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Mexico

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This Article reviews legal developments in Mexico during 2012.¹

I. Introduction

On December 1, 2012, Enrique Peña Nieto became Mexico's fifty-seventh president.² Some expect Peña Nieto, a member of the PRI (*Partido Revolucionario Institucional*), to not only champion but actually to succeed in adopting pro-growth reforms and in curbing the drug violence of recent years.³ But others — both on the left and right — are less optimistic. Indeed, on inauguration day, leftist and student groups protested in Mexico City,

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1. For developments in 2011, see Patrick Del Duca et al., *Mexico*, 46 INT'L LAW. 583 (2012) [hereinafter *2011 Update*]. For developments in 2010, see Patrick Del Duca et al., *Mexico*, 45 INT'L LAW. 555 (2011) [hereinafter *2010 Update*].

2. See *infra* Part I.

3. Héctor Aguilar Camín & Jorge G. Castañeda, *Mexico's Age of Agreement: A Mandate for Reform*, FOREIGN AFF, Nov.-Dec. 2012, at 24-26, 28.

repeating accusations that the PRI bought the election through election-day gifts to the poor and backroom deals with the media, the outgoing administration, and big business.⁴ Mainstream and conservative detractors feel that Peña Nieto will resort to the old ways of the PRI, where authoritarian politics, corruption, and clientelism prevailed.

While electoral politics took center stage in 2012, Mexico continued to make great strides toward furthering an independent judiciary and a legislative branch in touch with the needs of a growing democracy. Landmark Supreme Court decisions include one that limits the ability of Mexico's telecom giant Telmex/Telcel, owned by Carlos Slim, the world's richest man, to bring *amparo* (constitutional injunction) actions to delay the enforcement of antitrust rulings.⁵ Another case is poised to enable suppression of evidence gathered in violation of the accused's constitutional rights.⁶ A third case, now pending, addresses whether the famed but battered *Compañía Mexicana de Aviación* (Mexicana) will escape bankruptcy liquidation.⁷

On the legislative and regulatory side, labor law reforms represent what is widely perceived as the most significant legislative accomplishment of the year, if not the decade. Mexico's immigration laws were also reformed in 2012, with the aim of codifying the human rights of immigrants and streamlining the temporary work visa process.⁸ Amendments to numerous federal laws implemented 2010 reforms regarding class action lawsuits.⁹ Advancements in the rule of law include the new Federal Law against Corruption in Public Contracting,¹⁰ Business and industry benefitted from promulgation of the new Mining Regulation,¹¹ reforms to corporate law,¹² and likely new regulations in the telecom industry.¹³ Trade between the United States and Mexico is now worth more than one billion dollars a day.¹⁴

II. Florence Cassez

Florence Cassez, a French citizen linked to a gang of kidnappers active in and around Mexico City, was sentenced to sixty years imprisonment after being convicted of engaging in organized crime, kidnapping, and possession of firearms.¹⁵ Mexico's Supreme Court has yet to rule definitively on whether Cassez should be freed, but preliminary rulings have raised the prospect that violations of fundamental rights, such as consular assistance and a prompt charge, as well as police misconduct and violations of Cassez's rights after her detention, would mandate that the case be retried. Comparatively, this issue is akin to

4. *World News: Protests Greet Mexico's New President*, UPI (Dec. 1, 2012, 6:15 PM), http://www.upi.com/Top_News/World-News/2012/12/01/Protests-greet-Mexicos-new-president/UPI-82821354374696/.

5. See *infra* Part VII.

6. See *infra* Part II.

7. See *infra* Part V.

8. See *infra* Parts VI, XII.

9. See *infra* Part IV.

10. See *infra* Part IX.

11. See *infra* Part XIII.

12. See *infra* Part VIII.

13. See *infra* Part VII.

14. Elisabeth Malkin, *Mexico Finds Unlikely Allies in Trade Fight*, N.Y. TIMES, Dec. 25, 2012, at B1.

15. *Mexican Court Rejects Florence Cassez's Appeal*, FRANCE 24 (Mar. 22, 2012), <http://www.france24.com/en/20120321-mexico-france-court-rejects-frenchwoman-bid-freedom-florence-cassez>.

the long-standing U.S. criminal procedure “fruit of the poisonous tree” doctrine.¹⁶ The prospect of the Supreme Court’s definitive ruling in favor of dismissal of charges or a retrial speaks to what various Mexican intellectuals have long sought — an independent judicial system unburdened by pressure from other spheres of power.¹⁷

III. Same-Sex Marriage

On December 5, 2012, the First Chamber of Mexico’s Supreme Court unanimously ruled in three *amparo* actions to invalidate a provision of the law of the state of Oaxaca that defines marriage as limited to a man and a woman.¹⁸ The rulings direct the Oaxaca authorities to allow the marriages but do not directly apply to any plaintiffs other than those before the court. Five consecutive consistent rulings are required for the rulings to achieve precedential value. Therefore, until two additional rulings are issued by the court, the recent *amparo* actions are not binding. Nonetheless, the reasoning of the rulings — grounded in Mexican constitutional provisions of human rights, equality, and the prohibition of discrimination on grounds of sexual preference — holds persuasive value for all Mexican courts, as the Supreme Court will presumably continue to apply its reasoning as additional cases reach it.¹⁹ For the moment, only the Federal District and the state of Quintana Roo define marriage as between “persons.”²⁰ But the Supreme Court has also ruled that other states in Mexico must recognize lawful same-sex marriages performed in those states.²¹

IV. Environmental Class Actions

In 2010, the Constitution was amended to include Article 17, providing for class actions.²² On February 29, 2012, the Article 17 amendments were implemented through reforms to the Federal Civil Procedure Code, the Federal Civil Code, the Federal Economic Competition Law, the Federal Consumer Protection Law, the Financial Services User Defense Law, and the Ecological Balance and Environmental Protection Law.²³

16. See BLACK’S LAW DICTIONARY 740 (9th ed. 2009).

17. See *Mexico Supreme Court Rejects Florence Cassez Release*, BBC NEWS (Mar. 21, 2012, 11:59 PM), <http://www.bbc.co.uk/news/world-latin-america-17467330>; *Justice to Argue Rights of Jailed French Woman May Have Been Violated*, FRANCE 24 (Aug. 03, 2012), <http://www.france24.com/en/20120308-rights-french-woman-jailed-mexico-may-have-been-violated-cassez-justice-court-opinion>.

18. Jesús Aranda, *Parejas del Mismo Sexo Ahora Pueden Ampararse para que se Reconozca su Enlace [Same-Sex Couples Can Now Apply to Recognize Marriage]*, VANGUARDIA (Dec. 7, 2012), <http://www.vanguardia.com.mx/parejasdelmismosexoahorapuedenampararseparaquesereconozcasuenlace-1434040.html>.

19. See 2011 Update, *supra* note 1, at 585.

20. See 2010 Update, *supra* note 1, at 555-56.

21. *Id.* at 555.

22. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 29 de Julio de 2010 (Mex.) (providing that the Union Congress “shall issue the laws that regulate collective actions.” Those laws will establish the “fields of application, the judicial procedures, and the mechanism for damage recovery. The federal courts shall have exclusive jurisdiction over these procedures and mechanisms.”).

23. Decreto por el que se reforman y adicionan el Código Federal de Procedimientos Civiles, el Código Civil Federal, la Ley Federal de Competencia Económica, la Ley Federal de Protección al Consumidor, la Ley Orgánica del Poder Judicial de la Federación, la Ley General del Equilibrio Ecológico y la Protección al Ambiente y la Ley de Protección y Defensa al Usuario de Servicios Financieros [Decree Amending and

A class action seeks to vindicate collective rights and interests before the federal courts. It pertains only to matters of consumption of goods and services, public or private, and the environment. It protects the rights of a group or individual rights whose protection corresponds to a group.²⁴ Rights protectable by class action are: (1) diffuse and collective rights and interests;²⁵ and (2) individual rights and interests with collective incidence.²⁶

Under the new regime, a so-called diffuse action would seek protection of diffuse rights and interests, not divisible among members of an indeterminate collectivity, to obtain restitution of the situation to its *ex ante* state, or if not possible, alternate satisfaction conforming to the rights and interests of the collectivity. Such an action could, for example, be brought in connection with deforestation of an environmentally-protected area. By contrast, a class action could be brought to protect the rights and interests of a collectivity defined or determinable class based on common circumstances. It would seek repair of the damage, plus payment of individual damages to group members. Such an action, for example, could be brought in connection with contamination of a drinking water well. Diffuse and class actions are distinct from individual actions that concern individual rights and interests, even of a collective impact.

The class action must demonstrate environmental damage that affects a class of persons, and that a person or entity caused it in violation of federal or state environmental law or international treaty.

A class action must be filed no later than forty-two months after the alleged damage occurs. If damage is continuous, the statute of limitations runs from the last day on which damage occurred. Standing to bring an environmental damage class action is limited to: (1) the Federal Prosecutor for Environmental Protection; (2) a common representative of the class comprised of at least thirty members (even if involving an *ejido* (agrarian) community, the individual assent of more than thirty people is needed to establish the class); (3) nonprofit civil associations, legally constituted and operating at least one year before commencement of the action, the corporate purpose of which includes promotion or defense of environmental rights; and (4) the Attorney General.²⁷ Representatives in the second and third categories must satisfy additional requirements established in Federal Civil Procedure Code Article 586; for example, acting with diligence, expertise, good faith in defense of the collective interest, and avoidance of conflicts of interest.

In contrast to ordinary civil actions, class actions proceed only upon court certification that the collective interest is properly represented, all legal requirements have been met, and an individual action could not be pursued. The action can be settled at any time during the proceedings with judicial approval. Injunctive relief is available if damage is imminent or irreparable. The defendant may post a bond to lift the injunction, unless the judge deems the act or omission an imminent and irreparable threat to public interest, the

Supplementing the Code of Civil Procedure, the Federal Civil Code, the Federal Law on Economic Competition, the Federal Consumer Protection Law, the Organic Law of the Judicial Power of the Federation, the General Law of Ecological Balance and Environmental Protection, and the Law on Protection and Defense of Financial Services Users], *Diario Oficial de la Federación* [DO], 30 de agosto de 2011 (Mex.).

24. Código Federal de Procedimientos [CFPC] [Federal Civil Procedure Code], *as amended*, arts. 578-79, *Diario Oficial de la Federación* [DO], 24 de enero de 2013 (Mex.).

25. *Id.* art. 580.

26. *Id.* art. 581.

27. *Id.* art. 585.

life, or health of members of the class, or for national security reasons. Each party bears its own costs and expenses, as well as legal fees.

The pending proposed bill to enact the Federal Environmental Liability Law²⁸ would give further force to class actions. The constitutional basis for this law was established with amendment of Article 4, Paragraph 6, providing that “[e]very person has the right to enjoy a healthy environment for its development and welfare. The State will guarantee the respect of this right. The environmental deterioration and damage will cause responsibility on those who are producing it in terms of the provisions of the law.”²⁹

V. Mexicana de Aviacion Bankruptcy

Mexicana de Aviacion, Latin America’s oldest commercial airline, is currently in insolvency proceedings (*concurso mercantil*). These proceedings have remained in the initial voluntary restructuring stage known as *conciliación* (conciliation) since August 2010.³⁰ The compatibility of the extended proceedings with the *Ley de Concursos Mercantiles* (the Mexican Bankruptcy Law) is now pending before Mexico’s Supreme Court.

In August 2010, Judge Felipe Consuelo Soto accepted Mexicana’s request to open the first stage of bankruptcy proceedings, through which Mexicana would seek a consensual restructuring of its liabilities, so as to avoid liquidation. In accordance with a growth plan, Mexicana had acquired a significant fleet, most of which was arrested at its maintenance area in Mexico City.³¹ According to the Federal Institute of Bankruptcy Specialists (IFECOM, in Spanish), Mexicana had 24,374 creditors,³² over US \$850 million in debt, and required US \$250 million to return to operations.³³

IFECOM—part of the federal judiciary—assists the presiding judge. Article 145 of the Bankruptcy Law provides that the conciliation stage, including any extensions, not exceed 365 calendar days.³⁴ Further, Article 7 accords the presiding judge “the powers necessary to accomplish that which the Bankruptcy Law provides.”³⁵ Failure of the judge or IFECOM to comply with the law, absent force majeure, gives rise to a disciplinary action before the Federal Judicial Council.³⁶

28. See Con Proyecto de Decreto Que Expide La Ley Federal de Responsabilidad Ambiental [Federal Environmental Liability Law] (Proposed Dec. 6, 2011), available at http://sil.gobernacion.gob.mx/Archivos/Documentos/2011/12/asun_2829583_20111208_1323361282.pdf.

29. Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 4, Diario Oficial de la Federación [DO], 30 de Noviembre de 2011 (Mex.).

30. Ley de Concursos Mercantiles [LCM] [Bankruptcy Law], as amended, art. 145, Diario Oficial de la Federación [DO], 27 de Diciembre de 2007 (Mex.).

31. *La Flota de Mexicana de Aviación [The Mexicana Fleet]*, AERO LATIN NEWS (Feb. 9, 2010), <http://www.aerolatinnews.com/index.php?sector=noticias¬icia=17946>.

32. Blanca Campos, *Analizan Sanción a Juez de Mexicana de Aviación [Judge Sanction Analyzed Mexicana]*, SEXENIO (Mar. 16, 2012), <http://www.sexenio.com.mx/articulo.php?id=13840>.

33. *Judge Sets New Liquidation Deadline for Bankrupt Mexican Airline*, FOX NEWS LATINO (Nov. 16, 2011), <http://latino.foxnews.com/latino/news/2011/11/16/judge-sets-new-liquidation-deadline-for-bankrupt-mexican-airline/>.

34. Ley de Concursos Mercantiles [LCM] [Bankruptcy Law], as amended, art. 145, Diario Oficial de la Federación [DO], 24 de Enero de 2013 (Mex.).

35. *Id.* art. 7.

36. Ley de Concursos Mercantiles [Bankruptcy Law], art. 7 (Mex.).

In March 2012, Judge Consuelo Soto appeared before the Federal Judicial Council's disciplinary committee to respond to assertions of having improperly extended the Bankruptcy Law deadlines.³⁷ He argued that the Mexicana bankruptcy had proceeded with respect for workers' rights and that his rulings were grounded in the law, international treaties, and the Mexican Constitution. He asserted that the conciliation period had not exceeded the 365-day term by virtue of indefinite suspension due to "supervening events."³⁸

On April 3, 2012, IFECOM affirmed the judge's actions as consistent with law and in defense of workers and the preservation of the business.³⁹ IFECOM's general director asserted that the Bankruptcy Law does not specify how long a bankruptcy proceeding should last, but rather, when the proceedings are a question of public order, that the court must strive to conserve the business and avoid prejudice to those who transact with it.⁴⁰ But although Articles 1 through 3 grant the judge discretionary powers if the business can be saved, no express provision creates such a broad "public order" exception to the one-year statutory term for the conciliation stage. Thus, the Supreme Court now faces the question of the extent to which a judge's discretion in cases with an important public interest may trump express statutory language.

VI. Federal Labor Law

On November 30, 2012, just before the end of his presidency, President Calderon signed into law long-anticipated reforms to Mexico's federal labor law, significantly amending the prior 1970 legislation.⁴¹ Despite the rigorous protections accorded workers under the new Article 123 and the 1970 legislation — including significant rights to work, extensive mandatory, non-waivable benefits on discharge, and a labor court system that consistently imposed on the employer the burden of proof — Mexico's labor markets barely afford the average worker a living wage under inadequate health, safety, and social conditions.

A. HISTORICAL AND CONSTITUTIONAL SIGNIFICANCE

Article 123 proclaims: "every person has the right to a respectable and socially useful employment."⁴² In implementation, the Constitution requires norms guaranteeing Mexican workers a dignified minimum wage, profit sharing, a maximum workday and week, vacation pay, collective bargaining rights, and the right to retain the employment for as

37. Alberto Barranco, *Van Contra Juez Mexicana [Van Against Mexicana Judge]*, EL UNIVERSAL (Mar. 21, 2012), <http://www.eluniversalmas.com.mx/columnas/2012/03/94975.php>.

38. *Id.*

39. Jorge Arturo López Gómez, *Niegan que Juez Haya Violentado Proceso de Mexicana [They Deny that Judge Has Violated Mexican Process]*, EL UNIVERSAL (Apr. 3, 2012), <http://www.eluniversal.com.mx/notas/839731.html#>.

40. *Id.*

41. *Ley Federal del Trabajo [LFT] [Federal Labor Law]*, as amended, Diario Oficial de la Federación [DO], 30 de Noviembre de 2012 (Mex.).

42. *Constitución Política de los Estados Unidos Mexicanos [C.P.]*, as amended, Diario Oficial de la Federación [DO], 29 de Julio de 2010 (Mex.).

long as it exists.⁴³ Collective labor relations continue to be governed by collective bargaining agreements between the employer and the union and protect the right to strike. Such agreements must be ratified by a local or federal Conciliation and Arbitration Board, a quasi-judicial agency that hears and resolves labor disputes between employers and employees and between unions and their members. As a general rule, all doubts arising out of an individual labor agreement continue to be resolved in the employee's favor. For example, if the term of employment is not specified, it is deemed to continue indefinitely.⁴⁴ Accordingly, an employer may not terminate an employment relationship without just cause.⁴⁵

B. SEXUAL HARASSMENT

The reform adopts new prohibitions of "aggression" and "sexual harassment."⁴⁶ Aggression is the use of power, expressed through verbal or physical conduct, in a workplace relationship in which the victim is subordinated to the aggressor. Sexual harassment is a form of violence, which, despite the absence of subordination, constitutes an abusive use of power that implies a risk for the victim. Both aggression and sexual harassment by either a co-worker or the employer are now punishable by fines of up to 5000 times the daily minimum wage (which is roughly US \$5), or approximately US \$25,000.⁴⁷

C. SUBCONTRACTING

Mexican companies generally outsource employee services to avoid the mandatory ten percent profit-sharing requirement and social security obligations for employees, as well as to benefit from tax savings offered by third party payroll companies. The reform curbs the outsourcing benefits by imposing joint and several liability for labor law violations, evasion of the profit-sharing and social security obligations, and providing for fines.⁴⁸

D. SEASONAL HIRING

The reform allows seasonal hiring, pursuant to which the work relationship is suspended at the end of the season until the start of the following season.

43. *Id.* art. 123 (noting that the benefits afforded to Mexican employees commonly amount to 30 percent or 40 percent of basic payroll costs).

44. *Id.* arts. 35, 47 (noting that generally, just cause will not be found unless the employee: (1) engages in fraudulent or deceitful acts in the workplace; (2) intentionally causes damage or negligently causes serious damage to the workplace; (3) engages in behavior constituting a safety risk; (4) commits immoral acts at the workplace; or (5) reveals company secrets, disobeys company orders without justification, or is absent from work more than three days in a thirty day period without permission or just cause. In all cases, the employer must prove just cause by direct evidence, such as testimony of two witnesses.).

45. *Id.* art. 47.

46. Ley Federal del Trabajo [Federal Labor Law], art. 3 (Mex.).

47. *Id.* art. 994.

48. *See id.* art. 7.

E. TRIAL AND TRAINING PERIOD HIRING

Work relationships proposed for over 180 days or for an indefinite period may be conditioned on an up to thirty-day trial period to verify that the worker fulfills established requirements and possesses necessary knowledge.⁴⁹ For directors, general managers, technicians, and specialized professionals, the trial period may be extended up to 180 days. During a trial period, the worker is entitled to receive a salary, social security benefits, and other applicable benefits.

Training periods of three months generally, or six months for directors, general managers, technicians, and specialized professionals, can be contemplated.⁵⁰ During this trial period, after considering the opinion of the Joint Productivity, Training, and Instruction Commission and the nature of the category or position, the employer can terminate the employment without liability. But trial or training periods cannot be extended, and if employment is continued at the end of a period, it is considered to be of an indefinite term and the trial or training period counts for seniority.

F. WORK CONDITIONS, HOURLY WAGES, AND SPECIAL JOBS

Highlights of the reforms related to work conditions, hourly wages, and special jobs are outlined below.

1. For the first time, workers may be hired on an hourly basis so long as the maximum legal work shift is not exceeded, labor and social security rights are respected, and the hourly wage is not less than the minimum wage for a daily shift, roughly US \$5.⁵¹
2. Employees performing duties other than those for which they were hired are entitled to separate compensation.
3. In general, employers must give priority to: Mexican workers over their foreign counterparts; those who have provided satisfactory service for the longest period; heads of family with no other source of income; those who have completed mandatory basic education; trained over untrained workers; those possessing the greatest aptitude and knowledge to perform a specific task; and unionized workers over non-union counterparts.
4. Maternity leave is increased to six weeks before and after childbirth, and the mother may transfer four of the prenatal weeks to the postnatal period.⁵² Birth of a child with a disability or necessitating hospitalization can extend the postnatal rest period to up to eight weeks. A six-week paid rest period is established in case of adoption, recognizing equal rights of non-biological mothers. A male worker is entitled to five days paid paternity leave when his child is born or in the event of adoption, thereby recognizing paternity as a male right. A mother is entitled to two daily thirty-minute periods to feed her baby during a lactation period of up to six months. If this is not possible, and based on a prior agreement with her employer, the working day can alternatively be reduced by one hour.

49. *Id.* art. 39-A.

50. *Id.* art. 39-B.

51. *Id.* art. 89.

52. *Id.* art. 170.

5. Compensation equal to 5000 days salary (almost fourteen years) is payable if a worker dies; a 685 percent increase from prior law.⁵³ The Mexican Social Security Institute will be responsible to pay this amount if the employee is properly enrolled; if not, the employer is liable.
6. New rules establish safety and hygiene standards for coal miners, prohibiting, inter alia, hiring of workers under age eighteen.

G. SEVERANCE PAY AND FINES

Constitutional severance must be paid based on the worker's salary as of the payment date. The payment of accrued salaries is limited to twelve months.⁵⁴ This was a key amendment for employers, as under the old law, back pay would accrue until the judgment was paid, which, due to backlog and appeals, would often take up to five years.

Fines for violating the labor law reforms range from roughly US \$250 to US \$25,000, whereas the old law did not contemplate fines.⁵⁵ Fines for sexual harassment may be levied on the employer who engages in such conduct or allows such conduct by employees. Presentation of false documents or witnesses is punishable by imprisonment of between six months to four years, plus a fine of up to roughly US \$10,000.⁵⁶ This amendment is aimed at reducing the frequent instances in which either a plaintiff or a defendant procures and offers false testimony of witnesses.

VII. Telecom Regulation

Mexico's mobile phone penetration rate is low relative to countries of comparable development, including, notably, most of Latin America.⁵⁷ Because of its concentrated telecommunications sector — Telmex/Telcel controls 79 percent and 70 percent of the fixed and wireless markets, respectively — Mexico has higher purchasing power parity (adjusted telephone fees) than those of any other Organization for Economic Cooperation and Development (OECD) member.⁵⁸ The OECD estimates that Telmex/Telcel's market dominance costs Mexico about US \$25 billion, or 1.8 percent of GDP per year, accounting for direct overcharging and the opportunity costs of under-consuming telecom services.⁵⁹ When allocated among Mexico's population of 113 million, this yields an annual welfare loss of US \$220 per capita and translates into a tremendous unmet need and potentially highly profitable investment opportunity for firms willing to undercut the incumbent firms' prices.⁶⁰ But this assessment depends on availability of effective interconnection —

53. *Id.* tit. IX.

54. *Id.* art. 47.

55. *Id.* art. 993.

56. *Id.*

57. See *World Bank Development Indicators: Mobile Cellular Subscriptions (Per 100 People)*, WORLD BANK, <http://data.worldbank.org/indicator/IT.CEL.SETS.P2> (last visited Feb. 23, 2013).

58. See ORGANISATION FOR ECON. COOPERATION & DEV., *OECD REVIEW OF TELECOMMUNICATION POLICY AND REGULATION IN MEXICO* (Jan. 2012) [hereinafter *OECD REVIEW OF MEXICAN TELECOM POLICY*], available at <http://www.oecd.org/sti/broadbandandtelecom/50550219.pdf>.

59. *Id.*

60. Rafael DeAquino Villar, *Opportunities for Competition: Developments in Mexico's Interconnection Regulation*, ABA SECTION OF INT'L LAW (July 2012), available at http://www.americanbar.org/content/dam/aba/unacategorized/international_law/mc_newsletter_july_2012.authcheckdam.pdf.

the framework for enabling data-exchange over discrete, separately administered networks.

The discussion below focuses on Mexico's *Ley Federal de Telecomunicaciones* (Telecom Law)⁶¹ and *Ley Federal de Competencia Económica* (LFCE).⁶² But Mexico has also undertaken, under NAFTA, GATS, and a 2004 WTO dispute settlement with the United States over Mexico's failure to effectively regulate anticompetitive practices by Telmex,⁶³ to bring its regulatory framework into conformance with their minimum standards of market access and investor protection.⁶⁴ In addition to any influence these agreements have had on Mexican law, they also constitute sovereign obligations.

A. ANTI-TRUST

1. COFETEL's Regulatory Jurisdiction

Article 7 of the Telecom Law cites various policy goals and generally attempts to balance private rights (e.g., freedom of contract and no regulatory takings without just compensation) against societal interests in, inter alia, expanding access to information, maintaining a competitive marketplace, protecting national sovereignty, managing the scarce commonly-owned electromagnetic spectrum, and ensuring the quality of telecommunications service.⁶⁵ Article 9-A grants to the Federal Telecom Commission (COFETEL, in Spanish) regulatory and advisory powers, the principal subjects of which are "telecommunications networks."⁶⁶ Per Article 11, paragraph I-II, "installation, operation, or exploitation" of a private telecommunications network (PTN) using electromagnetic spectrum requires two separate concessions from the Communications and Transportation Secretariat (SCT, in Spanish), which pursuant to Article 3, section 8, are "all integrated systems for information transmission through any media, including transmission."⁶⁷

2. Concession-Based Duties

The specific requirements for obtaining concessions to operate networks, including the network's technical specifications and the services the operator intends to provide, are detailed in Chapter 3 of the Telecom Law for PTNs and Chapter 2 for Enhanced Message Service.⁶⁸ When the concession is granted, much of this information is codified into spe-

61. See *Ley Federal de Telecomunicaciones* [Federal Telecommunications Law], as amended, *Diario Oficial de la Federación* [DO], 17 de Junio de 1995 (Mex.).

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

63. See *Dispute DS204: Mexico—Measures Affecting Telecommunications Services*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds204_e.htm (last visited Feb. 23, 2013).

64. See *Marrakesh Agreement Establishing the World Trade Organization*, Apr. 15, 1994, 1867 U.N.T.S. 154, Annex 1B; *North American Free Trade Agreement* (NAFTA), U.S.-Can.-Mex., ch. 11, Dec. 17, 1992, 32 I.L.M. 289 (1993).

65. See *Ley Federal de Telecomunicaciones* [Federal Telecommunications Law], as amended, art. 7, *Diario Oficial de la Federación* [DO], 17 de Junio de 1995 (Mex.).

66. *Id.* art. 9A.

67. *Id.* art. 11.

68. *Id.* arts. 10-11.

cific obligations and conditions. Article 9-A paragraphs IV, VIII, and XIII charge COFETEL with ensuring licensees comply with concession rights, obligations, and conditions.⁶⁹ In egregious cases of noncompliance, Chapter 3, paragraph VII empowers the commission to recommend that the SCT revoke PTN concessions.⁷⁰ In practice, however, revocation is so drastic a sanction that it has never been used. Since COFETEL cannot impose noncompliance fines without the SCT's approval, concession rules are difficult to enforce. Perhaps the most concrete effect of titular concession rules is that the obligations imposed on Telmex after its privatization, but prior to the drafting of the Telecom Law, served as a working model for the generally-applicable obligations contained in Chapter 4. They were inspiration for what has now become the primary statutory basis for COFETEL's power to promulgate affirmative regulations, and for the duty of PTNs licensed under the Telecom Law to abide by those regulations.⁷¹

3. *Interconnection*

Given the limitations of concession-based regulation, almost all the recent telecom regulatory progress stems from the Telecom Law and LFCE — especially Telecom Law Article 42, which obligates PTN operators to respond to interconnection requests and negotiate terms in good faith within sixty days.⁷² But unlike other provisions in the Telecom Law, if negotiations deadlock, Article 42 has an actual enforcement mechanism — COFETEL's authority to set the interconnection price directly. This is one of COFETEL's most concrete powers, and the foundation of its gradual accrual of independence.

4. *Trend of Judicial Support*

Since the Telecom Law's inception, Telmex and other incumbent PTNs have fought to dilute Telecom Law Article 42 and Chapter 4.⁷³ Until recently, the Mexican federal courts provided a hospitable battlefield. The *amparo* writ allows an aggrieved party to challenge governmental acts. An *amparo* challenge can allege irreparable harm in the specific manner that a regulatory action or decision was taken, or it can attack the general sufficiency of the statutory or constitutional authority on which it was grounded. For most of these controversies, there is no binding precedent; a corollary of the limited notion of precedent in Mexican law. Statutes are generally consulted as the primary source for legal rules. By implication, under Mexican statutory supremacy, the standard of appellate review for an administrative ruling is unavoidably substantive. Rather than asking whether the challenged decision lies outside the discretion of the official issuing it, the court asks, essentially *de novo*, whether the legal rule was correctly applied to the facts. When the facts and rules are highly technical, as is frequently the case with telecom interconnection, the court may lack the expertise to make proper determinations. Moreover, if

69. *Id.* art. 9-A.

70. *Id.* art. 37.

71. See OECD, OECD ECONOMIC OUTLOOK 66 (1999), available at http://www.keepeek.com/Digital-Asset-Management/oecd/economics/oecd-economic-outlook-volume-1999-issue-2_eco_outlook-v1999-2-en (discussing evolution of concession obligations into those contained in the Telecom Law).

72. *Id.* art. 42.

73. *Id.*

a court grants *amparo*, the statute is not overturned in all instances, but only nullified with respect to the individual litigant. As such, each party must seek relief individually, with the predictable consequence of crowded federal court dockets.

To compound matters, administrative rulings were, until recently, suspended during the pendency of an *amparo* proceeding. This created a powerful incentive for well-resourced telecom providers to file lawsuits and appeal unfavorable judgments regardless of the underlying merits. Delayed judgments concerning mandated interconnection rates allowed incumbents like Telmex to systematically retain fees higher than those ultimately determined, sometimes for several years.

Things began to change in March 2011. The Supreme Court ruled en banc, by a vote of six to four, with one recusal, that mandatory interconnection rates set by COFETEL cannot be suspended during an *amparo* review, but will instead remain in effect until the final disposition.⁷⁴ On February 27, 2012, by the same margin, the Court, citing Telecom Law Article 9-A, held that COFETEL's authority to set mandatory interconnection rates is exclusive, and not reviewable by the SCT.⁷⁵ Notwithstanding the persuasive power of these opinions, neither strictly controls the actions of lower judicial bodies. Nonetheless, the Court's rulings remain likely to be followed by lower courts, and any divergence from its rulings is subject to its review. As a practical matter, the effect of the rulings has been to carve out a significant de facto space for COFETEL to act exclusively and autonomously on interconnection pricing disputes—and possibly in other areas.

B. LIKELY JUDICIAL ENDORSEMENT

By ruling in COFETEL's favor in its two recent en banc decisions, the Supreme Court ratified COFETEL powers and implied its authority to move forward. This trend continued when on April 18, 2012, the First Chamber of the Court rejected Telefonica's long-pending challenge against the PFII (*Plan Fundamental de Interconexión e Interoperabilidad*), holding that COFETEL has authority to promulgate ex ante technical regulatory plans. This ruling is consistent with the court's discernible desire in this line of proper-agency-authority cases to close the regulatory "double window."⁷⁶

C. TELMEX

Since 2009, Telmex has been subject to a *Comisión Federal de Competencia* (CFC) finding of market dominance in fixed call termination.⁷⁷ On March 26, 2012, the CFC also found that Telcel holds a dominant position in mobile call termination.⁷⁸ This follows a record

74. Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, toma X, Octubre de 2011, Tesis P./J. 10/2011 (Mex.).

75. *Amparo en Revisión 240/2011*, 27 de febrero de 2012, Pleno de la Suprema Corte de Justicia [SCJN] [Supreme Court], *Semanario Judicial de la Federación y su Gaceta*, Décima Época (Mex.).

76. See OECD REVIEW OF MEXICAN TELECOM POLICY, *supra* note 58, at 47-49, 53-54 (discussing the overlap between SCT and COFETEL regulatory responsibilities and resulting inefficiencies).

77. See Patrick Nixon, *Antitrust Commission Declares Telmex Dominant in Fixed Line Termination*, BN AMERICAS (Nov. 9, 2009), http://www.bnamericas.com/news/telecommunications/Antitrust_commission_declares_Telmex_dominant_in_fixed_line_termination.

78. See Anthony Harrup, *Regulator Confirms Dominance of Slim's Telcel*, WALL ST. J. (Mar. 27, 2012, 10:12 PM), <http://online.wsj.com/article/SB10001424052702303816504577308402386208954.html>.

US \$1 billion fine (pending *amparo* review) that the CFC imposed in 2011 for exclusionary interconnection practices, invoking powers newly-acquired from a reform of the competition law enacted in the same year.⁷⁹ The dominance findings expose Telmex/Telcel to asymmetric price regulation by COFETEL, which, through application of the foregoing incremental cost model, forced Telmex to cut its interconnection rates from ninety-five Mexican cents per minute in 2011 to thirty-nine cents in 2012, with a further reduction to thirty-one cents required by 2014.⁸⁰ Telmex has signaled repeatedly — through actions and public pronouncements—that it will ardently fight all attempts to impose prices.

VIII. Corporate Law

Amendments to the General Law of Commercial Companies, regulating the incorporation, operation, and liquidation of Mexican commercial companies, took effect on January 1, 2012.⁸¹ Previously, the law mandated that articles of incorporation declare a specific corporate life. Because of the uncertain validity of establishing a commercial entity of indefinite life, Mexican lawyers and notaries public commonly specified a ninety-nine-year life. The amendment eliminates the need for this practice by allowing for perpetual existence. The second amendment concerns minimum capital of the *Sociedad Anónima* (stock company) and *Sociedad de Responsabilidad Limitada* (limited liability company).⁸² Previously, the law contemplated a minimum capital of 50,000 pesos for incorporation of a *Sociedad Anónima* and of 3000 pesos for a *Sociedad de Responsabilidad Limitada*. Now, the shareholders and partners, respectively, of the *Sociedad Anónima* and of the *Sociedad de Responsabilidad Limitada*, are free to set the minimum capital stock of the entity. This amendment encourages incorporation of entities, by both Mexicans and foreigners, as even the modest capital previously required to establish an entity to open a business is no longer required.

IX. Federal Anticorruption Law for Public Procurement

The new Federal Anticorruption Law for Public Procurement, effective June 12, 2012, provides significant administrative fines and other penalties, including debarment against individuals and companies, whether Mexican or foreign, who engage in specified corrupt activities with respect to Mexican federal public procurement.⁸³ It imposes the same fines and penalties on Mexican individuals and companies who engage in bribery in relation to

79. See Patrick Del Duca & Juan Carlos Velázquez de Leon, *Antitrust Update*, ABA SECTION INT'L L. MEXICO UPDATE, Aug. 2011, at 1, available at http://www.americanbar.org/content/dam/aba/uncategorized/international_law/mc_newsletter_august_2011.authcheckdam.pdf.

80. See Anthony Harrup, *America Movil's Telcel to Cut Interconnection Rates Through 2014*, ADVFN, <http://www.advfn.com/nasdaq/StockNews.asp?stocknews=TFONY&article=50082992> (last visited Feb. 23, 2013).

81. Ley General de Sociedades Mercantiles [General Law of Commercial Companies] [LGSM], *as amended*, Diario Oficial de la Federación [DO], 11 de Juno de 2012 (Mex.).

82. *Enero 2012 Actual: Actualización Legal: Reformas a la Ley General de Sociedades Mercantiles en cuanto a Duración de las Sociedades y Capital Social* [January 2012 Current: Legal Update: Amendments to the Corporations Act in Duration of Societies and Social Capital], CNN MEX. REPORT, <http://mexicoreport.com/es/2012/01/Reformas-a-la-Ley-General-de-Sociedades-Mercantiles-en-cuanto-a-Duraci-n-de-las-Sociedades-y-Capital-Social?aid=1203> (last visited Feb. 25, 2013).

83. Ley Federal Anticorrupción en Contrataciones Públicas [Federal Anticorruption Law for Public Procurement], Diario Oficial de la Federación [DO], 12 de Juno de 2012 (Mex.).

public contracts of foreign governments. In both cases, it contemplates only administrative sanctions. However, it does not displace or interfere with other Mexican laws that may be applicable, i.e. laws imposing criminal penalties.

The first part of the law deals with corrupt activities as to Mexican federal procurement. In this regard, federal public procurement covers procurement by (1) federal government departments, agencies, and administrative bodies; (2) companies with majority federal government ownership such as PEMEX and the *Comisión Federal de Electricidad* (CFE); (3) certain federal government controlled trusts; and (4) state and municipal governments where the procurement is funded in whole or in part with federal monies. "Procurement" includes all steps in the process of soliciting, entering into, carrying out and fulfilling contracts for acquisitions of property or goods, leasing, services, public works and related services, and also all steps in the competition, bid, or tender process to grant a federal concession or permit.⁸⁴ "Corrupt activity" includes directly or indirectly

[p]romising, offering or giving money or any other gift to a public official or a third party, so that the public official carries out or abstains from carrying out an act related to his function, or that of another public official, for the purpose of obtaining or maintaining a benefit or advantage, whether or not the money or gift is accepted or received, and without regard to the result obtained.⁸⁵

Other covered corrupt activity includes evading or misrepresenting compliance with applicable rules and regulations, and presenting false or altered documentation or information for the purpose of obtaining a benefit or advantage.

Upon a finding of corrupt activity, the basic fine can range up to US \$240,000 for an individual or US \$9.615 million for a company.⁸⁶ But if the basic fine is less than the benefit realized, the fine could be increased another 50 percent, or up to 35 percent of the total contract amount if the contract was awarded and completed.⁸⁷ The penalty may also include debarment for not less than three months and not more than eight years for an individual, or ten years for a company.⁸⁸

X. Wal-Mart de Mexico

In April 2012, the New York Times published an investigation into alleged bribes in the amount of US \$24 million that Wal-Mart de Mexico made to various Mexican government officials to obtain building permits, reduce fees for environmental impact authorizations, and expedite other federal, state, and municipal permits required for its supermarkets.⁸⁹ U.S. authorities have begun investigations under the Foreign Corrupt Practices Act (FCPA).⁹⁰ What are the legal effects in Mexico if Wal-Mart executives are

84. *Id.* art. 3.

85. *Id.* art. 8.

86. *Id.* art. 27.

87. *Id.*

88. *Id.*

89. David Barstow & Alejandra Xanic von Bertrab, *The Bribery Aisle: How Wal-Mart Got Its Way in Mexico*, N.Y. TIMES (Dec. 18, 2012), http://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html?_r=2&.

90. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (2006).

found guilty of bribing Mexican government officials? Mexico has no law analogous to the FCPA, and the FCPA as a U.S. law of extraterritorial application is per se irrelevant to Mexican law. So, what institutions address the bribery allegedly committed by Wal-Mart de Mexico?

Federal Penal Code, Article 208 establishes the figure of *cobecbo*, manifested in two ways. The first is when a public servant, alone or through another person, requests or receives improperly for himself or another, money or any other gift, or accepts a promise to do or not do something, right or wrong, related to his functions. In this first case, the public servant “requests the gift”, either by himself or through a third party. The second case is the commission of the crime of bribery by spontaneously giving or offering money or any gift to any of the persons contemplated in the first instance, so that any public servant might take or fail to take an act, right or wrong, related to his functions. In this case, the individual or company proposes the gift, without being solicited by the official. The penalty for bribery [varies], but the maximum penalties are imprisonment for two to fourteen years, a [fine of US \$5000], and dismissal and disqualification for three months to two years from performing another public job, position, or commission in government. These limited consequences pale in comparison to the millions collectible through bribes.⁹¹

“Federal Criminal Code Article 220 also contemplates the offense of abuse of functions, which is when a public servant improperly grants, directly or through another person, contracts, concessions, permits, licenses, authorizations, franchises, or exemptions, accomplishes purchases or sales, or performs any legal act that economically benefits the public servant,” punishable by both fines and imprisonment.⁹²

Likewise, the Federal Law of Administrative Responsibilities of Public Servants establishes anti-corruption norms through obligations on public servants.⁹³ Examples include Article 8, fractions XII and XIII, that mandate all public servants to refrain, during the course of their duties, from seeking, accepting, or receiving, either directly or through another person, money, real or personal property by sale at a price patently below the ordinary market, gifts, services, jobs, positions, or commissions for themselves or for another person, from any physical or legal person whose professional, commercial or industrial activities are directly linked, regulated, or supervised by the public servants concerned, in the course of their employment, office, or commission, which involve conflicting interests.⁹⁴ This prohibition applies through the year following the public servant’s retirement. It also mandates that public servants in the course of their service not obtain or seek benefits additional to the verifiable remuneration that the State provides for performance of their duties. Penalties for violation include: private or public reprimand, suspension of employment, position or commission for a period not less than three days

91. See Gabriel Aréval Mascareño et al., *Wal-Mart Mexico and Implications in Mexican Law: an Uncertain Path*, ABA SEC. OF INT’L L. MEX. UPDATE, July 2012, at 11, available at http://www.americanbar.org/content/dam/aba/uncategorized/international_law/mc_newsletter_july_2012.authcheckdam.pdf.

92. *Id.* at 12.

93. Ley Federal de Responsabilidades Administrativas de los Servidores Públicos [LFRASP] [Federal Law of Administrative Responsibilities of Public Servants], *as amended*, Diario Oficial de la Federación [DO], 13 de Marzo de 2002 (Mex.).

94. *Id.* art. 8.

no more than a year, discharge, economic sanctions, and temporary disqualification from public service.

The newly adopted Federal Anti-Corruption Law in Public Procurement punishes anyone who offers tips or bribes public officials in relation to public tenders.⁹⁵ But this law does not reach bribes outside federal procurement, permitting processes, or international trade transactions.

XI. Bar Membership

Today, there is no legal obligation for a Mexican attorney to join a bar association. A person may simply finish law school and be licensed to practice law in all fields. There are no state bar exams to practice law. The three main national bar associations in Mexico jointly prepared draft constitutional amendments aimed to require lawyers to become members of a bar association. They also drafted proposed new regulations governing professions. Both documents were filed with Mexico's Senate in 2012.

XII. Immigration Law

Effective October 28, 2012, President Calderón promulgated the Regulations of the Immigration Law, eliminating several provisions of the Regulations of the General Population Law.⁹⁶ The new provisions emphasize compliance with human rights, mainly related to Mexico's inflow of persons from Central and South America. The amendments also address business and tourism, streamlining procedures to increase Mexico's competitiveness in the global economy and facilitating tourist entry.

Article 52, section II authorizes a foreigner with a job offer, with an invitation from any authority or academic, artistic, sporting, or cultural institution assuring in-country compensation, or who enters Mexico to perform a remunerated, seasonal activity pursuant inter-company agreements with foreign entities, to remain in Mexico for an uninterrupted period not exceeding 180 days.⁹⁷ To obtain this work visa, Article 115 provides that the sponsoring Mexican individual or company must have opened a basic file documenting its legal status with the Immigration Institute and issue an offer letter to the foreigner stating name and nationality, contemplated occupation, compensation, length of stay and location of workplace, and the sponsor's assumption of liability for the foreigner's travel expenses.⁹⁸

95. *Id.* art. 2.

96. Decreto por el que se expide el Reglamento de la Ley de Migración y Se Reforman, Derogan y Adicionan diversas Disposiciones del Reglamento de la Ley General de Población y del Reglamento de la Ley de Asociaciones Religiosas y Culto Público. [Decree Issued Concerning Regulation of the Migration Act and Amending, Repealing and Adding Various Provisions of the Rules of the General Population Law and Regulation of the Law of Religious Associations and Public Worship], *Diario Oficial de la Federación* [DO], 28 de Septiembre de 2012 (Mex.).

97. *Id.* art. 52.

98. *Id.* art. 115.

XIII. Mining Regulations

An October regulation under Mexico's mining law replaces 1999 regulations and confirms 2005 amendments to the law.⁹⁹ The regulation modifies the lottery for awarding new mining claims and simplifies procedures to register new claims and present concession requests.¹⁰⁰ Article 54 updates the name of the agency responsible for appraisals, forced easements, and expropriations in connection with mining claims, to the Institute of Administration and Evaluation of National Assets.¹⁰¹ Article 59 affirms the 2005 statutory amendment that mining concessions are no longer for either exploration or exploitation, but rather both.¹⁰² It details the minimum investment requirements for exploration and exploitation of a claim, fixed proportional to the surface area covered by the concession granted, in accordance with a schedule to be updated annually in the Official Gazette. Investment reporting rules are clarified, and Article 70 obligates holders of mining claims six years or older to annually report production, benefit derived, and destination of minerals.¹⁰³ The regulation's Title Six modernizes the Public Registry of Mining and Mine Cartography to (a) expedite recordation of agreements and acts involving mining claims and of mining business entities; (b) enable electronic recording; and (c) synchronizing filings with the new *Sistema Integral de Administración Minera* (Comprehensive System of Mining Management).¹⁰⁴

99. Reglamento de Ley Minera [Mineral Law], *as amended*, Diario Oficial de la Federación [DO], 12 de Octubre de 2012 (Mex.).

100. *See id.* art. 29.

101. *Id.* art. 54.

102. *Id.* art. 59.

103. *Id.* art. 70.

104. *Id.* arts. 78-94.

