

State Bar of Texas International Law Section

INTERNATIONAL NEWSLETTER

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On the eve of the ILS' trip to Mexico, the International Newsletter is pleased to publish a series of seven articles that are related to Mexican legal issues.



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By Juan Carlos Luna Ruiz, Queen Mary University of London, Energy and Natural Resources LLM Candidate, 2019, United Kingdom

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By Lilly Teng, Managing Partner, Orchid Law PLLC and Hal Kaiser, Senior Partner, Orchid Group LLC, San Antonio

Opportunities in international business for Americans and Asians will continue to expand, particularly in energy, trade and all critical industries, given the tremendous talents and drive of the people, and financial capital and power in the regions. These industries also contain the highest risks of disruption caused by geopolitical tensions, changes in government, policies, laws, and diametrically opposed ways of thinking, which are shaped by history and cultural norms. By looking through unfiltered lenses and understanding the rationale for the different perspectives, Americans and Asians can find the right partners and build relations for long-run success and true trustworthy connections.

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By Alejandro Catala Guerrero, Partner at Basham, Ringe y Correa, S.C., Mexico City and Joseph J. Wielebinski, Shareholder at Winstead PC, Dallas

This article discusses the general principles governing both the recognition and enforcement of a foreign judgment under Mexican law, including limitations on the types of judgments that will be enforced and the steps to be taken and information needed for recognition.

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**TOM WILSON**

ILS Chair

MESSAGE FROM THE CHAIR

March and April are always big months for the ILS. In March we have our Annual Institute, and in April we take our international trip. This March, our Annual Institute will be on March 28 and 29 at The Baker Institute on the beautiful campus of Rice University. In April, our international trip is to Mexico City on April 3 through 6. On top of all those activities, we publish our third edition of the ILS International Newsletter.

Since our Winter Edition, the ILS has hosted two events, one in Houston and one in Dallas. The Houston event was a lunchtime panel discussion of the impact of the #MeToo Movement on international business and legal matters. When we met in Dallas, we had panels of both outside counsel and inside counsel who discussed how lawyers can begin practicing in the international arena. We also had a panel on the important topic of immigration law.

While the leadership of the ILS has been busy with all of these events, at the same time we have begun the planning for next year. Recall that the Texas Bar year starts in June when the Bar's annual meeting occurs. In the coming year, we will no doubt return to the city of Austin in September and the city of San Antonio in October. We are also looking to extend our programs to El Paso, possibly the most international city in the state of Texas given that it shares a border with

Mexico. We are exploring additional opportunities for more outreach with law schools in Texas. Of course, we will continue the efforts of our International Human Rights Committee. Finally, for next year, our international trip will very likely be to Toronto, Canada.

As you can tell from what we have done and what our plans are, the ILS is a very active section of the State Bar. For anyone with any interest in international legal matters, the ILS is a necessary source of information. It is also a really good deal at the \$30 annual fee.

I hope to see many of you in the coming weeks at our events. As always, please let me know if you have any feedback on our events or this newsletter. You can contact me at twilson@velaw.com. Now, please enjoy the terrific newsletter that our authors and our Editor, Jim Skelton, have prepared. ●

WHAT DOES THE #METOO MOVEMENT HAVE TO DO WITH INTERNATIONAL LAW AND BUSINESS?

BY TOM WILSON

ILS Chair and Partner at Vinson & Elkins LLP, Houston

The answer to the question in the title of this article was given by a sterling panel at an ILS event on January 31 in Houston. The emphatic answer is that the #MeToo Movement has had and will continue to have a significant impact on international legal and business matters. Our panel included a director of a large energy company, an assistant dean of a law school, a development specialist with an international consulting company, and

an attorney with a major international law firm. Each of them had had their own specific experiences related to the topic.

Those who attended learned how companies can best prepare their employees for international assignments. There was also a discussion of how best to handle complaints from employees in far flung operations in terms of both investigations and, if needed, remedial action.

Different regions of the world, including South America, Africa, and Asia, were discussed. The legal issues, business issues, and cultural issues were all reviewed in a wide ranging discussion on the topic. ILS wishes to thank Annell Bay, Lauren Fielder, Fabiana Peek, and Christopher Bacon for their valuable participation in this panel. ●



From left to right: Chris Bacon, Counsel, Vinson & Elkins; Annell Bay, Non Executive Director at Apache Corporation, Hunting PLC, and Verisk Analytics; Tom Wilson, Partner, Vinson & Elkins and Chair, International Law Section; Lauren Fielder, Assistant Dean, School of Law at The University of Texas at Austin; and Fabiana I. Peek, Consultant, Social Performance and Development Specialist, Acorn International LLC.



JAMES W. SKELTON, JR.

Editor in Chief
International Newsletter

EDITOR-IN-CHIEF MESSAGE

This third issue of the International Newsletter of the International Law Section is packed with seven informative articles about Mexico and the United States, which is no doubt due to this year's focus on Mexican legal matters. We're also pleased to present insightful articles about trust issues related to doing business in Asia, treaty ratification issues in Kosovo, and testifying at U.S. hearings on tariffs levied against Chinese goods.

The seven articles on Mexican legal issues cover the following topics: (i) the effects on both sides of the border of tax incentives and the new free trade zone in northern Mexico; (ii) the development of pluri-ethnic sovereignty in Mexico; (iii) the future of Mexico's renewable energy industry; (iv) the new hydrocarbons strategy in Mexico; and (v) the enforcement of foreign judgments and double derivative actions in Mexico. While there are two articles each related to topic (i) and topic (v), each of those articles approach the topic from a different perspective.

We chose to modify the categories of topics in the call for articles notice for this third issue, and we intend to do so again for the fourth issue. If you have any suggestions for additional topics, please let us know. As has been the case for all three issues, articles about Mexican legal subjects will continue to be given a high priority.

We'll also continue to ask authors to provide, in addition to their article, a brief synopsis of the article, an "about

the author" summary regarding the author and his/her practice, and an image suggestion using key words or a photo or drawing that reflects the theme of the article. You'll find the synopsis in the table of contents, while the about the author piece and image suggestion will be included with the article.

The International Law Section's International Newsletter is dedicated to providing international lawyers in Texas and elsewhere with insights into as many aspects of international legal issues as possible. We have been fortunate to publish many timely topics thus far, and we welcome any comments or suggestions you may have. ●

MEXICO ENACTS NEW TAX INCENTIVES FOR THE NORTHERN BORDER REGION

BY RENE CACHEAUX, AND PABLO SAENZ
Cacheaux Cavazos & Newton, L.L.P., San Antonio

Introduction

With Mexico's new federal government now in place, numerous political changes have emerged since the beginning of January. Such changes include a new tax incentive designed to benefit the northern Mexico border region by encouraging increased economic and trade activity in the area.

The Tax Decree

On December 31, Mexico's Department of Finance and Public Credit ("SHCP" by its initials in Spanish) published the *Decree on Tax Incentives for the Northern Border Region* in the Official Journal of the Federation. Such Decree took effect on January 1, 2019 and is valid for calendar tax years 2019 and 2020.

The Decree establishes tax incentives for taxpayers operating in certain municipalities in northern Mexico and is designed to promote economic growth in the region and make Mexican border businesses more competitive with businesses operating along the southern border of the United States. The municipalities that are included for this new incentive, listed by state, are as follows: **i. Baja California:** Ensenada, Playas de Rosarito, Tijuana, Tecate, and Mexicali; **ii. Sonora:** San Luis Río Colorado, Puerto Peñasco, General Plutarco Elías Calles, Caborca, Altar, Sáric, Nogales, Santa Cruz, Cananea, Naco, and Agua Prieta; **iii. Chihuahua:** Janos, Ascensión, Juárez, Praxedis G. Guerrero, Guadalupe,



Coyame del Sotol, Ojinaga and Manuel Benavides; **iv. Coahuila de Zaragoza:** Ocampo, Acuña, Zaragoza, Jiménez, Piedras Negras, Nava, Guerrero, and Hidalgo; **v. Nuevo León:** Anáhuac; and **vi. Tamaulipas:** Nuevo Laredo, Guerrero, Mier, Miguel Alemán, Camargo, Gustavo Díaz Ordaz, Reynosa, Río Bravo, Valle Hermoso, and Matamoros.

The Decree should be analyzed in conjunction with a recent resolution of Mexico's National Minimum Wage Commission establishing a new Border Zone General Minimum Wage (equivalent to double the General Minimum Wage). Such new provision applies to the region comprised of municipalities located within the 25 kilometers (approximately 15 miles) of the border, as well as a few other adjacent municipalities.

Specifically, the tax incentive provides benefits for two types of Mexican

federal tax payments: Income Tax (IT) and Value Added Tax (VAT). Regarding IT, the incentive is applied in the following manner: taxpayers will apply a 20% tax rate to the income received in the tax year, as well as to any provisional payments of said tax, for any taxable income received on business activity in the region, with the exception of income derived from intangible assets.

It should be noted that not every taxpayer operating in the border region is eligible for the IT tax incentive. The Decree lists various categories that are excluded, including taxpayers in the following activities: financial markets, maquila companies (not including shelter operation companies), those that perform activities through trusts, those that engage in agriculture and livestock activities, cooperative production companies, outsourcing companies,

those who were audited and who are not in good tax standing, those who are in liquidation, and those who already have certain tax incentives, among others.

On the other hand, the VAT tax incentive consists of applying an 8% rate to any taxable activity performed by individual taxpayers or legal entities engaged in the sale of goods, provision of services, or lease of goods (not, however, to VAT payments for the importation of goods or services), occurring in business transactions conducted by companies located within the northern border region.

Importantly, the Decree's described tax incentives remain subject to certain requirements to be issued by the Tax Administration Agency ("SAT," for its initials in Spanish). We suggest that affected taxpayers operating in Mexico's northern border region carefully analyze the possibility of seeking the new tax incentives.

It is worth mentioning that the Decree essentially creates unequal treatment between certain taxpayers, and potentially violates governing Mexican legal requirements as to tax equality and tax equity. Given such unequal treatment, taxpayers who do not benefit from the incentives, but perform the same taxable activities as other taxpayers, will likely take legal action in pursuit of the new incentives.

Conclusion

Finally, it is important to recognize that the main purpose behind the new border tax incentive is to make northern Mexico more competitive, productive and attractive for investors. However, interested businesses and investors should be aware that the tax incentives expire after two years and are subject to certain requirements. We will continue to

observe the impact of the new incentives and any prospective benefits generated in Mexico's northern border region.



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Both authors work frequently with CCN labor specialists throughout the firm's eight Mexico offices. ●



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DEVELOPMENT TOWARDS PLURI-ETHNIC SOVEREIGNTY IN MEXICO

BY AUSTIN PIERCE
Vinson & Elkins LLP, Houston

Introduction

Mexico has always been a highly diverse nation. It is home to several scores of ethno-linguistic groups. However, Mexico's defining trait has long been *el mestizaje* — “the mixing,” which refers to the blending of Amerindian and European blood that gave rise to Mexico's self-identity. Nevertheless, to this day, approximately 10% of the country identifies as indigenous,¹ one of the largest populations in the Americas.

Mexico's relation with its indigenous population has undergone several major changes, growing more accommodating as the concept of *mestizaje* stopped playing such a centralizing role. Originally, the lenition was from coercive actions to assimilatory ones. However, Mexico's variegated and, at points, isolating terrain meant such policies were met with mixed results. Then, approximately 25 years ago, another change began to take shape, as the assimilatory notion gave way to a concept of integration. As with any substantial transformation, however, there have been growing pains. The remainder of this article will examine Mexico's development towards a pluri-ethnic state, as the country adapts to integrating indigenous sovereignty into its political structure.



The Pluri-Ethnic State

Although the process of redefining indigenous relations with the Mexican state began earlier, an encompassing legal formulation did not start to take shape until the 1990s. In 1992, Mexico adopted two amendments to its constitution, which became the reformed Articles 4 and 27. Article 4 was Mexico's first legal reference to itself as a multi-ethnic nation.² Article 27 specifically referred to the integrity of the lands of indigenous groups.³ These changes were the starting point for a legal architecture for incorporation of indigenous society within Mexico.

However, they were a weak version of indigenous rights reform. Article 4 focused heavily on cultural rights but was light on discussion of socio-economic or political rights. Moreover, following the promulgation of the amendments, Mexico ratified the North American Free Trade Agreement (NAFTA),⁴ which some had thought would undermine the protections of indigenous groups' land, among other concerns.⁵ These diluted reforms sat poorly with many in the indigenous rights movement. Some turned to forceful recourse.

Concurrent with NAFTA going into effect, a group in Chiapas known as the Zapatista Army of National Liberation

declared war against Mexico,⁶ a conflict which became known as the Zapatista Uprising. Though brief, only 12 days in length, the Zapatista Uprising launched the concerns of indigenous groups to the national agenda. The conflict was followed by a lengthy peace negotiation, part of which included further revisions to the Mexican constitution.

This new amendment, which became Article 2 of the constitution, recognized the rights of indigenous peoples to free determination and autonomy within Mexico for internal affairs “social, economic, political, and cultural.”⁷ Notably, the language of the article extended beyond mere cultural rights. Though some find it insufficient, Article 2 has helped inform Mexico’s grapple with pluri-ethnic sovereignty.

This step forward was underscored when Mexico’s highest courts affirmed the municipality of Cherán’s move towards rule according to local indigenous customs.⁸ Cherán is a Purépecha community in the Northwest portion of Michoacán. After years of rule under corrupt officials and a local cartel, in 2011, the inhabitants of Cherán drove these corrupt and criminal parties out of their community and proceeded to establish a system of self-rule based on Purépecha customs.⁹ That same year, the Upper Chamber of the Electoral Tribunal of the Federal Judiciary acknowledged the rights of the indigenous community of Cherán to elect local authorities via their own customs, distinct from the State of Michoacán’s prescribed electoral process.¹⁰ Then, by 2014, the argument over what rights the indigenous community possessed had found its way to Mexico’s Supreme Court. The Court¹¹ concluded that the community was entitled to its self-government under several legal bases and, moreover, that failure to consult with and incorporate the indigenous municipality into a decision-making process that would impact that indigenous community

violated its rights.¹² This has paved the way for Cherán to function effectively as a state-within-a-state, as their autonomous rule has continued through today without significant interruption.¹³

“

In 1992, Mexico adopted two amendments to its constitution, which became the reformed Articles 4 and 27. Article 4 was Mexico’s first legal reference to itself as a multi-ethnic nation. Article 27 specifically referred to the integrity of the lands of indigenous groups. These changes were the starting point for a legal architecture for incorporation of indigenous society within Mexico.

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Cherán has not been the only story of progress. Several courts have restored lands to the Wixárika (Huichol).¹⁴ There has been progress towards autochthony in areas beyond land reform as well. For example, in 2003, Mexico adopted the General Law of Linguistic Rights of Indigenous Peoples.¹⁵ This law established the indigenous languages of Mexico as official languages alongside Spanish, with equal validity, including in all

areas of state action.¹⁶ Though Mexico’s pluri-ethnic sovereignty is by no means complete, these actions have been discrete steps towards such a reality.

However, there have been a number of stumbles along the way. The transfer of land to the Huichol has been met with large-scale resistance.¹⁷ While disagreement in Nayarit has thus far largely avoided violent confrontation, other areas have not been so fortunate. In Ostula, Michoacán, the Nahua community has been subject to forceful retribution for their attempts at self-government.¹⁸ In the early 2010s, more than 30 people in the one community had been brutally murdered or kidnapped.¹⁹ Such civilian-led retribution has also been widespread in Chiapas, leading to the displacement of indigenous peoples.²⁰ These issues highlight a gap between the legal architecture and the popular sentiment in certain regions of the country.

Sometimes that sentiment finds its way into additional legal documents. A prime example would be the 2014 Federal Law for Telecommunications and Radio Broadcasting (the Telecommunications Law). In the original promulgation of the Telecommunications Law, Article 230 required broadcasts to “make use of the national language.” Notably, the law required use of “the national language,”²¹ in the singular, despite the promulgation of legal parity between Spanish and indigenous Mexican languages more than a decade earlier.²² Given the regional nature of the indigenous languages and the ubiquity of Spanish, it is difficult to conceive of this singular “national language” as anything but Spanish, which would break the earlier guarantee of parity.

Thankfully, that particular mishap was subsequently resolved. The law had been controversial for several reasons, not least of which being the abrogation of the hard-won recognition of linguistic rights secured in 2003. Therefore, in 2016, Mexico’s legislature amended the law to

permit broadcast in “any of the national languages,”²³ with proper use of the plural to encompass the more than 60 languages that had previously been excluded.

It is unclear where these various developments point for indigenous communities in Mexico. There have been substantial steps forward in the legal framework; however, these have been merely aspirational in many instances of application. At other times, notable shortcomings can still be seen in the country’s assessment and treatment of its indigenous population. Despite advances in the realm of theoretical autonomy, treatment of indigenous populations in other areas of the law at times has been described as a “sequence of violations of due process.”²⁴

President Andrés Manuel López Obrador has made several pledges to help Mexico’s indigenous peoples. These have included promises not only for indigenous economic development but also for implementation of further constitutional reforms to expedite internal autonomy for the country’s indigenous peoples.²⁵ The promises have been met with a mix of hope and skepticism, especially since the President has turned his focus to other major projects.²⁶

Conclusion

Nevertheless, the legal architecture is in place for indigenous populations to develop a much more pointed role in their own affairs. The direction this takes

is yet to be wholly realized, as Mexico is still coming to terms with its relatively recent self-recognition as a multi-ethnic state. Although continual advocacy would be necessary to effectuate large-scale change in Mexico’s internal composition, the developments of the last 25 years have the country well on its way to constituting a pluri-ethnic sovereignty.



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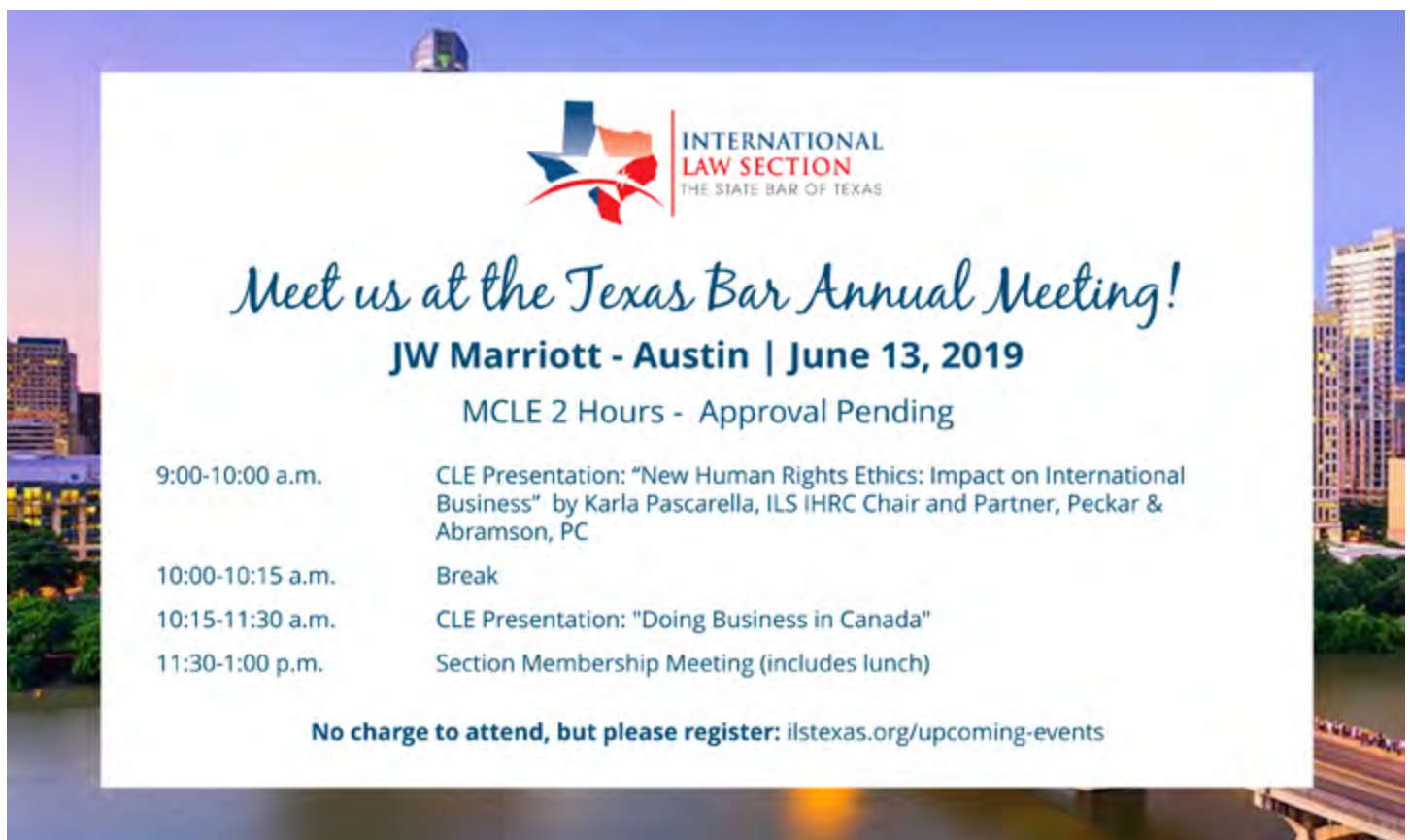
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Endnotes

- 1 See, e.g., Comisión Nacional para el Desarrollo de los Pueblos Indígenas, Indicadores Sociodemográficos de la Población Indígena 2000-2005 (Sep. 2006), available at http://www.cdi.gob.mx/cedulas/sintesis_resultados_2005.pdf.
- 2 See Decreto por el que se reforma el Artículo 4o. de la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial 3 (Jan. 28, 1992), available at http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_122_28ene92_ima.pdf ("la nación Mexicana tiene una composición pluricultural sustentada originalmente en sus pueblos indígenas").
- 3 See Decreto por el que se reforma el Artículo 27 de la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial 3 (Jan. 6, 1992), available at http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_120_06ene92_ima.pdf ("la ley protegerá la integridad de las tierras de los grupos indígenas").
- 4 Peter Bondarenko, North American Free Trade Agreement, in Encyclopædia Britannica, available at <https://www.britannica.com/event/North-American-Free-Trade-Agreement> (last accessed Feb. 11, 2019).
- 5 Paul Rich, NAFTA and Chiapas, 550 Annals of the American Academy of Political and Social Science 72, 72-74 (Mar. 1997); Tim Golden, Mexican Troops Battling Rebels; Toll at Least 57, New York Times (Jan. 3, 1994), <https://www.nytimes.com/1994/01/03/world/mexican-troops-battling-rebels-toll-at-least-57.html>.
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- 8 Although Mexico is a civil law country and the value of that case law is not analogous to case law in the United States, such cases are nevertheless valuable as persuasive legal argument and provide insight into the legal environ.
- 9 See, e.g., Linda Pressly, Cheran: The Town that Threw out Police, Politicians, and Gangsters, BBC News (Oct. 13, 2016), <https://www.bbc.com/news/magazine-37612083>.
- 10 See SUP-JDC-9167/2011, Juicio para la Protección de los Derechos Político-Electorales del Ciudadano (2001), available at <https://portal.te.gob.mx/colecciones/sentencias/html/SUP/2011/JDC/SUP-JDC-09167-2011.htm>.
- 11 See Controversia Constitucional 32/2012, Suprema Corte de Justicia de la Nación (2014), available at <http://www2.scjn.gob.mx/AsuntosRelevantes/pagina/SeguimientoAsuntosRelevantesPub.aspx?ID=138752&SeguimientoID=593&CAP=>.
- 12 Id.
- 13 See, e.g., Andalusia Knoll Soloff, After long fight for self-government, indigenous town of Cherán, Mexico ushers in new council, NBC News (Sep. 4, 2018, 12:53 PM), available at <https://www.nbcnews.com/news/latino/after-long-fight-self-government-indigenous-town-cheran-mexico-n906171>.
- 14 The case of the Huichol is distinct from some other indigenous peoples in Mexico, as the Huichol have land charters from the Spanish crown that have formed the basis of many of their claims. See, e.g., Donald Ricky, Native Peoples A to Z: A Reference Guide to Native Peoples of the Western Hemisphere 1526 (2009).
- 15 Ley General de Derechos Lingüísticos de los Pueblos Indígenas, Diario Oficial (Mar. 13, 2003), available at http://www.diputados.gob.mx/LeyesBiblio/pdf/257_200618.pdf.
- 16 Id. at Art. 4, 7, 10.
- 17 See Tracy Barnett, Wixarika Take a Stand, Intercontinental Cry (Sep. 20, 2016), <https://intercontinentalcry.org/wixarika-take-stand/>; Tras




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10:00-10:15 a.m.	Break
10:15-11:30 a.m.	CLE Presentation: "Doing Business in Canada"
11:30-1:00 p.m.	Section Membership Meeting (includes lunch)

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MEXICO'S RENEWABLE ENERGY AND THE ROAD AHEAD: THE NEXT SIX YEARS

BY EDUARDO MARQUEZ CERTUCHA

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Introduction

Andrés Manuel López Obrador (AMLO) was finally victorious in his third run for president of Mexico. AMLO won with more than 53% of the total votes, carrying 31 of the 32 states, and achieving the most resounding political victory in the short life of the democratic Mexico. Some experts argue that AMLO's victory can be attributed in part to his assessment of the economic challenges the country faces and his strong promise to combat corruption. This article focuses on the current administration's preliminary assessment of the renewable energy industry and the outlook for it in Mexico. It then examines the most relevant initial actions taken by the AMLO administration in relation to its original stated goals.

Proyecto 18

Proyecto de Nación 2018-2024, which we will refer to as Proyecto 18, was AMLO's stated platform during the presidential campaign. The plan, prepared by AMLO's team, laid out his assessment and proposals across industries. In particular, it divided his energy policy into four main goals: increase hydroelectric energy, accelerate the transition to renewable energies, rehabilitate thermoelectric production and restructure the oil sector. Those goals clearly conveyed that his energy policy would be geared toward the promotion of, and transition to, renewable energy through the



development of hydro and thermoelectric energy. Despite this specificity of intention, Proyecto 18 failed to provide sufficient details on AMLO's plan for the electric wholesale market (*Mercado Eléctrico Mayorista* or MEM) and other sources of renewable energy, such as wind and solar.

The Renewable Potential: Increasing Hydroelectric Energy

Fossil fuels represent 90.4% of Mexico's total primary energy supply (TPES), most of which consists of oil (48.1%), natural gas (35.1%) and coal (7.3%). Notably, renewable energy accounts for just 8.3% of Mexico's TPES. The disparity between fossil fuel

and renewable energy supply is likely one of the many reasons prior administrations made oil and gas the main focus of their energy policy agendas. Nowadays, 23 of 73 gigawatts (GW) of installed capacity is renewable energy, which includes solar, hydro, wind, biomass and geothermal. The Energy Transition Law, published December 24, 2015, optimistically aimed to increase the use of renewable energy to 25% in 2018, 30% in 2021 and 35% in 2024. According to research by the Wilson Center, Mexico is among the top three countries in Latin America for both wind and solar potential. In fact, the largest solar plant in Latin America is currently being constructed in Coahuila.

All this begs the question of what

the new administration's plans are to foster renewable energy. To capitalize on Mexico's potential in renewable energy, Proyecto 18 vowed to prioritize the development of the hydroelectric and thermoelectric industries. Its goal was to reach full generation capacity in the current hydroelectric plants, construct new hydroelectric plants and preserve the current thermoelectric generation (in contrast with the systematic decommission of such plants as proposed under the prior administration).

Proyecto 18 further promised that AMLO would rehabilitate 63 hydroelectric power plants to increase capacity to 2.8 terawatt hours (TWh), with a required investment of \$1.2 billion. It also said the administration would install 13 new hydroelectric power plants with an aggregate capacity of 840 megawatts (MW) and a required investment of \$1.85 billion, and construct at least 112 small and private hydroelectric plants with an aggregate capacity of 1,095 MW with an expected investment of \$6.3 billion. Proyecto 18 argued in favor of hydro energy by citing the potential savings for independent power producers in substituting gas with electric energy. This, incidentally, may also be achieved using other types of alternative energy.

To achieve its objectives, shortly after taking office, the new administration announced that the Mexican and Canadian governments would enter into negotiations to modernize and rehabilitate 60 hydroelectric plants in Mexico through a partnership with Hydro-Quebec. Though a deal has not been signed, preliminary discussions are optimistic and consistent with the prior promises made by AMLO. It does, however, remain to be seen whether the rehabilitation and promotion of hydroelectric and thermoelectric generation will ultimately be a viable, cost-effective solution to replace other alternative sources of energy.

Cancellation of the 4th Long-Term Auction: Uncertainty for Solar and Wind Energy

AMLO did not fully address his plans for solar, wind and other renewable energy in Proyecto 18. Other than the more detailed proposals for hydro and thermoelectric energy, it did not mention how the new government would promote the development of solar and wind energy. Proyecto 18 notes that the construction of wind farms in the Istmo de Tehuantepec and other regions in Mexico has "invaded" more than 50,000 acreages, in some cases without the consent of local communities. In seeking to address that problem, Proyecto 18 cited the need to shift to smaller-scale wind projects to lessen the impact on the lives of the communities in affected areas.

On January 31, 2019, the *Centro Nacional de Control de Energía* ("CENACE") cancelled the 4th long-term energy auction following the announcement on December 2018, just a few days after AMLO took office, that the energy auction would be suspended. The administration's argument for the move centered on its stated need to review and understand the situation of the market and the MEM. This was a critical development considering that the long-term auctions allow basic service suppliers to participate as purchasers alongside the government's Comisión Federal de Electricidad (CFE). Through long-term power purchase agreements, these basic service suppliers enter into contracts to satisfy the power, cumulative electric energy and clean energy certificates (*Certificados de Energías Limpia* or CEL). Contracts are awarded for a 15-year term for power and cumulative electric energy and a 20-year term for CEL.

To date, three long-term auctions have taken place. The third auction, launched in November 2017, was the first bid with buyers other than CFE, and also the first to contemplate setting up a

clearing house to act as counterparty for credit support purposes in the contracts. In total, the third auction concluded with the approval of 16 projects, with a purchase offer of 6,090 GWh-year of electric energy, 6.1 million of CELs and 1,414 MW-year of power with an estimated investment of US\$2.4 billion. Also of note is that the average price in the prior auctions decreased from \$47.7 per package (MWh + CEL) in the first auction, to \$33.7 per package (MWh + CEL) and \$20.57 per package (MWh + CEL) in the second and third auctions, respectively.

Proyecto 18 had criticized the prior administration for having entrusted the success of energy reform with an MEM that lacked the sufficient participation of private parties. The MEM in question began operations in 2016 and, to date, has 82 participants. This does demonstrate that it has made progress in its short life. In a sense, the government's position should not surprise the market, as AMLO had consistently stated that he would review the current contracts entered into by the prior administration in the CNH oil and gas bids. As such, the government's current position to suspend the long-term auctions for electric energy is at least consistent across the energy industry. It is also important to note that, at least for now, the cancellation of the long-term auctions seems to be a temporary measure and we should expect that, at some point, the long-term auctions will be reinstated.

Conclusion

Less than 100 days have passed since AMLO took office, too soon to fully assess the initial actions the administration has taken concerning renewable energy. The private sector has nevertheless urged the government to clarify its intentions regarding fostering the generation of renewable energy and allowing the MEM and long-term bids to grow the electricity

market. The current government has a great challenge ahead of it. After being the opposition for 30 years, it has finally convinced the Mexican electorate that a new direction with “drastic” action is needed. It must now become technically and pragmatically savvy enough to translate the AMLO ideals into real development for Mexico in the next six years.



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THE NEW UPSTREAM HYDROCARBONS STRATEGY IN MEXICO IN LIGHT OF THE USMCA AND THE LEGITIMATE EXPECTATIONS CONCEPT

BY JUAN CARLOS LUNA RUIZ

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Introduction

Mexico, the United States and Canada recently announced the signing of a new rebranded trilateral commercial agreement, the United States-Mexico-Canada Agreement ("USMCA"), which is intended to replace the 1994 North America Free Trade Agreement ("NAFTA"). Simultaneously, the new Mexican federal government has proclaimed a new national upstream hydrocarbons plan. One of the issues that has arisen from this new approach is what effect it will have on foreign investor expectations in the upstream hydrocarbons sector.

This article briefly discusses the new upstream hydrocarbons strategy launched by the new Mexican federal government and certain USMCA investment protection provisions. In this regard, it analyzes some cases in which it would be feasible that the Mexican State may breach the "legitimate expectations" of foreign investors if such new strategy does not meet the minimum standards of treatment settled on under the USMCA.



Upstream Hydrocarbons Sector in Mexico

After the enactment of the Mexican constitutional reform in energy matters in December 2013 and the enabling energy laws published on August 2014 (jointly, the "Energy Reform"), participation in the "strategic activities" of exploration and production of hydrocarbons was opened to private investment through several kinds of contracts, namely production sharing agreements, profit sharing agreements and licenses¹ ("E&P Contracts").

From the beginning of the Energy Reform's implementation until the end of 2018, 107 E&P Contracts have been awarded through different bidding rounds convened by the National Hydrocarbons Commission ("CNH"). According to the 2018 CNH's Hydrocarbons Reserves in Mexico Report,² 7% of the 3P reserves³ are held by contractors via the E&P Contracts biddings. Of the 107 E&P Contracts, 19 involve contractors from the United States and 4 involve contractors from Canada.⁴

New United States-Mexico-Canada Agreement

On September 30, 2018, Mexico, the United States and Canada released the draft text of the USMCA. With respect to the hydrocarbons sector, Chapter 8 recognizes Mexico's direct, inalienable and inalienable ownership of all hydrocarbons in its subsoil — notwithstanding the fact that this principle is already recognized by Article 2 of the Charter of Economic Rights and Duties of States issued by the United Nations General Assembly.⁵

On November 30, 2018, the final text of the USMCA was signed at the G20 summit in Argentina by the corresponding presidents of the United States, Mexico and Canada. As of today, its ratification by each of their legislative bodies is still pending.

The Energy Reform and the New Mexican Federal Government

Long before the administration of new Mexican president, leftist Andrés Manuel López Obrador (popularly known as "AMLO"), gained control, AMLO heavily criticized the fundamental principles on which the Energy Reform was based and expressed his intention to apply new policies for the hydrocarbons sector. He argued that the Energy Reform has not achieved an increase of oil production and instead has resulted in high costs of fuels and electricity. For these reasons, AMLO announced that one of the first steps of his administration would be a review of the ongoing E&P Contracts.

Likewise, on October 2018, AMLO's party, *Movimiento de Regeneración Nacional* (known as "MORENA"), attempted by means of a legislative proposal to reform the Federal Public Administration Act in order to centralize administrative control of the energy regulators in Mexico away from the CNH

and the Energy Regulatory Commission ("CRE") into the Ministry of Energy ("SENER"). However, the proposal raised criticism and protest from investors, business organizations and rating agencies, which caused MORENA to reluctantly withdraw the proposal. Several weeks after MORENA initiated its proposal, two CNH Commissioners, including its President, announced their resignation, generating many questions and doubts about the energy future in Mexico. Moreover, in late February 2019, AMLO began an aggressive campaign against the autonomous energy regulators based on alleged acts of corruption, particularly aimed at one of his critics, the CRE's Commissioner President. This effort to discredit the regulators appears to be an attempt at the *de facto* control of the powers of such regulators.⁶

Furthermore, on December 15, 2018, AMLO announced a new national hydrocarbons plan that aims to "rescue" the national oil industry by boosting crude production at Pemex, raising crude output to 2.4 million barrels/day up from the current 1.65 million barrels/day.⁷ Similarly, he announced that \$3.65 billion will be invested in Pemex for projects arising from the Pemex's allocations granted in Round Zero in 2014.⁸ Moreover, on February 15, 2019, AMLO announced a new bail-out plan for Pemex, with \$5.5 billion in additional federal funds for 2019.⁹ Accordingly, the old procurement contracts that Pemex used to perform its activities before the Energy Reform will be used according to the new hydrocarbons plan, which means that procurement of Pemex will not be subject to the transparency and competition mechanisms conditional for granting E&P Contracts under the Energy Reform.

Nevertheless, AMLO has assured that existing E&P Contracts will be honored, but urged the corresponding contractors to demonstrate their advantages and real benefits to the country within a three-year truce period. Until then, future

petroleum bidding rounds scheduled under the SENER's five-year plan will be "halted." Last year, the CNH announced that Pemex would make seven farm-outs of some of its acreage by the last quarter of 2019, and such plan hasn't been changed officially. In late February, however, Pemex's CEO pointed out that it is not in Pemex's short-term strategy to undertake this kind of transaction, and, consequently,¹⁰ it's not clear that such farm-outs will take place.

It is noteworthy that according to the Mexican national oil and gas industry association ("AMEXHI"), and figures from the CNH, the oil and gas companies have (i) paid around \$2 billion to the Mexican Petroleum Fund; (ii) invested \$2 billion more in seismic surveys in order to appraise the Gulf of Mexico's features pursuant to the permits for performing such activities authorized by the CNH ("ARES Permits")¹¹ and the public policies in SENER's five-year plan of bidding rounds; and (iii) committed around \$20.57 billion for CNH-approved development plans, for which 25% of activities have been performed with the remainder programmed for further stages to be completed between 2019 and 2041.¹²

Such figures tend to show that certain long-term expectations for private investors may have been created not only under the ongoing E&P Contracts, but also as a consequence of the ARES Permits.

Investment Protection Provisions under the USMCA

The USMCA reflects the lessons learned from NAFTA, by retaining substantial features related to foreign "covered investment"¹³ such as: (i) the minimum standard of treatment, including the "fair and equitable treatment standard" ("FET Standard") and full protection and security standard; (ii) national treatment; (iii) most-favored nation; (iv) free transfer of capital; and (v) protection in the event of direct or indirect expropriation.

Nevertheless, the USMCA limits the availability of investment claims from US investors in Mexico and vice-versa and also eliminates future investor-state arbitration between Canada and the U.S. after NAFTA's termination.¹⁴ Moreover, such claims will be confined to (i) "Legacy Investment Claims and Pending Claims" (USMCA Annex 14-C);¹⁵ (ii) "Mexico-U.S. Investment Disputes" (USMCA Annex 14-D); and (iii) "Mexico-U.S. Investment Disputes Related to Covered Government Contracts" (USMCA Annex 14-E).¹⁶

Mexico-U.S. Investment Dispute

Pursuant to USMCA Annex 14-D, the investor-state arbitration applicable to Mexican or U.S. investment claims may proceed only for claims of (i) "direct expropriation";¹⁷ (ii) violations of "national treatment"; and (iii) violations of "most-favored nation treatment"; provided that, as footnote 22 from USMCA Chapter 14 sets out, the scope of such "treatment"

...excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations; rather, "treatment" only includes measures adopted or maintained by the other Annex Party, which may include measures adopted or maintained pursuant to or consistent with substantive obligations in other international trade or investment agreements.

In other words, the general rule is that alleged violations related to the "minimum standard of treatment," including the FET Standard and the full protection and security standard, and "indirect expropriations," will not be able to be solved by means of the USMCA's investor-state arbitration mechanisms. Such complaints shall be solved before local tribunals.

USMCA's Protections for Strategic Sectors

Notwithstanding the above, USMCA Annex 14-E provides an exception to the general rule applicable to Mexico-U.S. investment disputes in Annex 14-D for claimants who are a party to a "covered government contract," defined as:

“
The USMCA reflects the lessons learned from NAFTA by retaining substantial features related to foreign “covered investment” such as: (i) the minimum standard of treatment, including the “fair and equitable treatment standard” (“FET Standard”) and full protection and security standard; (ii) national treatment; (iii) most-favored nation; (iv) free transfer of capital; and (v) protection in the event of direct or indirect expropriation.
”

[A] written agreement between a national authority of an Annex Party and a covered investment or investor of the other Annex Party, on which the

covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector (emphasis added).¹⁸

Such “covered sectors” are (i) oil and gas, (ii) electricity, (iii) telecommunications, (iv) transport services, and (v) infrastructure.

Hence, “covered sectors” enjoy protection of Annex 14-E, which applies to claims of (i) breaches of the minimum standard of treatment in accordance with customary international law,¹⁹ including the FET Standard²⁰ and the full protection and security standard,²¹ (ii) “indirect expropriation,”²² and (iii) violations with respect to the establishment of the acquisition of an investment.

Key Terms for Indirect Expropriation and Protection of Legitimate Expectations

The USMCA contains several clarifications and qualifications to key terms related to indirect expropriation and the protection of “legitimate expectations” as set forth below.

- (i) *Investment* means “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”²³
- (ii) Whether an *indirect expropriation* has occurred under USMCA Article 14.8.1 will be determined by “a case-by-case, fact-based inquiry” that considers (a) “the economic impact of the government action,” (b) “the character of the government action, including its object, context, and intent,” and (c) “the extent to which the government action interferes with distinct, reasonable investment-backed expectations.”²⁴

(ii) The reasonableness of “investment-backed expectations” in an indirect expropriation claim may be alleged “whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.”²⁵

Expectations Arising from the Mexican Upstream Hydrocarbons Sector

The Mexican upstream hydrocarbons industry has become one of the most dynamic and attractive in the international market due to the Energy Reform’s implementation. Likewise, the opening up of the upstream sector has been characterized by a globally recognized high level of transparency and the best international practices. This has led to foreign investors committing part of their global budget to develop upstream activities in Mexico.

In this regard, considering that the “legitimate expectations” could be defined as the investor’s expectations of generating value from its capital after making a rational business decision relying on the public policies and representations made by the host State, and taking into account the recent announcements from the Mexican government with respect to potential material changes in the hydrocarbons sector, it is worthwhile to address the potential foreign investors’ “legitimate expectations” arising from the upstream hydrocarbons sector in light of case law and the USMCA.

Over the years, both NAFTA and non-NAFTA arbitral tribunals have gradually qualified and narrowed the conditions amounting to a breach of “legitimate expectations.”²⁶ This doctrine currently identifies certain requirements of “legitimate expectations” to be as follows: (i) the expectations must be objective,²⁷ reasonable,²⁸ based on

specific,²⁹ definitive, unambiguous and repeated assurances or commitments made by the host State to the investor; and (ii) such assurances “must have been made purposely and specifically to have induced” the investor’s investment.³⁰ It is clear, therefore, that the ultimate purpose of the “legitimate expectations” doctrine is closely related to the stability and predictability of the legal framework.

“

Over the years, both NAFTA and non-NAFTA arbitral tribunals have gradually qualified and narrowed the conditions amounting to a breach of 'legitimate expectations.'

”

In this regard, the risk of a potential “legitimate expectations” claim may arise mainly from the individualized representations and assurances contained within the E&P Contracts (including their corresponding inherent regulatory authorizations issued by the CNH, i.e., field exploration and development plan approvals) and the ARES Permits. Such expectations would rest on a set of objective, specific, definitive and unambiguous commitments that induced multiple business decisions and legal transactions to be made by investors. It means that the foreign investments inception has implied a “complex process”³¹ of commitments.

Meanwhile, the E&P Contracts do not contain a stabilization clause but do

include a poorly-worded intangibility clause that forbids unilateral changes to the E&P Contract and requires the consent of all the parties before any changes are made.³² Hence, if AMLO’s administration changed in an abrupt and radical manner the framework applicable to or intended to amend the original conditions of any E&P Contract or of an administrative resolution related to it, such change of circumstances may constitute unreasonable and unfair treatment in accordance with customary international law.

With respect to the ARES Permits, the rationality behind them is that the seismic data-acquisition companies would recover their investment and gain a determined profit as long as the CNH continued to launch bidding rounds and the oil companies were acquiring the corresponding processed seismic data. Furthermore, if the Mexican State were to halt or cancel the bidding rounds planned under the SENER’s five-year plan, it may also discriminatorily breach the “legitimate expectations” of such companies.

Conclusion

So far, AMLO has backed the USMCA and it seems that it will pass without any significant obstacle to the Mexican Senate vote. Some experts have mentioned, however, that the USMCA’s passage through all three countries’ legislative bodies may not be completed until the second half of 2019 or early 2020 because the recent United States government shutdown delayed its ratification timetable, and, consequently, the Mexican and Canadian lawmakers have not yet moved forward on ratifying the agreement.³³

Once the USMCA enters into force, foreign investors in the Mexican upstream hydrocarbons sector could potentially allege that “legitimate expectations” have derived from the E&P Contracts or even

the ARES Permits. Hence, even if the Mexican State is entitled to exercise its sovereign regulatory power, in the event of an abrupt and unreasonable change in the legal and regulatory framework and business context without assuming the circumstances of the investments committed in Mexico — according to case law and the USMCA — it could be argued that such expectations were breached. This is so because under the USMCA the oil and gas sector is protected in accordance with customary international law, including the FET Standard and claims of indirect expropriation.

In the interest of minimizing potential conflicts arising in the hydrocarbons sector from potential acts of administrative harassment, abrupt regulatory changes, and/or unjustified termination of contracts and permits by the Mexican federal government, it is advisable that, before taking any such action, the Mexican government should carry out appropriate actions in consultation with, or at least with notice to, potentially affected investors, according to the best international practices in regulatory reforms.³⁴



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- 11 According to the CNH website, until September 11, 2018, the CNH had 39 valid ARES Permits issued for performing 2D and 3D seismic surveys and seismic reprocessing. Also see <<https://cnh.gob.mx/informacion/inversionAres.aspx>> accessed on January 17, 2019.
- 12 See CNH website <<https://hidrocarburos.gob.mx/>> updated until January 17, 2019.
- 13 Pursuant to USMCA Article 14.1, a covered investment means "with respect to a Party, an investment in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter."
- 14 See USMCA Article 14.2.4. and the definition of "Annex Party" provided in its Annex 14-D.
- 15 In terms of USMCA Annex 14-C, Article 6(a), a legacy investment means "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this agreement."
- 16 USMCA Article 14.2.4.
- 17 USMCA Annex 14-B, Article 2.
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TAMPERING WITH TREATIES: KOSOVO PRESIDENT SEEKS JUDICIAL ADVICE ON RATIFICATION

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Introduction

Kosovo President Hashim Thaçi is asking his nation's Constitutional Court (the "Court") for advice on ratifying his correspondence with the European Union ("EU"). The letters, which establish an EU rule-of-law mission in Kosovo, constitute an international agreement. Hence the president wishes to know whether the letters should be ratified in parliament, under Article 18.1 of the Constitution, or should they be considered ratified upon signature by the head of state, under Article 18.2.

The answer to that question has broad implications. The former chief justice is of the opinion that it could affect the work of a special war-crimes court and Kosovo's negotiations for a peace treaty with its former enemy, Serbia. He suggests the Court should dismiss the president's referral, for it has no power to review international agreements currently in force. In any case, he claims the exchange of letters has already been ratified.

Other jurists have also called on the Court for restraint. This article echoes their message, and addresses the political and legal background of the case, as well as the way in which the referral might fail on procedural grounds. Based on the merits of the case, the author believes the Court should recognize the exchanged instruments as a ratified treaty, which should be upheld. In addition, the author will emphasize the importance of judicial



abstinence on this matter, and compare Kosovo's circumstances to the experience of powerful Western democracies.

Facts and Procedure

In 2008, Kosovo became a state pursuant to an international plan, which included supervised independence and an EU rule-of-law mission with police and judicial powers. Known as EULEX, the mission was formally established by the EU Council, and invited to Kosovo by the country's president.

International supervision ended in 2012, but EULEX's mandate continued by agreement. The agreement was concluded in the form of letters exchanged in 2012 between the president

of Kosovo and EU's high representative. This happened again in 2014 and 2016, when EULEX's term was extended through 2018. Kosovo's legislature ratified the letters every two years.

Yet Kosovo faced another challenge to the rule of law. In 2011, the Parliamentary Assembly of the Council of Europe approved a report by Swiss senator Dick Marty, who brought forth allegations of crimes committed during and immediately after the 1998-1999 Kosovo war with Serbia. Kosovo undertook to prosecute the suspected crimes in cooperation with international partners. The 2012 letter from President Jahjaga extended EULEX's term for two more years, but accepted for an indefinite period — until further decision of the EU

Council — the authority of a task force to investigate Dick Marty's allegations. The commitment is reiterated in detail in the 2014 letter, which also commits to prosecute the investigated crimes through mechanisms outside of the country. For this purpose, Kosovo amended its Constitution in 2015.

Article 162 of the Constitution, as amended, now provides for the "Specialist Chambers and Specialist Prosecutor's Office," known collectively and colloquially as the Special Court and less often as the Specialist Judicial Institution. Under this provision, ratification pursuant to Article 18 is no longer required for treaties regarding the Special Court. Such agreements provide the means to prosecute crimes and execute sentences. Kosovo has already entered into treaties with the Netherlands, which will host the Special Court. Moreover, Article 162.13 incorporates by reference the law ratifying the 2014 letters, and ties the term of the Special Court to the term of the EULEX investigative task force. Under the Special Court law, the specialist prosecutor inherits the authority of the task force, while relying on EULEX for support.

In essence, the EULEX agreement stems from the 2008 decision, the president's letters, and Article 162 of the Constitution. The 2012-2016 letters acknowledge their transfer of Kosovar sovereignty to an international organization, according to Article 20 of the Constitution.

In 2018, President Thaçi exchanged letters with the EU High Representative Federica Mogherini, prolonging EULEX's presence through 2020, but EULEX will now be limited to an advisory role. This exchange of letters entered into force without a parliamentary vote. While similar in content to the earlier correspondence, the 2018 instrument does not mention Article 18.1, which provides for ratification by the Assembly.

In the meantime, Mr. Thaçi is

negotiating what he calls a final agreement with Serbia, which doesn't recognize Kosovo's independence and claims all of Kosovo as a Serbian province. The potential agreement might include border changes, despite objections by the Kosovo prime minister, opposition groups, and civil society.

Admissibility

In September 2018, the president petitioned the Constitutional Court for an interpretation of Article 18. The Court may not answer an unclear question that does not help the president exercise his powers. Likewise, it should avoid untimely cases, and may not review treaties in force.

The Court turns down referrals if, *inter alia*, (i) the facts could not plausibly support the party's allegations, (ii) the Court has no jurisdiction over the subject matter, or (iii) the matter has nothing to do with the Constitution. In general, the head of state may present "constitutional questions" under Article 84(9), or he may request assistance in matters listed under Article 113.

Since the *Qeska* ruling in 2010, the Court looks to the facts to decide whether a matter raises an 84(9) constitutional question. Such questions should assist the president of the republic in exercising his or her powers, as with the case with the advisory opinion issued to President Jahjaga on nominating a prime minister in 2014. In *Qeska*, President Sejdiu asked about the competent authority to determine whether a waffling mayor had truly resigned, so the president could call new elections. The Court found that the matter presented a constitutional question tied to provisions on elections and local self-governance, and admitted the referral under Article 84(9) alone, without turning to Article 113.

But Thaçi is now submitting a vague, impermissible, and untimely demand. He faces no dilemma on what to do next

like his predecessors did in the earlier cases. Besides, the Constitution does not permit a *posteriori* control of treaties, that is, after ratification or entry into force. Assessing the ratification procedure would do harm to the letters' content, and invalidating them would jeopardize Kosovo's communication as a state with international actors.

It is also too late to handle the petition. This is a typical instance of what Americans call a "moot question" or an ineffective cause. The president's question has withered, since the EULEX agreement is now in force. Yet the referral is equally unripe for consideration. The United States adheres to the "ripeness doctrine," shunning adjudication that may become unnecessary because of changes circumstances. By comparison, a ruling on ratification is needless as it couldn't be used to renounce a valid treaty.

Merits

The letters are a treaty in force under international law.

Under customary international law and the Vienna Convention on the Law of Treaties (1969), states have a duty to implement international agreements, and may not invoke domestic laws to avoid their obligations. But they may agree beforehand that a treaty will be subject to ratification.

International law recognizes two types of ratification: domestic or constitutional and international. Domestic ratification typically entails a vote in the legislative body. On the other hand, international ratification is complete upon signature by the head of state, prime minister, or another representative.

The Thaçi-Mogherini correspondence illustrates international ratification. The president has the power to bind Kosovo, and his letter expresses Kosovo's intent to be bound. The correspondence is an instrument whose exchange constitutes a

treaty. Moreover, the 2018 letter does not mention parliamentary ratification.

No parliamentary approval needed.

Article 18 of the Constitution specifies how international agreements are ratified. The most relevant parts include subparagraph 1(1), which compels a two-thirds vote in parliament for agreements of a political nature, and paragraph 4, requiring that modifications follow the same procedure as the original ratification. Thus, when an agreement voted in parliament is modified, the parliament must vote again. Next, Article 20.1 allows the transfer of sovereignty through treaties.

As to EULEX, the earlier letters were expedited to the Assembly for ratification because they regulated a political matter and delegated sovereignty to the EU. The letters state so, citing articles 18.1 and 20.1. They also modified previous agreements, extending EULEX's executive mandate and providing for the investigative task force. Therefore, they called for a legislative vote.

Conversely, this year's letters bear no political import and hand over no sovereign clout, since EULEX is now being downgraded to an advisory role. EULEX will resemble a foreign aid organization that supports Kosovo institutions in their work. Such organizations have operated in the country for years, and have never called for an agreement ratified in parliament. For example, UNDP and USAID have hired supporting staff for courts and administrative bodies.

While the mission's executive mandate ended in June 2018, functions linked to the Special Court will continue for an indefinite period.

The Assembly does not ratify secondary agreements.

Kosovo counts ratified treaties as the law of the land and applies them directly, save for when they require passing

another law. Ratified treaties become law regardless of how they're ratified. Agreements that follow international ratification are ordinarily of an administrative or executive character: they complement or clarify a framework agreement that has been ratified in parliament. Therefore, lawmakers need not vote anew.

“Article 18 of the Constitution specifies how international agreements are ratified. The most relevant parts include subparagraph 1(1), which compels a two thirds vote in parliament for agreements of a political nature, and paragraph 4, requiring that modifications follow the same procedure as the original ratification. Thus, when an agreement voted in parliament is modified, the parliament must vote again.”

Kosovo has adopted this mechanism, allowing the president to ratify treaties while requiring that he notify the Assembly. Reflecting an international custom, South African and Irish

constitutions mention technical and administrative agreements that require no legislative approval. U.S. jurisprudence distinguishes treaties from executive agreements: the Senate ratifies the earlier with a two-thirds vote, while the president may sign the latter without involving the Senate.

The Thaçi-Mogherini exchange of letters is of the administrative kind. The Assembly has ratified the EULEX agreements on several occasions: when it consented to the plan for supervised independence, and when it ratified the letters three times. Meanwhile, the letters are an Article 162 agreement: paragraph 1 states the international obligation behind the Special Court, paragraphs 4 and 5 exempt related agreements from ordinary ratification, and paragraph 13 enshrines the 2014 letters that provide for EULEX's supportive role. If its effect were to be curtailed, the EU would not have accepted Thaçi's letter.

Conclusion

The Constitutional Court has a rare opportunity to halt petitions that have flooded in from state bodies since 2010, when Qeska allowed the president to refer matters not explicitly listed under Article 113. Established democracies have limited the use of the judiciary for the needs of politicians.

The U.S. Supreme Court has declined to issue advisory opinions since its inception in the late 1790s. The U.S. Constitution also requires a case or controversy, whereby courts should serve aggrieved parties or prevent imminent damage. American judges avoid matters of foreign policy and political disputes, which could be better resolved if left to bodies subject to the democratic process. The "political nonjusticiability" doctrine enjoys some application in Europe, too, and has recently found its way into Kosovo, as noticed in a recent decision on the wages of government ministers.

Germany is another useful example, having abandoned advisory opinions in the 1950s.

Judicial restraint in this case would help the rule of law, considering why EULEX and the Special Court were established — because the domestic justice system proved ineffective. The specialist institution has jurisdiction over crimes punishable under imperative rules of international law (known as *jus cogens*). War crimes may be prosecuted by any state on the basis of universal jurisdiction, so that undoing EULEX would not avert prosecution or criminal liability. But impeding the Special Court could paint Kosovo as an irresponsible actor internationally.

Whatever the response on the merits, it would affect the country's future. This case has to do with the specialist institution and the negotiations for a peace treaty with Serbia. If the Assembly must vote, the letters could fail; if presidential signature would do, Thaçi might try to conclude a deal with Serbia all by himself.

Therefore, the Court should not hinder Kosovo's ability to uphold an effective treaty. Because of its history and the limited recognition of its independence, the Republic of Kosovo is already handicapped in relations with foreign states, and a judicial decision should not increase the burden.



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FREE TRADE ZONE IN NORTHERN MEXICO COULD BOOST TRADE WITH TEXAS COMPANIES

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Introduction

Effective January 1 of this year, Mexico has resurrected a free trade zone (FTZ) along its U.S. border through the Tax Incentive Decree for the Northern Border Region, creating one of the largest of these economy-boosting zones in the world.¹ Led by President Andrés Manuel López Obrador, who was elected in 2018, the Mexican administration is aiming to increase economic prosperity in the country, especially in its northern section, to encourage its residents to prosper locally without needing to cross into the U.S. for shopping and livelihood.

Prominent features of the zone include decreased income and import tax rates, lower production costs, increased wages, and lowered energy prices to compete with U.S. prices. These fiscal policies will encourage foreign and domestic businesses to take advantage of savings and geographic location, and will also assist the local workers with a livable wage. The zone is intended to promote investment, production and technological development, and the creation of jobs. "Migration should be a choice, not forced," López Obrador said.²

How the FTZ Works

The geographic area of the zone is long and narrow, stretching 2,000 miles across from the Gulf to the Pacific and extending 15.5 miles south of the U.S. border.



Historically, the border area — known as Zona Libre — thrived as a duty-free zone until NAFTA was enacted and applied to the whole country.³ Businesses in border states such as Texas and California will now want to consider how the revival of these economically minded terms may impact their operations. Tax considerations and qualifications will naturally be a primary concern, as well as costs of employment and modifications to insurance policies. Because qualifying companies that are headquartered within the FTZ will pay income tax at a rate of 20%, rather than 30%, U.S. companies with Mexican subsidiaries may want to consider relocating their Mexican headquarters (or creating a Mexican counterpart if not yet in the Mexican market) to take advantage of the FTZ's income tax savings.

Exporters to Mexico will want to consider how the value added tax (VAT) reduction may impact their sales production. VAT for qualifying imports ultimately entering Mexico from the FTZ will be cut in half from 16% to 8%. This may be especially good news for Texas companies serving the Mexican market by providing a boost in consumer sales. However, some analysts are concerned that increased consumers sales may be marginal since the VAT still has to be paid upfront at time of purchase and then can be claimed as a tax deduction the following year.⁴

Manufacturers in the FTZ will enjoy deferred duties and tariffs that only apply to the finished product that leaves the FTZ to enter Mexico, rather than also including the component parts. Likewise, completed products that enter the United

States would be taxed at the applicable rates on the whole item without including component parts. Lowered gasoline, natural gas and electricity costs could allow for reduced company overhead as well.

Contracts related to operations affected by the FTZ, such as manufacturer, distributor, employment and reseller agreements, should be reviewed to account for any company modifications, and companies with Mexican operations will want to confirm compliance with the increased minimum wage. Minimum wages have been increased nationwide as of January 1 (102.68 pesos or \$5.10 per day, up from 88.36 pesos)⁵ and are even higher within the FTZ (176.72 pesos or \$8.80).⁶ Note that activities carried out

in the northern border zone must have substance or materiality in order to be in a position to apply the announced benefits.⁷ Companies will need to confirm compliance with transfer pricing obligations for transactions between national companies to stay within the applicable tax requirements.⁸

Conclusion

Mexico's first free trade zone was opened in 2005 at an industrial park in central San Luis Potosi, which has continued to see investment from U.S. companies as a result.⁹ While many analysts do believe this new FTZ will be an economically beneficial move for Mexico that could also positively affect the U.S., tangible

results could be years down the road. If the effects are as hoped, it could slow migrant crossings into the southern U.S. by lessening the need to do so, enhance relations of the bordering countries, and encourage increased cross-border trade — which would be good for business and good for Texas.



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Endnotes

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301 TARIFF HEARINGS AND THE VALUE OF TESTIFYING

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Introduction

In the spring of 2018, the Trump administration announced a new round of tariffs ("301 Tariffs") against the People's Republic of China ("PRC"). These 301 Tariffs were enacted last summer and encompass a massive-if-not-total cross-section of products and components manufactured in the PRC and imported into the United States. The 301 Tariffs represent an increase in "Group 1" and "Group 2" of 25% and a present tariff increase for "Group 3" of 10%.¹

To afford U.S. companies a chance to seek an exception from these large tariff increases, the administration created the "301 Hearing" process, which was held in Washington, D.C. over the summer. The 301 Hearings and initial determinations were an extremely fast-tracked process, with the 301 testimony process commencing in July for Groups 1 and 2, and concluding in August for Group 3. As part of my Of Counsel role, I represented my firm's clients and testified on their behalf in both Groups 2 and 3, in July and August of last year, before the respective Committee.²

Although, at the time of writing this article, no further 301 Tariffs have been announced, based upon the administrations rhetoric and actual/threatened additional rounds of tariffs (against the PRC and/or other countries), additional 301 Tariffs may be on the horizon. The enactment of new tariffs would, in all likelihood, bring with it the same fast-track 301 Hearing and decision-making model that was implemented this past summer, and, as such, a brief review of this hearing and testimony process



may prove to be very helpful should your client's products or components become the target of new tariffs in the coming months.

The Committees

A Committee was formed for each Group, and for Groups 2 and 3 the Committees were fast-paced and well organized. Throughout each day of testimony that I attended, including but not limited to those days in which I testified, the Committee for said Group heard five minutes of testimony from each company representative, which was undertaken in groups of six-to-eight company representatives at a time ("Testifying Group"). Upon conclusion of the testimony from all members in the

Testifying Group, the Committee initiated follow-up questions directed at some (but never all) of the members of the Testifying Group until the members of the Committee were satisfied.

Nature of Inquiries/Follow-Up Questions by the Committees

Throughout the testimony a theme arose in the follow-up questions the Committee posed to various testifying individuals. The theme focused on the following issues: (i) Were there currently any existing financially valid options for the testifying company's product/component to be manufactured in a country other than China — and *if yes* — why aren't all such options already being fully explored if not undertaken;

(ii) if no financially valid options for the manufacturing of the testifying company's product/component currently existed, what were the reasons for the absence of any such options presently; (iii) if no financially valid options for the manufacturing of the testifying company's product/component existed currently, how long would it take, and what were the estimated costs for the testifying company to research, locate, and undertake all necessary steps and efforts to fully establish an economically viable manufacturing venue outside of China?

Determine The Deferral Value If Your Company Has Multiple Products/Components

Each of the Committee members clearly understood that the immediate imposition of the 301 Tariffs at such a high percentage would definitely have a dilatory effect upon U.S. companies (and therefore upon their U.S. consumers and employees). In my opinion, what the Committees sought in these 301 Tariff Hearings (and may very well seek in any future tariff removal hearings) were unique and specific examples of when the effect of the tariff would result in economic damages beyond the understandable and foreseeable, and could put at risk the company's underlying production of equipment (if not the economic viability of the company itself), as a result of its current inability to obtain the product or component from any other nation.

Should your client import multiple products or components under a proposed tariff code being reviewed by the Committees, in my opinion, the "Value of Tariff Code Removal," which is the basic standard used to analyze a tariff, should not be viewed from the perspective of the most tariffs paid as a result of the greatest volume of products/components imported. Rather, the Value of Tariff Code Removal should

be focused on the unique and specific instances where the implantation of the tariff would result in the most severe and gravest of economic damages to the company, for which no viable alternative currently exists.

Conclusion

There are obvious legal fees and costs required in the drafting and submission of the testimony to be read before the Committees, as well as testifying during the hearing. However, the in-person opportunity to make a concise cogent explanation of why your client sought removal from a potentially massive tariff is an opportunity that should not be dismissed lightly.

Although it is possible for the written testimony to be drafted by non-attorneys, as well as to be presented by the company President, or other non-attorney representative, only one representative of each company may appear to testify. The propensity of the Committees to propound follow-up questions to each testifying representative places the individual testifying in the realm more suited to that of counsel well accustomed to such an environment in terms of what is stated in the public record without exception.

In light of the Trump administration's rhetoric regarding the imposition of tariffs, this fast-tracked process of written statement and testimony before the Committees is a model, which, having been created and instituted, will be revisited multiple times in the coming months. Familiarity with this process and knowing what information and scenarios the Committees are seeking in order to grant the sought-after tariff code removal may be an invaluable resource should your client's product or components become the target of such substantial tariffs, 301 Tariffs or otherwise, in the future.



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Endnotes

1. On or about February 25, 2019, President Trump announced a continuance from the March 1st designated deadline which would have increased Group 3 from 10% to 25% tariffs. No new deadline date has been announced or designated.
2. The Committees for both Group 2 and Group 3 consisted in part of one representative of some-to-all of the following; The Department of State ("State"), The Department of Commerce ("Commerce"), The Department of Homeland Security ("DHS"), The Department of Labor ("Labor"), the International Trade Commission ("ITC") and the Small Business Association ("SBA").

THE ENFORCEMENT OF TEXAS DOUBLE DERIVATIVE ACTIONS IN MEXICO

BY DR. CARLOS A. GABUARDI, PH.D.
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Introduction

Recently, a Texas Company filed a double derivative action against an Illinois and a Delaware company about a joint venture for which they had first incorporated another Delaware corporation and later on, two Mexican commercial companies as vehicles to their Mexican venture.

Although I was not involved in this litigation, a Texas lawyer asked me to give my opinion on two questions: (1) If the Plaintiff gets a favorable judgment in Texas against the Mexican commercial entities, would that judgment be enforceable in Mexico; and (2) if the court finds that there is no basis for Texas jurisdiction, may the Plaintiff file a successful double derivative action against the Mexican entities and the individuals who are managing them? This article will assess the likelihood of succeeding in an attempt to enforce a Texas double derivative judgment in Mexico, as well as filing a Texas double derivative action in Mexico.



The Facts of the Case

The facts of the case are reviewed briefly as set forth below.¹

In 2013, Texas Sustainable Development, LLC, (TSD), a Texas Corporation, found a business opportunity to support the Mexican operations of Jidosha Motors Co. (Jidosha). TSD and Metal Cutters Suppliers, LLC, (MCS), an Illinois Company, were awarded

a contract that was negotiated for an initial three-year term with undefined annual renewals to support the new facility, its suppliers and to provide service to other customers in Mexico. It was projected that such venture would generate substantial revenues for at least five years.

During this process, TSD and MCS Holdings, LLC (MCS Holdings), MCS's

parent company, incorporated a Delaware Corporation, MCS de Mexico, LLC for the sole purpose of conducting this Mexican operation. TSD and MCS Holdings were co-equal members and managers of MCS de Mexico.

Since all operations would take place in Mexico, they also incorporated two Mexican entities as the vehicles for this venture. The new entities were owned

by MCS de Mexico (98%), and TSD and MCS Holdings (1% apiece). One of the Mexican entities signed the Jidosha contract in Mexico, and the primary base of operations was also established in Mexico and all contracts with customers, suppliers, and vendors were made by the Mexican entities.

At some point, issues about the management and operation of MCS de Mexico and the Mexican Entities arose between the American parties to the joint venture. However, TSD argued that in 2015 it was “shut out” from any involvement in the Mexican entities and the actual lead in managing the day-to-day operations was taken by TSD, MCS, MCS Metals, and Holdings and its other Mexican partner, with whom they had developed a different business relationship at the same time they were setting up the Jidosha operation.

TSD argued that it had agreed to a basic operating agreement with MCS entering into a fiduciary relationship to develop this business upon the basis of good faith and loyalty to the joint venture. Notwithstanding, the parties also agreed that they could and would continue competing with each other provided such competition was not in conflict with the best interest of their new Mexican venture.

Upon these facts and basis, TSD filed a lawsuit in Texas, including claims that were derivative or double derivative in nature. MCS de Mexico or the Mexican entities were not named as parties in that suit.

The Enforcement of a Double Derivative Judgment in Mexico.

In my opinion, a Texas judgment against the Mexican entities would not be enforceable in Mexico because, under Mexican Law, judicial judgments (Mexican or foreign) can only be enforced against parties to the litigation and none of these entities were named as parties in the

Texas litigation. However, the answer would be different if the Mexican entities had been parties to the Texas litigation and the fundamental judicial guarantees for due process of law had been observed.

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In my opinion, a Texas judgment against the Mexican entities would not be enforceable in Mexico because, under Mexican Law, judicial judgments (Mexican or foreign) can only be enforced against parties to the litigation and none of these entities were named as parties in the Texas litigation. However, the answer would be different if the Mexican entities had been parties to the Texas litigation and the fundamental judicial guarantees for due process of law had been observed.

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Indeed, Mexico has a long tradition of honoring and enforcing foreign judgments. Since 1929, the Mexican Supreme Court upheld three critical points that still prevail in Mexican law: (a) a judgment issued by foreign courts may be enforced by Mexican Courts; (b)

Mexican courts may not review or decide upon the (i) the justice or injustice of the judgment, or (ii) the legal authorities or the legal basis supporting the decision in question; and (c) Mexican courts may only review whether or not the judgment in question is authentic and if it complies with the requirements set forth by Mexican Law.

Accordingly, even when new questions appear from time to time, the Mexican legal framework for seeking enforcement of foreign judgments has been well-settled. In Mexico, several legal bodies govern the enforcement of foreign judgments.² Nonetheless, there are no treaties for the enforcement of foreign judgments between the United States and Mexico and no special statute governs a case like the one at hand. Therefore, the enforcement of this Texas Judgment would be governed by the rules of the Mexican Code of Commerce³ and the Federal Code of Civil Procedure.⁴

Most of the requirements governing the enforcement of foreign judgments are similar among these legal bodies, and the scope and content of these provisions have been affirmed and construed by the Mexican Supreme Courts and some Circuit Courts. However, these concepts may be understood differently in Mexico than in the country issuing a foreign judgment. Therefore, this may be a sensitive issue. In my practice, I have noticed that the understanding of some concepts, such as what is “personal service of process,” a “final judgment” and the “resources of last recourse,” may be understood and interpreted differently under Mexican and Texas law. Hence, each one of the Mexican law requirements should be carefully discussed and reviewed by both the Mexican and Texas lawyers preparing the enforcement of the Texas judgment in question.

Finally, the last test to keep in mind is the matter of “public order” because it is often the key to opening the “Pandora’s Box” that not infrequently hinders or

prevents the actual foreign judgment enforcement process.

May double derivative actions against commercial entities and the individuals who are actually managing such entities be successfully filed in Mexico?

Derivative actions, as they are understood in the Anglo-American Common Law,⁵ are entirely foreign to Mexican lawyers and the Mexican legal system.⁶ Accordingly, the concept of double derivative actions is twice as foreign for a Mexican lawyer, and under Mexican law the beneficiary of a Texas double derivative action would be considered as a third party, with no rights against the Mexican entity concerned.⁷ However, minority shareholders of Mexican entities may file legal actions claiming liability against its actual or former Directors under a limited set of circumstances.⁸

Still, the original question remains: May a Texas entity file a successful double derivative action against Mexican commercial entities and the individuals who are managing such Mexican entities?

Arguably, there may be a legal basis to do so since the Mexican legal system has incorporated the principle that a juridical relationship validly established in a foreign country in accordance with all the laws with which they had a connection at the time of their establishment shall be recognized in Mexico, provided that they are not contrary to the principles of their public policy (public order).⁹

This principle has only been enforced by the Mexican Supreme Court and the Federal Circuit Courts in matters related to contracts and deeds. To the best of my knowledge, no case based upon double derivative actions rights has ever been tried before a Mexican Court. If such a case were tried, it would probably be viewed as a case of first impression and the results would be extremely uncertain.

Therefore, filing a petition in Mexico

based upon double derivative actions rights would not be my first choice and I would encourage my clients to opt for remedies based upon Mexican Law. Nevertheless, there could be circumstances in which double derivative actions may be the only choice, either as a defense or as a critical basis for counter-suing.

Conclusion

As Steve Covey pointed out, one should always begin having the end in mind, and this is especially true for international business transactions and private international law.

Whenever the implementation or enforcement of a given transaction may land in a foreign jurisdiction one should seek the advice of local counsel. Otherwise, the odds of having a negative result is highly likely since the rules and standards known at home are most probably different.

Generally speaking, using standard forms to conduct business between Mexico and the U.S. usually means that legal documents will be forgotten in an office drawer, which will be of no service when facing a legal conflict. Rather than use standard forms, therefore, an international lawyer should make every effort to understand business ventures as a whole and ensure that the legal documents reflect the actual true intent of the business partners.

The lives and fate of Mexico and the U.S. are indistinctly fused together in many ways.¹⁰ However, legally speaking, our two countries belong to different worlds: The Anglo-American Common Law and the Mexican version of the Civil Law. Other than the international trade agreements, there are only a few treaties between our two countries and international judicial cooperation between Mexico and the United States is almost non-existent. As a consequence, it seems that the best way to strengthen

the link of communication that will enhance legal certainty and stability between our two countries is for the legal communities on both sides of the border to work together more closely.



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Endnotes

- 1 In the narrative of the facts I changed the name of the companies and places involved in this controversy. However, this is the actual case: IN RE SCRAP METAL SERVICES, LLC, SMS ALL STAR HOLDINGS, LLC, ALL STAR METALS, LLC, JEFFRY K. GERTLER, RICHARD A. GERTLER, AND NIKHIL SHAH, Case 17-0972, Supreme Court of Texas. <http://www.search.txcourts.gov/Case.aspx?cn=13-17-00642-CV&coa=coa13> (Last consulted as of February 4, 2019).
- 2 If there is a treaty between Mexico and the country concerned (e.g., The Treaty between Mexico and Spain for the Enforcement of Judgments on Civil and Commercial Matters), such treaty shall prevail. In some fields, such as in Bankruptcy cases, the Bankruptcy Statute provides for a special procedure to enforce bankruptcy judgments; Commercial matters in general are governed by the provisions set forth by the Code of Commerce; and Non-commercial contracts and torts, as well as family law matters would be governed by the Code of Civil Procedure of the State where the enforcement of the judgment in question is sought. According to the Mexican Constitution, each one of the 32 States of the United Mexican States has a State Judiciary and a Code of Civil Procedure of their own, while at the same time there is a Federal Judiciary and also a Federal Code of Civil Procedure that governs civil procedure for civil matters which are federal and also may supplement the State Codes of Civil Procedure that make reference and re-send the matter to the Federal Code of Civil Procedure. At the time I am writing this work (February 2019), there is a Bill of Law currently under discussion in the Mexican Congress to enact a single uniform Code of Civil Procedure for the entire country, but both the lawyers forum and Mexican academia have reacted negatively towards that initiative. Additionally, such Bill of Law does not appear to be a priority for the current federal legislature.
- 3 The requirements set forth under Article 1347-A of the Mexican Code of Commerce are the following: a. That all formalities for Rogatory Letters coming from abroad, are complied with as provided by Mexican Law. (Section I); b. That the foreign judgment concerned has been issued in reference to an action in personam, as opposed to an action in rem (Section II); c. That the issuing court had jurisdiction to hear and adjudicate the controversy in question in conformity with the provisions acknowledged by International Law which are compatible with those set forth by the Mexican Code of Commerce (Section III); d. That there is not a contract clause submitting to the exclusive jurisdiction of Mexican Courts (Section III); e. That service of process in such legal proceeding was personally made to defendants, providing them with sufficient guarantees to assure them their right to be heard and defended themselves before a court of competent jurisdiction (Section IV); f. That the judgment which enforcement is being requested is final under the laws of the country where it was issued, or there is no ordinary recourse against them (Section V); g. That there is no pending litigation on the same cause and among the same parties before Mexican Courts, in which the Mexican Court had served process to the parties, or when Rogatory Letters to serve process to the other parties have been issued and delivered to the Mexican Secretariat of Foreign Affairs or when a Judgment has already been issued in this matter (Section VI); h. That the cause of action that originated such judgment is not contrary to Public Order (Section VII); i. That the judgment which enforcement is being requested complies with the legal requirements as to be considered authentic (Section VIII); and j. that the country of origin actually enforces Mexican Judgments or Resolution of analogous nature.
- 4 These are the requirements that under the Federal Code of Civil Procedure have to be attached to International Rogatory Letters: a. an authentic copy of the award or jurisdictional resolution; b. an authentic copy of records showing that service of process in such legal proceeding was personally made to defendants, providing them with sufficient guarantees to assure them their right to be heard and defend themselves before a court of competent jurisdiction, and c. proof that the judgment for which enforcement is being requested is final under the laws of the country where it was issued and there is no ordinary recourse against it.
- 5 "In corporate law, a derivative action mechanism allows minority shareholders and, in certain jurisdictions, single directors or even creditors to file and litigate a lawsuit on behalf of the corporate entity against an insider (e.g., a presiding or former director, officer, or controlling shareholder) or a third party whose action has allegedly injured the corporate entity." Yaad Rotem, *The Law Applicable to a Derivative Action on Behalf of a Foreign Corporation—Corporate Law in Conflict*, 46 *Cornell International Law Journal* 2013, P. 323.
- 6 Cfr. Richard R. Dillenbeck, *The Shareholder's Suit in Mexican Law*, Vol. 9, No. 1 (Winter, 1960), pp. 78–84. This is the only Law Review Article that I found that referred to Mexico and Mexican Law; although it does not specifically state that the very notion of derivative actions is a foreign concept to Mexican Lawyers and the Mexican Legal System, this is my own conclusion both from my personal knowledge and understanding about the legal systems of Mexico and the American Legal System, and from the reading of this article.
- 7 Under the authority of the principle of territoriality of Mexican law, all Mexican commercial entities are governed by Mexican law in all matters concerning its own operation and organization, in all matters concerning the relationship between the entity and its shareholders, as well as in those matters arising among the shareholders themselves with respect to the commercial entity. Additionally, all Mexican entities incorporated before a Mexican Notary Public always include a clause confirming the submission to Mexican Law by all shareholders of Mexican Commercial entities.
- 8 Shareholders representing at least 25% of the capital stock of Mexican Corporations (*sociedades anónimas*) may file legal actions claiming liability against its actual or former Directors under a limited set of circumstances after complying with some legal requirements. The scope and reach of the rights of shareholders of a Mexican Limited Liability Company (*Sociedad de Responsabilidad Limitada*) are not the same and individual shareholders may sue the managers (in a manner similar to a derivative action), provided that the Shareholders Meeting had not released the managers of their purported liability.
- 9 Article 13, Section I of the Federal Civil Code, which is the Mexican law version of Article 7 of the Inter-American Convention on General Rules of Private International Law (an International Treaty in which the United States is not a signatory party), as well as Article 86 B of the Federal Code of Civil Procedure, have incorporated this principle into the Federal legal system providing that the principle that juridical relationships validly established in a foreign country in accordance with all the laws with which they have a connection at the time of their establishment shall be recognized in Mexico, provided that they are not contrary to the principles of their public policy and Mexican courts shall apply foreign law in the same manner that such foreign courts would do it.
- 10 Just to make a note from a perspective of economics, it is worthwhile mentioning that the United States is Mexico's leading business partner and Mexico is the third-leading supplier of the U.S. Also, the sociological influence of the U.S. in Mexico is more than obvious and the opposite is also true.

A MATTER OF TRUST

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HAL KAISER
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Introduction

"Can we trust the local (foreign) partner?" We are asked this question more often now than ever before, and it requires a well thought out and carefully articulated response.

Regardless of whether you are involved in international, complicated cross-border transactions or domestic business deals, finding the right partner, knowing your client and whom your client is working with should be the first risk to check off the list before committing resources and investing time along with priceless reputations. We have previously described a method of conducting a thorough and deep due diligence beyond contracts and documents.¹

This article compares issues that often result from a gap in understanding of business cultures and communications between America and Asia and the impact on international business. We will focus on issues that arise from a lack of trust and knowledge of business cultures and communication styles in China and Korea.

Americans understand there are many business cultures and communication styles in the USA, shaped by immigration from around the world over hundreds of years. We are fortunate to live in a stable country with the most diverse society with significant individual liberties (e.g., political, social, economic, and personal). The vast majority of Americans communicate through English (American style) and, except for local accents and phrases, can travel and do business in the 50 states without serious consequences caused by a lack of understanding of the local culture or from miscommunications caused by a language barrier. In contrast,

the populations in Asia, while comprised of primarily homogenous societies, communicate through hundreds of languages and dialects that are not mutually intelligible and business cultures that are vastly different.

Americans manage risks through contracts and develop trust during the course of working together, doing deals, and participating in business and social events. Perhaps one reason is that the opportunities in America and "deal flow" are plentiful. In contrast, Asians manage risks through relationships — and the relationships, therefore, must be trustworthy. Business opportunities are also plentiful; however, the consequences of aligning with the wrong partner has significantly greater, and in some cases permanent, consequences.

Korea Business Culture and Communications

The fear of embarrassment, or of losing face, remains paramount in Korea and among Korean professionals. Historically, this manifested itself through avoidance of speaking too much for fear of making mistakes in English as well as a reluctance to admit a failure to understand what is being said. While the linguistic side of things has evolved significantly after a generation of parents pushing their kids to learn English and an educational and tutorial system heavily built around English competency, fear of losing face remains an issue in international business.

The more common challenge in transactions these days is a lack of understanding of market complexities in the USA and the continuing reluctance among companies to hire competent



local advisers, or insistence on hiring known and trusted advisers in Korea who are unable to provide the local knowledge. This lack of understanding of the intricacies of deals becomes a challenge to timelines; Korean companies will not suffer the embarrassment of outright admitting to a lack of knowledge. Instead, they will ask the other side to provide information about certain aspects of the market and will lock on to deal aspects they can understand, regardless of how unimportant those aspects may be to the overall transaction.

Americans, not realizing what the Koreans are asking, typically will not provide enough information for the Korean side to get what they need to explain to management or credit committees. For example, if the transaction relates to the power industry, the Korean company may ask for the American side to provide an explanation of risk management tools for securing power revenue and managing fuel exposure as well as examples of where such tools have been used on other projects. The American side will generally provide high-level overviews, failing to realize the Korean side does not understand, and is really asking to be taught and provided with detailed information.

What we observe next is that the American side will grow irritated as the Koreans latch onto elements they can understand, but are generally unimportant. As a result of these issues, frustrations mount among Americans because deals take too long and fall apart without understanding what happened, why the deal did not close, or how to handle interactions better the next time (if there is a next time).

How do Americans bridge the gap and engage Korean business partners more efficiently and within the expected transaction process timelines?

The best approach is to have an adviser experienced in working with

Koreans, who knows how they think and operate, and who has the trust of the Korean company. Then, the team members will ask all the questions, get complete answers, will rely upon the explanations, and be in position to explain the situation up the organization's chain of command. The adviser should be a huge part of running the meeting, coordinating communications, and educating the deal team.

Building trust takes time, especially with both social and business contacts, and must be earned. Speaking the language is not enough. Korean investors have been misled by Korean-speaking advisers in USA energy investment deals. These advisers lacked basic market knowledge, but were too proud to admit it.

In a typical outbound investment or divestiture, the two parties (assume a Korean company is reviewing an investment with an American company) execute a non-binding expression of interest. The data room is opened and the legal due diligence begins along with technical experts. External counsel is engaged and the billable hours begin. Combining the customary western legal rate structure with Korean business culture norms, plus not enough trust, leads to a perfect-storm scenario in which the client's deal team does not ask all the necessary questions, or admit they don't understand, or ask for further explanation. The tendency and cultural norm is to stay quiet and plow onward. The results are several-fold.

- Deal closes and immediately problems flare with rising tempers and legal costs;
- Deal does not close, advisers and Americans are frustrated and criticize the Koreans; and/or
- Relations and bridges are scorched forever, without genuine understanding of what happened and how it could have been handled better.

Korean companies are increasingly becoming ideal partners for American companies, particularly as lenders to projects. Helping the deal team work through and understand the market, legal/regulatory, and commercial issues so they can explain to management or credit committees in headquarters means they are much better partners for American companies.

China Business Culture and Communications

Unlike Korean business culture, "losing face" is not a main cause of issues resulting in frustrated business dealings with companies from China. "Losing face" pales in comparison to other significant factors in doing business in China or with companies from China.

Much has been written about "guanxi" (关系), which for the vast majority of Americans and foreigners doing business in China and with Chinese companies, means "relationship." A deeper and more accurate interpretation of the characters includes elements/feelings of a connection, nexus and/or bond beyond a mere introduction or chain of introductions that brings a business opportunity or dealing. Relationships, connections and networks, are important in every country and all cultures. However, it is over simplistic to believe if one has a relationship or series of relationships in China, that is enough. The provocative and deeper query is, "which relationships can be trusted and who is trustworthy?"²

Trust is a very complicated characteristic and trait to describe. The characters of "Trust" (xinren, 信任) and "Trustworthiness" (chengxin, 诚信) encompass qualities of such things as belief in, honesty, count on, and reliability. China's thousands of years of history, reoccurring periods of political instability, revolutions (along with famine and hardships) have caused the Chinese

to first and foremost rely upon and trust family, unconditionally, based on blood, heritage, and legacy. The second kind of trust is with people introduced by family members with whom they have done business successfully. To have these types of connections is a very important factor in business in China. Business opportunities introduced through these relationships should have a higher probability of being advanced because there is high level of trust, *from all sides*.

On the contrary, business culture in the USA frowns upon doing business through family and relatives' connections. Nepotism is not allowed because our value system is based upon principles of non-discriminatory and equal access/treatment. We require disclosures about familial connections in applications for jobs, schools, procurement contracts, tenders, etc. The overarching public policy is not to be preferential and we have many rules and protocols in place to enforce such.

In the Chinese culture, officials and authorities receive respect, however, trust is only placed in people they know and with whom they share a common unconditional bond. The Chinese perspective of "guanxi" remains real, but the real relationships usually come through a family or extended family level, and not through official channels. Even official relationships of the type that are resilient through changes in control, power and regime often begin with a period of growing up together in the same hometown, village, and regional culture, where the extended family network is located.

However, an ethical and legal conundrum could arise for Americans in these situations. If one is brought into a business opportunity through the family and extended family networks, along with unconditional trust, there is an expectation to use great efforts to try to understand the Chinese perspective and turn the opportunity into something

tangible and successful for all involved in the introduction, while keeping American issues and sensitivities in check. This means certain USA laws and rules, such as FCPA, are not necessarily the foremost important issues from the Chinese perspective. Therefore, Americans need to know upfront who is being introduced, how business has been done and will be done, and what is expected before accepting the offer of "guanxi," or else risk burning bridges and coming under scrutiny. This includes knowing whether the people involved in the deal are being investigated or have the potential of being investigated by authorities in China or the USA, before taking any steps forward.

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In the Chinese culture, officials and authorities receive respect, however, trust is only placed in people they know and with whom they share a common unconditional bond.

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How do Americans as non-family members find trustworthy relationships and do business in full compliance with USA laws and rules, and ethical principles? The short answer is that it is complicated and takes time and patience. Trustworthy relationships are earned, built through work, and a track record of correcting mistakes and solving problems and disputes with business solutions (without litigation) over years. Chinese trust the people who can get things done

successfully, and who have the necessary knowledge and wisdom. All this takes time and the spirit of cooperation. If understood and applied properly, Chinese companies and people can be very good partners for Americans in international business.

Consider certain fundamental differences between the USA and China legal systems. In China, there is no attorney-client privilege or other legal privileges that can be invoked related to the attorney's work and communications with the client or others involved in the matter. In the USA, the legal system is an adversarial structure with protections such as due process, right to sue and face your accusers, pre-trial discovery, choice of judge or jury, etc. Our systems and processes are transparent and we are given the opportunity to learn, find facts, dig for the truth, prepare arguments, and present to a neutral third party (e.g., mediator, arbitrator, judge, or jury) for decisions. However, the legal system in China is based on an authoritarian system (discovery should not be presumed step) and the judge reports to Communist party and law enforcement officials. Therefore, government authorities are the final arbiters in civil and criminal cases. As a practical matter, settling disputes with business solutions is highly preferred in China.

Changes in policy are made at the highest levels and not always announced until later, not as published laws, and determine the direction of things to come. The fact is that the majority of China Bar lawyers and foreign lawyers working in China can hardly keep up with the pace of changes. For example, the guidelines for securing outbound investment approval are changing in China. Depending on the nature of the investment and reputations involved, a Chinese company will be required to conduct a broad investigation of foreign partners and people involved prior to legal and technical due diligence. The

investigation covers market reputation and integrity, track record, allegations of impropriety, financial problems, failed ventures, business and political connections, litigation, etc.

We have explained how China's long history, multiple business cultures, and systems shape the complicated and colorful business cultures(s), actions and thinking of people in business, legal procedures, and interpretation (and enforcement) of substantive laws and regulations.

Understanding all of these important points will help American companies and advisers structure arrangements with Chinese companies that are consistent with each other's commercial goals, and legal and ethical principles. Meaningful relationships combined with a trusted adviser should be considered soft pre-conditions, providing flexibility to timely pivot with political and policy changes,

before such occur. In other words, in China business cultures, lawyers are better advisers by being proactive, not reactive.



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Endnotes

- 1 See, Lilly Teng, Hybrid Due Diligence in International M&A and Litigation, 1 Newsl. Int'l L. Sec. St. B. Tex. 16 (2018), <http://files.constantcontact.com/cf349dd3701/b45c3ac1-4ba9-4f88-b822-ef13de029bf2.pdf>, and <http://www.orchidlaw.biz/news-and-insights/hybrid-due-diligence-in-international-m-a-and-litigation>.
- 2 There are multiple business cultures in China created by the approximately 200+ primary dialects and sub-dialects, which do give rise to differences in communications and approaches of which foreign companies should be aware.

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RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN MEXICO

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Introduction

With increased business opportunities in Mexico, there is also an increased risk that an investment could “go south” and result in litigation. The challenge in such litigation may not just be obtaining a favorable judgment: the challenge could include recognition and enforcement of such favorable judgment in Mexico. This article will discuss the basic principles for obtaining recognition and enforcement of a foreign judgment in Mexico.

In the United States, the recognition and enforcement of a foreign judgment is relatively easy, although the procedures vary on a state-by-state basis. In Mexico, however, the constitutional principle of due process mandates strict compliance with applicable rules and procedures. The discussion below addresses broad principles for recognition and enforcement of foreign judgments in Mexico and not the specific requirements in each jurisdiction.

Background

The Mexican Republic is formed by federal entities, of which 31 are states and one is a Federal District, Mexico City. Each one of these units has its own local legislature. Moreover, pursuant to Article 124 of the Mexican Constitution, each state has the right to exercise the authority not expressly granted by the Mexican Constitution to federal agencies.

In principle, the application of federal law and international treaties corresponds to federal authorities; however, when the dispute only involves



private interests, pursuant to Article 104 paragraph II of the Mexican Constitution, the parties may choose to submit their dispute to the state courts.

Notwithstanding each state's authority to regulate recognition and enforcement of foreign judgments, the fact is that many state's rules are similar to those of the Federal Code of Civil Procedure, and several states adopted the rules of the Federal Code by reference.

Mexican law and the judiciary, at both the federal and state levels, recognize the notion of comity and international cooperation. Accordingly, recognition and enforcement of foreign judgments in civil and commercial matters will be made pursuant to the procedural rules of the Federal Code of Civil Procedure, Code of Commerce and local Code of Civil Procedure, as applicable.

Conditions for Recognition and Enforcement

Pursuant to applicable procedural rules in the Mexican Codes of Commerce and Civil Procedure, and, except as otherwise provided in international treaties to which Mexico is party, foreign judgments are to be recognized in Mexico provided that, in summary, the following conditions are met:

- i) satisfaction of the formal requirements established by applicable procedural rules;
- ii) the judgment is not an exercise of an action *in rem* of real estate located in Mexico;
- iii) the foreign court had jurisdiction to decide the case;
- iv) service of process was properly made so as to provide the defendant with due process of law;

- v) the judgment is final (i.e., *res judicata*);
- vi) the claims are not the subject matter of a lawsuit pending before any Mexican court; and
- vii) the decision does not contravene matters of Mexican public policy.

Recognition and Enforcement Procedures

The procedure for the recognition and enforcement of foreign judgments in Mexico can generally be summarized as follows:

- a) the requesting court/judgment party must include in its request:
 - 1) an authentic (certified) copy of the judgment; 2) evidence of the service of process to defendant; 3) a declaration that the judgment is final (*res judicata*); and 4) an address for the party seeking enforcement to receive notices in Mexico;
- b) a Spanish translation of the request ("exhorto"/letter rogatory), and of all documents worded in a different language must be provided;
- c) once the request is received by the competent Mexican court, it will summon the parties involved, and grant them a nine-day term to produce their allegations/defenses and offer evidence in regard thereto;
- d) if evidence is propounded and admissible, the court will schedule a

- hearing for its reception;
- e) the Public Prosecutor, "*Ministerio Público*" (each court has an appointed representative of Mexican society), will always be summoned to participate in the proceedings; and
- f) once proceedings are completed, the court will issue its decision. The decision is appealable and, in turn, the ruling of the appellate court can be challenged through constitutional action "*juicio de amparo*" before a federal court. Completion of these proceedings may take approximately one year.

Once the recognition proceedings are completed, if the judgment debtor does not voluntarily comply with the judgment, enforcement will be initiated by the court. In this scenario, at the request of the executing party, the court will order the attachment of the judgment debtor's property and schedule a judicial auction at which the executing party may secure transfer of title to the attached property or receive the proceeds of the sale.

Since the judgment debtor's property needs to first be identified and located, and a determination made as to whether such property is movable or immovable, no estimated time for actual collection can be anticipated nor is there any assurance of collection since it depends on the financial condition of the judgment debtor.

Conclusion

Obtaining a favorable judgment is only one step in the litigation process. When the judgment is from a foreign court, the successful litigant must have the judgment recognized and enforced in the local country where the judgment debtor's assets are located. In Mexico, this process is not without its challenges, and an understanding of the basic principles for obtaining recognition and enforcement of a foreign judgment is a critical step in the litigation process.



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Endnotes

- 1 Mexico is party to the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, the Inter-American Convention of Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, and the Inter-American Convention on Letters Rogatory, which shall be observed in the event that the foreign judgment is rendered by a court of any of the other parties thereto.
- 2 Mexican courts can reject enforcement if proven that in the country of origin foreign judgments and/or awards are not enforced in similar cases.
- 3 Article 567 of Federal Code of Civil Procedure grants Mexican courts exclusive jurisdiction over, among others: i) land and waters within Mexican

territory; ii) resources of exclusive economic zone or any sovereign rights therefrom; and iii) acts related to the Mexican State regime, federal agencies and states of the Mexican Republic. Regarding jurisdiction of foreign courts, the Mexican rules establish that it will be recognized based on rules accepted in "the international sphere" which are consistent with Mexican domestic rules.

- 4 It is highly advisable to appoint Mexican attorneys, jointly or individually, to participate in the proceedings, and to include their names in the disclosure, or alternatively, to grant a power of attorney to such attorneys.
- 5 The Federal Code of Civil Procedure does not regulate in detail specific formalities for "exhortos" (letters rogatory). Article 550 only

mentions that "exhortos" are to be written official communications: a) expressing which actions are requested by the requesting authority; b) providing the necessary information and data (c); attaching certified copies of pertinent documents (such as: complaint, service of process to defendant, the judgment, attestation that it is a final non-appealable decision, translation of documents worded in a language different from Spanish, etc.).

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