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RECENT DECISIONS OF THE MEXICAN SUPREME COURT OF JUSTICE

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For the first time ever, the Mexican Supreme Court of Justice has rendered a judgment regarding the constitutionality of the Federal Law of Economic Competition (hereinafter, the FLEC). The purpose of this article is to highlight the core issues that were resolved by the Federal Courts regarding the interpretation of the FLEC. In addition, I will provide brief comments on the seven cases that were resolved by the Mexican Supreme Court of Justice on May 15, 2000.

The 1993 FLEC provided a new stage in the Mexican legal environment. [1] While it is true that the Sherman Act[2] was enacted in 1890, the Political Constitution of the United Mexican States (hereinafter, the Constitution) has banned monopolies since 1857, although it did not have supplementary legislation. Consequently, it was not until the FLEC that the Mexican policy forbidding monopolies and monopolistic practices was really applied.[3] The FLEC basically enforces and develops Article 28 of the Constitution, which essentially provides a prohibition on monopolies and monopolistic practices.[4] Although the Constitution does not explicitly state anything about concentrations, the Supreme Court has recently interpreted Article 28 of the Constitution in order to assert that concentrations are encompassed and established under the terms of the Constitution. The FLEC is enforced by only one federal agency, the Federal Competition Commission (hereinafter, the Commission), which is comprised of five commissioners appointed by the President of our country. The Commission depends on the Ministry of Commerce and Industrial Development (currently, Ministry of Economy). Recently, the Commission has sought to enforce strongly the FLEC and, in my personal opinion, it has as much power as a *Cabinet* or *Secretariat* in the legal organization of Mexico. The FLEC has been supplemented by other statutes, namely the Regulations of the FLEC and the Internal Regulations of the Commission that were just enacted in 1998.[5]

Unlike the law in the United States of America, the Mexican Competition Law is federal in nature. Mexico does not have state antitrust statutes. Accordingly, there is no dual jurisdiction since the Commission is the only adjudicatory authority in this area.[6] Consequently, the Commission has the monopoly on prosecuting

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1. Federal Law of Economic Competition (*Ley Federal de Competencia Económica*), Diario Oficial (D.O.), December 24, 1992, which entered into force 180 days subsequent to its publication therein.

2. Sherman Antitrust Act, 15 U.S.C. §1 (1890).

3. By way of example, before the FLEC, major antitrust statutes forbade only monopolies and acts tending to monopolize. The idea of concentrations was introduced in the Mexican Constitution in the early 1980s. Concentrations (merger and acquisitions) as preventative policy was neither provided for in the Mexican Constitution nor in antitrust statutes prior to the FLEC.

4. La Constitución Política de los E.U. Mexicanos, Feb. 5, 1917 at Art 28 – Monopolies as further amended.

5. Regulations of the FLEC (*Reglamento de la Ley Federal de Çompetencia Económica*), D.O., March 4, 1998. Internal Regulations of the Federal Competition Commission, D.O. August 28, 1998, repealing the prior Internal Regulations published in the D.O. on October 12, 1993.

6. Different from US antitrust law where there are two enforcing Federal agencies (The Antitrust Division of the Department of Justice and the Federal Trade Commission), State Antitrust authorities and several antitrust

monopolies and monopolistic practices. There is no trial by jury as in the US. Thus, every single case regarding competition matters must be tried before the Commission. Unlike the Sherman Act, the FLEC provides for no criminal penalties; however, the Mexican Federal Criminal Code, enacted in 1930's, lists some criminal penalties for horizontal practices (cartels) involving articles of prime necessity.

Furthermore, the FLEC contains no allowances for treble damages, despite the fact that double damages were established in the 1992 bill that was prepared by the executive to be discussed by the Congress. As a consequence of the foregoing, a plaintiff must follow the general rule stating that a party may recover damages for an illegal act before the competent courts only when there is evidence of direct and immediate harm. Hence, there is no possibility under Mexican law for claiming punitive, indirect or consequential damages. So far, from the best of my knowledge, there has never been tried a case in which a plaintiff has sued for both damages and lost profits deriving from monopolistic practices or illegal concentrations.

All this preliminary background information allows me to state that all of the decisions rendered by the Court were finally decided in the *amparo* proceeding. Because *amparo* proceedings are difficult to comprehend, even for Mexican attorneys, it is necessary to begin with a brief explanation of their function. First of all, an *amparo* proceeding is a constitutional challenge. It is an independent trial which deals with constitutionality and not a mere recourse or challenge to a legal matter. Second, the proceeding is always heard by a federal court (Federal District Court –indirect *amparo*- or a Collegiate Circuit Court –direct *amparo* or appeal from an indirect *amparo*) and, at the final stage, it can be heard by the Supreme Court of Justice when dealing with issues of constitutionality of laws/regulations. Finally, when a Federal Court or the Supreme Court issues a judgment at the conclusion of an *amparo* proceeding, the result has only effects for the person seeking the *amparo* with no general effects. This has been called *formula otero*. *Formula otero* means that the judgment resolving the constitutionality or unconstitutionality of the law (or a provision thereto) will have only particular, and not broad or general effects.[7]

If the challenge is confirmed, (and only if the resolution deals with penalties), then the adverse party will have to file a nullity action before the Federal Tax Court (currently Federal Tribunal of Administrative and Tax Justice) and, thereafter a Direct Constitutional Suit (*amparo directo*) to be heard by the Collegiate Circuit Court. If the resolution confirmed by the Commission imposes sanctions other than or in addition to penalties, then an "indirect constitutional suit" (*amparo indirecto*) must be filed. Thereafter, this resolution might be challenged through a "revision recourse" (*recurso de revisión*) before the Collegiate Circuit Courts or the Supreme Court of Justice if the issue to be determined is the constitutionality of a federal law where no precedent has ever been created.

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statutes (i.e. Sherman Act, Clayton Act, Federal Trade Commission Act, Robinson-Patman Act, etc.), Mexico has only the Federal Competition Commission as sole authority adjudicating Competition Law in Mexico.

7. Mexican law does not provide for the *stare decisis* doctrine as known in civil law countries. Notwithstanding, Sections 192 and 193 of the *amparo* Law provide for what is called "jurisprudence" (*jurisprudencia*) which is a binding precedent when several requirements are met. The general idea is that five uninterrupted—cases are decided in the same sense by the Supreme Court of Justice and Collegiate Circuit Courts. Once jurisprudence is declared, the precedent binds lower courts, administrative and State Tribunals.

Before May 15, 2000 when the Supreme Court of Justice rendered its judgment regarding the constitutionality of several provisions of the FLEC, a number of other cases were resolved by Federal Courts. One of those cases, which was resolved by a Federal District court in Mexico City involved a suit brought by public brokers (*corredores públicos*) against public notaries. In that case, the public brokers alleged that public notaries had the monopoly to intervene in those cases related to real estate and had concerted with the Public Registry of the Federal District in order to avoid recording legal acts created by public brokers. Public notaries in Mexico have quite a different and broader function than those in the United States since the former not only provide certification to certain legal acts, but also provide legal advice and ensure legal certainty in the acts in which they intervene, such as the purchase of real estate. Public brokers or *corredores públicos,* alleged that they had the right to intervene in acts involving real estate, such as securing commercial transactions. They specifically interpreted and quoted a provision from the Federal Law of Public Brokers whereby credit transactions could be secured by real estate.[8] Accordingly, public brokers sued public notaries before the Commission, asserting that public notaries and the Public Registry of Property in Mexico, Federal District, acted in concert to avoid recording those legal acts created by public brokers dealing with real estate (boycott).

The Commission started the proceedings and ultimately declared the existence of a relative monopolistic practice. On appeal (*Reconsideration Recourse,* heard by the Commission), the Commission upheld the decision. In response, public notaries filed an indirect *amparo* complaint before the District Federal Court arguing, among other things, that Article 3 of the FLEC was unconstitutional since it goes beyond Section 28 of the Mexican Constitution. Finally, the District Court found that Public Notaries are not "economic agents" as defined by the FLEC. The reasoning of the Federal District Court was that Article 28 of the Constitution contains a limited list of the active economic agents that can be subject to a monopolistic practice, including commercial entities, manufacturers, producers or services. Since a public notary does not fall within those kinds of producers or manufacturers, the Federal District Court determined that the FLEC (which is supposed to regulate and detail the Constitutional provision) goes beyond what the Constitution states (since the Constitution did not so provide); therefore, it declared Article 3 the FLEC unconstitutional. However, because of the characteristics of the *amparo* proceedings, the declaration of unconstitutionality only served for the public notary's case, and not for any other. Here, the important message sent by this Federal District Court was that Section 28 of the Mexican Constitution will be construed narrowly as to the "active" economic agents that may commit a monopolistic practice.

Another case that frequently arises is when the Commission starts an *Ex-Officio* investigation and makes a request for information, (e.g., corporate documents, answers to particular questions or witness testimony under subpoena). In that situation, the plaintiffs always need to stay the proceedings and stop such request.

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8. Section 6-V of the Federal Law of Public Brokers expressly sets forth that public brokers may certify and act as public certifier in agreements and acts of a commercial nature, except when dealing with real estate. Public borkers are expressly authorized to participate in the creation of mortgages related to vessels, ships, aircraft and credit agreements with chattel mortgage (*Contratos de Crédito de Habilitación y Avío*).

Since the FLEC does not provide a means of challenging such an order before the Commission, the only way to challenge immediately the request and the corresponding investigation is through an indirect *amparo* complaint. As a general rule, the filing of an *amparo* allows the plaintiffs to seek a stay of the proceedings until the *amparo* is resolved.[9] However, the Administrative Collegiate Circuit Courts have recently determined that proceedings held before the Commission are essential to maintaining public order since they are the sole means by which monopolies and monopolistic practices are prosecuted. Therefore, *Ex-Officio* investigations carried out by the Commission and the accompanying requests for information cannot be stayed in any manner whatsoever unless very exceptional circumstances occur. Those exceptional circumstances, from the best of my knowledge, have occurred only a couple of times (e.g., the request for information may bring as consequence the disclosing of confidential information). This refusal to stay the proceedings provides very strong support for the administrative procedure held before the Commission.

Turning now to the main topic of this article, the rulings rendered by the Supreme Court of Justice have interesting legal implications. First, the Supreme Court of Justice was re-composed in 1994 and, therefore, is now comprised of eleven members. Second, the judgments rendered on May 15, 2000 by the Supreme Court of Justice are not binding since they have not created what is called *jurisprudencia* or jurisprudence. As mentioned before, and in general terms, in order to create *jurisprudencia*, at least eight justices of the Supreme Court must decide five uninterrupted cases in the same manner. Here, all resolutions were in individual cases that may become jurisprudence in the near future but, at this stage, are not binding. However, the Federal Courts are following them. Third, as stated before, this is the first time that the Court has made a construction of the FLEC and that is why it is important to keep those precedents in mind. Fourth, in my personal opinion, the Supreme Court of Justice will support the FLEC even if reverses other important precedents related to administrative proceedings. For me, it is clear that the Court believes that the FLEC and the Commission are so important in a global economy that it has undermined other important legal principles such as legal certainty and due process of law. Therefore, the struggle will be whether the powers of the Commission are to be broadened or whether the powers of the Commission need to be limited, since it could be considered as a "giant" that needs to be tamed.

As mentioned before, several important cases were resolved by the Supreme Court of Justice on May 15, 2000. Two of those cases were related to the Mexican subsidiary of Warner Lambert Company.[10] Basically, in one of the cases, Warner Lambert challenged the concepts of relevant market and substantial power set forth in Sections 11, 12 and 13 of the FLEC. It also asserted that neither the concept of concentration nor its procedure for challenge is provided for in the Constitution. Finally, it challenged that Article 30 of the FLEC is unconstitutional since there is no provision in the statute setting forth the steps and due process guarantees to be

9. As a general rule, Section 124 of the Amparo Law provides that a stay of the proceedings will be granted if i) it is so requested by the affected party; ii) there is no threat to the social interest or public order and iii) it will be difficult to recoup damages and lost profits if the act is enforced.

10. *See Amparos en Revisión* 2617/95 and 121/97, resolved by the Supreme Court of Justice on May 15, 2000.

observed by the Commission during the informal or preliminary stage of an *Ex-Officio* investigation. In other words, Warner Lambert challenged the Commission's "fishing expedition" attributes. It is important to remark that one of the core issues raised by Warner Lambert Company was the unconstitutionality of the so called "catch all provision" set forth in Section 10-VII of the FLEC.

The Court also resolved the *Luis Ruiz Ortiz*[11] and *Warner Bros.*[12] cases. There, the issue was whether Section 39 of the FLEC violates the Constitution since the FLEC provides no means to challenge procedural rulings issued by the Commission and since it appears that only the final resolution rendered by the Commission may be challenged. Thus, the affected party must either file an *amparo* complaint or wait for the definitive resolution to be rendered.

In *Gas Imperial*[13], in my opinion, the most important concept was whether or not the FLEC provides for the concept of antitrust injury. Since the Constitution provides that a specific group of people (*clase social determinada*) must be harmed in order to have antitrust injury or damage to the process of competition and Section 10 of the FLEC does not so provide, then again, the FLEC contravenes what the Constitution sets forth.

In *Cablevision*,[14] the core issue was whether or not the Commission has the power to issue provisional measures since neither the FLEC nor its Regulations so provide. No regulation or statute provides that the Commission has the power to issue provisional orders, attachments of assets or orders to stay activities. Likewise, it is not valid to apply the Federal Code or Civil Procedure in a supplementary manner. Ultimately, the Supreme Court did not resolve that point of the case since it dealt with some procedural issues of the complaint; therefore, that issue remains standing.

As you recall, the FLEC provides for absolute and relative monopolistic practices or what are basically horizontal and vertical restraints. Section 10 of the FLEC contains a list of wrong doings or administrative mischiefs. In general, a relative monopolistic practice is any multilateral act among non-competitors or unilateral behavior that unduly forces competitors out of the market or harms the antitrust process or free access to markets. Section 10 provides a detailed list of relative monopolistic practices (i.e. vertical distribution, tie-ins, boycotts, resale, price maintenance, etc.). In my opinion, such a section provides very broad powers to the Commission to determine what a mischief might be. Therefore, the section can be constitutionally challenged since Mexico is a civil law rather than common law country. An economic agent that can potentially be sanctioned needs to know what kind of behaviors may carry sanctions for their violation, especially since the penalties issued by the Commission might be very strong. This can be summarized in the Criminal Law phrase that is also useful in administrative law: "*nulla poena sine lege*" (there is no penalty without a rule of law). Thus, mischiefs must be clearly established by statute. No discretion in that regard must remain with the Commission since it may violate Section 49 of the Constitution (Division of Powers) and Section 14 (legal certainty).

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11. *See Amparo en Revisión* 2318/97 and 2349/97, resolved by the Supreme Court of Justice on May 15, 2000.
12. *See Amparo en Revisión* 643/97, resolved by the Supreme Court of Justice on May 15, 2000.
13. *See Amparo en Revisión* 354/97, resolved by the Supreme Court of Justice on May 15, 2000.
14. *See Amparo en Revisión* 1950/96, resolved by the Supreme Court of Justice on May 15, 2000.

Warner Lambert asserted in its *amparo* complaint that the concept of relevant market by product is essentially based on whether it is possible to substitute products or services. If the market is full of substitutes, the relevant market by product will be defined broadly, diminishing the possibility for a finding of market power. It should be noted that the FLEC requires only the *possibility* of substitution. Warner Lambert challenged that requirement, along with others contained in Sections 11 and 12 of the FLEC, as being overly vague and devoid of clear rules. Companies do not know, for example, whether price, physical characteristics, use, intended use, cross elasticities of demand or supply will be used to make the finding since the criteria are not definitively established by law. As a consequence, the interpreter may use the economic tool he thinks it fits the requirements.

The holdings of the Supreme Court of Justice on this point are very important. The Court held, first of all, that all interpretation of the FLEC provisions must be made within the context of the law. Since the FLEC is an economic law, one must obtain feedback from economic theories in order to answer what a substitute is. The statute itself does not define such concepts. I do not agree because there are several economic theories, and more importantly, there are no criteria to harmonize the interaction of the elements set forth in Section 12 of the FLEC for a finding or definition of a "relevant market."

Second, for the first time the Supreme Court quoted extensively from cases from both the United States and the European Community and made specific references to international authors.[15] It seems strange to me that the Supreme Court had to quote other statutes in order to interpret the FLEC, which should be a self-contained statute. If the interpreter in this area of "restrictive law" or administrative law of mischiefs must consult external sources, it may serve as evidence that the law is not a self-explanatory statute, and therefore, it might be unconstitutional.

Finally, the Supreme Court stated that the concepts of relevant market and substantial power are undetermined concepts that only acquire meaning when specifically applied in reality within the economic context of the FLEC.

The second argument before the Supreme Court in the first Warner Lambert case was whether concentrations are illegal under Article 28 of the Constitution. Again, the Constitution does not provide that concentrations are prohibited or may be prohibited. It only says that authorities will effectively and strongly prosecute monopolistic practices and monopolies. Since the prohibition is not found in the Constitution, Warner Lambert alleged that *Ex-Oficio* investigations to challenge concentrations go beyond what the Constitution provides. In response, the Supreme Court looked at the aim and the objective of the law, not necessarily at its wording. The Court held that the objective of Article 28 of the Constitution is to be both preventive-oriented in the case of concentrations and repressive based when talking about monopolistic practices. Accordingly, one should strive to give effect to the FLEC above all else to ensure the survival of the objective rather than of the strict wording.

The third challenge is perhaps one of the most interesting because it involved allegations of fishing expeditions by the Commission. Here, Warner Lambert

15. The Court referred specifically to both Chapter 15 of the North American Free Trade Agreement and the 1981 United Nations Code for Control of Restrictive Practices.

claimed that when a proceeding goes before the Commission, the Commission begins a fishing expedition, requesting information, witnesses, etc. In these instances, the defendant does not know whether that information is going to be used against it or whether it will have the opportunity to challenge any finding reached due to the information gathered during the proceedings. Therefore, the defendant does not really have a right to a hearing since it is not known in what character the requested party will appear in the proceedings. In other words, there is *uncertainty* for the economic agent. Therefore, the proceedings become a *pesquiza*, a secret investigation, a fishing expedition. By way of example, the Commission resolves to start an investigation regarding a specific product or service. It requests information from the defendant and a year might elapse while witnesses are summoned and documents are gathered. The defendant might begin to think that the Commission has decided not to proceed with the inquiry. However, a significant time thereafter, the Commission might start a formal investigation, make the publications in the Federal Official Gazette and serve process on the defendant. The defendant will then recognize the need to return to that case, to answer the complaint, to provide evidence and to make its closing argument. Of course, during that proceeding the defendant will not have the opportunity to make a procedural challenge and before being summoned, it will be precluded from checking the file since it is "reserved" for the sole use of the Commission. Rather, it will either have to wait until the final resolution of the dispute or attempt to file an *amparo* complaint that probably will not be admitted by the Federal Court. Finally, the Commission will likely render a resolution that can be challenged only through the *Reconsideration Recourse* at the end of the proceedings.[16]

The challenge that Warner Lambert raised was directed precisely to assert the unconstitutionality of this preliminary stage of the *Ex-Officio* investigation carried out by the Commission. In response, the Supreme Court first determined that the objective or the end is more important than the means. Since the prosecution of monopolies is the main objective of Article 28 of the Mexican Constitution, the Commission has the right to prosecute those behaviors. Second, the Supreme Court indicated that the commencement of a proceeding is a disturbing act, (*acto de molestia*)[17] and not a depriving act (*acto de privación*).[18] Under Article 14 of the Constitution, the right to a hearing is a prerequisite to the deprivation of an individual's property rights. However, if the act is merely disturbing or merely an act to annoy or grieve an entity, there is no right to a hearing. The disturbing party needs only to provide a written request stating the basis of its authority that provides for the disturbance. Under that reasoning the Supreme Court of Justice held that since the commencement of a proceeding is a disturbing act but not a depriving act, the proceedings held before the Commission are constitutional.

Warner Bros, Luis Ortiz and *Cablevision* also challenged the fact that procedural challenges are not allowed during the Commission proceedings. A defendant must either attempt an *amparo* complaint or wait until the final resolution of the dispute. In those cases, it was alleged that the prohibition on procedural challenges violates

16. *See* Federal Law of Economic Competition *(Ley Federal de Competencia Económica)*, Diario Oficial D.O., December 24, 1992 at Art 39.

17. *See Constitución Política de los .Estados Unidos Mexicanos*, Feb. 5, 1917 as amended at Art 16.

18. *See Constitución Política de los Estados Unidos Mexicanos*, Feb. 5, 1917 as amended at Art 14.

the Constitution because it amounts to a denial of the right to a hearing. Furthermore, it forces the defendant to bear the burden of following the proceedings before the Commission and to wait until definitive resolution is rendered. The Supreme Court of Justice held again that the objective of the FLFC, as an administrative statute, is to provide for quick proceedings. Public order and public policy demand that disputes involving monopolistic practices be resolved expeditiously. Second, administrative proceedings are different from civil proceedings in which one can challenge every step of the proceedings through revocation, appeal, etc. Here, the focus is on the quick resolution of the case. Third, the plaintiff will have the opportunity to file an *amparo* complaint. However, as we have seen, the *amparo* complaint is sometimes difficult to obtain on the merits and a stay of the proceedings pending the resolution of the *amparo* will be granted only in exceptional circumstances. Therefore, in reality, there is no opportunity for a procedural challenge to the proceedings before the Commission. Finally, the Regulations of the FLEC basically state that only the Commission's final resolution may be challenged; challenges to procedural rulings are impermissible.

These cases have important consequences. First, although they are not binding precedents, the federal courts are following them. For practical purposes they are binding. Second, it is clear to me that the Supreme Court of Justice has supported the antitrust statute, even overruling *de facto* binding precedents created by the Supreme Court in other administrative proceedings, for example in tax matters. Thus, the Supreme Court has acknowledged that competition law is so important that will sustain its constitutionality. However, the difficulty remains whether or not the FLEC violates the Constitution. Third, relevant market and substantial power were held to be constitutional by a vote of 9-1 (one absence). Fourth, concentrations must be considered as being encompassed within the meaning of the Mexican Constitution. Fifth, preliminary stages of the *ex-officio* investigations or "*fishing expeditions*" by the Commission are constitutional. Sixth, the reconsideration recourse can now only be filed against definite resolutions of the Commission. No procedural challenge is allowed during the proceedings except for the *amparo*, which is not a recourse but rather an independent constitutional trial. Seventh, the Commission can request information and the party from whom the information is requested must comply or face the imposition of strong penalties by the Commission.

Several pending issues will likely be resolved in the near future. First, the constitutionality of the "catch-all provision" has yet to be determined. For example, predatory pricing and price discrimination are commonly challenged in the United States and the parties may sue one another based on those provisions. In Mexico, there is a provision under Section 7-1 of the Regulations to the FLEC regarding predatory pricing policies, but there is not a definition of predatory pricing under the FLEC. Moreover, under Mexican law, regulations passed by the Executive cannot substitute for formal legislation, which must only come from the Congress. Since the FLEC does not provide a definition of predatory pricing we may ask if it is cost below average cost? Total cost? What kind of cost? Will the possibility to recover losses be important? Must the defendant suffer losses? Currently, the defendant does not know the Commission's criteria in prosecuting those cases. If the Court declares "the catch-all" provision unconstitutional, then price discrimination policies, cross subsidizing and predatory pricing policies will all be valid, at least

for the time being, until either the Congress makes a clear definition or the Supreme Court reverses its judgment. To be sincere, and this is my personal opinion, the Supreme Court will probably support the catch all provision and will avoid its important mission to apply the Constitution above all. In some ways, and probably deriving from a global economy, Mexico wants to apply legal methods and rules that work from a different legal system.

Next, some people have challenged whether the mere existence of the Commission is constitutional. As mentioned before, the Commission in some cases defines the behavior to be challenged, thereby making it a legislative body. It prosecutes or starts proceedings before itself, then conglomerates or merges the power to adjudicate and the power to prosecute. If we add that, in the case of the "catch-all provision" they determine the elements of a mischief, then all powers (executive, legislative and jurisdictional) are comprised in the same institution, contrary to Section 49 of the Mexican Constitution. Therefore, all powers are merged in the same entity. Whether the Commission, as an entity, is constitutional will be resolved by the Court in the near future.

Finally, does the Commission have the authority to order provisional measures or not? While it is not in the law, I do not doubt that the Supreme Court will probably sustain that position since the FLEC is so important.