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# DIRITTO MERCATO TECNOLOGIA

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(settembre – dicembre 2016)

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*Mexican Constitutional and Regulatory Telecommunications  
Developments: Terms of Interconnection with a Dominant  
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Stefano De Luca

MEXICAN TELECOMMUNICATIONS REFORM: MEXICO'S SUPREME COURT  
DECLARED ZERO-INTERCONNECTION RATES UNCONSTITUTIONAL

Stefano De Luca  
Cullen International

**SUMMARY:** 1. Introduction. - 2. What is amparo? - 3. The importance of interconnection. - 4. Telecommunications Regulatory Authority and Interconnection in Mexico. - 4.1. Interconnection in Mexico. - 4.2. Implementation process of the new Federal Institute of Telecommunications (IFT) - 4.3. IFT regulatory authority - 4.4. IFT v. COFETEL comparison. - 5. How did the writ of amparo formerly affect interconnection and the public interest? - 6. The End of the Regulatory Authority's Decisions Suspension During the Pendency of a Claim of Amparo: From COFETEL to IFT. - 6.1. COFETEL: The Mexican telecommunications regulatory body during the implementation process of IFT. - 6.2. The 2011 Plenary Mexican Supreme Court constitutional reading of the FTL in accordance with the public interest concern. - 6.3. Plenary Chamber of Mexico's Supreme Court decision reports on interconnection issues: Amparo en revision 318/2011 and Amparos en revision 426/2010 y 318/2011 03/07/2013. - 6.3.1. Plenary Chamber of Mexico's Supreme Court decision reports on interconnection issues: Amparo en revision 318/2011 and Amparos en revision 426/2010 y 318/2011 03/07/2013. - 6.3.2. Report of the Mexican Supreme Court decision of March 7, 2013 on the amparos en revision 426/2010 and 318/2011. - 7. New Federal Telecommunications and Broadcasting Law. - 7.1. IFT's Powers. - 7.2. Access and Interconnection. - 7.3. Preponderant Economic Agent's Obligations and Asymmetric Regulation: Art.131 TBL declared unconstitutional by the Mexico's Supreme Court. - 8. Conclusion.

## 1. Introduction

Mexico's new Federal Institute of Telecommunications—"IFT", the present Mexican telecommunications regulator, has defined the terms on which "preponderant economic operators" Telmex, Telnor and Telcel must make available interconnection for completion of calls originating from competitors' customers based on a 2013 constitutional amendment. In addition, the recently enacted Federal Telecommunications and Broadcasting Law has set a zero-interconnection rate in favor of non-preponderant economic telecom operators completing calls in the preponderant economic operators' network, raising the possibility of argument that the law unconstitutionally limits the IFT's autonomous constitutional power to determine interconnection rates on preponderant economic operators as stated in the Mexico's Constitution. This argument has been adopted by the Mexico's Supreme Court which unanimously decided that the prohibition on preponderant economic agent to charge for interconnection rates, as mandated by the Federal Telecommunications and Broadcasting Law is unconstitutional. IFT's establishment of interconnection rates, indeed, benefits from the recently amended constitutional provisions that recast the writ of *amparo* so as to prevent suspension of IFT's definition of interconnection rates and other terms during the pendency of *amparo* proceedings. The authority of IFT's definition of the terms of interconnection with preponderant economic operators, its determination that Telmex, Telnor and Telcel are preponderant economic operators, and the constitutional recasting of the writ of *amparo* are all built on prior regulatory and judicial actions.

The centrality of IFT's role with respect to compelling interconnection on terms that can allow a competitive telecommunications market not only has legal foundations, but also derives its legitimacy from the public policy objectives that IFT pursues. The legal foundations for IFT's current role are: 1) the Constitution, 2) the New Federal Telecommunications and Broadcasting Law (hereinafter TBL) as long with, before the TBL entered into effect, the repealed Federal Telecommunications Law as amended (hereinafter FTL), and 3) prior Supreme Court judgments that addressed

IFT's immediate predecessor, COFETEL. Indeed, the new Mexican telecommunications and antitrust constitutional framework for law, as well as Mexico's recently enacted TBL, and recent judgments of the plenary chamber of Mexico's Supreme Court are all sources that support the authoritative role of IFT's decisions on interconnection matters involving telecom operators holding substantial power in the market. With the benefits of these foundations, IFT's decisions on interconnection have potential to serve as tools to further both social interest and public order in the telecommunications sector. By virtue of these developments, IFT as a regulator has the independence and autonomy necessary to carry out its responsibilities, namely, to ensure that the telecommunications market is competitive and that it achieves public policy objectives of making available affordable services to all parts of society.

A fundamental innovation of the development referenced above is that IFT's decisions on interconnection may be challenged only through the procedure of *indirect amparo*, with the consequence that their effectiveness will not be the object of suspension during the pendency of any challenge.

## 2. What is *amparo*?

“Amparo encompasses a set of federal judicial procedures by which any private person (individual or enterprise) may contest the action of a government agency or official, either at state or federal level, on the ground that the action is unconstitutional. Under the Amparo Law the federal courts are empowered to issue what amounts to an order (*fallo de nullidad*) preventing the governmental defendant from carrying out the contested action.”<sup>1</sup> Hence, *amparo* is a judicial procedure in the Mexican legal system aiming to protect individuals against governmental abuses of authority.

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<sup>1</sup> *Ley de Amparo* [LA] [Legal Protection Law], as amended, Diario Oficial de la Federación [DO], el 2 de Abril de 2013 (Mex.). See Stephen Zamora, José Ramón Cossío, Leonel Pereznieta, José Roldán-Xopa & David Lopez, Mexican Law 213 (2004).

Mexican courts and legal experts identify two broad categories of *amparo*, according to the number of procedural levels (*instancias*) or courts involved in the process: “indirect” and “direct” *amparo*.<sup>2</sup>

Mexican law has long understood the pendency of a writ of *amparo* to suspend the effects of acts of governmental authorities alleged as unconstitutional until the merits of the challenge are addressed. As a consequence, indiscriminate use of the writ of *amparo* has been available to impede government in its exercise of regulatory power to implement public policies.

On one hand, the writ of *amparo* protects citizens’ or corporations’ constitutional rights against the State’s improper use of power by allowing the judicial system to suspend governmental acts until the challenge is completed. On the other hand, and at the same time, *amparo* deprives the State of the authority to set public policies and regulations by delaying the effectiveness of the government actions and allocating to the judicial system the power to make decisions on regulatory policies. Indeed, one feature of practice with the Mexican writ of *amparo* is that any action of an authority of one of the Mexican states, including a Mexican state court, can be stayed and challenged by initiating action in a Mexican federal court.<sup>3</sup> This aspect of practice in association with the writ of *amparo* served to maintain central power in Mexico.

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<sup>2</sup> For further definitions of “direct” and “indirect” *amparo*, see Zamora *et al.*, *supra* note 1 at 266-268: “Indirect amparo...encompasses all two-stage procedures that begin at the District Court level and move up either to the Circuit Court, or in some instances, all the way up to the Supreme Court... By means of indirect *amparo*, challenges can be lodged against the constitutionality of legal provisions that apply to the general population (*amparo contra leyes*), against most administrative decisions resulting from proceedings other than a trial (*amparo administrative* and some types of agrarian *amparo*), and against arbitrary detention (*amparo habeas corpus*) Direct amparo...encompasses all processes that must be heard in a single stage before panels of Circuit Court judges. This type of *amparo* is the process designed for individuals to assert their right to judicial protection against a decision of any Mexican court at any level of government, local, state, or federal, in either criminal, civil, administrative, or labour matters, and is also known as “judicial *amparo*” (*amparo judicial*).”

<sup>3</sup> Zamora *et al.*, *supra* note 1 at 213.

### **3. The importance of interconnection**

Considering that one of the goals of launching a cellular telecommunications company in Mexico is to enable its customers to interconnect across networks and to communicate with subscribers of different operators, providing interconnection is crucial for the new company to be able to deliver its services and avoid failure. According to 47 C.F.R 51.5, a regulation implementing the US Federal Communications Act,<sup>4</sup> interconnection is “the linking of two networks for the mutual exchange of traffic.” This concept can be further subdivided into the two terms: network interconnection and access interconnection. The former takes place between operators possessing networks, and the latter between an operator with a network and an operator without one. From the perspective of a new operator entering the market, and given the high cost of developing an owned network infrastructure, reaching an agreement to use the existing facilities of another operator for providing services is likely the best solution. “It is generally recognized that a satisfactory interconnection and access regime is indispensable to the development of a competitive telecommunications sector.”<sup>5</sup> Therefore, typically the national regulatory authority imposes interconnection requirements including an obligation to interconnect and the prices for interconnection.

In sum, an essential stage for a new mobile telephone company to enter the market is to reach an interconnection agreement with other telecom operators so that its customers can communicate without barriers.

## **4. Telecommunications Regulatory Authority and Interconnection in Mexico**

### **4.1. Interconnection in Mexico**

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<sup>4</sup> 47 C.F.R. § 51.5 (2013).

<sup>5</sup> OECD (2012), OECD Review of Telecommunication Policy and Regulation in Mexico 65, OECD Publishing, *available at* <http://dx.doi.org/10.1787/9789264060111-en>

Although private enterprises reappeared in the Mexican telecommunications sector in the mid 1990s with the privatization of Telmex through a group led by Mr. Carlos Slim,<sup>6</sup> one company dominates the field, and it is almost impossible for new entrants to avoid seeking interconnection with this entity. Indeed, Telmex and Telcel held respectively 80% of the fixed line market and 70% of the mobile phone market in terms of subscribers. The América Móvil Group, related to Mr. Slim, owns both companies. Telmex and Telcel are the incumbents in the Mexican telecommunications sector, and reaching an interconnection agreement with them is essential for new entrants seeking to provide efficient services to end users.

#### **4.2. Implementation process of the new Federal Institute of Telecommunications (IFT)**

The new Mexican 2013 constitutional amendment concerning telecommunications<sup>7</sup> has created the present telecom regulatory authority, IFT, which is characterized by actual independence and much more regulatory power in executing its responsibilities than the former telecom regulatory authority, COFETEL. The following elements establish IFT's authority regarding interconnection: 1) promulgation of the Constitutional Decree on Telecommunications,<sup>8</sup> 2) promulgation of the new Federal Telecommunications and Broadcasting Law<sup>9</sup> (hereinafter TBL), 3)

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<sup>6</sup> For history leading to the creation in Mexico of the State monopoly in the telecommunications sector, see Patrick Del Duca, *The rule of law: Mexico's approach to expropriation disputes in the face of investment globalization*, 51 UCLA L.R. 65 (2003)

<sup>7</sup> *Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6o., 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones* [Decree to reform and add various provisions to the Political Constitution of the Mexican United States in the areas of telecommunications], Diario Oficial de la Federación [DO], 11 de Junio de 2013 (Mex.).

<sup>8</sup> *Id.*

<sup>9</sup> Ley Federal de Telecomunicaciones y Radiodifusión [LFTR] [Telecommunications and Broadcasting Law], *as amended*, Diario Oficial de la Federación [DO], 14 de Julio de 2014 (Mex.).

ratification of IFT's President and governing body by Mexico's Senate,<sup>10</sup> 4) legislative adoption of the organic statute of IFT,<sup>11</sup> and 5) IFT's issuance of decisions that identified Mexican dominant operators and set interconnection rates.<sup>12</sup>

The Constitutional Decree on Telecommunications (June 11, 2013) amended Art. 28 of the Mexico's Constitution, providing that a new telecommunications regulatory body (the Federal Institute of Telecommunications, known as IFT) would replace the former one (COFETEL). According to the constitutional amendment, IFT is an independent agency with constitutional status that has the power to coordinate the entire telecom sector including to address legal issues such as antitrust, universal coverage, quality of the telecom service and access. Most importantly, the constitutional amendment grants to the actions of IFT, including its interconnection decisions, the status of being subjected only to the process of *indirect amparo*, and excludes the possibility that IFT's actions would be the object of suspension during the pendency of any challenge reinforcing the immediate effectiveness of IFT's regulatory powers.

The provisions of the Constitutional Decree on Telecommunications have been incorporated in the recently enacted Federal Telecommunications

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<sup>10</sup> Comunicado de Prensa No. 13/2014 [Press Release No. 13/2014], Instituto Federal de Telecomunicaciones, *El Pleno del IFT determina las tarifas asimétricas por los servicios de interconexión que cobrará el agente económico preponderante* (Mar. 31, 2014), available at <http://www.ift.org.mx/iftweb/2014/03/el-pleno-del-instituto-federal-de-telecomunicaciones-determina-las-tarifas-asimetricas-por-los-servicios-de-interconexion-que-cobrara-el-agente-economico-preponderante/>.

<sup>11</sup> Estatuto Organico del instituto Federal de Telecomunicaciones [EOIFT] [Organic Statute], Diario Oficial de la Federación [DO], 23 de Septiembre de 2013 (Mex.).

<sup>12</sup> Instituto Federal de Telecomunicaciones, *Acuerdo Mediante el cual el Pleno del Instituto Federal de telecomunicaciones determinas las tarifas Asimétricas por los servicios de Interconexión que cobrará el agente económico preponderante* [Agreement by which the Plenary of IFETEL Committee determined the Asymmetric Interconnection Rates to Apply to the Preponderant Economic Agent], 4 (Mar. 26, 2014), available at [http://www.ift.org.mx/iftweb/wp-content/uploads/2014/03/P\\_IFT\\_260314\\_17.pdf](http://www.ift.org.mx/iftweb/wp-content/uploads/2014/03/P_IFT_260314_17.pdf).

and Broadcasting Law.<sup>13</sup> The recently adopted TBL adds a statutory recognition to the new constituted independent regulatory authority (IFT), building on the constitutional one already accorded IFT through Art. 28 of the Mexico's Constitution as amended by the Constitutional Decree on Telecommunications. The TBL, effective August 13, 2014, has repealed both the FTL<sup>14</sup> and the Federal Radio and Television Law.<sup>15</sup>

In addition, on September 10, 2013 the Senate of Mexico's ratified IFT's President and governing body, which had been previously appointed by the Federal Government (the President and all the State Ministers), formally constituting IFT (see transitory Art. 6 of the Telecommunications Constitutional Decree.)<sup>16</sup> "What we have to do is to resolve before March 9 who are the preponderant economic actors and the regulation that we should impose on them," IFT President Gabriel Contreras said last December, 4, 2013 at an event in Mexico City after IFT's establishment. "Those processes have indeed started."<sup>17</sup>

Following the Mexican Senate's ratification, IFT plenary committee approved its organic statute, which was published in the official gazette on September 23, 2013 contemplated by the constitutional amendment provisions.<sup>18</sup>

Finally, as IFT President Gabriel Contreras had promised, in March 2014 the new regulatory authority issued two decisions, which determined the preponderant economic operators in the Mexican telecommunications

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<sup>13</sup> Ley Federal de Telecomunicaciones y Radiodifusión [LFTR] [Telecommunications and Broadcasting Law], *as amended*, Diario Oficial de la Federación [DO], 14 de julio de 2014 (Mex.).

<sup>14</sup> Ley Federal de Telecomunicaciones [LFT] [Telecommunications Law], *as amended*, Diario Oficial de la Federación [DO], 16 de Enero de 2013 (Mex.) (repealed 2014).

<sup>15</sup> Ley Federal de Radio y Televisión [LFRT] [Radio and Television Law], *as amended*, Diario Oficial de la Federación [DO], 9 de abril de 2012 (Mex.) (repealed 2014).

<sup>16</sup> *Decreto, supra* note 7, at transitory Art. 6.

<sup>17</sup> Patricia Laya, *America Movil, Televisa Deemed Dominant in Initial Finding*, Dec. 5, 2013, available at <http://www.bloomberg.com/news/2013-12-04/mexico-regulator-said-to-find-america-movil-televisa-dominant.html>

<sup>18</sup> Estatuto Organico del instituto Federal de Telecomunicaciones [EOIFT] [Organic Statute], Diario Oficial de la Federación [DO], 23 de Septiembre de 2013 (Mex.).

market and the asymmetric interconnection rates to apply to them. On March 6, 2014 IFT adopted a decision, which identified Telmex, Telnor and Telcel as preponderant economic operators in the Mexican telecommunications market.<sup>19</sup> As a result of their dominant position, on March 26, 2014 the IFT plenary committee determined the asymmetric interconnection rates to apply to the preponderant economic operators based on a long-run average incremental cost model<sup>20</sup> (hereafter, the “LRIC model”). As stated in IFT’s determination of preponderant economic agents in the telecom sector “Agreements (ACUERDOS) Art. 3 (TERCERO) par. 3,”<sup>21</sup> the asymmetric interconnection rates set in the former agreement will be effective from the commencement of the measures imposed on the preponderant economic agent in the telecom sector (April 6, 2014)<sup>22</sup> until December 31, 2014. The actions reported above, namely the determination of preponderant economic operators in the Mexican telecommunications market and the setting of asymmetric interconnection rates related to preponderant economic operators, have been taken in reliance on the transitory Art. 8 of the Telecommunications Constitutional Decree.<sup>23</sup> Pursuant to that article, IFT has the authority, within 180 calendar days from the appointment of all its commissioners, to:<sup>24</sup>

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<sup>19</sup> Instituto Federal de Telecomunicaciones, *De la Sesión del Pleno del Instituto Federal de telecomunicaciones en su V Sesión Extraordinaria del 2014, Celebrada el 6 de Marzo de 2014* [Plenary session of IFT Committee at its V Extraordinary Session] (Mar. 6, 2014), available

at [http://apps.ift.org.mx/publicdata/P\\_IFT\\_EXT\\_060314\\_76\\_Version\\_Publica\\_Hoja.pdf](http://apps.ift.org.mx/publicdata/P_IFT_EXT_060314_76_Version_Publica_Hoja.pdf).

<sup>20</sup> Instituto Federal de Telecomunicaciones, *Acuerdo Mediante el cual el Pleno del Instituto Federal de telecomunicaciones determinas las tarifas Asimétricas por los servicios de Interconexión que cobrará el agente económico preponderante* [Agreement by which the Plenary of IFT Committee determined the Asymmetric Interconnection Rates to Apply to the Preponderant Economic Agent], (Mar. 26, 2014), [http://apps.ift.org.mx/publicdata/P\\_IFT\\_260314\\_17.pdf](http://apps.ift.org.mx/publicdata/P_IFT_260314_17.pdf)

<sup>21</sup> *Id.*

<sup>22</sup> Press Release, América Móvil, América Móvil Informa (March 31, 2014), [http://www.americamovil.com/mailling/AMX\\_about\\_IFETEL.pdf](http://www.americamovil.com/mailling/AMX_about_IFETEL.pdf)

<sup>23</sup> *Decreto, supra* note 7, at transitory Art. 8.

<sup>24</sup> *Id.*

- Identify in the telecommunications, broadcasting, and radio industries if there are preponderant economic agents that exceed 50 percent of the national market share in a direct or indirect way, calculated by users, subscribers, audience, installed capacity, or usage, of such a network.
- Issue norms to establish accounting, structural, and functional segregation; asymmetric regulations of tariffs; and essential asset dispositions or sales, in order to avoid harm to competition and consumer abuse.
- Implement local loop unbundling obligations and obligations of provision of access to the local loop of the preponderant economic agents in telephony, pay TV, and fixed internet.

The actions concerning the preponderant economic operators and the asymmetric interconnection rate determinations were issued within the 180 calendar days framework set by the Telecommunications Constitutional Decree. Indeed, both the decision that determined Telmex, Telnor and Telcel as preponderant economic operators (March 6, 2014)<sup>25</sup> and the decision to apply asymmetric interconnection rates to them (March 26, 2014)<sup>26</sup> had been made within this 180 day period running from the appointment of all IFT's commissioners, which occurred on September 10, 2013, thus triggering the operativity of IFT's regulatory powers.

#### **4.3. IFT regulatory authority**

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<sup>25</sup> Instituto Federal de Telecomunicaciones, *De la Sesión del Pleno del Instituto Federal de telecomunicaciones en su V Sesión Extraordinaria del 2014, Celebrada el 6 de Marzo de 2014* [Plenary session of IFT Committee at its V Extraordinary Session] (Mar. 6, 2014), [http://apps.ift.org.mx/publicdata/P\\_IFT\\_EXT\\_060314\\_76\\_Version\\_Publica\\_Hoja.pdf](http://apps.ift.org.mx/publicdata/P_IFT_EXT_060314_76_Version_Publica_Hoja.pdf)

<sup>26</sup> Instituto Federal de Telecomunicaciones, *Acuerdo Mediante el cual el Pleno del Instituto Federal de telecomunicaciones determina las tarifas Asimétricas por los servicios de Interconexión que cobrará el agente económico preponderante*, [Agreement by which the Plenary of IFETEL Committee determined the Asymmetric Interconnection Rates to Apply to the Preponderant Economic Agent] 172 (Mar. 26, 2014), [http://apps.ift.org.mx/publicdata/P\\_IFT\\_260314\\_17.pdf](http://apps.ift.org.mx/publicdata/P_IFT_260314_17.pdf)

The recently amended Federal Telecommunications Law (repealed by the new TBL on August 13, 2014), and IFT's regulatory powers to impose asymmetric interconnection obligations, as well as the constitutional protection accorded by Art. 28 of the Mexican Constitution against an immediate suspension of IFT's interconnection decisions under the shadow of the writ of *amparo*, have collectively offered certainty and stability to the Mexican telecommunications sector, thus setting a potentially positive time to conduct telecommunications negotiations involving Mexico. Indeed, the new legal tools mentioned above helped to set out reasonable conditions for infrastructure sharing and removed the main bottlenecks, such as lack or expensive interconnection access, which prevented competition.

The recently amended Federal Telecommunications Law<sup>27</sup> (repealed by the new TBL on August 13, 2014) defines objectively the interconnection legal framework and IFT's authority to solve disputes on interconnection rates. According to its Art. 42 (at present, Art. 129 TBL):

“Holders of licenses to public telecommunication networks shall interconnect their networks, and to this end shall reach an agreement within 60 calendar days from when any may request it. If said term has elapsed and the parties have not executed an agreement, or before so requested by both parties, the Ministry shall reach a decision within 60 calendar days concerning the conditions upon which no agreement has been made.”

Taking into consideration a constitutional reading of the FTL (repealed by the new TBL on August 13, 2014), as it was amended by the Telecommunications Constitutional Decree, in the event of a failure to reach an agreement between the parties, prices are to be fixed by IFT within 60 days.

Indeed, the transitory Art. 8 of the Telecommunications Constitutional Decree,<sup>28</sup> as transposed in Art. 28 of the Mexican Constitution, states that IFT has the regulatory powers to determine the existence of preponderant economic operators in the fields of broadcasting and telecommunications, and to impose the necessary measures to develop a competitive market

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<sup>27</sup> Ley Federal de Telecomunicaciones [LFT] [Telecommunications Law], *as amended*, Diario Oficial de la Federación [DO], 16 de Enero de 2013 (Mex.) (repealed 2014).

<sup>28</sup> *Decreto, supra* note 7, at transitory Art. 8.

including asymmetric interconnection rates. As shown by the “Agreement by which the Plenary of IFT Committee determined the Asymmetric Interconnection Rates to Apply to Preponderant Economic Operators,”<sup>29</sup> the interconnection rates IFT applies in the case of a missing interconnection agreement with a preponderant economic operator (at present, Telmex-Telnor-Telcel) have been already set by IFT in its decision of March 26, 2014. The interconnection rates set by IFT on March 26, 2014 are effective from April 6 to December 31, 2014.<sup>30</sup> Below are reported the specific interconnection rates which were determined by IFT for both the fixed and mobile market:<sup>31</sup>

Service	Interconnection fee (Usd)
<b>Fixed Market (Telmex)</b>	
a) Interconnection rate per minute within the same regional node	\$0.00154
b) Interconnection rate per minute among regional nodes that depend on a domestic node	\$0.00173
c) Interconnection rate per minute among regional nodes that depend on different domestic nodes	\$0.01790
d) Transit rate per minute within the same regional node	\$0.00864

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<sup>29</sup> Instituto Federal de Telecomunicaciones, Acuerdo Mediante el cual el Pleno del Instituto Federal de telecomunicaciones determinas las tarifas Asimétricas por los servicios de Interconexión que cobrará el agente económico preponderante, [Agreement by which the Plenary of IFT Committee determined the Asymmetric Interconnection Rates to Apply to the Preponderant Economic Agent] (Mar. 26, 2014), available at [http://apps.ift.org.mx/publicdata/P\\_IFT\\_260314\\_17.pdf](http://apps.ift.org.mx/publicdata/P_IFT_260314_17.pdf)

<sup>30</sup> Press Release, América Móvil, América Móvil Informs (March 31, 2014), [http://www.americamovil.com/mailling/AMX\\_about\\_IFETEL.pdf](http://www.americamovil.com/mailling/AMX_about_IFETEL.pdf)

<sup>31</sup> *Instituto Federal de Telecomunicaciones, Acuerdo Mediante el cual el Pleno del Instituto Federal de telecomunicaciones determinas las tarifas Asimétricas por los servicios de Interconexión que cobrará el agente económico preponderante*, [Agreement by which the Plenary of IFT Committee determined the Asymmetric Interconnection Rates to Apply to the Preponderant Economic Operators] (Mar. 26, 2014), available at [http://apps.ift.org.mx/publicdata/P\\_IFT\\_260314\\_17.pdf](http://apps.ift.org.mx/publicdata/P_IFT_260314_17.pdf)

e) Transit rate per minute among regional nodes that depend on a domestic node	\$0.00066
f) Transit rate per minute among regional nodes that depend on different domestic nodes	\$0.00091

### **Mobile market (Telcel)**

a) Switched termination rates of mobile users under the “calling party pays” system or “domestic calling party pays” system	\$0.0156 per minute
b) Termination rate for the short message services (SMS) of mobile users	\$0.00299 per message

Last but not least, the Mexican Constitution (last amended by decree published in the Official Gazette of December 20, 2013)<sup>32</sup> incorporated the provisions of the Telecommunications Constitutional Decree providing only a right to indirect amparo and a status of non-suspension against the decisions of the new regulatory authority (IFT). As stated in Art. 28 sec. VII of the Mexican Constitution,<sup>33</sup> “The general norms, acts or omissions of...the Federal Institute of Telecommunications may be impugned uniquely through the process [juicio] of indirect amparo and will not be the object of suspension” during the pendency of any challenge.

#### **4.4. IFT v. COFETEL comparison**

The independent nature of IFT, the exclusion of the “double window” procedure from IFT’s operation, and the constitutional protection of IFT decisions against *amparo* suspension place the new regulatory authority, IFT, in a better position than its predecessor, COFETEL.

The establishment of IFT as an autonomous agency with the power to coordinate the entire telecom industry avoids the flaws in COFETEL’s operation that derived from COFETEL’s subordinate status to the Ministry

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<sup>32</sup> *Decreto, supra* note 7.

<sup>33</sup> Constitución Política de los Estados Unidos Mexicano [C.P.], as amended, Diario Oficial de la Federación [DO], Art. 28, 7 de Julio de 2014 (Mex.).

of Communications and Transports (hereinafter SCT). COFETEL's subordinate status that gave rise to the so-called "double window" procedure requiring the cumulative approval of each of COFETEL and the Ministry in order to adopt regulatory decisions in the telecom sector. According to Art. 28 of the Mexican Constitution, IFT is "an autonomous body, with legal personality and its own patrimony, that has the objective of the efficient development of broadcasting and telecommunications, according to that provided in this Constitution and in the terms established by the laws."<sup>34</sup>

Further, IFT has full constitutional powers to (i) establish the national and regional frequencies for telecommunications, broadcastings, and radio that could be used through concessions; (ii) issue regulations and grant concessions for the telecommunications, broadcasting, and radio industries; (iii) approve any transfers of concessions; (iv) review the monopolistic issues in the industry with authority to order disinvestments; and (v) to be the authority in the matter of economic competition of the sectors of broadcasting and telecommunications, exercising in an exclusive form the powers contemplated for the Federal Commission of Economic Competition with the objective of eliminating the barriers to competition.<sup>35</sup> Concerning interconnection matters, IFT is empowered to issue decisions based on a prior opinion of the Minister of Finance. The Minister of Finance's opinion is not binding, thus avoiding a potential *amparo* claim asserting that although IFT's decisions are protected against suspension during the pendency of a claim of *amparo*, the Minister of Finance's decisions are not. The Minister of Finance's non-binding opinion "...must be issued in a time period not greater than thirty days; such period [having] lapsed without issuing the opinions, IFT will continue the corresponding proceedings."<sup>36</sup>

The disappearance of the subordinate dependence on the SCT and of the associated inefficient "double window" process grants IFT full regulatory powers in the telecommunications sector, avoiding political pressure and delays in its regulatory policy activity.

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

First, the constitutionally independent character enjoyed by IFT has superseded the subordinate nature and the political dependence of COFETEL on the Ministry of Communications and Transports. Indeed, COFETEL's legal status was that of a "de-concentrated body" directly related to the Ministry of Communications and Transportations (hereinafter SCT), which approved its budget and its actions, leaving COFETEL with at best limited autonomy.

Second, the inefficient regulatory decision process, known as "double window", where a) COFETEL gave an opinion, b) SCT reached a decision and c) COFETEL was responsible for its implementation had a detrimental effect, which included: delaying decision-making processes, raising conflict of interest between policy formulation and regulatory functions, and in particular exposed every single step of the regulatory decisions (e.g. interconnection rates) to be challenged by *amparo* claims.<sup>37</sup> Indeed, this lack of division between policy formulation and regulatory functions (double window) weakened COFETEL's decision on interconnection matters, by multiplying the likelihood of appeals against any of the numerous steps in the procedure by a potential challenger. For instance, in setting interconnection rates there was both an administrative procedure of COFETEL and a separate administrative procedure of SCT that could each separately be appealed and immediately suspended by a potential challenger under the writ of *amparo*.

## **5. How did the writ of *amparo* formerly affect interconnection and the public interest?**

As opposed to COFETEL, the new telecommunications regulatory authority is now safeguarded from many legal challenges. Indeed, the recourse against actions taken by IFT, including interconnection and public interest ones, can only be made through a constitutional writ of indirect

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<sup>37</sup> OECD, *supra* note 5 at 46.

amparo, as no administrative recourse is possible. In addition, constitutional writs of amparo cannot be used to apply for injunctions to halt IFT actions.<sup>38</sup>

In practice, access delayed is often access denied. Although the effect of a COFETEL and SCT interconnection action suspended by an *amparo* claim could have been resuscitated by a favorable court decision on the legitimacy of the regulatory action, “a suspension ensured that the incumbent obtained several years of higher revenue until the court took a decision.”<sup>39</sup>

“In 2009 COFETEL issued a Technical Plan for Interconnection and Interoperability with the intention of giving operators greater certainty over the availability and pricing of interconnection and access services.”<sup>40</sup> However, the leading operators in the market –

Telmex, Telcel and Telefonica – appealed the plan through a judicial injunction preventing its application to the companies. In this case, the Federal Court of Tax and Administrative Justice granted amparo against COFETEL’s interconnection decisions, disregarding the public interest argument put forward by COFETEL and harming drastically the new entrants’ commercial interest in having a predictable interconnection framework.<sup>41</sup>

This past context drastically harmed new entrants into the telecommunications market that had to pay interconnection rates well above costs to complete calls and final consumers who had to pay higher telephone rate plans due to the lack of competition between telecom operators. Indeed, suspending COFETEL’s interconnection decisions, rather than ensuring that the regulator’s decisions remained in force until the appeal process has run its course, was harmful for both 1) the protection of the market’s competitiveness and 2) the public interest in the telecommunications sector.

In the Mexican telecommunications market, the writ of *amparo* was used to suspend COFETEL’s decisions on interconnection access and rates

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<sup>38</sup> Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, Diario Oficial de la Federación [DO], Art. 28, 7 de Julio de 2014 (Mex.).

<sup>39</sup> OECD, *supra* note 5 at 55.

<sup>40</sup> OECD, *supra* note 5 at 66.

<sup>41</sup> OECD, *supra* note 5 at 67.

until the merits of the case were litigated. This outcome affected the Mexican economy by establishing barriers to entry of new competitors and damaging the welfare of its population through exceptional monopoly rents. Thus, to weaken the powers of the telecom authority by suspending its regulatory mandates on interconnection matters meant a support for the lack of competition that resulted in low infrastructure development and high prices for final consumers due to the impossibility of new entrants to compete with the incumbent in the absence of fair interconnection conditions. Indeed, the aftermath related to the delay in assuring access to interconnection or fair interconnection rates due to the suspension of COFETEL's decisions was that new entrants could not develop their network and offer low fees to their final consumers.

Suspending the decisions of the regulator related to cost-based interconnection prices or to interconnection access was against the public interest because final users had to pay high prices and enjoy a less developed telecommunication infrastructure. For instance, "in 2009 COFETEL established regulations for a framework on interconnection, which would have applied to all market players,"<sup>42</sup> but the incumbent managed to achieve suspension of the framework to prevent it from being subjected to its conditions, thus achieving its goal of delaying the implementation of the plan because the plan was suspended during the several years of pendency of the *amparo* proceedings. As expected, the higher costs of interconnection applied to new entrants were reflected in telephone rate plans available to the final consumers. This situation, together with the lack of interconnection access that led to the loss of new entrants' capacity to provide services, constituted weaknesses of a non-competitive market.

In sum, excessive recourse to *amparo* together with the grant of suspension of the challenged decision during the pendency of the *amparo* action harmed both the commercial interest of new entrants to receive interconnection as well as the interest of consumers to pay low rates. Hence, this abusive use of *amparo* negatively impacted the public interest to

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<sup>42</sup> OECD, *supra* note 5 at 56.

develop an efficient telecom infrastructure and provide the best telecommunication service for the society.

## **6. The End of the Regulatory Authority's Decisions Suspension During the Pendency of a Claim of *Amparo*: From COFETEL to IFT**

The fundamental innovation from the Mexican Telecommunications and Antitrust Constitutional Legal Framework in this regard, is that IFT's decisions on interconnection may be challenged only through the procedure of indirect amparo, and their effectiveness will not be the object of suspension during the pendency of any challenge.<sup>43</sup> This legal achievement was built on prior regulatory and judicial actions such as: COFETEL enjoyment of IFT powers during the implementation process, a majority interpretation of the Plenum of Mexico's Supreme Court related to the FTL (repealed by the new TBL on August 13, 2014) in accordance with the public interest concern, and the Plenary Chamber of Mexico's Supreme Court rulings that set the main characteristics of the regulatory authority interconnection decisions which would later be incorporated in the Telecommunications Constitutional Decree.

IFT is the phoenix rising from COFETEL's ashes. Indeed, IFT takes up an innovation of Mexican law achieved through significant struggles in the final period of COFETEL, its predecessor agency. Only in its last years of COFETEL's existence were its interconnection decisions not subjected to suspension by amparo recourses.

### **6.1. COFETEL: The Mexican telecommunications regulatory body during the implementation process of IFT**

COFETEL was responsible for solving disputes between operators concerning interconnection matters until the new regulatory authority, IFT, was fully constituted. During the transition to IFT, COFETEL enjoyed the

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<sup>43</sup> Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, Diario Oficial de la Federación [DO], Art. 28, 7 de Julio de 2014 (Mex.).

IFT's interconnection decisions' status of not being object to suspension under amparo recourses during the pendency of any challenge. Indeed, the transitory Art. 7 of the Telecommunications Constitutional Decree<sup>44</sup> established that COFETEL had the duty to exercise all the powers stated in the Decree until full implementation of the new Federal Institute of Telecommunications.

The legal bases supporting this result were the Telecommunication Constitutional Decree, the transitory Article 7 of the same Decree, and Art. 28 of the Mexican Constitution:

- Pursuant to the Telecommunication Constitutional Decree of June 11, 2013,<sup>45</sup> a new telecommunication regulatory body (the Federal Institute of Telecommunications, known as IFT) replaced the old one (COFETEL) with much powerful regulatory powers.

- In addition, transitory Article 7 of the Telecommunications Constitutional decree granted COFETEL the duty to exercise all the powers stated in the decree until IFT would have been implemented. In those powers, there was a provision of no suspension for decisions related to interconnection. Consequently, COFETEL enjoyed the same protection on its interconnection decisions as IFT.

- Also, the Mexican Constitution, restated to reflect the provisions of the Telecommunications Constitutional Decree, recognized the constitutional protection of not being subjected to suspension by *amparo* recourses during the pendency of any challenge to COFETEL's interconnection decisions. If as stated in Art. 28 sec. VII of the Mexican Constitution,<sup>46</sup>

“The general norms, acts or omissions of...the Federal Institute of Telecommunications (IFT) may be impugned uniquely through the process [juicio] of indirect *amparo* and will not be the object of suspension”, the result of a comprehensive reading of the Telecommunications Constitutional Decree in agreement with the Mexican Constitution supported the

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<sup>44</sup> *Decreto, supra* note 7, at Art. 7<sup>th</sup> transitory.

<sup>45</sup> *Decreto, supra* note 7.

<sup>46</sup> Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, Diario Oficial de la Federación [DO], 7 de Julio de 2014 (Mex.).

interpretation of the impossibility of a COFETEL’s interconnection decision suspension by “*amparo*” until the appeal ran its course. Likewise, if as is stated in transitory Article 7 of the Telecommunications Constitutional Decree, COFETEL had the authority to exercise all the powers assigned to IFT (e.g. including no suspension of interconnection decisions) until IFT would have become operative; it was a logical consequence that suspending COFETEL’s decisions on interconnection matters was unconstitutional because it contradicted Art. 28 of the Mexican Constitution. Indeed, COFETEL had been exercising IFT’s powers assigned by decree as a default rule until IFT became operational, and during that period any suspension of COFETEL’s interconnection decisions was the same as the suspension of IFT’s interconnection decisions.

## **6.2. The 2011 Plenary Mexican Supreme Court constitutional reading of the FTL in accordance with the public interest concern**

Article 28 of the Mexican Constitution, as amended effective 2013, prevents the application of stays (*amparos*) to interconnection rate decisions issued by IFT. This provision gives definitive stability to the majority view of the Plenary Chamber of Mexico’s Supreme Court that in May 2011 granted protection to COFETEL’s interconnection decisions from the possibility to be subject to suspension during the pendency of an *amparo* claim on the ground that such a suspension would have been against the public interest.<sup>47</sup>

In Mexico, as in the US, the judicial power is distributed between independent but interrelated systems of federal and state courts. The Mexico’s Supreme Court, the top of the three-tier federal court system structure, works as a constitutional court.

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<sup>47</sup> Maestro Saúl García Corona, *No Procede la Suspensión de los Efectos de las Resoluciones que Fijan Aspectos No Acordados por las Partes Sobre las Condiciones de Interconexión, Obligación de Interconectar y Fijación de Tarifas*, *crónicas del pleno y de las salas*, available at <https://www.scjn.gob.mx/Cronicas/Cronicas%20del%20pleno%20y%20salas/cr-030511-LMAM-interconexion.pdf>, (Mex.) (last visited Aug. 21, 2014).

“The Mexico’s Supreme Court (hereafter SCJN) is composed of a Chief Justice (*Presidente de la Suprema Corte*) and ten associate justices (*ministros*) who are organized in into two chambers (*salas*) of five justices each. Each chamber of the court adjudicates cases according to subject matter. ... All other cases within the Court’s jurisdiction, including special constitutional disputes and suits challenging the constitutionality of certain governmental actions, are handled by the full Court sitting in plenary session (*sesionado en pleno*). Decisions by the Court when sitting *en banc* and by each chamber are by majority vote, unless otherwise specified by law.”<sup>48</sup>

The Mexican legal system has unique procedures to defend the supremacy of the Constitution over conflicting laws and governmental acts.<sup>49</sup> One of these is the *juicios de amparo* procedure leading to the Plenary SCJN’s decision on May 2011. The *writ of amparo* “... offers federal judicial protection from improper action under color of governmental authority to the plaintiffs who seek it.”<sup>50</sup> Federal *amparo* jurisdiction derives from articles 103 and 107 of the Mexican Constitution.<sup>51</sup> Art. 107, together with other federal laws, establish the jurisdiction of the SCJN, circuit courts, and district courts over different types of *amparo* actions. In the Plenary SCJN’s decision on May 2011, the Plenary was acting as a constitutional court under a “contradiction of thesis jurisdiction” (*jurisprudencia por contradicción de tesis*)<sup>52</sup> on reference of a question submitted by the Federal Décimo Tercer Tribunal Colegiado en Materia Administrativa del Primer Circuito<sup>53</sup> acting on an indirect *amparo* claim on revision.<sup>54</sup> Indeed,

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<sup>48</sup> Zamora *et al.*, *supra* note 1 at 189.

<sup>49</sup> For the discussion of the procedures defending the supremacy of the Mexican Constitution – *juicios de amparos*, *controversias constitucionales*, and *acciones de inconstitucionalidad* – see see Zamora *et al.*, *supra* note 1 at 257-286.

<sup>50</sup> Patrick Del Duca, *The rule of law: Mexico’s approach to expropriation disputes in the face of investment globalization*, 51 UCLA L.R. 98-99 [Mexico’ Federal Judiciary] (2003)

<sup>51</sup> Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, Diario Oficial de la Federación [DO], Art. 103-107, 7 de Julio de 2014 (Mex.).

<sup>52</sup> *Ley de Amparo*, *supra* note 1, at art. 225-227.

<sup>53</sup> Zamora *et al.*, *supra* note 1 at 269.

<sup>54</sup> Maestro Saúl García Corona, “No Procede la Suspensión de los Efectos de las Resoluciones que Fijan Aspectos No Acordados por las Partes Sobre las Condiciones de

according to Art. 107 of the Mexican Constitution sec. XIII, “when...the Collegiate Tribunals of one same circuit with different specialization sustain contradictory opinions, (the Collegiate Tribunals) may denounce the contradiction before the Supreme Court of Justice, with the objective that ... (the Supreme Court of Justice) decides on the opinion that must prevail.”<sup>55</sup> This procedure is intended to promote uniformity in the constitutional interpretation of laws and regulations.

In the Plenary SCJN decision on May 2011, a contradiction of thesis related to an indirect *amparo* claim on review related to interconnection rates - between two collegiate tribunals<sup>56</sup> belonging to the same first circuit with different specializations - led to a denouncement of the contradiction before the Plenary of the SCJN. Indeed, the Décimo Tercer Tribunal Colegiado en Materia Administrativa del Primer Circuito denounced the contradiction of thesis before the SCJN, leaving to the Supreme Court the duty to decide whether the suspension of COFETEL’s interconnection rates subject to an indirect *amparo* claim was against the social interest or the public order.

In line with the view expressed by six of the eleven Justices of the Plenum of Mexico’s Supreme Court in the decision on interconnection prices issued on May 2011,<sup>57</sup> COFETEL’s interconnection decisions were not subject to suspension during the pendency of *amparo* proceedings because any such suspension would have been against the public interest as

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Interconexión, Obligación de Interconectar y Fijación de Tarifas”, crónicas del pleno y de las salas”, 1-3, available at <https://www.scjn.gob.mx/Cronicas/Cronicas%20del%20pleno%20y%20salas/cr-030511-LMAM-interconexion.pdf>, (Mex.) (last visited Aug. 21, 2014).

<sup>55</sup> Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, Diario Oficial de la Federación [DO], Art. 107, 7 de Julio de 2014 (Mex.).

<sup>56</sup> Décimo Tercer Tribunal Colegiado en Materia Administrativa del Primer Circuito and Noveno Tribunal Colegiado en Materia Administrativa del Primer Circuito.

<sup>57</sup> Maestro Saúl García Corona, “No Procede la Suspensión de los Efectos de las Resoluciones que Fijan Aspectos No Acordados por las Partes Sobre las Condiciones de Interconexión, Obligación de Interconectar y Fijación de Tarifas”, crónicas del pleno y de las salas”, available at <https://www.scjn.gob.mx/Cronicas/Cronicas%20del%20pleno%20y%20salas/cr-030511-LMAM-interconexion.pdf>, (Mex.) (last visited Aug. 21, 2014).

described in Art. 1 and Art. 42 of the Federal Telecommunications Law (repealed by the TBL on August 13, 2014).<sup>58</sup> Consequently, the suspension of the legal injunction on COFETEL's interconnection decisions could not have been provided because it would have been in contrast with the requirements set by Art. 128 sec. 2 of the *Ley de Amparo*<sup>59</sup> as amended as of April 2, 2013, which are set up to avoid prejudice to the public interest. In compliance with the provisions established in the FTL (repealed by the TBL on August 13, 2014), the Mexican State had the authority to regulate the interconnection rates by means of COFETEL to pursue the public interest. Hence, any delay in the effectiveness of COFETEL's decisions regarding interconnection rates through the claim of *amparo* would harm the public interest goals that the Mexican State wanted to pursue.

From Justice Sergio A. Valls Hernández point of view, suspension of COFETEL's interconnection rate decisions undermined the authority of the Mexican State in the telecom sector to foster fair competition and to promote adequate coverage against the public interest objectives established in the provisions of the FTL (repealed by the TBL on August 13, 2014). In addition, Justice Jorge Mario Pardo Rebolledo argued that Art. 1 of the FTL accorded a public interest character to the Federal Telecommunication Law Act's provisions and that COFETEL's interconnection price decisions enjoyed this character. As stated in Art. 42 and Art. 9-A of the FTL, <sup>60</sup>“licensees shall reach an agreement on interconnection within 60 days on any request, and if agreement is not reached COFETEL (at present, IFT) shall reach a decision within 60 days.”<sup>61</sup> Hence, COFETEL's decisions on interconnection prices taken on behalf of the Ministry of Communication and Transports had a public interest character that protected them from suspension related to “amparo” claims.

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<sup>58</sup> Ley Federal de Telecomunicaciones [LFT] [Telecommunications Law], *as amended*, Diario Oficial de la Federación [DO], Art. 1 and Art. 42, 16 de Enero de 2013 (Mex.).

<sup>59</sup> *Ley de Amparo*, *supra* note 1.

<sup>60</sup> Ley Federal de Telecomunicaciones [LFT] [Telecommunications Law], *as amended*, Diario Oficial de la Federación [DO], 16 de Enero de 2013 (Mex.).

<sup>61</sup> OECD, *supra* note 5 at 42.

As ruled by the Court, if Art. 42 and Art. 9-A of the FTL assigned to COFETEL (at present, IFT) the power to solve issues related to interconnection prices between competitors on behalf of the Ministry of Telecommunications and Transports and, at the same time, article 1 of the FTL states that the Federal Telecommunications Law provisions are of public interest, then the COFETEL's decisions on interconnection rates (at present, IFT's decisions on interconnection rates) were also of public interest.

Consequently, COFETEL's decisions on interconnection could have not been suspended under "*amparo*" in agreement with the Art. 128 sec. 2 of the *Ley de Amparo*, which did not allow to suspend an action during the pendency of an *amparo* proceeding when such suspension would have been against either the public interest or the public order.

In conclusion, the amended Art. 28 of Mexico's Constitution restated the path adopted by the majority of the Plenary Chamber of Mexico's Supreme Court acting under a "*jurisprudencia por contradicción*" procedure on whether a suspension of COFETEL's interconnection decision was constitutional in relation to the prejudice against the public interest. Moreover, the constitutional amendment adds constitutional value to the result achieved by the ruling of the Plenary of the Supreme Court. It should be noted that, although the Plenary of the SCJN was clear in its conclusion that any stay during the pendency of an *amparo* proceeding challenging the telecom regulator's decision would be contrary to the public interest character of such decision, the Plenary of the SCJN's ruling enjoyed only the limited precedential character typical of a court in a civil law jurisdiction. Indeed, there is no general rule of *stare decisis* in Mexico. Although the lack of *stare decisis*, Mexico's SCJN does have a concept of precedent<sup>62</sup> binding for lower state and federal courts, known as *jurisprudencia*, only when either 1) five consecutive judgments of the SCJN apply the same rule by a vote of at least eight of eleven ministers for cases decided in plenary session or four of five ministers in cases decided by *salas* ( judgment known as

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<sup>62</sup> Patrick Del Duca, *The rule of law: Mexico's approach to expropriation disputes in the face of investment globalization*, 51 UCLA L.R. 101 [Mexico' Federal Judiciary] (2003)

*jurisprudencia obligatoria*),<sup>63</sup> or 2) judgments of the SCJN resolve conflicts arising between chambers of the SCJN, the Circuit Plenaries, and the Collegiate Tribunals (*jurisprudencia por contradicción*).<sup>64</sup> Hence, unless five consecutive and consistent SCJN's judgments about the same legal issue are issued by the Court with the majority cited above or a conflict of thesis arises, SCJN's rulings may be persuasive, but do not achieve the status of having to be followed by lower state and federal judges in deciding subsequent cases. In our case, the Plenary of the SCJN's decision was binding only for lower courts because it was a conflict of thesis resolution (*jurisprudencia por contradicción*). Hence, the future Plenary of the SCJN's decisions on similar legal disputes did not have to follow the May 2011 decision as a binding precedent because the Plenary of the SCJN does not bind itself. Indeed, the Plenary of the SCJN might have overturned the May 2011 decision simply by changing its mind through a subsequent decision on a similar dispute. Furthermore, unlike the declaration of the constitutionality of a law by a US court, a Mexican judge's determination whether to grant *amparo* against alleged unconstitutional acts benefits only the parties in the *amparo* action because it does not invalidate the relevant law or other acts with general effects.<sup>65</sup> Consequently, the incorporation of the Court's holding in a clause of the Constitution values the substance of the holding as clearly binding on all Mexican authorities whether legislative, executive, or judicial.

### **6.3. Plenary Chamber of Mexico's Supreme Court decision reports on interconnection issues: Amparo en revision 318/2011 and Amparos en revision 426/2010 y 318/2011 03/07/2013**

Recent rulings of the Plenum of Mexico's Supreme Court accorded judicial deference to COFETEL's interconnection decisions, granting them the status of not being suspended until the end of the dispute. Legal principles expressed in those decisions clarified the legal evolution that led

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<sup>63</sup> *Ley de Amparo*, *supra* note 1, at art. 222-223.

<sup>64</sup> *Ley de Amparo*, *supra* note 1, at art. 225.

<sup>65</sup> *Zamora et al.*, *supra* note 1 at 272.

to the draft of the Mexican Constitution amendment that prevents suspension of IFT' regulatory decisions during the pendency of *amparo* proceedings.

### **6.3.1. Report of the Mexican Supreme Court decision on the Amparo en revision 318/2011**

In May 2011, Mexico's Supreme Court (hereafter SCJN) issued a significant decision, which stated that in the context of decisions by COFETEL on interconnection prices, these decisions could remain in effect until an appeal in Court led to the decision being rescinded.<sup>66</sup> The general overview regarding the Plenary's SCJN May 2011 decision, showed in sec. *ii.* above, is stressed here to better focus on the policy reasons leading the Plenary of the SCJN to recognize to COFETEL's interconnection decisions the status of not being suspended during the pendency of an *amparo* claim.

The outcome of the SCJN's decision 318/2011 was the solution of the contradicting judicial conflict on the suspension of COFETEL's interconnection decisions arisen between the Décimo Tercer Tribunal Colegiado en Materia Administrativa del Primer Circuito related to the review of *amparo* R.A. 38/2010-204 and the Noveno Tribunal Colegiado en Materia Administrativa del Primer Circuito related to the review of R.I. 458/2008 and R.I. 474/2006. Indeed, the SCJN resolved the contradiction (*jurisprudencia por contradicción*) of the former collegiate circuit courts thesis related to whether the suspension of the decisions made by COFETEL on interconnection obligations or interconnection rates should be seen as contradicting the public interest and the public order, and therefore, whether to suspend these COFETEL interconnection mandates.

On the one hand, the Décimo Tercer Tribunal Colegiado en Materia Administrativa del Primer Circuito overruled the *amparo* granted against a COFETEL administrative decision which set interconnection conditions that were not agreed between private operators in the judgment 1107/2009. From the Court's point of view, COFETEL's interconnection conditions decisions were legal because they were in compliance with the Art. 87 sec. III of the

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<sup>66</sup> OECD, *supra* note 5 at 58.

Administrative Procedure Law.<sup>67</sup> According to the former legal framework, the Court foresaw in the suspension of the regulatory decision a possible harm for social interest and the public order.

On the other hand, the Noveno Tribunal Colegiado en Materia Administrativa del Primer Circuito did not consider an eventual suspension of COFETEL's decisions on interconnection rates as a prejudice for the social interest and the public order. Consequently, when deciding the appeal RI 458/2008, this court granted *amparo* and suspended COFETEL's decision on interconnection rates applying the old Art. 124 sec. II of the Law of Amparo (at present, Art. 128 *Ley de Amparo*).<sup>68</sup> According to the old Art. 124 sec. II of the Law of Amparo, the suspension of the administrative act will be granted every time that a prejudice to the social interest or the public order does not exist.

By a majority of six out of eleven votes, the Plenum of the SCJN decided that, whenever private telecommunications operators did not reach an agreement related to interconnection access or interconnection rates, COFETEL's subsequent decisions on interconnection obligations and interconnection rates were administrative acts that enjoyed a presumption of validity and legality and were not subject to suspension.

According to the Plenary of the SCJN, COFETEL's decisions were expression of the Constitutional power of the Mexican State to regulate the telecommunications sector. Hence, COFETEL's interconnection decisions

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<sup>67</sup> *Ley Federal de Procedimientos Administrativos [LFPA]* [Administrative Procedures Law], as amended, Diario Oficial de la Federación [DO], 4 de Agosto de 1994 (Mex.): “*La interposición del recurso suspenderá la ejecución del acto impugnado, siempre y cuando: ... II. No se siga perjuicio al interés social o se contravengan disposiciones de orden public;*”

<sup>68</sup> *Ley de Amparo*, supra note 1, at Art. 128: “*Con excepción de los casos en que proceda de oficio, la suspensión se decretará, en todas las materias, siempre que concurran los requisitos siguientes:*

*I. Que la solicite el quejoso; y*

*II. Que no se siga perjuicio al interés social ni se contravengan disposiciones de orden público.*

*La suspensión se tramitará en incidente por separado y por duplicado.”*

tended to perform the goals set by the Federal Telecommunications Law such as supporting the presence of new operators and services in the telecommunications market, promoting fair competition between telecom operators, providing adequate social coverage and assuring top conditions in the viability of the telecommunication services for the benefit of the society.

For the reasons explained above, the SCJN issued that granting *amparo* would have been against the social interest and the public order. In fact, suspending COFETEL's interconnection decisions would affect competition in the market between telecommunications operators and may be considered harmful for final consumers that were going to bear the lack of a competitive telecommunication market paying high fees.

To conclude, as shown by the two decisions discussed above, whether or not to grant *amparo* against COFETEL's interconnection decisions depended on the urgency of avoiding a delay in their effectiveness simply because it may have affected the social interest and the public order. As a matter of fact, the only way to save COFETEL's decisions on interconnection from granting *amparo* was to find a social interest or a public order prejudice reaching out from that suspension in compliance with the Art. 87 of the *Ley Federal de Procedimiento Administrativo* and the old Art.124 of the *Ley de Amparo*.

For this reason, the main legal issues in the Mexico's Supreme Court decision 318/2011 were: 1) whether suspending COFETEL's decisions on mandatory interconnection obligations was prejudicial to the social interest and the public order; and 2) whether suspending COFETEL's decision on interconnection rates was prejudicial to the social interest and the public order.

First, the SCJN ruled that it was not possible to make a distinction between mandatory interconnection obligations and interconnection rates for analyzing the effect of suspension. This was because both the access to interconnection and the rate of the interconnection were essential to not affect the social interest of the final consumer (i.e. mobile telephone owner). For instance, a mobile-telephone owner was not only interested in having interconnection with other mobile-telephone owners who were customers of different mobile operators (guarantee interconnection access), but, most

important, a customer is also interested in having a strong competition between mobile operators in order to choose the lowest mobile rate plan. One of the ways to promote fair competition and low mobile rate plans was to assure low interconnection rates from the incumbent to new entrants and Other Licensed Operators (hereinafter OLOs) in the telecommunication sector. Indeed, a suspension of a COFETEL's interconnection decision that tried to impose lower rates meant that new entrants and OLOs had to pay interconnection rates well above costs to complete calls. This undermined considerably their ability to expand in the market and to offer competitive mobile rate plans with harm for the social interest of the final consumer (i.e. mobile-telephone owner). In addition, a strict interpretation of Art. 42 of the Federal Telecommunication Law (repealed by the TBL on August 13, 3014) showed that when private parties did not reach an agreement on interconnection conditions, COFETEL had the duty to solve the issue regardless of whether it was interconnection access or interconnection rates. In conclusion, the court accepted the lack of distinction between mandatory interconnection obligations and interconnection rates with a majority of six votes out of eleven. Consequently, the problem of granting *amparo* on COFETEL's interconnection decisions was treated as a unique legal issue.

Secondly, according to Justice Luis María Aguilar Morales, both COFETEL's decisions related to mandatory interconnection obligations and interconnection rates were affecting the final consumer, so suspending COFETEL's decisions on those matters would have been against the public interest in contrast with the provision of the old Art. 124 of the *Ley de Amparo* (at present, Art. 128 of the *Ley de Amparo*). Following the Justice's reasoning, it was not possible to make a distinction between suspending a mandatory interconnection obligation decision and suspending a decision fixing rates of interconnection as the former was affecting a social interest and the latter was just a commercial agreement between telecommunication operators without indirect effects on the final consumers. Indeed, returning to the example of the mobile-telephone owner, interconnection access and interconnection rates were intrinsically related to the final goal of assuring the best public service for consumers. Consequently, it was not possible to grant *amparo* against COFETEL's interconnection decisions because they

aimed to pursue the social interest and the public order requirements set by the old Art. 124 sec. 2 of the *Ley de Amparo* (at present, Art. 128 of the *Ley de Amparo*).

Next, the SCJN's reasoning moved to analyze the Mexican State power on the telecommunications sector from a constitutional and statutory perspective, finding that the Mexican State sovereignty in this field allowed the government to make interconnection decisions to pursue public interest by means of COFETEL's mandates and that a suspension of those decisions would have been in contrast with the old Art. 124 sec. 2 of the *Ley de Amparo* (at present, Art. 128 of the *Ley de Amparo*).

According to Justice José Ramón Cossío Díaz, the Mexican Federal Constitution provides that the concession and exploitation of a state ownership as the frequency spectrum by licensees shall always respect the conditions of public interest, in which interconnection access and rates are included. Furthermore, an interpretation of Art. 42 (at present, art. 129 TBL) of the Federal Telecommunications Act (repealed by the TBL on August 13, 2014) shows that the Mexican State has regulatory power to fix the interconnection rates whenever the licensees do not reach an agreement within 60 days.

According to the prior Art. 42 FTL (at present, art. 129 TBL),<sup>69</sup> the Ministry of Communications and Transportation reached its decision on interconnection issues by means of COFETEL as provided by Art. 9-A FTL,<sup>70</sup> which assigned to the old telecommunications regulatory authority,

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<sup>69</sup> Artículo 42, *Ley Federal de Telecomunicaciones* [LFT] [Telecommunications Law], as amended, Diario Oficial de la Federación [DO], 16 de Enero de 2013 (Mex.) (repealed 2014): "Holders of licenses to public telecommunication networks shall interconnect their networks, and to this end shall reach an agreement within 60 calendar days from when any may request it. If said term has elapsed and the parties have not executed an agreement, or before so requested by both parties, the Ministry shall reach a decision within 60 calendar days concerning the conditions upon which no agreement has been made."

<sup>70</sup> *Id.*, Artículo 9-A: "*La Comisión Federal de Telecomunicaciones es el órgano administrativo desconcentrado de la Secretaría, con autonomía técnica, operativa, de gasto y de gestión, encargado de regular, promover y supervisar el desarrollo eficiente y la cobertura social amplia de las telecomunicaciones y la radiodifusión en México, y tendrá*

COFETEL, the power to fix the interconnection conditions that had not been agreed between the licensees of the public telecommunications networks.

Because Art. 1 of the FTL<sup>71</sup> defines the Federal Telecommunications Law and its dispositions of public interest, it could have been implied that also COFETEL's interconnection decisions, which were in compliance with the FTL articles, had a public interest nature too. Therefore, suspending COFETEL's interconnection decisions, as provided by Art. 1 of the FTL, would have affected the public order and it would not have satisfied the requirement provided by the old Art. 124 of the *Ley de Amparo* (at present, Art. 128 of the *Ley de Amparo*).

Finally, the Court discussed the regulation of the telecommunications sector provided in the Mexican Constitution as assuring the public interest by fostering fair competition and defending fundamental rights and it explained how a suspension of COFETEL's interconnection decisions might have affected both. Firstly, Justice Guillermo I. Ortiz Mayagoitia, asserted that one of the main goals of the FTL (repealed by the TBL on August 13, 2014) is developing a fair competition in the telecommunications market in compliance with the Art. 28 of the Mexican Constitution, and that COFETEL's interconnection decisions were the main tool to assure fair and non-discriminatory interconnection rates that lead to competitiveness in the telecommunication market. Secondly, Chief Justice Juan N. Silva Meza argued that in Art. 28 of the Mexican Constitution is written that one of the duties of telecommunications is defending fundamental rights such as access to information, freedom of speech, education, democratic participation and integration of indigenous communities. For these reasons, COFETEL's interconnection decisions on access and rates were important to develop the

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*autonomía plena para dictar sus resoluciones. Para el logro de estos objetivos, corresponde a la citada Comisión el ejercicio de las siguientes atribuciones:*

*X. Promover y vigilar la eficiente interconexión de los equipos y redes públicas de telecomunicaciones, incluyendo la que se realice con redes extranjeras, y determinar las condiciones que, en materia de interconexión, no hayan podido convenirse entre los concesionarios de redes públicas de telecomunicaciones;*"

<sup>71</sup> *Id.*, Art. 1: "This law is of public interest, and its purpose thereof is to regulate the usage, utilization and exploitation of the frequency spectrum, telecommunications networks and satellite communications."

fundamental rights shown above and, as an expression of the public interest, those decisions should prevail over the private interest of the frequency spectrum licensees that did not want to reach an interconnection agreement with others.

The constitutional role of the State in the telecommunications sector, as expressed by COFETEL's interconnection decisions, was cardinal to the defense of fundamental rights and to the develop of competition and, therefore, it could not be subjected to suspension. In fact, suspending COFETEL's interconnection decisions meant undermining the competitiveness and the fundamental rights in the telecommunications market against Mexican constitutional provisions.

In conclusion, the Mexican State's constitutional power to regulate the telecommunications sector for public interest reasons such as defending fundamental rights, protecting final consumers, and promoting fair competition led the Plenary of the SCJN to rule against granting *amparo* related to COFETEL's interconnection mandates. Indeed, a suspension of COFETEL's interconnection rates decisions during the pendency of an *amparo* claim would delay and frustrate the effectiveness of regulatory measures taken to promote the public interest in the telecommunication sector until a final decision on the *amparo* claim is made. For instance, starting in 1998 the Mexican telecommunications incumbent Telmex succeeded in delaying the effectiveness of a regulatory authority decision affirming that Telmex had substantial power in the telephony market for 10 years, through filing a series of *amparos* and appeals, until a final judicial decision on the case.<sup>72</sup> Because COFETEL's interconnection mandates were expressions of the former constitutional regulatory authority, the Plenary of the SCJN saved COFETEL's interconnection rate decisions from being subject to a long period of suspension related to the amount of time required by a claim of *amparo* to reach its final judicial outcome.

### **6.3.2. Report of the Mexican Supreme Court decision of March 7, 2013 on the amparos en revision 426/2010 and 318/2011**

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<sup>72</sup> OECD, *supra* note 5 at 56.

The SCJN decision on March 2013 established several legal criteria that led to the recognition of the constitutionality of the FTL (repealed by the TBL on August 13, 2014) and the legality of COFETEL's interconnection decisions, granting them judicial deference against suspension and strengthening the role of COFETEL as the regulatory authority in the Mexican telecommunications.<sup>73</sup>

The outcome of the main legal issues addressed by the SCJN in this decision was:

- The Constitutionality of Art. 9-A, sec. X of the FTL (repealed by the TBL on August 13, 2014) that gave power to the regulatory authority to determine the interconnection conditions when parties cannot find an agreement.
- COFETEL had the power to fix the interconnection rates and other economic conditions when the licensees could not reach an agreement.
- The discretionary power of COFETEL in its regulatory decisions was subjected to the legal principles established by law.
- COFETEL's discretionary decisions that were gradually reducing the interconnection rates as well as the possibility to reduce call traffic in compliance with the principles of the FTL (at present, TBL) were legal.

In sum, the rulings of the Plenum of Mexico's Supreme Court restated the legality of COFETEL's interconnection decisions and reinforced COFETEL role as the undisputed regulator in the Mexican telecommunications sector. These rulings have functioned as a trailblazer for the telecommunications constitutional reform that recognizes powerful and effective regulatory tools to the new Mexican telecommunications regulatory authority, IFT.

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<sup>73</sup> *Comision Federal de Telecomunicaciones, Resoluciones de la SCJN Fortalecen la Actuacion de la Cofetel en Materia de Interconexion* (Mar. 7, 2013), available at <http://www.cft.gob.mx:8080/portal/wp-content/uploads/2013/03/Comunicado-10-Resoluciones-de-la-SCJN-fortalecen-la-actuación-de-la-Cofetel-en-materia-de-interconexión-Mar-07-2013.pdf> (Mex.).

## 7. New Federal Telecommunications and Broadcasting Law

The last step of the deep transformation of the telecommunications and broadcasting industries that has taken place in Mexico starting from the 2013 Constitutional amendment<sup>74</sup> has been achieved with the adoption of the New Federal Telecommunications and Broadcasting Law, published July 14, 2014.<sup>75</sup> The new Federal Telecommunications and Broadcasting Law (hereafter TBL) has repealed both the FTL and the Federal Radio and Television Law starting from August 13, 2014. The TBL implemented and expanded the Constitutional amendment concerning the telecommunications and antitrust legal framework adopted in June 2013. The TBL, among other things, 1) states IFT's powers, 2) establishes access and interconnection procedures, and 3) defines a preponderant economic agent's obligations along with its asymmetric regulation.

### 7.1. IFT's Powers

Following the legal framework already set in Art. 28 of the Mexico's Constitution by the 2013 Constitutional amendment, Art. 7 of the TBL restated Mexico's Constitutional provisions such as IFT's autonomy through its juridical personality and own patrimony, and IFT's promotion and regulation role with the objective of the efficient development of all broadcasting and telecommunications matters, including IFT's exclusive exercise of authority in antitrust matters affecting both markets. In particular, IFT will exercise its exclusive authority affecting antitrust matters under its jurisdiction with respect to the provisions of Art. 28 of the Mexico's Constitution, the TBL, the Federal Competition Law, and other applicable regulations.

### 7.2 Access and Interconnection

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<sup>74</sup> *Decreto, supra* note 7.

<sup>75</sup> Ley Federal de Telecomunicaciones y Radiodifusión [LFTR] [Telecommunications and Broadcasting Law], *as amended*, Diario Oficial de la Federación [DO], 14 de Julio de 2014 (Mex.).

The TBL states in Art. 129 the rules to achieve network access and set interconnection rates between telecom operators following a two step procedure: 1) like in Art. 42 of the repealed FTL, holders of licenses to public telecommunication networks shall interconnect their networks, and to this end shall reach an agreement within 60 calendar days from when any may request it; and 2) if said term has elapsed and the parties have not executed an agreement, the interested party shall request IFT to rule on the interconnection rates, conditions, and terms not agreed with the other party.

The proceeding before IFT related to interconnection matters can be terminated by either **a)** IFT's decision on interconnection matters issued no later than 30 working days from the parties' deadline to make allegations (Art. 129 sec. VI), or **b)** the parties' agreement ratified before the IFT before IFT issues a decision on the dispute. According to Art. 129 par. 2 sec. IX, IFT's decision on interconnection rates will be effective no later than 30 days starting from the day after either **i.** notification of IFT's decision or **ii.** the parties' ratification of an agreement before the IFT. Moreover, IFT enjoys the power to apply sanctions against telecom operators that do not comply with either IFT's interconnection rate decisions or parties' agreements ratified before IFT.

Finally, as explained throughout the paper, IFT's interconnection decisions can be appealed only with a claim of "indirect *amparo*" that does not suspend the regulatory decision during the pendency of the *amparo* proceeding before the court.

### **7.3. Preponderant Economic Agent's Obligations and Asymmetric Regulation: Art. 131 TBL declared unconstitutional by the Mexico's Supreme Court**

The TBL confirmed IFT's ability to impose asymmetric obligations on any operator found to be preponderant in each of the telecommunications or broadcasting sectors. Article 262 of the TBL qualifies as preponderant economic operators those who hold a national participation in the

telecommunications or broadcasting sectors that exceeds 50% of users, subscribers, audience, traffic on its networks or used capacity thereof.<sup>76</sup>

Among the most important obligations IFT can impose on preponderant telecom operators are the following:<sup>77</sup> a) obligations to provide interconnection on a non-discriminatory basis, b) unbundling local loop services, c) infrastructure sharing, d) obligation to obtain IFT's prior approval for all service pricing to consumers.

As already shown in IFT's decisions on March 2014, IFT has the power to determine preponderant economic operators in the telecom and broadcasting sectors and impose on them asymmetric interconnection rates pre-fixed by IFT. First, in the decision of March 6, 2014, IFT determined Telmex, Telnor, and Telcel as preponderant economic operators in the telecom sector.<sup>78</sup> Second, in the decision of March 26, 2014, the plenary of IFT set the asymmetric interconnection rates applying to telecom preponderant economic operators<sup>79</sup> that are in effect from April 6 until December 31, 2014.<sup>80</sup> However, the new Federal Telecommunications and

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<sup>76</sup> For the mathematic formula to apply in order to determine a *preponderant economic agent* see: Ley Federal de Telecomunicaciones y Radiodifusión [LFTR] [Telecommunications and Broadcasting Law], *as amended*, transitory Art. 9, Diario Oficial de la Federación [DO], 14 de Julio de 2014 (Mex.).

<sup>77</sup> Ley Federal de Telecomunicaciones y Radiodifusión [LFTR] [Telecommunications and Broadcasting Law], *as amended*, Art. 267, Diario Oficial de la Federación [DO], 14 de Julio de 2014 (Mex.).

<sup>78</sup> Instituto Federal de Telecomunicaciones, *De la Sesión del Pleno del Instituto Federal de telecomunicaciones en su V Sesión Extraordinaria del 2014, Celebrada el 6 de Marzo de 2014* [Plenary session of IFT Committee at its V Extraordinary Session] (Mar. 6, 2014), *available* at [http://apps.ift.org.mx/publicdata/P\\_IFT\\_EXT\\_060314\\_76\\_Version\\_Publica\\_Hoja.pdf](http://apps.ift.org.mx/publicdata/P_IFT_EXT_060314_76_Version_Publica_Hoja.pdf)

<sup>79</sup> Instituto Federal de Telecomunicaciones, *Acuerdo Mediante el cual el Pleno del Instituto Federal de telecomunicaciones determinas las tarifas Asimétricas por los servicios de Interconexión que cobrará el agente económico preponderante* [Agreement by which the Plenary of IFT Committee determined the Asymmetric Interconnection Rates to Apply to the Preponderant Economic Agent], (Mar. 26, 2014), *available* at [http://apps.ift.org.mx/publicdata/P\\_IFT\\_260314\\_17.pdf](http://apps.ift.org.mx/publicdata/P_IFT_260314_17.pdf)

<sup>80</sup> Press Release, América Móvil, América Móvil Informs (March 31, 2014), *available* at [http://www.americamovil.com/ mailing/AMX\\_about\\_IFETEL.pdf](http://www.americamovil.com/ mailing/AMX_about_IFETEL.pdf).

Broadcasting Law goes further than IFT's March 2013 asymmetric interconnection decision by stating in Art. 131 sec. a) that a preponderant economic operator does not have the right to charge anything for termination of traffic in its own network. Therefore, calls of all the Mexican non-preponderant operators completing in the preponderant operators' network (Telmex, Telcel, and Telnor) are not subject to interconnection charges at all.

Although the purpose of Art. 131 of the TBL is to unravel the highly concentrated Mexican telecom market and to foster competition by imposing a zero-interconnection rate for calls completing in the preponderant operators' network, the provision of Art. 131 of the TBL has been subject to constitutional challenge. Indeed, even though Art. 131 of the TBL seems to follow OECD best practice that recognizes innovation and greater flexibility in business models where the termination rates are set low or at zero,<sup>81</sup> it subtracts from IFT the constitutional power of imposing measures on preponderant economic operators to avoid results affecting competition – including asymmetric interconnection rates – assigned to the new regulatory authority by Mexico's Constitution. Therefore on August 16, 2017, Mexico's Supreme Court unanimously decided that Art. 131 of the TBL is unconstitutional because it violates IFT's autonomous constitutional power to set asymmetric interconnection rates on preponderant economic operators.<sup>82</sup> The Supreme Court did not establish whether imposing a zero-interconnection rate would be illegitimate per se, but it just established that it is the sector regulator IFT, and not the Mexican Congress, the authority responsible for regulating telecommunications tariffs. IFT's constitutional power, indeed, has already been exercised by the new regulatory authority through setting the asymmetric interconnection rates applying to

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<sup>81</sup> OECD (2013), OECD Communications Outlook 2013 52, OECD Publishing, *available at* <http://www.oecd-ilibrary.org/docserver/download/9313021e.pdf?expires=1408584910&id=id&accname=ocid194760&checksum=535C03FA9DCCEFB85EE14014DE234296>.

<sup>82</sup> Suprema Corte de Justicia de la Nación, press release (Aug. 16, 2017) *available at* <http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=4582>

preponderant economic operators in the decision of March 6 and 26, 2014.<sup>83</sup>

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In order to understand more fully the application of Art. 131 of the TBL,<sup>85</sup> the difference between a “*preponderant economic agent*” and an “*agent with substantial power*” in the telecom market should be appreciated. The former (*preponderant economic agent*) is determined by Art. 131 par. 2 of the TBL to be those who hold a national participation in the telecommunications or broadcasting sectors that exceeds 50% of users, subscribers, audience, traffic on its networks or used capacity thereof, and is subject to a mandatory statutory application of a zero interconnection rates for calls originating from competitors’ customers and completing in the preponderant economic operator’s network. The latter (*agent with substantial power*), falling below the quantity requirements set in Art. 131 par. 2 of the TBL but still handling a substantial power in the telecom sector, is subject to IFT’s assessment of either 1) continuing to apply the original zero interconnection rate for calls originating from competitors’ customers and completing in the preponderant economic operator’s network (as in Art. 131 sec. **a**) of the TBL), or 2) fixing a new asymmetric interconnection rate according to Art. 131 par. 2-3-4 sec. **b**) of the TBL. Hence, while the procedure of letting IFT free to decide either whether imposing a zero-interconnection rate or fixing asymmetric interconnection rates on *agent*

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<sup>83</sup>Instituto Federal de Telecomunicaciones, *De la Sesión del Pleno del Instituto Federal de telecomunicaciones en su V Sesión Extraordinaria del 2014, Celebrada el 6 de Marzo de 2014* [Plenary session of IFT Committee at its V Extraordinary Session] (Mar. 6, 2014), available at

[http://apps.ift.org.mx/publicdata/P\\_IFT\\_EXT\\_060314\\_76\\_Version\\_Publica\\_Hoja.pdf](http://apps.ift.org.mx/publicdata/P_IFT_EXT_060314_76_Version_Publica_Hoja.pdf)

<sup>84</sup>Instituto Federal de Telecomunicaciones, *Acuerdo Mediante el cual el Pleno del Instituto Federal de telecomunicaciones determinas las tarifas Asimétricas por los servicios de Interconexión que cobrará el agente económico preponderante* [Agreement by which the Plenary of IFT Committee determined the Asymmetric Interconnection Rates to Apply to the Predominant Economic Agent], (Mar. 26, 2014), available at [http://apps.ift.org.mx/publicdata/P\\_IFT\\_260314\\_17.pdf](http://apps.ift.org.mx/publicdata/P_IFT_260314_17.pdf)

<sup>85</sup> See Art. 131, Ley Federal de Telecomunicaciones y Radiodifusión [LFTR] [Telecommunications and Broadcasting Law], as amended, Art. 267, Diario Oficial de la Federación [DO], 14 de Julio de 2014 (Mex.).

*with substantial power* respects IFT's constitutional powers to encourage competition by imposing fair or cost-based asymmetric interconnection rates, the same may not be asserted for the mandatory statutory zero interconnection rate applied on *preponderant economic agent* through Art. 131 sec. a) of the TBL. Indeed, the latter has been declared unconstitutional by the Mexico's Supreme Court potentially because the TBL approved by the Mexican Congress imposes a political influence that it is not necessarily related to market consideration of efficiency.

As a result of the new, strong regulatory powers enjoyed by IFT to set access obligations against dominant operators in the telecom sector as well as the new TBL provision setting zero-interconnection rates for calls completing in the network of dominant operators, the América Móvil Group – who owns both the Mexican dominant operators Telmex and Telcel – has declared its intention to divest subscribers and assets to reduce its market share below 50% in order to avoid the stringent dominant operators asymmetric regulation set by the new Federal Telecommunications and Broadcasting Law. Indeed, the América Móvil's board of directors advised through a press release on July 8, 2014 that it “resolved to authorize measures to reduce its national market share in the Mexican telecommunications market under fifty percent in order to cease being a *“preponderant economic agent,”* under the terms of the Constitution of the United Mexican States and its implementing legislation.”<sup>86</sup> América Móvil has also stated that the zero-interconnection rate imposed on the group *“is confiscatory, is not objectively reasonable, and constitutes a disproportionate restriction on freedom of trade”*.<sup>87</sup>

## 8. Conclusion

“We are living a historic new phase in the Mexican telecommunications sector, which began with the last year's constitutional

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<sup>86</sup> Press Release, América Móvil, América Móvil Informs (July 8, 2014), available at [http://www.americamovil.com/mailling/AMX\\_Strategic\\_Committee.pdf](http://www.americamovil.com/mailling/AMX_Strategic_Committee.pdf)

<sup>87</sup> América Móvil, press release (Aug. 16, 2017), available at [http://www.americamovil.com/sites/default/files/2017-08/AMX-SCJN-en\\_2.pdf](http://www.americamovil.com/sites/default/files/2017-08/AMX-SCJN-en_2.pdf)

reforms,” said former telecom regulator Mony de Swaan. “We are seeing the beginning of the end of a period of almost complete dominance of Mr. Slim.”<sup>88</sup> The new TBL seems to be the cure for the highly concentrated Mexican telecom market because, along with the Telecom Constitutional reform, it is capable of attracting new telecom operator entrants, and fostering competition to the benefit of Mexican consumers.

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<sup>88</sup> Anthony Harrup & Juan Montes, *América Móvil to Sell Assets to Cut Mexico Market Share Below 50%*, Wall St. J. (Jul. 8, 2014, 8:48 PM), available at <http://online.wsj.com/articles/america-movil-to-sell-assets-to-cut-mexico-market-share-below-50-1404859497>

La rivista “Diritto Mercato Tecnologia” offre aggiornamenti e riflessioni agli studiosi e agli operatori nel nuovo scenario socio-economico originato dal legame tra diritto, mercato e tecnologia, in prospettiva interdisciplinare e comparatistica. Approfondisce, con studi nei settori privatistici e comparatistici, tematiche afferenti, in particolare, alla proprietà intellettuale, al diritto antitrust e della concorrenza, alle pratiche commerciali e alla tutela dei consumatori, al biodiritto e alle biotecnologie, al diritto delle comunicazioni elettroniche, ai diritti della persona e alle responsabilità in rete.

