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Environmental Audits in Mexico*

A. INTRODUCTION

Voluntary compliance measures have been growing in number and importance worldwide as a way in which private parties adopt specific actions for purpose of attaining the goals that are not otherwise so efficiently obtained through the normal command and control approach. Mexico is not alien to this practice, and has found in environmental audits the leading tool to create incentives for private environmental compliance.

Environmental audits basically consist of a procedure initiated by a private party and conducted under the supervision of the Mexican Federal Environmental Protection Agency (*Procuraduría Federal para la Protección al Ambiente*—the PROFEPA) whereby the respective organization/company is evaluated to determine what specific actions are necessary to bring its facilities into compliance over a period of time and with pre-approved budgets and deadlines. Therefore, through the Environmental Audits, a systematic evaluation of the internal administrative, production, and commercial activities of a company is carried out in order to verify their consistency with all environmental and ecological standards. The results of the audit bind the private party to perform the required corrective actions with the incentive of not being sanctioned for those matters covered and addressed as a result of the audit.

Notwithstanding very broad and imprecise rules for their implementation and overall effects, the PROFEPA has fostered/promoted Environmental Audits, among others, for the following main reasons:

A. To provide an incentive for private companies to come forward with their environmental problems and reach an organized and time/economic sensitive solution to the respective environmental problems.

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B. To create a mechanism whereby the private party will allocate the necessary resources to allow and comply with the Environmental Audits, thus maximizing the budget of the PROFEPA to cover industries that still present significant environmental problems and that must be subject to the normal approach of inspections and sanctions.
C. To increase the levels of compliance and the standard of due diligence by industry and region by setting forth the examples to follow based on the actual results of audited companies.

B. Objectives of the Environmental Audit

The main objectives that are sought during the performance of an Environmental Audit are the following:

A. Analyze the manner in which the respective industry handles its environmental responsibilities generally.
B. Evaluate the degree of compliance with environmental standards and the company's own environmental policies and guidelines.
C. Examine the industrial routines and procedures and their impact on the different areas of regulatory control (air emissions, waste management, effluent treatment, noise and other pollutants controls, etc.).
D. Finally and most importantly, define an action plan where a concrete schedule is determined for the audited company to address the problems and lack of compliance issues assessed during the audit.

C. Stages of the Environmental Audit

Once a company has come forward with the PROFEPA and signs an Agreement to participate in the program and abide by the results obtained in the process, Environmental Audits generally encompass the following four stages:

1. *Planning*

During this phase, and based on a global analysis of the respective industry, a detailed activity program is prepared to include all steps that will be performed during the audit. During this stage, the auditor that is selected by the private party among those certified by PROFEPA will perform a broad analysis of the specific company, the industry it participates in, the materials used and the products therein manufactured.

2. *In Situ Evaluation*

This is the fundamental phase in all Environmental Audits. The selected auditor will proceed to make the required specific analysis and diagnosis of the industry involved to determine its compliance levels and problematic areas. All of the analysis, monitoring, and research performed involves the constant feedback and involvement of the PROFEPA.

3. *Post Audit*

In this phase a final report is put together whereby the information obtained during the Environmental Audit is organized along with the respective conclusions and corrective actions recommended. The report includes: (i) an Executive Summary; (ii) the Audit Report; (iii) the Final Evaluation; (iv) the Action Plan; and (v) Technical Exhibits and Photographs.

4. *Compliance*

An Environmental Compliance Agreement (ECA) is entered into by PROFEPA and the audited company which sets forth the specific activities and deadlines to implement the recommended corrective actions. We must emphasize that although from a practical standpoint the agency agrees not to sanction companies that are parties to an ECA, the PROFEPA at no time waives its sanctioning attributions. What will happen evidently is that if at any time the audited company fails to comply with the ECA, the PROFEPA will sanction the delinquent party accordingly.

During the time it is implemented and after all goals are met, the PROFEPA will conduct periodic reviews to monitor full adherence to the respective corrective actions and the lack of any new problems.

D. Final Comments

The voluntary nature and flexibility of the Environmental Audit have turned it into a useful environmental protection instrument in Mexico. In fact the audit represents an efficient device to ensure that industries meet the applicable environmental standards without the absolute need for disciplinary measures to be taken. The PROFEPA has thus more or less successfully conducted this project, which after more than four years has proven a valid resource to improve compliance levels and avoid depending entirely on the traditional command and control—inspection and sanction approach.

Financial Services in Mexico*

The Mexican economic crisis, which began with the December 1994 devaluation of the peso and prompted the U.S. Government/IMF rescue package in early 1995, has led to a variety of measures to strengthen the Mexican financial system:

- Late last year, Banco de México issued an extensive circular outlining new guidelines for banks and other institutions to follow in order to avoid practices that might exacerbate their financial problems. Banco de México, Circular 2019/95, dated September 20, 1995, regarding asset, liability and services transactions.
- In April, amendments to the Credit Institutions Law and the Financial Groups Law were adopted to, among other things, limit loans to bank insiders, facilitate the sale of problem loans, and modernize bank regulation. Some of the amendments also make exceptions to the bank secrecy rule in order to facilitate the due diligence inquiries of prospective buyers of the banks themselves.[1]
- In July, the Ministry of Finance and Public Credit announced new rules on capital requirements for banks and securities firms, which became effective on September 1, 1996. The new rules require higher capitalization levels to cover bank or brokerage investments in speculative securities, and are expected to bring capital levels up from their current minimum 8% of assets to between 8.7% and 12% of assets.[2]
- A number of government programs have been instituted to assist the financial system and its customers to weather the economic crisis. These include: the UDI system of

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1. *Diario Oficial de la Federación*, April 30, 1996.
2. *Id.* July 15, 1996.

inflation-adjusted loan units; the ADE program for a temporary moratorium on loan collections; special programs under FOBAPROA and FAMERVAL (trusts administered by Banco de México) to inject capital into the financial system; government purchases of bad loans from the banks; and February 1995 amendments to the Credit Institutions Law which permitted foreign banks to acquire controlling interests, and inject new capital, in some banks.

- The privatization of the pension fund system, under the new Law for Retirement Savings Systems published in the *Diario Oficial* on May 23, 1996, is expected to open up new sources of funds to assist in the development of a secondary mortgage loan market; it will also provide business for a number of asset managers now being organized. Rules were published under the Law in the *Diario Oficial* on October 10, 1996.
- New rules are expected to be promulgated in the near future to enable nonbank banks or special-purpose financial companies (*sociedades financieras de objeto limitado* or SOFOLes) to expand actively into mortgage banking and loan servicing activities. Currently, there are restrictions on the corporate purposes of SOFOLes which prevent them from engaging in such activities.
- The establishment of new credit information companies or credit bureaus is expected to enable the banks and other credit-grantors to make sounder credit decisions in the future.
- Tentative steps are being taken to reform the laws related to secured transactions. It is expected that the Federal District Civil Code will be amended soon to permit UCC-style security interests to be created in various types of personal property.
- With regard to the possibility of the development of a secondary market in mortgage loans, the Federal District Civil Code was amended in May to facilitate the sale by Mexican banks of their loans to other institutions.[3] However, for such loans to be transferred to a special-purpose entity which could be utilized to securitize the loans, it appears to be necessary to amend Article 93 of the Credit Institutions Law, which prohibits sales of bank loans to entities apart from other Mexican banks, unless specifically authorized by Banco de México.

Mexico's Telecommunications Industry*

The enactment of the much anticipated (and debated[4]) Federal Telecommunications Act of 1995[5] provided the essential groundwork required to launch, at long last, an army of telecommunications white knights: the new players and would-be competitors of Telefonos de Mexico (Telmex), the incumbent carrier, vowing to provide world class service[6] to a disenchanted Mexican market place, desperately in need of rescue.

Mexico realized that to modernize meant to telecommunicate the country, within and without. Unfortunately, this story, as most involving white knights and valiant rescues, takes the first two twists as it unfolds.

3. *Id.* May 24, 1996.

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4. Lobbying and discussion took several months, longer than any other recent piece of legislation.

5. Published in Official Daily (*Diario Oficial de la Federacion*), June 7, 1995 [hereinafter FTA].

6. Telecommunications concessions issued to the new telecommunications carrier required the identification of the types of telecommunications services to be provided (FTA, art. 26, Section III).

A. First Twist: The FTA Fell Short of the Mark on Several Counts

In the field of interconnection: The FTA required the incumbent operator and the new entrants to enter into a formal interconnection agreement[7] which had to be filed before the regulator.[8] The negotiation of such a complex agreement, the first of its kind, took almost nine months. To date, only two issues remain unresolved and their resolution is in the hands of the regulator.[9]

Interconnection mandated by law (such as is the case in the United States) seemed the right solution to many to simplify a multi-pronged process which, due to the adoption of an aggressive market opening schedule, was being forced to deal with many issues at the same time with only a handful of experts.[10] But simply copying a common law solution and transplanting it to a civil law system could have been a formula for disaster: The Mexican legal system lacked substantive related, let alone direct, precedents which could lend support to the regulator's interpretation of the scope and breadth of the incumbent operator's obligations to interconnect and of the new entrant's rights and obligations on this very subject. Further, submitting to the construction-by-analogy rules mandated by the Mexican Civil Code[11] did not lend adequate comfort to anyone under the circumstances. The resulting agreement, however, which will be in effect for two years, reflects the major concerns of both negotiating teams.

In the field of tariff registration, tariffs may be freely set by competitors,[12] and, pursuant to the FTA, such tariffs must be filed of record before the Telecommunications Registry, provided, however, that a dominant carrier (such as, in this case, the incumbent carrier) (i) may be subject to certain antitrust related regulations,[13] and (ii) is also subject to certain tariff related restrictions according to its concession.[14] In direct contradiction with the FTA, a recent executive order issued by the regulator[15] provides for specific waiting periods before a rate may become effective and seems to require the filing and approval of all tariffs.[16]

As regards antitrust, the FTA created an apparent duplication—and, not surprisingly, ultimately a vacuum—of jurisdictions (of the Mexican Antitrust Commission and of the telecommunications regulator) by empowering the telecommunications regulator with authority to impose specific obligations upon the dominant carrier.[17] It is worth noting that, to this date, the new entrants have addressed their differences with the incumbent carrier at non-antitrust fora, thereby reserving antitrust challenges as part of their strategy.

In addition to the foregoing, as regards what has been dubbed essential resources,[18] such as, for example, last-mile access to a customer, the FTA failed to make the distinction between the auctioning[19] of the telecommunications spectrum for purposes of a total wireless solution,

7. FTA, arts. 42 and 43.
8. *Id.*, art. 64, § VI.
9. The agreements were finally executed by all the new market entrants in the month of October.
10. Namely (i) size and form of distribution of the upgrading of the existing network, and (ii) the limitation of liability of the incumbent carrier.
11. Mexican [Federal] Civil Code, art. 1858.
12. FTA, art. 60.
13. *Id.*, art. 63.
14. Telmex Concession, § 7.
15. Executive Order setting forth the process to register tariffs of the telecommunications services under the FTA. Official Daily of November 18, 1996 (hereinafter EO).
16. *Id.*, arts. 1 and 3.
17. FTA, art. 63.
18. "*Recursos Esenciales.*"
19. FTA, art. 14.

and the need to permit the ready access and use of direct point to point wireless connection between a long distance carrier and its customer (as an alternative to a wired last-mile solution). The result, a huge dilemma: on the one hand, the FTA does not provide a foolproof alternative to an auction process for the new entrants and, on the other, the incumbent carrier, the carrier with an essential resource (*i.e.*, the last-mile connection), has not been regulated for this purpose.

Finally, the presubscription process, which revolves around a very aggressive balloting schedule and the default selection of the convenient operator,[20] is on the brink of being tested by all the participants.

B. Second Twist: The Regulator Is Called to the Rescue

Since enactment of the FTA, the regulator has issued regulations, executive orders, and resolutions, some of which may yet be scrutinized to determine their conformity with Mexican law, specifically with its constitutional law principles. While it must be recognized that the regulator may, in some instances, be faced with the difficult role of innovator, it is similarly clear that the regulator recognizes its responsibility in the resolution of such issues as the ones outlined above and in the structuring of a sound body of law and administrative precedents which must bring about true market competition in a market and industry which had none.

20. Long Distance Services Rules 2301.2.