Mexican Law

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The Mexican Law Committee has compiled five brief articles into one submission for this Year in Review. The articles discuss different aspects of the Mexican legal system and are intended to give the reader a broad view of current legal developments in Mexico. Juan Carlos Luna and Juan Francisco Torres-Landa analyze the rapid growth of electronic commerce around the world and discuss the importance of regulating e-commerce in Mexico. The article by John Rogers and Adrian Zubikarai discusses what Mexico's Business Coor-

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dinating Council (Consejo Coordinador Empresarial (CCE)) is doing to improve corporate governance in Mexico. The areas of concern include shareholder's rights, equitable treatment of all shareholders, and accountability of the board to the company. Michael Connelly's article looks at the effects of the refusal by the United States to implement the North American Free Trade Agreement (NAFTA) provision on free flow of commercial vehicles between Mexico and the United States. The fourth article, by Adrian Vazquez, analyzes three cases before the Federal Fiscal Tribunal to demonstrate how the Mexican judiciary analyzes antidumping cases in its civil law system. Finally, James R. Holbein gives an overview of NAFTA chapter 19 panel decisions, the process of panel selection, and panelist compensation.

I. Report on the Developments Leading to Possible Regulation for E-Commerce in Mexico

A. Introduction

The transition to a digital economy is an important part of the broader move towards a global information society. All around us, in ways and forms we cannot fully appreciate, new digitally based economic arrangements are transforming the way people interact. This is a phenomenon that is quite visible in developed countries (especially in the United States where the Internet was first developed and has grown exponentially), but that is slowly but surely picking up in developing economies, including Latin America and, for the purpose of this article, Mexico.

Electronic commerce (e-commerce), which generally refers to commercial transactions based upon the processing and transmission of digitized data, including text, sound, and visual images carried out over the Internet, and the information technology industries that make e-commerce possible, are the two facets of the digital economy forming a partnership that has proved to be critical for changing the way business is conducted and the way individuals interact with companies, data sources, and even governments.

E-commerce dramatically reduces the economic distance between producers and consumers by reducing advertising, delivery, design, and manufacturing costs. At the same time, it improves market intelligence and strategic planning, enhances opportunity for niche marketing, provides equal access to markets, and provides customer involvement in product and service innovation.

These efficiencies are more easily grasped in developed countries, not only because there are more potential customers (with regard to total volume as well as number of computer owners), but also because people, and to some extent the general legal system, are better prepared to deal with the power of the Internet and the ease with which commercial transactions can be performed through those means. It is perhaps the hardware and mental shortcomings (and not so much a legal barrier) that countries like Mexico have to be really concerned about to develop e-commerce more rapidly.

Nonetheless, some form of regulation will need to be established to create the elements of legal certainty and safety that will serve as the basis for widespread recognition of e-commerce transactions as binding, enforceable, and subject to dispute settlement mechanisms and adjudication. Although the existing legal framework is dealing with the current stage of e-commerce, there are some limitations (after all, the current laws were created basically when computers did not even exist) on the exact way to interpret and recognize electronic transactions. Since some key elements of traditional regulation are replaced in the field of e-commerce, the decision of how to implement new legal standards must be carefully analyzed. The delay in creating those rules should benefit from added experience and legal developments in other countries.

B. Some References about Current Developments

In order to have an idea of the magnitude of e-commerce, as of May 1999, 171 million people worldwide had Internet access. By 2003, it is estimated that the number of Internet users making purchases over the Internet will jump from thirty-one million in 1998 to more than 183 million. The amount of commerce will exceed U.S.$1 trillion by that date. By 2005, it is estimated that a billion people will be connected to the Internet.

In Latin America, the total expected sales during 1999 will be U.S.$77 million, but, interestingly, customers from the area will spend some U.S.$90 million additionally through sites located in the United States. At the end of 1999, it is expected that Mexico will have approximately 1.5 million on-line ready customers (second in Latin America; Brazil has 3.9 million customers according to The Boston Consulting Group). However, the number of users in Mexico only represents less than two percent of the total population, and effective users to date represent only 0.05 percent of all Mexicans. Those numbers, however, should be interpreted as a clear indication of the potential for growth of e-commerce in Mexico.

Internet sales are just the tip of the iceberg of economic value that companies can derive from e-commerce. It is also a way to efficiently run a business, resulting in significant cost savings. The latest research has found that worldwide businesses in industrial nations enjoyed e-commerce driven cost savings of $17.6 billion in 1998 according to the Giga Information Group Inc.

Based on e-commerce growth, three major trends will eventually transform the way companies in Mexico (and, for that matter, in Latin America) do business: (i) electronic integration will replace vertical integration creating a more powerful and agile organization at a lower cost by using private networks to create extended enterprises; (ii) virtual capabilities are replacing physical ones as products are being digitized and distributed electronically; and (iii) micro-marketing is replacing mass marketing. Customers are going to companies that can anticipate their needs and give them what they want, when and where they want it.

Exploiting these new possibilities will necessarily accelerate an enormous amount of legal changes; the challenge now is to make all such transformations capable of working together under a new and creative framework, one that sponsors, rather than hinders, these types of transactions.

C. Expected Growth Trends and Challenges

It is recognized that e-commerce is still in its infancy in Mexico, and in Latin America generally. However, there is no doubt of its potential for exponential growth. Currently, there are approximately ten million Internet users in Latin America (representing three percent of the total Internet users worldwide) with estimates that the figure will go up to thirty million by 2003. Growing at a rate of approximately thirty-two percent annually, it is expected that electronic transactions will grow from U.S.$167 million in 1998 to U.S.$8 billion by 2003. Despite such optimism, Latin American countries face several difficulties in order to allow the complete e-commerce driven transformation.

One of the most important characteristics of the Latin American e-commerce market is the small Internet presence compared with that in the United States and Canada (which has an estimated ninety million users representing more than half the total percentage of worldwide users), and Europe (which has close to forty million users). Another important characteristic is the rapid growth in the last two years and the potential for exponential growth in the short term.

There are two critical success factors for the establishment of a Latin American environment for e-commerce: (i) a modern, affordable, and accessible telecommunications infrastructure; and (ii) a sound legal environment that provides businesses and consumers confidence regarding their transactions.

On the telecommunications scenario, it is clear that the growth of e-commerce depends upon a global information infrastructure. Developing this infrastructure requires creating effective competition in telecommunications markets and ensuring the growth of global e-commerce through expanded access to the information infrastructure and services. Most Latin American countries are still far away from desired telecommunications infrastructure. As an example of the disparities within the continent, Canada and the United States have between sixty and sixty-four telephone lines per every 100 inhabitants, compared with twenty-one in Uruguay and eighteen in Argentina, who have the highest percentages, and Mexico with ten lines. Another concern is the high connection charges to the Internet, where the average monthly phone charge is U.S.$53 dollars, twice as high as the U.S. average; consequently, only twenty percent of the computers in Latin America are connected to the Internet. Opening the telecommunications market is fundamental to ensure the growth of e-commerce in the region.

D. Steps Leading to a New Legal Framework

From a legal perspective, there are several specific issues that need to be carefully considered in order to avoid the creation of obstacles in the development of e-commerce, such as encryption, legal recognition of electronic signatures, effective protection of privacy, taxation, contract law, transparent and effective level of consumer protection, liability, intellectual property rights, and advertising, to name only the critical ones. As these issues are currently under global analysis, awareness has an important role to play in keeping all interested parties informed of important developments in providing practical assistance, where appropriate, on how to implement and comply with such emerging legal requirements.

Just as in the case of Mexico, other Latin American countries are discussing electronic trade issues, seeking to boost the use of the Internet and the spread of e-commerce within the framework of their regional requirements as well as their international integration. As general reference, we include the following status report of what is happening in some of the main nations in the region.

- *Brazil.* More than eighty percent of Latin American e-commerce transactions take place in Brazil, which is also a leader in electronic banking. This is noteworthy because Brazil has no e-commerce legislation, although currently the Brazilian Congress is analyzing three preliminary drafts of e-commerce bills.
- *Colombia.* Colombia has already implemented e-commerce legislation, largely based on the UNCITRAL model law. Law 527 was enacted in August 1999.

- *Argentina.* Congress drafted a project Digital Signature Law in August 1999. Other relevant adjustments to Civil Code provisions are being considered by Congress.

In summary, Latin American countries are currently in the very first stage of drafting specific e-commerce legislation. In the short term, we will see a more proactive stance in relation to important legislative changes in areas such as tax treatment of e-commerce, consumer protection, and intellectual property.

In the case of Mexico, the second most important country in Latin America with regard to Internet users, various projects to regulate e-commerce are being analyzed, including the adoption of the UNCITRAL Model Law on Electronic Commerce. A significant effort to regulate electronic signatures is under way, and will most likely find its way through the inclusion of a new chapter in the Commerce Code on electronic transactions or an independent law dealing with these rules. Other relevant amendments to existing laws, such as the Federal Consumer Protection Law and tax and stock market regulations are expected to be discussed in the coming months to cover the needed areas where rules should be considered for e-commerce to be a safe harbor when it comes to legal recognition and enforcement.

Basic legal concerns in this process can be identified in three fundamental areas:

- *Consumer Trust.* Issues include electronic authentication, privacy, and protection of personal data, encryption, illegal and harmful content, cultural and linguistic content, and consumer protection;
- *Business Environment.* Issues include intellectual property, electronic contracts, and customs duties and taxation; and
- *Infrastructure.* Relates to competition, setting standards and interoperability, education and computer literacy, and Internet governance and domain names including trademark issues.

E. Elements of a New Global Legal Framework

In addition to issues that can be more narrowly analyzed on a national basis, given the natural component of globalization of the Internet, there are some broader legal issues that must be considered and that will require that national legal systems in some way recognize matters that should, in an ideal scenario, be harmonized throughout all countries.

The following are some of the current legal issues in dealing with the establishment of a framework to allow e-commerce development in all countries on a healthy and consistent basis.

1. *Safety of Electronic Transactions*

The development and use of authentication and certification technologies and mechanisms play an important role in building user confidence in electronic transactions. As the importance of information systems for society and the global economy intensifies, systems and data are increasingly exposed to a variety of threats, such as unauthorized access and use, misappropriation, alteration, and destruction. Security of information systems involves the protection of the availability, confidentiality, and integrity of those systems and the data that is transmitted and stored on them. Both technological and legal solutions are required to replace in the electronic arena the physical security of the paper-based world (the key underlying element of traditional regulation of conventional legal acts). Cryptography will play a particularly important role in ensuring the security of data and the reliability of transactions by safeguarding both confidentiality and integrity.

a. Verification of Electronic Transactions

The ability to verify certain information about merchants, consumers, and contracts in the electronic environment is essential to establish a reliable electronic transaction. Mechanisms are thus needed to verify independently certain information. For example, a buyer might want to know the commercial registration information that a business provides to the government when the company is created, proof that the person they are dealing with is indeed the company's representative, or whether the business is in compliance with certain applicable standards.

In the same context, a seller might want to know the buyer's identity, something about him or her (e.g., whether the consumer is old enough to buy an age-restricted product), or the buyer's ability to pay. Finally, both parties might need some assurance of payment and delivery, an enforceable copy of the agreement, or knowledge of the applicable body of law that governs the transaction.

b. Privacy Concerns

As e-commerce develops, the volume and nature of personal data (name, address, interests, purchases, etc.) disclosed on networks during electronic activities and transactions will increase. New methods for processing the vast accumulation of data allow the creation of customer profiles that combine demographic data, credit information, usage patterns, and details of transactions. If consumers do not have control over the collection and use of their personal data, e-commerce will facilitate an invasion of their privacy. But if consumers are in a position either to decline or to give informed consent to the collection and use of their personal data, e-commerce will not be different from traditional commerce. Businesses and consumers will have to help adjudicate the trade-off between protecting privacy and obtaining the benefits of e-commerce that they both value. Education on this issue is, therefore, of primary importance.

c. Illegal and Harmful Content

There has been public concern about the content of some of the information distributed and accessed on the Internet. The development of e-commerce could potentially be impeded by illegal and harmful content issues where users fear unwanted content, and where network service providers fear the liability they will take on if they are expected to be responsible for the content that flows across their systems.

2. *Consumer's Interests*

For e-commerce to flourish, consumer confidence is a must. Consumers must trust that when a problem occurs with an electronic transaction, the solution will be fast, easy, inexpensive, and available from anywhere in the world. On the other hand, there must be no trade barriers. These two fundamental elements will greatly define the future of e-commerce.

Consumers using e-commerce need to be afforded a transparent and effective level of protection. Users must gain confidence in the digital marketplace. National regulatory frameworks that provide such confidence in the physical marketplace must be adjusted where necessary to help ensure continued confidence in the context of the global networks.

E-commerce has many qualities that consumers find attractive, but it also has properties that could facilitate fraudulent activities, making law enforcement and prosecution difficult tasks. In addition, its international nature means that the laws and regulations a consumer relies on for protection at home may not apply in the merchant's country. E-commerce thus requires effective protection that should be developed under international cooperation among industry, governments, and international organizations. Digital products sold via e-commerce, such as software, music, or services, will create particular challenges for many existing consumer protection laws. For instance, in most cases, a consumer will consume the product immediately by downloading it and making a perfect digital copy; this will make returning the product for a refund problematic. Moreover, the status of click wrap licenses, which require consumers to abide by certain conditions prior to consuming, may violate basic consumer rights to redress. It is expected that specific technological tools will offer new ways to resolve some of these issues and allow consumers to protect themselves if they use them and learn to trust them.

3. *Tax Implications*

There is a need to ensure that taxation does not act as a barrier to the further development of e-commerce and that this new form of doing business does not undermine the tax base. Issues to be resolved include: taxpayer service, tax administration, tax treaties, transfer pricing, and consumption tax.

Jurisdictional rules applying to taxes and tariffs are generally based on concepts of physical geography, such as place of supply or residence of a taxpayer. As e-commerce is not bound by physical geography, it may become difficult for taxpayers and governments to determine jurisdiction and revenue rights. For consumption taxes, there may be a need for action to avoid double or nontaxation.

The availability, reliability, and completeness of commercial records generated in an e-commerce environment, including those from electronic payment systems, are also of concern where such records must be relied upon to ensure that taxation and tariffs have been appropriately and fairly applied.

The ability in e-commerce to create electronic substitutes, like electronic books, presents challenges for revenue collection and quota regimes. The existence of electronic products also raises issues of fairness between the taxes and tariffs imposed on physical goods and electronic substitutes. The ability, within electronic distribution channels, to bypass any or all of the traditional middlemen between producer and consumer raises serious issues for the collection of taxes, particularly withholding taxes.

The key issues for Mexican revenue authorities (and, in general, Latin American and others) are: to review existing taxation arrangements, including concepts of source, residency, permanent establishment, and place of supply, in light of e-commerce, and to modify the existing arrangements or develop fair alternatives, if required; to ensure that e-commerce technologies, including electronic payment systems, are not used to undermine the ability of revenue authorities to properly administer tax law; to provide a clear and equitable taxation environment for businesses engaged in both physical and e-commerce; and to examine how these new technologies can be exploited to provide a better service to taxpayers.

On an international consensus, any taxation of Internet sales should follow these principles: it should neither distort nor hinder commerce. No tax system should discriminate among types of commerce, nor should it create incentives that will change the nature or location of transactions; and the system should be simple and transparent. It should be capable of capturing the overwhelming majority of appropriate revenues, be easy to implement, and minimize burdensome record keeping and costs for all parties. Failure to attain a simple tax administration system will only result in lack of incentives for compliance and overall evasion with little, if any, possibility of effectively tracking transactions with no written or traceable records.

In dealing with such legal issues and others of crucial importance, such as intellectual property rights, jurisdiction, and export compliance, and based on the fact that e-commerce is global in nature, a global approach to solving these legal questions is required. For this reason, Mexico and other Latin American countries must be observant of the current international trend in defining the legal framework that will rule and define e-commerce, and thus, in this case, the interaction of international legal frameworks plays a key role.

F. Conclusions

The role of government in Mexico, and the rest of Latin America, is first to recognize the enormous potential of e-commerce to expand business opportunities, reduce costs, increase efficiency, and facilitate a greater participation of small and medium businesses in the global market. Further, taking into consideration the different stages of development of its economies, with their diverse regulatory, social, economic, and cultural frameworks, they have to set the policies and mechanisms to promote and facilitate the development of e-commerce by providing a favorable environment, including a consistent and complete legal and regulatory framework; promote mechanisms to ensure trust and confidence among e-commerce participants; and promote the efficient functioning of e-commerce by developing domestic frameworks that are compatible with international standards and regulations.

There are basically two main challenges for policy makers in Mexico and the rest of Latin America: (i) the speed of technological change and (ii) globalization. Until now, the Internet has developed in a legal vacuum, and, at the same time, traditional policy making cannot keep up, making necessary a more flexible approach towards self-regulation, in some instances, of codes of conduct and private participation.

Efforts to regulate e-commerce, however, should not attempt to adopt a traditional approach as the resulting legislation will either become an obstacle to the orderly growth of electronic transactions, or, more realistically, rules that are not observed and difficult or impossible to enforce. Although to date Mexico has not yet implemented specific legislation dealing with e-commerce and, therefore, the existing framework is dealing with a creature it was not designed to handle, the analysis of what is to be set in place must be carefully evaluated to avoid taking steps in the wrong direction.

Mexico and other Latin American countries are living the first days of the electronic marketplace. As a result, Latin America needs fast, efficient, and internationally coordinated actions in order to create a sensible regulatory framework with the aim of dismantling existing legal uncertainties and to enable its citizens to participate in such market in a secure way.

E-commerce in Mexico, and in Latin America generally, is a fundamental tool for economic development. Its continued growth promises to be one of the most important and exciting developments of the next century, but it will not be fully embraced and it will not be able to flourish until there is trust that: (i) services and networks are secure and reliable; (ii) transactions will be safe and private; (iii) there will be ways to prove the origin, receipt, and integrity of information received; (iv) there are ways to identify the parties involved; and (v) there are appropriate mechanisms and remedies available if something goes wrong, including but not limited to, proper dispute settlement mechanisms and adjudication. Simply put, users need to feel comfortable and secure in order to make e-commerce a part of their daily lives.

The electronic market offers Mexico and the rest of Latin America a unique opportunity for economic growth, to improve industry competitiveness, and to stimulate investment and innovation. But the risk also exists of allowing disparities in the level of access to computers and the Internet that will create a division between those in society who possess the information and those who do not. For this reason, a partnership between government and business is required to ensure a socially acceptable transformation towards a digital economy, enabling everyone to fully participate in this remarkable economic and legal transformation.

The ability to understand legal needs and new regulatory conditions will provide a great competitive advantage that will allow response to this changing environment by rapidly adapting not only the relevant policies but also the corresponding business strategies. For this reason, increasing economic development of Mexico and the entire Latin American region will be subject to the degree of development of the legal and regulatory framework, as well as decisive private and governmental influence.

II. Corporate Governance Advances in Mexico

A. Introduction

Along with many other countries, Mexico has traditionally provided little legal protection for minority shareholders in corporations organized under its laws. Most Mexican corporations are controlled by their respective founding families or restricted groups of investors. While a number of Mexican companies have issued shares to the public that are listed on the Mexican Bolsa, the New York Stock Exchange, and elsewhere, the shares held by non-insiders represent in most cases, if not all, a controlling majority of the voting shares. From time to time, foreign shareholders of Mexican companies have complained about what they sometimes perceive as a lack of adequate access to or information about the companies in which they have invested.

B. World Bank/OECD Recommendations

For a variety of reasons, including a concern that deficiencies in minority investor protection can add to the volatility of security prices in times of financial distress, the World Bank and the Organization for Economic Cooperation and Development (OECD) have recently begun to promote legal reforms in various countries with a view to improving the legal rights of investors in companies incorporated in such countries. The OECD Council, at a meeting at the Ministerial level in May 1999, adopted the OECD Principles of Corporate Governance that call for OECD member countries to promote corporate governance frameworks that will recognize shareholders' rights, ensure the equitable treatment of all shareholders, including minority and foreign shareholders, "ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company," and ensure the "strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders."

C. Mexico's CCE Code of Best Practices

Mexico, which has been a member of the OECD since 1994, has recently taken tentative steps to address the concerns reflected by the OECD Principles. CCE earlier this year adopted a Code of Best Practices (CCE Code) containing recommended practices for Mexican companies with respect to the structure and operation of a company's Board of Directors, the evaluation and compensation of senior management, the role of the company's auditors, the control of the company's finance and planning functions, and the disclosure of information to shareholders. Essentially, the CCE Code recommendations seek to promote (i) an increased flow of information relative to the administrative structure and functions of a company's corporate organs; (ii) the use of corporate procedures that will ensure that the financial information provided will be sufficient; (iii) the use of procedures that will promote participation and communication by and among Board members; and (iv) the use of procedures that result in adequate disclosures of information to shareholders.

The CCE Code proposes that the Boards of Mexican companies assume obligations that go beyond those specified in the General Law of Mercantile Companies, the Credit Institutions Law, and the Securities Market Law. The suggested additional obligations are (i) to establish the strategic vision of the company; (ii) to ensure that its shareholders and the capital markets have access to public information on the company; (iii) to establish internal control mechanisms; (iv) to assure that the company has the procedures needed to ensure that applicable legal requirements are satisfied by the company; and (v) to regularly evaluate the performance of the CEO and other members of senior management.

With respect to Board structure, the CCE Code recommends, for example, that a Board of Directors have between five and fifteen proprietary members, that the role of alternate members be limited, that at least twenty percent of the Board consist of independent non-shareholder Directors, and that at least forty percent of the directors be either entirely independent or, if they have two percent or more of the shares of the company, not be officers, senior management, advisors, customers, suppliers, debtors, or creditors of the company. It is also recommended that the Board meet at least four times a year, that special meetings be held at the request of at least twenty-five percent of the Board members, that Board members be subject to strict ethical standards requiring them to disclose conflicts of interest, and that they attend at least seventy percent of the meetings that are called.

Among the recommendations in the CCE Code with respect to disclosure of information to shareholders are the suggestions that the published agendas for shareholders' meetings be as specific as possible regarding the items expected to be considered, that supplemental information relevant to the agenda items be distributed to the shareholders at least fifteen days prior to the meeting, that shareholders be given the option of issuing proxies to vote on certain issues through representatives, and that the information distributed include the proposed candidates for membership on the Board and their professional backgrounds. Additional information relative to the plans and performance of the Board and its committees and other intermediate bodies should also be disclosed.

The CCE Code is voluntary but appears to be an important step toward increasing Mexican companies' awareness of practices that would improve the confidence of shareholders, including minority shareholders, in their ability to obtain timely information about the company and to play a more effective role, where their numbers of shares permit, in the operation of the company.

D. The CNBV Circular

On September 27, 1999, the National Banking and Securities Commission (the Comisión Nacional Bancaria y de Valores (CNBV)) promulgated its Circular 11-11 Bis 8 (the CNBV Circular) as to certain information that must be provided to the CNBV by companies whose shares are publicly traded in Mexico. Although the CNBV Circular will not enter into force until January 1, 2001, it may put additional pressure on the Mexican business community to adapt to the practices outlined in the CCE Code. The CNBV Circular does not make compliance with the CCE Code mandatory but does require the companies subject to the CNBV Circular to disclose periodically the extent to which they are complying with the practices contained in the CCE Code. The CNBV Circular provides, among other things, that not later than June 30 of each year the listed company must furnish to the CNBV a written indication, in accordance with Exhibit 26 of the circular, of the application of the CCE Code with respect to its board of directors and general shareholders' meetings. Exhibit 26 contains a questionnaire with a detailed list of questions regarding the matters addressed by the CCE Code. Information supplied to the CNBV will become available to members of the investing public.

E. Conclusion

Although the CCE Code is voluntary and the related reporting to the CNBV will not begin until 2001, the fact that the code has been issued by the CCE, a body of distinguished and influential business leaders, is a promising sign that important members of the Mexican business community have recognized that their access to the Mexican and international capital markets will increasingly depend on their ability to assure investors of increased compliance with internationally recognized best corporate practices. If the experts at the World Bank and the OECD are correct, this should help to minimize the adverse effects of future market volatility on shares of Mexican companies.

III. Mexico: Implementation of "Open Borders" Is Delayed as the United States, Raising Safety Concerns, Continues to Deny Access to Mexican Vehicles

Citing safety, the United States continued to deny access to Mexican commercial vehicles seeking to enter the United States in 1999, as it has done since late 1995.[1] Under the North

1. As noted in a recent U.S. Department of Transportation Office of Inspector General Audit Report, thousands of Mexican trucks already enter the United States, but are limited to travel within a narrow strip (anywhere from three to thirty miles) along the border. Mexico-Domiciled Motor Carriers, Office of Inspector General Audit Report TR-2000-013 (Nov. 4, 1999). The report noted that all "Mexico-domiciled motor carriers must obtain *operating authority (Certificate of Registration)* from the U.S. Department of Transportation before they can operate anywhere in the United States." *Id.* at 5. Presently, there are approximately 84,000 Mexican commercial vehicles with such authority. Of those 84,000, "[a]bout 98% . . . are currently limited to operating within the commercial zones along the four southern border states provided they meet U.S. safety standards. Under the applicable statutes, the remaining two percent (168 motor carriers) are allowed to operate beyond the commercial zones." *Id.* at ii. These include Mexican commercial vehicles owned by Americans; certain tour and charter bus operations; vehicles that were "grandfathered" in because of having received appropriate authority from the Interstate Commerce Commission; and one carrier that traverses the United States to reach Canada without loading or unloading any goods.

American Free Trade Agreement (NAFTA),[2] commercial vehicle traffic between the United States and Mexico was to travel freely in each country's border states[3] beginning December 1995; unimpeded travel within the entire North American continent was to have commenced January 1, 2000. Because of what it terms its serious concerns about the safety of Mexican vehicles seeking to enter its territory, the United States has, since late 1995, refused to implement these two NAFTA provisions. While the borders remained closed to Mexican trucks, the United States and Mexico have engaged in significant activity since the summer of 1998 in an attempt to resolve the matter.

A. Introduction

NAFTA, narrowly passed in late 1993 over the objections of most labor and environmental groups,[4] sought to eliminate various trade barriers between the United States and Mexico. Among those barriers were restrictions on the ability of one country's goods-carrying trucks to enter into and travel freely within the other's territory.[5] Under NAFTA, transborder commercial traffic was to begin flowing unimpeded into and within the border states[6] in December 1995. However, on the day this NAFTA provision was to take effect, then-U.S. Department of Transportation Secretary Federico Peña and then-U.S. Trade Representative Mickey Kantor, citing safety concerns, announced an indefinite delay in allowing Mexican trucks to enter the United States beyond the commercial zone.[7] While the United States

2. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993) [hereinafter NAFTA].

3. The American border states are Arizona, California, New Mexico, and Texas; the *frontera mexicana* consists of Baja California, Chihuahua, Coahuila, Nuevo Leon, Sonora, and Tamaulipas.

4. *See President Confers with Labor Leader for Fence Mending*, N.Y. Times, Dec. 11, 1993, at A1.

> President Clinton met with the labor leader Lane Kirkland at the White House today in an effort to repair a relationship frayed by the North American Free Trade Agreement . . . Although still angry with Mr. Clinton, organized labor needs his backing for its priorities: worker retraining programs, occupational safety improvements and a bill that would bar the hiring of permanent replacements for striking workers. For his part, Mr. Clinton needs labor's support for the health care plan if there is to be any hope of getting it through Congress next year.

Id.; *see also Environment Groups Are Split on Support for Free-Trade Pact*, N.Y. Times, Sept. 16, 1993, at 1. "A dispute over the trade pact with Mexico and Canada has split the American environmental movement, exposing a profound ideological rift over whether some large national environmental organizations have become too friendly with the Clinton White House." *Id.*

5. *See* Mexico-Domiciled Motor Carriers, *supra* note 1. Some cross-border commercial activity already occurs, as it has for decades, as a matter of both law and practicality. By promoting the free, unimpeded flow of goods from one country to another, through the eventual elimination of such practices as drayage (where goods from the interior are brought to the border by one (usually high-quality, long-haul vehicle), transferred to another truck (often a substandard one), then delivered across the border to be delivered to another carrier), NAFTA hoped to stimulate economic trade and integration among the United States, Mexico, and Canada.

6. *See supra* note 3.

7. *See, e.g.*, Paul Blustein, *White House Sidesteps Several Key NAFTA Rules*, Dec. 28, 1995, Austin American-Statesman.

> U.S. Trade Representative Mickey Kantor and Transportation Secretary Federico Peña, citing highway safety concerns, announced an indefinite delay in a NAFTA provision that would have allowed Mexican trucks to start traveling freely throughout Southwestern border states in a few weeks. Kantor also has helped Florida tomato growers by tightening restrictions on Mexican tomato imports.

Id. According to at least one news source, Secretary Peña took this action in consultation with his Mexican counterpart, Carlos Ruiz Sacristan, "who for weeks had been pushing for a delay to protect Mexican truckers raised concerns about Mexican vehicles, drivers' hours of service behind the wheel, weight limits, and insurance, Mexico noted that the commonly used American long-haul trucks of fifty-three feet exceeded Mexican standards; thus, American trucks were likewise barred from venturing beyond the border commercial zone into the six Mexican border states.

While NAFTA's advocates questioned Peña's move, coming as it did within days of the Teamsters arguing its case in Washington, D.C., questioning, inter alia, the constitutionality of NAFTA,[8] it appears Mexico did not take *formal* action for several years. Indeed, in an apparent attempt to assuage American concerns, Mexico, through its actions, actually appeared to validate some of the American concerns. For example, in July 1998, the two nations entered into a Memorandum of Understanding (MOU) regarding the drug and alcohol testing of Mexican truck drivers who cross into the United States.[9] The MOU kept Mexico's present testing system in place, while creating a process by which Mexican truckers entering the United States comply with federal drug and alcohol testing regulations.[10] The document also envisioned creation of common databases and information sharing about drug and alcohol testing and enforcement of regulations.[11] While such Mexican action was no doubt meant to allay American concerns and speed up the border opening, a plausible argument can be made that it allowed opponents of opening the borders to point to Mexico's unsafe (i.e., no drug testing) commercial vehicle industry.

B. Recent Developments

1. *Mexico Petitions for NAFTA Chapter 20 Arbitration*

In September 1998, the Mexican government indicated its intention to proceed under chapter 20[12] of NAFTA, and seek creation of an arbitration panel to amicably deal with the border trucking issue. Mexico alleged that by prohibiting Mexican trucks from free access to the four border states, the United States continued to violate that portion of NAFTA.[13] At the time, the United States reiterated its commitment to enact all aspects of NAFTA, but only after its legitimate safety concerns were addressed.

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from an onslaught of U.S. competition." John Maggs, *US-Mexican Trucking Disagreement Escalates as Trade Ties Break Down*, J. Com., Dec. 22, 1995.

8. *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478 (D.C. Cir. 1992). The case involved a Teamster challenge to a Memorandum of Understanding (MOU) that the U.S. Department of Transportation entered into with its Mexican counterpart providing for recognition of foreign commercial driver's licenses.

9. Memorandum of Understanding Between the Department of Transportation and the Secretariat of Communications and Transport of the United Mexican States, June 10, 1998.

10. *See, e.g.*, Procedures for Transportation Workplace Drug Testing Programs, 49 C.F.R. pt. 40 (2000); Controlled Substance and Alcohol Use and Testing, 49 C.F.R. pt. 382 (2000).

11. *See* Kevin G. Hall, *Mexico, U.S. Agree on Drug Testing for Truckers; Harmonizing Safety Procedures*, J. Com., July 10, 1998, at 1A. The MOU came partly in response to an August 13, 1996 legal memo prepared by U.S. Department of Transportation General Counsel Nancy E. McFadden, in which she stated that the United States did, in fact, have jurisdiction over foreign drivers whose work brought them within the borders of the United States. She stated:

> [w]hether a Canadian or Mexican driver that operates in the United States is chemically dependent is clearly of interest to the United States as the safety fitness of these drivers has a substantial, direct and foreseeable effect within the United States. U.S. residents have a reasonable expectation that all drivers of commercial motor vehicles on U.S. highways will be subject to the same high safety and fitness standards and not be impaired by drugs or alcohol.

12. Chapter 20 of NAFTA allows a party (i.e., Canada, Mexico, or the United States) to invoke article 2006 and seek consultation with any other party, the ultimate goal of which is to resolve potential disputes.

13. *See also* Mexico Requests the Creation of an Arbitration Panel Regarding the Access of Mexican Trucks into the United States, BOL-98-161 (Sept. 23, 1998), http://www.embassyofmexico.org/english/1/4/

Interestingly, the association representing Mexican trucking interests, Canacar, expressed ambivalence, if not downright opposition, to opening the border fearing that Mexican drivers, in the then-current financial straits in which Mexico found itself, could not compete effectively against their American counterparts.[14]

2. *Department of Transportation Office of Inspector General Reports*

In late 1998, the U.S. Department of Transportation (DOT) Office of Inspector General (OIG) issued the first[15] of two audit reports that provided opponents of opening the borders in the near future with considerable support. The audit was undertaken to assess the present ability of the Federal Highway Administration (FHWA) to ensure the safety of commercial trucks entering the United States from Canada and Mexico. The report was highly critical of the ability of the FHWA to adequately enforce existing federal safety standards to vehicles entering the country from Mexico. In particular, the report concluded that too few vehicles were being inspected along the U.S.-Mexico border, and of those vehicles that *were* inspected too few of them complied with U.S. standards.[16] The report also noted that federal inspectors did not coordinate their efforts well with state authorities; as a consequence, potentially unsafe Mexican vehicles are allowed to pass into the border commercial zone unimpeded.[17]

September/BOL-98-161.htm.

> Yesterday, Mexico requested the creation of an arbitration panel to analyze and resolve the two-year-old controversy derived from the United States' refusal to allow Mexican trucks access to California, New Mexico, Arizona and Texas, as well as for Mexicans to invest in cross-border transportation services within U.S. territory under the North American Free Trade Agreement (NAFTA). As of December 18, 1995, the United States should have allowed the access to U.S. border states and, starting on January 1, 1997, Mexican investors were supposed to have had access to this sector. However, despite the numerous meetings held between officials from both countries, the United States has still not eliminated the restrictions, which it unilaterally adopted.
>
> The creation of the panel constitutes the third and final step of the dispute-resolution procedure provided under chapter 20 of NAFTA. On December 18, 1995, Mexico initiated this procedure by requesting consultations under NAFTA's Article 2006. The consultations were held on January 19, 1996, and, since then, Mexican and U.S. officials have held several meetings on this issue, without having reached a satisfactory solution. Thus, on July 24, 1998, Mexico requested a meeting of the Free Trade Commission, based on NAFTA's Article 2007, which was held on August 18, 1998. However, it was not possible to settle the controversy. This is why Mexico has requested the creation of an arbitration panel which must definitely rule on this alleged infringement of the NAFTA.
>
> In spite of its decision to continue these procedures to resolve the dispute,.Mexico is still open to finding a negotiated solution that allows the parties to fulfill their commitments under NAFTA.

Id.

14. *See* Mary Sutter, *Mexico Asks Arbitration to Force Open Border*, J. COM., Sept. 24, 1998, at 11A. In spite of Canacar's ambivalence, the Mexican government expressed concern "about the precedent set by the Clinton administration's unilateral decision to not respect the [NAFTA] border opening." *Id.*; *see also* Daniel J. McCosh, *Mexican Truckers in No Rush to Open Border*, J. COM., Jan. 11, 1999, at 12A.

15. Motor Carrier Safety Program for Commercial Trucks at U.S. Borders, Office of Inspector General Report TR-1999-034, http://www.oig.dot.gov/audits/tr1999034.html.

16. *Id.*; *see also* Kevin G. Hall, *Report Blasts DOT for Lax Border Checks*, J. COM., Jan. 6, 1999. "... some 50 percent of Mexican trucks inspected at Texas border crossings were pulled out of service. By comparison, 25 percent of U.S. trucks nationwide and 17 percent of Canadian rigs at the northern border were idled." *Id.* The Report noted that the state of California, with its four border checkpoints, had an acceptable level of inspection.

17. The Report noted that, whenever full commercial vehicle integration occurs, "the States will be performing inspections of both U.S. and foreign carriers in the border States and the interior States." Report TR-1999-034, *supra* note 15, at 1.

a. Congressional Response

In partial response to the first OIG report, some 250 Congressmen (nearly half the members of the U.S. Congress) wrote President Clinton, asking that he continue to keep the southern border closed to Mexican commercial vehicles. They argued that until such time as Mexican vehicles met U.S. safety standards, Mexican drivers should undergo the same requirements as their American counterparts, and the federal government dedicate sufficient resources to adequate inspection, the border should remain closed to traffic beyond the commercial zone.[18]

In November 1999, the OIG issued a second audit report examining the FHWA's oversight of Mexican vehicles operating beyond the commercial border zone.[19] This report concluded that throughout 1998, Mexican vehicles were in fact operating in twenty non-border states (an occurrence that was not to have happened until January 1, 2000), and that a large number of Mexican vehicles with authority to travel only in the commercial zones of the border states were in fact traveling beyond that zone.[20]

b. United States Department of Transportation Response

In response to the OIG reports and congressional concern, the DOT indicated it would triple the number of safety inspectors along the U.S.-Mexico border and would increase the intensity of inspections.[21] Other undetermined action was pending at the end of 1999.

National politics from mid-1999 through the end of 2000 were dominated by presidential and congressional elections; in such a climate, the proponents of maintaining the status quo (i.e., taking no action) appeared to have the upper hand. In the United States, there was no public clamor to remove the barriers.

In January 2000, the Administration indicated that the borders would remain closed to

18. *See Clinton Order to Oppose Entry of Mexican Trucks*, NAT. J. CONG. DAILY, June 25, 1999. Teamsters President James Hoffa joined House Transportation and Infrastructure ranking member James Oberstar (D-Minn.) and Rep. Jack Quinn (R-N.Y.), Thursday in calling on President Clinton to keep the U.S.-Mexico border closed to unsafe Mexican trucks and drivers unqualified to drive on U.S. roads. In letters to Clinton and Kenneth Mead, the Transportation Department's inspector general, the three laid out concern for the safety of American roads based on the high number of cross-border violations by Mexican trucking companies. If Clinton does not respond by keeping borders closed, a North American Free Trade Agreement provision will allow Mexican trucks to begin operating throughout the United States at the beginning of next year. "The primary problem is that U.S. drivers pass standards, including physicals and drug tests to drive on our roads, and that Mexican drivers don't have to do any of this," Oberstar said. When asked about the expected reaction from Clinton and the DOT, Hoffa indicated he was hopeful both would support closed borders, noting a 1998 DOT report finding that many trucks were not being inspected at U.S.-Mexico borders, and that of those inspected, many did not meet U.S. standards.

19. Mexico-Domiciled Motor Carriers, *supra* note 1.

20. *Id.*

21. *See* Kevin G. Hall, *U.S. Increases Inspection Force for Trucks on Mexican Border*, J. COM., July 23, 1999, at 15.

> DOT personnel will conduct more Level 1 inspections, the most rigorous inspections which include the undercarriage of a vehicle. Currently there are three levels of inspection. In Level 1, an inspector goes under the vehicle to check brakes, suspension and other areas. Level 2 involves a walk around the truck to check lights, horn and other basics. Level 3 involves a check for a valid commercial driver's license and U.S. authority to operate in border zones.

Id.

northbound traffic for at least another year.[22] In response, Mexico demanded the naming of a dispute resolution panel[23] to review the question; a preliminary report from such a panel was expected by mid-2000.

IV. Mexican Judicial Review in Antidumping Matters

Mexican law is based on a civil law tradition as opposed to a common law system as in the United States. Civil law tradition demands a formalistic application of the law, as would criminal procedure in the United States. Mexican antidumping law has tried to encompass both legal systems. Thus, the Mexican antidumping practice is based today on common law figures but influenced by civil law formalities. The judicial organs having authority to review antidumping determinations have a limited trade law practice and, of course, review the cases under a formalistic approach as they do in their everyday practice.

This section addresses controversial issues of selected cases in which the Federal Fiscal Tribunal (FFT) has reviewed final antidumping determinations from the investigating authority, the Secretary of Commerce and Industrial Development (SECOFI). We hope this section will be of assistance for attorneys when choosing the forum in which to bring a complaint—binational panels, WTO panels, or domestic judicial review.

The Mexican antidumping system started back in the beginning of 1987. The first legal instrument[24] was approved by Congress in 1986, and later substituted in 1993 by the Foreign Trade Law. After more than a one-year investigation process, few companies have the interest of challenging an adverse determination. National producers would not want to fight against SECOFI; importers fear customs actions; and exporters either prefer binational panels (United States and Canada) or lose interest in the Mexican market. Thus, the number of companies challenging adverse determinations is very limited and the FFT has not obtained a great deal of experience in antidumping law, as indicated below. The FFT has chosen to apply and interpret the law under a formalistic standard.

First, it must be said that the FFT is not part of the judicial branch. It is part of the executive branch but acts as a jurisdictional organ. It was created as a legal tribunal to review acts from the tax authorities including customs rulings. The experience in foreign trade of the FFT comes from the application and interpretation of the customs legal framework. The Foreign Trade Law and the Federal Fiscal Code granted, however, authority to the FFT to review final determinations in antidumping matters, notwithstanding their inexperience with this new area of law.

The FFT reviews AD final determinations applying the standard of review set forth in article 238 of the Federal Fiscal Code.[25] If a final determination is considered illegal by the

22. *See U.S. Delays Opening Border to Trucks from Mexico*, N.Y. TIMES, Jan. 8, 2000; *see also U.S. Seeks Delay in Key NAFTA Issue with Mexico*, LOS ANGELES TIMES, Jan. 7, 2000. Both newspaper accounts suggested that the Administration took this action to ensure labor support for Vice President Al Gore in his presidential campaign.

23. *See* USA-98-2008-01.

24. Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior.

25. An administrative resolution shall be declared illegal when any of the following causes is proven:

I. Incompetence of the officer who has issued, ordered or processed the proceeding;
II. Omission of the formal requirements set forth by the laws, affecting the defenses of the particular and the sense of the resolution, even the lack of foundation or rationale;
III. Procedural vices affecting the defenses of the particular and the sense of the resolution;

FFT, it shall order the investigating authority either to nullify the final determination (null and void order) or to take measures consistent with the order (nullity for certain effects). Below are three case examples in which the FFT has issued a final order. As we will see, due to the formalistic application of the law, the FFT has not been consistent with standard WTO practice.

A. Case 1: Special Steel from Brazil

On November 18, 1994, SECOFI determined antidumping duties for a number of special steel products from Brazil. After three Brazilian exporters exhausted legal remedies[26] and filed a nullity suit before the FFT on February 12, 1998, the Superior Chamber of the FFT declared that the AD final determination had been illegal, based on article 238(I) of the Federal Fiscal Code.

In other words, the FFT found that the investigation had been conducted or carried out through an officer from SECOFI,[27] which had no legal existence and therefore was incompetent to conduct the investigation. This medium ranking officer within the investigating authority had ordered the presentation of relevant information, ordered in situ visits, and appeared in every procedural stage. Thus, the FFT concluded that all acts from such officer had been illegal, and the final AD determination could not stand based on such illegalities. Finally, on November 21, 1999, SECOFI published a notice revoking the antidumping duties.

B. Case 2: Glazed Ceramic Mosaic from Brazil

In antidumping duty administrative reviews, the investigating authority normally examines a change of circumstances in the dumping margins. If, from the review, the investigating authority finds new dumping margins, it would modify the dumping duties based on the new dumping margins. In absence of an export price, it would have no other choice but to confirm the antidumping duties based on the best information available.

On August 4, 1995, through an antidumping duty administrative review, SECOFI confirmed antidumping duties on the imports of glazed ceramic mosaic from Brazil because there had been no export price to Mexico. A Brazilian association of exporters alleged that since there had been no exports to Mexico of the subject product, the investigating authority had to eliminate the dumping duties because there had been no dumping practices. After filing for a nullity suit, the FFT declared on August 25, 1998, that SECOFI was not permitted to impose antidumping duties in the absence of exports to Mexico. The rationale behind this determination was that in the absence of exports of the subject product, there is no positive proof to determine a dumping margin. Therefore, SECOFI's confirmation of the antidumping duties had been illegal.

IV. If the facts taken into consideration did not happen, were different or were considered in an erroneous way, or if it was issued contrary to the applicable provisions or due provisions were not applied;

V. When the administrative resolution issued in the exercise of discretional powers fails to correspond to the purposes for which the Law grants said powers.

26. In order to have legal access to the nullity suit before the FFT, a company must first exhaust the revocation recourse before SECOFI.

27. Director General Adjunto Tecnico Juridico from the Unidad de Practicas Comerciales Internacionales of SECOFI.

On March 29, 1999, SECOFI revoked the antidumping duties and complied with the nullity order of the FFT.

C. Case 3: Stoneware and Porcelain Ware from China

It has been GATT and WTO standard practice that in antidumping administrative reviews there is no legal obligation to conduct the so-called injury test, except in the case of sunset reviews.

On October 31, 1997, through an antidumping administrative review, SECOFI increased the antidumping duties to the imports of stoneware and porcelain ware from China. One importer decided to challenge the increase in the dumping duties and filed revocation recourses and, finally, a nullity suit. On September 14, 1999, the Superior Chamber of the FFT ordered that SECOFI's final determination had been illegal, among other reasons, because the investigating authority had not made a positive determination of injury to the national production.

According to the FFT, if, in an ordinary investigation, the investigating authority needs to examine dumping, injury, and causation, in an antidumping review, it has to act in a similar way. Therefore, contrary to all economic logic and rationale, today's criteria would be to examine injury and causation to the national production when the dumping margins are modified.

D. Conclusion

As it can be noted, FFT's approach to antidumping judicial review is very formalistic and confirms their serious inexperience in antidumping law matters. However, the above can be an important advantage for respondents seeking a judicial remedy based on procedural defects or other arguments with a small WTO basis. Therefore, respondents must be careful in choosing between alternative dispute settlement mechanisms (such as NAFTA's chapter 19), WTO panels, or domestic judicial review, depending on the nature of arguments and precedents supporting the case before the judicial or panel body.

V. Significant Events in 1999 under NAFTA Chapter 19

A. Introduction

NAFTA has been a major success from the perspective of trade policy, economic adjustment, and political stabilization. Mexican law provides for binational panel review under NAFTA chapter 19 of antidumping and countervailing duty determinations by each country's trade agencies involving NAFTA goods. The system is ten years old, if you include the experience under the U.S.-Canada Free Trade Agreement (FTA), and has moved from a temporary political expedient under the FTA to a permanent fixture of trade litigation under NAFTA. This section is an overview of what happened under the chapter 19 system in 1999. It reviews the results of the panel reviews in which decisions were issued during the year. It also covers problems with the process of panel selection and the status of ongoing litigation. Finally, it summarizes a problem involving the important issue of panelist compensation. All of these problems affect Mexican participation in this unique dispute settlement system.

B. Panel Decisions

Six panels, two in Canada and four in the United States, issued eight decisions in 1999. Five of the decisions involved imports of Mexican goods. It is unfortunate that no panel decisions were issued in Mexico during 1999. The panel review of the High Fructose Corn Syrup case in Mexico has been delayed for nearly two years due to the failure of the parties to select a suitable panel. The section below on selection of panels deals with that issue. A short summary of each panel review and the decisions issued follows below:

1. *CDA-97-1904-02, Certain Hot-Rolled Carbon Steel Plate, Originating in or Exported from Mexico*

Two decisions were issued by the panel. The primary question was what is the appropriate degree of deference owed by the panel under Canadian law in its review of the agency's determination. On May 19, 1999, the panel issued a decision that extensively reviewed the Canadian standard of review that governs panels. The panel split 3-2 on nonnational lines and remanded to the Canadian International Trade Tribunal (CITT) to determine whether it was required under Canadian law to issue a separate order and separate reasons for Mexico. The CITT issued its remand determination with a separate order for Mexico, but without a separate analysis. On December 15, 1999, the panel again issued a split decision, with the majority affirming the agency determination on remand, applying a standard of patent unreasonability, and the minority advocating a standard of considerable deference. The minority would have remanded to the CITT for a separate analysis of certain factors and an explanation of their effect on the final decision based on a standard of considerable deference to the agency.

2. *CDA-USA-98-1904-01, Certain Prepared Baby Food Originating in or Exported from the U.S.*

This panel also confronted the question of whether the appropriate level of deference was defined by the standard of patent unreasonability or considerable deference. In their decision of November 17, 1999, the panel found that the findings of fact made by the CITT were supported rationally by the evidence, applying a standard of patent unreasonability. They also found that the Complainants failed to identify any error of law by the CITT for the panel to review. As has been the case in every panel review in Canada under NAFTA, the agency determination was affirmed.

3. *USA-97-1904-01, Grey Portland Cement and Clinker from Mexico*

This panel confronted an extraordinary number of technical issues in its fifth annual administrative review of the antidumping order. On June 18, 1999, the panel issued a lengthy decision that affirmed the Department of Commerce on almost all issues. The panel remanded to the Department for a recalculation of the normal value of cement without including bagged Type I cement. The panel also remanded for the Department to reconsider its level of trade calculation and to correct certain ministerial errors. The Department issued its final determination on remand on November 15, 1999, reducing the dumping margin from 73.69 percent to 44.89 percent. The panel will review that finding and issue another decision by February 14, 2000.

4. *USA-97-1904-07, Porcelain-on-Steel Cookware from Mexico*

The panel review of the ninth administrative review of the antidumping duty order resulted in a decision on April 30, 1999, that affirmed the Department of Commerce in all respects but one. The panel remanded for the Department to reconsider whether the ratio it used in calculating indirect selling expenses for a reseller of Mexican cookware was a ministerial error. As a result of the remand, the Department raised the dumping margin for one of the Mexican companies from 2.74 percent to 16.97 percent.

5. *USA-97-1904-03, Corrosion-Resistant Carbon Steel Flat Products from Canada*

This panel issued three decisions, the first in 1998 and two in 1999. The panel originally ordered the Department to deal with transfer pricing between affiliated companies differently than in its determination. The Department initially refused to do so, but in its second determination on remand, it recalculated transfer pricing in accordance with the panel's second decision. However, the Department stated that it would not be bound in other panel reviews to use the methodology found lawful by the panel. This position is permissible because under the terms of NAFTA article 1904.9, panel decisions are only binding on the governments, "with respect to the particular matter between the Parties that is before the panel." This article was inserted to ensure that the panel process would not result in re-interpretation of the antidumping and countervailing duty laws of each country by domestic and foreign experts, rather than judges.

6. *USA-CDA-98-1904-03, Brass Sheet and Strip from Canada*

In its July 16, 1999 decision, the panel remanded to the Department of Commerce to explain its use of average prices rather than weighted average prices in calculating the costs of production of the Canadian producer. The Department recalculated the margin at 0.40 percent, which is de minimis. The Department also stated that the order should remain in place because there were indications that dumping would resume if the order were removed. This panel review took place at the same time as the sunset review of the order.

C. Panel Selection and Ongoing Litigation

The governments have allowed the process of panel selection to delay many panel reviews far beyond the time periods called for in chapter 19 of NAFTA. Of five panel reviews initiated in the United States in 1998, four have been suspended or delayed pending panel selection. Of seven panels requested in the United States in 1999, no panels have been selected, although two were terminated. Both the Mexican and Canadian panels initiated in 1998 have been delayed for nearly two years pending panel selection. While there may be good reasons for some of the delays, this trend is disturbing. If the parties can conspire to delay the implementation of such a crucial aspect of the agreement, then they can delay any provision. The resulting uncertainty about the application of the accord directly contradicts the objectives of the agreement. It would be appropriate for the parties to comply immediately with the terms of the agreement, rather than to continue this politicization of the process.

D. Panelist Compensation

One of the remarkable features of the chapter 19 system is the willingness of private sector experts to perform public service as expert panelists. There is a serious problem developing in the process that must be addressed by the governments as soon as possible. The rate of compensation for panelists is Cdn$400 (U.S.$275) per day, plus travel expenses. That rate was set in 1988 in an exchange of letters between the top trade officials of the

United States and Canada. That compensation rate was extended to NAFTA in 1993 in a similar exchange of letters among the highest trade officials of Canada, Mexico, and the United States. At current exchange rates, this amounts to approximately U.S.$35.00 hourly. Most of the panelists earn substantially more than that rate in their private sector positions.

This has not caused much of a problem in the United States, where there is a large pool of trade lawyers and international experts who are willing to serve on panels, at least once. It has caused many of the most qualified people in Canada and Mexico to decline to serve on panels because they simply cannot justify the financial hardship of this public service to their law firms or other employers. The number of qualified experts in both Canada and Mexico is much more limited than in the United States, and both governments have encountered problems finding experts willing or able to serve on binational panels. Once it becomes impossible to find qualified panelists, the process is doomed to become irrelevant and eventually eliminated.

It is time to raise the rate of pay to at least that of other similar international institutions. For example, the International Centre for the Settlement of Investment Disputes pays roughly four times the daily rate of NAFTA. The WTO pays panelists Sfr. 600 daily, approximately U.S.$370 daily. Commercial arbitrators earn between three and ten times the NAFTA rate. Based on the current rates for similar activities, the compensation rate can certainly be raised to the WTO level ($46.00 hourly). A better incentive for ensuring a ready supply of experts who will serve on panels would be to raise the rate to a more commercially viable $95 hourly, plus travel expenses. This rate is lower than most of these experts earn in their professional capacities. In addition, despite the increase in compensation, there is little incentive to work extra hours given the higher hourly rate most panelists can earn in their private capacities. This pay increase is therefore unlikely to create budget problems, except in the largest and most complicated matters. It is time to compensate NAFTA panelists at a rate appropriate to the expertise they bring to this system.