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legal memo

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The adoption of voluntary regulatory mechanisms to complement the State's "command and control"

Environmental issues are complex and cross-cutting. The mechanisms for their regulation must, therefore, provide a rich combination of instruments that allow the State to establish an optimal balance between reasonable costs and administrative burdens for the regulated parties and the treasury, and effective environmental protection. Voluntary mechanisms may constitute a viable complementary alternative for the achievement of an adequate environmental policy.

1. Introduction

In the history of environmental law in Mexico we can recognize two milestones that set relevant guidelines. The first refers to the **amendment to the Constitution made in August 1987**, which modified article 73, section XXIX, subsection G, in order to give the Congress of the Union the power to issue laws establishing the concurrence between the Federal Government, the governments of the states and the municipalities, within the scope of their respective competencies, in matters of environmental protection and the preservation and restoration of the ecological balance.

This gave way, in 1988, to the enactment of the LGEEPA (since its predecessor, the Federal Environmental Protection Law, was restricted precisely to the federal sphere). The LGEEPA would be extensively reformed in 1996, after the signing of the Free Trade Agreement (NAFTA) with the United States and Canada, due, among other reasons, to the need to homologate some figures and provisions with respect to the countries with which the agreement was signed, including, for example, the name, nomenclature, and criteria for the declaration of natural protected areas.

The second milestone to be considered took place in 1992, when the General Assembly at the United Nations Conference held in Rio de Janeiro approved the **Rio Declaration on Environment and Development -also known as the Rio Summit-** from which the principles that today govern current environmental law were derived and which at the time permeated the different laws on the subject. This year was also paradigmatic in areas of International Public Environmental Law, as the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity were signed (both of which have had an important influence on national legislation).

Based on the above, the foundations were laid for the configuration of environmental policy instruments and their guiding criteria.

2. Environmental policy instruments and guiding principles

a. Guiding criteria

The guiding criteria for the public administration of environmental policy that govern environmental law in our country are as follows:

The following are provided for in Article 15 of the LGEEPA. Relevantly, it is worth highlighting the following:

- Ecosystems are the common heritage of society and the life and productive possibilities of the country depend on their balance.
- Whoever performs works or activities that affect or the Company is obliged to prevent, minimize, or repair the damage caused, as well as to assume the costs that such damage implies. Likewise, incentives should be given to those who protect the environment, promote, or carry out actions to mitigate and adapt to the effects of climate change and make sustainable use of natural resources.

This is extremely relevant for the proper application of the Environmental Impact Assessment, a highly relevant environmental policy instrument.

- Non-renewable natural resources should be used in such a way as to avoid the danger of their depletion and the generation of adverse ecological effects; and
- Everyone has the right to enjoy an adequate environment for their development, health and well-being, a guarantee enshrined in Article 4 of the Constitution.

b. Environmental policy instruments

These are instruments of different kinds -recognized in the LGEEPA- that legitimize the intervention of the State to solve the problems underlying the protection of the environment.

These instruments are:

- Environmental planning;
- Ecological land management;
- Economic instruments;
- Environmental regulation of human settlements;
- Environmental impact assessment;
- Official Mexican environmental standards;
- environmental self-regulation and audits;
- and environmental research and education.

There are other environmental management instruments that, due to their relevance, are worth mentioning:

1. The establishment of Natural Protected Areas;
2. Access to environmental information and citizen participation;
3. Environmental surveillance, inspection, and supervision; and
4. The preparation of technical and justification studies to analyze land use changes in forest lands.

Of course, the above list is not exhaustive, and the introduction and reform of the mentioned mechanisms is due, among other reasons, to what is periodically agreed in the different conferences of the parties to the international instruments signed and ratified by Mexico, as well as to the voluntary instruments adopted by private companies, including certain international certifications, which nurture our domestic environmental compliance framework.

3. Regulatory mechanisms

Environmental regulation must make use of all the suitable and necessary instruments to solve current environmental problems, so there is a tendency to explore ways in which the authority can make use of its powers in a more efficient and economic manner without having to make substantial investments in financial, human and material terms; in this sense, self-regulation - understood as all those mechanisms that arise from voluntary action- is one of the most desirable alternatives for this to happen.

Such self-regulation must be carefully designed to work both ways, both to preserve the fundamental values of environmental law and to enable it to achieve its objective, as well as to provide legal certainty for investments and, at the same time, an incentive for companies to voluntarily seek to comply with the standards to the best of their abilities.

Despite the above, Mexican environmental legislation is more oriented towards "command and control" regulatory approaches, that is, the establishment of a general regulation and the search for its compliance, which, by definition, can lead to deficiencies.

This is because many companies that could go beyond such compliance do not do so, precisely because the standard was set to exhaust only a general standard of compliance.

A typical example of this is the limits established in the various official Mexican standards. These standards establish maximum emission parameters for pollution control, and, in many cases, they are homogeneous parameters for very diverse industries.

However, for some years now, it has been recognized as a global trend to promote and strengthen instruments and regulations that favor strategies oriented towards voluntary compliance, to provide alternatives to traditional regulatory mechanisms of command and control. There are several reasons for this:

- Emission permits (also known as "allowances") or make changes in their processes, inputs, equipment, etc., in order to comply with progressively stricter greenhouse gas emission parameters.
- Command and control instruments tend to establish parameters of general application that are too lax, since the same standard must be able to be met by all potential regulated parties (even though there may be regulated parties that, with relative ease or affordability, could assume changes that go far beyond what is established in a NOM or regulation).
- The command-and-control instruments require a substantial investment by the government in order to have a broad and effective verification, translated into a robust base of verifiers at the national level, as well as sufficient human resources to defend, in due course, its sanctioning determinations.

On the other hand, voluntary mechanisms can be much more affordable for the treasury (or in other words, for the taxpayer, including all of us) and allow the regulated party to hire a verification unit, certifier, environmental consultant, etc., which must be supervised by the public administration, under different schemes.

Of course, we believe that the State should never give up its powers of inspection, supervision and oversight when attempting to promote self-regulation mechanisms. This is so because the authority's powers in this matter are of public order.

However, the State can and must make use of alternative mechanisms, supported by third parties, to complement its functions, for the sake of an integral and holistic application of environmental policy.

To this end, it would be ideal to improve instruments such as the Environmental Audit (an instrument whose application has declined in the last decade) and other certification schemes, so that they can offer greater reliability in their diagnoses and results (there have been cases of companies that have obtained Clean Industry Certifications and have presented deficiencies in their environmental compliance), as well as greater and better benefits for those who hold such certifications and recognitions, including: **(i) receiving better tax treatment, (ii) being preferred in public or private tenders, (iii) obtaining soft loans from private and development banks, and (iv) receiving better conditions for the extension of the term of the certification: (i) receiving better tax treatment, (ii) being preferred in public or private bids, (iii) obtaining soft loans from private and development banks, and (iv) receiving better conditions for the extension of their permits and authorizations, among many others.**

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