Mexican Law

Editor's note: In the publication of Issue Number 3, Volume 35, Fall 2001 of *The International Lawyer*, corresponding to the Section of Foreign Law Year In Review: 2000 (Mexican Law), pages 930–932, there is a mistake that needs to be corrected. The full Section B (A Free Trade Agreement with the European Community: A Common Misunderstanding) is misleading as to the use of the terms European Community ("EC") and European Union ("EU").

The context must be interpreted in the sense that the agreement so analyzed was executed with the EC since the EU lacks legal standing. The EC has indeed legal recognition and authority to execute international agreements. On the other hand, the EU is the supranational and intergovernmental form of cooperation that might acquire legal recognition as such to enter into international agreements in the near future. In the meantime the Agreement executed with Mexico was entered into with the EC (first pillar of the European Union as depicted thereto at page 931) as to the community areas and the participation of the Member States as such was due to those areas fall outside of the community scope. Thus, for the sake of clarity the entire section B where the reference is made to the EC must be changed or read as referring to the EU.

The trend to acknowledge authority to the EU is one of the items that may change in the report to be prepared by the working group that seeks to draft a Constitution whereby the EU will have legal status and will absorb the EC.

JORGE JIMÉNEZ, JUAN FRANCISCO TORRES-LANDA R., OMAR GUERRERO RODRÍGUEZ, RICARDO A. PONS MESTRE, JULIA S. PADIERNA-PERALTA, ALBERTO ESENARO, PATRICIO ITURRALDE, PROF. JAMES A. GRAHAM, AND MACARENA TAMAYO-CALABRESE*

*Jorge Jiménez prepared the section on Mexican Energy Issues. Mr. Jiménez is a member of López Velarde, Heftye, Abogados in Mexico City. He is an attorney and counselor at law admitted in Mexico and New York and can be contacted at jjimenez@lvha.com.mx. Juan Francisco Torres-Landa R., Omar Guerrero Rodríguez, and Ricardo A. Pons Mestre prepared the section on International Cooperation in Competition Matters Between the United Mexican States and the United States of America. Mr. Torres-Landa (jftl@bstl.com.mx) is a partner in the Mexico City law firm Barrera, Siqueiros y Torres Landa, S.C. He is active in teaching, publishing, and is co-chair of the Mexican Law Committee of the ABA Section of International Law and Practice. Omar Guerrero Rodríguez (ogr@bstl.com.mx) is also a partner with Barrera, Siqueiros y Torres Landa, S.C. and is active in international business transactions and arbitration, as well as teaching and publishing. Ricardo A. Pons Mestre (rpm@bstl.com.mx) is a senior associate at Barrera, Siqueiros y Torres Landa, S.C. and is heavily involved in antitrust practice and corporate transactions. Julia S. Padierna-Peralta prepared the section on Mexico's Elimination of NAFTA Duty Drawback and Entry Into Force of Sectoral Development Programs. Ms. Padierna-Peralta is a former Mexican trade official and now an associate in the Washington, D.C. office of the law firm of Neville Peterson LLP. She focuses her practice on Mexico Trade, Customs and Federal Regulation; Customs Law; Regulatory Law; and International Trade Law. This article is for informational purposes only and does not purport to provide legal advice. Ms. Padierna-Peralta can be reached at jpadierna@npwdc.com. Alberto Esenaro and Patricio Iturralde prepared the section on Mexico: Legal Aspects to Invest in Mexican Wireless Market. Mr. Esenaro is an associate at Santistevan Abogados, S.C. in Mexico

I. Mexican Energy Issues

In the last few years, the Mexican energy sector has left its monopolistic stage and started to develop as a real practice area of law. The slow but steady opening of the sector to international investment has resulted in this area of law becoming of increasing interest in Mexico. As a consequence, changes in this sector are now followed more closely by Mexican and international practitioners.

The year 2001 was an important year in legal development in the energy industry, particularly in setting ground for 2002 developments. The main changes are the following.

A. Opening of the Markets

1. *Oil and Gas*

In December 2001, the Ministry of Energy, along with Petróleos Mexicanos (Pemex),[1] presented the new structure for Multi-Service Contracts (MSC) for the exploration and production of gas. The intent of the MSC is to adapt international structures such as production sharing agreements or risk service contracts to the restrictive legal framework for exploration and production of hydrocarbons in Mexico. The MSC prohibits sharing the production between Pemex and private developers, as well as paying private companies in kind with oil and/or gas.[2] The MSC contemplates, however, increasing payments based on productivity and revenues available from the projects. Pemex, through its subsidiary Pemex-Exploración y Producción (exploration and production), will launch a series of bids by mid-2002 for the development of these projects.

In addition, in October 2001, the Ministry of Energy announced the strategic plan for the energy sector, which contemplates the granting of concessions for production of non-associated natural gas. This concept would, however, require a further reform entailing congressional action. Such action may be seen in 2002, depending on the outcome of congressional progress in other non-related areas, such as tax reform and even the reform of the electricity sector. The strategic plan also considers the opening of the refining sector to private investment, both foreign and domestic.

City. In Mexico, he holds the degree of *Licenciado en Derecho* from the *Universidad Panamericana*. Web Page: www.santistevan.com.mx and E-mail: aesenaro@santistevan.com.mx. Patricio Iturralde is an associate at Santistevan Abogados, S.C., in Mexico City. In Mexico, he holds the degree of *Licenciado en Derecho* from the *Universidad Nacional Autónoma de México* and in the United States he holds the degree of Master of Laws from St. Mary's University in San Antonio, Texas. Web Page: www.santistevan.com.mx and E-mail: piturralde@santistevan.com.mx. James A. Graham prepared the section on The Med-Arb.net Project. Professor Graham is Director, Center for Dispute Resolution, Facultad Libre de Derecho de Monterrey, www.fldm.edu.mx/jgraham; Lawyer, JAG Advocate-International Legal Consulting, www.jagadvocate.com. Macarena Tamayo-Calabrese wrote the section on ADR Project in Mexico. Ms. Tamayo-Calabrese is the Director of the Latin American Legal Initiatives Council in the International Liaison Office of the American Bar Association headquarters in Chicago. She is also Director of the International Bar and Outreach Office of the ABA and can be reached at mcalabrese@staff.abanet.org.

1. Under the Organic Law of Petróleos Mexicanos and Subsidiary Entities, Pemex-Exploración y Producción, a Pemex subsidiary, is entrusted with the exploration and production of hydrocarbons, including oil and natural gas. *See* "Ley Organica de Petroleos Mexicanos y Organismos Subsidiarios" art. 3, D.O., 16 de julio de 1992.

2. *See* Art. 6 of the Regulatory Law of Constitutional Article 27 in the Field of Petroleum.

2. *Electricity*

a. Regulations for Purchase of Power Output

On May 24, 2001, President Fox issued amendments to the Regulations of the Electricity Public Utility Law (*Reglamento de la Ley del Servicio Público de Energía Eléctrica*).[3] The purpose of the amendments is to authorize the *Comisión Federal de Electricidad* (CFE), the government monopoly electricity provider in Mexico, to enter into power purchase agreements with private power producers for purchase of large amounts of excess power output, without the need to award such contracts through a bidding process (which is the general rule under Mexican law).

As regulated now, CFE may purchase from self-use permit holders and cogeneration permit holders, their power surpluses for up to 50 percent of the installed capacity of self-supply plants, and 100 percent of the capacity of cogeneration plants. Prior to the reform, CFE was limited to purchasing up to twenty MW of excess power from cogeneration and self-supply plants. Due to the highly political nature of the energy discussions in Mexico, the Permanent Commission of the Mexican Congress filed, on July 4, 2001, a constitutional challenge against the validity of the amendments to the Electricity Regulations.[4] The constitutional challenge is based on the allegation that President Fox exceeded his authority with this measure. Although the resolution of this controversy is pending before Mexico's Supreme Court, most scholars and practitioners, particularly in the constitutional law and energy law areas, expect it to be rejected and the Regulations upheld.

b. Constitutional Amendments

Also in the electricity sector, on December 4, 2001, the ruling National Action Party (*Partido Acción Nacional*) (PAN), through Senator Rodríguez-Pratts, submitted a bill to amend the Federal Constitution and open the generation, distribution, and marketing of power to private participation.[5] Under this proposal, the Federal Government would maintain control of the national transmission grid. The constitutional amendments would require implementing legislation, which could be expected in 2002. The bill is similar to the proposal that has been lobbied by the Federal Government and is to be submitted to Congress at the beginning of the following congressional session in March 2002. Under both the PAN and the government's proposals, the assets currently owned by the government through CFE would remain under its realm.

B. Gas Industry Reform

The Energy Regulatory Commission (*Comisión Reguladora de Energía*) (CRE) has issued a decree for publication by President Fox, for amendments to the Natural Gas Regulations (*Reglamento de Gas Natural*) (RGN). The purpose of the reform is twofold: (a) to redefine the rules for the creation and operation of the so-called natural gas consumption clubs (*sociedades de autoabastecimiento*), and (b) to define the rules for granting permits for installing liquefied natural gas (LNG) terminals in Mexico, a trend that is being pursued by many major energy companies.

3. *See* "Decreto pro el que se reforman y adicionan diversas disposiciones del Reglamento de la Ley del Servicio Público de Energía Eléctrica," D.O., 24 de mayo de 2001.

4. *See* Mex. Cong., Constitutional Controversy 22/2001.

5. For complete text of the Senate bill, see Gaceta Parlamentaria, 4 de diciembre de 2001.

Consumption clubs are groups of gas users allowed by law to join forces and create a private system to receive gas supply. Many industrial parks have followed this structure, rather than securing their gas supply through the local distribution company in the relevant geographic area. The new rules for the consumption clubs tend to impose more limitations on the ability of consumption clubs to be created, protecting the exclusivity given by the RGN to distribution companies.

Through the amendments creating new rules for LNG Terminals, the CRE is seeking to determine, among other matters, the obligations for the terminal owners and operators, including safety standards, open access to third party shippers and users, regulate rates, and determine the type of technology that can be used.

The amendments to the RGN have been reviewed by the Federal Commission on Regulatory Improvement (*Comisión Federal de Mejora Regulatoria*) (COFEMER), which has proposed certain revisions, namely, softer rules for gas consumption clubs, and the elimination of certain technical requirements for LNG Terminals.[6] The amendments to the RGN, incorporating COFEMER's comments, will be published soon by President Fox in the Federal Register.

C. Government-Sponsored Energy-Infrastructure Projects: New Government Procurement and Public Works Regulations

In Mexico, a substantial part of energy usage, and all infrastructure projects in general, are related to government projects. On January 2000, Congress passed two new statutes related to government procurement: the Law of Acquisitions, Leases, and Services of the Public Sector (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*)[7] and the Law of Public Works and Related Services (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*).[8] On August 20, 2001, President Fox published implementing Regulations to these two statutes in the Federal Register.

One of the main innovations of the new Regulations, at least with respect to procurement and services, is the creation of a procedure of *points and percentages*, whereby the government entities allocate points to various matters in the bid, such as the technology being offered, the life of the product, warranty, technical experience of the supplier, product support, capability of the provider, and other synergy issues. Thus, and very importantly, the price will not necessarily be the exclusive element considered by the government in awarding a project. Also, in order to fight corruption, the new Regulations open the bid processes to public scrutiny. The Mexican Bar Association has executed a cooperation agreement with the Federal Comptroller, and is now overseeing some of the new major bid proceedings.

Many changes have been incorporated through the new Regulations, including (1) the elimination of most prior experience requirements; (2) elimination of financial and net worth requirements, except where justified; and (3) clearer rules for joint participation in

6. Draft of Regulations submitted to the Commission on Regulatory Improvement (COFEMER), Aug. 28, 2001; revised per COFEMER's request Oct. 24, 2001; final revisions issued by COFEMER Dec. 7, 2001 and sent to the Office of the General Counsel to President Fox under official action Commission on Regulatory Improvement, Mex. Cong., Amendments to Natural Gas Regulations (COFEME/01/1045).

7. D.O., 4 de enero de 2000, at 7, 29.

8. "Reglamento de la Ley de Obras Públicas y Servicios Relacionados con las Mismas," D.O., 20 de agosto de 2001.

bids through consortia, including confirmation that no local presence for foreign bidders can be required. Most of the changes made through the new Regulations are slowly but steadily being incorporated into Pemex and CFE's bid practice, and will become generally used in 2002.

II. International Cooperation in Competition Matters Between the United Mexican States and the United States of America

A. Introduction

Identifying competition issues in a global economy is a common legal trend. However, this is a fairly recent practice. In the last two decades, Mexico created an extensive network of multilateral and bilateral trade agreements to open its economy, and, as a natural companion, promoted a new competition enforcement policy administered by the Competition Federal Commission (CFC). It is within this context that at the end of January 2001 Mexico and the United States of America executed an international agreement or accord (not a Treaty) known as the "U.S.-Mexico International Competition Assistance Agreement" published in the Federal Official Gazette on January 24, 2001 (the "Agreement").

Although the aim of international cooperation between Mexico and the United States had already been foreseen in NAFTA, it was not until this recent Agreement that a set of formal rules have been set in motion. NAFTA's Chapter XV only contains a general goal of the parties' commitment to enforce their own competition policies and statutes, but does not contain a common set of antitrust rules, or similar commitments, to have one single legal instrument to govern competition in the NAFTA region.

For the United States, this Agreement is added to the network of similar agreements already in force (Australia, Brazil, Canada, Germany, European Community, Israel, Japan, and now Mexico). For Mexico, it represents the first of its kind. Nonetheless, Mexico is currently negotiating similar agreements with South Korea, Japan, and Brazil. Likewise, as recently as November 15, 2001, Mexico has signed a similar agreement with Canada, although this one may take the form of an international treaty since it is currently in the process of being reviewed by the Senate. If that is the case, it will be added to the list of international treaties with cooperation in competition matters, mainly executed with the European Community and the European Free Trade Area.

Reaching uniformity in legislation and application of competition rules is now a common effort in the international forum. Furthermore, increasing interest exists in detecting and combating international cartels that hamper and diminish competition, especially in a world without trade barriers. Those ideas have promoted the interest of all countries to enhance international cooperation and assistance in antitrust matters. Although informal cooperation has existed for some time, now formal rules and commitments have been established. These rules will probably be used more frequently in mergers and acquisitions, although they were also designed for restrictive and collusive practices of trade, along with technical assistance. These rules, it seems, were first applied in Mexico in the Lysine, Citric Acid, and Vitamin cases dealing with international cartels having effects almost everywhere.

All the data suggests that competition authorities share great expectations in this kind of cooperation agreement. However, we must be cautious as the scope of these cooperation instruments has not been yet tested, especially concerning certain contentious issues such as the use of confidential information, service of process of economic agents abroad, etc. To date, no real experience exists in the application of this Agreement. It is likely that

supplementary legislation must be enacted to harmonize potentially conflicting provisions of other rules and regulations. This is certain: Mexico is committed to follow the international trend in this matter. That is the topic this article discusses.

B. An Overview of Mexico's Network of International Trade Agreements

At the end of the 1980s Mexico changed its policy of staying behind its borders and instead engaged in opening up to foreign commercial relationships. This began with Mexico's accession to the General Agreement on Tariffs and Trade (GATT) in 1985. After GATT, Mexico went on to develop one of the most extensive networks of international trade agreements. This ambitious policy of liberalization, privatization, and deregulation generated the need for the 1992 enactment of the Federal Law of Economic Competition (FLEC). The FLEC created the CFC as the administrative agency in charge of the application of the FLEC with its new orientation of protection of the competition process and free access to markets.

Mexico has also increased its participation in international organizations dealing with trade. For example, in 1990 Mexico was a founding member of the European Bank for Reconstruction and Development, and in 1994, joined the Organization for Economic Cooperation and Development (OECD). The OECD has continuously provided advice and information to the CFC, which has modeled certain policies based on those OECD recommendations. Mexico has also acted as a founding member of the World Trade Organization (WTO), another entity that is still seeking the creation of a common set of rules to regulate competition and antitrust issues among its members.

Moreover, in the multilateral and bilateral level, Mexico has also entered into Free Trade Agreements (FTA) mainly with the following countries:

Country	Date of publication in the Federal Official Gazette	Chapter dealing with competition policies
NAFTA (United States of America, Canada and Mexico)	December 20, 1993	Chapter XV
Bolivia	January 11, 1995	No rules set forth therein
Costa Rica	January 10, 1995	No rules set forth therein
"Group of Three" – Mexico, Venezuela and Colombia	January 9, 1995	Chapter XVI
Interim Accord related to Commerce and related matters executed with the European Community	May 21, 1998	Article 5
Nicaragua	July 1, 1998	No rules set forth therein
Chile	July 28, 1999	Chapter 14
Israel	June 28, 2000	Chapter 8
European Community and its Member States	June 26, 2000	Article 11 Title IV Article 39 Annex XV of the Decision 2/2000
"North Triangle" – Guatemala, Honduras and El Salvador	March 14, 2000	No rules set forth therein
European Free Trade Area (Liechtenstein, Norway, Switzerland, and Iceland)	June 29, 2001	Article 51

Additionally, Mexico is currently negotiating trade agreements with Singapore, Japan, South Korea, and MERCOSUR (Argentina, Uruguay, Paraguay, and Brazil). Likewise, Mexico is a strong promoter for the Free Trade Area of the Americas, which is to be launched by 2004. Completing the list of these important developments, Mexico has a growing network of Bilateral Investment Treaties with several countries, including several European countries.[9]

C. International Cooperation in Competition Matters

Even though Mexico's prohibition of monopolies goes back to the 1857 Constitution and several antitrust statutes that were enacted thereafter, before the enactment of the FLEC, Mexico did not have an operating competition policy in place. The CFC has been responsible for the creation and development of a new competition culture in the Mexican marketplace. Thus, the Mexican government is no longer seen as the key player but rather as the regulator preventing and reacting in those cases where there are distortions in the market.

Certainly the FLEC and its Regulations as well as the adjudication proceedings handled by the CFC may and should be perfected. Although having had a short life, the CFC has effectively shown both domestically and internationally that Mexico promotes a "level playing field" for participants in this geographical market. It is as part of these efforts that the Agreement executed by the CFC finds its justification and proper place.

International treaties have become particularly important in the Mexican legal system. Their importance has increased due to a recent Mexican Supreme Court of Justice landmark decision[10] holding that international treaties are superior to federal laws and are only subordinated to the Mexican Constitution. This decision changes a former interpretation in the sense that federal laws and international treaties had identical legal value. The core reason to sustain the new finding lies in the fact that international undertakings assumed by the Mexican State commit all Mexican authorities before the international community. In this context, Mexico's President is authorized by Article 133 of the Constitution[11] to sign international treaties that, in order to become effective, must be ratified by the Senate. Thus, this significant decision sends a clear message to the international community that Mexico is willing and ready to enforce commitments entered into with other nations.

Under this scenario, NAFTA, as an international treaty, sets forth in its Chapter XV-Competition Policy, Monopolies and State Enterprises §§ 1501-2 and 1504 the common goal of the parties to cooperate and assist each other towards the enforcement of competition laws in the free trade area, as follows:

> 1501(2). Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties

9. Mexico has currently executed sixteen bilateral investment treaties; thirteen of which have been executed with Member States of the European Community.

10. Semanario Judicial de la Federación y su Gaceta, Vol. X, noviembre de 1999, Thesis P. LXXVII/99, at 46. (Plenary session of the Mexican Supreme Court of Justice). "International Treaties. They are hierarchically located above Federal Laws and immediately below the Mexican Constitution." Amparo en revisión 1475/98, Sindicato Nacional de Controladores de Tráfico Aéreo, May 11, 1999. Unanimity of ten votes (Justice José Vicente Aguinaco Alemán being absent). Proponent Justice: Humberto Román Palacios. Legal Secretary: Antonio Espinoza Rangel.

11. *See* Mex. Const. art. 133.

shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.

1504. *Working Group on Trade and Competition.* The Commission shall establish a Working Group on Trade and Competition comprising representatives of each Party, to report, and to make recommendations on further work as appropriate, to the Commission within five years of the date of entry into force of this Agreement on relevant issues concerning the relationship between competition laws and policies and trade in the free area.

Moreover, the international treaties executed with the European Community, Israel, EFTA, and before with the Group of Three surpass the objective foreseen in NAFTA and actually provide a complete set of rules dealing with international cooperation in competition matters. It is not the goal of this article to compare such instruments, although we can state that the subject matter, objectives, mechanisms, protection of confidential information, and other related areas all have the same orientation.

The Agreement is not actually an international treaty but rather an inter-institutional accord. As discussed previously, international treaties must be signed by the Mexican President and ratified by the Senate. On the other hand, a Ministry or a decentralized Federal, State, or Municipal entity, within its scope of authority, may sign inter-institutional accords, such as the Agreement.

Under a constitutional analysis, the Agreement was published as the "Accord executed between the United Mexican States and the United States of America regarding the Application of its Competition Laws." Its text is not sufficiently clear as to who were the precise parties to the Agreement. Moreover, there is no indication as to whether the Ministry of Foreign Affairs granted its opinion as to the authority to execute it. This seems paramount since the CFC is not a decentralized body but rather an agency dependent upon the Ministry of Economy, which should have been the signatory to this Agreement through its authorized representative.[12]

D. Main Provisions of the Agreement

The Agreement recognizes the commitments of Mexico and the United States of America under Chapter XV of NAFTA for the cooperation and coordination of competition authorities, to effectively apply their competition statutes within the free trade area. The Agreement also acknowledges that coordinated actions, in some cases, may result in a more effective resolution for the interests of both parties than actions carried out independently.

Considering the foregoing, the Agreement is divided into thirteen articles, the main provisions of which are the following.

1. *Purposes and Definitions*[13]

Article I of the Agreement sets forth that the purposes thereof are to promote cooperation, both in the application of the law, and also regarding technical issues and coordination between competition authorities of both countries. One of its main objectives is avoiding

12. *See id.*; *see also* "Ley para la ejecución para los tratados internacionales," §§ 1, 2-II and 7, D.O., 2 de enero de 1992.

13. "Acuerdo entre los Estados Unidos Mexicanos y los Estados Unidos de América sobre la aplicación de sus leyes de competencia," art. 1, D.O., 24 de enero de 2001 [hereinafter Agreement].

conflicts in the application of competition laws of the parties and minimizing the effect of any difference that may arise regarding their respective interests.

This Article also includes certain definitions used in the Agreement as follows: (1) *anti-competitive activities*, which refer to any conduct or transaction subject to sanctions or corrective measures under the competition statutes of one of the parties; (2) *competition authorities*, which for Mexico would be the CFC and for the United States the Antitrust Division of the Department of Justice and the Federal Trade Commission; (3) *competition laws*, referring to the FLEC and its Regulations,[14] and for the United States, the Sherman Act, the Clayton Act, the Wilson Act, and the Federal Trade Commission Act, all regarding provisions related with competition matters; and (4) *enforcement actions* (acts for the application of the law), which refers to any investigation or procedure carried out by one of the parties with respect to its competition laws.

2. *Notification*[15]

Article II of the Agreement provides for the notification to the other party of enforcement actions of their antitrust statutes that may affect the interests of the other party. This Article further describes those actions that may affect the interests of the other party, which include anti-competitive activities, concentrations or acquisitions, conduct required or approved by the other party, corrective measures in the territory of one of the parties, and information searches.

The notification provisions seek to increase communication between the parties to avoid conflicts in the application of competition laws and, to this end, include telephone communication between the authorities and the reference to collaboration for the exchange of information between the parties. There is also the possibility for the officers of one of the countries to visit the territory of the other country in the course of the investigation in compliance with their own competition laws.

The core of the cooperation activities of the parties has been in the form of notifications under Article II of the Agreement, mainly with respect to filing of concentration notices (e.g., mergers and acquisitions).[16]

3. *Cooperation in Law Enforcement (Positive Comity)*

Article III of the Agreement refers mainly to the acknowledgement of the parties to mutually cooperate in the detection of antitrust activities and the application of their competition laws. As part of this collaboration, this Article provides the sharing of information among the competition authorities of the parties.

In addition, Article V of the Agreement provides for cooperation between both countries when one of the parties considers that anti-competitive activities affecting the substantial interests of the party are performed in the territory of the other party. This cooperation refers to a request of one of the parties for the other party to perform enforcement actions regarding the corresponding law. Under this Article, there is no obligation for the requested party to commence any action, but it is required to carefully consider whether they will commence enforcement actions or not, or to extend the ones already initiated. Likewise,

14. Except for the provisions regarding restrictions to interstate trade by state authorities.

15. Agreement, *supra* note 13, art. II.

16. Informal interview with officers of the International Regulation General Bureau of the CFC on November 29, 2001.

the requesting party will maintain the right to commence enforcement actions with respect to the above-mentioned activities.

4. *Coordination*[17]

The Agreement provides the possibility of coordinated actions when the competition authorities of both parties carry out enforcement actions of their antitrust statutes. In the performance of coordinated actions, the parties shall consider, among other issues, the objectives in the application of the law of the authorities of the other party, costs, and the ability of the parties to obtain information.

5. *Prevention of Conflicts*[18]

The parties are bound to carefully consider the relevant interests of the other party in all stages of enforcement actions. These actions include those decisions related with the commencement of an investigation or process, the scope of the investigation or process, and the nature of the corrective measure or sanction claimed in each case. To this end, the parties acknowledge their desire to minimize any adverse effect in the enforcement actions on the interests of the other party, particularly in the selection of corrective measures.

6. *Technical Cooperation*[19]

Technical cooperation provisions under the Agreement mainly refer to the joint activities related with the competition legislation and policy of the parties, including the exchange of information, exchange of personnel for training, and the participation of personnel of competition bodies such as instructors or consultants regarding competition legislation and policy.

In this regard, in June 2001, officers of the Department of Justice and the Federal Trade Commission visited Mexico for three days to discuss with CFC officers investigation techniques in antitrust cases. This meeting, in the area of technical issues to facilitate enforcement actions, is the first one of its kind held by antitrust authorities of both countries since the execution of the Agreement.[20]

7. *Confidentiality*[21]

The obligation of the parties to maintain the confidentiality of information is probably one of the most sensitive provisions under the Agreement. Article X provides that notwithstanding any other provision under the Agreement, none of the parties is bound to provide information to the other party if such communication is forbidden by the legislation of the party holding that information, or is incompatible with the substantial interests of such party. In addition, the parties shall maintain the confidentiality of any information that is communicated by the other party under a confidential nature, and shall oppose a request by third parties to disclose such information.

17. Agreement, *supra* note 13, art. IV.

18. *Id.* art. VI.

19. *Id.* art. VII.

20. Informal interview with officers of the International Regulation General Bureau of the CFC (Nov. 29, 2001).

21. Agreement, *supra* note 13, art. X.

8. *Current Legislation*

Article XI of the Agreement expressly provides that nothing contained in the Agreement binds any of the parties to perform any act or refrain from performing any act incompatible with their current laws or to modify their legislation.

9. *Other Provisions*

The Agreement also includes provisions regarding consultations[22] and periodic meetings.[23]

E. The Next Steps

Cooperation among competition authorities around the world has increased in the last few years with the basic goal of minimizing the effects in one jurisdiction of acts performed in another. However, the authors believe that this international cooperation should be broader and also aimed at: reducing transaction costs for economic agents involved in multinational mergers and acquisitions, and granting legal certainty for economic agents with respect to conduct affecting the countries where they operate.

This problem has been clear in the need for one-stop filing in order to avoid multiple international submissions in global acquisitions. For example, the need to notify a significant number of competition authorities about mergers involving companies with subsidiaries or operations all over the world requires unreasonably significant time and transaction costs. The ability and time to respond to each filing and the analysis by different competition authorities may vary depending on the competition laws and legal systems applicable in each jurisdiction, in some cases reaching less than desirable or logical outcomes.

To address these concerns, harmonization of competition laws and the creation of a world competition authority would seem to be the ideal solution, recognizing that sovereignty and nationalism are significant obstacles in the way. As with all ideal solutions, they are difficult to achieve, at least in the immediate future, due to differences among competition authorities and the overall discrepancies in competition policy, culture, legal systems, and other principles governing this area of law.

Notwithstanding these impediments, competition agencies have recognized these concerns and, as recently stated by a CFC Commissioner (Fernando Heftye), fourteen antitrust authorities are in the process of creating an International Competition Network (ICN) that would work on the basis of non-binding recommendations.[24] The ICN's goal would be to harmonize criteria, foster international cooperation, and grant transparency in the actions of the authorities. Hopefully, the ICN, which seems to be a new alternative towards harmonization of competition law around the world, will address these concerns. The first meeting of the ICN is to be held in July 2002 in Italy and in 2003 in Mexico to commemorate the tenth anniversary of the CFC.

22. *Id.* art. VIII.

23. *Id.* art. IX.

24. Fernando Heftye Etienne, Remarks at the Annual Economic Competition Encounter (*Encuentro Anual de Competencia Económica*) sponsored by the Mexican Bar Association (*Barra Mexicana, Colegio de Abogados, A.C.*) (Nov. 29, 2001).

III. Mexico's Elimination of NAFTA Duty Drawback and Entry Into Force of Sectoral Development Programs: 2001 Developments

A. Introduction

The year 2001 witnessed major developments affecting Mexico's manufacturing landscape, including the elimination of NAFTA duty drawback and the establishment of Mexico's Sectoral Development Programs. Both of these developments are having a significant impact on *Maquiladora* and PITEX companies heavily reliant on foreign inputs to manufacture products for export. Mexico's elimination of NAFTA duty drawback and the establishment of Sectoral Development Programs are basically "two sides of the same coin."

B. Elimination of NAFTA Duty Drawback: One Side of the Coin

Prior to 2001, the waiver or deferral of import duties, commonly know as "duty drawback," was the prime feature of Mexico's temporary importation programs, namely, the *Maquiladora* and PITEX programs.[25] For decades, companies operating under these programs benefited from the in-bond, duty free importation of materials, parts, and components for manufacturing of finished products for export. Beginning January 1, 2001, however, Mexico's duty deferral regime ended with respect to inputs incorporated into finished products destined to NAFTA markets.[26]

Why is Mexico's elimination of NAFTA duty drawback significant? It means that *Maquiladoras* and PITEX companies using non-NAFTA originating inputs—whether materials, parts, components, or packaging—to manufacture goods for export to the United States or Canada now face Mexico's general external tariffs or most favored nation (MFN) rates. Mexico's MFN rates can be as high as 35 percent. This is affecting *Maquiladora* and PITEX companies heavily dependant on non-regional inputs since they now have to pay duties on such inputs, while inputs from the United States and Canada continue to be allowed to enter Mexico duty free. Note that duty drawback is still permitted on NAFTA-originating inputs and non-NAFTA inputs exported outside the NAFTA region. Other exemptions to the elimination of NAFTA duty drawback apply to textiles and apparel imported pursuant to specific NAFTA provisions; temporary imports from the United States or Canada for "repair or alteration;" and re-exportation of NAFTA-originating goods "in the same condition."[27]

C. Mexico's Sectoral Programs: The Other Side of the Coin

Mexico did not remain idle during the crucial changes of 2001. To alleviate the anticipated impact associated with the elimination of NAFTA duty drawback, the Mexican gov-

25. *Maquiladora* and PITEX (Temporary Import Program to Produce Articles for Export) programs are temporary importation programs that allow for the temporary entry of goods into Mexico for repair, transformation, or manufacture. Since its inception in 1965, the *Maquiladora* industry has grown to approximately 3,700 registered companies. The PITEX Program dates back to 1985. At present there are close to 5,000 PITEX companies operating in Mexico.

26. Mexico's elimination of duty drawback was mandated by Article 303 of the North American Free Trade Agreement. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., art. 303, 32 I.L.M. 289 (1993). NAFTA entered into force Jan. 1, 1994.

27. *Id.* art. 303(6).

ernment established "Sectoral Development Programs" (*Programas de Promoción Sectorial, or PROSEC or PPS* by their Spanish acronym). By regulation, these Programs went into effect for *Maquiladora* and PITEX plants on November 20, 2000, and by law for all other manufacturing companies on January 1, 2001.

Mexico's Sectoral Development Programs are being administered by Mexico's Economy Secretariat (former SECOFI), and allow participating companies to import eligible non-NAFTA inputs, machinery, and equipment at fixed, reduced duty rates to be used in certain industries. The duty rates on most qualifying inputs are either 0 percent or 5 percent, and a number of products have duty rates of 3 percent, 7 percent, or 25 percent. Those rates on average are significantly lower than Mexico's current MFN duty rates and have led hundreds of *Maquiladora* and PITEX companies to seek the benefits of the Programs.

As of December 2001, Mexico had established a total of twenty-two Sectoral Development Programs to benefit well over 5,460 products, identified by tariff item, to be imported and used for the manufacturing of specific, qualifying finished products.

The industries covered by the Programs include:

Mexico's Sectoral Development Programs

I.	Electricity	XII.	Rubber and Plastics
II.	Electronics	XIII.	Iron and Steel
III.	Furniture	XIV.	Pharmochemicals, Drugs and Medical Equipment
IV.	Toys, Games and Sport Goods	XV.	Transportation
V.	Footwear	XVI.	Paper and Cardboard
VI.	Mineral and Metals	XVII.	Wood
VII.	Capital Goods	XVIII.	Leather and Skins
VIII.	Photographic Goods	XIX.	Auto and Auto Parts
IX.	Agricultural Machinery	XX.	Textiles and Apparel
X.	Miscellaneous	XXI.	Chocolate, Candy and Similar ("Like" Products)
XI.	Chemicals	XXII.	Coffee

A key feature of Mexico's Sectoral Programs is that they are policy instruments subject to periodic changes.[28] This characteristic has provided companies with the opportunity to seek the inclusion of their critical inputs in the Programs. However, the constant revision of existing Programs has also created uncertainty within Mexico's industrial sectors, as changes to the Programs could result in the elimination of previously qualifying tariff items or an increase in import tariff rates.

D. Mexico's Sectoral Programs at Work

Sectoral Programs make tariff classification central to their coverage. Participating manufacturers may import non-NAFTA originating inputs, machinery, and equipment that are classified in one of the listed qualifying Mexican Tariff Schedule (HTS) numbers, at an *ad valorem* tariff indicated in the specific Sectoral Program. Each Program lists certain end-products and inputs (as well as capital equipment) by HTS number. If both the end-product

28. The twenty-two sectoral programs that have been established thus far are governed by the December 31, 2000 Sectoral Programs Decree. This Decree was amended on March 1, May 18, August 7, and December 31, 2001.

and the non-NAFTA input (and/or capital equipment) used to manufacture such end-product are listed, the non-NAFTA inputs or capital equipment may be imported at the import duty rate specified in the particular Program.

The potential benefits provided by the Sectoral Programs work in tandem with the limited duty drawback options still available under NAFTA. In accordance with NAFTA Article 303, the Mexican government may only waive import duties on the non-NAFTA inputs equal to the lower of two amounts:

- The sum of import duties paid or owed on the non-NAFTA inputs imported into Mexico and used in producing the exported end-product, adjusted for inflation from the month of importation; or
- The amount of import duties paid or owed on the end-product subsequently exported to the U.S. or Canada.

Under the new rules, Mexican import duties on the non-NAFTA *inputs* will be payable within sixty days of exportation of the finished product to one of the other NAFTA countries, and may be waived in whole or in part. Applicable import rates may be the MFN or a preferential (i.e., Sectoral Programs or free trade agreement) duty rate. Duties on *machinery* and *equipment* imported by *Maquiladora* or PITEX plants must be paid at the time of importation, under either a preferential or MFN rate.

Maquiladora and PITEX companies continue to be exempt from the payment of Mexico's value-added tax on inputs, capital equipment, and machinery to be used for the manufacturing of products for export.

E. Conclusion

Mexico's elimination of NAFTA duty drawback and the entry into force of Mexico's Sectoral Programs are two major 2001 developments shaping Mexico's current manufacturing landscape. *Maquiladora* and PITEX companies exporting to NAFTA markets are the ones that have been most directly affected by the elimination of NAFTA duty drawback. Mexico's Sectoral Programs, however, have helped these companies remain competitive.

IV. Mexico: Legal Aspects to Invest in Mexican Wireless Market

A. General Overview

The Mexican Congress passed the Federal Telecommunications Law (FTL) at the end of May 1995.[29] The FTL establishes the regulatory framework for competition and foreign investment in the telecommunications sector. It covers the use, enjoyment, and exploitation of:

(i) Radio-electric spectrum allocations;
(ii) Public telecommunication networks; and
(iii) Satellite communications.

The FTL is one of a series of statutes that opened the doors to foreign private investment in Mexico while reducing the role of government to a simple regulatory role. This law

29. *See* "Ley Federal de Telecomunicaciones," Diario Oficial de la Federación ("D.O.") Federal Official Gazette, 7 de junio de 1995.

mentions the avoidance of monopolies and equal treatment (through the supervisory participation of the Federal Competition Commission, COFECO), the free access to the public to provide telecommunication services and the rights of consumers.

Even though the Ministry of Communications and Transport (SCT) has jurisdiction over telecommunications, the FTL created the Federal Telecommunications Commission (COFETEL) through a Presidential Decree.[30] COFETEL was intended as an independent agency, which, together with the SCT, would oversee compliance with the FTL and its Regulations.

On November 22, 2001 Pedro Cerisola, Communications and Transport Minister, named Jorge Arredondo as President of the COFETEL. Jorge Arredondo is an industrial engineer and private sector consultant who worked for telecommunication equipment-maker Ericsson and in the regulatory area for Axtel, S.A. de C.V. (Axtel), a local telephone company.

Currently the fixed-line telephone companies are limited to a 49 percent foreign ownership. On the other hand, mobile telephones are allowed 100 percent of foreign ownership with prior authorization of the Foreign Investment Commission (Agency of the Ministry of Economy).[31]

Between 1990 and 2000, the telecommunication industry grew four times more than the Mexican joint economy, and its participation within the Gross National Income went from 1.07 percent to 3.03 percent.

B. Laws and Rules

The FTL was enacted on June 7, 1995 on the D.O.[32] It has been recognized as a pro-competitive law. Notwithstanding this consideration, Congress is currently discussing making important amendments to the FTL. The expected amendments to the FTL are designed to ensure the timely and effective application of its main provisions.

Radio-electric spectrum can be exploited by the private sector provided the interested party obtains a concession title to that effect. The FTL divides radio-electric spectrum into:

(i) Free Spectrum, of free use;
(ii) Official Spectrum, reserved to the federal, state or local government;
(iii) Experimental Spectrum, for scientific purposes or equipment testing;
(iv) Reserved Spectrum, frequency bands not assigned by the SCT and new technologies; and
(v) Specific Use Spectrum, for commercialization of telecommunications services by the private sector.

Public telecommunication networks are the only networks regulated in the FTL. Such networks are defined as systems integrated by means of transmission, such as channels or circuits, that use frequency bands of radio-electric spectrum, satellite links, wiring, electric transmission networks, or any other mean of transmission.

The concession title granted by the SCT for the exploitation of the radio-electric spectrum will contain all of the additional requirements not contained in the FTL that the

30. "Decreto por el que se crea la Comision Federal de Telecomunicaciones," 9 de agosto de 1996.

31. "Ley de Inversion Extranjera," art. 7, § III(x) and art. 8, § IX, D.O., 27 de diciembre de 1993 [hereinafter FIL].

32. Approved by Congress on May 18, 1995. For more information, see the Congress Debate Diary of that day.

concessionaire must comply with. Such additional requirements concern the area of coverage, technicalities, and compromises.

C. COFETEL

COFETEL is an "independent" agency created to regulate and promote the development of the telecommunications industry. Even though its legal framework indicates that the COFETEL is "independent," in practice there is a lot of communication between the SCT and COFETEL to make joint decisions, including the granting of concession titles. Furthermore, COFETEL depends on SCT to enforce its own resolutions. This interdependency has created some animosity between the SCT and COFETEL.

D. COFECO

The Mexican competition policy appears in three documents:

(i) Article 28 of the Constitution, which bans monopolies and monopolistic practices;
(ii) The Federal Law of Economic Competition (LFCE) implementing the Constitutional provision by preventing and penalizing anti-competitive conduct and mergers;[33] and
(iii) The Regulations to implement the LFCE developing specific aspects of this law.[34]

In 1993, COFECO was created to enforce the LFCE.[35] The COFECO has been an important part of the opening of the telecommunications industry to competition in Mexico. COFECO has exercised its authority to prevent, investigate, and penalize unfair competition. The most important parts of the telecommunications industry that have been opened to competition are: long-distance, local service, mobile phones, pay phones, and satellite services.

The Mexican telecommunication market has deregulated, increasing competition and decreasing rates. These changes have benefited the end-users by giving them access to a wider variety of services at a much lower cost. Still ahead for the authorities to ensure real and effective competition that will benefit millions of telecommunications users is the consolidation of the new regulatory framework.

In 1997, the COFECO realized that Teléfonos de México, S.A. de C.V. (Telmex) had substantial power, among others, over the markets of local telephone service and national and international long distance. Thereafter, in 2000, SCT resolved that Telmex would have specific obligations regarding tariffs, service quality, and public information (Dominant Operator Resolution).[36] These measures protect other investments in that area. After the

33. *See* "Ley Federal de Competencia Economica," arts. 8–15, D.O., 24 de diciembre de 1992 [hereinafter LFCE] for definitions on anti-competitive conduct and mergers; and LFCE arts. 35–38 for the penalization.

34. These regulations were published on March 4, 1998.

35. *See* LFCE, *supra* note 33, arts. 23–29 for a description of the COFECO.

36. "Resolucion Administrativa por la que la Secretaría de Comunicaciones y Transportes por conducto de la Comisión Federal de Telecomunicaciones, establece a Teléfonos de México, S.A de C.V, obligaciones especificas relacionadas con tarifas, calidad de servicio e información, en su carácter de concesionario de una red pública de telecomunicaciones con poder sustancial en cinco mercados relevantes, de acuerdo con el articulo 63 de la Ley Federal de Telecomunicaciones," File No. 312.045/10, D.O., 12 de septiembre de 2000. On December 4, 1997 the COFECO declared Telmex an economic agent with substantial power in the relevant market of basic local telephone services, access, intercity transport, and domestic and international long distance. Such declaration was notified to COFETEL on March 12, 1998, so in turn COFETEL could issue the Dominion Regulation on September 8, 2000 (see COFETEL's Internal Bulletin No. 9/98 dated March 20, 1998 and No. 50/98 dated April 18, 1998).

Dominant Operator Resolution, Telmex has been filing Constitutional Writs (*Amparo*) invoking invested rights under the original title of the concession granted.[37]

E. Foreign Investment and Neutral Investment

The telecommunications industry in general is earning more money than ever, according to the National Statistics Institute (INEGI).[38] This industry represents 2.6 percent of the total GNP and about 13.3 percent of the total communications GNP, while it represents about 5.7 percent of the total manufacturing (industry) GNP.[39] COFETEL has said it expects to see investment in this industry reach a total of about U.S.$19.6 billion from the time Telmex was privatized in 1991 through the year 2002, making this sector one of the most dynamic in the country.

As provided by the Foreign Investment Law (FIL), the fixed-line telephone companies are limited to a 49 percent foreign ownership, and the cellular and PCS phones are allowed 100 percent of foreign ownership. Telecommunications concessions will be awarded only to individuals or entities of Mexican nationality. In addition, investment in all Mexican telecommunications concessionaires (other than cellular and PCS phones), is limited by law to 49 percent. The FIL, however, provides that neutral investments will not be considered in computing the level of foreign ownership in Mexican companies. Neutral shares, which are defined as passive shares with limited or no corporate rights, are not counted toward the 49 percent foreign ownership capital.[40]

Iusacell, Mexico's second largest mobile phone company has used this approach in order to maximize foreign investment involvement in the company. Currently, Verizon Communications (formerly Bell Atlantic) owns 39.4 percent of Iusacell, and Vodafone Group Plc owns 34.5 percent. Any structure involving the use of neutral investment requires prior approval by the Foreign Investment Commission.

F. Wireless Telephone Service: Advance Mobile Phone Services (AMPS) and Personal Communication Services (PCS)

As from May 1, 1999, COFETEL began the Program "Caller Party Pays" (CPP, *El que llama Paga*), which made the cellular market grow from 3,349,000 users in 1998 to 19,396,000 in 2001, surpassing the number of current users of fixed-lines of 13,368,000 users. The Mexican market is following the world tendency to use a 100 percent digital network for cell phones. The Government restriction-free policy plus the "boom" of the CPP has increased the participation of several international cell phone operators such as Verizon Communications and Vodafone Group Plc in Iusacell, and America Movil in Telcel (the major mobile operator in Mexico).

37. This title actually refers to the amendment to the title concessions of Telmex originally granted on March 10, 1976 for thirty years to be a partially state-owned company. The amendment was issued on August 10, 1990 to gradually sell Telmex to private investors.

38. For further details, see Instituto Nacional de Estadística Geografia e Informática, *at* http://www.inegi.gob.mx (last visited July 3, 2002). Be advised that the statistics contained in this page are updated from time to time.

39. *See* Mexico Connect, *at* www.mexconnect.com (last visited July 3, 2002).

40. FIL, *supra* note 31, arts. 19 and 20. This Article of the FIL further provides that limited corporate rights refer to privilege-revenue shares with no right to vote in ordinary shareholders' meetings.

G. Wireless Fixed-Line

Wireless fixed-line operators must obtain a title of concession for rendering services. Wireless fixed lines have been increased as an alternative for new operators such as Operadora Unefon, S.A. de C.V. and Axtel, who try to avoid paying for using the local loop of Telmex.

H. Radio Communication (Trunking and Paging)

Companies providing services of trunking or paging require a title, concession, or permit for using the corresponding frequency. Recently, the users of paging have been decreasing due to the impact of the CPP. For example, in 1998 there were 651,000 users of pagers, but in 2001, pager users fell to 471,000. The trunking market is different since Inversiones Nextel de México, S.A. de C.V. has introduced trunking devices to the market that are capable of connecting to the fixed line network, and have multiple services at competitive rates similar to PCS. In this regard, trunking users grew from 140,000 in 1998 to 272,000 in 2001.

I. Satellites

Satellite communication is the system that allows the delivery of microwaves to a satellite for its amplification and return to be received by a station. A concession title is required for occupying and exploiting geostationary positions and satellite orbits assigned to Mexico, and exploiting signal emission and reception and associated frequency bands of foreign satellites providing services in Mexican territory.

In 1995 the Mexican Federal Constitution was amended to change satellite communications from an "activity restricted to the State" to an "activity with specific regulation," in which private foreign investors can participate.[41] Most of the provisions that regulate the communications via satellite are contained in the "Regulations for Communications Via Satellite," rather than in the FTL.[42] Also, a treaty signed in 1996 between the United States and Mexico authorizes the use of satellites from both countries to render services towards, from, and within the other country, provided each complies with the provisions in effect of the other.[43]

Even though private investment could enter into satellite communications since 1995, Telecomunicaciones de México, a federal agency operating Mexican satellites, was not sold to Satellites Mexicanos (Satmex) until 1997. Thereafter, 75 percent of Satmex was sold to Telefónica Autrey and Loral Space & Communications.[44] Currently Satmex has three satellites in operation: Morelos II, Solidaridad II, and Satmex 5 through which it provides, among other things, broadband media and stream services, direct TV, broadcasting, telemedicine practice, and long distance. Satmex is planning to launch Satmex 6 at the beginning of 2003.

41. Mex. Const., *supra* note 11, art. 28, approved by Congress in February 1995, and published on March 2, 1995.

42. D.O., 1 de agosto de 1997.

43. Published at the D.O. on November 8, 1996 through the Enacting Decree of the Ministry of Foreign Affairs.

44. Newspaper "La Crónica", July 30, 2001.

J. Value Added Services

Value added services providers (audio, video and teletext, remote data processor, electronic data exchange, internet and e-mail service providers, etc.) are only required to register before the SCT.

K. Resellers or Traders

Resellers or traders of telecom services are those companies who, without owning the infrastructure, provide telecom services to third parties. Currently, there are no authorizations issued for resellers (except for public telephony).

L. The Forthcoming Telecom Law

Many forums are discussing the proposed telecom law, including lawmakers, telecom companies, technicians, COFETEL, COFECO, SCT, the Telecom Chamber of Commerce, etc. However, there is no defined deadline or path for this new law. One thing is certain; this new law will have to deal with many issues to improve the Mexican market, such as:

- Technological convergence,
- Re-allocation of frequencies,
- Solving the by-pass problem,
- Interconnection,
- Universal service fund,
- 3G Services, and
- Increasing the authority of COFETEL, among others.

V. The Med-Arb.net Project

For several years in Mexico, particular attention has been given to Alternative Dispute Resolution (ADR) mechanisms. However, ADR is not yet institutionalized enough to be an integral part of the national legal environment. In order to remedy to this situation, some law schools have begun to introduce ADR lectures into their course offerings. This year the *Facultad Libre de Derecho de Monterrey* (FLDM)[45] became one of the first law schools in Monterrey to offer a mediation[46] and arbitration[47] course during the fall semester of 2001.

The lecturers of these classes decided to initiate a joint working program, including besides traditional lecturing, some moot cases, and investigation. Furthermore, students were asked to create, for the first time in a Mexican university, a mediation center for resolving internal disputes, following what has become an established trend in American universities. With regard to the investigating tasks, developing an information database was one of the main requirements. As one step led to another the database rapidly changed into a Web site. Valuable material in English and in French had been collected; however, no

45. *Facultad Libre de Derecho de Monterrey*, *at* http://www.fldm.edu.mx (last visited July 3, 2002).

46. Rafael Lobo, *at* http://www.fldm.edu.mx/jgraham/medarb/RLMA/Redaccion/lobo/lobo.html (last visited July 3, 2002).

47. Lecture by the author, *El Derecho del arbitraje*, *at* http://www.fldm.edu.mx/jgraham/Catedra/MASC/masc.html. (last visited July 3, 2002).

Latin American scholarly law journal could be found. This led to the idea to create a *Latin American Journal of Mediation and Arbitration.*[48] The initiators of this project invited the *Universidad Autónoma of Nuevo Léon,*[49] which offers the first Mexican Master's Degree in ADR,[50] to join them in order to form an inter-university cooperative venture.

Two fundamental issues had been identified: gathering information on what happens in Latin America, and pointing out what is missing. Following this idea, it was decided to open the Journal to English and French speaking authors in order to have a real exchange of practice and experience from all over the world.[51] This multilingual and cultural diversity, reflected by the composition of the editorial committee,[52] should allow the *Latin American Journal of Mediation and Arbitration* to be a "cross-cultural" platform providing "the ability to see something as different, without attaching a value judgment [because] something that is different is merely different—not necessarily inferior or superior."[53] As such, it might be a valuable source not only for scholars and practitioners, but also to governmental officers charged with reviewing judicial and legal proceedings. Being a multi-university project, the subscription to the journal is free.[54]

The Journal and the informational Web site[55] are just the building blocks of something more ambitious. In fact, in Mexico, there is a real lack of trained skillful mediators or arbitrators. Of course, like in other countries, Mexico counts on some famous arbitrators and mediators who, however, are acting in a closed community. If ADR should be demythologized to be a natural way of resolving disputes there will obviously be a real need for well-trained people.

This is why the Med-Arb Project includes the development of ADR centers, which can have different forms. This first project, as said before, has been internal to the FLDM. Under the direction of their respective professors, the students drafted their own mediation-arbitration rules and established a compliant med-arb resolution policy for any dispute between students and the administration of the Law School. In a second stage, the Law School founded a Dispute Resolution Center[56] open to the local community, providing, for example, mediation services in family matters. A specialized investigation pool providing its services to the local government completes the Center. Other projects are on the way. On a national level, the project aims to help local governments to establish public mediation centers and to promote on-line dispute mechanisms. On a regional level, a recent coop-

48. *Revista Latinoamericana de Mediación y Arbitraje* (RLMA).

49. Universidad Autónoma de Nuevo León, *at* http://www.dsi.uanl.mx (last visited July 3, 2002).

50. Universidad Autónoma de Nuevo León, *Especialización en Métodos Alternos de Solución de Controversias, at* http://www.dsi.uanl.mx/oferta_educativa/posgrado/fdycs/esp_meto_alternos.html (last visited July 3, 2002). The Masters degree program is under the direction of Prof. F. Gorjón (http://www.fldm.edu.mx/jgraham/medarb/RLMA/Redaccion/gorjon/gorjon.html) who acts as Secretary General of the Journal.

51. Thus, the Journal will publish a regular chronicle on recent development on African arbitration practice.

52. Prof. Dr. Leonel Pereznieto Castro, UNAM, Mexico (Chairman); Prof. Dr. A. Mendoza, Pepperdine Law School, USA; Prof. Dr. Pierre Mayer, University of Paris Panthéon-Sorbonne, France; Prof. Dr. Gabrielle Kaufmann Kohler, University of Geneva, Switzerland; Prof. Dr. Philippe Fouchard, University of Paris Panthéon-Assas, France; Prof. Dr. J.A. Graham, FLDM, Mexico; Prof. R. Lobo, FLDM, Mexico; Prof. Dr. F. Gorjón, UANL, Mexico; Prof. Dr. João Bosco Lee, Universidad de Curitiba, Brasil (Members).

53. A. Mendoza, *Cross Cultural Dispute Resolution,* 1 R.L.M.A. 5, 6 (2001).

54. http://www.med-arb.net.

55. *Id.*

56. http://www.fldm.edu.mx/jgraham/CRC.

eration underway with the University of La Havana (Cuba) and the development of similar projects in other Latin American countries are planned.

ADR, hopefully, will renew the *ars boni et aecqui* by fueling a legal system that has ceased for a long time now to be the expression of "wisdom, justice and reason," changing the "sacerdotal vocation of the law into acts of authority."[57] Let us hope that the ADR procedure will preserve justice over proceedings and that the *aequitas mercatoria* will not forget the *aequitas gentium*.[58]

VI. ADR Project in Mexico

Late in 2001 the United States Agency for International Development/Mexico awarded funding through the Rights Consortium[59] to collaborate in building capacity and enhancing effective mediation in Mexico.[60] The goal of the project is to serve as a catalyst to move mediation in Mexico forward, in ways deemed appropriate by our Mexican partners, and to create opportunities for learning, dialogue, and enhancement. It is the intention of the Mediation Project to expose Mexican stakeholders to a broad range of mediation theories and practices and to spearhead a collaborative process that relies on stakeholder participation.

The project director and two experts have conducted assessment visits throughout Mexico. Through these visits it was learned that there are approximately ten states in Mexico that are moving forward with mediation initiatives. All of them are at various stages of legislative and programmatic development. Some have greater resources at their disposal and count with a greater degree of political will. While some are concentrating explicitly on court-based initiatives, others have aspirations of incorporating mediation in a variety of arenas. This diversity provides fertile ground for different, yet equally effective mediation models throughout the country, and is similar to the way in which mediation evolved in the United States.

Mexico is ripe for growth. Though little information sharing and collaborating have occurred within Mexico, the tide is changing quickly and there is a real eagerness to learn and share each other's experiences. Leaders are enthusiastic about creating court-based mediation programs, expanding community services, using mediation to resolve disputes typically handled by government agencies, experimenting with peer mediation programs in schools, and increasing the academic focus on mediation and conflict management in higher education. Further, commitments have been received from national and state leaders to this mediation project and its initiatives.

With such variety of interest, financial ability, and focus, it is obvious that a "one size fits all" approach will not be in the best interest of the project. Instead, a strategy has been developed that meets the needs and desires of each state and its respective constituency groups. This strategy will involve rendering services such as technical assistance, judicial and lawyer education; training for program managers; and advice on legislative reform.

57. Marceau Long & Jean-Claude Monier, Portalis, L'esprit de justice 54 (1997).

58. Even if in arbitration serious doubts are allowed!

59. The Rights Consortium entities involved in this project include the American Bar Association (ABA) Latin American Legal Initiatives Council, the ABA Section of Dispute Resolution, and Freedom House.

60. In Mexico, the terms *mediation* and *conciliation* are at times used interchangeably, and at other times used to describe slightly different processes. For our purposes, the term *mediation* is meant to include the process of conciliation as well.

The current strategic approach is to bring together high-level representatives from each of the states and entities willing to participate in this project in an advisory capacity. They will form an advisory committee that will be active throughout the project, ensuring ownership of the project at the highest level in Mexico, and serving as a conduit of information between states. This advisory committee will assist in selecting representative members of their state or entity to serve on a national commission, which will be composed of constituency groups from each state or entity. Thereafter, the commission members will lead planning efforts in their respective states through the creation of working groups.

Administrative oversight of the project rests with the director of Latin American Legal Initiatives Council (LALIC), who also serves as project director. In addition, two consultants with lengthy experience in the development of mediation in the United States and abroad will serve as key resources and will support the efforts of the project staff in Mexico. The Mexican project staff shall be composed of three Mexican lawyers with knowledge and experience in the mediation field. Additional resources will be provided, as needed, by participating organizations, including the ABA Section of Dispute Resolution, the National Association of Community Mediation, the National Judicial College, the National Institute of Media and the Courts, and the Maryland Mediation and Conflict Resolution Office. The consortium partner, Freedom House, will administer the small grants program, spearhead the logistical coordination of the advisory group, and any U.S. study tours conducted in the later phase of the project. It is expected that through this methodology a coordinated and focused national mediation movement will be solidified, and that it will propel mediation in Mexico to its next phase of development.