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Erratum
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CONFRONTING DIFFERENCES IN THE UNITED STATES AND MEXICAN LEGAL SYSTEMS IN THE ERA OF NAFTA

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The North American Free Trade Agreement ("NAFTA")[1] will focus more attention on the differences between the legal systems in the United States and Mexico.[2] NAFTA establishes binational panels to interpret the Agreement and to resolve unfair trade practice disputes.[3] In unfair trade practice cases, panelists will be required to determine "whether such [administrative] determination was in accordance with the anti-dumping or countervailing duty law of the importing Party."[4] Such binational panels are obligated to "follow general legal principles that a court of the importing party otherwise would apply" in reviewing an administrative authority ruling.[5] These standards of review, however, may vary widely between the parties to the Agreement.[6] Binational

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1. Oct. 7, 1992 draft, U.S.-Can.-Mex. [hereinafter NAFTA].

2. This article focuses exclusively on the United States and Mexico. Canada has its own distinct legal system, but one that shares the same common law tradition as the United States.

3. NAFTA, *supra* note 1, chs. 19 & 20.

4. *Id.* art. 1904.2.

5. *Id.* art. 1904.3. Annex 1911 defines "standard of review" by reference to each party's judicial review statutes, namely for Canada, § 18.1(4) of the Federal Court Act; for the United States, 19 U.S.C. § 1516(B)(1)(A), (B); and for Mexico, Article 238 of the Código Fiscal de la Federación [Federal Tax Code].

6. The differences in standards of review has been a matter of some contention under the Canada-United States Free Trade Agreement. The United States International Trade Commission and a Binational Panel took significantly different positions regarding the U.S. standard of review in *Fresh, Chilled or Frozen Pork*, 13 I.T.R.D. (BNA) 1291 (USA-89-1904-11, Jan. 22, 1991). Arguably, binational panel review has been more valuable to Canadian than to American exporters, because the standard of judicial review is more rigorous in the United States than in Canada. Keith B. Ferguson, *Dispute Settlement Under the Canada-United States Free Trade Agreement*, 47 TORONTO FAC. L. REV. 317, 349 (1989); G. Lermer, *The Dispute Settlement Mechanism in the Free Trade Agreement*, CANADIAN AGRICULTURE TRADE 40. Canadian exporters have successfully utilized Chapter 19 more often than U.S. exporters to date. Free Trade Agreement, U.S.-Can., Status Report (Binational Secretariat, U.S. Section, Sept. 1992).

In the United States, the standard of review is one of "arbitrary, capricious, [or] an abuse of discretion," "unsupported by substantial evidence on the record," or "otherwise not in accordance with law." Gary Horlick et al., *Dispute Resolution Mechanism*, *in* THE CANADA-UNITED STATES FREE TRADE AGREEMENT 68 (citing 19 U.S.C. § 1516a(b)(1)); Donald P. Cluchey, *Dispute Resolution Provisions of the Canada-United States Free Trade Agreement*, 40 ME. L. REV. 335, 347 n.97 (1988). The United States Supreme Court has held that the standard of "substantial evidence" is "more than a mere scintilla of evidence" but less than 51% of the evidence. *Consolidated Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938). The binational panel of experts has not been as deferential to administrative decisions as the American courts given their considerable technical competence. *See, e.g.*, *Fresh, Chilled and Frozen Pork*, 12 I.T.R.D. (BNA) 2299, 2304 (Binational Panel No. USA-89-1904-06, Sept. 28, 1990).

In Canada, the standard of review under the Federal Court Act is either a failure to "observe a principle of natural justice or otherwise acted beyond, or refused to exercise, its jurisdiction,"

arbitral panels will also resolve disputes involving interpretation and application of NAFTA.[7] NAFTA further encourages arbitration to settle private commercial disputes involving agriculture, intellectual property, and investment.[8]

United States, Canadian, and Mexican lawyers will be appointed to these arbitral panels in government-to-government disputes as well as in private disputes arising under NAFTA.[9] Lawyers will be required to apply the law of their neighbor because the "law of the importing country" as well as its "standard of review" will govern in unfair practice disputes.[10] In controversies about matters other than antidumping and countervailing duty laws, panelists will be required to interpret NAFTA terms which may carry different meanings in their respective legal system.[11]

NAFTA will require that lawyers involved in cross-border transactions or disputes, as well as NAFTA panel members, learn the basic precepts of their neighbor's system.[12] Yet, United States and Mexican legal traditions (private law), constitutions (public law), and political systems

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"error in law," or as basing a decision on "erroneous finding of fact . . . in a perverse or capricious manner." Horlick et al., *supra* at 68-69, 78-79 (noting that "where a tribunal properly admits evidence, it cannot be reversed for giving the wrong weight to particular evidence."); *see also* John Kazanjian, *Dispute Settlement Procedures in Canadian Antidumping and Countervailing Duty Cases*, *in* TRADE-OFFS ON FREE TRADE: THE CANADA-U.S. FREE TRADE AGREEMENT 197, 198, 201 (Marc Gold & David Leyton-Brown eds., 1988). Kazanjian, a Canadian trade lawyer, argues that the Canadian "Federal Court will generally defer" to administrative trade authorities. *Id.* at 198. He also argues that it is likely that "both the U.S. and Canadian panel members would take their own expertise into account and could be less deferential than the Federal Court to the expertise of the trade regulators." *Id.* at 201.

In Mexico the applicable standard is set forth in Article 238 of the Código Fiscal de la Federación [Federal Tax Code], which governs administrative review by the Tribunal Fiscal de la Federación [Federal Tax Court] via direct *amparo*. It deals primarily with formal issues (competence of the official, lack of compliance with formal or procedural requirement, errors of law, violation of the purpose of the law, etc.). The court may nullify administrative rulings on the basis of evidentiary defects, such as the "absence of basis or cause," or if the facts underlying the cause "did not occur" or the facts were otherwise irrelevant or inapplicable to the legal standard. *Id.* art. 238 (II), (IV). Administrative decisions must satisfy "the principal of congruency, or logical development, concept and reach between the arguments of the parties and the decision of the Tax Court." Lic. Raúl Rodríguez Lobato, *Derecho Fiscal*, 282-84 (2nd ed. 1986). The administrative authority may "not simply assert that the [offered proof] was improper or insufficient, without stating the reason or cause for such conclusion." Lics. Luis Daniel Delgadilo Maíz & Fernando Mier Estrada, *Una Década de Jurisprudencia en Material Fiscal* 38, 84, 107 (notification), and 122 (authority to reverse in whole or in part) (1991).

7. NAFTA, *supra* note 1, art. 2004. Binding arbitration is neither required nor possible without consensus of the disputing parties.

8. NAFTA establishes an Advisory Committee on Private Commercial Disputes. *Id.* art. 2022.(4). This provision mandates that, "[e]ach party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area." *Id.* art. 2022(1). Such systems are specifically contemplated for "commercial disputes [that arise in connection with transactions] in agricultural [goods]," *id.* art. 707, and for "Settlement of Disputes between a Party and an Investor of Another Party," *id.* ch. 11, § B.

9. "A majority of the panelists on each panel shall be lawyers in good standing." *Id.* annex 1901.2(2). "Roster members shall have expertise in law, international trade, other matters covered by this agreement." *Id.* art. 2009.2.

10. *Id.* ch. 9.

11. *Id.* ch. 20.

12. For the common law lawyer desiring an introduction to civil law countries, the following

are so markedly different that legal training and law practice in one country is more likely to hinder rather than aid United States and Mexican lawyers in understanding their neighbor's legal system.[13] This article describes the basic conceptual, historic, and political features of the Mexican legal system. Comparisons are made respecting the use of case law, the constitution, amending the constitution, federalism, treaty power, and the independence of the judiciary. The constitutional and political predominance of the President of Mexico, or *presidencialismo Mexicano*, is described.

I. DISTINCT LEGAL TRADITIONS (PRIVATE LAW)

Mexico's private law system, including torts, property, commerce, and inheritance, traces its origin to the Roman civil law, which dates from the Twelve Tablets of Rome in 450 B.C.[14] Its milestones include the

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sources are available: JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION (2d ed. 1985); FREDERICK H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW (1955); JOHN HENRY MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS (1978); KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA (1975); William J. Bridge, Leonel Pereznieto Castro & James F. Smith, *A Different Legal System*, *in* DOING BUSINESS IN MEXICO (1992); INTRODUCCIÓN AL DERECHO MEXICANO (1983) (a comprehensive treatise of Mexican law in Spanish); DICCIONARIO JURÍDICO MEXICANO, 292-73 (1985) (an alphabetized collection of summarized legal writings of leading Mexican jurists on modern as well as historical legal terms of art). A civil law *diccionario* is roughly equivalent to a common law digest in that the legal writings of treatise writers on given topics are collected alphabetically. Many treatise writers have written their own *diccionario*. *See, e.g.*, RAFAEL DE PINA, VARA, DICCIONARIO DE DERECHO (1984); ANTONIO LUNA ARROYO & LUIS G. ALCERREGA, DICCIONARIOS DE DERECHO AGRARIO MEXICANO (1982). For a comprehensive, but dated, bibliography of Mexican law, see HELEN L. CLAGGETT & DAVID M. VALDERRAMA, A REVISED GUIDE TO THE LAW AND LEGAL LITERATURE OF MEXICO, (1973).

For a concise summary of the United States legal system see E. ALLAN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES, (2d ed. 1983). Also, several texts in Spanish are available on United States law: LEDA BOECHAT RODRIGUES, LA SUPREMA CORTE Y EL DERECHO CONSTITUCIONAL NORTEAMERICANO (1965); JOHN CHOMMIE, EDUARDO LERIVERLAND & OSCAR SALAS, EL DERECHO DE LOS ESTADOS UNIDOS, (1963); JULIO CUETO RUA, EL COMMON LAW, (1956); GRAY L. DORSEY, LA LIBERTAD CONSTITUCIONAL Y EL DERECHO, (1967); PHANOR J. EDER, PRINCIPIOS CARACTERÍSTICOS DEL "COMMON LAW" Y DEL DERECHO LATINOAMERICANO, (1960); CHARLES EVANS HUGHES, LA SUPREMA CORTE DE LOS ESTADOS UNIDOS (2d ed. 1971); GORDON IRELAND, CURSILLO DE DERECHO CONSTITUCIONAL AMERICANO COMPARADO, (1941); Karl Lowenstein, *Las Libertades Civiles en Los Países Anglosajones*, *in* VEINTE AÑOS DE EVOLUCIÓN DE LOS DERECHOS HUMANOS (1974); RICHARD B. MORRIS, DOCUMENTOS FUNDAMENTALES DE LA HISTORIA DE LOS ESTADOS UNIDOS DE AMERICA, (1962); GLENN A. PHELPS Y ROBERT A. POIRIER, DEMANDAS CONSTITUCIONALES PERMANENTES (1988); OSCAR RABASA, EL DERECHO ANGLOAMERICANO (1982); BERNARD SCHWARTZ, LOS PODERES DEL GOBIERNO: COMENTARIO SOBRE LA CONSTITUCIÓN DE LOS ESTADOS UNIDOS (1966); JAMES FRANK SMITH, DERECHO CONSTITUCIONAL COMPARADO: MÉXICO-ESTADOS UNIDOS, (1990); BÁRBARA STRICKLAND, ESBOZO DEL SISTEMA JURÍDICO DEL SISTEMA NORTEAMERICANO (1985); EUGENIO URSÚA-COCKE, ELEMENTOS DEL SISTEMA JURÍDICO ANGLOSAJÓN (1984).

13. The lack of knowledge on the United States side of Mexican law has appropriately been characterized as "appalling." Sharon D. Fitch, *Dispute Settlement Under the North American Free Trade Agreement: Will the Political, Cultural and Legal Differences between the United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures?*, 22 CAL. WEST. INT'L L.J. 353, 387 (1992).

14. The Anglo-American common law system dates from the Norman Conquest (1066 A.D.), some 1500 years later. Friedrich K. Juenger, *Dos Culturas Jurídicas*, *in* DERECHO CONSTITUCIONAL COMPARADO: MÉXICO Y LOS ESTADOS UNIDOS 16 (1990).

Corpus Juris Civilis of the Emperor Justinian in the sixth century, its revival in Italian universities in the twelfth century, and its reemergence in the form of modern civil codes in nation-states in Europe and Latin America in the nineteenth century. It is the oldest, most widely used, and most influential legal system in the world. Spanish law, which evolved from the Roman civil law, governed the viceroyalty of Mexico as well as the rest of what is now Latin America for three centuries.

For centuries, civil lawyers have been taught to discover legal principles as articulated over time by legal scholars and incorporated into positive law by legislators. Civil lawyers are trained to apply logic. Specific results are derived from general principles. As one commentator has noted, "[t]o paraphrase Holmes by inversion, the life of the civil law has not been experience but logic."[15]

A code in a civil law country is like a constitution in that it presents a broad statement of general principles with specific detail where necessary. Statutes that derogate from the general structure are to be strictly interpreted within the framework of the general document. Codes are designed to be of indefinite duration despite political change.[16] The French Napoleonic Code of 1804 influenced Spain and Mexico in the development of their modern codes.[17] The French Revolution targeted the judiciary as a privileged, aristocratic, and even reactionary force that must be relegated to the role of applying, not interpreting, legislative norms. Mexico has inherited this tradition, which requires judges to apply the appropriate code provisions, to reason deductively from the principles reflected in them (or a more general one), or, where necessary, to consult doctrinal writing to arrive at the proper result.[18] The judiciary in Latin America is essentially a civil service position.[19] An American lawyer who reads legal writings by a Mexican jurist is struck by more frequent references to primary (statutes) and secondary (treatise writers) sources than to case law. Often it is simply the straightforward application of logic that motivates Mexican legal writing. Much attention is devoted to describing the pertinent legal history, which often comes from Roman law or even earlier sources.

The United States legal heritage is distinct. The judiciary in England was generally acknowledged to be the interpreter of the "common law"

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15. William J. Bridge et al., *A Different Legal System*, *in* DOING BUSINESS IN MEXICO (1992).

16. Bridge, *supra* note 15, at 3-9 to 3-10; FREDERICK H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 55-61 (1955). The Mexican Civil Code was originally promulgated in 1870 and revised in 1884 and 1928. JAMES HERGET & JORGE CAMIL, INTRODUCTION TO THE MEXICAN LEGAL SYSTEM (1978).

17. A. Verdugo, *Derecho Civil Mexicano*, 1 Mexico 10 (1885).

18. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 50-58 (2d ed. 1985).

19. Professor Merryman has written that:

> [t]he net image of the [civil law] judge is an operator of a machine designed and built by legislators. His function is a mechanical one. The great names of the civil law are not those of judges . . . but those of legislators (Justinian, Napoleon) and scholars. . . . The civil law judge is not a culture hero or a father figure, as he often is with us. His image is that of a civil servant who performs important but essentially uncreative functions.

MERRYMAN, *supra* note 18, at 36-37.

if there was no statute or precedent on point. By the seventeenth century common law judges were viewed as protectors of the "rights of Englishmen" in both England and the American Colonies.[20] Well before the Supreme Court's decision in *Marbury v. Madison*,[21] American colonial lawyers were accustomed to viewing the judiciary as a superior source of law. Judges determined what the common law was and whether legislative or executive measures were violative of hierarchically supreme "Magna Cartas," such as colonial charters.[22] To an American lawyer, constitutional or statutory language must be analyzed through the lenses of the judicial decisions that have interpreted the provisions. This necessarily follows from the common law principle of stare decisis: once a disputed point of law has been settled by a judicial decision, that decision will be followed in all subsequent cases. Mexican lawyers are inevitably surprised at the plethora of case citations in legal writing in the United States.

Judicial review as well as the concept of binding precedents exists in Mexico, but in a very limited form, rendering the judiciary far less significant as a political institution than in the United States.[23] Dissenting or concurring opinions are a rarity. Federal appellate opinions are published[24] but they are usually quite brief, simply stating the basic facts and dispositive legal principles. While published decisions may have persuasive value, binding precedential effect is limited to cases brought under a Writ of Amparo[25] *if* they have been decided the same way in five consecutive cases by a prescribed majority vote, without an inconsistent ruling by that particular court or a superior federal court.[26] Such precedents (*jurisprudencia definida*)[27] are obligatory on the lower courts and certain administrative law tribunals, but neither the legislative bodies nor administrative agencies are obliged to conform to these precedents.[28] A subsequent party with a claim based on substantially

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20. MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 36-41 (1971).

21. 5 U.S. 137 (1803).

22. CAPPELLETTI, *supra* note 20, at 39-40.

23. The Writ of Amparo is entrusted exclusively to the federal courts. It can be used to protect individual's constitutional rights, to challenge unconstitutional laws (amparo against law), to resolve conflicts stemming from administrative acts and decisions (amparo administrative) and to review judicial decisions (amparo casación). POLITICAL CONSTITUTION OF THE UNITED STATES OF MEXICO, *reprinted & translated in* DOING BUSINESS IN MEXICO, app. E, arts. 103, 107 (1992) (hereinafter MEX. CONST.). *See generally* RICHARD K. BAKER, JUDICIAL REVIEW IN MEXICO (1971); Héctor Fix-Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. WEST. INT'L L.R. 36 (1979); Pedro Pablo Camargo, *The Claim of "Amparo" in Mexico: Constitutional Protection of Human Rights*, 6 CAL. WEST. L. REV. 20 (1970); H.L. Clagett, *The Mexican Suit of Amparo*, 33 GEO. L.J. 418-437 (1945).

24. These opinions are published in the SEMINARIO JUDICIAL DE LA FEDERACIÓN.

25. This all important and highly versatile procedural device in Mexico is exclusively entrusted to the Federal Courts. *See supra* note 23.

26. *Ley de Amparo* [*Law of Amparo*], MEX. CONST., *reprinted in* DOING BUSINESS IN MEXICO, *supra* note 23, §§ 191-95.

27. *Jurisprudencia definida* is published in bound volumes every ten years and more frequently in soft bound publications. The *jurisprudencia* is set forth in the form of a restatement of the rule of law. The facts of the five consecutive cases are not described, but these decisions are cited. Ironically, such "restatements" take the form of legislated principles despite the civil law precept that judges are not to make law.

28. While such legislative modifications are not obligatory in the United States, they are

the same facts and circumstances who is before an administrative agency must therefore commence a new individual Writ of Amparo due to the fact that, under the civil law system, the previous successful challenge only affects the parties (*intra partes*) which were before the court.[29]

These differences in legal traditions provide ample material for perplexed, if not unflattering, characterizations of the other legal system. Following the signing of NAFTA, the widely-read Mexican weekly *Proceso* described the American common law system in a manner often heard in Mexico:

> This means that no written or approved law exists [in the United States] but rather the determination of what is law is casuistic, that is with reference to former cases, that derive their authority from "uses and customs from time immemorial of opinions and decrees of recognized courts."
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> . . .
>
> In contrast, in Mexico all of the jurisprudence is based in written law, general and specific, and codes and contracts that are applied as a fixed point of reference. This marks the fundamental difference between both legal systems in that in [Mexico's] the criteria that governs is the law, but in North America it is the judges that have supreme and sovereign moral authority.[30]

More erudite descriptions of the United States legal system by Mexican legal scholars have underscored these differences for generations.[31] At

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generally undertaken because the judicially-condemned measure would be a dead letter, given the common law doctrine of stare decisis. The Mexican system may produce an opposite result. For example, foreigners have a right to practice law in Mexico as guaranteed by Articles 1, 4, 5, and 33 of the Mexican Constitution. Nevertheless, a Writ of Amparo must be filed on an individual basis to guarantee such rights even though countless cases have found such restrictions to be unconstitutional, because amparo only affects the parties before the court. *Lem Davis Callahan Lashley, reprinted and translated in* WOODFIN L. BUTTE, SELECTED MEXICAN CASES 17 (1970); Bridge, *supra* note 15, at 3-27 to 3-28 (n.2).

29. MEX. CONST. art. 107, § II; *Ley de Amparo*, § 76, MAURO CAPPELLETTI, *supra* note 20, at 86. The constitutional mandate that courts may only decide the case before them and not make general declarations dates from Article 25 of the 1847 El Acto Constitutivo y de Reformas de 1847 [The Constituent and Reform Act of 1847]. GUILLERMO F. MARGADANT, INTRODUCCIÓN A LA HISTORIA DEL DERECHO MEXICANO 129 (1984). Professor Margadant's invaluable legal history of Mexico has been translated into English. GUILLERMO F. MARGADANT, AN INTRODUCTION TO THE HISTORY OF MEXICAN LAW (1983).

30. Lucía Luna, *Marcadas Diferencias en los Sistemas Jurídicos de México y Estados Unidos [Marked Differences in the Legal Systems of Mexico and the United States]*, 824 PROCESO 7 (Aug. 17, 1992). The article also mentions the institution of the jury and the prerogative of prosecutors to reward criminally-accused witnesses for their testimony with immunity, reduced charges, and payments as examples of institutions and practices that are unknown in Mexico. The question of whether our constitution is indeed a written one has been the subject of scholarly analysis in this country as well. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

31. EMILIO RABASA, EL DERECHO ANGLOAMERICANO (1984); ANTONIO CARRILLO FLORES, LA SUPREMA CORTE DE JUSTICIA MEXICANA Y LA SUPREMA CORTE NORTEAMERICANA, ORÍGENES SEMEJANTES; *Caminos Diferentes [The Mexican Supreme Court of Justice and the North American Supreme Court: Similar Origins and Different Roads] and Estudios de Derecho Administrativo y Constitucional [Administrative and Constitutional Law Studies], in* LA CONSTITUCIÓN, LA SUPREMA CORTE Y LOS DERECHOS HUMANOS, 215-85 (1987).

the same time, critical commentary on the Mexican legal system is common in the United States.[32] For example, criticisms of the Mexican legal system have been the theme of several congressional hearings.[33] Some commentators, however, have described the convergence of the legal systems, arguing that Mexico's judiciary increasingly relies on case law as having "persuasive value" and that United States law is dominated by extensive codes at both the federal and state level.[34] Nonetheless, American lawyers continue to be frustrated by the absence of controlling case law in Mexico while Mexican lawyers fail to appreciate why the "plain meaning" (or deductive analysis) of the United States Constitution or statute is not determinative.

II. THE MEXICAN AND UNITED STATES CONSTITUTIONS (PUBLIC LAW)

In 1824, the drafters of Mexico's first Constitution following independence were greatly influenced by the United States Constitution of 1787.[35] The Mexican Constitution of 1917 continued the basic political structure of a republican and federal national government with three branches: an executive (popularly elected), a legislature (bicameral), and a judiciary (lifetime appointments for the Supreme Court), as well as

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32. On September 8, 1992, Senator Daniel Moynihan (Dem., New York), referred to the Freedom House Survey on the question of the independence of the Mexican judiciary, during the Senate Finance Committee Hearing on NAFTA. The Freedom House survey for 1991-1992 stated that "[a]lthough it is nominally independent, the [Mexican] judicial system is weak, politicized and riddled with corruption." FREEDOM IN THE WORLD, POLITICAL RIGHTS AND CIVIL LIBERTIES 328 (1992); *see also* Boris Kozolchyk, *Mexico's Political Stability, Economic Growth and the Fairness of its Legal System*, 18 CAL. WEST. INT'L L.J. 105, 110-17 (1987-88).

33. Congressional hearings, respecting the treatment of Americans incarcerated in Mexico's jails and prisons, occurred in the mid-to-late 1970s and led to the passage of the Prisoner Transfer Treaty with Mexico. The treaty permits nationals, sentenced in their neighboring country, to serve their sentence in their own country. Robert L. Pisani & Theodore Simon, *The United States Treaties on Transfer of Prisoners: A Survey*, 17 PAC. L.J. 823 (1986). These hearings gave considerable attention to the apparently routine practice in Mexico of subjecting arrested persons to torture, holding them *incommunicado*, etc. The hearings that led up to the passage of The International Narcotics Control Act of 1986 gave considerable attention to the alleged failures of the Mexican authorities to "fully investigate" the 1985 murders of Drug Enforcement Agent ("DEA") Enrique Camarena Salazar, his pilot Alfredo Zavala Avelar, and the 1986 detention and torture of DEA agent Victor Cortez, and threatened sanctions unless Mexico "has brought to trial and effectively prosecuted those responsible." 132 CONG. REC. H11241 (daily ed. Oct. 17, 1986) (Congressional findings regarding narcotics control efforts in Mexico). On September 12, 1990, the House Subcommittee on Western Hemisphere Affairs and House Subcommittee on Human Rights and International Organizations held hearings on human rights abuses in Mexico.

34. *See generally*, James J. Friedberg, *The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*, 52 PITT. L. REV. 289 (1990); Gregory Howard Williams, *Police Discretion: A Comparative Perspective*, 64 IND. L.J. 873 n.2 (1989). Professor Merryman describes the emergence of constitutionalism, federalism (emergence of European Community), and decodifications as contributing to the evolution of the civil law model. MERRYMAN, *supra* note 18, at 151-58.

35. Felipe Tena Ramírez quotes one of the contemporary observers of the Mexican Constitutional Convention of 1824 (Zavala) as follows: "The deputies of the new states came full of enthusiasm for the federal system and their manual was a poor translation of the United States Constitution printed in Los Angeles, which served as a text and model for the new legislators." FELIPE TENA RAMÍREZ, LEYES FUNDAMENTALES DE MÉXICO 153 (1808-1987).

separate state governments and a bill of rights.[36] Yet, the nineteenth century effort to transplant the United States Constitution in a completely different political and legal context was destined to fail.[37]

New Spain (colonial Mexico) was not well prepared either for self government or democracy at the time of its independence in 1821 after centuries of highly centralized Spanish colonial administration.[38] Moreover, the Mexican creole (Spanish born in Latin American) population was bitterly divided over the continuing domination of the church, army, and large landowners. Also, the population was markedly heterogeneous because of the large native population that was not acculturated to European or democratic values.[39] In the century preceding the Mexican Constitutional Convention of 1917, Mexico was dominated by *caudillismo* (charismatic political and military chieftains) and political chaos. Porfirio Díaz assumed the presidency in 1876, bringing political stability to Mexico until 1910. He united the conservative factions (clergy, army, landowners, rural chieftains) and foreign interests. However, the constituencies of Father Miquel Hidalgo y Costillo, General José María Morelos, and the liberals, who had fought for a century for religious toleration and for an end to the domination of the army, rural bosses, and foreign interests, were not to be denied. The simmering social tensions exploded in the revolution of 1910. The coup d'etat and assassination of the recently elected President Francisco I. Madero, accomplished with the complicity of the United States Embassy, unleashed the revolutionary forces led by Venustiano Carranza, Alvaro Obregón, Pancho Villa, and Emiliano Zapata.[40]

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36. The Mexican Bill of Rights formed the first chapter of the Mexican Constitution of 1917. The first ten amendments to the United States Constitution set forth the Bill of Rights, for which the Federalists, the proponents of ratification of the Constitution, promised to campaign for, upon adoption. They did so. The Bill of Rights was initiated by the First Congress and ratified in 1791.

37. "[T]he inhabitants of Mexico wanted to establish a federal system, and practically copied the federal constitution of the Anglo-Americans, their neighbors, but they transported only the letter as they could not transfer the spirit that gave it life." Jesús Reyes Heroles, *El Liberalismo Mexicano*, 3 FONDO DE LA CULTURAL ECONÓMICA 354 (1988).

38. For example, in 1856, Lic. José Maria Iglesias, a Mexican jurist, wrote that the error of federalism of the 1824 Constitution:

> consisted in the blind spirit of imitation of the United States of the North, without pause for reflection that what was there, an unquestionable truth, wasn't so for us by mere supposition. The English colonies have enjoyed their local independence from the time they were first colonized; but the provinces of New Spain were governed to the contrary by a system entirely centralized during three centuries of colonial domination. Facts were established in the history and history is not altered with vain declarations.

Heroles, *supra* note 37, at 398-99.

39. In 1519, the Spanish conquistadores encountered a native population of 3.5 to 4 million in what is now Mexico. MENDIETA Y NUNEZ, EL DERECHO PRECOLONIAL 35, 44 (5th ed. 1985). When the Mayflower landed at Plymouth Rock a century later (1620), the pilgrims found a Native American population that was far less developed than the Aztecs wth respect to political or legal institutions. The entire indigenous population of what is now the United States and Canada has been estimated to have been between 1 and 1.5 million in a territory almost four times as large and Mexico. SAMUEL E. MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 13-15 (1965).

40. HENRY B. PARKES, A HISTORY OF MEXICO, *infra* note 40; W. Raymond Duncan, *The*

The Mexican Constitution of 1917, like previous Mexican constitutions,[41] was written and promulgated in a time of war and religious and political strife.[42] The Constitution is ideological, even dogmatic. It includes statements of broad principles as well as detailed prescriptive provisions. Although the Querétero Convention was called by Carranza to restore the liberal Constitution of 1857 and to make modest political reforms, revolutionary goals were incorporated into the document as well.[43] Carranza called the Constitutional Convention of Querétero to isolate his political enemies, which included both the old order and his former revolutionary allies. All factions hostile to the cause of his "Constitutional Army" were excluded from the convention, including not only the forces of Victoriano Huerta but Pancho Villa (who called his own constitutional convention in Aguascalientes) and Emiliano Zapata.[44] It appears that Carranza thought of the convention as more of a symbolic than a deliberative event. He set a time limit of sixty days to "discuss, approve and modify" the draft constitution, which was essentially the Constitution of 1857.[45] The Querétero delegates, however,

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Mexican Constitution of 1917: Its Political and Social Background, 5 INTER-AM. L. REV. 277-88 (1963).

41. Mexican constitutional scholars inevitably began their analysis of an issue of constitutional law by reference to earlier constitutions. *See* LOS DERECHOS DEL PUEBLO MEXICANO [THE RIGHTS OF THE MEXICAN PEOPLE] (Porrúa, Mexico 1979). Two of these constitutions were drafted before Mexican independence. The Constitution of Cádiz of 1812, the first political constitution of Mexico, was promulgated by the liberal junta of Spain, which was then seeking to reform the Spanish monarchy following French occupation. The Constitution of Cádiz established a bill of rights, elected representatives in the Spanish Cortes, and provided considerable independence. The Constitution of Apatzingán of 1814 set forth the political goals of the forces of Miguel Hidalgo y Costilla and José María Morelos. It would have established universal suffrage, indirect elections, a ruling junta of three, and a Supreme Court. Following independence in 1821, the liberal Constitution of 1824 declared Mexico a federal republic.

The earlier constitutions were more ideological rally cries and calls to arms than a "ratified" consensus for a plan of governance. The liberals favored federalism and individual liberties. The conservatives were adamantly opposed to both. They insisted on a centralist government with considerable deference to the army and to the church. The conservative constitutional reforms of 1836 (the "Seven Constitutional Laws") and 1842 were followed by the liberal Constitutions of 1847 and 1857, with the latter having the most influence. The Constitution of 1857 marked the beginning of a bitter three-year war between the liberal and conservative forces. The Constitution was suspended during the "Maximiliano" (French intervention), but later served as the model for the current Constitution of 1917. GUILLERMO S. MARGADANT, INTRODUCCIÓN A LA HISTORIA DEL DERECHO MEXICANO 114-16, 129, 149 (1984); FELIPE TENA RAMÍREZ, LEYES FUNDAMENTALES DE MÉXICO 1808-1987 153-54 (1987).

42. For a comparative analysis of the historical antecedents of the Philadelphia Convention of 1787 and the Querétero Convention of 1917, as well as the conventions themselves, see James F. Smith, *Introducción, El Origen Histórico, Político e Intelectual de las Constituciones de los Estados Unidos y México [Introduction, the Historic, Political and Intelectual Origins of the Constitutions of the United States and Mexico]*, *in* DERECHO CONSTITUCIONAL COMPARADO: MÉXICO Y ESTADOS UNIDOS (1990).

43. Duncan, *supra* note 40, at 289-309.

44. FRIEDRICH KATZ, THE SECRET WAR IN MEXICO, EUROPE, THE UNITED STATES, AND THE MEXICAN REVOLUTION 267-68 (1983); FRANK BRANDENBURG, THE MAKING OF MODERN MEXICO 52-54 (1963); HENRY BAMFORD PARKES, A HISTORY OF MEXICO 60-62 (1969).

45. Victor Niemeyer, *El Congreso Contituyente Norteamericano de 1787 y el Congreso Constituyente Mexicano de 1916-1917, Comparación y Contraste. [The North American Constitutional Convention of 1787 and the Mexican Constitutional Convention of 1916-1917, Comparison and Contrast] in* DERECHO CONSTITUCIONAL COMPARADO: MÉXICO Y ESTADOS UNIDOS (1990).

represented the social conscience of the revolution.[46] The revolutionary articles, Article 27 (agrarian reform and national ownership of the subsoil, coastland, etc.) and Article 123 (labor protection), were drafted by committees meeting outside of the main assembly and were overwhelmingly approved by the convention.[47] The Mexican Constitutional Convention, unlike the Philadelphia Convention over a century earlier, addressed economic and social goals and rights, equating social justice with—if not elevating it over—individual liberty.

Dr. Guillermo F. Margadant, a noted legal historian of Mexico, has described the promulgation of the Mexican Constitution of 1917 in the following terms:

> The Constitution of 1917 was a multilateral declaration of war, directed against the large land holders, the bosses, the clergy, and mining companies (that lost their rights to the subsoil). The potentially threatening effect of the Constitution was softened by the fact that Venustiano Carranza calmed the Church and oil companies by promises that under his regime the Constitution would not have total effect.[48]

The Mexican Constitution has been consistently characterized by Mexican constitutional scholars as a project to be accomplished, a statement of revolutionary ideals that is nominal in that there is no intended immediate congruency between its stated aspirations and reality.[49]

III. AMENDING THE CONSTITUTION

Ulysses Schmill, the current president of the Mexican Supreme Court, has noted that Mexico's Constitution may be classified as "rigid" in that it may not be amended by ordinary legislation.[50] In practice, however, it has proven to be quite easily amended. Under Article 135 of the Mexican Constitution, amendments (*reformas*) may be proposed by a two-third vote of each legislative house and then must be accepted by an absolute majority of the state legislatures. In the United States, two-thirds of the Congress are required to initiate an amendment, but three-fourths of the states must ratify the proposal.[51] Mexico has amended

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46. *Id.* at 74.

47. *Id.*

48. MARGADANT, *supra* note 29, at 34.

49. JORGE CAPIZO, LA CONSTITUCIÓN MEXICANA DE 1917 125 (1986) (standard text for Constitutional Law courses in Mexican Law Schools); *see also* the description of the Political Constitution of the United Mexican States of 1917, found in DICCIONARIO JURÍDICO, *supra* note 12, at 272-73. Jorge Carpizo has written that the United States Constitution, unlike the Mexican Constitution, is classified as "normative" or one in which the political reality conforms to what is provided in the constitution. The Mexican Constitution is considered "nominal" in that such congruency does not exist. Jorge Carpizo, *La Democracia y la Clasificación de las Constituciones una Propuesta*, IX ANUARIO JURÍDICO 360 (1982).

50. ULYSSES SCHMILL, EL SISTEMA DE LA CONSTITUCIÓN MEXICANA 91 (1971).

51. U.S. CONST. art. V. In the United States the constitutional amendment process may also be commenced by two-thirds of the state legislatures, whereupon Congress is to "call a Convention for proposing amendments." Ratification by three-fourths of the state legislatures or state con-

its Constitution 359 times[52] in less than half the time that the United States has accepted twenty-six amendments.[53] The amendments to the Mexican Constitution are incorporated in the text rather than listed at the end, as in the United States Constitution. There are three reasons for the relative frequency of amendments to the Mexican Constitution as compared with the United States Constitution: (1) the amendment process is less restrictive in Mexico and this is especially true given the political reality of a dominant political party and a powerful presidency;[54] (2) the Mexican Constitution provides not only a broad outline of the form of government but a prescriptive government code which is quite detailed, thereby requiring more amendments;[55] and (3) the Mexican Supreme Court has limited power to render binding interpretations of the Constitutions, whereas the United States Supreme Court has effectively "amended" the United States Constitution hundreds of times.[56] Mexico has on occasion processed an amendment in less than one month.[57] In the United States the process can be extraordinarily slow and difficult. For example, although the Equal Rights Amendment was approved by some thirty-five states, this was accomplished over a ten year period and was still short of the required approval by thirty-eight states.[58]

IV. FEDERALISM

The Mexican Constitution has virtually copied the critical provisions of the United States Constitution regarding federalism.[59] The early days

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ventions is then required. State conventions were only used once, in the case of the 21st Amendment—the abolition of the hapless attempt to prohibit alcoholic beverages. *See* D. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983).

52. J. Jesús Orozco Henríquez, *El Sistema Presidencial en el Constituyente de Querétero y Su Evolución Posterior* [*The Presidential System in the Querétero Convention and Its Subsequent Evolution*], *in* EL SISTEMA PRESIDENCIAL MEXICANO (ALGUNAS REFLEXIONES) 49 (1988).

53. The first ten amendments were proposed in the first Congress and ratified as a group in 1791. The last amendment, concerning the eighteen-year-old vote, was ratified in 1971. Accordingly, the United States Constitution has been amended 26 times (arguably seventeen times) in 205 years (1787-1992), while Mexico's has been amended at least 360 times in 75 years (1917-1992).

54. Orozco Henríquez, *supra* note 52, at 54-55.

55. Louisiana, the only civil law state in the United States, has had eleven constitutions. The Constitution of 1921 is a massive code of 250,000 words and has been amended 530 times. *El Proceso de Enmiendas, Análisis y Comparación*, *in* DERECHO CONSTITUCIONAL COMPARADO, *supra* note 14, at 215 (citing Elmer E. Cornwell, Jr., *The American Constitutional Tradition: Its Impact and Development*, *in* THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE (Kermit L. Hall et al., eds.) (1981)).

56. Jorge Madrazo, *Introducción*, *in* DERECHO CONSTITUCIONAL COMPARADO, *supra* note 14, at 11.

57. Jorge Madrazo, *La Reforma Constitucional, Estudio Comparativo* [Constitutional Amendments: Comparative Study], *in* DERECHO CONSTITUCIONAL COMPARADO, *supra* note 14, at 199.

58. Ruth B. Ginsburg, *Ratification of the Equal Rights Amendment: Question of Time*, 57 TEX. L. REV. 919, 919-45 (1979); Grover Rees, III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Extension*, 58 TEX. L. REV. 875, 875-932 (1980).

59. Jesús Reyes Heroles has written that "[t]he federal idea, recreated by the classic Montesquieu, needed a model to make it into a system. For our legislators, the federal inspiration came with liberalism and the precise, clear, legal almost geometric scheme found in the United

of both republics witnessed ferocious battles between the centralists (Alexander Hamilton in the United States and Lucas Alamán in Mexico) on the one side and the states' rights advocates (Thomas Jefferson in the United States and Miguel Ramos Arizpe in Mexico) on the other.[60] The concept of states' rights, however, has steadily eroded on both sides of the border, provoked in Mexico by the dominance of the executive branch, the passage of a series of constitutional amendments, and the enactment of several federal codes which serve as models for state codes.[61] In the United States, congressional acts subsequently approved as constitutional by the Supreme Court have broadened the scope of federal prerogatives to the point where any limit is no longer considered a constitutional-legal restraint but simply a political one.[62] While both systems continue to have concurrent federal-state jurisdiction over an infinite variety of measures, it is the national government's prerogative to preempt such areas as it chooses.[63]

The control of the federal judiciary over the state judges in the two countries has had a distinctly different outcome. In Mexico, the federal courts have assumed jurisdiction to review all decisions of the state courts for compliance with applicable local, state, and federal law with respect to both substance and procedure.[64] In the United States, state court judges may protect their decisions from federal review if they "clearly and expressly" state that their decision is based on "independent, adequate and separate" grounds of state law.[65]

V. THE CONSTITUTION AND TREATIES

Article 133 of the Mexican Constitution is a near literal translation of the Supremacy Clause of the United States Constitution.[66] None-

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States." Heroles, *supra* note 37, at vol. I, 427. Article 121 of the Mexican Constitution follows the Full Faith and Credit clause of the United States Constitution, while Article 124 sets forth an almost literal translation of Article X of the United States Constitution.

60. Dr. Manuel González Oropeza, *El Federalismo, in* DERECHO CONSTITUCIONAL COMPARADO, *supra* note 14, at 219.

61. *Id.* at 222.

62. In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 537-47 (1985), the Supreme Court held that the search for a sacred province of state autonomy is doomed to failure because the United States Constitution does not contain substantive limits to the power of the federal government; rather, the protection of states' rights lies in the political process. The Mexican Supreme Court appears to have adopted a similar doctrine. Oropeza, *supra* note 60, at 223.

63. For a careful analysis of the doctrinal basis of "concurrence" in Mexico, see Laura Trigueros Gaisman, *El Federalismo en México Autonomía y Coordinación de las Entidades Federadas [Federalism in Mexican Autonomy and Coordination of the States] in* DERECHO CONSTITUCIONAL COMPARADO, *supra* note 14, at 247-57; for the United States, see Alan Brownstein, *id.* at 259-76.

64. Oropeza, *supra* note 60, at 226-27. For a fascinating historical account of the famous Mexican case of magistrate Miguel Vega, see Carrillo Flores, *La Suprema Corte Mexicana: de 1824 al Caso de Miguel Vega y la Acusación Contra los Magistrados en 1869, Nacimiento y Degeneración del Juicio de Amparo [The Mexican Supreme Court of Justice from 1824 to the Case of Miguel Vega and the Proceedings Taken Against the Judges in 1869, Birth and Degeneration of the Writ of Amparo], in* LA CONSTITUCIÓN, LA SUPREMA CORTE Y LOS DERECHOS HUMANOS, *supra* note 31, at 105-20.

65. Michigan v. Long, 463 U.S. 1032 (1983).

66. Article 133 of the Mexican Constitution reads:

theless, the question of the hierarchy of law, namely, whether a court would be obligated to follow subsequent federal legislation that may contradict a treaty or executive agreement, such as NAFTA, might be answered differently in the two countries. If the United States Congress approves legislation contrary to binding international agreements and the measure becomes law, the legislation is binding on the United States courts notwithstanding the treaty.[67] Article 133 of the Mexican Constitution, like the Supremacy Clause of the United States Constitution, equates treaties with federal statutes as long as they conform to the Constitution. Mexican jurists have argued that the courts would rule that the treaty prevailed despite subsequent contradictory legislations.[68] Without question, Mexico's legal tradition and political philosophy are more deferential to international law.[69]

> This constitution, the laws of the Congress of the Union set forth it and all the treaties in accordance with it, celebrated by the President of the Republic, with approval of the Senate, will be the Supreme Law of the Union. Judges of each State will adjust laws and treaties to such Constitution, notwithstanding opposing regulations found in the Constitution of laws of such states.

DOING BUSINESS IN MEXICO, *supra* note 23, app. E-1; *see also* U.S. CONST. art. VI.

67. When a treaty or congressional executive agreement and a federal law "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control." Whitney v. Robertson, 124 U.S. 190, 194 (1888). The Latin maxim *leyes posteriores priores contraries abrogant* ("the last expression of the sovereign must control") aptly states the principle. Congress may amend its trade laws as it chooses, as a matter of internal law, despite whatever international law violations may be implied. Moser v. United States, 341 U.S. 41 (1951); Foster & Elam v. Neilson, 2 Pet. 253 (1829). *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 163, 221-22, 407 (1972).

The Trade Agreements Act of 1979, PUB. L. No. 96-39, 93, Stat. 144, § 3(a), which implements the Tokyo Round Antidumping Code Subsidies Code, explicitly states that no such agreement "which is in conflict with any statute of the United States shall be given effect." Treaties which are self-executing or executive agreements which are their constitutional equivalent, namely executive agreements which are first authorized by Congress and then subsequently implemented by congressional legislation, are as binding on the courts as federal statutes. B. Altman & Co. v. United States, 224 U.S. 583, 587 (1912).

68. Fernando Alejandro Vazquez Pando, a distinguished Mexican legal scholar and a specialist in private international law, has written that treaties as "special enactments" prevail over "general legislative laws," and that while the Congress can modify "law or abrogate treaties" a federal law may not annul a treaty, given that they are two distinct sources of normativity. FERNANDO ALEJANDRO VAZQUEZ PANDO, JERARQUÍA DEL TRATADO DE LIBRE COMERCIO ENTRE MEXICO, ESTADOS UNIDOS DE AMÉRICA Y CANADÁ EN EL SISTEMA JURÍDICO MEXICANO [HIERARCHY OF NAFTA IN THE MEXICAN LEGAL SYSTEM] 35, 41 (1992). Accordingly, the American doctrine that a treaty and federal law are of equivalent hierarchy, and that the latest in time ("ley posterior") governs, does not apply. *Id.*

However, Dr. Emilio O. Rabasa, former Mexican Ambassador to the United States and also a distinguished legal scholar, has stated:

> I consider federal laws and treaties, when the latter are concluded in keeping with the Constitution, to rank at the same level. Therefore, . . . resorting to the old principle under which recent law annuls or revokes law promulgated in the distant past, in the event of conflict, either the law of Congress or the treaty may prevail depending on their dates of promulgation.

Emilio O. Rabasa, *Constitutional Procedures for the Approval of treaties in Canada, the United States and Mexico*, VOICES OF MEX. 58 (Apr.-June 1992).

The International Trade Commission has reported that, "It is the position of the Government of Mexico that . . . where there is conflict between an earlier statute and a later international agreement, or vice versa, the later of the two would prevail. This is a matter which may need

A. *Political Reality of the Mexican Constitution: El Presidencialismo Mexicano*

1. Presidential Legislative Power

In Mexico, the executive branch receives the lion's share of governmental power.[70] The presidential term of office, however, is limited to one six-year term.[71] The president's power comes from the Constitution, ordinary laws, and, most importantly, the political system.[72] In Mexico, it is the President who initiates legislation.[73] The Mexican Congress usually approves the president's initiatives, often without major discussion.[74] Presidential veto power has not been significant.[75] In effect the President legislates and Congress exercises a kind of veto power.[76] Unlike the presidential veto in the United States, the Mexican veto may

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to be addressed by the Mexican Supreme Court before it can be fully resolved." *Potential Impact on the U.S. Economy and Selected Industries on the North American Free Trade Agreement*, Report to the Committee on Ways and Means of the United States House of Representatives and the Committee on Finance of the United States Senate on Investigation No. 332-337 under Section 332 of the Tariff Act of 1930, USITC Publication 2596 E-4 (1993).

69. Article 89, Section X of the Mexican Constitution reflects the Mexican philosophy in conducting foreign policy that "[e]xecutive [p]ower shall observe the normative principle . . . [of] the legal equality of states." Dr. Cesar Sepulveda, a celebrated Mexican jurist in the field of private international law, has written:

> The examination of the Mexican practice reveals that no norm has existed that attempts to limit compliance with an international treaty, nor have the courts established binding precedent, in any case, to place the Constitution over treaties. Also, it is certain that the Mexican nation has complied in good faith with all of its obligations derived from the international legal order, despite its effect on its internal interests. The logical consequence is that in general International Law is superior to the norms of the Mexican state.

CESAR SEPULVEDA, DERECHO INTERNACIONAL 79 (1986) (translated by the author).

70. In Mexico, the president has the power to affect all aspects of everyday life, and it is he who guides the destiny of Mexico. The president occupies the place of a European king in the 18th century. The Mexican president has control over matters relating to agriculture, international relations, labor, education, commerce, industry, and social security. *Id.* at 294. His powers are extensive, and in many areas he acts almost without restriction. For an excellent overview of the Mexican presidential system, see JORGE CARPIZO, EL PRESIDENCIALISMO MEXICANO (1987) [hereinafter PRESIDENCIALISMO. This classic book succintly describes the ordinary and extraordinary faculties of the Mexican presidency. *See also* CARPIZO LA CONSTITUCION, *supra* note 49 at 294; Orozco Henríquez, *supra* note 52 at 34-58.

71. MEX. CONST., art. 64; DANIEL MORENO, *in* DERECHO CONSTITUCIONAL MEXICANO (3rd ed. 1976) at 416-17.

72. PRESIDENCIALISMO, *supra* note 70, at 82; Francisco José de Andrea Sánchez, *Los Partidos Políticos y el Poder Ejecutivo en México* [*The Political Parties and Executive Power in Mexico*], *in* EL SISTEMA PRESIDENCIAL, *supra* note 52, at 411-13.

73. PRESIDENCIALISMO, *supra* note 70, at 83-84; Orozco Henríquez, *supra* note 52, at 25-26, 48 (98% of all legislation is initiated by the executive); MORENO, *supra* note 71, at 405.

74. PRESIDENCIALISMO, *supra* note 70, at 83-84. Although some presidential initiatives are not passed, this is primarily because the president himself had lost interest in the proposal. Moreno, *supra* note 71, at 405.

75. PRESIDENCIALISMO, *supra* note 70, at 89.

76. *Id.* at 89-90. The Mexican president has, however, exercised his veto power on a number of occasions. *Id.* On one occasion, in 1935, the Congress overrode the presidential veto. *Id.* The success rate of the presidential veto in Mexico is comparable to its success in the United States. Approximately nine out of ten proposals vetoed by the United States president are sustained. *Id.* at 92.

be total or partial.[77] This further expands the President's power to legislate.

Article 131 of the Mexican Constitution gives the executive branch extensive legislative authority in commercial matters relating to the import, export, and transport of goods.[78] The Mexican Congress has delegated its constitutional powers over commercial matters,[79] and has authorized the executive to participate in industrial and commercial activities related to the production, distribution, and consumption of goods and services.[80] The executive may impose price controls and rationing, may establish priorities for scarce goods, may organize distribution of goods, and may determine production.

Only the President can initiate annual revenue and budget proposals.[81] Moreover, Congress has delegated to the executive certain legislative powers regarding taxation.[82] The President decides how public funds will be collected and spent.[83] Although the President is required to make an annual account of the country's financial affairs,[84] the report is given after the expenditures have occurred.[85] The president may spend money without the authorization of Congress.[86] There are no effective controls over the President's public spending.[87]

The executive has extensive law-making powers through regulations.[88] While a regulation cannot contradict, modify, augment, or alter the law, nor can it be exercised independently of any law,[89] as a practical matter there are few if any restraints on the President's legislative prerogative.[90] For example, the 1989 Foreign Investment Regulation,

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77. MEX. CONST. art. 72(c) gives the president the power to veto all or only part of a proposal. The power of partial veto is generally believed to enlarge the role of the president in the legislative process. In systems without partial veto power, such as the United States, the president's power is less flexible and less complete than in systems which allow partial veto. PRESIDENCIALISMO, *supra* note 70, at 86; Moreno, *supra* note 71, at 405.

78. MEX. CONST. art. 131; SCHMILL, *supra* note 50, at 289.

79. MEX. CONST. art. 73 (X); Orozco Henríquez, *supra* note 52, at 40-44.

80. *La Ley Sobre Atribuciones del Ejecutivo Federal en Materia Economica* [*The Law of Executive Economic Prerogativas*], *in Diario Oficial*, arts 2, 4, 5, 7, 8, 12 (Dec. 30, 1950), gives the executive authority over the production, distribution, and consumption of food, clothing, essential materials for national industries, and products of fundamental industries. *See* PRESIDENCIALISMO, *supra* note 70, at 136; Schmill, *supra* note 50, at 289.

81. Article 74(IV) of the Mexican Constitution gives the president the exclusive power to initiate the *ley de ingresos* (revenue bill) and Article 74(V) gives the president the exclusive power to initiate the budget proposal. PRESIDENCIALISMO, *supra* note 70, at 142-47.

82. MEX. CONST. art. 72(h); PRESIDENCIALISMO, *supra* note 70, at 146.

83. PRESIDENCIALISMO, *supra* note 70, at 150.

84. MEX. CONST. art. 74(IV) indicates that the object of the public account (*la cuenta publica*) is to inform the country of the results of the president's financial management.

85. PRESIDENCIALISMO, *supra* note 70, at 149.

86. *Id.* at 146-49.

87. *Id.* at 150.

88. Although the Constitution does not expressly give the executive the power to issue regulations, Article 92 acknowledges the existence of regulations, and Article 89(I) gives the president the power to promulgate and execute the laws enacted by Congress, "providing for them in the administrative sphere and their exact observance."

Much academic discussion has focused on the use of the word "providing" in Article 89(I),

which was promulgated by presidential decree, is probably unconstitutional because it contradicts the authorizing statute.[91] It is unlikely, however, that the matter will be successfully challenged in the Mexican courts, and even if it were it is even less likely that it would effectively undermine the legality of the decree.[92]

2. Powers of Appointment

a. Constitutional Powers

The Constitution gives the President the power to appoint the most important officials in the country.[93] The executive can appoint, without approval by the Senate or any other agency of government, the secretaries of the government, the governor of the Federal District, and the attorney generals of the republic and of the Federal District.[94] With Senate approval, the President can appoint ministers, diplomatic agents, high ranking treasury employees, general counsels, colonels, and other top officials of the armed services. The president may also remove most officials without approval by any other agency of government.[95] Indeed, the President has the power to appoint freely all employees of the union not determined by the Congress or law, as well as all armed services officers beneath the rank of colonel.[96]

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but today no one questions the power of the president to administer the law through the issuing of regulations. PRESIDENCIALISMO, *supra* note 70, at 105-08; FELIPE TENA RAMIREZ, DERECHO CONSTITUCIONAL MEXICANO (1984) at 464-68; MORENO, *supra* note 71, at 423-24; SCHMILL, *supra* note 50, at 289-92. Orozco Henríquez notes that *jurisprudencia* has approved such executive prerogatives. *See* Orozco Henríquez, *supra* note 52, at 49.

89. TENA RAMIREZ, *supra* note 88, at 467-68; SCHMILL, *supra* note 50, at 291.

90. A regulation aims to execute, develop, and compliment in detail the norms of the law. A regulation is a concrete rule whose validity depends on its conformity with laws that are often vague and abstract. The presidential power to regulate was created out of necessity. The exact observance of the law requires determination of details which only the power in charge of executing the law can know. A regulation is the mechanism through which the abstract mandates of Congress are put into effect. TENA RAMIREZ, *supra* note 88, at 467-68; SCHMILL, *supra* note 50, at 291.

91. Ignacio Gomez-Palacio, *The New Regulation on Foreign Investment in Mexico: A Difficult Task*, 12 HOUS. J. INT'L L. 253, 255-62 (1990).

92. While the foreign investment law declares regulations that are inconsistent with it "null and void," it does not necessarily follow that the "individual guarantees" provided in Articles 1 through 29 of the Constitution are violated. *Id.* at 262; *see* BAKER, *supra* note 23, at 93-94. Even if national or established businesses successfully challenged the regulation through a Writ of Amparo, however, there is little likelihood of binding jurisprudence condemning the regulation due to the restrictive conditions for binding precedent and the absence of *erga omnes* effect. Despite the promulgation of an apparently unconstitutional regulation over three years ago, no such judicial challenge has arisen. *See Reglamento de la Ley Para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, DIARIO OFICIAL (May 16, 1989).

93. MEX. CONST., art. 89(II), (III), (IV), (V), (XVII), and (XVIII). CARPIZO, LA CONSTITUCION MEXICAN DE 1917, *supra* note 49, at 295; SCHMILL, *supra* note 50, at 287-89.

94. MEX. CONST. art. 89(II); MORENO, *supra* note 71, at 423; SCHMILL, *supra* note 50, at 287-89.

95. PRESIDENCIALISMO, *supra* note 70, at 119; MORENO, *supra* note 71, at 423; TENA RAMIREZ, *supra* note 88, at 465; SCHMILL, *supra* note 50, at 287-89.

96. MEX. CONST. art. 89(II), (V); MORENO, *supra* note 71, at 423; SCHMILL, *supra* note 50, at 287-89.

b. Political Powers

The President's most important power of appointment is his capacity, as the leader of the dominant political party, the Partido Revolucionario Institucional ("PRI"),[97] to decide who will be his successor. This prerogative alone gives him enormous political power.[98] The president also determines who will be governors, municipal presidents, senators, and the majority of the *deputados*.[99] For sixty years (1929-1989) the PRI held all governorships, the presidency, and a more than two-thirds majority in both houses of Congress. This, however, is beginning to change governorships. In 1989 Baja California, and then in 1992 Chihuahua, elected governors from the opposition party, the Partido de Acción Nacional ("PAN"). Also in 1992 an interim Panista governor has been appointed in the state of Guanajuato.[100] In two other states, San Luis Potosí[101] and Michoácan,[102] PRI candidates were declared the official winners by the PRI-dominated electoral apparatus, but prolonged massive demonstrations protesting voter fraud eventually forced President Salinas to intervene by accepting (i.e., demanding) the resignation of the "elected" governors, who were then replaced by an interim governor who promised new elections. These results may be read as meaningful steps in the struggle for clean elections. Nonetheless, it remains the president who determines who will be governor when circumstances dictate a strategic retreat for the PRI.[103]

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97. PRESIDENCIALISMO, *supra* note 70, at 120-21; CARPIZO, LA CONSTITUCIÓN MEXICANA DE 1917, *supra* note 49, at 302; SCHMILL, *supra* note 50, at 291.

98. Peter H. Smith, *The 1988 Presidential Succession in Historical Perspective*, *in* MEXICO'S ALTERNATIVE POLITICAL FUTURES 391-415 (Wayne A. Cornelius et al., eds. 1989).

99. PRESIDENCIALISMO, *supra* note 70 at 120-21; Jorge Carpizo, *Estudios Constitucionales*, *in* LA GRAN ENCICLOPEDIA MEXICANA ("LGEM") 339-40 (1983).

100. Although Guanajuato's state electoral board nullified the ballots from thirty polling precincts on the grounds that more votes had been recorded than there were voters, the board gave the election to the PRI candidate, a former mayor of Mexico City named Ramón Aguirre. The PAN candidate, Vicente Fox, insisted that results from another 500 precincts should have been annulled. After two weeks of domestic and foreign pressures, including a strongly worded editorial from the *New York Times*, President Salinas intervened and the state legislature nominated Carlo Medina, the opposition mayor from León, before Aguirre took office. Scores of PRI militants stormed the Legislative Palace and occupied it until they were removed by state police. Tim Golden, *Mexican Rulers Yield on State Election*, N.Y. TIMES, Aug. 31, 1991, at A3.

101. The declared winner, PRI candidate Fausto Zapata, resigned from office two weeks after being sworn in. Mr. Zapata resigned after meeting with President Salinas. As in the case of Guanajuato, there were several precincts where the PRI candidates got more votes than there were people registered to vote. Editorial, *The Last Gasp of the Dinosaurs?*, L.A. TIMES, Oct. 13, 1991, at M4.

102. *Proceso* later described the stepping down of the PRI candidate, Eduardo Villaseñor, as part of the same pattern seen in Guanajuato and San Luis Potosí: "Muddy elections, complaints from the opposition, official disdain, threats of violence, disillusionment of the aggrieved. And then the final—when everything appears lost for them—the reversal in the last minute, escalated mobilization and then like a disengagement—the fall." Pascal Beltrán del Rio & Francisco Castellanos, *El Caso Michoacán no Puede Darse por Cerrado Cristóbal Arias* [*The Michoacán Case Cannot be Taken as Closed: Cristóbal Arias*] 832 PROCESO 16-17 (Oct. 12, 1992). Three weeks after Governor Villaseñor assumed office, his fateful meeting with the President ended the longest struggle for a governorship in Mexican history. *Id.*

103. While Article 76(V) of the Mexican Constitution provides for the removal of governors when the constitutional powers of the state have ended, this was not the procedure invoked in the cases of Guanajuato, San Luis Potosí, or Michoacán.

VI. INDEPENDENCE OF THE JUDICIARY

In Mexico, as in the United States, the President nominates justices of the Supreme Court with the approval of the Senate.[104] The Mexican Supreme Court has twenty-one members and four chambers: labor, penal, administrative, and civil.[105] The Mexican President also nominates district court judges with the approval of the House of Deputies.[106] Supreme Court justices enjoy lifetime appointments.[107] Lower federal judges may also obtain lifetime appointments if they are reelected to their positions after a term of six years or if they receive a higher judicial appointment.[108] Federal judges may be impeached by the House of Deputies and tried by the Senate.[109]

Judges may not hold executive, legislative, or state positions.[110] Conflicts of interests with private parties are likewise prohibited.[111] The Mexican Supreme Court's authority as the constitutional court of last resort was enhanced in 1987 when the Constitution was amended to give it discretionary authority to accept only cases of constitutional significance.[112] The Mexican judiciary depends on the executive for providing its offices and necessities.[113]

American critics of NAFTA have argued that Mexico's judiciary is so lacking in independence that its impartiality cannot be assumed.[114] NAFTA appears to have addressed this concern by establishing a special committee to determine whether "the application of another's Party's domestic law, has prevented or frustrated the functioning of the binational panel."[115] The "special committee" provisions may also emanate

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104. MEX. CONST., art. 89(XVII), at 96, 98-99.
105. There are also five alternate justices. *Id.* art. 94.
106. *Id.* arts. 89(XVII), 73(VI)(4a).
107. *Id.* art. 94.
108. *Id.* art. 97.
109. *Id.* arts. 110, 111.
110. *Id.* arts. 44(V), 49, 125.
111. *Id.* art. 101.
112. *Id.* art. 107(VIII), (IX).
113. *Id.* art. 89(XII).
114. Senator Daniel Moynihan (Dem., N.Y.) has made this argument on more than one occasion. *See supra* note 32.
115. NAFTA, *supra* note 1, art. 1905. Article 1905 would also be available should a United States court ruling frustrate the functioning of a binational panel in the United States, for example, by finding the NAFTA binational panel provisions violative of Article III (adjudication by the judiciary) or the Appointments Clause (appointment of federal officials by the president) of the United States Constitution, as some have argued. *See e.g.*, U.S. CONST., art. II, § 2, cl. 2. Jim C. Chen, *Appointments with Disaster, the Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1456 (1992). Most authors have concluded that the courts would be highly unlikely to find such a conflict. Gilad Y. Ohana, *The Constitutionality of Chapter Nineteen of the United States-Canada Free Trade Agreement: Article III and the Minimum Scope of Judicial Review*, 89 COLUM. L. REV. 897 (1989); Gordon A. Christenson & Kimberly Gambrel, *Constitutionality of Binational Panel Review in Canada-U.S. Free Trade Agreement*, 23 INT'L LAW. 401 (1989); Dave Resnicoff, *The United States-Canada Free-Trade Agreement and the U.S. Constitution: Does Article III Allow Binational Panel Review of Antidumping and Countervailing Duty Determinations?*, 13 B.C. INT'L & COMP. L. REV. 237 (1990).

from concern that judicial review in Mexico, which is constitutionally guaranteed, may undermine the functioning of the panel.[116] Other critics of NAFTA have asserted that judicial review is inadequate in Mexico.[117]

The power and prestige of the Mexican Supreme Court pales in comparison to the high court of the United States. Given that the Court's rulings in *amparo* (constitutional litigation) are "limited to shield and protect the private parties in the specific case involved in the complaint, without any general declaration respecting the law or act that was implicated in the litigation,"[118] such rulings have little or no political impact or visibility. This is due in part to the limited effect of the rulings of the Mexican courts in that such rulings do not establish the law. Moreover, a single decision has no precedential value. The more fundamental difference, however, is the overwhelming predominance of executive power. It is within this context that the Mexican constitutional writ, the *amparo*, has functioned since 1847.

In his classic treatise, *Democracy in Mexico*, Pablo González Casanova, one of Mexico's most distinguished political scientists, concluded that:

> [t]here is no doubt that the Supreme Court of Justice is endowed with power; yet it does generally follow the policy of the Executive, and in fact it serves to make the Executive more stable. (Its political function is to hold out hope for those groups and individuals who are able to utilize this recourse to protect their interests or rights.)

Professor González Casanova's findings demonstrate that, in the period of 1917 to 1960, litigants enjoyed a reasonable chance of success in challenging executive actions.[119] Other studies have concluded that Mexico's effectiveness of judicial review compares favorably with other Latin American countries.[120] In an exhaustive study comparing the independence of the judiciary of the Mexican and United States Supreme Courts, Professor Carl E. Schwartz concluded that the frequency with which the two courts decided cases against their executive was roughly

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116. NAFTA establishes the *Safeguard to Assure Proper Functioning of Panel Process*, 9 INT'L TRADE REP. (BNA) 1431 (Aug. 19. 1992) (the special committee safeguard "was put in place to respond to concerns about Mexico's judicial system, a Chamber of Commerce analysis stated"). Because the Mexican Constitution guarantees judicial review of administrative rulings, the possibility that a Mexican court could frustrate the implementation of a binational ruling is not entirely eliminated by NAFTA. MEX. CONST. art. 107(II), (III), (V)(b).

117. *U.S.-Canada Settlement Mechanism Must be Broader for NAFTA Experts Says*, 8 INT'L TRADE REP. (BNA) 1544 (Oct. 23, 1991).

118. MEX. CONST., art. 107(II); BERNARD SCHWARTZ, LOS PODERES DEL GOBIERNO: COMENTARIO SOBRE LA CONSTITUCIÓN DE LOS ESTADOS UNIDOS 329 (1966).

119. Dr. González Casanova found that from 1917 to 1960, claimants challenging executive action were successful in one-third of 3,700 rulings. One-third (34%) were denied, and 24% percent were rejected on procedural grounds or waived by the claimant. Even during Mexico's revolutionary period, 1917-1940 (a nationalistic era that included the expropriation of foreign oil company holdings), 36% of such cases decided on the merits were decided for the claimants, two-thirds of whom were foreign and Mexican owners of companies, banks, land, etc. PABLO GONZÁLEZ CASANOVA, DEMOCRACY IN MEXICO, 21-24 (1965).

120. *See* JOHN HENRY MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEM, 339-40, 778-84 (1978).

equal—at least in a quantitative sense.[121] Professor Schwartz noted that both courts have political question doctrines and other grounds for simply declining to exercise jurisdiction in areas of political sensitivity.[122]

Notwithstanding these scholarly comparisons, Mexico's judiciary has been the target of criticism both inside and outside of Mexico. Mexican Supreme Court appointments have been criticized as based more on political loyalty than judicial competence.[123] Moreover, the removal of judges in Mexico has often been effected by edict of the President of the Mexican Supreme Court, not unlike the removal of governors by the nation's President without invocation of constitutional procedures for impeachment.[124]

By the same token, it is difficult to argue that the United States judiciary is free of significant political influence. Presidential appointments to the federal judiciary in the United States have been markedly ideological not only in recent years but historically.[125] State court judges are often elected officials who are by definition politicized. In other states, judges may be appointed but are subject to recall elections. In 1986, three justices of the California Supreme Court were recalled for their alleged opposition to the death penalty in a highly politicized campaign. Their removal and subsequent replacement has had a profound impact on a great many issues beyond the death penalty in that state.[126]

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121. Professor Schwartz found that for certain selected years in the 1960s the Mexican Supreme Court (en banc or in its Administrative Chamber) granted the relief requested in 46% of the executive cases as opposed to 39% in the United States. He found that "the Mexican Supreme Court most sharply deviates from the norms of other agencies of government when it decides complaints in criminal and administrative matters." SCHWARTZ, *supra* note 118, at 321-22, 329. He notes that while only 12.5% of the criminal *amparo* petitions were granted on their merits, less than 5% of the applications for federal habeas corpus were decided by the Federal District Court in favor of the applicants for the writ. *Id.*

122. Professor Schwartz notes that Mexico's restrictions flow primarily from specific constitutional and statutory provisions, as well as from certain judicial doctrines which have denied *amparo* jurisdiction in cases involving free exercise of religion, political demonstrations, electoral matters, dismissals of certain "public functionaries," and matters involving the university. "On the other hand," Professor Schwartz states:

> Mexican jurists would find it strange that United States Courts traditionally have abstained from, or severely restricted, review of state and federal tax laws, military courts-martial and administrative actions, administrative rationale for deportations, state practices adversely affecting the economic status of resident aliens, and the interpretation of international treatise and executive agreements.

SCHWARTZ, *supra* note 118, at 288-96, 330. The deference of the federal courts to the executive branch in matters affecting foreign relations has effectively shielded the extraterritorial application of abusive law enforcement tactics (unlawful searches and seizures and kidnapping) from judicial review. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992). The Mexican reaction has been understandably bitter. *See* Lucia Luna, *El Caso Alvarez Machain, Uno Más en la Cadena de Violaciones Estadounidenses*, PROCESO 11 (June 22, 1992).

123. *El Cese de Polo Bernal y la Designación de Adato Afrentosos: 20 Juristas*, PROCESO 6 (Jan. 20, 1986).

124. Several judges have simply been fired by the President of the Supreme Court despite constitutional provisions for judicial impeachment. *Tropezones del Poder Judicial, Politizado y Comprometido con el Ejecutivo*, PROCESO 6 (Feb. 6, 1989).

125. Randall R. Rader, *The Independence of the Judiciary: A Critical Analysis of the Confirmation Process*, 77 KY. L.J. 767 (1989).

126. David S. Clark, *La Selección y la Responsabilidad de Jueces en los Estados Unidos de América Bajo una Perspectiva Comparativa*, *in* DERECHO CONSTITUCIONAL COMPARADO: MEXICO

VII. CONCLUSION

Given the dissimilarities in the political and legal cultures of Mexico, the United States, and Canada, the era of NAFTA presents an unprecedented opportunity to design new institutions equipped to address complaints by citizens as well intergovernmental disputes. The most successful multinational tribunal, the European Court of Justice, has had the benefit of a common substantive law,[127] a permanent institutional presence, and binding adjudication. The successes, mixed as they are, of the GATT dispute settlement mechanism can be attributed in large measure to its excellent Secretariat, which provides institutional support to its ad hoc panels. Significantly the GATT 1991 Dunkel Text calls for a permanent appellate body. The Binational Panels of NAFTA, which have jurisdiction over unfair trade practice disputes (Chapter 19) as well as making recommendations to the parties in all other disputes (Chapter 20), are exclusively ad hoc. While the rulings of the unfair trade panels are binding, the recommendations of the "arbitral panels" in the institutional chapter are not. Although there is no permanent institutional presence, there is no inherent preclusion from such an organizational evolution, which is exactly what occurred with GATT.[128]

As a presidential candidate, Bill Clinton called for trinational environmental protection and labor rights commissions as essential supplementary agreements to NAFTA.[129] United States Trade Representative Mickey Kantor has informed Congress that such commissions would have "independent expert staffs and the authority to review complaints from citizens and nongovernmental organizations alike," equipped to "review and report publicly on the enforcement activities of the relevant government agencies." Ambassador Kantor added, "We've found with these international bodies accountability and exposure make a big difference."[130]

Y LOS ESTADOS UNIDOS 453 (1990). Indeed, some have argued that given the policymaking role of jurists in the United States, it is not only understandable but also essential that they be subject to political rejection or approval. Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 S. CAL. L. REV. 809 (1986).

127. NAFTA appropriately retains national law given that it is not an agreement which purports to foster political union or legal harmonization beyond the specific provisions of the agreement. *See, e.g.*, NAFTA, *supra* note 1, arts. 1714-16 (enforcement of intellectual property laws through national judicial procedures); *id.* art. 1904 (use of national unfair trade practice provisions and procedures, etc.).

128. James F. Smith & Marilyn Whitney, *The Dispute Settlement Mechanism of the NAFTA and Agriculture*, 68 N.D. L. REV. 567, 573-76, 597-98 (1992); *see supra* text accompanying notes 1-8.

129. Governor Bill Clinton, *Expanding Trade and Creating American Jobs*, remarks at North Carolina State University (Oct, 4, 1992), *cited in The North American Free Trade Agreement: An Assessment* (statement of Jeffrey J. Schott, Institute for International Economics, Washington, D.C., before the Committee on Small Business, U.S. House of Representatives, Dec. 15, 1992).

130. *Hearing Before the Trade Subcomm. of the House Ways and Means Comm.* 103rd Cong., 1st Sess., ____ (1993) (testimony of U.S. Trade Representative Mickey Kantor). Ambassador Kantor stated that negotiations concerning these commissions will begin on March 17, 1993. Federal Information Systems Corporation Federal News Service, March 11, 1993. Congressional

These commissions could address a significant institutional shortcoming of NAFTA's legal institutions, if they were composed of permanent commissioners or at least enjoyed a permanent trinational secretariat. Perhaps more significantly, these commissions could provide what NAFTA has excluded: a private right of action for citizens who have grievances against the parties but no effective forum to air them. This is true not only in commercial, environmental, and labor rights disputes but in the sensitive area of human rights violations.[131] Extensive human rights violations have been reported in Mexico[132] and the United States (alleged border patrol abuses[133] and complaints about the criminal justice system[134]) during the negotiation of NAFTA.

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critics of the NAFTA have called for a commission equipped with the power to impose punitive tariffs on companies' exports who violate a party's environmental (and perhaps labor) law. *White House Walks the NAFTA Tightrope*, WALL ST. J., Mar. 15, 1993, at A1.

131. Daniel Moynihan, Chairman of the Senate Foreign Relations Committee, has expressed concern over the absence of basic political, labor and human rights in Mexico. Christopher Whalen, *Bordering on Repression*, WASH. POST, Dec. 27, 1992, at C03. One writer has called for a North American Parliament, with representatives of the people (not governments), which could bolster the authority of the Inter-American Court of Human Rights and, using that court as a model, set up trade, labor, and environment commissions to ensure compliance with international standards. Andrew Reding, *A North American Parliament?*, J. COM., Sept. 22, 1992.

On June 6, 1990, President Salinas de Gortari dramatically focused on human rights violations in Mexico by creating a National Commission on Human Rights ("NCHR") with authority to investigate complaints, to make public findings and recommendations concerning such violations, and to report on the compliance of the pertinent public agencies with its directives. Mexico has taken the critical step of admitting that it does have human rights problems by publicly airing them through the recently established NCHR. If the United States were to do the same it is likely that numerous case histories of police abuses would be compiled.

132. Human rights violations in Mexico, including numerous cases of disappearances, unlawful arrests, torture and assassination of political party leaders and followers, land reform and rural human rights activists, labor union organizers, human rights workers, lawyers and journalists have been widely reported in recent years.

Reports on human rights problems in Mexico include: AMERICAS WATCH, HUMAN RIGHTS IN MEXICO, A POLICY OF IMPUNITY (1990), UNCEASING ABUSES: HUMAN RIGHTS IN MEXICO ONE YEAR AFTER THE INTRODUCTION OF REFORM (1991); AMNESTY INTERNATIONAL, MEXICO: TORTURE WITH IMPUNITY (1991); JORGE LUIS SIERRA GUZMÁN, *et al.*, COMISIÓN MEXICAN DE DEFENSA Y PROMOCIÓN DE LOS DERECHOS HUMANOS, LA COMISIÓN NACIONAL DE DERECHOS HUMANOS: UNA VISIÓN NO GUBERNAMENTAL (1991) [hereinafter UNA VISIÓN]; MINNESOTA LAWYERS HUMAN RIGHTS COMMITTEE, PAPER PROTECTION: HUMAN RIGHTS VIOLATIONS AND MEXICAN CRIMINAL JUSTICE SYSTEM (1990).

The State Department's 1990 Country Reports of Human Rights Practices cited 97 complaints of police abuse by U.S. citizens (through Sept., 1990, an increase of 5% over 1989) and 60 cases of alleged torture which the U.S. government formally protested. The State Department's 1991 Report reported 60 cases of police abuse of U.S. citizens through September, 1991.

In its first bi-annual report, NCHR stated that it had collected information on 1,000 cases of torture and recommended prosecution in 33 cases. TORTURE WITH IMPUNITY, *supra*, at 31.

133. Reports from Americas Watch as well as those of other non-governmental organizations, such as the Mexican Commission for the Defense and Protection of Human Rights, have described numerous case histories of apparent abuses by the border patrol. In BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO (May 1992), Americas Watch summarized their findings as follows:

> Beatings, rough physical treatment, and racially motivated verbal abuse are routine. Even more serious abuses, including unjustified shootings, torture, and sexual abuse, occur. When they do, investigations are almost invariably perfunctory, and the offending agents escape punishment. The human rights abuses reported here are similar in kind and severity to those about which we have reported in many other countries. Moreover, the response of the U.S. government is as defensive and unyielding as the responses of many of the most abusive govern-

Addressing environmental, labor, and human rights protection in the context of NAFTA would send a strong message that NAFTA will be good news for the public at large as well as for the multinational investors and traders with whom it is most often associated.

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ments.

BRUTALITY UNCHECKED, *supra*, at 1.

The Immigration Law Enforcement Monitoring Project ("ILEMP") Report of February 1992 cited 392 complaints from May 1988 to May 1989 of unjustified shootings, sexual assaults and verbal harassment. These figures had decreased from 814 complaints from May 1988 to May 1989. (The authors of the report attributed this decrease to the amnesty applicants whose temporary permanent resident cards were improperly taken away.) SEALING OUR BORDERS: THE HUMAN TOLL 11 (1992). Between 1982 and 1990, Mexico filed at least 24 diplomatic notes of protest with the United States Department of State, on behalf of Mexicans killed or seriously injured by agents of the Immigration and Naturalization Service (INS). BRUTALITY UNCHECKED, *supra*, at 6. From 1985 to 1991 Mexico filed 75 complaints concerning Mexican nationals killed, wounded or mistreated by Border Patrol agents. Michael J. Nunez, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico*, 43 HASTINGS L.J. 1573 (1992).

134. In one notorious case, Dr. Humberto Alvarez-Machain, a Guadalajara gynecologist, was kidnapped in Mexican territory by Mexican nationals in the pay of the United States Drug Enforcement Agency ("DEA"). Mexico's formal requests for the return of Dr. Humberto Alvarez-Machain were to no avail, although it would appear that under international law, the United States had violated Mexico's sovereignty and was entitled to his return, which they subsequently demanded. Both the Federal District Court (United States v. Caro-Quintero, 745 F. Supp. 599, (C.D. Cal. 1990)) and Ninth Circuit Court of Appeals (United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991)) found the kidnapping a violation of the United States-Mexico extradition treaty and ordered his return. But the United States Supreme Court reversed, finding that the treaty of extradition between Mexico and the United States didn't bar kidnapping, and that any alleged violations of international law would not affect the jurisdiction of a United States court. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2196 (1992). Dr. Alvarez-Machain was later ordered released by the trial judge, who ruled that the case against him was too weak for the jury to even consider it. Jim Newton & Marjorie Miller, *Defendant Freed in Camarena Case Returns to Mexico*, L.A. TIMES, Dec. 16, 1992 at A3.

Mexican officials have also protested the imposition of death sentences on Mexican nationals. Katherine Ellison, *Salinas Government Calls on U.S. to Save 17 Condemned Mexicans*, MIAMI HERALD, Sept. 17, 1992 at A20. Mexico does not have a death penalty. Several of the 17 condemned Mexican citizens have questionable aspects to their convictions. Christine Tierney, *Mexicans View U.S. Death Penalty as Barbaric*, REUTERS, Sept. 23, 1992.

While the Rodney King case has focused attention of the racial animus against Afro-Americans that appears to pervade the Los Angeles Police Department, the Christopher Commissions study, commissioned following the incident, reveals that Latinos, as well, frequently suffer civil rights violations at the hands of the authorities. The Report of the Independent Commission of the Los Angeles Police Department, July 9, 1991 (Warren Christopher, current Secretary of State, chaired a blue ribbon group which included Mickey Kantor, the current United States Trade Representative).

COMMENTS ON NAFTA'S IMPACT ON THE DIFFERENCES BETWEEN THE UNITED STATES AND MEXICAN LEGAL SYSTEMS

AURELIANO GONZALEZ-BAZ*

I present this paper not as a scholar, but as a practitioner in the United States-Mexican market. Before discussing what a Mexican lawyer feels about the North American Free Trade Agreement ("NAFTA")[1] and related American laws, I want to highlight a few important ideas.

First of all, I am very pleased that for the first time in many years in my country a set of laws, which is this Agreement, has been drafted by lawyers. For too long we have had documents drafted by economists.

Secondly, this Agreement suggests that we really do not have the basis for an agreement. We have here a civil law country, a common law country with a system of presidential government, and a common law country with a parliamentary system. It should be impossible for the three of us to ever agree on anything. That is probably why this Agreement will be so important; it will for the first time take away the things that we do not agree upon and focus us on the things we do agree upon.

For twenty years or so I have spent hours explaining, and in many cases justifying, to foreign lawyers and foreign investors why Mexico is not more like the United States. It has been a very arduous task, often resulting in defeat. It has been healthy for my economy, but very hard on my family. I have always felt, as I have walked away from these meetings or business gatherings, that if Mexico were more like the United States it would probably be better off as a country. Now for the first time, the three countries have to look at a 2000 page document, fourteen pounds in all, and recognize that not one of the three countries is completely right, and not one of the three is completely wrong. If we do not agree on something, however, we are going to lose business and trade opportunities to other countries.

The first thing that NAFTA will do is put the three countries on an even keel. Mexico has never been in this position. Either it has never been afforded to us, or we have never taken the opportunities we previously had. I do not view the differences as being negatives. I view them as challenges for attorneys in Canada, the United States, and Mexico to become better lawyers—not to become lawyers of the other countries. I have enough problems finding out what my country does without having

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1. Oct. 7, 1992 draft, U.S.-Can.-Mex., [hereinafter NAFTA].

to worry about fifty laws in the United States. At the end of the day, however, I think NAFTA will make us all better lawyers.

It is true that Mexico is not going to become a country of case law, although Mexican scholars and jurists would agree that the amount of mandatory case law available in Mexico is growing by leaps and bounds every year. American lawyers also tell me that codified civil law has been growing in the United States, so maybe we will reach a common road which will be more effective and productive. But, we do have some profound differences, and NAFTA is not going to be the cure for them.

NAFTA is telling us what the differences are. For example, the United States does not have an official language, while Mexico does. Does that mean that you cannot sign an agreement in Mexico in any other language? No. But it does mean that if you want to enforce an agreement, you are going to have to translate it into Spanish, and if you do not sign it in Spanish, then its enforceability will be up to a judge. So, does that mean that we are going to have a multiplicity of languages? Probably so. I cannot envision coming into a court of law in Oklahoma City or New York or Chicago with an agreement in Spanish and expecting an American court to be able to interpret it. Thus, the system that the Europeans follow with a number of official languages is not necessarily bad. It will require us to learn another language.

Another difference is in the format of agreements. Civil law agreements are very short, because the civil or commercial code law fills in the gaps. More accurately, our agreements fill in the gaps in the applicable codes. If you want something different, special, restrictive, or clarifying then you make a reference in your agreement. It is not uncommon to produce a joint venture in fifteen pages in Mexico. In the United States it takes fifteen pages to describe who the parties are. In Mexico, lawyers would like to have sixty page agreements. But thirty or thirty-five pages is stretching it.

The concept in Mexico that form is as important as substance is mind-boggling to Americans. One day I started a presentation by saying "Ladies and Gentlemen, in Mexico the concept of legality, of equity, does not exist." That is, it does not exist if you do not use the proper forms. The forms are as important as equity. In the American legal system, a decision will be based upon equity: i.e., what was the intent of the parties? But, in Mexico, it would be resolved based upon the format.

The first thing that Mexican courts look at is whether you complied with the procedural requirements. In the United States, if a law suit is filed against a company, an attorney will appear in court and simply state that he is the attorney for that company. In Mexico, the first thing that an attorney would do is supply a power of attorney that must meet very rigid requirements to prove that person represents the company. If the attorney does not have the power of attorney, the client will lose the case without a review of the merits. The differences in the two systems, therefore, are real. It is not that our laws do not recognize the

principle of equity; it is that equity does not override or have a greater importance than the other requirements with which everybody must comply.

We also have cultural differences. What do cultural differences have to do with law? If you do not understand Canadian and Mexican cultural differences, you are going to have problems dealing with Canada and Mexico, because you are never going to understand why something should be or should not be in an agreement. You will never understand why people do business in a different fashion.

It is very sad that the United States and Mexico, which had a combined trade in 1992 of over $26 billion, know so little about each other. Spanish is not taught in the United States and English is not prevalent in Mexico. People in Mexico prefer Europe to the United States for their holidays. The United States population does not really travel in Mexico until they are married and on their honeymoon. There are no more than 200 Mexican companies that in year ending June 1992 would have carried out three exportations in a year to the United States. That is a drop in the bucket. Ninety-two percent of Mexican exports to the United States, other than petroleum exports, are carried out by the eight automotive companies that have automobile or engine manufacturing factories in Mexico. That has to change.

Mexican lawyers rarely write papers. The law is there. In the United States, everybody writes a paper and it is published. In Mexico, we are going to have to learn how the United States and Canadians manage without a codified or a civil law system. That for us is mind-boggling. I believe, however, that the differences that we have should instead be seen as opportunities. The most important thing is that NAFTA will teach us to be neighbors and to understand each other.

NAFTA, which we whole-heartedly welcome, will do what no politicians, no universities, no scholars, and no governments have done. It will teach the North American countries to work together, to live together, and to talk together.

DISCUSSION OF THE DIFFERENCES BETWEEN THE UNITED STATES AND MEXICAN LEGAL SYSTEMS

QUESTION: From a Mexican point of view, it is quite surprising that the North American Free Trade Agreement ("NAFTA")[1] is structured differently than normal. Although the Agreement is very complete, it does not appear to be based on general logical principles. Would Professor Smith please comment on this.

ANSWER, *Prof. Smith*: I had the same impression. In fact, I was recently struggling with NAFTA Article 1905,[2] which I think many of you are going to come to know and have some emotional reaction to. It is a very complicated provision, and I was struck how its concepts are extraordinarily Anglo/American. The Spanish translation, which was done by very skilled translators, is very awkward. I think that you have pointed to differences in style and structure that are going to cause problems.

I suppose a common lawyer's response may be, "Oh well, it doesn't matter that much anyway. We are going to fill this all out by experience and make it work." My reply would be, "Why don't we at least have provisions for identification of majority and minority opinions of the arbitral panels in Chapter 20?"[3] Such identification is now prohibited for Chapter 20 arbitral panels, but is permitted for panels reviewing administrative decisions in anti-dumping and countervailing duty cases.[4] We may have another John Marshall out there whose opinions could have some significance in molding a new legal order.

ANSWER, *Lic. Gonzalez-Baz*: The scholarly world of Mexico refers to NAFTA as the "Imported Agreement"—it was prepared outside Mexico. They cannot understand why Mexican lawyers have accepted the Agreement in this form.

COMMENT, *Member of Audience*: Based on my experience in Montreal, I would like to give a note of reassurance here. If you have a civil law system, as we have in Quebec, it is possible to develop respect for one another while living in comparable but different legal systems. We have done this for hundreds of years and it works. I do not see any reason why the three countries cannot develop comparable respect and understanding to resolve legal problems under their different legal systems.

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1. Oct. 7, 1992 draft, U.S.-Can.-Mex.
2. *Id.* art. 1905, annex 1903.2.
3. *Id.* art. 2017(2).
4. *Id.* annex 1903.2.

ERRATA

The editors regret that some errors occurred in James F. Smith's article, *Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, in Volume 1 (1993) of the *United States-Mexico Law Journal.* The editors apologize to Professors Smith, Bernard Schwartz and Carl E. Schwarz for these errors.

Due to confusion between the names Bernard Schwartz and Carl E. Schwarz, errors were made in several footnotes. The following errata corrects these errors.

1. Page 86, note 6, add the following:

Professor Carl E. Schwarz has written that the Federal Tax Court is "known for its hard-headed review of administrative decisions for their substantive conformity with existing revenue statutes and the due process rights of taxpayers or other assessed citizens." He found that the Mexican Supreme Court (Administrative Chamber) upheld the Tribunal against the federal fiscal authority in at least 60% of the cases that the government had appealed—contrasting favorably with greater percentages of pro-government decisions in the Civil, Criminal and Labor Chambers of the Court. Carl Schwarz, *Judges Under the Shadow: Judicial Independence in the United States and Mexico*, 3 CAL. WEST. INT'L L.J. 260, 305 (1973).

2. Page 103, note 118, delete "BERNARD SCHWARTZ, LOS PODERES DEL GOBIERNO: COMENTARIO SOBRE LA CONSTITUCIÓN DE LOS ESTADOS UNIDOS 329 (1966)" and insert:
Schwarz, *supra* note 6, at 329.

3. Page 103, last text paragraph, second line from the bottom, change "Carl E. Schwartz" to: Carl E. Schwarz

4. Page 104, note 121, line 1, change "Schwartz" to: Schwarz

5. Page 104, note 121, line 5, delete "Professor Schwartz, *supra* note 118" and insert:
Professor Schwarz, *supra* note 6.

6. Page 104, note 122, line 1, change "Schwartz" to: Schwarz

7. Page 104, note 122, line 5, change "Schwartz" to: Schwarz

8. Page 104, note 122, line 11, delete "Professor Schwartz, *supra* note 118" and insert:

Professor Schwarz, *supra* note 6.