Mexico

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Mexican law in 2011 has shown its vibrancy through constitutional amendments, judicial decisions, legislation, regulatory actions, and diplomatic achievements. New constitutional amendments affirm the protection of human rights in accord with international standards, broaden the accessibility of Mexico's courts for protection of those rights and of individual guarantees, and address the procedural excesses associated with Mexico's signature writ of *amparo*. Mexico's Supreme Court further embraced the judicial role in assuring the rule of law, notably with a decision on military justice requiring all Mexican judges to review the consistency of challenged acts with Mexico's undertakings pursuant to the Inter-American Convention on Human Rights. Legislative and popular attention remains focused on implementing the constitutionally mandated overhaul of Mexico's criminal justice system, moving it from an inquisitorial to an adversarial model. Mexico's competition law authorities in 2011 have taken actions that confirm their relevance to the challenges of monopolies in Mexico. Legislation affirming case law supportive of arbitration further consolidates arbitration as an effective tool for resolution of business disputes. The North American Free Trade Agreement (NAFTA), linking Mexico to the U.S. and Canadian economies, is the source of a growing compliance audit practice relative to the origins of goods and is the framework for the 2011 achievement of cross-border trucking between the United States and Mexico. Also, Mexico adopted new food labeling require-

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ments and the United States maintained its position on the creditability of a broadly applied Mexican tax.

I. Constitutional Law

The 2011 amendments to Mexico's Constitution add express protection of human rights to the guarantees of individual rights previously contemplated.[1] The amendments also redefine the writ of *amparo*, long a signature characteristic of Mexico's legal system, which allows anyone whose rights are violated under color of law to seek protection from a federal court. Recognizing the profound implications of the amendments for the judicial role in Mexico, Justice Juan N. Silva Meza, President of Mexico's Supreme Court, declared:

> Between the Mexican Constitution and international treaties in matter of human rights that obligate us, there are no divergences, there is no contradiction: their origin is the same. Accordingly, the reform is not an attack against the Constitution: it fortifies it, it improves it. In this direction must be understood the relation between the two reforms: the instrument protector of rights *par excellence* [the writ of *amparo*], is broadened, correspondingly the norms concerning human rights, among which the writ of *amparo* itself is encountered, will be interpreted, always favoring the broadest protection of persons.[2]

Indeed, the second and third paragraphs of the Constitution's opening article now provide:

> The rules on human rights will be interpreted in accord with the Constitution and with international treaties on the subject, at all times granting people a wider protection. All authorities within the scope of their powers have the obligation to promote, respect, protect and guarantee human rights in accord with the principles of universality, interdependence, indivisibility and progressiveness. Consequently, the State must prevent, investigate, punish and redress violations of human rights in the terms established by law.[3]

A. Human Rights

The Constitution's First Title referenced only guarantees of individual rights for forty-nine years, but now also references human rights.[4] To guarantee individual rights connotes broadly action to respect, protect, and even defend. Human rights, in contrast, are

1. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 6 de Junio de 2011 (Mex.).

2. Justice Juan N. Silva Meza, President of the Supreme Court of Justice of the Nation and the Council of the Federal Judiciary, Remarks on the Signing of the Decree Amending Miscellaneous Articles of the Constitution of the United Mexican States (June 9, 2011) (transcript *available at* http://www.cjf.gob.mx/FirmaDecreto.html).

3. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, arts. 103–04, Diario Oficial de la Federación [DO], 6 de Junio de 2011 (Mex.).

4. Ignacio Burgoa, Diccionario de Derecho Constitucional [Constitutional Law Dictionary], Garantias Amparo [Amparo Guarantees] (1998).

entitlements of each person to privileges, freedoms, and forms of civil, political, economic, social, and cultural development. They are to be promoted, not just defended.[5] Further essential points of the amendments are:

- definition of the limited cases in which exercise of rights can be restricted or suspended;
- requirement that authorities who fail to accept recommendations of bodies for protection of human rights publish their reasons; and
- empowerment of the National Commission on Human Rights as the investigative authority for serious human rights violations.[6]

Mexico's Constitution now newly contains an express prohibition on discrimination on grounds of sexual preferences. "It maintains the prohibition against discrimination based on ethnic or national origin, gender, age, disability, social status, health status, religion, opinions, marital status, or any other reason in violation of human dignity or any discrimination that negates or impairs individual rights and freedoms."[7]

These reforms impact the federal administration of justice in several ways. Applicability of the writ of *amparo* is extended by the constitutionalization of human rights embodied in the international treaties to which Mexico is a party. Moreover, the constitutional amendments expressly introduce new procedural rights such as: (i) the *amparo adhesivo* to protect individual and collective interests; (ii) actions against authorities for violations of human rights arising from failures to act;[8] and (iii) provision for declaration of unconstitutionality with general effect.[9] Details of these rights are left to implementing legislation that remains pending.

B. Amparo

The combination of the constitutional amendments on human rights and those relative to the writ of *amparo* allow the writ of *amparo* to:

- be used in pursuit of the constitutionally recognized human rights;
- be used by the organizations of civil society in defense of collective rights to health, in preservation of the environment, or for historical patrimony;
- be available to challenge official arbitrariness and failure to comply with legal mandates;
- be available to protect injured parties in addition to successful *amparo* plaintiffs; and
- be employed to obtain the benefits of a law's declaration of unconstitutionality.

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5. Instituto de Investigaciones Jurídicas [Legal Research Institute], Diccionario Jurídico Mexicano [Mexican Legal Dictionary] 1063–66 (7th ed. 1994) (Mex.).

6. Secretaría de Relaciones Exteriores [Ministry of Foreign Affairs], *El Senado Aprueba la Reforma Constitucional en Materia de Derechos Humanos* [Senate Approves Constitutional Reform in the Field of Human Rights] 1, 3 (Apr. 2010) (Mex.).

7. Aline Cárdenas, *Constitutional Reform on Human Rights*, 34 A.B.A. Sec. Int'l L. (Mexico Update) 1, 5 (2011).

8. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 103(I), Diario Oficial de la Federación [DO], 6 de Junio de 2011 (Mex.) (providing that the Courts of the Federation shall settle any dispute arising "[u]nder general rules, acts or omissions of the authorities that violate human rights, and the guarantees granted, for their protection by this Constitution, and by the treaties to which the Mexican State is a party.").

9. *Id.* art. 107.

The constitutional amendments relative to *amparo* modify the nature of the writ of *amparo*, the organization of the judiciary, and how binding judicial precedent, known as *jurisprudencia*, is established in Mexico.

Amparo actions, whether brought as interlocutory challenges or following otherwise dispositive judicial rulings, have been criticized for creating delay in Mexican litigation. To avoid serial *amparo* proceedings, Constitution Article 107(III)(a) redefines how procedural violations are reviewed through direct *amparo*. Henceforth, the circuit collegial court is required to consider all procedural violations raised by a complainant, plus any that it finds on its own motion, to define definitively what is to be addressed on remand. Procedural violations not so considered cannot be raised in a subsequent *amparo* proceeding, either by the complaining party or at a court's own motion.

Constitution Article 107(I) broadens the concept of the interest of an injured party, under which standing to bring a writ of *amparo* is accorded, by incorporating the concepts of individual or collective interest to bring an *amparo* action against acts not emanating from judicial authorities. This is true when the challenged act violates rights recognized by the Constitution and thereby affects the legal sphere of the citizen, whether directly or by virtue of the citizen's special situation under the legal system. The requirement of impingement on a subjective right in a personal and direct manner remains only as to acts or resolutions of judicial, administrative, or labor courts. Many accordingly anticipate a flowering of class-action litigation in Mexico.

To assure protection of parties with an interest in a successful *amparo* challenge, in addition to the complaining party, an *amparo* action for "adherence" may be brought, although implementing legislation is required to determine the form and time periods in which it must be brought. Ordinary direct *amparo* actions remain subject to the prerequisites of the principle of definitiveness and the obligation to exhaust ordinary recourses to raise procedural violations. But exceptions remain for cases involving the rights of minors or incompetent persons, civil status, order or stability of the family, and criminal matters brought by the person sentenced.

Constitution Article 107(IV) more clearly establishes the availability of the writ of *amparo* in administrative matters against acts and omissions of non-judicial authorities. It also defines when the writ is available, notwithstanding the potential availability of ordinary recourses for suspension of the challenged administrative acts.

Constitution Article 107(IX) establishes the availability of recourse for review of direct *amparo* rulings in cases that rule against the constitutionality of general norms, establish the direct interpretation of a constitutional precept, or do not decide such questions when they have been raised, provided that they concern a criterion of importance and transcendence, as recognized by the Plenary Chamber of the Supreme Court. The scope of the recourse is limited solely to the decision of specifically constitutional questions.

Constitution Article 107(X) addresses the judicial power to suspend an act challenged through an *amparo* proceeding. In essence, implementing legislation is contemplated to provide guidance on how a court should weigh the *prima facie* appearance of validity of the act against the social interest in its suspension. Subsection XVII of Article 107 eliminates the joint and several liability that was contemplated against a responsible authority failing to suspend a challenged act or that provided an insufficient guarantee. Consequences for an authority's failure to comply include dismissal from office and, if the authority has acted culpably, criminal prosecution.

Constitution Article 107(XVI) allows the Supreme Court to grant deferred compliance with an *amparo* ruling at the request of the responsible authority and of the hierarchical superior. Criteria for the grant of deferred compliance established by the Supreme Court turn on whether compliance burdens society disproportionately to the benefits to the complaining party, or when, because of circumstances of the case, it is impossible or disproportionately burdensome to restore the situation that prevailed prior to the violation. The complaining party in such an instance might be deemed adequately compensated by the payment of damages. The parties in the proceeding can agree on the substitute compliance through an accord ratified before the specific judicial body.

C. Jurisprudencia

Binding precedent, apart from matters of constitutional review, is established in the Mexican legal system by a court's repetition of a legal holding on five occasions without contradiction.[10] Constitution Article 107(XIII) newly contemplates that plenary chambers of each circuit will hear cases of conflicting rules of *jurisprudencia* sustained by the collegial courts of the same circuit. Constitution Article 94 contemplates the power of the Federal Council of the Judiciary to establish such chambers, taking into account the number and specialization of the circuit courts comprising each circuit, but leaves the composition and functioning of the chambers to be implemented by further legislation.

Constitution Article 107(XIII) adopts a procedure to resolving conflicting *jurisprudencia* adopted by collegial courts of the same circuit. It establishes that the Attorney General of the Republic, the collegial courts, district judges, and the parties in the proceedings from which conflicts arise, may denounce such conflicts before the plenary chamber of the corresponding circuit, so that it might decide which principle should prevail as *jurisprudencia*. Moreover, when the plenary chambers of distinct circuits, the plenary chambers of a circuit in a specialized subject matter of the same circuit, or the collegial tribunals of a single circuit with distinct specialization have conflicting *jurisprudencia* in resolving matters of their competence, any of the justices of the Supreme Court, the judges of the same plenary circuit chambers, and the bodies referenced in the foregoing paragraph, can denounce the contradiction before the Supreme Court, with the purpose that the relevant plenum or chamber can decide which principle will prevail.

Constitution Article 107(II) defines a framework for the principle of effectiveness of an *amparo* ruling by establishing an exception for *amparo* rulings against general rules that are not tax rules. When bodies of the Judicial Power of the Federation establish *jurisprudencia* by repetition in which a general norm is ruled unconstitutional, the Supreme Court will notify the issuing authority, and if the problem of unconstitutionality has not been addressed after ninety calendar days, the court, by majority of at least eight votes, may issue a general declaration of unconstitutionality that determines the reach and conditions in conformity with the terms of implementing legislation.

10. Ley de Amparo [LA] [Law of Amparo], *as amended*, arts. 192–93, Diario Oficial de la Federación [DO], 24 de Junio de 2011 (Mex.).

D. Federal Courts

In terms to be established by implementing legislation, both Houses of Congress, through their president, or the Federal Executive, by conduct of its legal advisor, will be able to seek priority judicial resolution of *amparo* proceedings, constitutional controversies, and actions of unconstitutionality by asserting urgency associated with the social interest or public order.[11]

In the clauses that now comprise Constitution Article 104, the catalog and types of matters within the competence of the federal courts are now specified by the addition of express constitutional grounding for jurisdiction over cases related to federal crimes. Further, Article 104 specifies the cases in which concurrent competence of state courts may exist, at the plaintiff's election, in the case of solely particular interests.

E. Military Justice

On July 14, 2011, the Mexican Supreme Court ratified a September 23, 2009 decision of the Inter-American Court of Human Rights that had condemned Mexico in connection with the apparent abduction of Rosendo Radilla Pacheco by elements of its military. The Mexican Supreme Court ruled that an ordinary judge could hear and address human rights violations by military personnel. Moreover, the Supreme Court ruled that all Mexican judges must accomplish "review of Conventionality," meaning judges must review and assure that all rules pertaining to human rights are applied in conformity with the Inter-American Convention of Human Rights. Accordingly, no judge, state or federal, may apply a general legal rule in a specific instance if its application would be incompatible with the Convention.[12]

II. Criminal Justice

In 2008, Mexico's Constitution was amended to mandate adoption of a new adversarial system of criminal justice, to foster a more transparent environment, and to afford greater due process and other internationally recognized human rights.[13] The amendment provides that it will be in full effect by 2016 in all thirty-three of Mexico's jurisdictions, namely its federal jurisdiction, its thirty-one constituent states, and its federal district serving as its capital city.[14] To date, ten states—including Baja California, Chihuahua, Durango, Guanajuato, Hidalgo, Estado de México, Morelos, Oaxaca, Yucatán, and Zacatecas—have moved forward significantly to implement the reform, while the rest, including the Federal District that holds Mexico City, vary in their degree of preparation,

11. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 104, Diario Oficial de la Federación [DO], 6 de Junio de 2011 (Mex.).

12. Resolución dictada por el Tribunal Pleno en el expediente varios 912/2010 y Votas Particulares formulados por los Ministros Margarita Beatriz Luna Romas, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Diario Oficial de la Federación [DO], 4 de Octubre de 2011, Página 1–4 (Mex.).

13. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, arts. 16–22, 73, 123, 155, Diario Oficial de la Federación [DO], 6 de Junio de 2011 (Mex.).

14. David A. Shirk, Judicial Reform in Mexico: Change & Challenges in the Justice Sector 4 (May 2010), http://catcher.sandiego.edu/items/peacestudies/2010-IngraShirk-JRM%20(2).pdf.

but lag behind.[15] On September 21, 2011, President Calderon sent to Congress a proposed draft Federal Code of Adversarial Criminal Procedure.[16] This draft and the eventual text adopted will greatly influence formulation of the thirty-two codes of criminal procedure in Mexico's thirty-one states and in its federal district.

In 2011, the film PRESUNTO CULPABLE (Presumed Guilty) by Mexican lawyers Roberto Hernandez and Layda Negrete, cinematographer John Grillo, and documentary filmmaker Geoffrey Smith, became the highest grossing Mexican documentary in Mexico's film-making history.[17] A "wake up call" for reform of the criminal justice system, this documentary "reveals the story of Antonio Zúñiga, a wrongly convicted man, and his struggle for justice and freedom."[18] Legal controversy has surrounded the film. The prosecution's sole witness "brought a lawsuit in which he claimed not to have authorized the taping of the trial or the public exposition of his testimony."[19] The court granted the witness a temporary suspension of the film's exhibition "with the result that movie theaters around Mexico halted their screenings. Subsequently, another court, presented with an *amparo* challenge to the ruling of suspension, set aside the suspension on condition that the film be modified [to not] divulge the identity of the witness."[20]

III. Antitrust

Two Mexican federal regulatory agencies—the telecommunications regulatory commission, Comisión Federal de Telecomunicaciones (COFETEL) and the Federal Competition Commission, Comisión Federal de Competencia (CFC)—took high profile actions with respect to telecommunications during 2011.

In April 2011, the CFC imposed an approximately US$1 billion fine on America Móvil, the dominant telecommunications carrier, on the basis of a finding that it had abused its dominant position by charging excessive fees for interconnections of its smaller competitors' networks to its own broader network.[21] The fine remains subject to appeal. The fine was calculated as the equivalent of ten percent of the company's assets, the maximum fine allowed for repeat offenses.

Separately, Mexico's Congress in April amended the Federal Competition Law effective as of May 11, 2011.[22] The amendments criminalize anticompetitive collusion with a potential ten years of incarceration and possible fines of up to eight percent of annual sales for abuse of market dominance, and ten percent in the event of collusion. The CFC may

15. *Id.* at 25.

16. Alonso González-Villalobos, *Mexico Commences Legislative Debates on Its Federal Code of Criminal Accusatorial Procedure*, 34 A.B.A. SEC. INT'L L. (MEXICO UPDATE) 1, 22 (2011).

17. John Hecht, *"Presento Culpable" Is Mexico's Highest-Grossing Documentary*, HOLLYWOOD REP. (Feb. 28, 2011), http://www.hollywoodreporter.com/news/presunto-culpable-is-mexicos-highest-162501.

18. Lorena Martínez León, *Presumed Guilty: A Glimpse at Mexico's Penal System and Criminal Procedure Laws*, 34 A.B.A. SEC. INT'L L. (MEXICO UPDATE) 1, 27 (2011).

19. *Id.*

20. *Id.*

21. *Mexico's CFC Explains $1Billion Fine Against Carlos Slim's Telcel for Monopolizing Mobile Market*, HISPANICALLY SPEAKING NEWS (Apr. 25, 2011), http://www.hispanicallyspeakingnews.com/notitas-de-noticias/details/mexicos-cfc-explains-1billion-fine-against-carlos-slims-telcel-for-monopoli/7162/.

22. Ley Federal de Competencia Económica [LFCE] [Antitrust Law], *as amended*, Diario Oficial de la Federación [DO], 30 Agosto de 2011 (Mex.).

also issue preventive injunctions when investigating monopolistic practices or prohibited concentrations and conduct "dawn raids."

This spring, COFETEL addressed several longstanding disputes involving the cost of interconnection offered to competitors. Because of the market structure, the profitability of any of the smaller competitors is constrained by the cost of being able to complete calls only through the dominant actor. COFETEL fixed a new, dramatically lower interconnection charge for calendar year 2011 at $0.3912 MXN per minute, and also moved to establish a methodology for calculating interconnection charges during the 2012 calendar year.[23] On May 3, 2011, Mexico's Supreme Court, by a vote of six to four, ruled on grounds of public order that federal judges may not suspend the effectiveness of the interconnection rates established by COFETEL.[24]

Mexico's telecommunications sector remains highly concentrated, with predominance of the market in the hands of one operator, and the balance shared among a limited number of competitors. Recent declarations of each of the leading actors in the telecommunications and television broadcast sectors, respectively America Móvil and Televisa, have emphasized their respective interests in crossing lines of demarcation between these sectors, and the prospect of further new competition in each as the result of the blurring of those lines. Administrative, rule-making, legislative, and judicial proceedings in respect of all the matters referenced here are anticipated to continue with intensity for the foreseeable future.

IV. Arbitration

A January 27, 2011 amendment to Mexico's Federal Code of Commerce added a new Chapter X, defining judicial intervention in commercial settlements and arbitration.[25] Chapter X is part of the Code of Commerce's Book Five, Title Four, which is applicable to both international and domestic arbitration, and was adopted July 23, 1993 as Mexico's incorporation of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (UMLA).

The Code of Commerce provides that in matters governed by Title Four no court shall intervene, except in nine instances[26]: (i) referral to arbitration when there is an arbitration agreement,[27] (ii) appointment of arbitrators,[28] (iii) judicial assistance in the taking of evidence,[29] (iv) consultation with respect to fees of the arbitral tribunal,[30] (v) recognition and enforcement of interim measures,[31] (vi) recognition and enforcement of arbitral awards,[32]

23. *Cofetel Reduces 60% Interconnection Rates; Telmex is Considering Curbing Investment*, MEXICAN BUS. WEB (Dec. 6, 2011), http://www.mexicanbusinessweb.com/english/noticias/inversiones-infraestructura.phtml?id=6241.

24. Anthony Harrup, *Mexico Supreme Court Favors Telecoms Regulator*, MARKET WATCH (May 3, 2011), http://www.marketwatch.com/story/mexico-supreme-court-favors-telecoms-regulator-2011-05-03.

25. Código de Comercio [CCo.] [Commercial Code], *as amended*, art. 1421, Diario Oficial de la Federación [DO], 9 de Enero de 2012 (Mex.).

26. *Id.* art. 1421.

27. *Id.* art. 1424.

28. *Id.* art. 1427.

29. *Id.* art. 1444.

30. *Id.* art. 1456.

31. *Id.* arts. 1479, 1480.

(vii) revision of arbitral tribunals' decisions on the challenge of arbitrators,[33] (viii) decisions of arbitral tribunals denying a challenge to their competence, issued in a form other than an award,[34] and (ix) requests for the annulment of arbitral awards.[35]

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[36] and, later, UMLA[37] each speak to the issue of the initiation of judicial proceedings by a party to an arbitration agreement, providing that, "at the request of a party that produces an arbitration agreement, the court shall refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of performance."[38] Title Four has a similar provision.[39] "How the requested court should enforce this provision was left to the law of the forum. Mexican law now provides for the stay of the judicial proceedings, allowing the arbitrators to" decide on their own jurisdiction.[40] "If the dispute is later terminated in arbitration, at the request of any of the parties, the judge shall terminate the court proceedings; if not, the judicial proceedings shall resume."[41]

The party that requests the referral to arbitration shall do so in its first submission on the merits.[42] After hearing the parties, the judge is to "stay the proceedings, unless hard evidence is provided to show the nullity of the arbitral agreement," its inoperability, or the impossibility to perform it.[43] "If the dispute is resolved through arbitration, then the court shall terminate its proceedings. If not, the court may resume the case and make a final decision."[44] There is no recourse against the judge's referral to arbitration.[45] While the issue is pending before the courts, the arbitration may commence or continue, and an award may be issued.[46]

When there is need to appoint an arbitrator, the judge, at the request of any of the parties, shall make the appointment. This may happen when the parties fail to agree on the sole arbitrator, when one of the parties fails to designate its arbitrator, when the two arbitrators appointed by the parties cannot agree on the chair, or when a party or a third party fails to perform a function entrusted to it in an agreed appointment procedure.[47] The same rules apply to substitution of an arbitrator.[48]

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32. *Id.* arts. 1462, 1463.

33. *Id.* art. 1429.

34. *Id.* art. 1432.

35. *Id.* art. 1457.

36. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 2, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

37. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INT'L COMMERCIAL ARBITRATION, art. 8, U.N. Sales No. E.08V.4 (2006).

38. Jose Maria Abascal, *The January 2011 Amendment to Mexican Law on Judicial Control and Cooperation in Mexican Arbitration*, 34 A.B.A. SEC. INT'L L. 1, 20 (2011).

39. Código de Comercio [CCo.] [Commercial Code], *as amended*, art. 1421, Diario Oficial de la Federación [DO], 9 de Enero de 2012 (Mex.).

40. Abascal, *supra* note 38, at 21.

41. *Id.*

42. CCo., art. 1464.

43. Abascal, *supra* note 38, at 21.

44. *Id.*

45. CCo., arts. 1464–65.

46. *Id.* art. 1424.

47. *Id.* art. 1427.

48. *Id.* art. 1431.

The judge shall first hear the parties and may convoke them to a hearing, and may also consult with one or more arbitral institutions, or commercial or industry chambers.

> Then, unless the judge considers that the list method is not convenient, the judge shall send the parties an identical list containing at least three names. Each party has ten days to return the list, after having deleted the name or names to which it objects, and numbered the remaining ones in the order of its preference. Then the judge shall make the appointment in conformity with the order of preference indicated by the parties. When making the appointment, the judge shall request the arbitrators to make disclosures on their impartiality and independence.[49]

The judge's decision is not subject to recourse, but the parties may challenge the arbitrators so designated.[50]

The 2006 UMLA provisions on recognition and enforcement of Interim Measures (IMs)[51] are now incorporated into Mexican law.[52] Unless the arbitral tribunal decides otherwise, IMs shall be recognized and enforced by Mexican courts: (i) at the request of any party, (ii) irrespective of the State in which they were issued, (iii) without judicial review of the arbitrators' decision, (iv) with the requirement of security when the arbitrators have not so provided or when needed for the protection of the rights of third parties, and (v) when the grounds for denying recognition and enforcement are limited. In general, the respondent bears the burden of proof. The requesting party, or the party that obtained recognition or enforcement, shall promptly inform the court of any suspension, termination, or modification of the IMs.

"Grounds for denial are similar to those contemplated by the New York Convention and UMLA."[53] Recognition and enforcement may only be denied if the party against whom it is sought proves: (i) nullity of the arbitration agreement, (ii) lack of notice of initiation of the proceedings or of the appointment of an arbitrator, (iii) lack of opportunity to present its case, (iv) breach of the rules, (v) *ultra petita*, (vi) security ordered by the arbitral tribunal not posted, or (vii) termination or suspension of the IMs.[54] Recognition and enforcement may also be denied if the court finds that enforcement would be contrary to Mexican public policy or that the subject matter of the dispute cannot legally be submitted to arbitration. If the court finds that the enforcement of the IMs would be incompatible with its powers and procedures, it may appropriately recast the IMs for purposes of their enforcement.

"The last paragraph of Code of Commerce article 1480 provides for the liability of the party that requested the IMs and the arbitral tribunal that granted them. Only a superficial reading can conclude that this is a case of strict liability."[55] The provision merely restates the Mexican tort liability system's essential conditions to impose liability; "namely that the IMs [are] unlawful and the damages [are] a direct and immediate consequence of

49. Abascal, *supra* note 38, at 21.
50. CCo., arts. 1467–68.
51. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, § 4.
52. CCo., arts. 1479–80.
53. Abascal, *supra* note 38, at 22.
54. CCo., arts. 1462, 1480.
55. Abascal, *supra* note 38, at 22.

the unlawful IMs."[56] More importantly, the liability may be regulated by agreement, except in case of *dolus*. "As most arbitration rules exempt arbitrators from liability, it is not likely to be a problem."[57]

A useful improvement is a new multipurpose, expedited proceeding that complies with due process of law and will serve to decide: (i) recourses against arbitrators' determinations on jurisdiction; (ii) challenges of arbitrators, (iii) IMs issued by courts, (iii) annulment of awards, and (iv) recognition and enforcement proceedings.[58] "Annulment and enforcement proceedings may be consolidated when both are filed in the same jurisdiction and the hearing has not yet been held. Appointment of arbitrators and related measures, judicial assistance on taking of evidence, and the opinion on arbitration fees are dealt with in *jurisdicción voluntaria* proceedings."[59] This is applicable in instances where the court is not asked to address disputed legal issues.

V. NAFTA

A. Audits

Compliance with the North American Free Trade Agreement (NAFTA) rules of origin, primarily located in Chapter Four, is presumed when the producer or the product exporter issues a Certificate of Origin, in the latter case, in reliance on a written representation from the producer.[60] "NAFTA Article 506 contemplates procedures to verify Certificates of Origin. The verifications may be conducted through written questionnaires to producers and exporters, or direct visits to their premises."[61]

Case law of Mexico's Tribunal Federal de Justicia Fiscal y Administrativa distinguishes questionnaires from visits to premises as distinct proceedings, each with its own set of rules.[62] This administrative court and several judicial tribunals have ruled that notifications in a different country must be made using certified mail and delivered to the legal representative of the company with proof of receipt.[63]

Written questionnaires initially inquire whether the recipient issued the Certificates of Origin.[64]

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56. *Id.*

57. *Id.*

58. CCo., arts. 1468–80.

59. Abascal, *supra* note 38, at 22.

60. North American Free Trade Agreement (NAFTA), U.S.-Can.-Mex., arts. 401, 506, Dec. 17, 1992, 32 I.L.M 289 (1993).

61. Luis F. Martinez, *Knock, Knock. Who's There? It's the NAFTA Auditors. The NAFTA What?*, 34 A.B.A. Sec. Int'l L. (Mexico Update) 1, 24 (2011).

62. Tribunal Federal de Justicia Fiscal y Administrativa [TFJFyA] [Federal Court of Fiscal and Administrative Justice], Second Section from the Superior Chamber, Book I, Quinto Época, tomo LXXVII, Mayo de 2007, Página 398 (Mex.) (Verifications of origin. The enforcement of the proceedings established in NAFTA is of discretional nature).

63. Tribunal Federal de Justicia Fiscal y Administrativa [TFJFyA] [Federal Court of Fiscal and Administrative Justice], Second Section of the Superior Chamber, año tres, Cuarto Época, tomo XXV, Agosto de 2000, Página 189 (Mex.) (Notice to the exporter of the document that communicates intent to perform a verification visit valid when made through courier companies.).

64. NAFTA, art. 506.

> Subsequently, the governmental authorities may request evidence to show that the company complied with the rules of origin. Producers may additionally be asked to describe the production process, including where each step of the process took place, and to provide bills of materials, invoices with details on the origin, tariff classification, and [the] supplier's name.
>
> Visits to the premises have the purpose of reviewing a foreign company's records and of observing the facilities used in production of the product. Prior to a visit, the inspecting customs administration must deliver a written notice of its intention to conduct the visit to the exporter or producer whose premises are to be inspected, and to the customs administration of the country in whose territory the visit is to occur. Visiting authorities must obtain prior written consent of the exporter or producer. Further, the visiting authorities are to accord the audited company the appointment of two witnesses for the visit.
>
> The trend of increasing international audits will probably continue, in an effort to deter foreign and domestic companies from creating or tolerating technical contraband.[65]

Targets of Mexican government audits should "respond to any official communications, complete Certificates of Origin accurately, and keep accounting and production records long enough to back the Certificates of Origin."[66] Under Mexican law, imports are generally auditable five years following importation, but because a verification of origin could last for up to two years,[67] importers, exporters, and producers should maintain records for longer periods of time.

"The competent authority in Mexico to perform verifications of origin is the Central Administration for Foreign Trade Taxation (*Administración Central de Fiscalización de Comercio Exterior*)."[68] It has the legal authority to verify compliance with international treaties to which Mexico is a party, and can audit any individual or legal entity, including importers, exporters, producers, and liable third-parties.[69]

The Mexican government uses international couriers to provide notifications to foreign companies that use Certificates of Origin in exporting to Mexico or in producing goods for such export.[70] Failure by U.S. or Canadian companies to respond to an official communication does not impede the Mexican government from making a potentially adverse determination. The decision by the Mexican government can be to:

- invalidate NAFTA Certificates of Origin issued by the producer or exporter;
- deny NAFTA preferential duty treatment for the products exported under those Certificates of Origin;

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65. Martinez, *supra* note 61, at 24–25.

66. *Id.* at 25.

67. Código Fiscal de la Federación [CFF] [Federal Tax Code], *as amended*, arts. 46-A, 67, Diario Oficial de la Federación [DO], 31 de Octubre de 2011 (Mex.).

68. Martinez, *supra* note 61, at 25.

69. Reglamento Interior del Servicio de Administración Tributaria art. 20 §§ A-V, art. 21 [Rules of Procedure of Service of Tax Administration], Diario Oficial de la Federacion [DO], 22 de Octubre de 2007 (Mex.).

70. David Hamill & Laura Farhang, *The Increase in NAFTA Verifications by the Government of Mexico: What Exports, Importers and Manufacturers Need to Know to Survive Such Audits*, 20 N. AM. FREE TRADE & INVESTMENT REP. 1–2 (2010).

- initiate legal procedures against the importers who used those NAFTA Certificates of Origin to collect the normal import duty rate, plus VAT, applicable antidumping duties, fines, penalties, and surcharges;
- undertake further NAFTA verifications of origin with the target producer and exporter for other fiscal years; and
- deny future NAFTA preferential duty treatment for identical goods.

The adverse consequences will likely concern additional parties other than the importer of record into Mexico, which is the entity against which a legal procedure is initiated by the government to collect unpaid duties.

> Because of the errors made by the producer or exporter who issued the NAFTA Certificate of Origin, the Mexican importer may then initiate a claim against the producer or exporter in the United States or Canada. Grounds for such a claim may include contractual breaches as well as claims under provisions of Mexico civil and commercial law.[71]

"In addition to the damage that may be caused to producers and exporters that do not pay sufficient attention to verifications of origin, importers often become involved, much to their surprise. Indeed, they typically are not even apprised by the Mexican authorities of the initiation of an investigation."[72] Mexican case law supports this harsh result, through rulings to the effect that because these international proceedings have the sole purpose of verifying Certificates of Origin, which can only be issued by a producer or exporter abroad, the importers need not be notified by the Mexican government.[73] Because the Mexican government does not share information with importers until they are sanctioned, "producers and exporters are well advised to inform their Mexican contacts of verifications of origin, so that importers may assist in any way possible, including by providing access to documents and facilitating contact with Mexican officials."[74]

B. TRUCKING

In October 2011, following a March 6, 2011 agreement in principle between the governments of Mexico and the United States, Mexican trucks began to enter the United States for purposes of completing shipments anywhere within the United States.[75] As part of the agreement allowing direct entry of freight trucks throughout the entire territory of each country, Mexico revoked tariffs that it had imposed on U.S. goods pending resolution of the dispute.[76] The transnational, ground-freight transportation issues had continued for

71. Martinez, *supra* note 61, at 25–26.

72. Martinez, *supra* note 61, at 26.

73. Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Jurisprudencia de Segunda Sala, tomo XII, Diciembre de 2000, Tesis clxxviii/2000, Página 1 (Mex.) (holding the origin verification proceeding over imported goods and the obligation to maintain secret any confidential information, established in articles 506 and 507, do not breach the importer's right to due process).

74. Martinez, *supra* note 61, at 26.

75. Jim Forsyth, *Years after NAFTA, First Long-Haul Mexican Truck Enters U.S.*, REUTERS (Oct. 21, 2011), http://www.reuters.com/article/2011/10/21/us-trucking-nafta-idUSTRE79K75P20111021.

76. Press Release, Office of U.S. Trade Rep., USTR Kirk: Mexico to Drop Retaliatory Tariffs by Fifty Percent (July 6, 2011), http://www.ustr.gov/about-us/press-office/press-releases/2011/july/ustr-kirk-friday-mexico-drop-retaliatory-tariffs-fift.

some fifteen years, notwithstanding NAFTA provisions for elimination of barriers to cross-border shipments.[77] The issue remained stalled until 2007 when both governments agreed on a temporary program that allowed a partial opening of the border to transnational ground freight transportation. But this program was cancelled in 2009 following suspension of funding in conjunction with action by the U.S. Congress.[78] For a trucking enterprise of one country to operate in the other requires completion of a three-stage accreditation process.[79] The first stage, "preoperative," begins with an application, continues with the accreditation of vehicles and operator/drivers, and concludes with temporary authorization. The second "operative" stage begins with a three-month period of full inspections, continues with reduced inspections starting in the fourth month of operations, and ends after eighteen months of the enterprise's operations. The third stage begins with a definitive, irrevocable authorization on satisfactory completion of the eighteen months of operation.

VI. Food Labeling

As of January 1, 2011, the labels of food and non-alcoholic beverage products distributed in Mexico must conform to the new standard NOM-051-SCFI/SSA1-2010, the Mexican Official Norm (NOM, by its Spanish acronym) that supersedes the previous NOM-051-SCFI-1994 issued in 1994.[80] The formerly optional nutritional information table became obligatory, except for small servings that may display a telephone number or website to access the information. If a product contains fat, the label must specify the amount of saturated fats, and if the product contains carbohydrates, the label must specify sugar content. Specification of dietary fiber also became mandatory. The recommended daily values per nutrient vary in comparison to the previous NOM.

All the ingredients and the percentage of each must be identified. Ingredients and additives that cause hypersensitivity, intolerance, or allergy must be mentioned in the labels. The scope of the term "additive" is broadened to match current food innovations. The previous NOM mandated lot numbers and expiration dates on labels, but the new NOM further requires that this information be preceded by a phrase or abbreviation (such as "LOTE," or "lot," in the case of lots, and "Cad.," or "Exp.," in the case of expiration dates) or reference in the label showing where this information appears in the package. Certain statements allowed to promote healthy products are now regulated. Previously any product could contain potentially deceptive phrases such as "healthy" or "natural." The new standard allows such statements only if verified.

77. Forsyth, *supra* note 75.

78. Chad MacDonald, Note, *NAFTA Cross-Border Trucking: Mexico Retaliates After Congress Stops Mexican Trucks at the Border*, 42 VAND. J. TRANSNAT'L L. 1631, 1644 (2009).

79. Press Release, Secretary for Communication and Transportation, Mexico and the United States Sign a Memorandum of Understanding on Cross-Border Trucking (July 6, 2011), http://en.presidencia.gob.mx/2011/07/mexico-and-the-united-states-sign-a-memorandum-of-understanding-on-cross-border-trucking/.

80. *Summary of Some of the Relevant Changes Included in the New NOM-051-SCFI/SSA1-2010 as Compared to the Old NOM-051*, MANITOBA FOOD PROCESSORS ASS'N, http://www.mfpa.mb.ca/resource/File/Mexico.pdf (last visited Feb. 20, 2012).

VII. Tax

Notwithstanding current controversies over U.S. tax policy, including the status of the U.S. Foreign Tax Credit (FTC),[81] the U.S. Internal Revenue Service (IRS) remains unlikely to chill U.S. investment in Mexico by revisiting the current creditability for U.S. tax purposes of payments under Mexico's *Impuesto Empresarial a Tasa Única* (IETU), imposed since 2008 as a separate tax applied to business, only if the IETU surpasses the liability under the standard income tax.[82]

When the IETU was first imposed, the IRS issued a notice that it required time to determine if the IETU was eligible for the FTC.[83] In the meantime, the IRS has allowed taxpayers to take the credit for IETU liabilities paid, and has declared that any decision to the contrary will not be enforced retroactively.[84] "The IRS has since provided no further guidance regarding creditability of the IETU."[85]

Once adopted, the IETU came under extensive constitutional challenges in Mexico.[86] Challenges focused on the lack of many of the traditional income tax deductions for wage, interest, and related party rents and royalties.[87] Individuals cited these disallowances as leading to unfair, disproportional taxation by not properly calculating net income.[88] The disallowances allegedly violated the constitutional guarantees of fairness.[89] When Mexico's Supreme Court heard the cases, it declared that the IETU was a tax on gross, rather than net, income.[90] As such, any deductions allowed were at the discretion of the legislature, and not an attempt to calculate net income.[91] Thus, because the calculations were not unfair, the IETU did not violate the constitution.[92] By labeling the IETU as not a tax on net income, Mexico's Supreme Court may have diminished the likelihood of the IETU qualifying for the FTC. But "because the application of the FTC is a purely U.S. legal question," the decision of the Mexican court is not binding on the U.S. authorities.[93]

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81. *See, e.g.*, U.S. DEP'T OF TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2012 REVENUE PROPOSALS 45 (2011), *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/Final%20Greenbook%20Feb%202012.pdf.

82. Enrique Hernandez-Pulido, *Mexico's Flat Tax (IETU) and How It Affects Investors in Mexican Real Estate Projects*, PROCOPIO TAX NOTES, http://www.procopio.com/userfiles/file/global/5203.pdf (last visited Feb. 20, 2012).

83. I.R.S. Notice 2008-3, 2008-2 I.R.B. 1.

84. *Id.*

85. Christopher Hanfling, *Mexico's Impuesto Empresarial a Tasa Única Is Not a Significant Concern for a Capital Intensive U.S. Venture in Mexico*, 34 A.B.A. SEC. INT'L L. (MEXICO UPDATE) 1, 11 (2011).

86. Manuel Carballo, *Revisa la Corte 40 Mil Juicios de Amparo Contra IETU*, LA PRENSA (Jan. 27, 2010), http://www.oem.com.mx/laprensa/notas/n1494717.htm.

87. Press Release No. 034/2010, Suprema Corte de Justicia [SCJN] [Supreme Court], Constitucional, la Ley del Impuesto Empresarial a Tasa Única [Constitutional, Law on Business Tax at Single Rate] (Feb. 2, 2010).

88. *Id.*

89. *Id.*

90. *Id.*; Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], Tesis Jurisprudenciales del Pleno, Novena Época, Febrero de 2010, Tesis 83/2010, Página 1 (Mex.), *available at* http://www.scjn.gob.mx/pleno/SecretariaGeneralDeAcuerdos1/TesisJurisprudencialesdelPleno/2010/TJ%2083-2010.pdf.

91. Tesis Jurisprudenciales del Pleno, Tesis 83/2010, at 1.

92. *Id.*

93. Hanfling, *supra* note 85, at 11.

The Mexico-U.S. tax treaty declares that a tax credit shall be provided for income taxes.[94] But it does not further define income taxes, and because the treaty existed before adopting the IETU, it does not provide guidance regarding the treatment of the IETU.[95] To qualify under the treaty, the IETU must be substantially similar to a tax that qualified for the credit when Mexico and the United States signed the treaty.[96] "The IETU is qualitatively and quantitatively different than either the asset tax that it replaced, or any other tax Mexico has imposed."[97]

To qualify for the FTC, a foreign levy must have the predominant character of an income tax in the U.S. sense,[98] one that meets the realization, gross receipts, and net income requirements of Treasury Regulation 1.901-2.[99] "The IETU does not meet the net income requirement of this test."[100] The net income element requires that gross receipts be reduced by the significant costs and expenses attributable to them.[101] The regulations further allow that, where a deduction is not allowed, the tax does not fail to reach net income if the tax provides allowances that effectively compensate for the non-recovery.[102] "Due to the insufficient compensation for wage expense and the lack of compensation entirely for the interest and related party rents and royalties disallowances, the IETU . . . does not allow recovery of the costs of doing business and therefore is not an income tax."[103]

"Credits or deductions based on the specific cost disallowed are not the only way to effectively compensate for disallowed costs; a tax can be judged in its totality to determine if there is effective compensation for a disallowance."[104] In *Exxon Corp. v. Commissioner*, the government imposed a tax on oil production that did not allow a deduction for interest expenses.[105] But various exclusions and allowances in the tax based on volume produced effectively compensated for the disallowance.[106] Similarly, in *Texasgulf Inc. v. Commissioner*, a mining tax did not allow deductions for interest or depletion, but a processing allowance based on volume mined was effective compensation.[107]

> Unlike *Exxon* or *Texasgulf*, the IETU does not include an additional exclusion, deduction, or allowance based on volume. Thus, without an additional method of compensating for the disallowed deductions, the IETU is not an income tax under the relevant case law . . . .
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> . . . .

94. Income Tax Convention, U.S.-Mex., art. 24, Sept. 18, 1992, S. TREATY DOC. No. 103-7.
95. Caren S. Shein & Jose Manuel Ramirez, *Mexican Tax Reform 2008: Is the IETU a Creditable Foreign Tax for U.S. Purposes?*, 59 TAX EXECUTIVE 497, 503 (2007).
96. *Id.*
97. Hanfling, *supra* note 85, at 11.
98. Treas. Reg. § 1.901-2(a)(ii).
99. *Id.* § 1.901-2(b).
100. Hanfling, *supra* note 85, at 12.
101. Treas. Reg. § 1.901-2(b)(4)(i).
102. *Id.*
103. Hanfling, *supra* note 85, at 12.
104. *Id.*
105. Exxon Corp. v. Comm'r, 113 T.C. 338 (1999).
106. *Id.* at 359.
107. Texasgulf, Inc. v. Comm'r, 172 F.3d 209, 216 (2d Cir. 1999).

Although the IETU does not meet the requirements for a creditable tax under the treasury regulations and case law, allowing the credit in this instance obeys the spirit, if not the letter, of the tax laws. Unlike the majority of levies that the treasury regulations were designed to prevent from being credited, the IETU is not a payment to the Mexican government for some economic benefit such as oil rights. Rather, the IETU is imposed across industries on the basis of gross receipts and allows for recovery of many of the costs of doing business, much like a true income tax.[108]

108. Hanfling, *supra* note 85, at 13–14.