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MEMORANDUM

FR: Daniel Rangel, Legal Fellow, Public Citizen’s Global Trade Watch
DT: June 29, 2020
RE: Status of Mexican Protection Unions’ Judicial Challenges Against Mexico’s Labor Law Reform as Revised North American Free Trade Agreement (NAFTA) Goes Into Effect

On May 1, 2019, Mexico passed a labor law reform to overhaul its outdated and corporate-friendly labor regime.¹ Mexico agreed to reform its labor laws and institutions during the Trans-Pacific Partnership (TPP) negotiations and amended its Constitution accordingly in 2017. The revised constitutional provisions mandated the creation of labor tribunals to deal with disputes between workers and employers as well as secret-ballot voting by workers for approval of collective bargaining agreements and election of union leadership, among other reforms.² However, when the Obama administration could not muster a majority in the U.S. Congress for the TPP in 2018 and then Donald Trump announced he would terminate U.S. participation in the deal, the Mexican labor reform process stalled, underscoring that many interests in Mexico opposed such changes.³ The election of a new government in Mexico and renegotiation of the North American Free Trade Agreement (NAFTA), during which congressional Democrats pushed for strengthening labor and environmental terms, finally resulted in the promised reforms to Mexico’s labor laws that were conceptualized in the 2017 constitutional changes.

Within weeks of the new Mexican labor law being enacted, interests opposed to the reforms began to file what are now hundreds of lawsuits to try to block their application to specific workplaces and existing union contracts and/or to gut the new law altogether on the basis of it violating the Mexican constitution. More than 600 lawsuits challenging the new law and its implementation have been filed to date.⁴

The lawsuits, filed before federal district judges across Mexico, take the form of protective actions called “*amparos*,” a concept in Mexican law that operates on two levels. Successful *amparo* claims would exclude specific union contracts from being subject to the reformed labor law obligations, including the requirement that workers have the opportunity to approve collective bargaining agreements. This would allow union contracts that are not in the workers’ interest and that were signed by “protection” unions to remain in place. In addition, elements of the *amparo* claims could also result in the new Mexican labor law being judged to be unconstitutional. This could eventually lead to Mexico’s Supreme Court of Justice of

¹ Congress of the United Mexican States, *DECRETO por el que se reforman, adicionan y derogan diversas disposiciones de la Ley Federal del Trabajo, de la Ley Orgánica del Poder Judicial de la Federación, de la Ley Federal de la Defensoría Pública, de la Ley del Instituto del Fondo Nacional de la Vivienda para los Trabajadores y de la Ley del Seguro Social, en materia de Justicia Laboral, Libertad Sindical y Negociación Colectiva*, May 1, 2019, Available at: https://www.dof.gob.mx/nota_detalle.php?codigo=5559130&fecha=01%2F05%2F2019

² Congress of the United Mexican States, *DECRETO por el que se declaran reformadas y adicionadas diversas disposiciones de los artículos 107 y 123 de la Constitución Política de los Estados Unidos Mexicanos, en materia de Justicia Laboral*, Feb. 24, 2019, Available at: http://dof.gob.mx/nota_detalle.php?codigo=5472965&fecha=24/02/2017

³ Álvaro Santos, *The Lessons of TPP and the Future of Labor Chapters in Trade Agreements, Megaregulation Contested: Global Economic Ordering After TPP*, at 140–74, (Oxford: Oxford University Press, 2019).

⁴ Magali Juárez, “*SCJN recibe recursos contra la ley laboral; tribunal envía 108 asuntos de la CTM*”, *Excelsior*, Feb. 10, 2020. Available at: <https://www.excelsior.com.mx/nacional/scjn-recibe-recursos-contra-la-ley-laboral-tribunal-envia-108-asuntos-de-la-ctm/1363177>

the Nation (SCJN) issuing a general declaration of unconstitutionality that would derogate the “unconstitutional” provisions,⁵ effectively reversing key reforms.

The lawsuits mainly have been brought by local labor unions associated with the Confederation of Mexican Workers (CTM for its acronym in Spanish). The CTM, which is linked to the Institutional Revolutionary Party (PRI for its acronym in Spanish),⁶ has worked for decades to help employers meet Mexican constitutional requirements that most workplaces have unions by negotiating and agreeing to “union contracts” that do not represent workers’ interests and that are not approved by the workers. The revised NAFTA requires that such “protection” contracts be reviewed and approved directly by workers within four year after the agreement goes into effect.⁷ As noted above, the reformed Mexican Constitution also guarantees workers the right to vote on and approve collective bargaining agreements.

What are the grounds for the lawsuits?

Amparo claims have been filed before federal district judges with respect to two government actions.

Lawsuits Against the Reformed Labor Law of May 2019: A total of 421 *amparos* have been filed against several provisions of the reformed Federal Labor Law (FLL).⁸ These lawsuits claim that the following Articles of the new Mexican labor law violate numerous provisions of the Mexican Constitution, including Article 123, which was among the terms amended in 2017 to require free and secret elections for key union decisions. The lawsuits also claim that the revised labor law breaches International Labor Organization (ILO) conventions 87 and 98—related to the right of freedom of association and collective bargaining, respectively. These are the key provisions of the FLL that are being challenged in these lawsuits:⁹

- Revised FLL Article 110: A prohibition against deducting union dues from wages without workers’ consent.
- Revised FLL Article 369: Cancellation of a union’s registry in cases where union officials or legal representatives have been involved in extortion.
- Revised FLL Article 371: The guarantee of free, direct, and secret elections with union members voting to determine union leadership.
- Revised FLL Article 373: A requirement of periodic reports by unions’ leaders to their members regarding the administration of unions’ assets.
- Revised FLL Article 390 Ter: The guarantee of free and secret elections with union members voting to approve contracts (collective bargaining agreements).
- Revised FLL Article 400 Bis: The guarantee of periodic review (every two years) of contracts (collective bargaining agreements) by the unions’ memberships.
- Revised FLL Article 590-D: The absence of employer or union representatives in the composition of the Board of the Conciliation and Labor Registration Federal Center, which is the government body that will register unions and collective agreements and certify union leadership.

⁵ Clicerio Coello Garcés & Alfonso Herrera García, *Jurisprudencia por reiteración y declaratoria general de inconstitucionalidad de leyes en el juicio de amparo*, *El Juicio de Amparo en el Centenario de la Constitución Mexicana de 1917*, Tomo II, 513-532, (Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México: México, 2017), at 525.

⁶ Aurora Zepeda, “‘Estamos firmes en el PRI, no conocemos otro partido’: CTM”, *Excelsior*, Oct. 21, 2019. Available at: <https://www.excelsior.com.mx/nacional/estamos-firmes-en-el-pri-no-conocemos-otro-partido-ctm/1343177>

⁷ U.S.-Mexico-Canada Agreement (USMCA) Annex 23-A, Sec. 2(f).

⁸ Pilar Martínez, “‘Reves para la CTM, jueces rechazan más amparos contra la reforma laboral’”, *Factor Capital Humano – El Economista*, Aug. 15, 2019. Available at: <https://factorcapitalhumano.com/leyes-y-gobierno/reves-para-la-ctm-jueces-rechazan-mas-amparos-contra-la-reforma-laboral/2019/08/>

⁹ *Ibid.*

- Revised FLL Article 923: Affirmation of the right to strike, even when a collective bargaining agreement is in effect, if the agreement has not been reviewed in the four years after the entry into force of the FLL reform.
- Revised FLL Articles 927 V: The authority for the novel federal and state labor tribunals included in the 2017 constitutional reforms, which decide extensions of pre-strike conciliation periods.

Additionally, Revised FLL transitional Article 11 is challenged in many of these cases. It establishes that all existing contracts (collective bargaining agreements) must be reviewed at least once during the four years after the reform enters into force. The plaintiffs argue that this transition requirement is tantamount to a retroactive application of the law, in breach of the Constitution.¹⁰

Lawsuits Against the Mexican Labor and Social Welfare Secretariat’s Protocol for the Review of All Existing Union Contracts: The other set of 200¹¹ *amparo* claims target the Mexican Labor and Social Welfare Secretariat’s protocol that sets forth the requirements for reviewing and legitimating the compliance of collective bargaining agreements with the reformed labor law’s requirements.¹² In July 31, 2019, the Labor and Social Welfare Secretariat issued the protocol that establishes the procedures for the review of all existing union contracts within four year of the passage of the reformed labor law. This is the process required by revised FLL transitional Article 11 and also the revised NAFTA’s U.S.-Mexico labor annex. The CTM-affiliated local unions that have filed *amparos* against this protocol claim that it and transitional Article 11 violate freedom of association and collective bargaining rights, as they impose *ex post facto* conditions for labor agreements already signed and in operation.¹³ The unions filing these cases assert that they will not comply with the collective bargaining agreement review requirements until the judicial review of their claims is finished.¹⁴

What is the current status of the cases?

Challenges to the FLL were first filed in late May, 2019.¹⁵ By October, CTM’s General Counsel asserted that judges had granted 30 injunctions (*suspensiones definitivas*), exempting plaintiffs from complying with the FLL until there is a final ruling.¹⁶ The Labor and Social Welfare Secretariat asserts that only four injunctions have been granted and that these decisions were based not on the merits of the case, but are interim measures to preserve the *status quo* pending a final ruling.¹⁷ Nevertheless, the Labor and Social

¹⁰ Andrea Becerril, “Obtiene la CTM siete amparos contra la reforma laboral”, *La Jornada*, Aug. 4, 2019. Available at: https://www.jornada.com.mx/2019/08/04/politica/007n1pol?fbclid=IwAR0XQvZGLCHQHmgejcUp_x_d0tTXWANhKym5Dm5QUtK8LBtuisseExJZSCv0.

¹¹ Magali Juárez, “SCJN recibe recursos contra la ley laboral; tribunal envía 108 asuntos de la CTM”, *Excelsior*, Feb. 10, 2020. Available at: <https://www.excelsior.com.mx/nacional/scjn-recibe-recursos-contra-la-ley-laboral-tribunal-envia-108-asuntos-de-la-ctm/1363177>

¹² Labor Secretary, *Protocolo para la legitimación de contratos colectivos de trabajo existentes*, Jul. 31, 2019. Available at: http://dof.gob.mx/nota_detalle.php?codigo=5566910&fecha=31/07/2019

¹³ See e.g. Mexico City’s Second Labor District Court, Judgement 2279/2019, Dec. 12, 2019.

¹⁴ Admin, “Van 870 recursos de CTM contra la Laboral; busca ir hasta la SCJN”, *La Razón de México*, Oct. 28, 2019. Available at: <https://www.razon.com.mx/mexico/van-870-recursos-de-ctm-contra-la-laboral-busca-ir-hasta-la-scjn/>

¹⁵ Pilar Martínez, “Revés para la CTM, jueces rechazan más amparos contra la reforma laboral”, *Factor Capital Humano – El Economista*, Aug. 15, 2019. Available at: <https://factorcapitalhumano.com/leyes-y-gobierno/reves-para-la-ctm-jueces-rechazan-mas-amparos-contra-la-reforma-laboral/2019/08/>

¹⁶ Admin, “Van 870 recursos de CTM contra la Laboral; busca ir hasta la SCJN”, *La Razón de México*, Oct. 28, 2019. Available at: <https://www.razon.com.mx/mexico/van-870-recursos-de-ctm-contra-la-laboral-busca-ir-hasta-la-scjn/>

¹⁷ María del Pilar Martínez, “CJF ordena concentrar los amparos contra reforma laboral para agilizar el proceso”, *El Economista*, Nov. 26, 2019. Available at: <https://www.eleconomista.com.mx/empresas/CJF-ordena-concentrar-los-amparos-contra-reforma-laboral-para-agilizar-el-proceso-20191126-0079.html>

Welfare Secretariat appealed (*recurso de revisión*) at least two of the injunctions.¹⁸ More importantly, on November 26, 2019, Mexico's Deputy Labor Secretary claimed that half of the *amparos* were dismissed (*sobrescidos*), since there were grounds to discontinue the proceedings.¹⁹

Some of the 200 *amparo* lawsuits filed against the transitional protocol issued by the Labor Secretary and Social Welfare Secretariat have been dismissed by district courts on the grounds that the incumbent unions failed to demonstrate that their rights were implicated, in part because they failed to prove that they had collective bargaining agreements currently in force that would be affected by the review process.²⁰

With the objective of centralizing the resolution of all the cases, the General Counsel of the Labor and Social Welfare Secretariat filed a petition with the Council of the Federal Judiciary—the body in charge of the administration of the judicial branch in Mexico—to concentrate all the *amparo* lawsuits challenging the reformed labor law and its implementation. On September 4, 2019, the Council decided that all the *amparos*, including those challenging the protocol and those that had resulted in injunctions, should be concentrated and decided by Mexico City's Second Labor District Court, in the first instance, and by the Sixteenth Labor Collegiate Tribunal of the First District on appeal, so as to avoid conflicting rulings.²¹ (In Mexico, some circuits have subject matter-specialized federal judges and tribunals based on the types of cases typically heard in that circuit.)²² Eventually, every pending *amparo* related to the reformed labor law and its implementation has to make its way to these two courts and has to be individually decided by them.

To date, Mexico City's Second Labor District Court has received more than 100 *amparos* and dismissed several of them.²³ Generally, this court has dismissed cases filed by CTM-affiliated unions against the FLL on procedural grounds without ruling on the merits of the case. Among the reasons for dismissals have been: (i) some of the challenged norms were not in force when the lawsuits were filed — such as the obligation to reform unions' bylaws to guarantee free, direct, and secret elections to determine union leadership, which only entered into force in December, 2019 (Revised FLL Art. 371); (ii) the plaintiffs did not prove that the absence of union representatives in the composition of the Board of the Conciliation and Labor Registration Federal Center affects their constitutional rights, and thus, lack standing (Revised FLL Art. 590-D); and (iii) most rules that regulate unions' activities—such as the prohibition of deductions of union dues from wages (Revised FLL Art. 110) or the approval of collective bargaining agreements through free, direct, and secret elections (Revised FLL Art. 390 Ter and transitional Art. 11)—are norms of general application that do not create, transform or extinguish legal rights and obligations by

¹⁸ María del Pilar Martínez, “*Secretaría del Trabajo impugna las suspensiones contra la reforma laboral que promueve CTM*”, *El Economista*, Aug. 4, 2019. Available at: <https://www.eleconomista.com.mx/empresas/Secretaria-del-Trabajo-impugna-las-suspensiones-contra-la-reforma-laboral-que-promueve-CTM-20190804-0020.html>

¹⁹ María del Pilar Martínez, “*CJF ordena concentrar los amparos contra reforma laboral para agiliza el proceso*”, *El Economista*, Nov. 26, 2019. Available at: <https://www.eleconomista.com.mx/empresas/CJF-ordena-concentrar-los-amparos-contra-reforma-laboral-para-agilizar-el-proceso-20191126-0079.html>

²⁰ See e.g. Mexico City's Second Labor District Court, Judgement 2279/2019, Dec. 12, 2019.

²¹ *Consejo de la Judicatura Federal, Secretaría de Creación de Nuevos Organismos*, Circular SECNO/7/2019; María del Pilar Martínez, “*CJF ordena concentrar los amparos contra reforma laboral para agilizar el proceso*”, *El Economista*, Nov. 26, 2019. Available at: <https://www.eleconomista.com.mx/empresas/CJF-ordena-concentrar-los-amparos-contra-reforma-laboral-para-agilizar-el-proceso-20191126-0079.html>

²² Suprema Corte de Justicia de la Nación, *¿Qué es el Poder Judicial de la Federación?*, (2005), at 68 and 73.

²³ International Lawyers Assisting Workers Network (ILAW), *Amicus Brief concerning the Amparos Against Mexican Labor Law Reforms*, (Jun. 24, 2020), at 11; Rubén Mosso, “*Batean amparos contra reforma laboral y abren camino al T-MEC*”, *Milenio*, Nov. 25, 2019. Available at: <https://www.milenio.com/politica/batean-amparos-reforma-laboral-abren-camino-t-mec>

themselves, but rather require further actions by which they are applied to determine if they violate the constitutional rights of the plaintiff.²⁴

During the first months of 2020, the Sixteenth Labor Collegiate Tribunal of the First District, which received the appeals of the first instance rulings issued by Mexico City's Second Labor District Judge and other district judges that delivered rulings before the concentration order, referred 108 cases to the SCJN.²⁵ When reviewing the appeals, generally, the appellate tribunal decided that the district judges properly dismissed most of the challenges on procedural grounds. However, the appeal tribunal noted that Revised FLL Articles 110, 371, 390 Ter, 400 Bis, and transitional 11 among other terms are, as a matter of fact, provisions that modify the legal status with their entry into force and therefore can be directly challenged through *amparo* lawsuits.²⁶ Yet, the appeal tribunal refrained from assessing the merits of the claims because it deemed that the SCJN, as the highest judicial authority in Mexico, is the competent court to decide the constitutionality of federal laws.²⁷

As explained in further detail in the next section, any merits decision made by the SCJN on the set of cases referred by the Sixteenth Labor Collegiate Tribunal of the First District, would set binding jurisprudence applicable to all of the pending *amparo* cases. Often in the Mexican court system, when numerous cases raise identical issues that must be decided by the SCJN, once a bloc of cases reach the SCJN, lower courts may defer action on pending cases raising the same issues awaiting a decision from the SCJN.

On June 23, 2020, the International Lawyers Assisting Workers Network (ILAW) filed an amicus brief before the SCJN defending the reforms to the FLL and asserting that, contrary to CTM's claims, the new labor processes and institutions contribute to Mexico's compliance with ILO conventions 87 and 98 related to freedom of association and collective bargaining.

It is worth noting that due to the Covid-19 pandemic, most activities of the Mexican judicial branch have been suspended starting on March, 18, 2020. This explains why the last updates on these cases occurred in February, 2020. However, the SCJN is set to resume activities in July, with a substantial case backlog.²⁸

What is the risk for Mexican labor law reform?

Amparo (protective action) in Mexico is a complex institution that encompasses different procedural goals, including the protection of constitutional rights of specific persons and challenging the constitutionality of norms of general application, such as federal laws.²⁹ Typically, when a protective action defies a norm of general application, the adjudicator will determine that the norm is not applicable to the plaintiff and declare its unconstitutionality.³⁰ To that extent, whereas the *amparos* filed by CTM affiliated unions have as their main objective safeguarding rights allegedly endangered by the reformed FLL; since they are

²⁴ See e.g. Mexico City's Second Labor District Court, Judgement 2383/2019, Nov. 25, 2019; Rubén Mosso, "Batean amparos contra reforma laboral y abren camino al T-MEC", *Milenio*, Nov. 25, 2019. Available at:

<https://www.milenio.com/politica/batean-amparos-reforma-laboral-abren-camino-t-mec>

²⁵ Magali Juárez, "SCJN recibe recursos contra la ley laboral; tribunal envía 108 asuntos de la CTM", *Excelsior*, Feb. 10, 2020. Available at:

<https://www.excelsior.com.mx/nacional/scjn-recibe-recursos-contra-la-ley-laboral-tribunal-envia-108-asuntos-de-la-ctm/1363177>

²⁶ See e.g. Sixteenth Labor Collegiate Tribunal of the First District, Judgement 110/2019, Nov. 12, 2019; Sixteenth Labor Collegiate Tribunal of the First District, Judgement 19/2020, Feb. 7, 2019; Sixteenth Labor Collegiate Tribunal of the First District, Judgement 06/2020, Feb. 13, 2020.

²⁷ Article 107 of the Constitution of the United Mexican States and Article 83 of the *Ley de Amparo*.

²⁸ Supreme Court of Justice of the Nation, Press release No. 084/2020, May 21, 2020. Available at:

<https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=6127>

²⁹ Héctor Fix-Zamudio, *Ensayos sobre el derecho de amparo*, (Mexico City: UNAM, 1993), at 20.

³⁰ Suprema Corte de Justicia de la Nación, *La Ley de Amparo en lenguaje llano*, (2014), at 35.

grounded on its supposedly unconstitutionality, they also entail a constitutional challenge to said legislation. The constitutional dimension of the protective actions acquired special relevance since a substantial proportion of them will be review in appeal by the SCJN.

Whenever the SCJN rules that a norm of general application is unconstitutional in five consecutive cases, it establishes binding jurisprudence for lower tribunals.³¹ Furthermore, in these cases the Court notifies the authority that issued the norm—in the case of federal laws, the Congress—for it to redress the unconstitutionality issue. If the authority fails to do so, the SCJN is entitled to issue a general declaration of unconstitutionality.³²

Thus, the consequence of referring more than 100 cases against the FLL to the SCJN is that the Court is likely to establish binding jurisprudence over the constitutionality of the legislation, provided that it rules on the merits of the claims. This could result in a positive outcome for Mexican workers if the Supreme Court reaffirms the legal validity of the FLL and obstructs new challenges to the reform. However, there are two alternative scenarios. First, the Court could side with Mexico City's Second Labor District Court's rationale and confirm the dismissal of the lawsuits. In this case, CMT-affiliated unions could potentially file new *amparos* redressing the procedural issues that led to the initial decisions to discontinue the proceedings. A second, grimmer scenario would be the SCJN deciding that the challenged provisions of the FLL are unconstitutional, which could lead to a general declaration of unconstitutionality, depriving the law of some of the most important aspects of the reform undertaken in 2019.

³¹ Articles 215, 216, 222, and 223 of the *Ley de Amparo*.

³² Article 107 of the Constitution of the United Mexican States.