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MEXICAN STANDARDS RELATED POLICY AND REGULATION

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The development of Mexican standards related policy and regulation is a topic I have close to my heart because I was involved both in the development of standards in Mexico and was responsible for the negotiations of Chapter Nine of the North American Free Trade Agreement (NAFTA) dealing with Standards Related Measures. However, since it has been almost ten years since those negotiations I may distort a portion of what happened.

I. THE FRAMEWORK

In thinking about how to state the issue of potential differences to arise in the standards related rules and policies between the United States and Mexico, and the clashes that can arise in this area, a famous old American song came into my mind. "I say tomato you say tomatoe. I say potato you say potatoe let's call the whole thing off."

Something of that sort is always prone to happen under the disciplines of NAFTA's standards related measures. There are so many issues that may be treated differently from one country to another under the technical regulations fields, that, to say the least, Chapter Nine of NAFTA presented and will continue to offer very delicate issues in the trade relationship among the three NAFTA nations.

In general terms one would say that the framework for the negotiations during the early 90's was that the negotiations started with almost no agreement on the basics. Neither Mexico, the United States nor Canada was ready or willing to let go of its national technical regulations or standards system, to accept that of the other countries. However the goal was to reach a common understanding on how to solve any differences in this area.

With three countries unwilling to make concessions, it is not surprising that the result of the disciplines in Chapter Nine are not as precise as one would expect, but its importance derives from the fact that, as with other aspects of international relationships, a real key to success is to avoid the technical barriers to communication. Therefore, the real value of Chapter Nine is the creation of trilateral committees, sub-committees and working groups that should be able to discuss the issues and timely solve any differences.

This article will attempt to explain the history and the present state of affairs on this issue.

II. THE HISTORY

To better understand some of the problems faced by Mexico during the early 90's, when NAFTA negotiations began, in dealing with technical barriers to trade,

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it is important to remember that the special terminology of GATT and its permutations were generally unfamiliar to Mexico until 1986, when Mexico joined GATT.¹

Before GATT and of course, many years before NAFTA, the Mexican office of Standards (*Dirección General de Normas*) of Mexico had concentrated authority for the creation of all technical regulations. The history of this office is quite unique.

Although its existence began at the end of the 19th century to make sure that the country would use the metric system and its authority was exclusively that of the measurements authority (*Departamento de Pesas y Medidas*), during the Second World War, the Mexican government decided to overtake the activity of creation of industrial standards within this office by creating a measurement and standards office under the old *Ley de Normas Pesas y Medidas*.

The reason for the government to take over an activity that was clearly of a private sector nature was justified as a temporary measure and to make sure that the Mexican industry would have information to meet the requirements deriving from its exports of war materials to the United States.

While the Government took over the responsibility of writing the standards on behalf of the private sector, (since, by definition standards are private – non-mandatory documents), initially the governmentally issued standards had no mandatory effect.

However, at some point in time someone in the government decided to make the standards mandatory, not a difficult task because the Government had, until very recently, absolute control of the Mexican Congress, by approving the old *Ley de Normas Pesas y Medidas* without taking into consideration that there is an intrinsic contradiction in the use of the word “*normas*” (standards) and the mandatory effect of its contents, which, legally should have been within the scope of “*Reglamentos*” (Regulations).

As a result, Mexico had legislation providing for “mandatory standards”, which is a strange animal. These were called “*Normas Oficiales Mexicanas*” or NOMS.

As the years went by, governmental authorities issued mandatory regulations or “*Normas Oficiales Mexicanas*” which, as stated above is a real conceptual mistake, because those should be regulations due to their mandatory nature. Legally, there was a problem, still continuing these days, because the government authorities issuing the standards should not have authority to issue technical regulations. In Mexico the authority to issue regulations to implement legislation is vested only in the President.²

The government, through SECOFI for several decades, issued under the same name of “*Normas Oficiales Mexicanas*”, technical regulations and standards. So to increase the confusion, there were “*Normas Oficiales Mexicanas*” that could be either voluntary or mandatory, depending on the situation. If the entire text of the

1. The agreement on Technical Barriers to Trade, which constituted the GATT Standards Code, had been renegotiated in preparation for the New World Trade Organization, so the definitions used in the NAFTA negotiations were those already agreed under GATT. The untested part of these definitions, was the inclusion of technical regulations and standards for “services”, inasmuch as traditionally, GATT and its Standards code had dealt only with trade in goods.

2. Constitución Política de los Estados Unidos Mexicanos. Art. 89(I) providing for the President to promulgate and execute laws has been interpreted to give the President exclusive power to issue enforceable regulations to implement laws

regulation was published in the Federal Gazette, the norms were mandatory, whereas if only the name of the standard was published, they were voluntary.

SECOFI coordinated the committees that were drafting the standards and mandatory regulations, and, of course, as was the case with each governmental ministry that issued these mandatory "*Normas Oficiales Mexicanas*" had to oversee compliance thereof.

Additionally, aside from the grave conceptual problem with the way it handled its standards system, there was a lack of coordination between governmental authorities, since not only SECOFI was issuing regulations under the "*normas*" name, but also other authorities such as the Ministry of Health, the Ministry of Communications and Transportation, the Ministry of Labor and even the Ministry of Agriculture, issued technical regulations as "*normas*" thereby making the system quite confusing and chaotic.

For example, the Ministry of Health might issue health regulations (named "*Normas Técnicas Sanitarias*") that could in some instances be incompatible in contents, with the technical regulations on industry or commercial labeling requirements issued by SECOFI.³

Another problematic issue was that there was not a single body organizing and coordinating the issuance of standards. It was then, and it is still today, a problem for the federal government to resolve.

There was a myriad of technical regulations, aside from problems with identity of the standards, until July 1992, when a new Federal Law on Metrology and Standardization was enacted, trying to solve all of the problems caused by history. Since 1992, Mexican standards (voluntary specifications for goods and services) are known as *Normas Mexicanas* or "NMXs" to differentiate them from the technical regulations or, NOM's.

Mexico became a member of the General Agreement on Tariffs and Trade (GATT) in 1986 and as you may imagine the Mexican Government had initially no expertise as to the rules of international trade.

Furthermore, in 1987, Mexico had the highest inflation rates in its recent history reaching levels of up to 170% a year. So when the new administration of President Salinas de Gortari entered the picture in 1998, one of the methods used in an attempt to reduce inflation was the use of unilateral duty reductions, to facilitate the imports of foreign competing goods at low tariffs thereby helping to curb inflation.

On the side, the Federal Government would also negotiate with specific industry sectors concerning price settings in order to reduce inflation. If the industry refused to decrease prices, the government had the ability to open the market to foreign goods and by reducing the duties that were previously imposed upon these goods, local producers were being aggressively invited to become more competitive and to offer goods in Mexico at international prices.

3. An example, of this was the case of Sodas where the Ministry of Health at one point insisted that the term "Refrescos" should be changed to a technical term "Aguas Edulcoradas" "Sweetened Water", while SECOFI maintained that the term "Refresco" (or soda) was acceptable because that was the traditional term used by industry and by consumers. This kinds of contradictions was problematic, but an unfortunate fact of life prior to NAFTA.

During this process Mexico discovered that not all imports are equal and a lot of trash imported goods were coming into the country, and domestic industry in Mexico was under a lot of pressure, to compete in internationally unfair conditions. It was at this time that Mexico discovered the flexibility of the use of technical barriers to trade as a swift mechanism to regulate imports, particularly against certain imports.⁴

Industry would complain to the government about the numerous competing imports flowing into the country. These products were simply being dumped into Mexico. Therefore, technical barriers were in many instances used as a mechanism of defense from unfair trade by requiring Chinese and other products to meet particular physical characteristics.

Having introduced the history of the problem, we proceed to the advent of NAFTA.

III. THE DIFFERENCES BETWEEN THE MEXICAN AND AMERICAN STANDARDIZATION SYSTEMS

In the early 1990s, negotiations for a new GATT Standards Code⁵ had already been completed and had reconfirmed the distinction between "technical regulations" and "standards" and both of these definitions included the adaptations to "services", not only to goods. This changed the whole scope of GATT and created a potential risk to international trade because of the rules implemented for the management of this type of trade.

The picture in Mexico then, was of a standard and technical regulations system characterized by that lack of order as to its management in an economy everyday more pressured to become competitive at international levels. Mexico, like most Latin American countries had concentrated its standardization activity in governmental bodies, making patent the need to create a formal, credible and reliable, private standardization and certification bodies to support the voluntary quality standards drive and its assessment. Mexico needed also to create private standardization and private conformity assessment bodies similar to those existing in the US and in many developed countries because prior to this time the government was inefficiently conducting all of the issuing of standards, technical regulations, testing for compliance, and enacting all of the authorization procedures. The international trade strategy of Mexico was to make its standard related system resemble those of its international trading partners to make sure that trade could flow under similar rules and parallel systems.

One problem Mexico encountered was that it did not know how to form these bodies, so help was sought from the European Union. This is a fact not commonly known. We told the Europeans that if they didn't help Mexico, we were going to enter into a free trade agreement with the United States and because our standardization system was, to say the least in shambles, most likely it would be taken over by the American market forces and private sector organizations, thereby

4. Of primary concern were the Chinese products aimed at the U.S. market which for some reason could not pass the U.S. standards or market tests.

5. Agreement on Technical Barriers to Trade (GATT Standards Code), GATT Basic Instruments and Selected Documents (Geneva: GATT Secretariat 1980)

jeopardizing any meeting of the systems with the European countries. Within five days the Europeans authorized a grant of \$2 million in ECUS⁶. These funds were provided in order to assist the Mexican government in strengthening this project of privatization and enhancement of its standardization system.

This is important, not only because of the many references in Chapter Nine of NAFTA to international standards, but because Mexico's approach was to use potential allies before facing the negotiations with the largest economy in the world. There is an interesting phenomenon in the establishment of standards through international organizations such as the International Standards Organization (ISO). International standards are approved through the majority vote of their members and each country has one vote. Under this mechanism, the United States has one vote while the European Union has 15 votes (since Europe notwithstanding that it may have a Common European standardization policy, has one vote for each one of its member countries), thereby giving the European Union a substantially greater influence in the international standardization bodies than that of the United States. The United States typically argues, often times with reason, that some of its standards *ARE* the international standards (and not the ones approved by international standardization bodies) because they are more widely used in international markets.

Notwithstanding that Mexico and other countries may not agree with this American argument there are several examples that show that due to the strength of the American economy and its industries, this may be true. An example may be the fact that the United States is the only country still using the British Imperial Measurement System⁷, and although clearly different than the international rule, it is still followed in several industries just because the reigning technology is sourced in the United States. Moving away from these practices may impose several inconveniences for the countries wishing to move towards international rules.⁸

With these types of issues lurking, Mexico sat down at the negotiation table with the United States and Canada with a plan to rearrange the Mexican structure of standards and technical regulations. With the support of the European Union, Mexico was embarked in a frantic race to create private bodies, to establish more accredited and reputable standards, and to back up its production and exports platform with quality assurance programs. All these efforts take a great deal of money and a lot of time.

IV. THE NEGOTIATION AND CONTENTS OF CHAPTER NINE OF NAFTA, AT A GLIMPSE

At the beginning of the negotiations, Mexico knew that its standards related system was somewhat deficient, while the United States had a tremendous standard writing system and testing capacity. In fact, the United States has more standards and more technical regulations than the entire rest of the world put together. Therefore, we naively suggested, as a first approach, that because technical barriers,

6. The then existing European currency Unit, now substituted by the Euro.

7. Paradoxically even the British have changed to the metric system, but the U.S refuses to change

8. A good example may be the presentation cards, which are sized, in Mexico and in most countries to the US and not the international standard, which follow the size of the paper cutting machines, which during many years were either manufactured in America, or using technology originated in America.

standards and technical regulations add additional costs to trade, the three countries should simply get rid of them. We suggested further that the three countries involved start from scratch and create uniform North American standards as a mechanism to assure free flow of goods and services.

Our counterparts in the United States and Canada were quite amused with this proposition and quickly declined. The United States went further to state that, politically Chapter Nine should be the "green chapter" of NAFTA and expected to create a strong message that NAFTA would not work to deteriorate the environment and a mechanism to move polluting jobs south. Indeed the US government was getting a great deal of political pressure from non-governmental environmental organizations fearful of the impact of trade with Mexico on the environment.

Paradoxically at the end, NAFTA's Chapter Nine was not green enough for the United States and a parallel agreement on environmental matters was necessary as a prerequisite for the approval of the treaty.

There were two principles involved in the overall negotiations of NAFTA. It should be GATT "plus", that is the exact level of commitment and disciplines contained under GATT, plus more attractive results than whatever was agreed to under such a multilateral agreement.

The second principle in the negotiations was "No Back Sliding", meaning that there could be no agreement that were less beneficial than those the Canadians and the Americans had already agreed upon in the Canada-U.S. Free Trade Agreement.

Looking at the text of the Chapter, we find several interesting explanations for the text:

Article 903 is a ratification of GATT⁹, only because the text of the GATT Standards Code had already been approved at the Uruguay round of negotiations and we knew that any inconsistency between the two sets of rules could require reopening the negotiations in GATT's Standards Code, which, we all feared could have been a disaster. Mexico had that safe harbor.

The message that Chapter Nine was to be the green chapter of NAFTA is to be found in Article 904, which says, regardless of GATT, each country has the full right "to adopt, maintain or apply any such standards related to protect the environment and health of its population as it considers appropriate..."¹⁰ This is a nice concept that politicians find appealing. It was drafted to send a strong message that the United States was not going to accept any deterioration of its environmental and health regulations because of NAFTA.

Article 904 provides not only for the right to set standards, but also the right to set the level of standards. For example, Mexico uses in many instance agricultural pesticides and fungicides that are cheap, basically because the patents have expired. The US may validly stop the imports of Mexican agricultural products using these pesticides arguing that it could become a health hazard.

9. Article 903: "Further to Article 104, the Parties affirm with respect to each other their existing rights and obligations relating to standards-related measures under the GATT Agreement on Technical Barriers to Trade and all other international agreements, including environmental and conservation agreements, to which such Parties are party."

10. Art. 904(2) standards are to be "in accordance with Art. 907(2)" which provides that a party to NAFTA "should avoid arbitrary or unjustifiable distinctions between similar goods or services" in determining the level of protection it considers appropriate.

But it may very well be the truth that large American chemical companies claim (when their patents have expired) and the pesticides become cheaper, that the product using such chemicals somehow becomes a health risk. This companies have huge investments in technology and development which is only fully recoverable during the life of a patent, but they also have the lobbying power to convince the government to establish levels of protection that in some instances are ridiculously high.¹¹

So the U.S. Government took a very strong position as to the “level of protection” to health mainly because the U.S. government needed to assure everyone that NAFTA would not result in the deterioration of its rules for protecting the health of its citizens and the environment, but not really making sure that trade will be assured.

Under the foregoing argument, this “green chapter” became a hostage of political issues. Under these circumstances, the only other available alternative to the Mexicans, not being in a position to accept U.S. standards, was to use the GATT standards. As a result, we proposed international standards. Mexico knew that there was a clash between Europe and the United States over international standards and technical regulations, but Mexico needed a safe harbor somewhere.

This safe harbor is found in the strong reference to international standards contained in NAFTA’s paragraph 905. However the second part of Article 905 basically dilutes what the first part of 905 establishes¹². Specifically, there is a desire to use international standards, but in practice, the three governments can do basically whatever they want.

Mexico convinced the United States and Canadian governments that there should be consideration for local conditions by inserting in the text of paragraph 905 wording related to “CLIMATIC, GEOGRAPHICAL, TECHNOLOGICAL OR INFRASTRUCTURAL FACTORS” but had to agree to the United States proposal not to be bound to use international standards “where such standards would be an INEFFECTIVE OR INAPPROPRIATE MEANS to fulfill it’s legitimate objective.”¹³

In conclusion this language basically means that if Mexico, Canada or the United States do not feel that international standards are as good as its own standards they will be able to use their own standards. Mexico, the less developed economy can always argue infrastructural factors and the United States or Canada, could argue that an international rule is simply inappropriate.¹⁴

11. Sometimes the allowable intake, measured in parts per million of carcinogens, in a particular product is such that it would allow an individual eating three apples a day a reasonable possibility that when he is 90 years old he will get cancer because of the eating of the apples. That could be the “level of protection” triggering a justifiable ban on imports due to threats to human health.

12. “Each Party SHALL USE, as a basis for its standards-related measures, INTERNATIONAL STANDARDS or international standards whose completion is imminent..... EXCEPT WHERE SUCH STANDARDS WOULD BE AN INEFFECTIVE OR INAPPROPRIATE MEANS TO FULFILL ITS LEGITIMATE OBJECTIVES, for example because of fundamental climatic, geographical, technological or infrastructural factors, scientific justification or the level of protection that the Party considers appropriate”.

13. Art. 905(3): Nothing in paragraph 1 shall be construed to prevent a party, in pursuing its legitimate objectives, from adopting, maintaining or applying any standards-related measure that results in a higher level of protection than would be achieved if the measure were based on the relevant international standard.

14. An example of an infrastructural factor would be a Mexican electrical system, which is supposed to match the U.S. system. The voltage used in the United States is 110 volts, plus or minus ten percent, whereas Mexico supposedly operates at 127 volts plus or minus ten percent. However, in the real world, with the

As you may deduce, ultimately, the three countries failed to resolve this problem. That is why technical barriers to trade, in my opinion, are a highly risky part of the free trade agreement.

If the U.S. negotiators could not agree to North American Standards or North American Rules, as originally proposed by Mexico, a second tier alternative was to try to make the standards between the countries "compatible". This is what paragraph 906 seeks to achieve. This article states, in subsection 2, that "without reducing the level of safety or of protection of human, animal or plant life or health, the environment or consumers, ...THE PARTIES SHALL, to the greatest extent practicable, MAKE COMPATIBLE THEIR RESPECTIVE STANDARDS RELATED MEASURES, so as to facilitate trade in a good or service between the parties."

If one looks at the definition of "making compatible" under paragraph 915¹⁵, this statement may be only little less than a dream.

The preceding paragraphs of this Chapter deal with the *creation* of the rules and the standards, and paragraphs 907 and 908 contain similar principles specifically addressing compliance with the rules, that is known as "conformity assessment". Interestingly, paragraph 908, contains an agreement to recognize, "wherever appropriate" the other countries' test results and conformity of procedures. We may expect that the wording "wherever appropriate" language be interpreted by the different countries to mean "don't recognize".

Again, in the section dealing with conformity assessment we find that Chapter Nine keeps a wide open door because it expressly recognizes "the existence of substantial differences in the structure, organization, and operation of conformity assessment procedures in their respective territories" thereby allowing for any of these differences to become a good excuse not to recognize conformity assessment procedures compatible or acceptable at all.

It gets scarier. The fact that paragraph 908 contains a recognition, by the three countries, of substantial differences in the structure of each country's organization and the operation of the conformity assessment bodies, made clear from the beginning that the disciplines or wishes of Chapter Nine will not apply to private entities, which in the case of the United States and Canada handle the majority of the conformity assessment procedures to determine compliance with a specific standard or technical regulation. In the case of Mexico, unlike that of Canada and United States, and as described before, conformity assessment activities have been almost entirely within the activities of the federal government. Therefore, it was really in Mexico's best interest to accept the text of this paragraph 908 because the U.S. government, as a federal government, has very few procedures to directly oversee compliance with technical regulations and basically no assurance capability when relating to the compliance of standards, while in Mexico, practically everything was regulated at the federal level.

government owned electricity company in Mexico, that plus or minus ten percent may actually be fifty percent. Therefore, electrical products designed for the U.S. market often will not work in Mexico. That's an infrastructural problem under which Mexico could enact electricity safety regulations imposing difficulties for the importation of US or Canadian products.

15. Art. 915: "make compatible means bring different standards-related measures of the same scope approved by different standardizing bodies to a level such that they are either identical, equivalent, or have the effect of permitting goods or services to be used in place of one another or fulfill the same purpose"

In Mexico trade authority (which is the authority under which a great deal of the technical regulations are created), is exclusively vested in the federal government while in the United States, trade authority is mainly vested in the governments of individual states or local governments.

Paragraph 908(2) contains also a commitment as to mutual recognition and mutual accreditation of conformity assessment bodies in the other parties' territory.¹⁶ This translates into an obligation for the Mexican government to negotiate with the U.S. government, the accreditation or licensing of laboratories and other private conformity assessment organizations located in the U.S. Territory. Underwriters Laboratory is one example.

The three countries should negotiate not only the recognition of the test result (contained typically in a written report) but also grant an accreditation of foreign entities granting them valid local authority and validity to the tests and assessments performed elsewhere.

Since the federal government in the United States, does not license conformity assessment bodies or testing laboratories, it could not grant this benefit to Mexican organizations, public or private. So what Mexico did in 1997 by amending its Federal Law on Metrology and Standardization, was to privatize the accreditation activity and place it in the hands of the private sector, which, as stated under paragraph 902, does not bind private sector organizations.

Paragraph 908 (2) was the last portion of the chapter to be agreed and was "bracketed" until the final stages of the negotiations.¹⁷ My recollection is that this section was taken to the lead negotiators with the concern that if we were going to have free trade, Mexico would need assurances that it would be able to avoid technical barriers to trade by demonstrating compliance with the rules. If Mexico had a good laboratory, it seemed reasonable that the U.S. government should recognize it as a dependable organization. However the U.S. government did not and does not have such authority or activity and in fact the US private sector strongly opposes any governmental intervention in these activities.

At that point in time, the funds provided by the European Community had been used to foster the creation of private standard related bodies and we had made intense consultations with the Mexican private sector as to this particular topic¹⁸. As a result, the discussion as to the acceptance or not of the recognition of U.S. tests laboratories and U.S. conformity assessment bodies by the Mexican government became almost a strategic and sovereignty issue.

The text of paragraph 908(2) was also heavily discussed by the higher authority and almost became a deal breaker. Mexico strongly argued that it could agree to it,

16. Although not defined under the text of NAFTA, accreditation is a formal recognition, by a competent authority (such as the federal Government in Mexico) of the technical capacity of a conformity assessment body or testing laboratory to perform its activities and without it, there is no valid activity to be performed by such body or laboratory.

17. A rule during the negotiation process was to place within brackets the unagreed text that was then to be discussed by the higher authority of the negotiators.

18. The Mexican government created a consulting mechanism with the private sector known as *Cuarto de al Lado* or the room next door, where there would be one or more representatives of private sector organizations sitting by in a room near the negotiating room, being ready for any consultation, comments or even opposition of the daily outcome of the governmental negotiation meetings. This mechanism proved very useful not only as a validation to the decision making process, but also as an effective meeting to get fresh ideas and arguments by well informed representatives of the Mexican private sector.

but needed about 20 years to create the infrastructure to allow its laboratories and conformity assessment bodies to be placed on an even keel. The negotiators for the United States claimed that since a college degree can be obtained in four years, Mexico should be able to accomplish this task in four years as well. We ultimately agreed in Annex 908.2 to the 4-year grace period. This is the explanation for the deferral of this commitment being tied to a four-year period, which was to elapse in 1998.

However in 1997, the Mexican government amended the Federal Law on Metrology and Standardization¹⁹ by introducing, among other reforms, Articles 70 A, 70 B and 70 C in order to create the "*Entidad Mexicana de Acreditación*", as a private sector organization with the authority to accredit, license or recognize any conformity assessment body (including testing laboratories) to operate under Mexican laws. The purpose of these amendments was to strengthen the private standardization system that was to be managed by the private sector in the 1992 legislation.²⁰

Paragraph 909 created a new mechanism that I greatly appreciate. This Article requires each Party to publish a notice of a proposed technical regulation 60 days prior to adoption. It was a very difficult decision then because the Mexican government had to create internal mechanisms to allow for a common procedure for the publication of drafts, which was completely strange to our government. But this is good. Once one is in the private sector it is good to see a draft. If there are mistakes, they can then be easily fixed. That, I think, is positive.

We learned during the negotiation process with the United States and Canada that standards become an issue for everything related to trade and if no agreement can be reached in the text of the treaty, we did agree that future work would be constantly needed. For this reason, under paragraph 913, a Committee on Standards Related Measures was established.

There are four separate sub-committees established to work on special standards. There was a parallel section on NAFTA dealing with land transportation. The same happened with telecommunications. The opening of the telecommunications and technical standards contained some of the main issues, as did the recognition of the important role of automotive standards.

Some might ask why there is an Automotive Standards Council and not a subcommittee in the other three cases. The answer is because the automotive standards were too important in the trade between Mexico and the United States. They weren't satisfied with being called a mere "subcommittee". These petty types of issues, believe it or not, cropped up during the internal negotiations and trilateral negotiations.

Finally, there is a special subcommittee on the labeling of textile and apparel goods. Why? It happened during the opening of the border between the United States and Mexico. There were a lot of imports of Chinese clothing pouring into Mexico. We knew that labeling, per se, could be a legal way to fully stop trade. If Mexico required labeling in the metric system and in Spanish, we would only be

19. D.O. May 20, 1997

20. See, generally the original text of the Federal Law of Metrology and Standardization as published in the D.O., (July 2, 1992).

able to trade ten percent of what we are now doing. And in this particular case we were under a lot of pressure due to tremendous imports of Chinese clothing. The problem with clothing was the existence of the U.S. multi-fiber agreement, which is a quota agreement to protect the U.S. textile markets. Fashion poses a particular problem because completely new clothing lines develop four or five times a year. All of the clothing that did not qualify for the U.S. market was dumped into Mexico and as a result, the Mexican apparel industry was hurting.

Therefore, in 1989 we talked with the Mexican customs authority, and they amended the customs regulations slightly to make it illegal to import apparel without complying with the Mexican labeling and technical standards. For example, the labeling authority at that time was under the Consumer Protection Law. This law was not drafted as a standard but as a ministerial decree. The decree provided that labeling for clothing should be sewn into the garment and monitored at the border. This created a huge problem because nobody could comply with it. This was so because when you manufacture a piece of clothing you must put the label in at a certain time in the process, not after the product is already packaged. Therefore, this new regulation required reopening everything before it could cross the border. All of a sudden seamstresses were hired in El Paso just to open packages and put labels on the items. It was a disaster because we did it wrong. We failed to notify the companies in advance and this was a clear violation of GATT. However, the United States government helped us so we would not be taken to a GATT disciplinary panel. Nevertheless, this was a hot issue so Mexico had to create the subcommittee for textile labeling.

V. IMPLICATIONS OF NAFTA ON THE MEXICAN STANDARD RELATED LEGAL SYSTEM

Breaching a NAFTA agreement is different from breaching GATT or other multilateral agreements. Under GATT or other multilateral agreements a breach can be resolved only by negotiations with other countries as groups and it is much more difficult to create a panic. NAFTA on the other hand, is very different because there is a direct bilateral relationship and everyone is monitoring one another. For this reason, NAFTA has become a much more effective tool than other international trade agreements.

Paragraph 908 is just an example of many of the important issues related to NAFTA. This particular issue was a very difficult decision for Mexico and it took several years to reach a consensus on how better to face the challenge and come up with a legal strategy to make sure that without violating NAFTA, Mexico could continue to have control over its standard related policy and its crucial conformity assessment activities.

By other substantial changes, (and I honestly believe it was for the benefit of Mexico, the federal government consented for the first time to publish drafts of technical regulations, as a result of Paragraph 909. With the limited capacity of the Mexican government, drafting documents and publishing them is always done under extreme pressure.²¹ That is why typically every regulation in Mexico becomes

21. "Further to Articles 1802 (Publication) and 1803 of the law on (Notification and Provision of

effective the following day after it is published in the *Diario Oficial de la Federación* (Federal Gazette).

Because of NAFTA the Federal government of Mexico has now to publish the drafts in advance of the adoption of technical regulations and allow everyone to comment on them. For the Mexican Government, publishing drafts became a hassle because it was not used to working that way. The Mexican government and its officers, including myself, had traditionally taken comments from no one.

Again, the 1997 amendments were designed to foster private sector participation. In order for the Mexican government not to violate NAFTA, by refusing to accredit foreign laboratories and foreign testing organizations, it had to recognize the technical competence of a testing laboratory or conformity evaluation body. Therefore, what the Mexican government did was to privatize this activity in Mexico. This should also prove to be a good decision.

This move will give Mexico an enhanced position to negotiate reciprocity agreements because Article 908 demands recognition and accreditation, but it does not have a reciprocity provision.²²

Directly resulting from NAFTA, Mexico's legislation clearly differentiates today the four basic areas of technical regulations and standards:

- (1) Calibration laboratories are critical to measurement. Without measurement there is no quality and no technology. There must be good traceability and measurement laboratories in order to have good quality and technology.
- (2) Test laboratories are organizations like Underwriters Laboratories. A testing organization tests a product and provides the results, whereas a certification body oversees the whole process.
- (3) The certification bodies not only certify the test results but also assure that everything else is in order to use the stamp marked that everything is up to standard. There is a slight difference between a testing organization and a certification body.
- (4) Verification Units are concerned with matters such as labeling, specifically whether a country is in compliance with labeling standards. The labels aren't tested, you just read them, and if they are according to the books, they are deemed to comply. This is verification.

Information), each Party proposing to adopt or modify a technical regulation, shall:

- (a) at least 60 days prior to the adoption or modification of such technical regulation, other than a law, publish a notice and notify in writing the other Parties of the proposed measure in such a manner as to enable interested persons to become acquainted with such measure, except that in the case of any such measure related to perishable goods, each Party shall, to the greatest extent practicable, publish such notice and provide such notification at least 30 days prior to the adoption or modification of such measure, but no later than when notification is provided to domestic producers"

22. For example, if today Underwriters Laboratories comes into Mexico and asks to be recognized as a testing laboratory, Mexico has no obligation to recognize it, although not to do so would be difficult given the fact that UL has been around for 100 years. Mexico has no equivalent to Underwriters Laboratories, which could ask the U.S. government for recognition of its technical capabilities. The concept of reciprocity is justified not only because of fairness, but it also gives Mexican entities adequate time to become reliable. It also makes it easier for the government to look at the results of the performance of these bodies instead collectively rather than having to go after each individual and each importer.

VI. FINAL COMMENTS

When I was Director General of Standards, that office had 1,300 employees and fifty percent of these employees were poorly paid inspectors. It was a disaster. These employees were charged with tasks of ensuring that gas pumps were measuring gas adequately, and seeing that products were properly labeled. Mexico made a policy decision to privatize this activity in an attempt to avoid corruption and gain credibility and efficiency. It was impossible that these employees were going to be the most honorable people in the world when they were being paid four hundred pesos a month, and given no education or information. Sad but true. This task has since been placed in the hands of the private sector. If there is corruption, it is not the government's fault.

There is one more area that is particularly sensitive and poses a potential problem. It is the definition of what constitutes a technical regulation. If we remember that Chapter Nine is the "green chapter" of NAFTA and that the "services" component is included in that Chapter, we must clearly follow up on Chapter Nine's definition of "technical regulation" as "a document which lays down the goods' characteristics OR THEIR RELATED PROCESSES AND PRODUCTION METHODS..." These words could potentially be interpreted that a product such as apparel being imported from Mexico be subject to technical regulations requiring that it be manufactured using a process that is "environmentally friendly" or "with labor conditions that are comparable to the United States" (the products RELATED PROCESSES).

Standard related matters are a tricky subject and will require in depth discussion and continuing analysis. In conclusion, technical regulations can be very disruptive to trade. In my mind, they are often in place for the sole purpose of either disrupting trade or at least increasing the exporter's costs.

As tariffs are reduced, the role of standards related measures is an area that will start to become increasingly noticeable. That is just an example of why, in the end, the free trade rules and disciplines may be too limited or ineffective to assure free trade to be permanently successful. In the end, the ultimate solution may be a common North American Common Market, but that is another issue altogether.

