



# Project Finance

in 38 jurisdictions worldwide

Contributing editors: E Waide Warner Jr and Gavin R Skene

# 2010



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# Mexico

Rogelio López-Velarde and Amanda Valdez

López Velarde, Heftye y Soria

## 1 Collateral

What types of collateral are available?

Security packages for international non-recourse financing associated with the development of projects in Mexico normally integrate a series of security interests over the project assets under both Mexican and foreign law (normally New York law). Mexican law allows the creation of security interests over almost all kinds of assets and rights held by project companies, including in rem security interests over real estate properties, contractual rights, licences, concessions and permits, moveable property and intellectual property rights. There are, however, exceptions to this general rule. For instance, contractual rights stemming from contracts governed by Mexico's government procurement laws (ie, all contracts with government entities and agencies) are limited on the type of security interests granted, as only account receivables may be assigned; thus, foreclosure over other contractual rights (such as typical step-in rights) is generally disallowed.

Pledges are normally created over contractual rights, account receivables, moveable property, and membership interests of the project companies. Mortgages are established over real estate properties, including land, buildings and fixtures. Pledges and mortgages grant in rem rights in favour of the pledgee or mortgagee, as well as priority rights in bankruptcy proceedings. Most pledges and all mortgages are subject to registration for public notice purposes, which is one of the key elements determining the priority among security interests affecting a specific asset.

It is also common to see security packages that include the creation of guarantee trusts. Under a guarantee trust, settler transfers title to a series of assets and rights to a trustee (normally a Mexican bank, as only certain entities may act as trustees under Mexican law), who holds title to the relevant assets and rights (ie, the trust estate) inasmuch as there are outstanding obligations under the financing arrangements. Meanwhile, the settler retains a beneficial interest to use and benefit from the corpus of the trust in the ordinary course of business, for as long as no defaults occur; if, however, a default occurs, the trustee is then authorised to foreclose on the trust estate through tailor-made foreclosure procedures established in the trust indenture, including out-of-court foreclosure (subject to certain due process requirements).

Similar foreclosure benefits were afforded to the 'pledges without dispossession' (ie, pledges in which the pledgor retains the use and possession of the pledged assets), as a result of reforms introduced in June 2003, when a series of federal statutes were amended to expedite commercial foreclosures and improve collection procedures, as a way to foster Mexico's lending environment.

On the other hand, Mexican law provides specific security interests for certain types of assets, such as aircraft and vessels; and lenders providing financing under the *avio* or *refaccionario* loans contemplated in the General Law of Negotiable Instruments and Credit Transactions. The purpose of a *refaccionario* loan (which is similar to a purchase money security interest) is to finance the start-up costs

of an agricultural or industrial business. *Avio* loans, on the other hand, are aimed at financing the continued operation of the business, and, therefore, the proceeds of the loan shall be used, under the supervision of the lender, to finance the acquisition of raw materials, salary payments, and direct indispensable business operation costs. Both *refaccionario* and *avio* loans are intended to finance production enterprises, and therefore, are not suitable for all types of projects. The lenders of an *avio* loan have a statutory non-possessory security interest over the goods purchased by the debtor, as well as the fruits, products and devices obtained with the use of the loan proceeds. The lenders of a *refaccionario* loan, on the other hand, have a statutory non-possessory purchase money security interest over business' real and moveable property, including machinery, instruments, and the fruits and products obtained therefrom.

Finally, Mexican banks are allowed to obtain special mortgages known as 'industrial mortgages' covering not only the real estate property of a certain business being financed by them, but also its concessions or licences, as well as all personal property utilised by the enterprise in its operations and the cash and accounts receivable generated; and banking pledges, which are pledges over 'durable consumer goods' (ie, goods that are not consumed as a result of their ordinary use), which does not require the delivery of the goods, but only the delivery of the invoice of purchase, with an annotation evidencing the pledge.

Because the purpose of this chapter is to provide international lenders and professionals with a general view of the project finance environment in Mexico, we have excluded from the rest of our responses all aspects related to *avio* and *refaccionario* loans (as the international financing community does not normally resort to Mexican law-governed loan agreements), as well as industrial mortgages and banking pledges (as those are available only for Mexican banks).

## 2 Perfection and priority

How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

Mortgages and guarantee trusts encompassing real estate property are perfected upon execution of the relevant deed of mortgage or deed of trust, validated by a notary public, and its registration at the Public Registry of Property of the location of the property. The priority of security interests over real estate property is determined by the time of filing of the security instrument for registration with the Public Registry of Property.

Regular commercial pledges are generally perfected by the delivery of the pledged assets to either the secured creditor or a third-party depositary. Prior to 2003, when the transaction required that the

debtor retain possession of the pledged assets, the lenders would typically designate an agent of the debtor to act as depositary; however, since non-possessory pledges were introduced it is no longer common to see regular commercial pledges being used in large project financing structures (except for pledges over shares or membership interests held by foreign entities). Instead, lenders resort to pledges without dispossession, where the pledge is perfected upon registration with the Public Registry of Commerce. Regular pledges for security over shares or membership interests are perfected upon registration in the corporate books of the interests' issuer.

Guarantee trusts over contractual rights require notice to all counterparties about the transfer of rights to the trust, while guarantee trusts involving personal property generally only require written form to be enforceable.

The creation of security interests over concessions, licences and similar rights, as well as certain regulated assets (eg, gas pipelines) normally requires prior approval of the governmental agency that granted such concession or licence (or at least notice). Additionally, special registrations may be required for security interests over specific assets such as aircraft, vessels or mining properties.

Registration fees and notarial fees are the main costs associated with the effectiveness and perfection of security documents, and they vary from state to state. Notarial fees are subject to maximum levels established by the state governments; however, notaries are normally allowed to grant discounts, which are normally obtained for large transactions. Likewise, some local laws permit discounts on the applicable registration fees when the transaction is related to a project that proves to be beneficial for the relevant state (eg, infrastructure, creation of jobs, direct investment in the state).

A corporate entity may hold collateral on behalf of the project lenders as the secured party, in the capacity of collateral agent, provided its appointment as agent is made in writing, specifically including the authorisation of the lenders to the agent to hold, in its own name, but for the benefit of the project lenders, the collateral granted in Mexico.

On 27 August 2009, a series of legal reforms were published for purposes of making the registration and search of security interests over personal property more efficient, through the creation of a special section of the Public Registry of Commerce for the registration of this type of security interests. This new section of the Public Registry of Commerce shall commence operations within one year, pursuant to the implementing regulations and procedures to be issued for that purpose.

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### 3 Existing liens

How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Typically, a search is conducted at the Public Registry of Property corresponding to the property's location. The creditor obtains a certificate indicating the registered owner of the property, and any registered liens over such property.

In addition, creditors should obtain copies of the registration files of the debtor at the Public Registry of Commerce (which acts as the registrar of companies) and other applicable registries, which may contain entries related to pledges and other security interests over the debtor's assets. Not all pledges require registration.

With respect to liens over the shares or membership interests of a company, creditors should review the company's shareholders' or members' registry books, and in the case of shares, review the actual share certificates to confirm the absence of any endorsements or annotations related to previous liens.

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### 4 Foreclosure on and sale of collateral

What steps must a project lender take to foreclose on and sell collateral in your jurisdiction?

Foreclosure procedures vary depending on the type of collateral. Foreclosure of mortgages requires judicial intervention pursuant to the summary proceedings that ultimately result in a public auction of the mortgaged properties, where the project lenders may participate requesting that the properties be transferred to them as payment of the guaranteed debt at the price (or a certain percentage of the price, depending on the applicable local laws) applicable at the relevant stage of the auction.

In the case of non-possessory pledges and guarantee trusts, summary judicial foreclosure proceedings are available, with the alternative option of having the relevant assets sold through a non-judicial proceeding if the parties are in agreement about the amount and due and payable status of the defaulted obligations. In addition, in the case of guarantee trusts, the parties are entitled to establish in the relevant trust indenture, ad hoc foreclosure procedures, where no judicial intervention is required. Judicial foreclosure procedures allow the secured lenders to receive the pledged assets upon determination of their value or choose to have such assets sold in a public auction procedure.

The sale of assets being foreclosed may be denominated in a foreign currency in the case of non-judicial foreclosure procedures.

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### 5 Foreign exchange

What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

Under the multiple bilateral investment protection treaties and free trade agreements to which Mexico is a party (eg, NAFTA, EU–Mexico Treaty), the Mexican government has accepted substantial restrictions on its ability to impose exchange control measures, or any sort of restrictions on transfers for the repatriation of funds. As a result, Mexican law does not currently contemplate any restrictions, controls, governmental fees or taxes on foreign currency exchange or transfers of funds to parties abroad.

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### 6 Remittances

What are the restrictions, controls, fees and taxes on remittances of investment returns or loan payments to parties in other jurisdictions?

Please see question 5. We do note, however, that remittances of investment returns and interest related to loans granted by foreign residents may be subject to income tax withholdings, at different rates ranging from zero to 28 per cent, depending on the nature of the remittance and the underlying transaction, the characteristics of the investor or lender, and the applicability of a double taxation treaty.

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### 7 Repatriation

Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

No, earnings need not be converted to local currency; there are no specific restrictions over their use or repatriation.

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### 8 Offshore and foreign currency accounts

May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Yes, project companies are allowed to establish and maintain foreign currency accounts both in other jurisdictions and locally. It is typical for project finance schemes that dollar-denominated accounts be set up onshore and offshore to receive the revenues of the project and pay lenders and other parties based on the financing documents' 'waterfall'.

**9 Foreign investment and ownership restrictions**

What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Although 100 per cent foreign ownership is permitted in most sectors, Mexican law does provide a series of restrictions on foreign investments in projects and related companies involved in certain specific activities. For this purpose, economic activities may be classified as follows:

- activities reserved to the state; for example, oil and gas exploration and production (except for oilfield services), production of basic petrochemicals, transmission and distribution of electricity as a public service, radioactive minerals;
- activities reserved for Mexican companies with no foreign investment (eg, gasoline retail, LP gas distribution, radio and TV broadcasting);
- activities with foreign investment limited to a certain percentage (domestic air transportation, cabotage, insurance, mobile telephone services);
- activities requiring approval by the National Commission on Foreign Investment (CNIE) for participation over 49 per cent (eg, ports, shipping services, private education, oil and gas drilling);
- activities with no restriction to foreign investment; and
- acquisitions above a certain monetary threshold requiring approval.

Foreign investors may nevertheless participate in reserved activities through 'neutral investment', with limited corporate rights, with prior approval of the CNIE.

Foreigners are not allowed to directly own real estate for residential purposes within 50km of the coast line and 100km from borders; however, they may hold beneficiary rights through a trust, which nevertheless provides full control of their investment.

All of these restrictions are equally applicable to foreign investors or creditors in the event of foreclosure in the project and related companies. Mexico is a party to numerous bilateral investment treaties and many of them contemplate security interests as investments subject to protection; however, their application in the context of a foreclosure on a project or related companies has not been tested, and therefore, it is difficult to anticipate the way Mexican courts will enforce the protection afforded under such treaties and the foreign investment restrictions normally applicable, as this situation is not specifically regulated either under the bilateral investment treaties to which Mexico is a party or under Mexico's statutory law.

No special fees or taxes are applicable to foreign investments, except for nominal fees for the mandatory registration of foreign-owned companies with the National Registry of Foreign Investment.

**10 Documentation formalities**

Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

As a general rule, the financing documents (other than security documents) and other project documents (except for those related to real estate rights) do not need to be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable; however, in the case of financing documents, it is sometimes advisable to have them registered along with the security documents, attaching official Spanish translations. This registration is intended to facilitate their enforcement, as it provides certainty about the terms of the financing documents and the terms of the

official translation that is to be used if the documents are to be enforced in a judicial procedure before Mexican courts. Mortgages and certain trusts need to be signed and validated by a notary public to be valid and enforceable.

**11 Government approvals**

What government approvals are required for typical project finance transactions? What fees and other charges apply?

There are no specific fees, approvals or licences required for typical project finance transactions, except for equity investments by foreigners in activities requiring CNIE approval. Likewise, foreign lenders may require certain registrations and tax certifications to qualify for reduced income tax rates.

**12 Foreign insurance**

What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

As a general rule, Mexican law prohibits that risks in Mexico be insured by foreign insurers. Thus, policies contracted with foreign insurers not authorised to operate in Mexico are not enforceable in Mexico. Reinsurance activities are permitted and not subject to the aforesaid restrictions (it is not uncommon to see foreign investors or creditors requiring satisfactory reinsurance); however, cut-through clauses are not enforceable under Mexican law. Other exceptions may apply under free trade agreements to which Mexico is a party.

Insurance policies issued by Mexican insurers may be payable to foreign secured creditors.

**13 Foreign employee restrictions**

What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Except for directors and general managers, Mexican labour law requires that at least 90 per cent of a company's employees be Mexican nationals. Technicians or professionals shall always be Mexican, except when there are no Mexican individuals available to take positions of a certain speciality, in which case, employers may hire foreigners in a proportion not exceeding 10 per cent, with a joint obligation by the foreign employees and the employer of training Mexican employees in the relevant speciality. All medical doctors shall be Mexican nationals. Foreign expertise needs may, nevertheless, be dealt through company-to-company personnel services agreements, through which foreign employees may be temporarily seconded to a project in Mexico, without establishing employment relationships with the Mexican enterprise.

All foreign personnel in Mexico are required to obtain appropriate immigration visas.

**14 Equipment import restrictions**

What restrictions exist on the importation of project equipment?

Because of numerous free trade agreements to which Mexico is a party, the importation of equipment is rather open, except for regular customs procedures and recordings. There are, however, limitations on the overall volume of importations of specific merchandise and equipment, and licences may be required for highly specialised equipment.

### 15 Nationalisation and expropriation

What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Expropriation is permitted only for public use purposes, upon payment of indemnification at market value. In addition, under Mexico's multiple bilateral investment treaties (including chapter XI of NAFTA and the treaties with Japan and most EU countries), Mexico has various commitments concerning expropriation and even creeping expropriation, which include:

- fair and non-discriminatory treatment to nationals of other treaty countries (the Protected Investors);
- refraining from impairing, by arbitrary or discriminatory measures, the management, maintenance, use, enjoyment or disposal of the Protected Investors' investments;
- MFN and national treatment;
- refraining from nationalising, expropriating or subjecting to measures in tantamount to nationalisation or expropriation, the investments of Protected Investors, except for expropriations made in the public interest, on non-discriminatory bases, under due process of law, and upon fair, market-value compensation paid in hard currency; and
- allowing free repatriation of funds.

In addition, under the US–Mexico Agreement for the Promotion of Investment, US businesses may benefit in Mexico from the investment protection, insurance and financing programmes and services offered by the Overseas Private Investment Corporation (OPIC). Mexico has not signed an agreement with ICSID, but it recently became a member of MIGA and has signed more than 26 bilateral investment treaties with its main trading partners.

### 16 Fiscal treatment of foreign investment

What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, for the purpose of effectiveness or registration?

Although there are no tax incentives specifically designed to attract foreign investment, foreign investors do benefit from reduced tax rates and tax credits recognised under multiple double taxation treaties signed by Mexico. Foreign investors also take advantage of sector-specific tax incentives in which foreign owned enterprises have taken the lead, including tax benefits for research and development projects, and special tax incentives for export-oriented assembly plants (maquiladoras). Foreign creditors may also benefit from reduced tax rates under double taxation treaties.

Registration fees and notarial fees are the main costs associated with the effectiveness and perfection of security documents, and those are equally applicable regardless if the parties to the transactions are foreign or Mexican.

### 17 Government authorities

What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

The government agencies and instrumentalities in typical project sectors continue to play a major role in Mexico; in some sectors, such as energy, because of the prevalent role of the state-owned companies, and in other infrastructure sectors because they are typically subject to government concessions. Additionally, federal environmental and antitrust authorities are typically involved: the Federal Competition Commission (CFC) and the Ministry of Environment and Natural Resources (SEMARNAT). CFC is required to provide clearance for

participation in certain sectors, to oversee market behaviour and economic conditions (eg, in ports and gas pipelines). SEMARNAT authorises infrastructure projects from the environmental impact and risk standpoints; lenders typically scrutinise the SEMARNAT approvals, to assess the environmental performance characteristics of the project from the standpoint of international lending community standards, including the Equator Principles.

In the energy sector, the state-owned companies – Pemex on the oil and gas side and the Federal Electricity Commission (CFE) on the power side – continue to play a major role in infrastructure development in Mexico. This is because most activities in the oil and gas sector, from upstream, midstream and downstream, and in the transmission and distribution of power are undertaken by the Mexican government. Therefore, a considerable portion of project finance deals refer to contracts having as an anchor tenant or facilities owner either the CFE or Pemex (through its various subsidiaries in the exploration and production, gas, refining and petrochemical subsectors). On the regulatory side, projects developed by private investors in the natural gas and power sectors (including gas transportation pipelines, LNG terminals and IPP power plants) are regulated by the Energy Regulatory Commission (CRE). Nuclear power, which is projected to have a sustained growth in Mexico in the years to come, is regulated by the National Commission on Nuclear Safety and Safeguards. The Ministry of Energy has a limited role in project finance structures as a regulator in the area of LPG terminals and pipelines. Mexico's independent regulator for oil and gas exploration and production activities is new and its activity is still incipient.

With respect to the communications infrastructure sector, including toll roads, ports and suburban trains, among others, the Ministry of Communications and Transportation (SCT) regulates the provision of services, including setting of rates and standards for services, and issues the relevant concessions to the project sponsors. In many instances, the project finance structures in this sector also interact with FONADIN, a government infrastructure development trust, which provides funding with limited recovery, and obtains certain limited rights to participate in proceeds after project lenders have been fully paid.

Waste water treatment plants and other water infrastructure facilities are usually developed by state authorities, and are thus subject to the jurisdiction of state authorities. Most projects are awarded through public tenders subject to state government procurement statutes.

Mineral extraction is regulated by the General Bureau of Mines, which issues exploration and exploitation concessions, collects fees payable by the mining companies and oversees compliance with development and exploitation plans.

### 18 International arbitration

How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Although Mexico is not yet a party to the ICSID Convention, Mexico fully recognises arbitration awards and arbitration agreements through its internal laws and other international treaties to which Mexico is a party. Arbitration in Mexico is mainly governed by Mexico's Commerce Code (which substantially adopted UNCITRAL's Model Arbitration Law), and the New York Convention (in addition to a number of other international arbitration treaties such as the Montevideo and the Panama Interamerican Conventions). International treaties are deemed, under the Mexican Constitution, as 'the Supreme Law of the Land'. Courts have the duty to decline jurisdiction and to order that the parties in controversy submit to arbitration, if the controversy is the subject matter of a written arbitration agreement.

With respect to arbitrability of matters, mostly all commercial matters are subject to arbitration, thus, most project agreements involved in a financing package can be subject to arbitration. Controversies arising from industrial property law, antitrust, labour, criminal law, tax and administrative laws, and bankruptcy are generally not arbitrable. With respect to government procurement contracts, the government procurement laws contemplate certain restrictions for cases in which a controversy can be subject to arbitration, which rules have not yet been issued. A worthy exception is Pemex and CFE contracts, where their own organisational statutes authorise submission of commercial disputes to international arbitration and even foreign law when required.

#### 19 Applicable law

Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Irrespective of Mexican conflict-of-laws rules, project agreements and financing agreements may be governed by their corresponding choice of law clauses, either Mexican or foreign. Unlike other jurisdictions, there is no need to have a substantial relationship between the law contractually chosen and the parties or subject matter of the relevant contract. Likewise, Mexican law follows the principle of *iura novit curia*, and therefore, foreign law is given full faith and credit, and is binding and enforceable in Mexican courts to the extent it does not contradict Mexico's public policy or was selected to willfully defraud Mexico's public policy (*fraus legis*).

While Mexican law generally allows the parties to choose the applicable law, project agreements are usually subject to Mexican law, because for infrastructure development, contracts usually have a number of regulatory and local issues, and interface with permits and concessions, and substantial performance of the contracts in Mexico plays a major role. The international lending community is usually comfortable with the choice of Mexican law for project agreements. Project agreements that stem from a government procurement process are governed by domestic federal laws.

On the other hand, pursuant to Mexico's conflict-of-laws rule (*lex rei sitae*), real estate property rights cannot be subject to a choice of law other than the law of the realty's location. Therefore, real estate property and rights shall always be governed by Mexican federal or local laws.

As to the documents comprising the financing package, the loan documents, including certain offshore collateral, are usually subject to New York law (and occasionally to other laws of choice of the lenders), while security documents (mortgages, share pledges and guarantee trusts related to property in Mexico) are subject to Mexican law.

#### 20 Jurisdiction and waiver of immunity

Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Submission to a foreign jurisdiction is effective and enforceable under Mexican law, if its enforcement is reciprocal (ie, its enforcement is not left to the discretion of one of the parties), the jurisdiction and venue contractually selected is where performance of the contract occurs or the court selected has personal jurisdiction over one of the parties or the relevant contract, or the subject matter of the contract is not subject to the exclusive jurisdiction of Mexican courts (eg, real estate matters, natural resources), and the parties have unequivocally waived their corresponding jurisdiction. Federal rules of civil procedure, and those of most Mexican states, have a whole chapter governing recognition and enforcement of foreign money judgments.

Unlike other jurisdictions, there is no sovereign immunity recognised under Mexican law; there is, however, certain immunity against attachments, attachments in aid of execution, garnishments or fore-

closures of certain assets which are government property or services under the exclusive control of the government.

#### 21 Bankruptcy

What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes are available to seize the assets of a business outside of court proceedings?

Mexico's bankruptcy statute, the Commercial Insolvency Law (CIL), establishes that, except for Mexican insurance and bonding companies, all commercial entities may be subject to insolvency and bankruptcy proceedings. As to governmental entities, only those commercial companies in which the Mexican government participates may be subject to insolvency proceedings. No governmental agencies or public instrumentalities may be subject to bankruptcy proceedings and none of their assets may be seized thereunder.

Mexican law does not allow the seizure of assets outside court proceedings. Any such acts or actions aimed at seizing assets of an individual or company shall be undertaken and approved by the courts under applicable procedural rules.

For as long as a procedure under the CIL is being undertaken, no seizure of assets is allowed, but only as a preventive measure resolved by the court to guarantee payment of credits in limited cases.

Foreign creditors are treated the same as local creditors. The law also allows the acknowledgment in Mexico of procedures undertaken abroad, and the request for assistance by a foreign authority, with respect to a procedure being undertaken in Mexico. The CIL procedures are in such case applicable unless otherwise provided by international treaties or unless there is no international reciprocity.

#### 22 Title to natural resources

Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Under Mexico's Constitution, the Mexican nation has title to real property rights over the land, waters and all subsoil products (including but not limited to minerals) within Mexican territory. Nevertheless, Mexico's Constitution and the Mexican nation also grant and acknowledge the right to private property by Mexican or foreign individuals or companies, subject to certain limitations as to the type, location and in some cases (eg, agrarian property), size of the relevant land.

Rights of private parties over natural resources such as water or minerals (other than radioactive minerals and domestic hydrocarbons) are granted by the state through concessions and permits for their use or exploitation; no property rights are granted. Moreover, no rights over subsoil products are granted to private parties. Holders of concessions and permits for use or exploitation of natural resources are limited to the rights provided in their concession title or permit, as well as specific limitations set forth in the applicable statutes under which the concession or permit was granted (eg, the Mining Law and the National Waters Law). No concessions are allowed for the exploration and exploitation of domestic hydrocarbons and radioactive minerals, and for the provision of transmission and distribution of electricity as a utility service.

#### 23 Royalties on the extraction of natural resources

What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

Royalties payable for the extraction of minerals are determined on the basis of the property surface subject of the concession, with no participation based on volumes of production or net revenues of the concession holder. Fees are payable on equal terms by domestic and foreign parties, and there are no restrictions for foreign investment in mining activities. Regular income taxes apply.

### Update and trends

Like many other countries, Mexico is relying on the promotion of infrastructure development as an anti-cyclic measure to overcome the worldwide financial crisis. In this regard, the Mexican federal government decided to undertake a number of reforms to modify key aspects of its budgetary structure to allow the release of funds that could be allocated to increase federal spending in infrastructure projects, mainly related to gas, oil and electricity. These include maintenance of power generation, transmission and distribution infrastructure, Pemex's facilities, roads, railways, education, health, safety, agriculture and tourism, among others. As a result, the federal government increased the funds originally allocated to infrastructure projects by more than US\$4 billion, and has launched an important programme of public bids. As a result, the National Infrastructure Fund (Fonadin), has increased its participation in the provision of funds to promote infrastructure projects involving private and public participation, where both recoverable and non-recoverable funds are contributed. The National Infrastructure Fund is mainly focused on tourism, water treatment and roads. Development banks, on the other hand, have developed new programmes intended to facilitate the provision of credit lines and guarantees to private parties involved who have been awarded concessions or contracts related to infrastructure projects.

However, most public resources are still being made available to the market through governmental entities contracting infrastructure projects, which are required to meet stringent project feasibility parameters, go through detailed approval processes, and launch public tendering procedures to have the projects awarded; and thus, projects are not being awarded quickly enough to effectively ease the

effects of the financial crisis. On the other hand, private investors are nevertheless required to put a certain percentage of risk capital, and obtain financing from other sources, which continues to be difficult in the present circumstances, even despite the public funds and support that are being contributed to the projects.

After extensive debate, in October 2008 the Mexican Congress finally passed a long-awaited reform of the Mexican energy sector. The Energy Reform entails the most important reform in the regulation of the Mexican oil and gas industry since 1958, when the Petroleum Law was first enacted, and includes the ability of Pemex to enter into incentive-based contracts or performance contracts consistent with industry practices, take investment decisions more independently and modify its operating structure through the creation of new subsidiary entities without the need for the approval of Congress, and the creation of an upstream regulator that can supervise Pemex's exploration and production activities and determine production programmes (including reserves substitution levels, technology programmes, among others) from a technical standpoint. In addition, the Energy Reform recognises the importance of a gradual substitution of fossil fuels in the worldwide markets as a result of global warming and emerging technologies, and implements a framework to foster the diversification of energy sources and the implementation of renewable energy projects.

In the midst of the world economic and financial crisis, the revamping of the Mexican energy sector is expected to revitalise the Mexican economy, boost growth in the sector and increase the number of projects suitable for obtaining international financing.

### 24 Export of natural resources

What restrictions, fees or taxes exist on the export of natural resources?

The Mexican government may establish regulatory and restrictive measures to undertake export of merchandises (including natural resources), in accordance with the Foreign Trade Law, and numerous free trade agreements that Mexico has ratified. Such measures would apply, in addition to the applicable provisions set forth in international treaties to which Mexico is a party, mainly in the event it is necessary to insure the supply of products of basic consumption by the population, the supply of raw materials to national producers and, in addition, to regulate or control Mexico's non-renewable natural resources.

Taxes applicable in Mexico for export activities are mainly the general exports tax and customs fees. These taxes, however, are subject to the applicability or not of any international treaty (including free trade agreements and double taxation treaties) to which Mexico is a party.

### 25 Environmental, health and safety laws

What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

The environmental, health and safety (EHS) legal framework in Mexico comprises a number of federal, local and municipal laws, regulations and norms that are applicable to the different sectors: the General Law of Ecological Equilibrium and Environment Protection, the General Law for Prevention and Integral Management of Wastes, the General Law of Wildlife, the National Water Law, the General Law of Sustainable Forest Development, their respective implementing regulations, the Federal Labour Law, the General Health Law, the Social Security Law, Official Mexican Norms applicable for EHS matters, among others.

The regulatory bodies administering Mexico's EHS legal framework are: at the federal level, SEMARNAT, the Ministry of Labour and Social Welfare, the Ministry of Health, and the General Bureau of Norms; at the local and municipal level, the respective local or municipal environment protection bureaus.

### 26 Project companies

What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Business structures of project companies greatly depend on the type of activity or project to be developed. However, due to regulatory concerns and because of corporate, tax and other considerations, usually developers resort to Mexican companies, which may have considerable flexibility for management and provide the necessary corporate shield to make a project non-recourse (note that generally there is no piercing the corporate veil under Mexican law). While there are other alternatives, the most typically used as vehicles for project companies are stock companies (*sociedades anónimas*), and limited liability companies (*sociedades de responsabilidad limitada*). The latter has been more widely used in the past few years, as it provides a number of benefits from the corporate governance perspective, in addition to other benefits from the tax perspective (particularly for US developers), since they qualify as flow-through vehicles under US 'check the box' rules.

Project companies may be structured under a Mexican subholding company that in turn may also have other operating subsidiaries, including a personnel services company that provides staffing services to the project. This scheme brings to the project important tax and labour benefits.

In recent years, as a result of the macroeconomic stability of the Mexican economy, infrastructure developers (both domestic and foreign) have had full access to domestic and international financing sources. Sources of financing include US, European and Japanese commercial banks, as well as Mexican commercial and development banks (including in this latter case Nafin, Bancomext and Banobras). Multilateral banks such as the IFC and IDB are also active.

Mexican companies have limited access to financing by placing commercial paper or going public in the Mexican securities market. Securitisation is still not a widespread practice in Mexico, although it is increasingly used as an alternative for refinancing large infrastructure projects (such as toll roads and large housing construction projects) in which the planning, development and construction stages have been concluded.

**27 Public-private partnership legislation**

Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

PPP enabling legislation has been enacted in Mexico both at the federal and state level, although a few states are still behind in this task. PPPs have been developed both under industry-specific programmes or regimes (eg, toll-roads), or under the general framework created, at the federal level, by the rules for the implementation of 'Projects for the Provision of Services' (issued in 2003 based on the UK PFI model), and at the state level, by the local PPP enabling rules or legislation, which are not industry-specific.

**28 PPP – limitations**

What, if any, are the practical and legal limitations on PPP transactions?

As a general rule, PPP projects shall be awarded through public bidding processes, and are subject to stringent budgetary authorisations based on cost-benefit analysis intended to evidence that a PPP project is the most efficient solution to develop the relevant project. In the case of projects for the provision of public services that cannot be subject to concessions, the contracting entity shall remain responsible for the provision of the relevant public service, while private parties are responsible only for the design, construction and operation of the required facilities, and the provision of administrative services.

**29 PPP – transactions**

What have been the most significant PPP transactions completed to date in your jurisdiction?

PPP projects in Mexico have been primarily focused on toll roads, suburban trains, waste water treatment, health care and educational centres. PPP projects for toll-roads have been implemented through industry-specific programmes and regimes, where the federal government (and in some instances, local governments) provides recoverable and non-recoverable resources to the project, while the concessionaire assumes the obligation to finance the rest through risk capital and third-party financing. Similar schemes have been used for water treatment facilities, through long-term service contracts (as opposed to concessions), where a portion of the required resources are also contributed by the federal, state or municipal governments.

In the case, of healthcare and educational centres, PPPs have been developed under the federal rules for the implementation of Projects for the Provision of Services or the local PPP enabling rules or legislation. These are projects where private investors enter into long-term services contracts to design, finance, construct and operate the required facilities, and provide administrative services, as required to enable the relevant public entity to provide public services. In these cases, government funds are also made available to the project, up to a certain level of the required investment.

The largest PPP awarded in Mexico has been the FARAC-1 Package, which consisted of a 30-year concession to operate and maintain over 550km of toll roads in the states of Michoacán, Jalisco, Guanajuato and Aguascalientes, awarded by the Ministry of Communications and Transportation and the Mexican Toll Road Bailout Fund, in the context of Mexico's toll-road re-privatisation programme. The project was awarded in 2007 to a consortium formed by Goldman Sachs and ICA, who offered approximately US\$4 billion.

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