1995

Mexico

Follow this and additional works at: https://scholar.smu.edu/lbra

Recommended Citation

https://scholar.smu.edu/lbra/vol1/iss1/9

This Update is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
IMPLEMENTATION:

Mexico

I. Introduction
Unlike the United States and Canada, Mexico had to initiate legislative reforms of tremendous proportions in order to modify its legal framework to meet its NAFTA obligations. However, Mexico enacted almost no implementing legislation to delineate its responsibilities and reforms under the NAFTA. All post-NAFTA implementing legislation initiated by Mexico has been limited to miscellaneous regulations, announced and published in its Diario Oficial de la Federación, which is the Mexican equivalent of the U.S. Federal Register. Instead, nearly all of the changes implemented into Mexican laws in accord with the NAFTA provisions were enacted in the years preceding the treaty's entry into force, namely 1992 and 1993. These reforms were broadly encompassing in scope, and generally cover far more issues and areas than those addressed in the NAFTA.

Assuming that Mexico's legislative reforms are successfully implemented and enforced, the NAFTA could potentially propel Mexico into the limelight as a world-class economy and the North American trading hub for all of Latin America. Hence, this implementation section in each issue of the journal will discuss and analyze several aspects of preparatory legislation enacted by Mexico to conform to the NAFTA chapters and their resulting effects on the NAFTA parties. This issue will address financial institutions (NAFTA Chapter 14) and government procurement (NAFTA Chapter 10), and the next issue will consider antidumping and countervailing duty legislation, and settlement procedures for trade disputes.

II. Implementation and Preparatory Legislation for Integrating the NAFTA Chapters Into the Mexican Legal Framework

A. FINANCIAL INSTITUTIONS (NAFTA CHAPTER 14)
Access to Mexico's financial services sector is deemed by many to be one of the most important aspects of the NAFTA Financial Services Chapter 14. In general, Chapter 14 broadly covers (i) regulated financial institutions from NAFTA signatory countries, (ii) investments in financial institutions from NAFTA signatory countries, and (iii) cross-border trade in financial services.¹

The key principles that underlie the NAFTA are most-favored nation (MFN) treatment and national treatment. Under the MFN provision in NAFTA Article 1406, Mexico must offer to United States and Canadian investors, financial institutions, investments and

cross-border service providers MFN treatment that it offers to any country.\textsuperscript{2} Under the national treatment provision of NAFTA Article 1405, Mexico cannot provide more favorable treatment to Mexican financial institutions than it does for U.S. or Canadian institutions.\textsuperscript{3} Furthermore, NAFTA Article 1403 provides that Mexico and the other signatory countries must permit the establishment of financial institutions in their territory on a non-discriminatory basis,\textsuperscript{4} and under Article 1404, they cannot restrict cross-border financial services currently permitted.\textsuperscript{5} Finally, “transparency” is required under NAFTA Article 1411.\textsuperscript{6} While the Mexican regulatory entities governing financial institutions have sometimes exercised broader, unbridled discretion than in the other NAFTA countries; under the NAFTA, Mexico must publish and make available its rules and regulations, and rulings on licenses for foreign financial institutions are normally to be issued within 120 days from the date of application.\textsuperscript{7}

NAFTA Article 1416 defines a financial institution as a company authorized to do business and regulated or supervised as a financial institution under the law of the NAFTA country in whose territory it is located. This definition permits the NAFTA’s coverage to expand and evolve to incorporate existing financial entities and new ones as they develop.\textsuperscript{8} Further, differences in Mexican laws from those in the U.S. and Canada create opportunities for U.S. and Canadian companies to provide services in Mexico that they cannot otherwise provide in their home markets.\textsuperscript{9} For instance, Mexico does not have laws that separate Mexican banks and insurance companies,\textsuperscript{10} and permits the establishment of foreign financial groups that can offer banking, insurance and other related activities.\textsuperscript{11} Mexico also allows its banking companies to underwrite securities and engage in other related activities such as trading in stocks and bonds.\textsuperscript{12}

Prior to the NAFTA, Citibank was the only foreign bank permitted to operate in Mexico.\textsuperscript{13} However, Mexico’s implementation of the NAFTA significantly liberalized trade and investment in financial services, and opened its financial markets to wholly-owned foreign-controlled subsidiaries for the first time in over 50 years.
1. The Regulatory Structure of Foreign Entities Operating Banks and other Financial Institutions in Mexico

a. Development of the Current System

In 1989, the administration of newly-elected Mexican President Carlos Salinas de Gortari began to implement a comprehensive plan for national economic development designed to promote sustained economic growth without generating excessive inflation.¹⁴ A key aspect of this program was the reprivatization of the Mexican banking industry and the promotion of foreign investment in this industry. In order to effectuate these plans and reprivatize the banking system, Mexico significantly modified its banking and financial service laws. In November 1989, President Salinas presented the Mexican Congress with amendments to the 1985 Banking Law¹⁵ to allow for foreign private minority participation in Mexico’s banks.¹⁶ He also submitted an amendment to the Mexican Constitution of 1917 which provided for the complete privatization of the banking system.¹⁷ Pursuant to the constitutional amendment, the Mexican Congress adopted a new Law of Credit Institutions (LIC) to replace its previous banking law.¹⁸ The LIC created three types of stock in Mexico’s banks to be exchanged for then-outstanding shares. Series A common shares, representing 51% of the government’s previous ownership position, had to amount to at least 51% of the capital stock of each bank and could only be acquired by Mexican nationals and financial holding companies.¹⁹ Series B common shares, representing the remaining previous ownership position of the government and original Series B certificates, could amount to 49% of a bank’s capital stock and could be acquired by Mexican nationals, financial holding companies, and private corporations.²⁰ Foreign investors were limited to Series C common shares, created solely to represent foreign capital participation; holdings could amount to no more than 30% of a bank’s capital stock.²¹ The LIC also allowed foreign banks to establish branch offices in Mexico,²² but approved branches were restricted to providing financial services to non-Mexican residents.²³

Subsequently, in preparing for implementation of the NAFTA, Mexico drastically modified the legal framework applicable to foreign participation in Mexican banking and other financial markets. On December 27, 1993, Mexico enacted the new Foreign Invest-

¹⁵. Ley general de Organizaciones y Actividades Auxiliares del Credito, D.O. Jan 14, 1985 (Mex.).
¹⁷. Constitucion Politica de los Estados Unidos Mexicanos of 1917, art. 28, D.O. June 10, 1990 (Mex.).
¹⁹. LIC, supra note 18, arts. 11, 13.
²⁰. Id. arts. 11, 15.
²¹. Id. arts. 11, 14.
²². Id. art. 7.
²³. Id.
ment Law (FIL), which liberalized the investment opportunities in economic activities that formerly were restricted to companies with no foreign investment and in certain sectors in which foreign investment was limited to a certain percentage of the capital stock (e.g. banking institutions), not to exceed a 49% equity participation. To facilitate the implementation of the FIL, on December 23, 1993 the Ministry of Finance and Public Credit (Ministry) published in the Diario Oficial de la Federacion a Decree entitled “Reforms, Additions, and Derogation of Various Legal Provisions of the Law to Regulate Financial Groups, Credit Institutions Law, General Law on Auxiliary Credit Institutions and Activities, Securities Market Law, Investment Funds Law, General Law on Insurance Mutual Institutions and Funds, and the General Law on Bonding Companies.” The Decree effectively standardized the capital formation requirements of and foreign equity participation in financial institutions engaged in these sectors. However, the most

24. Ley de Inversion Extranjera, D.O. Dec. 27, 1993. Article 5 of the FIL lists the activities reserved to the state. Id. art. 5. Article 6 lists the activities reserved to Mexican nationals or companies with a foreign-exclusion clause. Id. art. 6. Article 7 lists the activities in which foreign investors may participate at levels up to 10%, 25%, 30%, and 49%, depending on the economic activity. Id. art. 7. Those activities not mentioned in the FIL are open to foreign investment without limitation. Id. See Bravo, Mexican Legal Framework Applicable to Operations Involving Financial Services, 25 St. Mary's L.J. 1239, 1241 n. 5 (1994).

25. Se Reforman, Adicionan y Derogan Diversas Disposiciones de la Ley para Regular Las Agrupaciones Financieras, Ley de Instituciones de Credito, Ley General de Organizaciones y Actividades Auxiliares del Credito, Ley del Mercado de Valores, Ley de Sociedades de Inversion, Ley General de Instituciones y Sociedades Mutualistas de Seguros y Ley Federal de Instituciones de Fianzas, D.O. Dec. 23, 1993 (effective Jan. 1, 1994) (hereinafter Decree). See Bravo, supra note 24, at 1242-43 and n. 8. The Ministry and the Bank of Mexico are the primary regulators of the Mexican banking system. The Ministry coordinates the operation and administration of Mexico's banks, controls and supervises the operations of the Bank of Mexico, the National Banking Commission (CNB), and the National Commission of Values (CNV), and monitors the enforcement of federal banking regulations. See Nalda, NAFTA, Foreign Investment, and the Mexican Banking System, 26 G.W. J. Int'l L. & Econ. 379, 387-88 (1992). The Bank of Mexico sets the prime rate and regulates monetary transactions in accordance with directives imposed by the Ministry. Id. at 988. Note that the Bank of Mexico was recently reorganized by regulations effective October 1, 1994, that outline jurisdiction within the agency and powers of its various offices. See 1 Inter-Amer. Invest. Law No. 49 p. 193 (Oct. 7, 1994). The CNB supervises the provision of banking and credit services by Mexican banks, and also ensures compliance with Mexican banking regulations and sets maximum asset and minimum reserve requirements for the banks. Id. The CNV, in coordination with the CNB, regulates bank operations in stocks and other marketable securities. Id.

26. For example, “financial groups” are now defined as a holding company and two or more of the following financial institutions: general deposit warehouses, financial lessors, factoring companies, exchange houses, bonding companies, insurance companies, limited scope financial entities, brokerage firms, and multiple banking institutions, as well as companies engaged in operating investment funds. Id. art. 1. The group may be formed with at least two different types of the following financial institutions: multiple banking institutions, brokerage firms, and insurance companies; otherwise, it must be formed with at least three of the companies described above, except for companies operating investment funds. Id. A percentage limit of equity ownership of 20% is
important aspect of the Decree was the creation of a new chapter in each of the above referenced statutes entitled “Of the Affiliates of Foreign Financial Institutions.”

b. Legal Requirements Imposed On Foreign Participants by the New Chapter

The amendments of this chapter apply uniformly to all of the statutes, and allow majority participation of foreign financial institutions in the Mexican financial services industry. First, the amendments set forth definitions for the terms “affiliate,” “foreign financial institution,” and “affiliate holding company.” Second, the Decree states that affiliates and affiliate holding companies will be regulated by (i) relevant international treaties or accords; (ii) the new chapter promulgated in the Decree; (iii) legal provisions and rules for establishing affiliates published by the Ministry; and (iv) prior opinions of the national commissions on banking, securities, and insurance and bonding. To invest in the capital stock of an affiliate, a foreign financial institution must perform, in its country of

Note 26, continued

now imposed on institutional investors as well as foreign financial investors acquiring the Series “C” stock, and additional requirements include the prior permission of the Ministry and a determination by the Ministry that the capital stock of foreign financial investors is diversified. Permission from the Ministry is also required for any group of persons wishing to acquire control of a holding company. “Control” includes ownership of 30% or more of paid-in-capital, control of the general shareholders meeting, the possibility of appointing the majority of the board members, or any other means of controlling the holding company. All of the above referenced rules apply to credit institutions as well. Furthermore, the law now permits investment in exchange houses by foreign financial institutions as well as by foreign companies and individuals. Finally, the Ministry has the discretion to authorize foreign investment in the capital stock of brokerage firms, although the total foreign investment may not exceed an aggregate of 30% of total investment. Individual equity participation in brokerage firms cannot exceed 10%, except with prior permission from the Ministry, and it may never exceed 15%. The Ministry may also authorize the establishment of representative offices of foreign securities firms, but these offices may not perform any financial brokerage activity in the Mexican market that requires authorization from the federal government.

27. Id. art. 17.
28. An “affiliate” is defined as a Mexican company in which a foreign financial institution or affiliate holding company invests and which is organized and operated in accordance with relevant law. Decree, art. 1.
29. A “foreign financial institution” is defined as a financial entity incorporated in a country with which Mexico has executed an international treaty or accord that permits the establishment of affiliates in Mexico. Id.
30. An “affiliate holding company” is defined as a Mexican company in which a foreign financial group invests and which is organized and operated as a holding company of a financial group according to the terms of the Law to Regulate Financial Groups. Id.
31. Decree, art. 1. See Bravo, supra note 24, at 1245. The Ministry is authorized to interpret the provisions dealing with financial services that are included in international treaties and accords and to guarantee fulfillment of these commitments. Id. Prior authorization from the Ministry is required for incorporation as an affiliate. Id.
incorporation, the same types of operations the affiliate is it seeks to perform in Mexico.\textsuperscript{32} The capital stock of affiliates must be issued in one series of stock, and a foreign financial institution, either directly or indirectly, or an affiliate holding company must generally hold shares representing at least 99\% of the outstanding capital stock of the affiliate.\textsuperscript{33}

Furthermore, the Ministry may authorize these entities to acquire shares representing the capital stock of established financial service providers, including those of holding companies of financial groups, provided that (i) the foreign financial institution, affiliate holding company, or affiliate acquires shares representing 99\% or more of the capital stock; (ii) the bylaws of the institution must be amended to ensure compliance with the provisions of the relevant Chapter; (iii) if the acquiring party is a foreign financial institution or an affiliate holding company which already owns shares representing the capital stock of an affiliate of the same type, it must merge both so as to control only one affiliate of the same type; and (iv) if the acquiring party is an affiliate which already owns shares representing the capital stock of an affiliate of the same type, they must be merged.\textsuperscript{34} The affiliates' board of directors must be composed of at least five members, the majority of which must reside in national territory, and the surveillance body of the affiliate must include at least one auditor designated by the foreign financial institution or affiliate holding company.\textsuperscript{35}

Third, the Decree created “Transitory Articles” that generally authorize the Ministry to set individual and aggregate capital limits of affiliates or acquisitions by foreign financial institutions or affiliate holding companies in accordance with international treaties and other agreements, and allow it to suspend authorization of such entities if these limits are breached.\textsuperscript{36} Such foreign ownership restrictions are set forth in the Mexican reservations to Articles 1404 and 1407 of NAFTA Chapter 14, contained in Annex VII(B)-(C).\textsuperscript{37} These restrictions are to be gradually phased out over the duration of the transition period, from Jan. 1, 1994 to Jan. 1, 2000.\textsuperscript{38}

2. Recent Foreign Participation in the Mexican Banking and Financial Services Industries

In accordance with its regulatory reforms and pursuant obligations under the NAFTA, Mexico's financial system was officially opened to foreign competition on April 22, 1994. On April 21, the Ministry presented rules about the participation of foreign banking and financial subsidiaries in the Diario Oficial, and thus allowed foreign financial institutions to officially solicit the Ministry to operate subsidiaries in Mexico from April 22 to July 31, 1994.\textsuperscript{39} The rules dictated that foreign bank subsidiaries must have a minimum of $20

\begin{itemize}
  \item Id. See Bravo, \textit{supra} note 24, at 1246.
  \item Id. See Bravo, \textit{supra} note 24, at 1246-47. Affiliates may not issue subordinated debentures unless they are to be acquired by the foreign financial institution owning shares representing capital stock of the affiliate issuer, and are not permitted to establish branches or subsidiaries outside national territory. \textit{Id.}
  \item Id.
  \item See Bravo, \textit{supra} note 24, at 1247.
  \item Id. \textit{transitory art.} (translated from Spanish in Bravo, \textit{supra} note 24, at 1248-49).
  \item NAFTA, \textit{supra} note 1, arts. 1404, 1407 and Annex VII(B)-(C) — Mexico, 32 I.L.M. at 773-76 (\textit{hereinafter NAFTA}). \textit{See Bravo, supra} note 24, at 1249.
  \item Bravo, \textit{supra} note 24, at 1249.
  \item 11 \textit{Int’l Trade Rep. (BNA)} No. 17, p. 657 (April 27, 1994).
\end{itemize}
million and a maximum of $250 million of capital operating base and must submit business plans to the Ministry that outline in what manner their operations would benefit the Mexican economy. Further, in accordance with the Transitory Articles established in the Decree, on May 27, 1994, the Ministry published in the Diario Oficial the individual and aggregate capital limits applicable to U.S. and Canadian financial institutions through October 31, 1994. The limits imposed were based on a percentage negotiated in the NAFTA of aggregate capital of existing institutions in each financial subsector, and are designated to be revised in 1995 once the Ministry recalculates the aggregate capital of all Mexican and foreign institutions in each financial subsector.

The responding tide of applications submitted by financial institutions from both the NAFTA signatory countries, and non-NAFTA countries to the Ministry was nothing short of overwhelming. Between April 1 and July 31, 1994, 102 foreign providers of financial services filed applications with the Ministry to open subsidiaries in Mexico. The applications included petitions from 20 banks, most notably Bank of America, Chase Manhattan, Chemical Bank, Citibank, J.P. Morgan, NationsBank, and Republic National Bank of New York. On July 27, 1994, the Federal Reserve Board approved these seven banks to set up operations in Mexico. Moreover, Japanese banks such as Bank of Tokyo and Fuji Bank have filed petitions to establish operations through their U.S. subsidiaries. The Ministry stated that apart from the bank applications, it received petitions from 82 other foreign

40. 11 Int’l Trade Rep. (BNA) No. 32, p. 1239 (August 10, 1994). The regulations provide that the Directorate General of Commercial Banking analyze and make decisions on applications to organize and operate, or to acquire the majority of the capital stock of commercial banks, limited scope financial institutions, or financial groups that include a commercial bank. Applications for authorization to establish and operate an affiliate or an affiliate holding company would have to contain, in addition to other information, (i) a six-year projection of estimated capital and asset growth; (ii) the amount of requested paid-in capital, source of the funds to pay the capital, form of payment, and terms of such investment; (iii) a description of the type of operations the affiliate will perform and its geographic coverage; (iv) a description of the financial services provided directly or indirectly by the foreign financial institution in its country of origin and in other countries where it operates; (v) the capital structure of the foreign financial institution and of the related company or the affiliate of the holding company. See 11 Int’l Trade Rep. (BNA) No. 16, p. 606 (Apr. 20, 1994). Certain financial information is also required, including consolidated and audited financial statements of the foreign financial institution, the rating grade of the last issue of securities of the institution, and results of the most recent evaluation by the supervisory authority of the country of origin. Id.

41. 4 Mex. Trade & Law Rep. No. 6, Foreign Banking Regulations (June 1, 1994).

42. Id. The temporary capital limits for subsidiaries of U.S. and Canadian financial institutions are set forth in Table I. Commercial banks have an individual limit of US $228.9 million, and an aggregate limit of US $1.22 billion, and brokerage houses have an individual limit of US $76.4 million, and an aggregate limit of US $191 million, respectively. Id.

43. Int’l Trade Rep., supra note 40, at 1239.

44. Id.


institutions, including 11 holding companies, 17 brokerage houses, 13 insurance companies, 17 non-bank banks, 12 leasing companies, four factoring companies, and six mutual funds. Hence, on October 18, 1994 the Ministry announced its plans to allow 52 foreign institutions into Mexico's financial market by the first half of 1995, including 12 of the 13 insurance companies which initially submitted applications. Finance Minister Pedro Aspe also announced that licenses had been awarded to five financial groups, including Citibank, J.P. Morgan, and Chemical Bank. The “financial group licenses” granted to these firms will allow them to operate a bank, a brokerage and other financial units. In addition, ten U.S.-based banks received licenses, and brokerage licenses were awarded to nine institutions, including among them Goldman Sachs, Bankers Trust, Bear Stearns, Merrill Lynch, and Lehman Brothers. These approvals represented almost $1.2 billion in direct foreign investment.

B. GOVERNMENT PROCUREMENT (NAFTA CHAPTER 10)

The implementation of NAFTA Chapter 10 on Government Procurement represents a commitment to changes of significant proportions in Mexican law, largely because Mexico is not a signatory to the General Agreement on Tariffs and Trade (GATT) Agreement on Government Procurement, and the energy sectors in the United States and Canada are not controlled by “parastatal” enterprises such as Petroleos Mexicanos (PEMEX) and Comision Federal del Electricidad (CFE). Its purpose is to develop a balanced, nondiscriminatory, predictable and transparent government procurement process in the signatory countries. It requires many Mexican federal agencies and the two major government-controlled “parastatals,” PEMEX and CFE, to open their contracting opportunities to competition from U.S. and Canadian suppliers. NAFTA Article 1003 generally requires each NAFTA signatory country to accord goods, services, or suppliers from the other signatories NAFTA party treatment “no less favorable” than that accorded to other NAFTA parties, including those from the country itself. Hence, Article 1003 effectively combines both “most favored” and “national treatment” into a single category. Therefore, in awarding

47. Int'l Trade Rep., supra note 40, at 1239. The Ministry asserted that if all 102 applications were subsequently approved, it will represent an investment of $2.75 billion in 1994, with a potential to create 4,000 new jobs and a loan capacity of $3.25 billion. Id.
49. Id.
50. Id.
51. Id.
54. NAFTA, supra note 1, art. 1003. The ensuing discussion of Articles 1003, 1007, 1009, and 1015 is largely adopted from Arruda, Effects of the North American Free Trade Agreement on Trade Between the United States and Mexico in the Energy and Petrochemical Industries, 1 Tulsa J. Comp. & Int'l L. 191 (1994).
55. Id.
government contracts, Mexico cannot discriminate against any local entities on the basis of foreign affiliation or ownership by persons or entities located in another NAFTA party.

Further, Article 1007 prohibits each NAFTA party from developing technical specifications for the purpose of creating unnecessary obstacles to trade.56 Such obstacles could arise from specified regulations governing "quality, performance, safety and dimensions, symbols, terminology, packaging, marking or labelling."57 Thus, each party is required to ensure that the technical specifications called for by its entities in awarding contracts are stated in terms of "performance criteria" instead of "design or descriptive characteristics."58 Reference to international standards, national technical regulations, recognized standards or building codes is required, where appropriate.59 NAFTA Chapter 10 also required measurable changes in the manner in which Mexico's federal entities conduct their procurements of goods and services. NAFTA Article 1009 sets forth an extensive list of considerations to which public and quasi-public entities of each party may consider in developing their procurement procedures.60 Article 1009 generally requires that public entities adopt transparent tender processes designed to maximize competition and to eliminate discrimination and local preference. The procurement provisions required all parties to establish three types of tender processes: "open," "selective," and "limited."61 NAFTA Article 1015 additionally requires government entities to award contracts to suppliers who are determined by the procuring entity [under each procedure] to be fully capable of undertaking the contract and whose bid is either the lowest or the most advantageous based upon the tender procedure documentation.62 Notice of each award, including the major elements of the contract, must be published no later than 72 days from the award.63

1. Specific NAFTA Provisions Relevant to Mexican Procurement and the Mexican Parastatals

As the first agreement dealing with government procurement signed by Mexico, the NAFTA creates significant opportunities for selling U.S. or Canadian products to the Mexican government and government-owned enterprises. The coverage of NAFTA Chapter 10 specifically extends to Mexican procurements: (i) for goods, services, and construction services; (ii) conducted by specified federal government agencies or government-owned enterprises; and (iii) that exceed certain monetary thresholds. However, exclusions and transitional provisions reserved for Mexico limit the scope and coverage of NAFTA Chapter 10 in some areas. NAFTA Chapter 10 generally extends coverage of goods and services to all goods except those excluded by Annex 1001.1b-1, and all services except those excluded by Annex 1001.1b-2.64 The list of services excluded by Mexico will not actually be completed until July 1, 1995, and only those services listed on a temporary schedule of

56. Id. art. 1007.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id. art. 1009.
62. Id. art. 1015.
63. Id.
64. Id. annexes 1001.1b-1, 1001.1b-2.
included services contained in Appendix 1001.1b-2-A to Annex 1001.1b-2 will be covered until that time.\textsuperscript{65} The chapter covers only those construction services that are listed in a schedule of covered construction services, and are not listed in schedules specifying each country’s exclusions, all of which are contained in Annex 1001.1b-3.\textsuperscript{66} Other permanent exclusions include Mexican allowances in “set-asides” to small businesses and other groups amounting to US $1 billion per year in public procurements by non-PEMEX and non-CFE entities until 2003, as delineated in Annex 1001.2b.\textsuperscript{67}

The transitional provisions establish special rules in areas to provide Mexico more time to adjust to foreign competition in its procurement markets and to bring its government procurement practices into conformity with the NAFTA. As set out in Annex 1001.2a, these provisions allow Mexico to exempt from Chapter 10 up to 50% of (1) covered construction service procurements (not including PEMEX and CFE construction contracts) and (2) covered procurements of all types by PEMEX and CFE in 1994.\textsuperscript{68} These transitional exemptions will be phased out by 5% every year until 2003, when they will be reduced to zero.\textsuperscript{69}

The chapter’s monetary thresholds, which are expressed in U.S. dollars and are to be adjusted periodically for inflation, vary according to the type of procurement, the procuring entity, and the particular countries. For covered governmental agencies, the thresholds are: (i) $50,000 for goods and services and (ii) $6.5 million for construction services. For covered enterprises, the thresholds are: (i) $250,000 for goods and services; and (ii) $8 million for construction services.\textsuperscript{70} The agencies and enterprises covered by the procurement chapter are listed in Annexes 1001.1a-1 and 1001.1a-2. Mexican coverage extends to 22 government agencies, including all Cabinet-level agencies, and to 36 enterprises, including PEMEX and the CFE.\textsuperscript{71}

Virtually all of Mexico’s energy sectors are controlled by PEMEX and CFE, both of which generally obtain their supplies and services from Mexican companies, although U.S.

\textsuperscript{65} Id. annex 1001.1b-2, appendix 1001.1b-2-A.
\textsuperscript{66} Id. annex 1001.1b-3.
\textsuperscript{67} Id. annex 1001.2b.
\textsuperscript{68} Id. annex 1001.2a. Procurements of construction services by other covered entities will be subject to the same transition rules applicable to PEMEX and the CFE. Further, in the pharmaceutical sector, the procurement chapter will not apply to procurements by designated entities of drugs not patented in Mexico until 2002. Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id. art. 1001 and annex 1001.2c.
\textsuperscript{71} See generally NAFTA Effects, supra note 52. United States’ energy trade with Mexico and Canada is dominated by petroleum and natural gas products, with primary petrochemicals and electrical energy accounting for only a minor portion of trade. United States exports to Mexico in 1991 for the energy sectors were US $670 million, and U.S. imports from Mexico totalled US $5.3 billion. Due to the extensive reservations taken by Mexico with respect to the energy sectors and the existing obligations of the U.S. and Canada embodied in the CFTA, the economic impact of NAFTA on the energy sectors is likely to be limited to increased opportunities for U.S. investment in Mexico in nonbasic petrochemicals and electricity generation, and additional contracting opportunities for U.S. businesses in the supply of services and equipment to PEMEX and CFE. Id.
suppliers and service providers have a significant share of the market. President Carlos Salinas de Gortari and the Mexican Congress initiated a complete restructuring of the quasi-public entity effective in July 1992 dividing it into constituent parts: a central holding company and four autonomous subsidiaries. The new holding company, Petroleos Mexicanos Corporativo, remains responsible for overall strategic planning and finance, while the four subsidiaries are designated as PEMEX Exploration and Production, PEMEX Refining, PEMEX Gas and Basic Petrochemicals, and PEMEX Secondary Petrochemicals. Furthermore, PEMEX recently authorized the creation of PEMEX Marine Drilling, which will operate similar to a private enterprise with objectives to achieve standards of profitability, efficiency, quality and service comparable to international privately-held enterprises.

The CFE is the sole Mexican quasi-public entity governing the generation, distribution and pricing of electricity in Mexico. However, recent reforms to the Law on Public Electricity Service were initiated in December 1992 and released in May 1993 to substantially increase private investment in public-utilities projects and encourage more private electric generation through self-generation, co-generation and smaller independent power plants.

2. Preparatory Legislation on Government Procurement Enacted By Mexico Prior to NAFTA

Mexico's new procurement law, known as the Law on Procurement and Public Works, was published in the Diario Oficial de la Federacion on December 30, 1993. This legislation rescinded Mexico's previous procurement laws and went into effect January 1, 1994. The Law on Procurement and Public Works is not limited to matters covered by NAFTA's Chapter 10, and contains various provisions on issues such as budgeting and planning, contract administration, and penalties for violating its provisions. These provisions cover the procurement and leasing of movable property, the provision of services, and the undertaking of public works projects by government entities specified in Article 1. The Department of Finance and Public Credit and the Office of the Comptroller are the entities designated to issue administrative provisions implementing and interpreting these provisions, which will be published in the Diario Oficial de la Federacion.

72. Arruda, supra note 54.
73. Id.
74. See 1994 National Trade Data Bank, Market Reports, Mexico — Economic News No. 8 (June 20, 1994), available on LEXIS.
75. See NAFTA Effects, supra note 52.
76. See 1994 American Chamber of Commerce of Mexico, Business Mexico, AND THE WINNERS ARE...Outlook for Industrial Growth (Oct. 1994), available on LEXIS. See also Business Latin America, Mexico: Enticing Electricity (July 18, 1994), available on LEXIS (discussing the outpouring of interest in bidding for Mexico's first privately owned power producer generating electricity for the CFE grid, the Merida III thermolectric plant).
covered by the law will be conducted either by a “public call for bids” (the equivalent of open tendering, except that in some cases foreign bidders can be excluded), or a “limited invitation procedure” (similar to selective or limited tendering). Under Article 31, public calls for bids may either be “national” (in which case only Mexicans can participate, and domestic content requirements may also apply), or “international.”

Procurements conducted by “limited invitation” can involve two procedures: (1) a procedure in which three or more suppliers are invited to participate, which is the preferable procedure when limited invitation procedures are authorized or (2) “direct award” procedures that may be used when the three-supplier procedure is “not suitable.” Limited invitation procedures of either type are authorized only in 16 circumstances (eight of which apply only to procurement, leasing, and services, and three of which apply only to public works) set out in Articles 81 & 82. These provisions do not correspond precisely to the justifications for limited tendering in NAFTA's procurement chapter, and would not necessarily guarantee that the “direct award” procedure would be used only in cases where NAFTA authorizes limited tendering.

Title VI of the Law on Procurement and Public Works, entitled “Dissent and Appeal,” provides for bid protests to be heard by the Office of the Comptroller. Interested persons may file protests relating to any action that allegedly violates the law within 10 days of learning of the action. In its protest, the complaining party must: (1) provide the information in its possession relating to the contested action (which must be provided under oath, or the protest may be dismissed) and (2) enclose supporting documentation.

Title VI contains relatively little information on the procedures to be followed in bid protests, but does provide that: (i) the procurement may be suspended when there is information suggesting a violation of law, and suspension would not adversely affect the public interest or violate public order provisions or would prevent injustice to the procuring entity; (ii) the procuring entity must provide any information requested by the Comptroller within eight calendar days of the request; and (iii) the Comptroller’s investigation must be completed within 30 days of the request.

---

79. Law on Procurement and Public Works, supra note 78, art. 8. Note that under the law's transition provisions, the implementing regulations issued under Mexico's previous procurement laws will continue to apply to the extent they are not inconsistent with the Law on Procurement and Public Works until new regulations are issued. See Federal Contracts Report, supra note 77.

80. Law on Procurement and Public Works, supra note 78, arts. 28, 31, 80.

81. Provisions on public bidding are contained in Articles 31-41 of Title III, Chapter I. Certain bidding rules relating specifically to procurement, leasing and services are also included in Articles 45-55, Title III, Chapter II, and rules relating specifically to public works are included in Articles 56-79, Title III, Chapter III. See Federal Contracts Report, supra note 77.

82. The Department of Commerce and Industrial Development, after consulting with the Department of Finance and Public Credit, will decide when national public bidding will be conducted in accordance with reservations, transition measures, or other provisions of treaties. See Federal Contracts Report, supra note 77.

83. Law on Procurement and Public Works, supra note 78, arts. 28(b), 81.

84. Id. arts. 81-82. See Federal Contracts Report, supra note 77.
within 45 calendar days. If the protest is sustained, the Comptroller's decision may result in: (1) invalidation of the procurement from the time of the violation or (2) "total invalidation" of the procurement. If the protest is not sustained, the complaining party may appeal the decision to the Office of the Comptroller in accordance with the appeal procedures set forth in Article 99 of the Law of Procurement and Public Works.

Given the lack of detail in the Law on Procurement and Public Works itself and the absence of a track record for bid protests decided under the law, it could be some time before the effectiveness of Mexico's new bid protest system can be fully assessed. However, the question of whether NAFTA's promises of an open and transparent procurement system will become a reality for U.S. and Canadian bidders will depend in part upon the effectiveness of Mexico's bid protest system. Thus, conservative foreign companies presently venturing into the Mexican government market may find it advantageous to collaborate with Mexican partners under joint venture agreements and other business relationships.

III. Other Post-NAFTA Regulations and Developments

A. FOREIGN SECURITIES TRADING REGULATIONS

On June 6, 1994, the Ministry and the National Securities Commission (NSC) published Circulars 10-176 and 10-177 in the Diario Oficial de la Federación. Circular 10-176 established new rules for the recognition of foreign securities markets and foreign securities issuers for listing on the international quotations system. Circular 10-177 defined which foreign security depository institutions may receive services from Mexican depository institutions. The circulars took effect on June 7, 1994.

85. Id. art. 98. See also Federal Contracts Report, supra note 77.
86. Id. See Federal Contracts Report, supra note 77.
87. Id. art. 97.
88. Federal Contracts Report, supra note 77. For an excellent description of the various legal entities utilized in Mexico to engage in business relationships in the construction context, see Comment, Entering the Construction Services Industry in Mexico: Laws Affecting Foreign Participation, NAFTA, and Other Services, 7 Transnat'l Law. 227 (1994).
89. 4 Mex. Trade & Law Rep. No. 7, Regulation of Foreign Securities (July 1, 1994).
91. Circular 10-177, D.O. June 6, 1994. This circular first defines foreign security depository institutions that may receive services from Mexican depository institutions as being (i) persons identified in Article 57, Part 1 of the Securities Market Law; and (ii) foreign institutions which provide depository or custodial services (holding, administration, compensation, liquidation or centralized transfer of securities) which have automated systems for the management of securities domestically and overseas. Id. The circular further provides that depository institutions may contract the physical custody of securities and other services with foreign banks and foreign-owned institutions which provide depository/custodial services, but that those institutions must review the financial condition of a bank engaged as a custodian before depositing securities with it and monitor its status during the period of custody. Id. The circular also establishes a legal framework of factors to evaluate before concluding a contract with a custodian. Id.
Circular 10-176: Reforms to the Securities Market Law in 1993 authorized the trading in Mexico of securities issued in overseas markets on an automated international quotations system (IQS). Circular 10-176 defines the characteristics which foreign markets and securities issuers must have in order to qualify for listing on the IQS. \(^2\)

Mexico’s NSC will proceed in a two-phased analysis to determine whether certain foreign securities may be traded in its markets. First, the NSC will grant recognition on a case-by-case basis for each foreign securities exchange or issuer where (i) the securities may be acquired by Mexican investors; (ii) the characteristics of the security and the terms of its operation are not harmful to the market; and (iii) the policies which the issuers follow with respect to their participation in the market are congruent with the interests of the issuers. \(^3\) However, recognition will be granted only for the stock section of foreign markets if:

(i) the foreign market is subject to the supervision and vigilance of a regulator or self-regulating body and has a legal scheme which (a) protects investors' interests; (b) ensures order and transparency in operations; (c) prevents and sanctions the use of inside information; and (d) avoids conflicts of interest; (ii) the market has mechanisms that permit the accurate, timely and adequate dissemination of key information, locally and internationally; (iii) the market requires issuers to report periodically on their financial, legal and administrative situation as well as other information important to investors; (iv) internationally accepted norms for the preparation of financial reports apply and externally audited, consolidated, annual financial statements are required; and (v) mechanisms for collecting and recording information necessary for supervision of the market exist. \(^4\)

Further, recognition of issuers of foreign stock and debenture securities requires that:

(i) the issuers or their securities must be listed or registered in securities markets which meet the requirements in the circular; (ii) the securities market of the country of origin or of principal listing must establish norms for listing and trading the securities in that market as well as for the protection of investors and the market in the event of de-listing; (iii) the issuer must be obligated to provide to the market of its country of origin or principal listing as well as to the investing public, financial information approved by an inde-

---

92. New equity issues on the Mexican Exchange are subject to the approval of the Comisión Nacional de Valores (CNV) which was established as the market regulator in 1946 and is modelled on the U.S. Securities and Exchange Commission (SEC). See Reuters Textline, Mexico: World Equity Markets — Mexico, Euromoney Supplement (June 29, 1994), available on LEXIS.
93. Circular 10-176, supra note 90.
94. Id.
95. Debt instruments issued by sovereign governments of countries represented in the technical committee of the International Organization of Securities Commissions (IOSCO) and stock sections of the principal securities markets of these same countries will be automatically recognized for listing and trading on the IQS. Id.
pendent external auditor at the time of listing and at least annually; (iv) with
respect to debenture issues, the issue must be qualified by an authorized rating
firm except where the NSC waives this requirement; and (v) the brokerage
firm which solicits the recognition commits to provide key financial informa-
tion to the Mexican Stock Exchange on as timely a basis as it is available in its
country of origin or principal listing.96 Recognition may be revoked by the
NSC for failure to comply with the requirements of Circular 10-176.97

B. ANTIDUMPING REGULATIONS

Mexico's Ministry of Trade and Industrial Development (SECOFI) issued guidelines
in the Diario Oficial on August 26, 1994 for the creation of an advisory committee that will
aid the agency's Unit of International Commercial Practices in the investigation of dumping
charges.98 SECOFI asserted that the new group, to be known as the Advisory
Committee on International Commercial Practices, will identify and attempt to solve
problems relating to the application and collection of dumping duties.99 In 1993, Mexico
revised its laws against unfair trade practices and abrogated the legal framework on unfair
trade that had been in effect since 1987. The revision was driven in part to implement the
NAFTA and commitments made under the GATT. In comparison with the previous law,
the new legal framework has more comprehensive and transparent investigation proce-
dures, and gives "interested parties" greater protection.100 The legal framework for
Mexico's new antidumping and countervailing duty laws will be addressed in the next issue
of this journal.

There is no doubt that Mexico has been increasingly relying on its antidumping laws,
which have become "the most important instrument of import regulation and of industri-
al and trade policy in Mexico."101 For example, in 1994, Mexico initiated dumping investiga-
tions on U.S. meat imports and imposed massive antidumping duties on U.S. galvanized

96. Id. The Mexican Stock Exchange is the entity in charge of requesting information. The Exchange
may promote the recognition of a foreign market itself or on the petition of a brokerage house.
With respect to foreign issuers, the interested brokerage house must request that the Exchange
solicit recognition. Applications for the recognition of foreign issuers must provide a copy of the
prospectus for its various issues; current legal and administrative information if the prospectus is
older than one year; the two most recent financial statements; and for issuers of stock, monthly
data for the last two years on the market for its securities (price, volume traded, value of capital-
ization, number of trades, level of turnover and number of securities in circulation) for each
securities market in which the issuer or its securities are listed or registered. Id.

97. Id.
98. 11 Int'l Trade Rep. (BNA) No. 36 p. 1393 (Sept. 14, 1994).
99. Id.
100. 11 Int'l Trade Rep. (BNA) No.33 p. 1267 (Aug. 17, 1994).
101. Id. Furthermore, effective September 15, 1994, SECOFI has apparently shifted more of its opera-
tions to its 10 regional offices, which will be administered by the General Coordinator of Federal
Delegations, a new office that will concentrate on the border-area development. See 1 Inter-Am.
Invest. Law No. 47 p. 185 (Sept. 23, 1994).
and plate steel shipments. The U.S. Commerce Department reported in June 1994 that Mexico has been filing antidumping suits against the U.S. and other major importers, such as China, in an attempt to protect its industries from increased import competition. The report noted that nearly half of the 170 investigations launched by the Mexican government in 1993 involve unfair pricing allegations on goods from the U.S. and China, and that Mexico is the world’s fifth most frequent user of antidumping laws.

C. CERTIFICATION OF ORIGIN REGULATIONS

New certificate of origin requirements adopted by Mexico for non-NAFTA origin goods are being hailed by U.S. retailers as an import ban for the textile and footwear industry. The requirements apply to goods imported into Mexico that are subject to antidumping or countervailing duty orders. They are part of an effort by Mexico to crack down on circumvention of duties by transhipment through third countries that are not subject to antidumping and countervailing duty orders. Originally announced July 12, 1994, Mexico delayed implementation of the new requirements until September 1 for GATT signatories. The new certificate of origin requirements do not apply to goods that qualify for NAFTA tariff preferences and that are accompanied by a NAFTA certificate of origin. Goods that are considered of U.S. origin under Mexico’s NAFTA marking rules are also exempt from the requirements.

The U.S. Commerce Department stated that most goods shipped to Mexico will be affected either directly or indirectly by the new rules: “Introduction of the new certificate will likely increase confusion along the border, and enforcement may vary depending upon the port of entry. The [Department of Commerce] has already received numerous reports of goods which were denied entry at the border for lack of a proper certificate. Of special concern are reports that Mexican customs has refused to accept legitimate certificates for NAFTA qualifying goods.” U.S. retailers sending goods to their Mexican stores are especially vulnerable, since they may have bought imported goods from U.S. companies and


103. 1 Inside NAFTA No. 13 p. 2 (June 29, 1994).

104. Int’l Trade Rep., supra note 98, at 1389-90. See also Inside NAFTA, supra note 102, at 3; Inside NAFTA, supra note 103, at 4.


106. Id.

107. Id.

108. Id.
are not in a position to get the necessary documents.\textsuperscript{109} For many products, the Mexican government has insisted that exporters obtain certifications from government offices of the original exporting nation — a requirement which many foreign governments may not comply with.\textsuperscript{110}

The origin of the merchandise will be determined according to the rules of origin published in the new Mexican directive. The directive establishes two different types of certification procedures. One procedure requires “soft” country of origin certification and applies to products other than apparel, textiles and footwear.\textsuperscript{111} The other procedure — applicable to apparel, textiles and footwear — establishes more rigorous requirements, or “hard” certification. For these goods, Mexican customs will only accept original certificates, which must be “formalized” or authenticated by a designated official in the country of origin.\textsuperscript{112} Additional requirements apply to textile, apparel and footwear products originating in non-GATT countries, including China, Taiwan, Vietnam, Cambodia, Laos and North Korea.\textsuperscript{113} Specifically, certificates for goods from non-GATT countries must be verified by an independent, private inspection company accredited by SECOFI, and must be authenticated by a Mexican diplomatic representative in that country.\textsuperscript{114} These rules and their effects will be explored further in the next issue.

D. Other Developments

1. Mexican Telecommunications Market

Mexico’s private monopoly Telefonos de Mexico (TELMEX) and its subsidiary Telefonos del Noreste (TELNOR) will permit interconnections with an unlimited number of new domestic and international long distance carriers beginning on January 1, 1995.\textsuperscript{115} The new policy will open an annual US$ 7.2 billion market, by up to 49% foreign participation. U.S. companies known to be vying for concessions are AT&T, MCI, Sprint, Bell Atlantic, Motorola, IXC Communications, and Westel.\textsuperscript{116} The first ground rules for entry of foreign and domestic competitors were published on June 30, 1994 in the Diario Oficial, and initially require: (i) a total of 200 interconnection points, with 60 beginning in January 1997, 50 in 1999, 60 in 2000, and unlimited interconnections beginning in the year 2001; (ii) interconnection fees based on “actual costs” that TELMEX must make public in accord with international pricing guidelines; and (iii) user choice among various carriers available through access codes that contain the same number of digits for each carrier.\textsuperscript{117} The new rules leave open the possibility for foreign carriers to build private lines to service large corporate clients with high long distance volumes, among them many U.S.

\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id. at 1390.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} 11 Int'l Trade Rep.(BNA) No. 28 p. 1101 (July 13, 1994).
\textsuperscript{116} Int'l Trade Rep., supra note 119, at 1101.
\textsuperscript{117} Id.
subsidiaries in Mexico. Still to be released are rules covering such issues as cross-border long distance interconnections, application of licensing fees, award dates, and operators' technical, investment and infrastructure requirements. Of main concern to foreign competitors are the yet-to-be-disclosed licensing fees to be imposed by the Mexican government, which may be US $300 million or more.118

2. World Bank Loans to Mexico

On June 9, 1994 the World Bank approved three loans worth US $918 million to help Mexico improve environmental conditions in several of its cities, including six on the U.S. border.119 The loans are specifically designed for improving Mexico's water and sewage systems, solid waste pick-up and disposal, and for a pilot program for specially equipped trucks to treat some hazardous waste on site. Environmental improvements funded through the North America Development Bank, formed by Mexico and the U.S. in conjunction with the NAFTA, are separate from the World Bank loans.120 According to a statement from the World Bank, the border municipalities may apply for financial assistance through investment proposals. The proposals must be based on a master plan analyzing the city's environmental needs and priorities.121 The private sector is expected to increase its role in developing water and sewer infrastructure via financing, construction, operation of waste-water treatment plans, and the provision of drinking water.122

118. Id.
120. Int'l Trade Rep., supra note 115, at 947.
121. Id.
122. Id.