

Reform *from Without* versus Reform *from Within*:

NAFTA and the WTO's Role in Transforming Mexico's Economic System *

Once upon a time, a standard way to dichotomize the causes of economic or political change was to distinguish forces that worked *from above* -- typically elite-driven measures -- from pressures that came *from below*, which characteristically took the form of social movements or revolutionary uprisings. In more normal processes of incremental change, the two directions of transformatory pressure would often combine when, for instance, political parties combined in their programs both leader-inspired initiatives and member-voiced demands.

New forms of global governance¹ now require us to add a horizontal dimension to this vertical image of change. Given the intrusive role played by continental institutions such as the European Union and the unprecedentedly authoritative powers invested in the globally mandated World Trade Organization (WTO), we now need to distinguish between change *from without* and change *from within* the political economy. Of course any Latin Americanista worth her salt will immediately point out that change from without is not new either: every state south of the Rio Grande has experienced the heavy hand of Uncle Sam requiring that its political system make changes, often at the barrel of the gun.

The policy framework for guiding the Mexican economy provides a fascinating example of pressure for change *from within* (as a neo-liberal program to cut back the state's entrepreneurial role) instigated by the ruling PRI acting in parallel with the pressures for change *from without* of the virtually simultaneously signed trade liberalization agreements at the continental and global levels (in the form of the North American Free Trade Area (NAFTA) and the WTO). (That the internal forces of change in Mexico were manifestly driven not *from below* but *from above* is for our purposes largely irrelevant.)

The aim of this chapter is not to offer a mechanistic exercise in identifying which cause led to what effect. Rather, it is to provide some greater analytical clarity to a debate which has become muddied by the quite understandable emotions voiced

dramatically on the streets of Seattle in late 1999. Demonstrators against the WTO were expressing the view – *from below* – that a malevolent, corporation-led globalization was causing damage to the social, environmental, and human fabric of their national or community lives. There can be little dispute that the WTO and NAFTA are decidedly more powerful new legal orders which reach deep inside their members' societies to effect important changes in their national systems of law and regulation. There can be legitimate disagreement about *what* exactly this impact has been on member states and how *significant* it is.

Introduction: Why Mexico Interests Non-Mexicans

Mexicans may not have been much in evidence during the “battle of Seattle”, but that country's role in the development of a new trade order over the past decade has provided a dramatic case study of how countries are being changed by trade liberalization.

- Some have argued² that the adhesion of Mexico, as a third-world economy, to the North American Free Trade Agreement (NAFTA), as a first-world trade bloc, played a pioneer role paving the way for other countries of the South to rally behind the new WTO. It provided a demonstration effect, showing it was possible for less developed countries to deregulate their systems, renounce import substitution strategies, and play by rules that were Made in the U.S.A.
- One of the political economies most closed to foreign trade and investment, Mexico has transformed itself over a short decade into one of the most open.
- A country whose legal system is based on the European civil code is engaging in a process of deep integration with two states whose legal orders at the federal level derive from the common law tradition.
- A state, whose political economy was run on dirigiste lines with an import substitution economic development strategy has become one of the hemisphere's most radically neo-liberal governments with an export promotion philosophy.

Beyond attracting globe watchers, there are reasons for comparativists to be interested in Mexico's relationships with its continental partners.

- Students of North American integration will find Mexico's participation with Canada in forming a continental free trade area provides material for comparing how the United States's two neighbours relate to their continental hegemon, which happens also to be the global hegemon.

- Students of comparative continentalism can compare Mexico's experience in joining NAFTA by having to accept the basic principles and processes enshrined in the Canada-United States Free Trade Agreement (CUFTA) with countries in central and Eastern Europe which are proposing to join the European Union (EU) by internalizing in their legal systems the thousands of provisions of its *acquis communautaire*.

- Students of global governance can find Mexico's experiences help them understand better the dynamic process through which participation in external trade regimes at the continental and global levels affects countries' internally driven processes of deregulation.

This chapter proposes to address this last issue by looking at the most radical and surgical example of change, the holus-bolus implant of a domestic trade law system into Mexico (Part II) and reviewing some of the other changes brought about by the mix of global opening and internal restructuring that has characterized the Mexican experiment (Part III). Before launching into the analysis, we need to lay out a conceptual framework that will allow us to encompass this material (Part I).

I NAFTA's and the WTO's Relationship to Mexico's Political Order

If it is true that, while states need markets, markets also need states, then we cannot analyze Mexico's economic system without comprehending its political context. To analyze the impact of globalization on the Mexican political system it will help to distinguish among five of the basic component notions of a political order – its constitutional order, its legal order, its administrative order, its judicial order, and finally its coercive order.

A constitutional order frames the basic principles that establish the institutions that a political system needs to function. These are typically:

- a) an executive whose personnel provide leadership and decision-making;
- b) a legislative capacity, that is the ability to make new laws, and amend old ones;
- c) an administrative order to apply these rules by decree and regulation;
- d) a judicial system that interprets these rules, generally when conflict arising

from differing claims based on them needs to be resolved;

e) a coercive capacity to enforce the law and maintain order in society.

In establishing the executive, legislative, administrative, judicial, and coercive institutions which a particular system needs if it is to cope with change, a constitution both invests them with *powers* and sets *limits* to these powers. Constitutions can be *amended* but only according to specific conditions, which are typically much more difficult to achieve than simply passing a law. Normatively a constitution may articulate general principles that are considered inviolate by the community and beyond the power of the legislature or the judiciary to nullify. It generally establishes specific *rights* for its members.

In popular discourse a constitution and its component elements are thought of in hermetic and permanent terms. Because the nation-state is sovereign, it follows in common-sense thinking that constitutions are self-contained constructs only amendable from within by processes that are themselves defined in a country's founding law. But such a view is too historically simplistic. Constitutionally defined states are only a phenomenon of the last 250 years. Far from being hermetic, they were written as part of an international, if not at first global, process in which, for example, the founding fathers of the United States of America relied heavily on political theories generated in Europe or those of the United States of Mexico borrowed openly from the text of the US constitution.³

Even in the world of nations as we have known it in recent decades, there is an interaction between the legal order of one country and the outside world. When a state signs international treaties, it typically commits itself to internalizing their norms within its legal order. When it joins international organizations, it commits itself to certain obligations which constrain its autonomy in exchange for the advantages accruing from membership in them. Admittedly, signatory states do not always act in conformity to the conventions they have signed, whether these be ones that guarantee rights to children or promise specific reductions of polluting activities. (But then the practice of sovereign states does not always correspond to the text of their constitutions, either. The Soviet Union offers a dramatic, if distant example. Closer to home the living conditions of native peoples on many Canadian reserves has been censured as a violation of the United Nations human rights code, sweatshop and farm workers have been famously abused in the United States, and the violation of the right to organize in many maquiladoras has little apparent connection with the labor rights guaranteed by the lofty prose of the Mexican constitution.)

NAFTA and the WTO are different from previous international agreements because of the breadth and intrusiveness of the signatories' commitments which cover many areas of public policy and penetrate deep into the member states' legal and even administrative orders. They also innovate in the authoritative quality of their judicial processes which discipline with unprecedented effectiveness member states which are judged to have broken the new rules.

NAFTA and the WTO have three kinds of impact on national members.

1. Direct. For Mexico, whose constitution (Article 133) establishes that any properly negotiated and signed international treaty becomes part of the "supreme law" of the land, much of NAFTA and the WTO's provisions have direct effect. This means that if any Mexican law contradicts a NAFTA or WTO obligation, it is invalid. In practice many Mexican laws may still run counter to the sense of its international treaty obligations. The dissonance between the international and the national can be resolved preemptively by statute and regulation, or subsequently by judgment when some conflict between members of civil society is brought before judges who must then reconcile national law with international obligations.

2. Contingent. Some of NAFTA and WTO rules have contingent effect. Much of the turmoil in member states during the initial phase of membership in these new continental and global regimes has been caused by the need to give specific meaning to ambiguously phrased rules. They define practices -- such as the criteria stipulating what subsidies are acceptable -- which a country may not knowingly be disobeying until some foreign complainant starts an intergovernmental dispute process and a ruling is made through the appropriate multilateral dispute mechanism about the validity of that practice.

3. Supranational. As regimes with their own institutional structures, NAFTA and the WTO can also generate new rules that affect their members. Generally such new norms are negotiated intergovernmentally which makes them the equivalent of amendments to the original treaties. But in some cases, these institutions may actually create new norms through their own internal functioning. This happens, for instance, when a working group established by NAFTA issues some common standard for cross-border transport of dangerous chemicals that the three members have agreed in advance to accept or when the WTO's council or executive makes an "interpretation" which clarifies some hitherto ambiguous wording in the treaty. In this respect Mexico's membership in NAFTA and the WTO can be considered its participation in two *external* constitutional orders.

There is another way in which NAFTA and the WTO constitute *external constitutions* of loose confederations at the continental and global levels. NAFTA and the WTO enable their member states to exercise powers over their fellow signatories within these continental and global orders. NAFTA contains rules that bind not just Mexico, but the USA and Canada. Mexico can use these rules to enforce *its* rights in the United States and Canada, e.g., to sell its broomcorn brooms in those markets at specified tariff rates or to have its trucks deliver loads of Mexican goods to Florida. Whether these rights are respected by its partner states is an open question. If they are violated, NAFTA's juridical order gives Mexico a means for enforcing its rights on the nonconforming partner state. Similarly, the WTO's rules bind not just Mexico but each of the other 134 signatory states. So when Mexico thinks that the actions of some WTO member are violating its rights, for instance, when Guatemala imposes anti-dumping duties on cement imported from Mexico, it can launch an action against Guatemala to the WTO's dispute settlement body. If its case is sound it is likely to win, as the panel did in fact rule in this example. But if its legal homework had been poorly executed, it is also possible it can lose the case, as the appellate body ultimately decided when Guatemala appealed the panel's ruling.

In discussing the relationships between NAFTA and the WTO on the one hand, and Mexico's constitutional, legal, judicial, and administrative orders on the other, there are two further sets of issues to bear in mind, one pertaining to the country's political culture, the other relating to its geo-political context.

- *Political culture*

Mexicans have had a conflicted historical relationship with their constitution which has been an instrument both of revolutionary emancipation from foreign control and political repression by national autocrats. As a result it enjoys an ambivalent legitimacy. In some respects, such as the nationalization of the petroleum industry, its provisions are virtually sacrosanct. In other respects, the ease with which the ruling PRI was once able to make constitutional changes because of its command of the necessary two-thirds majorities in both houses of the federal congress turned constitutional amendments into actions with little more significance than enacting new legislation. In addition, the frequency of constitutional amendments detracts from their supral legislative gravitas. Changing the constitution in order to nationalize the banks one year (in response to the 1982 crisis brought on by the devastating combination of falling commodity prices, rising interest rates, and high levels of external debt, the state under President Portillo took over almost the entire banking system) and changing it back in order to privatize them less than a decade later (as part of a general program of economic liberalization, President Salinas put

this process into reverse in 1990) only served to undermine the overall legitimacy of the document itself.⁴

- *Geo-political vulnerability*

A state's political order also needs to be understood within its geo-political context. Its permeability (or, conversely, its ability to resist change) in the face of external pressures is related to three factors, the country's overall strength in the global balance of forces, the degree of its integration in the international system, and the distance separating the values that it expresses from those of the international community.

- Mexico being a mid-sized power with a weak economy can be considered much more permeable to outside influence than, say, China.

- When it was a closed system it was impermeable even to US pressure to change but, as soon as it broke out of its legal isolation, it became vulnerable to influence.

- Once it did open itself to normative intercourse with international and continental players, then the large gap between the values embedded in its political order made them subject to massive change. Having been rigid for decades, the Mexican political order became flexible, if not completely pliable. At least this is the story of Mexico's adoption of an international trade law regime, to whose analysis we will now turn.

II **Implanting International Trade Law**

In reflecting on how Mexico came to adopt international practices in the arcane field of antidumping and countervailing duties, we need to remember that this was a specific case of a general problem: the country's breaking free from a decades-old stance of legal autarchy.

“For over half a century, Mexico's absolute territorialism led to the virtual exclusion of foreign law from that country's court system.”⁵ Between 1932 and 1988, when it was isolated from the practice of private international law, “no foreign judgments were enforced in Mexico.” This was understandable, for the government had signed none of the relevant international agreements, whether that of Montevideo in 1889, of Bustamante in 1928 or any of the Hague conventions. As a result, Mexican courts applied only Mexican law to foreigners, whether these were tourists or corporate investors.

It was only in 1971 that Mexico adhered to the 1958 UN Convention on the

Recognition and Enforcement of Foreign Arbitral Awards. Then in 1975 it adopted six Inter-American conventions.

These steps were only a beginning. We need to remember that, just because the constitution declares international norms to be the supreme law of the land does not make them necessarily part of the judicial order. However good their quality, Mexican judges at the federal level (and the legal practitioners who interacted with them) were unfamiliar with these conventions and with the notion of applying foreign law in Mexico. As for the quality of judicial practice at the state level, it seems that the less said the better.

In the particular domain of trade law, Mexico had not needed any. Foreign trade was completely managed through a burdensome and mysterious system of import licences, official prices, and export subsidies administered case by case at the discretion of bureaucrats who were subject to corporate pressure, political influence and, of course, corruption.⁶ The system was highly protectionist and had no need for a trade remedy system that could impose antidumping (AD) or countervailing duties (CVD) on unfairly priced or subsidized imports. It suffered from no foreign import competition and *ipso facto* no unfair trade practices.

The political economy context for this absence of trade law was thirty years of successful experience with import substitution industrialization (ISI) that delivered industrial development at a 6.5 per cent rate of growth with low inflation. Although inefficiencies resulting from hyper protection caused concern in some quarters, there was no recognition till 1976 of the need to develop exports. When a new Commission on Tariffs and Controls on Foreign Trade was established and the idea of joining GATT led to preliminary negotiations in 1979, many nationalist sensibilities were so shocked that this gesture toward international opening became a hot political issue.

As far as relations with the United States were concerned, the Reciprocal Trade Agreements Program of 1942 had lapsed in 1950. It was not until 1981 that a first and inconsequential formal agreement was established, the 1981 Joint Trade Commission on Trade and Commerce.⁷ forthcoming). The following references come from the unpublished paper of the same title presented to Center for U.S.-Mexican Studies, UCSD, June 4-5, 1999, 13. Even with the devastating crisis of 1982 raising doubts about the viability of Mexico's industrial development model and putting liberalization on the policy agenda, resistance to abandoning state dirigisme was considerable. The Ministry of Commerce's National Program of Industrial Promotion and Foreign Trade -- which proposed liberalizing as little as

possible -- expressed the private sector's unwillingness to liberalize and Commerce bureaucrats' reluctance to give up their power. Once President de la Madrid insisted in 1985 that liberalization was to be the government's official policy and Mexico engaged in a sweeping program of economic modernization, structural adjustment, and linkage with the world economy through trade, foreign investment and the transfer of technology, something analogous to a political avalanche took place, with changes throughout the system sweeping old obstacles into oblivion and putting official prices, import permits, and foreign investment limits on the endangered species list.⁸

In November 1985 the president instructed the Secretary of Commerce to resume negotiations with GATT and by August of the following year Mexico officially joined the international trade order. This first step was far from bold, but a timid beginning indicated the direction of change. Mexico eliminated official prices but limited its participation in tariff liberalization to 373 out of 8,143 import categories affecting some 16 percent of its imports. It bound its maximum tariff to 50 percent, down from 100 per cent. These concessions mostly affected intermediate goods not made in Mexico and excluded the key sectors of agriculture, automobile, electronics and pharmaceutical products where performance requirements were still imposed in the spirit of the still functioning ISI model. The idea at the Ministry of Commerce was to minimize commitments in the light of the forthcoming Uruguay Round, but the landslide, having begun, proved hard to stop.⁹ In December 1987 import liberalization was accelerated: 7500 (90 per cent) import categories were fully liberalized, with a maximum tariff of 20 per cent and an average rate of 16 per cent.¹⁰

In this period, with trade conflicts rising on the US border, a pattern was established in which change at the multilateral level alternated contrapuntally with change at the bilateral level. With a devalued peso stimulating Mexican exports, American protectionist actions against these products caused Mexico to sign with Washington a Bilateral Understanding on Subsidies and Countervailing Duties in April 1985. Mexico obtained the benefit that proof of injury would be required for US producers threatening Mexican exports, but membership in GATT had eliminated neither peak import tariffs in Mexico's main U.S. market nor protectionist measures against Mexican exports."¹¹ The trading arrangement between the two countries amounted simply to the exclusion of the in-bond zone from either countries' trade barriers, making the maquiladoras a mini-legal order created by inter-governmental agreement. Trade authorities at SECOFI, the Mexican Ministry of Commerce and

Industrial Development, knew they would have to make more changes, but delayed acting as a strategic decision to get reciprocal concessions from the U.S. when it came to the next round of real negotiations.¹² The 1985 understanding was followed by a Framework Agreement on Trade and Investment negotiated with Washington in 1987,¹³ which was succeeded by a Mexico-US Understanding Regarding Trade and Investment Facilitation Talks in 1989.

These initial exchanges of concessions in each other's system were the precursor of the ultimate adoption in the wake of the negotiation of both NAFTA and the WTO of a complete antidumping and countervailing duty regime that was to accompany a broad new set of investor rights.

Mexico was still a trade law virgin in 1986 when it introduced its first antidumping and countervailing duty law two months before signing onto the GATT. The Foreign Trade Act Implementing Article 131 of the Constitution was relatively rudimentary and unsophisticated with just two articles constituting the legal framework for subsidies.¹⁴ This law was elaborated in November 1986 as Regulations Governing Unfair International Trade. A year and a half later the antidumping regulatory framework was expanded as a consequence of Mexico signing the Agreement in Implementation of Article VI of GATT, the antidumping code from the Tokyo Round. (Mexico still didn't sign the GATT subsidies code because of its own substantial subsidy system.)

Observers can only note wryly that the wholesale adoption by Mexico of an aggressive trade protectionist system violated not just the spirit of a free trade area, but the neo-liberal principle underlying it, namely the need for markets to be allowed to favour the highest possible levels of competition in the interest of getting for the consumers the lowest possible priced goods. The greatest change in Mexico's legal system was the adoption of the most retrograde aspect of the so-called advanced countries' legal order, which constitutes a costly barrier to entry encouraging collusive activity and perversely stopping competition by price.¹⁵ "I rue the day," regrets one practitioner, "that Mexico finds itself having to adopt US antidumping laws as the benchmark for its competition policy ... since antidumping is a non-tariff barrier in the grossest form."¹⁶

The paradoxes of antidumping continued in that NAFTA – in order to scotch any possibility that a supranational trade order might develop on the European model – had left the bulk of dispute settlement to ensuring the three member states properly implemented their own trade remedy laws. Since Mexico did not have laws on anti-dumping or countervailing duties, it agreed to import holus-bolus a complete

legal micro-structure – and on the Canada-American, common law model -- in order for it then to be enforced. In creating its new trade regime Mexico also had to respond to the virtually simultaneous agreements incorporated in the WTO. The *constitutional framework* for the NAFTA-mandated antidumping regime was Article 28 of the Constitution concerning subsidies,¹⁷ Article 73.X giving congress authority to legislate on commercial matters, and Article 131 empowering the executive to negotiate tariffs.¹⁸ These articles were not changed.

The *legal order*, however, had to be adjusted. The 1993 Foreign Trade Law (FTL)¹⁹ made amendments to Articles 60 and 68 of the FTL concerning administrative procedures and Articles 97 and 98 concerning file determinations. These were legislated to implement NAFTA alongside the NAFTA Implementing Decree.²⁰ From January 1995 the GATT subsidies code of 1994, Article 1 was part of Mexican law and was far more precise than the Foreign Trade Law Article 37 which had in consequence to be amended. Introducing an AD and CVD regime involved changing more than one law. Statutes considered to be part of the AD and CVD legal framework are the Law of Amparo, the Federal Judicial Power Organic Law, the Federal Tax Code, the Income Tax Act, the Customs Act, the Federal Public Administration Organic Law.

Further down the political scale, the *administrative order* had to be adjusted. Foreign Trade Law Regulations²¹ were promulgated, as was a SECOFI by-law of April 1993 concerning access to information and participation in dispute settlement.

The process of adjusting its law to NAFTA's and the WTO's norms subjected Mexico to surveillance from both bodies. "When Mexico adhered to the antidumping code, this issue as well as others was subject to scrutiny by the GATT committee on antidumping practices as it reviewed the compatibility of Mexican unfair trade law with GATT and its code. In April 1990, after two years of analysis the committee determined that Mexico's statutes did not require amendment."²²

Whereas only importers had at first had the right to judicial appeal, as a consequence of NAFTA the right to appeal or challenge a trade determination was extended to all of the interested parties in an antidumping or countervailing duty proceeding.²³ However new Mexican trade law may have been and whatever passing grade it may have received from its GATT review, it was considered inadequate by Canadian and American trade negotiators when NAFTA's rules were being written. "Mexico was obligated to make significant, substantive revisions to

its antidumping laws and regulations in order to implement the binational process.”²⁴ Twenty-one changes to Mexico's administrative procedure were specified in NAFTA's text.

These changes introduced due process provisions so that interested parties could participate fully in all stages of investigations. Worth noting especially were the requirements for the publication of the administrative and final determinations and for the investigating authority to maintain an administrative record which would constitute the basis for its final determination – two concepts foreign to the Mexican legal system.²⁵ In actual practice twenty of the twenty-one stipulated changes were made, the one exception being considered to conflict with Mexico's constitutional order.²⁶

Importing the antidumping and countervailing duty regime into Mexico caused changes to be made in its legal, judicial, administrative orders without, for all that, changing its constitutional order. In confirmation of this, a Mexican senate report concluded that NAFTA was congruent with the Mexican constitution. Indeed “when drafting Chapter 19, the Mexican negotiators were particularly careful in observing strict compliance with the individual guarantees and rights established in the constitution.”²⁷ For their part, Canada and the United States were concerned that the Mexican appeal system based on the notion of *amparo* might interfere with the trade panel process and insisted that a new mechanism safeguard the panel review system from this,²⁸ but as Beatriz Leycegui points out, no signatory can guarantee that its courts will not challenge a trade agreement's constitutionality.

As a result of the combined influence of the continental and multilateral negotiations there is a high level of harmonization among the three continental partners. “Because the US and Canadian laws have also adopted the GATT terminology and methodology, the concept of export price and the methods for calculating it in the three NAFTA countries are analogous.”²⁹ Similarly the definition of price discrimination in FTL Article 30 is consistent with GATT's antidumping code Article 2. Article 31 (the three methods of calculating the normal value of merchandise from market economies) is “in congruence with international practice and particularly US practice.”³⁰

Because Canadian and U.S. law also incorporate GATT rules, the result is a Mexican legal and administrative order for AD and CVD that is very similar within all three NAFTA countries in terms of the period subject to investigation, the economic factors considered, causal relations between injury and imports, the determination of injury provisions (Antidumping Code Article 3, Subsidies Code

Article 15), the definition of domestic industry (Antidumping Code Article 4, Subsidies Code Article 16). Conformity reaches down to the very questionnaires used by SECOFI which are similar to those used in the American system.³¹

Mexico could not introduce a new administrative order in a vacuum. Its regulatory framework for administrative procedures being both dispersed and incoherent, with every administrative law having its own procedures, it had to reform its administrative procedure system, bringing in the Federal Act of Administrative Procedures in 1994.³² As the process of regulatory reform continued, further changes were introduced to broaden its scope. On March 23, 2000, the Mexican Senate passed amendments to this law in response to “four main concerns: to increase transparency in the drafting of regulations by the executive branch; promote public participation in the regulatory process; provide citizens’ legal certainty regarding the enforcement of procedures and regulatory requirements; and ensure that the benefits resulting from new regulations outweigh their costs.”³³

From Theory to Practice: the Actual Experience of Mexico's Trade Remedy Law

A trade remedy system exists primarily to give national producers protection against what is deemed unfair foreign competition in their own market. As defined by the WTO and NAFTA agreements, Mexico's regime was made as transparent and predictable as its partners had demanded. It was also made liable to binational appeal through Chapter 19's dispute settlement process which had been designed not to be a supranational judicial order in any way similar to the European Court of Justice. On the contrary the rules spelled out in Chapter 19 simply allowed private parties, typically a company or industry whose exports had been targeted with antidumping or countervailing duties, to trigger an appeal process. This took the form of a binational panel whose mandate was to review whether the final determination made by SECOFI had properly followed the prescriptions of Mexican law. In effect, while Mexico's new AD and CVD regime gave it a defence against unfairly competing US or Canadian exports, Chapter 19 gave the US or Canadian exporters a counter-offensive tool with which to call into question the validity of any such defensive action they believed had been invalidly taken.

The best example so far of successful American exploitation of this right is the Cut to Length Steel Plate Steel Case which caused considerable upset in the Mexican legal community.³⁴ The NAFTA panel remanded SECOFI's final determination, declaring it illegal and null because several officers conducting the investigation lacked jurisdiction, thus violating Article 238.1 of the Federal Tax Code (*Código fiscal de la federación* (CFF)). According to the CFF's Article 238, one of the standards for review by the Federal Taxation Court is the competence of the

officials concerned. SECOFI challenged the panel's view of its own competence, arguing that it only had powers under NAFTA 1904 (8) to remand a decision for reconsideration. Two of the three panels argued, however, that NAFTA gave them the same jurisdiction as the FTC, the court that they were replacing, which had the power to review administrative agency determinations.³⁵

The legal uproar raised by the debate over a NAFTA panel's *competencia* over Cut to Length Steel Plate, which was seen as an application of American concepts to Mexican judicial proceedings, was mitigated somewhat by a parallel panel investigating the antidumping duty imposed on US flat coated steel products.³⁶ In this case the panel considered itself an arbitrator whose jurisdiction was limited by NAFTA and Mexican law. In short its authority was not the same as the court it replaced. It did not believe it had jurisdiction to declare a challenged determination null. Although it considered that one SECOFI official was without jurisdiction and therefore his actions were illegal, and although it ordered changes in the determination concerning one of the complainants, it upheld SECOFI's final determination.³⁷

In a third early case, that of Polystyrene and Impact Crystal,³⁸ there was another controversy over the extent of the panel's jurisdiction to consider whether SECOFI had exceeded its own jurisdiction. Ultimately the panel deferred to SECOFI and the political issue raised by this problem abated. (Unlike the United States but like Canada, the same agency carries out the investigation into dumping and determines the injury. Some question the legitimacy of SECOFI acting in both capacities, claiming that this creates distortions in the process.)

Trade law is not simply a matter of defending home markets. It can also be a strategic tool to gain access to a competitor's market. In the case of the Mexican antidumping duties imposed on US apple exports, the nature of the solution – a suspension agreement which established a reference price for American apples in the Mexican market in exchange for US Department of Agriculture removal of barriers to Chihuahua apples entering the US market suggests that the original antidumping action had an element of strategic arm wrestling about it.³⁹

Once one understands that NAFTA is more about managed than about “free” trade, then Chapter 19 dispute settlement can be seen as another tool available to exporting producers, competing national producers and their respective governments in their continual quest to improve their relative positions. The long and complex case of High Fructose Corn Syrup is an exemplar of this reality. If the Mexican government's objective was to increase its sugar exporters' share of

the US market, then its antidumping determination against US exports of high fructose corn syrup was a pawn in the strategy. When the US called for a Chapter 19 panel to review SECOFI's final determination, Mexico showed how it had learned from the master to play the new trade game by exploiting its right to appoint the fifth panelist to the panel and then delaying that appointment. Not surprisingly, the United States responded to this stalling tactic by showing off its mastery of trade dispute strategy. It managed not just to launch a NAFTA Chapter 19 appeal against Mexico's antidumping duties but a panel at the WTO as well, aiming thereby to reduce Mexico's leverage in stalling the original case. As Luis de la Calle made clear, Mexico preferred a settlement to a continuing confrontation,⁴⁰ although the Mexican government was itself under pressure from sugar workers pressing it to launch a Chapter 19 action against US restrictions on Mexican sugar exports. Unfortunately, since much of the dispute revolves around private letters exchanged between the NAFTA negotiators Mickey Kantor and Jaime Serra Puche, it is not possible for the public to know what legal case Mexico has to stand on.

In an antidumping duty applied to Mexican tomato exports following a surge of produce in the wake of the peso devaluation, the US applied a 201 safeguard duty under GATT's Article XIX. Intergovernmental negotiations produced a “suspension agreement” in October 1996 that bound Mexican growers to sell their produce at a predetermined price in the American market.⁴¹

However true it may have been that Mexico had “quite a lot to learn from Canada and the United States and other countries about how to defend itself in foreign trade related matters,”⁴² it has been a fast learner. Mexico is now the second most active user of antidumping in the world after the United States.⁴³ In the related field of food standards, it followed a United States announcement that three Mexican food processing plants were in violation of American food safety regulations by disqualifying seventeen American plants from shipping meat and poultry to Mexico. No matter that none of the Mexican inspectors who inspected the US plants spoke English.⁴⁴ This tit for tat was not just giving the message that Mexico can play hard ball too, but it demonstrated how quickly Mexico had internalized the American political culture of trade war.

NAFTA's Chapter 11 gives NAFTA area corporations an extremely broad right to challenge a government ruling that “expropriates” its assets and to submit the case to binding international arbitration. This innovation adds a significant option to Mexico's judicial order since it gives corporations based in Canada or the United States the right to challenge a Mexican government regulation jeopardizing their

profits.⁴⁵ In the first of the three Chapter 11 cases brought against Mexico, its victory in the Desona case suggests that NAFTA, in the words of the panel decision, will not “allow investors to seek international arbitration for mere contractual breaches. Indeed NAFTA cannot possibly be read to create such a regime which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.”⁴⁶

Americanization

In assessing its significance for the Mexican political order, it was intuitively persuasive to argue that Chapter 19's panel process would “be an instrument for change in the Mexican legal framework regarding countervail and antidumping legislation and procedure since... this aspect of Mexican law will now be subject to scrutiny by the international panels.” NAFTA's dispute mechanism would “aid domestic reformers to accomplish their goal of making the Mexican legal process more transparent and comparable in certainty to the Canadian and American systems.”⁴⁷ Support for this hypothesis is rooted in the fact that Mexico had no such system and that the new one it installed was essentially American. Prior to NAFTA it had virtually no experience in international trade disputes, whether binational panels or international arbitration panels.⁴⁸ As a result very few law firms had experience or even professional expertise in this field. Law faculties offered no courses in antidumping, international trade, conflict of law, or enforcement of foreign judgments. Mexico began “to be inspired by American statutes in these areas and, as a result there is an Americanization of Mexican law.”⁴⁹ Even the fact that this gap is being filled by cram courses and seminars now being offered at UNAM and SECOFI to bring lawyers, students, and judges up to speed on trade law questions supports the Americanization thesis.⁵⁰

Two factors caution us to qualify the argument.

1. Chapter 19 has been a considerable disappointment. It has not provided definitive and non-controversial solutions. They have not been particularly expeditious, although the number of days to reach a decision has fallen from 1,362 to 435. It has turned out to be very expensive and not a deterrent to initiating trade remedy actions. It has created neither certainty nor predictability as far as exporters' access to other NAFTA markets is concerned. And it is itself the cause of further intergovernmental tensions.⁵¹ Hence it may suffer a loss of institutional momentum in relation to other dispute settlement venues.

There has been great difficulty establishing a consensus about the panels' status and scope. It has proved difficult to find qualified panelists, several of whom have

had to withdraw because of alleged conflicts of interest, thereby slowing the process. There is even disagreement about the profile of a proper panelist, the US preferring judges who are likely to defer to American trade agency rulings. Canada and Mexico prefer trade experts who will be more rigorous in applying domestic law and more zealous in overturning what are often highly politicized decisions in the United States. Language differences have caused important problems, not just in slowing down proceedings by requiring translation of documents and interpreting during meetings. More fundamentally, differences between English and Spanish express profound differences between the two systems.

2. Although NAFTA negotiators tried to ensure that Mexico's antidumping and countervail law and practice would follow common law standards and so be removed from the Mexican judicial order, Chapter 19 panels are mandated nevertheless to act as would a Mexican court of appeal. The rub is that a Mexican court would necessarily operate according to the tenets of Mexican legal culture which in many respects are different and in some cases unique. For instance:

- Mexico's civil justice system limits the damages that can be recovered. (The US allows unlimited, including punitive damages.)
- In Mexico, the parties in a case do not serve each other. It is the duty of the court to give notice.
- An injunction is not available in Mexico where damages are irreparable. (In the US it is the preferred remedy.)
- Mexican civil law uses an inquisitorial procedure as opposed to the adversarial procedure of US common law.
- In Mexico trial evidence is presented as documentation in front of judges who themselves question witnesses.⁵²
- Hearings are held only to resolve questions of evidence. Judges may make decisions about evidence without questioning the parties.⁵³
- In Mexico the jury does not play a part in adjudicating civil disputes. (In the US, the jury is integral to the adjudication process.)
- Mexico allows civil disputes to invoke criminal sanctions.

- Mexican legal practice is not specialized – completely different from the elaborate division of labour in the US legal profession.⁵⁴
- In the Mexican tradition articles of law are interpreted in relation to the entire jurisprudence.
- Mexico does not have the concept of administrative practices. It relies on legislative histories.⁵⁵
- A judicial precedent is much more difficult to establish: for this to happen, the Supreme Court has to decide the same point in five consecutive separate cases.⁵⁶
- Two basic principles of Mexican law -- *motivación* from Article 14 of the constitution and *fundamentación* from Article 16 – have no meaning to common law practitioners.
- The law of *amparo* has a similar stature to Habeas corpus in the common law. It is the instrument to provide remedy against the final decision of all judges, all laws, and even administrative authorities.⁵⁷ Although NAFTA 1905 was written to safeguard against the use of *amparo* and NAFTA 1904:11 was meant to preclude judicial review of panel decisions, Mexicans – as Americans - are unlikely to accept that their right to appeal has been abrogated.⁵⁸

In the words of one practitioner, “We are a different civil system, we have a different set of laws, and we think differently.”⁵⁹

Given these substantial differences between the NAFTA countries' legal systems and judicial orders, it remains unclear what the long term impact in adopting AD and CVD laws and procedures will be, whether at Mexico's national level or the continental level of NAFTA's judicial development. The four chief possibilities would seem to be:

1. A completed Americanization of those aspects of Mexican law that deal with NAFTA's trade tensions might result. This would imply a final severing of the links between trade law and the rest of the Mexican legal order and so the development of a dual judicial order.
2. At the other extreme there could be a Mexicanization of AD and CVD practice, a kind of Montezuma's revenge in which the foreign system is integrated into the fabric of national judicial practice.

3. Somewhere in between there could be the development of an arbitration culture separated from the national along the trail already blazed by Chapter 11. Resort to mediation, arbitration and such bodies as the International Convention on the Settlement of Investor Disputes (ICSID) could help the integrated business culture of North America develop its own trade law, which could lead to a fourth possible outcome, the development of a continental judicial order.

4. Parties to binational panels in Mexico have already cited cases from US antidumping history.⁶⁰ “Although NAFTA was set up to prevent such a development, there are panels citing other panel decisions to some of the decisions or determinations that they make. Some panels are already indicating that they are relying on the reasoning or determinations that were made by prior panel. From that perspective it could be said that we can see the beginning of a NAFTA jurisprudence.”⁶¹ Such cross-citing is normal to the common law's legal culture. In the Mexico antidumping case against Guatemala the WTO panel even cited the reasoning of the CUFTA softwood lumber case.

There are persistent problems in finding qualified panellists as indicated by NAFTA's member states' failure to create the thirty-person permanent roster as required by NAFTA. Resultant pressure from within the legal community to establish a NAFTA tribunal would move the development of a continental legal order forward considerably. A more powerful stimulus to constructing a continental legal order would be formally to grant panel decisions the precedent-forming power that they are now apparently adopting informally. With *stare decisis*, panel precedents would become a matter of course, as they are at the WTO level.

III The Dance of the Dialectic: Trade Liberalization Meets Neo-Liberalism

For all its complications, the AD and CVD regime is relatively self-contained. The first analytical challenge was to observe how successfully a corpus of foreign legal practice could be transplanted. More subtle, complex and therefore difficult to analyze was the relationship between pressures *from without* and forces acting *from within* to change already existing aspects of the Mexican political economy.

In principle it should be possible to establish the nature of any specific economic sector at the moment when the PRI regime shifted to its neo-liberal path. Its liberalization *from above* program could be contrasted with the *from below* resistance on the one hand and the *from without* forces on the other. Among these latter factors one can distinguish between the openly politicized, direct US

government pressure expressing the demands of its private sector interests and the more legalistic requirements embedded in the continental and global regimes of NAFTA and the WTO. While the following discussion will adopt this simple model for heuristic, expository reasons, we need to bear in mind two important caveats.

1. What we conceptualize as a *from within* and *from above* force – the ideological commitment of the PRI leadership in the mid-1980s to a neo-liberal counter-revolution -- can itself be understood partly as a *from without* force. Because the young technocrats of the generation that took over programmatic direction of the PRI regime had learned their paradigm in the leading graduate schools of the United States and because of a globalized consensus diffused among the elites of the non-Soviet world in the wake of Thatcherism and Reaganism, it is somewhat simplistic to consider the de la Madrid/Salinas counter-revolution to be an entirely internal phenomenon.

A further difficulty with the notion of *from above* forces is that it obscures the differences within the system's elites. A program of reform that offers a prescription in the national interest may also play a role in a power struggle within the ruling party. Introducing the question of elite interests also obscures the distinction between internal and external factors. One device currently used by ruling groups to block their internal enemies -- whether dinosaurs within their own party or opposition politicians seeking to unseat them – is to sign international agreements which create norms that are supraconstitutional, committing the state in ways that are virtually irreversible, however much distress they cause to dispossessed peasants, unemployed workers, or bankrupted debtors.

2. A second analytical shorthand conceals further conceptual difficulties. “Market forces” can be seen as pushing for change as if they were disembodied -- as indeed they seem to be when a new technology creates tremendous pressure to change an existing regulatory system. The “market's need” may mean the economy's projected demand for a certain amount of electric power. It may also express pressure by aggressive foreign TNCs to exploit their market dominance at home by capturing market share abroad. But a need is never objective. Mexico's “need” for a low-cost, efficient telecommunications infrastructure can also be articulated as the pressure by potential local partners wanting to form alliances with foreign telecom providers and dislodge the monopoly grasp of Telmex.

Having recognized the unfortunate simplifications that a brief overview paper unavoidable commits, let us plunge into the analysis keeping in mind our five-fold

typology of a political order's principal components. Depending on the particular sector of the economy, the changes produced by the dialectical dance between trade liberalization and neo-liberalism has concentrated in one or other of the constitutional, legal and administrative, and the judicial and coercive orders. We will proceed in order of rising levels of external intrusiveness from agriculture and manufacturing through the energy utilities to banking in order to end with telecommunications and the associated issues of intellectual property rights.

Agriculture

Amending Article 27 of the Mexican constitution in 1992 affecting land tenure norms to promote both foreign and domestic private capital participation in agriculture was a fundamental reversal of the revolutionary tradition of land distribution which guaranteed peasant holdings in *ejido* communities. Having taken this radically pre-emptive initiative, the government took another gamble when negotiating NAFTA by agreeing to eliminate in principle its protectionist regime for the production of Mexico's food staples.⁶² Having conceded the principle of liberalization, however, Mexico held out for maximum protection of its farmers, negotiating separate agreements with Canada and the United States that gave the longest transition (fifteen years) to zero-tariff protection for the most sensitive products, the corn and beans grown by subsistence farmers.

NAFTA, of course, did not only affect Mexico's regulatory order in protecting its farmers from US and Canadian exports over the transition period. Its counterpart stipulations generated a continental regulatory order governing the access of Mexican agricultural exports to the US and Canadian markets which, perhaps not surprisingly, gave the longest transition period to those products most politically sensitive to lower-priced Mexican competition such as avocados. Given the use of food and health regulations to control the import of food stuffs, NAFTA's committee on sanitary and phyto-sanitary measures has allowed the US and Mexico to progress in the development, adoption, and enforcement of SPS measures while letting each country maintain the protection it deems necessary.⁶³

Manufacturing

The industrial counterpart to its restrictions on foreign ownership in land holding achieved by the Mexican revolution was the series of measures taken to limit foreign ownership in specific industrial sectors by President Camacho in 1944 that culminated in President Echeverria's Law to Promote Mexican Investment and

Regulate Foreign Investment. The accompanying Calvo doctrine which disenfranchised foreign investors and rationalized a policy of nationalist capitalist autonomy kept Mexico from signing a bilateral investment treaty with the United States or accepting the investment protections offered by ICSID.⁶⁴

When the collapse of the Mexican banking system in the 1982 crisis demonstrated that the economy's system of financial intermediation was incapable of channelling national savings into industrial development, the only alternative appeared to be attracting large quantities of foreign capital to finance the modernization of Mexico's manufacturing, infrastructure, and public utilities. These perceived "market needs" prompted a number of changes in the foreign investment regime which preceded the disciplines Mexico accepted in that area when it signed NAFTA. The Foreign Investment Commission (CNIE) was empowered in 1989 to waive restrictions deemed in the public interest, opening for foreign participation areas previously reserved for domestic capital.⁶⁵ In 1989 CNIE was authorized to give automatic approval for investment projects in "unrestricted industries". When foreign investment met guidelines to promote foreign trade and create jobs outside the major cities, it was allowed up to 100 per cent control.⁶⁶ Also in 1989 the National Securities Commission and the CNIE authorized foreigners to buy equities issued by Mexican firms, albeit without voting rights. An empirical indicator of this loosening of foreign investment controls was that the CNIE approved 98.4 per cent of the projects it reviewed from 1989 to 1993, the year that, in response to the NAFTA commitments, the restrictions of the 1973 law were abolished.

Hoping to restore Mexico's credibility with international investors by convincing them that its domestic policy reforms were irreversible and fearing that a multilateral agreement at GATT was not in the offing, Mexico agreed to investment provisions in NAFTA's Chapter 11 that gave foreign investors a higher standard of protection than even ICSID provided.⁶⁷

Rights of Canadian and American investors to national treatment and freedom from performance requirements as a condition of establishment required, of course, the eradication of those micro-economic policies that had constituted Mexico's import substitution industrialization model.

However committed PRI's technocrats may have been to neo-liberalism's doctrines, they could not ignore the entrenched interests of Mexican corporatism's most powerful fiefdoms, the automobile and textile sectors. Mexico's Automotive Industry Decree as modified over the years since 1962 with its complex provisions

concerning export performance and national content production was to be attenuated by NAFTA, not eliminated. In stages lasting from five to fifteen years, Mexican auto manufacturers were to have increasing entitlements to import parts, components and vehicles, with specified shares of the Mexican market, reduced requirements for value added, removed restrictions on foreign ownership for auto parts, internal sales of maquiladora production in the Mexican economy, and even eliminated export restriction on used cars.⁶⁸

These provisions required legislative changes. The rules of origin that accompanied the automotive industry regulations required changes in Mexico's administrative order, particularly its customs officials' administration of cross-border shipments to monitor the sliding scale of North American content for cars (reaching 62.5 per cent in 2002), parts (60 per cent) and other vehicles (60 per cent). Given the crucial role played by customs officials in enforcing rules of origin, the three countries agreed to work out uniform regulations regarding the interpretation, application, and administration of the rules of origin that they would then entrench in each system of national law, focussing particularly on the exporting country issuing certificates of origin for their qualifying export goods.⁶⁹

Whether this “excessive protection for a regional industry”⁷⁰ was the key factor attracting major foreign investments in the Mexican automobile industry by Mercedes-Benz, BMW, and Honda to build vehicles with North American auto parts for the continent,⁷¹ it is certain that NAFTA caused a direct change to the legal and administrative orders affecting auto manufacturing. Textiles was another heavily administered system of continental protection established in NAFTA by powerful rules of original and a complex array of tariff-rate quotas.

Power Utilities

In its NAFTA negotiations, Mexico was least willing to alter its controls in the third pillar of the Mexican revolution, the oil and gas industry, which was considered strategic to the whole economy, if not sacrosanct in the political system.⁷²

Electricity

The private producers of electricity had been regulated since 1933 and, since 1937, the *Comisión Federal de la Electricidad* (CFE) had been a nationally owned utility. Ultimately electricity had been made a national sector by the 1960 constitutional amendment of Article 27.⁷³ Hydrocarbons and Electric Power under Article 27 of the Mexican Constitution,” *United States-Mexico Law Journal* 3

(1995), 54. With the anticipated growth of demand exceeding Mexico's capacity to generate electricity, calls for more foreign investment had already led by 1992 to changes which opened power generation to foreign participation of 49 per cent -- or more, if authorized as a benefit to the Mexican economy. Electricity generating plants and power conduction lines and networks could now be constructed by private investors. With NAFTA's Chapter 6 and the resulting amendments to the Law for Public Service of Electric Power along with its implementing regulations, foreign investors could now own and operate electric generation facilities for industrial consumers and sell their excess power to the CFE.⁷⁴

With projected needs for forty 350 MW power plants over the twelve years following 1995,⁷⁵ NAFTA appears to have opened the door for loosening regulations to encourage more foreign participation in electricity generating facilities not just for the use of the investor but in co-generation and independent power production.⁷⁶ State firms may now negotiate cross-border supply contracts between suppliers and end users. CFE can negotiate purchases and sales with independent power producers in the US, and foreign suppliers can sell to the CFE, which keeps its monopoly on transmission and distribution under open, competitive bidding rules.⁷⁷

The dialectic between forces *from within* and forces *from without* can be seen in the subsequent proposal by President Zedillo in February 1999 to amend Article 27 of the constitution in order to reform the electricity sector, privatizing it into several generation and distribution firms, establishing a national transmission firm, and adding an independent regulatory entity to operate the transformed system. Although the proposal stalled in Congress, President Fox, who had talked a lot about the need to open the sector and allow more private investment, planned to introduce a similar proposal himself. failed to pass Congress, President Fox intends to reintroduce it.

Oil

Because Article 27 was the “most significant outcome of the Mexican revolution” embodying its cry for economic independence and proclaiming the destruction of vested interests, with the nation declared as the direct owner of the *propriedad raiz* and the rights of society prevailing over the rights of individuals,⁷⁸ Mexico's free trade interlocutors were obliged to accept major reservations in NAFTA that protected the petroleum industry as a state enclave (NAFTA annex 602.3)

Pemex had been formed in 1938 to operate properties expropriated from the

foreign oil companies. Even though Pemex remains the sole owner of the petroleum industry exploiting these resources, the sole supplier of oil and gas, and the only trader in oil and gas, NAFTA nevertheless reinforced the trend to opening the petroleum industry that had already begun in 1989 when the Petrochemical Resolution declassified some petrochemicals making them eligible for foreign investment and loosening the list protected from outside control from twenty to five.⁷⁹

Although Mexico's constitutional, legal, and administrative order seems to have been the least affected by NAFTA in the petroleum industry, US pressure to gain foreign investment rights in exploration and exploitation, the economy's need for greater supplies for internal use and export revenue, and the changes that have already been made in chipping away at Pemex's monopoly suggest that Article 27 – which has already been amended fifteen times – is vulnerable to further alteration.

A harbinger of such change came in 1997 when a new legal framework was established for natural gas production, distribution, and sale to residential and commercial customers.

Undermining Pemex's monopoly from another side is the system's contemporaneous antitrust regime. The *Ley Federal de Competencia Economica* (LFCE) created in December 1992 the first effective competition authority, the *Comisión Federal de Competencia* (CFC) which was designed on the basis of Canadian, European, and American models with a “high priority to interact with international counterparts in order to develop standards compatible with international standards and to establish a prominent role for the CFC in the globalization process.”⁸⁰

The CFC's challenge to Pemex's misuse of its overwhelming market power at the service station level would be misunderstood if it was taken to be the result of NAFTA's 1501(1) injunction that parties shall “adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto.” It is, rather, a result of inter-normativity within the epistemic community of antitrust policy makers whose work has ensured that “national laws tend to converge towards best practices.”⁸¹

Banking

If the story of trade liberalization in oil is one of largely successful plugging the

dike's leaks, the story of banking is that of the dike being swept away in a tidal wave. While the dike in the first case was solidly constructed on the basis of historical trauma and national action, the second was weakened from constant levelling and rebuilding. Already in the financial crisis of 1982 President Lopez Portillo had changed the constitution to make banking another state monopoly, nationalizing all but two of the banks which had themselves been a major cause of the economy's financial collapse.

Given the crucial role financial institutions play for neo-liberal theory in achieving economic efficiency by allocating and pricing capital, the Salinas administration began deregulating the financial sector to enhance its efficiency and to attract investment. It deregulated deposit and lending rates, ended credit allocation, removed restrictions on the kinds of business in which financial institutions could engage, strengthened prudential regulation (loan classification and capital adequacy guidelines were made consistent with those of the Bank of International Settlements), and amended the constitution to permit, once again, private ownership of the banks.⁸² In 1990 the *Ley de Instituciones de Credito* and the *Ley para Regular las Agrupaciones Financieras* created a universal banking model with limited foreign investment quotas. When most commercial banks were privatized in 1992-93 the new owners demanded protection from foreign competition because of the high prices they had paid. As the government itself wanted to keep a national payment system in domestic hands, it approached this part of the NAFTA negotiations defensively. As a result, it made minimal concessions at the micro level, though was more accepting of major change at the macro level. Although NAFTA provided national treatment, procedural transparency, prudential and safeguard measures plus a dispute mechanism for trade and investment in banking, investment, and securities institutions, it nevertheless restricted foreign ownership of banks, keeping strict market share limits on US and Canadian acquisitions. This created a dual banking system with foreign controlled entities subject to clear limitations and Mexican-controlled banks free of such limitations.⁸³

At the macro level one could debate whether Mexico had kept autonomy of its banking system with Article 1410, which allowed it to take reasonable measures to maintain the integrity of its financial system. This presumably would have allowed such Chilean measures as imposing reserve requirements on short-term capital flows.⁸⁴ Alternatively, NAFTA's article 2104.2(a) on the balance of payments allowed Mexico to impose capital controls under emergency conditions provided that it consult with the International Monetary Fund and be put under the Fund's Article 8 surveillance regime. Since Article 8 imposes extreme austerity, Canova argues that Mexico had given up the right established by the Bretton

Woods agreement Article 6 allowing states to restrict capital transfers. Chapter 11's definition of investment to include private debt and equity securities means that Mexico has "surrendered virtually all controls on hot money capital flows."⁸⁵ These provisions are not written in Mexican law. They are elements of the NAFTA order for the continental regime but applying specifically to Mexico.

The expectation that the three signatories would preserve their "distinct national approaches to regulation" and, through Article 1403, retain autonomy with respect to stabilization, monetary, credit and exchange rate policies proved short lived.⁸⁶ The liberalization of financial institutions that Mexico had instituted prior to NAFTA provided the mechanism for the capital flight that precipitated the crisis in 1994-95 -- the most severe in a history studded with such disasters -- and the consequent collapse of the financial system. Having withstood the US and Canadian pressure for opening up its banking system, Mexico was now forced to accelerate its financial institutions' liberalization while suffering the indignity of having its oil export revenues held as collateral against the \$51 billion bailout that allowed it to restore its financial system's functioning.⁸⁷

Far more than NAFTA, the exchange rate crisis led to very substantial changes in the financial system's legal order. With the government's *Fondo Bancaria para Protección al Ahorro* taking over thirteen banks along with much of their bad debt, the government proceeded to eliminate barriers to foreign ownership of banks and allow foreign takeovers of troubled institutions exempt of the NAFTA-specified limits. Its administrative order was also affected: a bailout condition attached to the World Bank's Financial Sector Restructuring Loan was Mexico's adopting accounting provisions closer to international standards to make the banking commission's monitoring and supervision of national bank solvency more transparent.⁸⁸

Telecommunications

Mexico's telecom reform preceded its negotiation of NAFTA by a considerable margin, being based on the twin logics of privatizing the state monopoly and establishing a regulatory regime to facilitate competitive entry of new firms. Encouraging competition was deemed a crucial means to achieve the end of attracting efficient industries requiring a high quality communications and data transmission infrastructure.⁸⁹ In 1989 Mexico opened telecommunications to foreign participation and a year later privatized Telmex, which was allowed to maintain its monopoly of international and long distance telephone calls.⁹⁰ While the Federal Competition Commission began to regulate competitiveness in 1993, Telmex resisted the breakup of its monopoly power. With frequencies for the

mobile service market allocated by auction, Bell Atlantic moved into this sector.⁹¹

In the NAFTA negotiations Mexico was almost as reluctant to open up telecommunications as petrochemicals. Nevertheless NAFTA established a gradual opening. Article 1302 provided that public telecommunications networks and services were to be non-discriminatory for firms in enhanced, value added, and intracorporate telecommunications. This only represented a small change in the telecommunications market, but it was a stepping stone towards further liberalization.⁹² In 1995 the Federal Telecommunications Law established a regulatory system by creating the Federal Telecommunications Commission (COFETEL) to implement the new regulations for the sector and give out licences.⁹³ Consistent with its NAFTA commitments, new regulations for long distance telephone in 1997 withdrew the monopoly enjoyed by Telmex.⁹⁴ The American firms MCI and ATT established joint ventures which rapidly gained 30 per cent of the long distance market.⁹⁵ In July 1998 local telephony was liberalized by the auction of seventy-seven licences for mobile phones. Although NAFTA's Article 1304 required the signatories' mutual recognition of their regulatory test data and technical standards for attaching equipment to public networks and although NAFTA's Telecommunications Standards Subcommittee developed such standards, Telmex has been resisting pressure to provide its competitors with services.⁹⁶ Paradoxically the privatized Telmex has enough political and economic strength as a private monopoly to frustrate the liberalization goals of the same government that created it. COFETEL has proven unequal to the task.

As a result of its NAFTA commitments and those made in the WTO's telecommunications agreement, Mexico has been under considerable pressure from the US government on behalf of its major telecomm companies, which complain of unfair competition because of Telmex's market dominance. With MCI grieving about "Telmex's escalating pattern of anti-competitive abuse" and about COFETEL's incapacity to curb non-competitive behavior,⁹⁷ the US asked Mexico for consultations at the WTO on its regulatory practice on July 27, 2000, alleging that Telmex's refusal to remove existing restrictions on international traffic between private carriers and to supply its competitors with dedicated lines for internet and business services violates the WTO Reference Paper.⁹⁸

Conflict between national, continental, and global norms was complicated when a Mexican court ruled against COFETEL and in favour of Telmex – a judgment which the US insisted did not release Mexico from its trade agreement obligations.

On a related issue, Mexico's commitment at the WTO to allow international simple

resale (which would allow firms to bypass Telmex lines with private lines) did not specify a date for introducing new regulations. This omission allowed Mexico to stall on Telmex's behalf.⁹⁹ Although NAFTA obliges Mexico to recognize US and Canadian certification bodies on the grounds of national treatment by January 1, 1998, Mexico did not in fact recognize US certification bodies.¹⁰⁰

Not being able to get the full benefit expected from its trade agreements, the US has resorted to other levers. The FCC fined the US subsidiary of Telmex \$100,000 as punishment for its parent not supplying MCI's Avantel and ATT's Alestra with private phone lines.¹⁰¹ On both sides of the border interests are conflicted. Beyond a certain point, the US is reluctant to get involved in its corporations' battles over the interpretation of the rules affecting product safety test data and attaching equipment.¹⁰² In Mexico there are also inter-agency problems with the SCT opposing SECOFI's positions.

Intellectual Property Rights

Most relentless of all has been US pressure to exploit the concessions it won in NAFTA concerning intellectual property rights. These rules and disciplines, more stringent than those contained in any previous international agreement, required Mexico to overhaul not just its law and regulations but even its judicial and enforcement institutions.

Well before NAFTA, the 1991 Law for the Promotion and Protection of Industrial Property opened most areas of science and technology for patenting with twenty year terms. The 1994 Industrial Property Law simplified the administrative measures to facilitate the granting of patents.¹⁰³ The 1997 copyright law was challenged by the US as a violation of NAFTA's Article 1714 on "expeditious remedies and procedures."¹⁰⁴ Following continuing pressure from its industry, the US prevailed on Mexico to make its copyright periods consistent with NAFTA: 20 years for patents, 15 years for industrial designs, 10 years for trade marks and trade names, 50 years for sound recordings, 50 years beyond the life of the author of computer software programs and data bases.¹⁰⁵

Altering its legal and administrative order in compliance with its international obligations does not necessarily mean that practice changes in a system. Mexico's judicial capacity to enforce the law was weak. Raids and seizures of pirated tapes, for instance, were rare, court rulings few, penalties minimal and delays in pressing criminal cases extensive.¹⁰⁶ The issue was the enforcement of NAFTA intellectual property rights to stop piracy.¹⁰⁷ NAFTA legitimized tough arm-twisting by the

US using the agreement as an instrument in its hegemonic pressure. Mexico promised to show the US its draft regulations in the light of Washington threatening to name Mexico as a priority country under Section 301 of its trade law.¹⁰⁸

The Mexican government ultimately announced a National Crusade against Crime and Delinquency in November 1998 proposing legal reforms to federal criminal procedure laws, reclassifying copyright infractions as criminal violations and piracy as serious economic crime, increasing penalties from six months to six years for copyright infractions and fines by a factor of ten. In the domain of enforcement, it provided increased funds for agencies to fight piracy and increased the 1999 budget to \$15 million, three times that of 1998 to allow 7,200 company inspections per year compared to the 1,800 carried out in 1996.¹⁰⁹ This “crusade” reflected close US oversight following congressional review of the draft regulations.¹¹⁰

IV Conclusions

The prime identifiable effects of NAFTA and the WTO on Mexico can be understood as direct, indirect, or contingent.

- The direct effects are the changes Mexico made to its political order so as to comply with its external commitments.
- The indirect effects are those resulting from subsequent demands, threats, and requests made by its NAFTA partners anxious to exploit the concessions won in their negotiations.
- Contingent effects may be triggered at any time when some national law, regulation, or procedure is decided to be in violation of a member state’s NAFTA or WTO commitments.

Two instruments that were billed as contingent levers for Canadian and American pressure on the Mexican system have proven as ineffectual as their designers actually intended. The North American Agreement on Labour Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC), did not require change in Mexico's formal political order. Rather they were to increase pressure on Mexico to enforce the existing provisions of its constitutional, legal, and administrative order so that its workers' rights would be protected in reality and its environmental norms be applied in practice. The

NAALC is a statement of intentions that sets up formalistic and bureaucratic procedures that are weak, ineffective, and in practice incapable of forcing Mexico to apply its labor laws.¹¹¹ Although observers are divided in their assessments of these two side agreements' effects, it appears reasonable to infer that “recent increases in Mexican budgets for environmental infrastructure and enforcement of laws and regulations would almost certainly not have come about if NAFTA had not provided the impetus.”¹¹²

While our focus has been almost exclusively on the Mexican political order as the object, having to change as the result of outside pressure to conform with its new continental and global trade obligations, these agreements must be seen as also extending Mexico's political order since they give that country rights in the political economies of its partner states. Canada and the United States have obligations under NAFTA to open their markets to specific Mexican products according to a clearly identified timetable. The WTO establishes further norms of behavior to which they are obligated to comply in their treatment of Mexican products and investors. If they fail to comply, then both NAFTA and the WTO, as continental and global legal orders in their own right, provide mechanisms to have misbehaving members conform.

Mexico's use of Chapter 19 panels against American antidumping actions has been active but unsuccessful. Given the United States's almost century-long experience in developing a sophisticated trade law jurisprudence it was perhaps to be expected that Mexico lost each of the cases that it initiated, whether porcelain on steel cookware,¹¹³ Portland cement,¹¹⁴ oil country tubular goods,¹¹⁵ or fresh cut flowers.¹¹⁶ The panels all deferred to the US agency, finding the original antidumping duties to have been properly determined according to American trade law.

Beyond the narrow – if deep – domain of antidumping, Mexico has shown it can use NAFTA's general dispute settlement mechanism to good effect. In two cases Chapter 20 has proven of some assistance in dealing with American violations of the basic NAFTA agreement.

In January 1998 Mexico won a Chapter 20 ruling against the United States's imposition under WTO rules of a 201 safeguard duty against Mexican broomcorn brooms. The panel argued that the US Department of Commerce had not effectively given “reasoned conclusions on all issues of law and fact”

as required under NAFTA's Article 803.3(12). What was justified under the WTO was no longer valid under NAFTA. When the US refused to withdraw its duties, Mexico retaliated by imposing duties on a range of US exports. Finally, on Nov. 11, 1998 the US withdrew its safeguard.¹¹⁷

Trucking has been a messier, because more politically charged, issue. Although rationalized in terms of protecting the American public from dangerous Mexican vehicles and drivers, the US violation of its NAFTA agreement to open its border to cross-border trucking was widely regarded as a political response to the Teamsters' fear of low-wage competition for its members. Following years of US administrative stonewalling in the face of its protests, Mexico initiated a Chapter 20 dispute process in August 1998.¹¹⁸ In a clear demonstration that NAFTA dispute settlement is not the expeditious process its defenders had anticipated, a panel was only constituted for this action in December 1999. Meanwhile the United States had been pressuring Mexico to improve the safety of its trucks by deploying more trained police for inspections, establishing automated truck safety data exchange, and ensuring government oversight of carrier compliance.¹¹⁹

At the same time the US has bolstered its tenuous position by linking the truck question to another of its transportation industry's goals of getting more expanded deregulated access to the Mexican market for US express couriers. The Chapter 20 dispute is but part of the complex overall US-Mexico transportation issue. Even though 80 per cent of US-Mexico trade is conducted by land, there is a long way to go before bilateral transit problems have been smoothed out. Mexicans have different administrative procedures and customs practices: even the forms used by trucking companies as truck bills become cause for contestation and so delay in the cross-border transporting of goods.¹²⁰

While Mexico is more a rule taker than a rule maker in the global trade system, it has nevertheless shown an interest and capacity for using the new multilateral regime at its disposal to further its interests proactively, whether in working out judicial interpretations of existing norms or in contributing legislatively to the negotiation of new trade norms. In the working out of a subsidy code during the Uruguay Round, it suggested that environmental subsidies should be green-lighted within carefully specified limits. It was a

party with the EU in the US film case against Japan, disagreeing with the American argument.¹²¹ With Ecuador, Guatemala, Honduras, and Panama, it associated itself with the United States against the EU in the bananas case.¹²²

Besides triggering a panel at the WTO to fight a Guatemalan antidumping duty against its exports, it is arguing in the current round of WTO negotiations for extending the transition period for implementing trade related investment measures for third world countries.¹²³

The obligations enshrined in the WTO are both more comprehensive than NAFTA's and more potent. The disputes handled through the WTO's dispute body are more expeditiously resolved and more authoritatively applied than under NAFTA.

For its part NAFTA is a supraconstitutional order with less heft. We have already seen that the development of a continental trade jurisprudence has been hobbled by the difficulty of finding panellists to staff a dispute, the trade panels' inability to use previous judgements as precedent, and the national-sovereignty principle entrenched in AD and CVD law. There are weak signs of a continental polity emerging. The negotiation of SPS and telecommunications standards in NAFTA working groups shows some autonomous normative capacity, and the harmonization of customs procedures to handle rules of origin and other cross-border matters suggests some minuscule supranational heartbeat.

After reviewing the various impacts that NAFTA and the WTO have had on Mexico's political order, it is difficult to conclude that they are malevolent factors whose radical reform or abolition – “Fix it or Nix It” was the most pertinent of the slogans inspiring anti-globalization demonstrators in Washington in April 2000 – offers hope for solving Mexico's problems. Indeed those pressing for corrections of the Washington consensus in the post-Seattle period of globalization may do better to work for transnational alliances that try to shift norms and rules at both the national and international levels. For if the opponents of neo-liberalism have anything to learn from its successes in such countries as Mexico, it is that reform *from within* is not feasible without being linked to reform *from without*. As Mexico's economic system continues to evolve, pressure for change will

undoubtedly continue from both sources.

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1 There are very good reasons for considering globalization not to be new at all since rates of foreign investment and trade as a proportion of GDP were as high a century ago as they are now. Nevertheless *some* features of today's globalization, such as the new world-embracing and regionally-limited trade agreements, are justifiably described as new.

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