT IS FOR A SPECIFIC PERIOD OF TIME BUT THERE IS A POSSIBILITY FOR A LIFE-TIME APPOINTMENT; =0 OTHERWISE | ++* |

The results were the following:

TABLE 5

Logistic regression Number of obs= 3503
 LR chi2(8) =105.55
 Prob > chi2 =0.0000
 Pseudo R2 =0.0372

Log likelihood = -1365.0516

| L | COEF. | STD. ERR. | Z | P> Z | [95% CONF. INTERVAL] | |
|------------------------|------------|-----------|--------|-------|----------------------|------------|
| (+)* BRANCH | 0.3739929 | 0.1684096 | 2.22 | 0.026 | 0.0439161 | 0.7040697 |
| (+) APPOINT#2 | 1.1757900 | 0.6110097 | 1.92 | 0.054 | -0.0217674 | 2.3733460 |
| (++) APPOINT#3 | -0.2171541 | 0.1972603 | -1.10 | 0.271 | -0.6037771 | 0.1694690 |
| (+++) APPOINT#4 | -1.4458750 | 0.2716523 | -5.32 | 0.000 | -1.9783040 | -0.9134464 |
| (++++) APPOINT#5 | -0.3392082 | 0.1583208 | -2.14 | 0.032 | -0.6495112 | -0.0289052 |
| (+) TENURE#2 | 0.6568936 | 0.1358941 | 4.83 | 0.000 | 0.3905461 | 0.9232410 |
| (+) TENURE#3 | 0.3086838 | 0.1537854 | 2.01 | 0.045 | 0.0072699 | 0.6100976 |
| (+) REGULATED SALARIES | -0.2425423 | 0.1122103 | -2.16 | 0.031 | -0.4624703 | -0.0226142 |
| _CONS | -2.0601450 | 0.1743773 | -11.81 | 0.000 | -2.4019180 | -1.7183710 |

Note: * indicates hypothesized signs from Table 2.

The magnitude and statistical significant of the estimated effects suggested that the included explanatory variables were significant determinants of the administrative court decision-making process, and the degree of courts' independence did affect the likelihood of upholding government actions/decisions.

All estimated coefficients except Appoint#3 were statistically significant at a 5% significance level. Furthermore, the estimated coefficients for the type of judges' appointment were statistically significant as a group (test p-value=0.0000), and similarly the estimated coefficients for the judges' tenure effect were statistically significant as a group as well (test p-value=0.0000). In general, the estimated results supported the predictions.

The key estimated coefficient of interest is the one for Branch; it is positive and statistically significant, thus confirming that administrative courts that are part of executive branch are more likely to uphold the government act/decision than administrative courts that are part of judicial branch. The main implication of this empirical evidence is that courts part of judicial system is more independent.

There is empirical evidence suggesting that the more dependent the judges' tenure process on the executive and legislative branches, the more likely these judges are to uphold the lawfulness of government acts.

The empirical evidence on the effect of the type of judge appointment is mixed. On one hand, as hypothesized, the estimated coefficient for Appoint#2 is positive and statistically significant, thus suggesting that as compared to the reference group of the most independent judge appointments (Appoint#1), an increase in the dependence of the judge appointment procedure on the executive branch increases the likelihood of upholding the lawfulness of government decisions. On the other hand, the estimated

coefficients for Appoint#3, Appoint#4 and Appoint#5 are negative, which contradicts the predictions.

Finally, the estimated effect for the processes of judges' salary determination is not as expected.

Analysis with control variables

After this preliminary analysis we ran the regression with the control variables and using the other classification for Appointment and Tenure.

We decided to maintain in the model only those variables that were significant at the 99% confidence level. The first regression we ran included the following variables: Dependent variable: Lawfulness; Independent variables: Branch, Tenure, Appointment, Regulated Salaries, Political Party and Plaintiff.

TABLE 6. THE RESULTS

| L | COEF. | STD. ERR. | Z | P> z | [95% CONF. INTERVAL] | |
|------------------------|------------|-----------|--------|-------|----------------------|------------|
| (+)* BRANCH | 0.8713894 | 0.1541684 | 5.65 | 0.000 | 0.5692248 | 1.173554 |
| (+) TENURE | .2681729 | 0.159174 | 0.092 | 0.000 | -1.0438025 | 0.5801483 |
| (+) APPOINTMENT | -0.7742403 | 0.1480063 | -5.23 | 0.000 | -1.064327 | -0.4841534 |
| (+) REGULATED SALARIES | -0.3893026 | 0.1160694 | -3.35 | 0.001 | -0.6167943 | -0.1618108 |
| (+) POLITICAL PARTY | 0.1152062 | 0.1422463 | 0.81 | 0.418 | -0.1635914 | 0.3940038 |
| (-) PLAINTIFF | 0.7294986 | 0.1202344 | 6.07 | 0.000 | 0.4938435 | 0.9651536 |
| _CONS | -2.125056 | 0.1496652 | -14.20 | 0.000 | -2.418394 | -1.831717 |

From this regression the least significant variable was Political Party with a p-value of 0.418, therefore we ran another regression without this variable.

TABLE 7. THE RESULTS OF THE SECOND REGRESSION

| L | COEF. | STD. ERR. | Z | P> z | [95% CONF. INTERVAL] | |
|------------------------|------------|-----------|-------|-------|----------------------|------------|
| (+)* BRANCH | 0.8443406 | 0.1508224 | 5.60 | 0.000 | 0.5487342 | 1.139947 |
| (+)* TENURE | 0.3441426 | 0.1284844 | 2.68 | 0.007 | 0.0923178 | 0.5959673 |
| (+) APPOINTMENT | -0.8007444 | 0.1445181 | -5.54 | 0.000 | -1.083995 | -0.5174942 |
| (+) REGULATED SALARIES | -0.3592316 | 0.1101841 | -3.26 | 0.001 | -0.5751885 | -0.1432747 |
| (-) PLAINTIFF | 0.7268822 | 0.1201529 | 6.05 | 0.000 | 0.4913869 | 0.9623775 |
| _CONS | -18.08662 | 2.32384 | -7.78 | 0.000 | -2.339695 | -1.809081 |

As can be seen with the incorporation of the control variables, the only explanatory variables with the expected signs were Branch and Tenure. These two variables were significant and their sign was as expected.

The coefficient of Branch variable was positive and significant at the 99% confidence level. This means that when a court pertains to the Executive Branch it is more likely to decide Lawfulness than when being part of the Judicial Branch. This result confirms the hypothesis.

The coefficient of Tenure was positive and significant at the 99% level of confidence. This means that those courts that guarantee tenure to their judges are less likely to decide Lawfulness than those that don't. This result confirms the hypothesis.

The coefficient of Appointment variable was negative and significant at the 99% confidence level. This means that when the executive branch takes part in the appointment process the court is less likely to decide Lawfulness. This result is contra intuitive because since the Executive Branch is the defendant in all these kinds of cases the expected sign would be the opposite.

The coefficient of Regulated Salaries was negative and significant at the 99% level of confidence. This means that when there is a prohibition for decreasing judges' salaries courts are less likely to decide Lawfulness. The result again is contra intuitive. One would expect that the prohibition would increase courts' independence.

The coefficient of Plaintiff was positive and significant at the 99% level of confidence. This means that when the plaintiff is a company courts are more likely to decide Lawfulness. The result again is contra intuitive.

Discussion

In this part of the paper we want to discuss some effects that might affect the findings and some issues that have to be improved in a further analysis.

Good Government effect: The main problem that can arise in this kind of analysis is that lawfulness is not a perfect proxy for court's independence. The main reason is that lawfulness as a result of a trial might be explained by the existence of good executive branches that acted lawfully. The counter argument for this is that, since in the Mexican administrative system there are not many incentives for citizens to sue the government, because of a lack of compensatory damages and lawyer fees, it can be expected that just in those cases in which the plaintiff is certain the executive branch acted in an unlawful manner will sue. Thus, in cases on which the stakes are high private citizens will have the incentive to sue the government just to modify the government act.

Selection effect: This effect might arise if plaintiffs are aware of executive courts dependence. If this is true it might be the case that plaintiffs invest less in those States with courts incorporated to the executive branch than in those States in which courts are incorporated to the judicial branch. But this effect can also lead to an extreme situation in which plaintiffs aware of the courts executive dependence decide not to sue. If plaintiffs that believe a court is dependent on the executive branch don't sue then the results of the existing cases have no selection effect. In any case, the selection problem would be more of a problem when stakes are low than when stakes are high.

Interdependence of control variables: As seen in the above section, the findings with the incorporation of the control variables were mixed and can't be explained by a reasonable theory. The reason of this can be found in the characteristics of the control variables, since most of them can depend on the existence of another one of them. For a future analysis control variables should be referred in a more direct manner to the States' characteristics and not to the courts characteristics.

Reality vs. normative system: The results above described can also be a consequence of a distortion in the real appointment procedure versus the one referred in the norm. For example, in those States in which the legislative branch participated in the appointment procedure but the political party of the legislative branch is the same as the executive branch it could happen that the executive branch is effectively participating in the appointment through its party's majority in the legislative branch.

Conclusions

We believe that important data has been found to shed some light in our two initial questions:

1. Does design of administrative courts as part of the judiciary or the executive have an impact on their independence?
2. Is there a design that assures a better protection of the rule of law and an efficient system of accountability of the administrative authorities?

This paper provides evidence that design matters. With the results given by this study it seems to be that the discussion on whether administrative courts should be part of the judicial power or part of the executive power is not useless, since it does seem to affect the final decisions of administrative courts in Mexico, hence the independence of these courts and the degree of protection of the rule of law vary from system to system.

The purpose of the analysis was to determine if branch, appointments, tenure and salaries influenced administrative courts' outcomes. The result was that at least branch and tenure are significant to the way administrative courts solved cases. The next step is to analyze the weight of each of these characteristics in order to achieve a more accurate conclusion, and to try to control for other variables that may also affect the outcome of the trials.

The historical reasons of the existence of the *Conseil d'Etat* and its evolution make this model very difficult to duplicate in other latitudes. Therefore although the Mexican administrative courts that belong to the executive branch claim to follow the French design this article shows that their outcomes and prestige is quite different.

Formal rules that determine the relationship of judges to each other and to the other branches of the states government create different incentives and change judges' behavior. Normative design matters and has an impact on the protection of the rule of law, as well as the accountability of the administrative authorities. The branch to which the court pertains does influence courts' outcomes therefore it has an impact on the strictness of the supervision of the administrative authorities. This is not to say that independence can be achieved completely by being part of the judiciary having the highest degree of independence in these variables, since there are examples of the opposite. Independence appears to be a very difficult quality to achieve in any type of courts, but especially in administrative ones, were the relationship with agencies and governments is very close. It seems not to be sufficient but necessary to have the characteristics above mentioned to achieve independence therefore designs matters.

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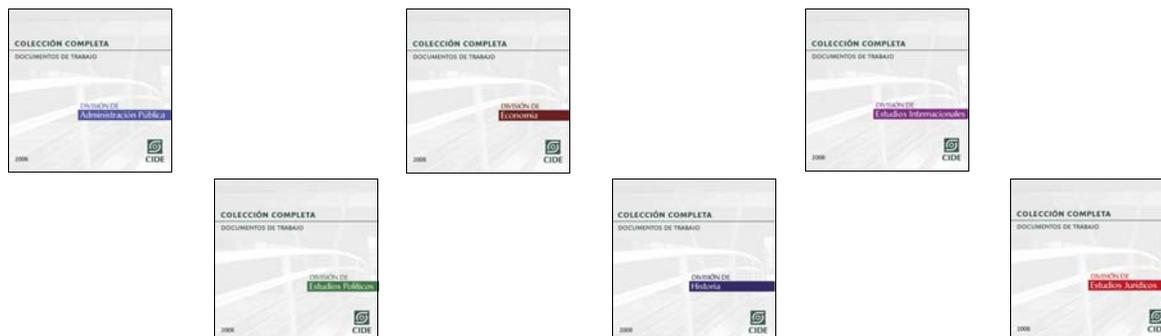
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