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Controversy over foreign government investments in Mexican financial institutions

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As soon as foreign governments announced they were taking equity positions in the largest financial institutions to save them from bankruptcy, Mexican financial laws began to be tested. The issue arose from a phrase contained in different financial laws providing that no foreign governments shall participate, *in any manner*, in the capital stock of a Mexican financial institution. Because most of the financial institutions receiving aid had a subsidiary or an affiliate in Mexico (*Mexican affiliate*) that would indirectly benefit from these governmental infusions of capital, the plain reading of the statute, particularly the phrase *in any manner*, caused a stir.

In particular, this aid created a political discussion as to whether indirect ownership by a foreign government of a Mexican affiliate caused the Mexican affiliate to be in breach of the law. If so, a breach could cause adverse consequences, including losing its charter. On the one hand, nationalists took this opportunity to demand the Mexican government hold the Mexican affiliates in breach of the law. Others in the government analysed the origin of the prohibition and worked toward a resolution that was more amicable to a global economy. What ensued was weeks of rhetoric interpreting and reinterpreting Mexican law, which highlighted the unfounded but omnipresent national sentiment against foreign governments that *own a piece of Mexico*.

The issue was settled, for the moment, by the Ministry of Finance (*MF*) when it issued a press release stating that Mexican law was not breached by the indirect aid to Mexican affiliates for a variety of reasons. While a press

release is not a binding communication, it was enough to calm the waters. The communication provided some legal analysis but left many issues open, specifically issues related to investments in insurance companies, which have additional concerns beyond the scope of this article. Unfortunately, without a binding opinion, the legal question remains unsettled. The arguments for the opposing politicians are simple to make: *in any manner* means any manner, case closed. The other side used a more sophisticated analysis of the Mexican legal system. In the end, we believe that the MF's political position has a solid legal basis.

To understand this conclusion an examination of the legal axioms of the proposition is helpful. First, foreign governments providing equity investments in parent companies or affiliates are not directly participating in the equity of a Mexican affiliate. Their participation is indirect. Second, Mexican affiliates derive their existence from national law as modified by international treaties adopted by Mexico, and have a special regime that is not applicable to other financial institutions. Third, as opposed to other jurisdictions like the United States, which recognise the existence of extraterritorial law, Mexican law is applicable only to transactions and events occurring within Mexican territory or to transactions where the parties agree to submit to Mexican law. Additionally, Mexican law does not govern whether a foreign government is entitled to own equity in financial institutions outside of Mexico. There is not a single provision in the law that establishes the manner in which a parent of a Mexican affiliate should be capitalised. Fourth, the specific provisions governing Mexican affiliates do not include the restriction against foreign government participation, *in any manner*, in the capital stock of said affiliates. In summary, this restriction should only apply to financial institutions that are not Mexican affiliates.

Based on the arguments mentioned above, it appears evident that the interpretation of *in*

any manner refers to investment by a foreign government directly into the Mexican affiliate. The one caveat to this argument derives from certain international treaties, such as Nafta, which provides that foreign governments are not allowed to invest *directly or indirectly* in different types of Mexican financial institutions. This provision followed the laws of Mexico at the time Nafta was enacted. However, since then the underlying law has changed replacing the *directly or indirectly* language with the *in any manner* language. This revision to the statute would invalidate the reservation made in Nafta due to the more advantageous interpretation of Mexican law.

However, support for the non-breach position can also be found in Nafta and similar treaties. These treaties provide that each government shall be allowed to adopt or maintain reasonable measures based on prudent reasons, including measures to protect investors and customers as well as the leverage and integrity of financial institutions. This approach ensures the stability of the financial system of a country and, thus, indirectly provides that Mexico should not penalise Mexican affiliates because of investments made by foreign governments in foreign entities to preserve the integrity of their own financial systems.

Even though debate has subsided, the legal issue still exists and may flare up again in the future. The Mexican government seems to understand this, and it is expected that the MF will promote legislation to resolve the issue. Such legislation would provide clarity to determine when the participation of a foreign government in the capital of Mexican financial institutions should be prohibited, and when exemptions should apply, such as extraordinary situations like the current global financial crisis.

It is likely that the reform will introduce the following concepts.

(i) Undue participation of foreign governments to influence the Mexican financial system is proscribed.

(ii) Limits to distribution of dividends by financial institutions with foreign government investments when their solvency and equity/debt ratio is affected.

(iii) The obligation to offer public investment (up to 50%) in the stock of Mexican financial institutions, if the participation by foreign governments remains in place during more than three years.

(iv) Specific sanctions.

Until then, financial institutions will swing in the uncertainty between the political arguments without the safety of legal precedent, as evidenced by the non-binding press release of the MF.

Banking and capital markets

Recommended firms
Tier 1
Creel García-Cuéllar Aiza y Enríquez Galicia y Robles Mijares Angoitia Cortés y Fuentes Ritch Mueller White & Case
Tier 2
Jáuregui Navarrete y Nader Kuri Breña Sánchez Ugarte y Aznar
Tier 3
González Calvillo Holland & Knight – Gallástegui y Lozano Martínez Algaba de Haro Curiel y Galván-Duque Romo Paillés y Guzmán Santamarina y Steta
Tier 4
Baker & McKenzie Berdeja Abogados

Mergers and acquisitions

Recommended firms
Tier 1
Creel García-Cuéllar Aiza y Enríquez Galicia y Robles Mijares Angoitia Cortés y Fuentes White & Case
Tier 2
Jáuregui Navarrete y Nader Kuri Breña Sánchez Ugarte y Aznar Ritch Mueller Santamarina y Steta
Tier 3
González Calvillo Basham Ringe y Correa Holland & Knight – Gallástegui y Lozano
Tier 4
Baker & McKenzie Goodrich Riquelme y Asociados Von Wobeser y Sierra

Project finance

Recommended firms
Tier 1
Galicia y Robles Ritch Mueller
Tier 2
Creel García-Cuéllar Aiza y Enríquez Jáuregui Navarrete y Nader López Velarde Heftye y Soria Mijares Angoitia Cortés y Fuentes White & Case
Tier 3
Kuri Breña Sánchez Ugarte y Aznar Martínez Algaba de Haro Curiel y Galván-Duque Santamarina y Steta

With its 2008 IPO, Mexico's stock market operator Bolsa Mexicana de Valores became Latin America's fifth stock exchange to go public, and the second largest next to Brazil's. While preliminary results of the \$444 million offering were disappointing, Mexico's financial lawyers predict the move strengthens Bolsa's place in the regional market, and contend the local exchange has an important edge over Bovespa among Latin America's Spanish-speaking businessmen. "They will opt for Mexico because of the language connection," one attorney predicts.

Mexico burst onto international headlines with last April's deadly outbreak of the H1N1 flu virus that sparked a global pandemic and closed schools, museums and businesses for two weeks in the country. The resulting blow

to Mexico's economy, already gripped by the effects of the global financial crisis, recorded the country's biggest drop in tourism revenue in the industry's recorded history and prompted the naming of 2009 the "lost summer" by Mexican officials.

Still, in the flu's aftermath Mexico's leading lawyers predicted little impact to the macro economy. Capital markets activity has notably slowed due to the larger economic crisis, and much of the caseload for Mexico's firms has shifted to the darker side of financial law – restructuring, bankruptcy and workouts. But there is a lack of sophistication in Mexico's 10-year-old bankruptcy laws, or *Ley de Concursos Mercantiles*, which have never been tested by large-scale failures. The inexperience of bankruptcy courts make them a last resort for local businesses, and Mexico's most adept arbitrators will be in high demand keeping clients and creditors at the negotiating table.

While there had been no large-scale bankruptcies at the time of writing, insolvency fears are ever-present in Mexico's business community. In the fourth quarter of 2008 cement producer Cemex – once the very model of a successful Mexican business – reported the first quarterly loss in its history, sparking the sale of its Australian operation and concerns over its ability to remain liquid. Last February Mexico's largest glassmaker Vitro defaulted on a \$44.8 million bond payment, leading to a lawsuit from derivatives holder Credit Suisse.

The Mexican government has struggled to continue the ambitious Farac highway development program. After the successful tender of the first stage of the project in 2007, the government failed to receive a sufficient bid when it launched Farac II last March. The government subsequently divided the second portion, which included the construction and operation of some 480 miles of new and existing toll roads, and hoped to offer the trimmed-down package as Farac III to concessioners in 2010.

Creel García-Cuéllar Aiza y Enríquez

With a presence that is certain in Mexico's capital markets, Creel García-Cuéllar Aiza y Enríquez maintains leadership in the country's legal landscape after the departure of its litigation practice just over a year ago. In 2008 Creel advised UBS and BBVA Securities as underwriters of Bolsa Mexicana de Valores's historic IPO that earned Mexico's stock exchange \$444 million and was named Equity Deal of the Year at the *International Financial Law Review's* 2009 Americas Awards.

Rivals emphasise Creel's recent work in securitisations as companies seek cash injec-

tions. In Mexico's first-ever structured instrument issuance, Agropecuaria Santa Genoveva placed a \$125 million bond on the market secured by proceeds from teak wood production. Creel represented Credit Suisse as placement agents for the deal.

Competitors note the firm's increased activity in M&A transactions representing clients that include Axa, Fortune Brands and Carnival Cruise Lines. In 2008 Aecom took advantage of Tyco's spinoff by purchasing Earth Tech, a service provider for the infrastructure development industry. Creel represented Earth Tech with regard to its Mexican assets involved in the \$510 million deal, which was signed in July 2008.

Alfonso García-Mingo has earned a reputation among clients as one of Mexico's most hard-working corporate attorneys. "He was working aggressively on matters throughout the swine flu when the office was closed," says one client.

The firm's M&A department closed a large deal last June at the height of the H1N1 crisis. As counsellors to security firm Andrews International, García-Mingo's team helped negotiate an acquisition of Mexico's Garda World Security, making Andrews the largest privately-held security firm in the US.

Leading lawyers

Carlos Aiza
Carlos Creel Samuel García-Cuellar
Alfonso García-Mingo
Jean Michel Enriquez

Galicia y Robles

With a renowned practice that spans Mexico's financial markets, Galicia y Robles is characterised by competitors as a smaller-sized firm that has leveraged client Carlos Slim to develop an active presence in many international markets. Rivals note that Rafael Robles is the sole corporate counsel for all of the influential businessman's companies, which include Telmex, Telcel and America Movil.

Peers contend the firm has a strong exposure in bank financing deals, with credentials in some of the largest recent transactions in Mexico. The firm represented a syndicate of banks including Santander, BBVA and Citibank financing Grupo Bimbo's acquisition of Weston Foods for a record \$2.5 billion, making Mexico's largest bakery one of the largest bakeries in the US as well.

Galicia participates in many of Mexico's large-scale M&A transactions, particularly in the energy and natural resources sector. Global power generation company Intergen retained the firm for its \$303 million acquisition of TransAlta's Mexican portfolio, comprising two combine-cycle gas plants and all the existing

agreements with clients and Mexico's state-owned utility CFE. Previously in 2008 Galicia represented Intergen in its sale of a 50% stake to GMR Infra, a holding company in the infrastructure development industry, for \$954 million.

Galicia is a noted leader in infrastructure projects, representing project developers, financiers and the Mexican government. Recently the firm helped OHL subsidiary ConMex negotiate \$470 million financing to develop the Periférico Oriente toll road, a concession Galicia helped make possible when it advised the government through the toll road privatisation process in 2007.

Leading lawyers

Francisco Fernández Cueto
Manuel Galicia Romero
Carlos de Maria y Campos
Rafael Robles Miaja

Mijares Angoitia Cortés y Fuentes

Peers do not hesitate to praise the lawyers at Mijares as adept and genial negotiators, singling out José Raz-Guzmán as a national leader in structured banking and Ricardo Maldonado as adept in corporate matters with Mexico's biggest companies. "They are our esteemed colleagues mostly focused on Mexican clientele," one rival says.

While Mexico's once-hot mortgage-backed securities market has cooled recently, Mijares advised Mexico's state housing fund Infonavit on recent placements of residential mortgage-backed securities, including 2008's placement that made \$265 million. Mijares was there last May when Infonavit went to the market again, placing \$154 million in RMBS as the first part of a planned \$72.9 billion program from 2009-2013.

Competitors note the firm enjoys a great deal of transactional work particularly acting on behalf of Mexican companies. One such client is Televisa, the largest producer of Spanish-language content in the world. Not only did Mijares advise the broadcaster on its 2008 note issuance that raised \$500 million; the firm also counselled Televisa in its acquisition of a 49% stake in Cablemas. The latter deal, requiring the approval of Mexico's antitrust authority, allows Televisa to expand into the telephone and internet service industries.

Mijares also represented a syndicate of banks comprising BBVA, Bancomer, Banorte and Banobras in loaning \$470 million to OHL subsidiary Conmex. The loan will fund the construction of the Circuito Exterior toll road.

Leading lawyers

Francisco Fuentes Ostos
Ricardo Maldonado Yáñez
Pablo Mijares Ortega
José Raz-Guzmán
Horacio de Uriarte Flores

Ritch Mueller

Ritch Mueller is characterised by the market as having begun as a boutique firm specialising in Mexico's capital markets and banking transactions. The firm has retained some of its roots and is not clearly organised into practice groups, with peers noting that the firm suffers from internal competition for the biggest transactions. But the structure allows the firm's heavy hitters to go after key deals across the market like last year's acquisition of Westen Foods by Grupo Bimbo, whom Ritch Mueller counselled in the \$2.5 billion purchase.

Luis Nicolau is singled out by peers as the firm's leader, with a good deal of exposure in both capital markets and project finance transactions. Recently Nicolau acted as counsel to the syndicate of lenders, led by Credit Suisse, in Arcos Dorados's \$700 million acquisition of the McDonald's franchise throughout Latin America.

The firm's sophistication in banking matters is commended by peers and exemplified by its contribution to the largest bank merger of last year. As local counsel to Bank of America in its acquisition of Merrill Lynch, Ritch Mueller was involved in some heavy challenging debate over Mexican banking law. Because the US government became a shareholder of Merrill Lynch through its 2008 bank bailout, the \$50 billion transaction required a reinterpretation of laws regarding the participation of foreign governments in Mexico's financial markets.

Thomas Mueller, who drives the firm's reputation in project finance, has represented Santander in many deals, including its financing of Mexico's Farac developments.

Leading lawyers

Thomas Mueller-Gastell
Luis A Nicolau
Federico Santacruz Gonzaléz
Gabriel del Valles Mendiota

White & Case

The international firm's troubles back home on Wall Street are being carefully followed by Mexico's lawyers to see how it will affect the local office. The economic crisis spurred several rounds of layoffs at the firm's headquarters and sparked a restructuring that pro-

duced, among other moves, a new head of the Latin American practice.

In June 2008 the Mexican firm added former US ambassador Antonio Garza to its partnership, promising to bring a wealth of strong governmental connections across both borders.

Competitors admit the name recognition has been good for the local partners but contend that with reputations built long before their affiliation with the US firm, there seems to be a sudden disparity between White & Case and its Mexico branch. "It wouldn't surprise me to see a shake-up there," remarks one peer.

White & Case's leading presence in Mexico is provided by Alberto Sepúlveda, whom competitors agree is a well-trusted advisor to Banamex. Thomas Heather is noted by rivals as carrying out the firm's work in restructurings and workouts. Recently Heather counselled creditor banks in restaurant and supermarket operator Controladora Comercial Mexicana's restructuring of some \$3 billion in debt following a 2008 default, as well as the creditors hold \$1 billion in claims from food distributor Gruma.

Competitors elevate White & Case's project finance practice particularly in regard to power development. Late in 2008 the firm represented a syndicate of banks including Calyon and WestLB that financed Intergen's acquisition of several power plants from Transalta for \$261 million.

Leading lawyers

Vicente Corta
Thomas Heather
Alberto Sepúlveda Cosío

Jáuregui Navarrete y Nader

Jáuregui improves its position in the rankings this year bolstered by overwhelming recommendations of peer attorneys. "They are up on the scale for their banking work," says one peer. While rivals contend the level of service varies among the partners, they note Jáuregui's recent streamlining of its payroll structure has aided the firm in the financial crisis. "They have skill at moving with the economy," one competitor remarks.

The economic downturn provided Jáuregui the opportunity to acquire the practice of Martínez y Narváez, which adds respected partners to the tax and bankruptcy practices. The firm has been active recently in insolvency matters, particularly on the side of lenders, exemplified by its representation of the Royal Bank of Scotland's restructuring of its revolving credit facility to steel manufacturer Grupo Collado.

Hans Goebel Caviedes is a noted choice for clients looking for a well-connected lawyer in Mexico's banking markets. "He's very well known and offers access to a lot of different parties," one client says. Goebel represented Bank of Montreal and the Ontario Teachers Pension Plan in granting a \$200 million credit facility to Consupago, a company that provides financial services to employees of the Mexican government.

The firm has a confirmed presence in project finance and has recently advised Mexico's federal and local governments on developing and implementing public-private partnerships.

Leading lawyers

Hans Goebel Caviedes
Julian Garza
Yves Hayaux-du-Tilly L
Michell Nader Schekaiban

Kuri Breña Sanchez Ugarte y Aznar

The partners of Kuri Breña are commended for the hands-on approach of their smaller-sized structure that promotes a dedicated client base. While competitors hold that the partnership's commission structure may hurt the firm's profitability in the economic downturn, Kuri Breña benefits from its reputation for having a solid crop of young, energetic attorneys focused on their clients' needs. Last year the firm opened an office in the industry and commerce centre of Monterrey.

Luis Octavio Nuñez is hailed by competitors as a bright, up-and-coming lawyer, and one client was impressed recently by his ability to keep all the parties of a deal at the negotiating table through a point of contention. "He was able to argue the point in a smart way [that] didn't make the new investor feel he had lost a battle," the client explains.

Kuri Breña's placement in Mexican securities market was demonstrated when Daniel Kuri Breña was retained as counsel in Rabobank's 2008 securitisation of \$55 million in receivables from the core subsidiary of Grupo Corvi, a leading transporter of retail products for convenience stores.

The firm enjoys an active role in Mexico's M&A markets, recently representing Mexico's largest prepaid coupon provider Prestaciones Universales in an auction of shares mandated by antitrust authorities. Shareholder Monex won the undisclosed bid.

Leading lawyers

Daniel Kuri Breña
Luis Gerardo Lemus Burguete
Luis Octavio Nuñez Orellana

Santamarina y Steta

A traditional franchise among Mexico's legal institutions, Santamarina y Steta is noted by rivals as an enduring presence in Mexican corporate transactions. Agustín Santamarina is commended as one of Mexico's most prominent statesman who has cultivated a list of influential clients, and competitors note Alberto Saavedra's competence in legal theory. "He's an academian and knows the ins and outs of Mexican law," one peer says. Still, rivals agree the partnership has yet to fully recover its market share taken by former Santamarina partner Manuel Galicia 15 years ago.

The firm's evenly-developed structure allows it to meet all the legal needs of its corporate clients. "They are a full-service firm, so they have responses for just about any request," one client remarks. Competitors also note that Santamarina is the only Mexico City-based firm to develop a successful practice in the important industrial centre of Monterrey.

In one highlight, the firm was local counsel to GM on its acquisition of Delphi's steering system business last year, and represented German car parts manufacturer Allgaier Werke in its acquisition of Mexico's Cables y Estampados.

Sergio Chagoya is hailed for his leadership in Mexico's capital markets. In 2008 Chagoya advised publicly-owned home developer, Sare Holdings, in a share placement that raised \$114 million on the Mexican exchange. The firm also counselled renewable energy developer Adaptivearc on a joint venture to develop waste-to-energy projects with a group of Mexican investors.

Leading lawyers

Jorge Barrero S
Sergio Chagoya D
Alberto Saavedra O
Agustín Santamarina V

Other ranked firms

As an international firm operating within Mexico's borders, Baker & McKenzie has benefited both from its global presence and its sheer size – it is the largest law firm in Mexico. Still, competitors hold that the firm's quality is inconsistent across its five offices, and that the firm has not developed self-sustaining inertia in Mexico's legal markets.

Still, in 2008 the firm leveraged its international reach representing Mexican oil platform operator Oceanografía in a \$335 million bond offering to investors spanning Asia, Europe and the US. Another active client for Baker & McKenzie's Mexican lawyers is Caterpillar, and in 2008 the local financing

arm awarded heavy equipment operator Maquinaria Diesel a senior secured credit facility. The \$140 million deal included a complex security package comprising mortgages, accounts receivable and machinery.

Leading lawyers: Jaime Trujillo

Nearing a century in operation, **Basham Ringe y Correa** is characterised by competitors as specialists in day-to-day corporate work with fully-developed tax, IP and labour practices.

One client singles out Miguel Peralta as a good choice for foreign investors, stating: "He is very knowledgeable about the trust law for foreigners owning property in the restricted zone." The firm has been successful in Mexico's important market for *ejido* land (public land that is sold for private use), recently helping toilet paper producer Papeles Higiénicos acquire a swath of land in the state of Hidalgo.

Leading lawyers: Miguel Ángel Peralta García and Daniel del Río Loaiza

A relatively young firm at 22 years, **Berdeja Abogados** is noted mainly for the reputation of Teófilo Berdeja in Mexico's capital markets. Competitors note that the firm has developed a significant day-to-day corporate practice that occasionally leads to transactional work.

Berdeja's most prized client is HSBC, and a lion's share of the firm's work is devoted to the prominent bank's activities in Mexico. In addition to advising HSBC on its varied acquisitions across Latin America, Berdeja assisted the bank in divesting its stake in Financiera Independencia, a Mexican micro-finance provider. The divestment of HSBC's \$149 million worth of shares was made in several forms, including a direct sale of stock and capital reduction.

Leading lawyers: Teófilo G Berdeja Prieto

No firm in Mexico is mentioned more by competitors for aggressive growth than **González Calvillo**. Last year, the firm expanded its office into the floor above to accommodate its increasing staff, and personifies a young, dynamic practice comprising ambitious partners. Rivals praise Jorge Cervantes as a constant presence in M&A transactions. "He is a guy that is active," one peer says.

Gonzalez lured both talented associates and longstanding clients away through a concerted marketing effort that is paying off. Recently the firm counselled Banorte in implementing a \$180 million credit facility to refinance the Mexican debt of Chrysler Financial Services.

The firm has a solid presence in the real estate market, advising Gicsa, Mexico's foremost real-estate developer, in a record \$1 billion finance package from GE's real-estate arm. The deal, considered the largest single real-estate transaction ever executed in

Mexico, is secured by projected rent revenue from more than 30 residential, commercial and industrial properties.

Leading lawyers: Jorge Cervantes Trejo, Enrique González Calvillo and José Víctor Torres Gómez

Noting a significantly diminished presence in the M&A market, competitors note **Goodrich Riquelme y Asociados** is focusing more on its renowned litigation practice. Rivals contend the firm has not promoted young talent to partnership, which is causing a brain drain within the lower ranks. Still, peers insist the firm has traditionally enjoyed an impressive list of international clients, with particular ties to the *maquiladora* (duty-free manufacturing) industry and small-scale local producers.

Late in 2008 Goodrich advised organic food and coffee exporter Agroindustrias Unidas on a \$650 million line of credit from a lending syndicate led by Rabobank. Last year the firm advised England's Penspen and the US company Greystar – two important on and off-shore oil pipeline developers – in a joint venture contract with Pemex to construct the \$1.3 billion System 1 pipeline in the gulf of Mexico.

Leading lawyers: Jorge A Sanchez-Davila

Von Wobeser y Sierra is led by well-referenced statesman Claus von Wobeser, who has built an important corporate practice around his presence as an international arbitrator, and enjoys strong relations with important German clients.

The firm's traditional role on the side of borrowers has led to some important transactional work in the area of bank financing. In the latter half of 2008 Von Wobeser advised confectioner Mars in the acquisition of Wrigley's and the resulting reorganisation of its Mexican operations. The firm also represented the candy companies on the local aspect of Goldman Sachs' massive \$23 billion loan that financed the merger, which created the world's largest confectionery player.

Leading lawyers: Raúl Cárdenas and Claus von Wobeser

Other notable firms

US firm **Jones Day** commenced its participation in Latin America's legal markets with the opening of an office in Mexico in January 2009. The firm is built on the foundations of De Ovando y Martínez del Campo, a respected and established player in the Mexican financial markets. Peers congratulate Fernando de Ovando on his selection as partner-in-charge of the firm, and expect to soon see the new Jones Day office included among the top ranks of world legal review publications.