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CHAPTER 19 OF THE NAFTA AND THE MEXICAN JUICIO DE AMPARO
When International Law Collides with the Mexican Legal Order

Isabelle Marie-Lise Girard

**Thesis submitted to the Faculty of Law of the University of Ottawa
in partial fulfilment of the requirements
for the Master of Laws (LL.M.)**

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Isabelle Marie-Lise Girard

Décembre 2002

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ABSTRACT

This thesis analyzes the impact and consequences of Chapter 19 of the NAFTA on the Mexican legal order and more particularly on the constitutional remedy of the *juicio de amparo*. The thesis deals with four main issues: (1) a study of the specific elements of the domestic judicial review process in antidumping and countervailing duty cases in Mexico with an emphasis on the functions and applications of the *juicio de amparo*, seeking to demonstrate the importance of the *juicio de amparo* to the Mexican legal order and its application in the context of the Mexican foreign trade law regime; (2) a study of the specific elements of the review procedure of Chapter 19 of the NAFTA to show that the Parties¹ intended to prohibit the application of domestic judicial review; (3) an analysis of the constitutional issues surrounding the establishment of a panel, to demonstrate that the doctrine of the exhaustion of local remedies does not apply to Chapter 19 of the NAFTA; and lastly (4) an analysis of the application of the *juicio de amparo* to the decisions of the binational panels and to the determinations on remand of the Mexican investigative authority. This thesis will show that binational panels are not authorities for the purposes of the *juicio de amparo* but that the *juicio de amparo* can apply to determinations, made pursuant to a remand for action of the panel, in certain circumstances.

¹ Parties pursuant to the *North American Free Trade Agreement* ("NAFTA") include Canada, Mexico and the United States.

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1. INTRODUCTION

The procedure of review of final determinations in antidumping and countervailing duty law by binational panels established pursuant to Chapter 19 of the *North American Free Trade Agreement* (“NAFTA”) has been the subject of frequent attacks in Mexico. This unique dispute settlement mechanism first saw light in 1988 in the context of the *Free Trade Agreement between Canada and the United States* (“FTA”) and Mexico adopted it, with minor modifications, when it joined the NAFTA. Although Mexico’s experience under NAFTA is relatively short compared to that of its counterparts, 11 proceedings have been commenced to date to review Mexican final determinations.² As a result of the increasing number of proceedings, Mexican judicial entities are now faced with the task of having to interpret the application of Chapter 19 of the NAFTA. This undertaking has not been without difficulties and various points of views have emerged in that respect. The purpose of this thesis is to examine whether binational panels established pursuant to Chapter 19 of the NAFTA are authorities for the purposes of the *juicio de amparo* and if not, whether such a conclusion contravenes specific provisions of the Mexican Constitution.

Chapter 2 of this thesis provides an overview of Chapter 19 of the NAFTA, the negotiations that culminated to an agreement and the specific functions of the arbitration panels. Given that the pivotal function of the panel created under Chapter 19 of the NAFTA is the domestic review of antidumping and countervailing duty law, an outline of the Mexican foreign trade law regime and its accompanying judicial review processes, including the *juicio de amparo*, will also be provided. The analysis will first explain the dispute

² To this date, 75 proceedings have been commenced with 19 initiated in Canada, 53 in the United States and 12 in Mexico, online: NAFTA Secretariat Homepage: <http://nafta-sec-alena.org> (date accessed: 4 November 2002).

settlement mechanism contained in Chapter 19 of the NAFTA emphasizing the relationship between the functions of the panels and the procedure of review of antidumping and countervailing duty law in Mexico. The analysis will stand by the following chronology: first Chapter 19's general functions and characteristics will be detailed. Given that binational panels are adjudicatory bodies responsible for the review of domestic law, it is only logical that an overview of the domestic law be provided. Furthermore, it is necessary to put into context the application of the *juicio de amparo* as a domestic remedy to review final determinations in antidumping and countervailing duty law.

Chapter 3 of the thesis will attempt to demystify the procedure of the *juicio de amparo* and highlight certain concepts that will assist us in appreciating the reasons why academics and judges in Mexico have advanced the theory that the *juicio de amparo* applies to the binational panels. Chapter 3 will provide an overview of history, functions and procedure of the *juicio de amparo*. The history and the functions of the *juicio de amparo* in the modern Mexican legal system will be described in sufficient detail to provide an understanding of an institution that is often cited by Mexican jurists in the context of international arbitration and more particularly in the context of Chapter 19 of the NAFTA, but of which very few non-Mexicans truly comprehend its true significance.

2. CHAPTER 19 OF THE NAFTA AND ANTIDUMPING AND COUNTERVAILING DUTY LAW IN MEXICO

2.1 The Dispute Settlement Mechanism of Chapter 19 of the NAFTA

Chapter 19 of the NAFTA provides for the establishment of panels relating to the review of the final determinations of each country's competent investigating authorities in matters relating to antidumping and countervailing duty law. The most important feature of the panel is that it effectively replaces domestic judicial review processes using the same standard of review as would a domestic court. The application of domestic law is therefore an essential characteristic of the NAFTA's Chapter 19. Chapter 19 of the NAFTA essentially establishes a hybrid system in which panels have an international quality but the applicable legislation and standard of review are characterized as national or domestic.³ Understanding the dispute settlement mechanism of Chapter 19 of the NAFTA will be useful in determining the nature of binational panels and whether or not such panels are authorities for the purposes of the *juicio de amparo*.

2.1.1 Origins

Binational panels were first introduced in the FTA on January 1, 1988 as a means for the review of antidumping and countervailing duty determinations of Canada and the United States' corresponding investigative authorities. The binational panels were formed in

³ G. Aguilar Álvarez, J. T. Fried, C.E. Roh, *et al.*, "El capítulo 19 del TLCAN: revisión de resoluciones en materia de cuotas *antidumping* y compensatorias por panels binacionales" in B. Leycegui, W.B.P. Robson and S.D. Stein, eds., *Comercio a golpes. Las prácticas desleales de comercio internacional bajo el TLCAN* (Mexico: ITAM-M. Á. Porrúa, 1997) at 41-63.

response to Canada and the United States' unwillingness to agree on the creation of a unified antidumping and countervailing duty code. Chapter 19 of the FTA was thus seen as a transitory arrangement until such a code could be agreed upon. Given each party's position on the issue, the arrangement was viewed by many as an ideal compromise.

During the FTA negotiations, Canada voiced its unwillingness to abide by what it perceived to be a biased and arbitrary administration of United States unfair trade laws.⁴ In fact, Canada considered that the antidumping and countervailing duty system in the United States was protectionist in nature and failed to safeguard against price discrimination and subsidies. Canada suggested the elimination of each country's respective antidumping and countervailing duty law for all duty-free goods and the settlement of price discrimination issues via a harmonized competition law regime, similar to an internal market. To achieve such objective, Canada offered to harmonize its competition law system and replace its antidumping and countervailing duty law systems with the antidumping and subsidies code of the World Trade Organization ("WTO").

The United States turned down such ideas preferring to retain *status quo* and refusing to exempt Canada from the administration of United States domestic antidumping and countervailing duty laws. For the United States, the idea of permitting an adjudicatory body, external to United States courts, to review United States domestic antidumping and countervailing duty law, was not easy to accept since it meant that persons were being excluded from the application of United States domestic unfair trade law through the normal domestic channels.⁵ The United States Congress perceived the United States antidumping

⁴ G. Cavazos Villanueva, *Binational Panels of Arbitration: Impartial Adjudicators or Spawning Ground of New Ideas? The Mexican Experience under the Mechanism for Dispute Resolution of Chapter 19 of the NAFTA* (LL.M. Thesis, University of Toronto Faculty of Law 1997) [unpublished] at 61.

⁵ *Ibid.* at 62.

and countervailing duty legislation as a fundamental right of the American industry to protect itself from imports made under unfair trade conditions.⁶ By incorporating the Chapter 19 mechanism to the FTA and subsequently to the NAFTA, the United States expressed its willingness to relax its traditional protective posture. The Chapter 19 mechanism was the only alternative available and acceptable to both parties at the end of the FTA negotiations;⁷ a position that remained during the negotiations surrounding Mexico's entry to the NAFTA. By the end of the negotiations of the FTA, a binational panel forum, empowered to review the domestic laws of each country, was put in place. The compromise was the replacement of domestic judicial review with a mechanism that would allow an impartial panel, composed of experts from both countries, to review the final determinations of each country's competent authorities and decide if such determinations were made in compliance with domestic legislation. Supporters of Chapter 19 considered that the new dispute settlement system was not a radical departure from existing legal regimes in the United States and Canada because the domestic standard of review would bind the panel and because both countries shared a common legal tradition.⁸ However, the results of the negotiations revealed that the principal objective of Chapter 19 of the FTA was not the replacement of judicial review but rather the establishment of a more efficient and fair system, free from domestic political influences. This objective, shared by both countries, eventually led to the culmination of the negotiations and the creation of Chapter 19 of the FTA.

It is timely to comment at this juncture that the dispute settlement system of the FTA

⁶ Victor Carlos Garcia Moreno, "El Capítulo 19 del Tratado de Libre Comercio de América del Norte" (1996) 32 *Alegatos* at 36.

⁷ *Ibid.*

⁸ B. Bucholtz, "Sawing off the Third Branch: Precluding Judicial Review of Anti-Dumping and Countervailing Duty Assessments under Free Trade Agreements" (1995) 19 *MD. J. INT'L. & TRADE* 175 at 179.

yielded satisfactory results. By 1998, 49 cases had been before the panels, 30 reviewing United States authorities and 19 reviewing Canadian authorities and the majority were resolved swiftly without much controversy.⁹ The General Accounting Office of the United States determined that a review before a panel could be concluded in less than 17 months compared with a time frame of two years for judicial reviews before the United States Court of International Trade.¹⁰ The study indicated that the panel reviews were conducted in an adequate manner and that the panelists effectively demonstrated their ability to consider the facts and engage in an in-depth analysis of the cases before them.¹¹

Negotiations for NAFTA did not initiate until the summer of 1992. Canada once again pushed for the inclusion of Chapter 19 because it held the position that the administration of antidumping and countervailing duty law by domestic authorities was a barrier to the growth of free trade in the region. Mexico, on the other hand, was reluctant at first to accept an international jurisdiction as a formula to resolve controversies with private citizens, largely owing to the fact that Mexico's overall experience in arbitration courts had so far, not been very positive.¹² Despite reservations, Mexico ultimately agreed to the inclusion of Chapter 19 to NAFTA. The decision was motivated by several reasons. Mexico considered the Chapter 19 of the NAFTA first and foremost from an exporting nation's point of view. Little thought had been given to the consequences that a review mechanism,

⁹ Hugo Perezcano Diaz, "¿Son los paneles binacionales establecidos conforme al Tratado de Libre Comercio de América del Norte autoridades para los efectos del juicio de amparo?" (1998) 27 *Revista de Derecho Privado* 211 at 218.

¹⁰ *Ibid.*

¹¹ United States General Accounting Office U.S.-Canada Free Trade Agreement, Factors Contributing to Controversy in Appeals of Trade Remedy Cases to Binational Panels, Briefing Report to Congressional Requesters GAO/CG 95-175BR (Canada 1995) at 54-55.

¹² See *The Chamizal Case*, 11 REP. INT'L ARB. AWARDS 309 (1911), *The Pious Fund Case*, 9 REP. INT'L ARB. AWARDS 1 (1902) and *Isla de la Pasión*, 2 REP. INT'L ARB. AWARDS 1105 (1931) as examples of Mexico's negative experience with arbitration.

administered by binational panels, would have on the Mexican legal order.¹³ Mexico also knew that even if it was impossible to eliminate the United States domestic protectionist rules, it could at least ensure that United States domestic rules were applied in a fair way.¹⁴ Scholars and the Mexican private sector industry were aware of the increasing trend of unfounded non-tariff barriers throughout the world and valued the importance of a dispute settlement system that would act as a check on administered protection.¹⁵ During Mexico's negotiations of Chapter 19 of the NAFTA, it was very important to learn from Canada's experience during the FTA years. Although the system had been successful to date, Mexico believed that improvements could still be made.

Furthermore, Mexico suggested changes that included, among others, the establishment of trinational rather than binational panels, the creation of a permanent and specialized jurisdiction or in the alternative, the establishment of a permanent arbitration panel system that would effectively replace the ad hoc panel mechanism. The recommendations were rejected for fear that any one of these structures would be considered a move toward a supranational body and the creation of a distinctive jurisprudence on antidumping and countervailing matters. All along, the United States insisted on safekeeping its own domestic laws on antidumping and countervailing matters and the current system under the FTA was as far as it was willing to go in the context of the NAFTA.

The extension of Chapter 19 to Mexico was not without reservations from the United States and Canada. The argument of the common legal tradition between the United States

¹³ S. López Ayllón, "Los paneles binacionales del capítulo XIX del Tratado de Libre Comercio no son autoridad para efectos del amparo (amparo en revisión número 280/98)" (2000) 2 Cuestiones Constitucionales 193 at 195.

¹⁴ García Moreno, *supra* note 6 at 37.

¹⁵ *Ibid.*

and Canada in support of Chapter 19 of the FTA did not hold grounds within the NAFTA given Mexico's civil law tradition. Canada and the United States were also concerned that the Mexican legal order could adversely affect the operation of the binational panel system, a concern that was well founded as will be demonstrated throughout this thesis.¹⁶ Furthermore, Mexico almost had no experience in unfair trade cases and could not provide sufficient judicial precedent to assist the panels in their review.¹⁷

Despite these various concerns, the three countries ultimately agreed to the incorporation of Chapter 19 to the NAFTA, subject to a few modifications. The most important modification was a safeguarding mechanism, provided in Article 1905 of NAFTA, to ensure the finality and the binding force and effect of the decisions of a panel. Article 1905 of NAFTA provides rules for safeguarding the panel review and as a last resort, for suspending the panel review system if another party's domestic law: (1) has prevented the establishment of a panel; (2) has prevented a panel from rendering a final decision; (c) has prevented the implementation of a decision or denied it binding force and effect; or (d) the party has not provided for an independent review, by a panel or a court of competent jurisdiction, of the final determination of the competent investigating authority.¹⁸

By agreeing to the dispute resolution of Chapter 19 of the NAFTA, Mexico stepped onto unknown territory.¹⁹ After several disappointing losses in international arbitration cases,²⁰ Mexicans had reasons to be sceptical about such a mechanism. Nevertheless, there was a general feeling that Chapter 19 panels would succeed in controlling abusive or

¹⁶ López Ayllón, *supra* note 13.

¹⁷ Cavazos Villanueva, *supra* note 4 at 62.

¹⁸ Art. 1905 of the NAFTA.

¹⁹ Cavazos Villanueva, *supra* note 4 at 65.

²⁰ See B. Sepúlveda Amor, "International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction" (1997) 19 *Houston Journal of Int'l Law* 565 at 580.

arbitrary application of domestic trade remedy laws without constraining Mexico's sovereignty.²¹ However, little attention was given to the impact and consequences that a review mechanism administered by binational panels would have on the Mexican legal order.

In addition, most of the justifications behind the creation of Chapter 19 of the FTA disappeared because of Mexico's membership to the NAFTA. Firstly, the system was originally intended to be a stepping-stone to the implementation of a common foreign trade law regime. The negotiators of the FTA intended for Chapter 19 to last only a few years, enough time for the Parties to negotiate a substantive regime to replace their corresponding domestic antidumping and countervailing duty laws.²² However, negotiations toward a common foreign trade law regime withered away and the binational dispute settlement mechanism acquired permanent characteristics under the NAFTA. Secondly, it was assumed that a system of domestic law review with countries of common law traditions would function more efficiently. This assumption, although never accurate in light of Canada's hybrid legal system, would have no application at all to Mexico's civil law tradition. Thirdly, the system was justified because there was no other alternative at the time. This argument no longer applies since the Dispute Settlement Understanding of the GATT/WTO came into force in January of 1995. The GATT/WTO provides substantive obligations with regard to dumping and countervailing duties without consideration for domestic law since the panels are only empowered to determine whether an action taken by the administrative agency of a country violates an international obligation assumed by one of the Parties.²³

²¹ M. Trebilcock and R. Howse, *The Regulation of International Trade* (London: Routledge 1996) at 407.

²² See Art. 1906 of the Free Trade Agreement, January 2, 1988, United States-Canada, 27 I.L.M. 293.

²³ M. Wiley, "When Chapter 19 Goes, What Will Replace It?" Lecture presented at the Inaugural Symposium of Centro JURICI and SALED, ITESM (Monterrey Institute of Technology and Higher Studies) Monterrey, N.L., Mexico [1995] at 4.

Fourthly, it was assumed that Chapter 19 of the FTA would never be the subject of constitutional challenges. However, many have expressed their doubts as to the constitutionality of Chapter 19 of the NAFTA in connection with the constitutions of Mexico and the United States. Consequently, the future of Chapter 19 of the NAFTA depends on its ability to effectively surmount these challenges.

2.1.2 Characteristics

The most important characteristic of Chapter 19 is contained in Article 1904, which provides that “...each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.”²⁴ Binational panels created pursuant to Chapter 19 will effectively replace domestic judicial review of final decisions rendered by investigative authorities in antidumping and countervailing duty law. In order to conduct an adequate judicial review, the NAFTA incorporates by reference the domestic legislation of each country in the area of antidumping and countervailing duties. In Mexico, the pivotal law is the Foreign Trade Act (*Ley de Comercio Exterior*). A panel’s review also extends to legislative history, regulations, administrative practice and judicial precedent but only to the degree that a domestic court would rely on such information to make its final decision.²⁵

A Party of NAFTA includes Mexico, Canada or the United States. Pursuant Chapter 19 of the NAFTA, the importing Party is the Party that issued the final determination and an involved Party is a term used to describe either the importing Party or a Party whose goods

²⁴ Art. 1904(1) of the NAFTA.

²⁵ Art. 1904(2) of the NAFTA.

are subject to the final determination.²⁶ Interested parties are the exporters or producers of the Party whose goods are subject to the proceeding.²⁷

NAFTA's Article 1904 replaces domestic judicial review and enables the binational panel to decide whether an antidumping or countervailing duty determination was made in accordance with the antidumping and countervailing duty law of the importing Party. As a result, the panels are international adjudicatory bodies of domestic law since they apply the importing Party's antidumping or countervailing duty law to the facts of the specific case.²⁸ The Chapter 19 panels have a limited jurisdiction over certain final administrative decisions. If for example, an injury determination made by the United States International Trade Commission covers imports from several countries, including Mexico or Canada, a binational panel would only have jurisdiction over the imports of a Party of NAFTA.²⁹

The procedural mechanics of Chapter 19 establish that a request for a panel shall be made in writing to the other involved Party within 30 days following the date of publication of the final determination in the official journal of the importing Party.³⁰ This effectively means that an involved Party has 30 days to request the establishment of a panel and that during such time other interested parties are unable to resort to the domestic means of judicial review. It is important to note at this point in time that the Chapter 19 procedure is only triggered at the request of an involved Party. However, although an involved Party may on its own initiative request a panel review, it shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures

²⁶ Art. 1911 of the NAFTA.

²⁷ Art. 1911 of the NAFTA.

²⁸ Art. 1901(1) of the NAFTA.

²⁹ James R. Cannon Jr., *Resolving Disputes under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill, 1994) at 28.

³⁰ Art. 1904(4) of the NAFTA.

for judicial review of a final determination, request such review.³¹ This effectively means that interested parties as well as domestic producers of goods similar to the goods of a Party subject to the proceedings have the right to request the establishment of a panel through the involved Party. The involved Party is either the importing Party or the Party whose goods are subject to the final determination. Unlike the majority of dispute settlement mechanisms, Chapter 19 is not restricted to complaints by states.³² The participation of private parties in dispute resolution mechanisms, signed between sovereign states, is part of a trend to include private parties “as subjects who come to speak for themselves before adjudicatory bodies”.³³

If no requests for a panel are made, domestic judicial review is always available. However, in order to avoid potential conflicts amid the decisions, once a request for a panel is made, the domestic forum will no longer be accessible. Before opting for a particular channel of review, interested parties and domestic producers must realize that the panels are not subrogated in the functions of the domestic courts and that the NAFTA does not confer upon such panels the same inherent powers. The powers of Chapter 19 panels are clearly defined in the NAFTA.

Panels can either uphold a final determination of the importing Party’s competent investigative authority or remand it for action not inconsistent with the panel’s decision.³⁴ A remand means a referral back to the investigative authority for a determination not inconsistent with the panel decision.³⁵ A panel’s decision is of binding force and effect on

³¹ Art. 1904(5) of the NAFTA.

³² Chapter 11 of the NAFTA provides for the settlement of disputes between a Party and an investor of another Party.

³³ A. F. Pérez, “Who Killed Sovereignty? Or Changing Norms Concerning Sovereignty in International Law” (1996) 14 WIS.INT’L L.J. 463 at 490.

³⁴ Cavazos Villanueva, *supra* note 4 at 76.

³⁵ Art. 1911 of the NAFTA.

the parties with respect to the particular issue. However, a decision does not create any sort of precedent and the effects are not *erga omnes* but rather *inter partes*. That is the decisions of binational panels are not binding amongst themselves or with the domestic courts of the parties (*erga omnes*).³⁶ A panel's inquiry is but one instance and only applies as between the parties (*inter partes*). A panel review is limited to whether the competent investigative authority, based on the evidence contained in the administrative record, applied its national antidumping and countervailing duty law correctly when issuing the contested final determination.³⁷

Another important aspect of the decisions of panels is that they are not appealable to domestic courts, a situation that has lead to several constitutional concerns especially in Mexico and the United States. Paragraph 11 of Article 1904 provides that a "final determination shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination within the time limits set out in the Article. No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts."³⁸

Although the decisions of panels are final, a form of "appeal" exists through the establishment of Extraordinary Challenge Committees ("ECC").³⁹ A Party may avail itself of this procedure, when, *inter alia*, a member of the panel has been guilty of gross misconduct, when the panel has seriously departed from a fundamental procedure, or when the panel has exceeded its powers or failed to apply the appropriate standard of review.⁴⁰

³⁶ See Art. 1904(9) of the NAFTA.

³⁷ Art. 1904(2) of the NAFTA.

³⁸ Art. 1904(11) of the NAFTA.

³⁹ Art. 1904(13) of the NAFTA.

⁴⁰ Art. 1904(13) of the NAFTA.

The Party alleging that one of those factors has materially affected the panel's decision can request the establishment of an ECC from a 15-person roster comprised of federal judges or former federal judges from the three countries.⁴¹ An ECC decision is binding on the parties and unappealable. In cases of panelist misconduct or bias, the ECC can take the following steps: (1) vacate the panel and establish a new panel; (2) remand the decision to the original panel for further considerations; or (3) deny the challenge and affirm the original panel decision.⁴²

As stated above, the binational panel is not a permanent supranational court, but an ad hoc adjudicatory body made up of panelists originating from the involved Parties. In that sense, binational panels are not like the traditional model of third-party arbitration. Each ad hoc panel, established pursuant to Article 1904 of the NAFTA, is composed of five panelists, a majority of whom are "lawyers in good standing".⁴³ According to Annex 1901.2 of the NAFTA, the "Parties shall establish and thereafter maintain a roster of individuals to serve as panelists [...]". This roster of at least 75 candidates shall include "judges or former judges to the fullest extent practicable." The members of the roster should have extensive knowledge of international trade law and be citizens of Canada, the United States or Mexico. From the roster, each involved Party shall appoint two panelists in consultation with the other involved Party. The Parties shall agree in the selection of the fifth panelist and the chair of the panel shall be appointed from amongst the lawyers on the panel by majority vote or, if necessary by lot.⁴⁴

⁴¹ Art. 1904(13) and Annex 1904.13 of the NAFTA.

⁴² Annex 1904.13(3) of the NAFTA.

⁴³ Annex 1901.2 of the NAFTA.

⁴⁴ Annex 1901.2(1), (2), (3) and (4) of the NAFTA.

Another characteristic of Chapter 19 is that it possesses a mechanism to protect the integrity of the panel review system. As mentioned earlier, this mechanism was not integrated to the FTA. The mechanism of safeguarding the panel review system is described in Article 1905. Article 1905 provides for situations whereby a Party alleges that the application of another Party's domestic law has prevented the normal functioning of the panel review system. The first step is characterized by a request for consultations. If no solution is reached, the complaining Party may request the establishment of a special committee.⁴⁵ The special committee will be asked to determine whether the allegations are correct and if such is the case, consultations will begin with a goal to reach a mutually satisfactory solution within 60 days of the issuance of the report of the special committee.⁴⁶ If no solution is reached, sanctions will be taken against the party complained of.⁴⁷

2.1.3 Functions of the Binational Panels

The Chapter 19 of the NAFTA is a unique binational panel review process, driven by independent and ad hoc panels, established to review final antidumping and countervailing duty determinations issued by the competent investigative authorities of the Parties. In accordance with Annex 1911 of the NAFTA, competent investigative authority means: (1) for Canada, the Canadian International Trade Tribunal or the Deputy Minister of National Revenue for Customs and Excise as defined in the *Special Imports Measures Act*; (2) for the United States, the International Trade Administration of the Department of Commerce or the

⁴⁵ Art. 1905(1) and (2) of the NAFTA.

⁴⁶ Art. 1905(7) of the NAFTA.

⁴⁷ Art. 1905(8), (9), (10), (11), (12), (13) and (14) of the NAFTA.

International Trade Commission; and (3) for Mexico, the designated authority within the Ministry of Economy.⁴⁸

The most important function of the binational panel is the review of final antidumping and countervailing duty determinations as provided for in Article 1904 of the NAFTA. Paragraph 1 of Article 1904 expressly states that each Party shall replace judicial review of final antidumping and countervailing duty determinations by binational panel review. This effectively means that parties affected by the final determinations of the competent administrative authorities will not be able to have recourse to domestic judicial review once another party requests a binational panel review. A binational panel review will also use the same standard of review as the domestic court and will evaluate whether the final determination of the competent investigative authority was made in accordance with such standard of review. When analyzing the legality of a final determination, the binational panel can only base itself on information contained in the administrative record of the involved Party using the standard of review set out in Annex 1911.⁴⁹ In other words, the binational panel is required to analyze the final determination and decide whether, pursuant to the standard of review and relevant legal principles, the decision was rendered in compliance with applicable statutes, regulations, legislative history, case law and administrative practice.

⁴⁸ The Ministry of Economy or “Secretaría de Economía” was formerly known as the Secretaría de Comercio y Fomento Industrial (“SECOFI”) translated as the Ministry of Commerce and Industrial Development until December 2000. This thesis will sometimes refer to the Ministry of Economy or SECOFI when applicable.

⁴⁹ The standard of review, as provided for in Annex 1911 means the following standards, as may be amended from time to time by the relevant Party: (a) in the case of **Canada**, the grounds set out in subsection 18.1(4) of the *Federal Court Act*, as amended, with respect to all final determinations; (b) in the case of the **United States**, (i) the standard set out in section 516A(b)(1)(B) of the *Tariff Act of 1930*, as amended, with the exception of a determination referred to in (ii); and (ii) the standard set out in section 516A(b)(1)(A) of the *Tariff Act of 1930*, as amended, with respect to a determination by the United States International Trade Commission not to initiate a review pursuant to section 751(b) of the *Tariff Act of 1930*, as amended; and (c) in the case of **Mexico**, the standard set out in Article 238 of the Federal Fiscal Code (“Código Fiscal de la Federación”), or any successor statutes, based solely on the administrative record.

This task is not without challenges for the panelists who are required to familiarize themselves with the domestic laws of each Party and to effectively apply a standard of review set by a domestic court. It is important to distinguish between the domestic standard of review and the manner in which a decision is to be rendered. The domestic standard of review does not indicate to the panel the manner in which a decision is to be rendered. The manner in which decisions are to be rendered is provided for in Article 1904(8) of NAFTA.⁵⁰ Article 1904(8) provides that the panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision. Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel's decision. The panel only has the authority to uphold a final determination or remand it for action not inconsistent with the panel's decision. The panel is only permitted to act within the boundaries of the provisions of Chapter 19.

2.1.4 Control Mechanisms

Article 1904(11) provides that "...a final determination shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination within the time limits set out in this Article. No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts". Consequently, a panel decision is not appealable to a domestic court⁵¹ and a decision rendered by a binational panel is binding on the involved Parties with respect to the particular matter before the panel.⁵²

⁵⁰ Perezcano Diaz, *supra* note 9 at 220.

⁵¹ Art. 1904(11) of the NAFTA.

⁵² Art. 1904(9) of the NAFTA.

2.1.4.1 Extraordinary Challenge Procedure

This aspect has entailed several constitutional concerns, especially in Mexico and the United States. Although one of the purposes of the Chapter 19 mechanism is finality, there does exist a form of “appeal” through the Extraordinary Challenge Procedure. A Party may avail itself of this procedure when, *inter alia*, a member of the Panel was guilty of gross misconduct, when the panel seriously departed from a fundamental rule of procedure, or when the panel exceeded its powers or failed to apply the appropriate standard of review. If any of these factors is alleged by one of the Parties to have materially affected the panel’s decision, the Parties are to establish an Extraordinary Challenge Committee or ECC from a 15-person roster comprised of federal judges or former federal judges from the three countries.⁵³

An ECC decision is binding on the Parties and unappealable. In cases of panelist misconduct or bias, the ECC can decide to: (1) vacate the decision of the panel in question and establish a new panel; (2) remand the decision to the original panel for further considerations; or (3) deny the challenge and affirm the original decision of the panel.⁵⁴ The ECC is the only alternative for a party dissatisfied with a decision of the panel. The ECC “...should be perceived as a safety valve in those extraordinary circumstances where a challenge is warranted to maintain the integrity of the binational process.”⁵⁵

Although finality and speed are advantages of the NAFTA mechanism, the elimination of the right of appeal, either domestically or internationally is viewed as a concern more particularly in Mexico with the existence of a unique form of appeal unlike

⁵³ Art. 1904(13) and Annex 1904.13 of the NAFTA.

⁵⁴ Annex 1904.13(3) of the NAFTA.

⁵⁵ In *re: Live Swine from Canada*, No. EEC-93-1904-01 USA, April 8, 1993, online: NAFTA Secretariat Homepage: <http://nafta-sec-alena.org> (date accessed: 4 November, 2002).

anything else found in the Canadian and United States legal order, the *juicio de amparo*. The *juicio de amparo* will be discussed in Chapter 3 of this thesis.

2.1.4.2 Safeguard Mechanism

A fundamental element of NAFTA's Chapter 19 is the corrective safeguard mechanism provided in Article 1905. The mechanism is exercised if it is determined that the application of one of the Party's laws: (a) prevented the establishment of the binational panel; (b) denied the binding nature of the binational panel's decisions; or (c) evaded the judicial review of a disputed final administrative determination.⁵⁶ An initial consultation period is established in accordance with Article 1905.⁵⁷ If no agreement is reached, the complaining Party may request the establishment of a "special committee" comprised of three members chosen from the same roster as the ECC panels. The Parties have 60 days to negotiate a solution, provided that the special committee has made an affirmative finding.⁵⁸ If no solution is reached by means of negotiation, the complaining Party may suspend the operation of Article 1904 with respect to the other Party or deny that Party benefits under the NAFTA as may be appropriate under the circumstances.⁵⁹ In other words, the NAFTA sanctions a right of retaliation in order to safeguard the dispute settlement mechanism.

2.1.4.3 Review of Statutory Amendments

Article 1903 provides that a Party may request a declaratory opinion from the panel as to whether a Party's statutory amendments to its antidumping and countervailing law are consistent with the *General Agreement on Tariffs and Trade* ("GATT"), the antidumping and

⁵⁶ Art. 1905 of the NAFTA.

⁵⁷ Art. 1905(1) of the NAFTA.

⁵⁸ Art. 1905(2), (3), (4), (5), (6), and (7) of the NAFTA.

⁵⁹ Art. 1905(8) of the NAFTA.

subsidies code of the WTO and the object of Chapter 19 of the NAFTA. The panel asked to issue a declaratory opinion shall conduct its review in accordance with the specific procedures set out in Annex 1903.2. If the panel determines that discrepancies exist between the domestic statutory amendments and the international legal obligations listed, it will recommend additional amendments to remove the incongruity. In such case, the two Parties shall immediately commence negotiations and aim to achieve a mutually satisfactory solution to the matter within 90 days of the issuance of the panel's final declaratory opinion.⁶⁰ If corrective legislation is not enacted within nine months from the end of the 90th day of the initial consultation period and no other mutually satisfactory solution has been reached, the Party that requested the panel may either adopt comparable legislative measures or terminate NAFTA on 60 days' written notice to the other Party.⁶¹

NAFTA's Chapter 19 is a mechanism, which basically replaces domestic judicial review and applies domestic law to resolve an international trade controversy. It is a binational ad hoc arbitration mechanism that is not compelled to follow any sort of precedent in its resolutions. Chapter 19 allows for the participation of private parties and is protected and regulated by strict rules of procedure, safeguard mechanisms and codes of conduct. Given the significant responsibility of the panelists as adjudicators effectively replacing domestic courts of judicial review and in order to better understand the remedies available to parties upon issuance of a final determination of the competent investigative authority in Mexico, it is now appropriate to analyse the antidumping and countervailing duty law of Mexico and the standard of review used by the relevant domestic court. The next

⁶⁰ Art. 1903(3)(a) of the NAFTA.

⁶¹ Art. 1903(3)(b) of the NAFTA.

section will discuss the antidumping and countervailing duty law in Mexico, the standard of review used in Mexico and the application of the *juicio de amparo* in the process of domestic judicial review of the final determinations of the administrative authority within the Ministry of Economy.

2.2 Antidumping and Countervailing Duty Law in Mexico

2.2.1 The Mexican Unfair Trade Regime

The unfair trade regime is relatively new in Mexico. The reason is simple. As with many other Latin American countries and during decades after the Second World War, the economy was based on an import substitution model.⁶² This meant that upon establishment of a local industry, such industry was shielded from foreign competition through direct tariff or non-tariff barriers.⁶³ The logic behind this system was that the new economies of these countries needed incentives and a series of protectionist measures in order to grow and create national industries.⁶⁴

The problem that occurred in Mexico with the import substitution model was that it extended for such a long period of time that it became extremely difficult to adjust Mexican practices to world pricing standards.⁶⁵ This opening of Mexico to foreign trade had to wait until the second half of the 1980s.⁶⁶ Mexico's participation in foreign trade law was formalised in 1986 when it joined the GATT. At that time, it was necessary for Mexico to implement a foreign trade law regime. The Mexican Congress enacted that year the Foreign

⁶² J.F. Torres Landa R., "Mexico" in L.E. Santos, ed., *The Compendium of Foreign Trade Remedy Laws* (Washington, D.C.: American Bar Association, 1998) 216.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

Trade Act Implementing Article 131 of the Constitution of the United Mexican States in Foreign Trade Matters (*Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior*).⁶⁷ This statute was subsequently repealed with the publication of the current Foreign Trade Act Implementing Article 131 of the Constitution of the United Mexican States (*Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior*) (the “Foreign Trade Act”) and its corresponding regulations (the “Regulations to the Foreign Trade Act”).⁶⁸

Although Mexico’s experience with foreign trade law is only fifteen years old, it has experienced one of the most dramatic changes in terms of openness to foreign trade.⁶⁹ Aside from the NAFTA, Mexico has now signed similar trade agreements with Chile, Colombia, Venezuela, the European Union, Nicaragua, El Salvador, Guatemala, Honduras, Costa Rica, Bolivia and Panama.⁷⁰ Parallel to this growth in trade arrangements, a dramatic increase in the interaction with other countries has exposed the local industries to the perils of international unfair trade practices.⁷¹ Consequently, Mexico has experienced a significant rise in the number of cases where foreign trade practices have been investigated and, in many instances, sanctioned with antidumping and countervailing duties.⁷²

⁶⁷ The Foreign Trade Act Implementing Article 131 of the Constitution of the United Mexican States (*Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior*), Federal Official Gazette, Jan.13, 1986.

⁶⁸ The Foreign Trade Act Implementing Article 131 of the Constitution of the United Mexican States (*Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior*), Federal Official Gazette, July 27, 1993 [hereinafter “Foreign Trade Act”] and the regulations pursuant to the Foreign Trade Act, Federal Official Gazette, Dec.30, 1993 [hereinafter “Regulations to the Foreign Trade Act”].

⁶⁹ Torres Landa, *supra* note 62 at 217.

⁷⁰ Online: OAS Homepage: <<http://www.sice.oas.org>> (date accessed: 4 November 2002).

⁷¹ Torres Landa, *supra* note 62 at 217.

⁷² *Ibid.*

The Mexican antidumping and countervailing law encompasses the Foreign Trade Act, a legislation enacted pursuant to Article 131 of the Mexican Constitution, its corresponding Regulations and the Federal Tax Code. Mexico is also bound by the international instruments to which it is a signatory such as the antidumping, subsidies and safeguards codes of the GATT, Chapter 19 of the NAFTA, Chapter 9 of the Free Trade Agreement between Mexico, Colombia and Venezuela,⁷³ Chapter 8 of the Free Trade Agreement between Mexico and Costa Rica,⁷⁴ and Chapter 8 of the Free Trade Agreement between Mexico and Bolivia.⁷⁵

The Ministry of Economy is responsible for enforcing the Foreign Trade Act. It does so through a specific agency known as the International Unfair Trade Practices Unit (*Unidad de Prácticas Comerciales Internacionales* or “UPCI”). The Foreign Trade Act’s objectives are to regulate and promote foreign trade, to increase competitiveness of the national economy, to foster the efficient use of the productive resources of the country, and to integrate adequately the Mexican economy into the international economy and contribute to improving the general well being of the population.⁷⁶ The Foreign Trade Act fulfils its objectives by impeding the international unfair trade practices of dumping and subsidies.⁷⁷

“Dumping” is defined as the importation of goods that are similar⁷⁸ or identical⁷⁹ to

⁷³ Published in the Federal Official Gazette, Jan. 9, 1995.

⁷⁴ Published in the Federal Official Gazette, Jan. 10, 1995.

⁷⁵ Published in the Federal Official Gazette, Jan. 11, 1995.

⁷⁶ Art. 1 of the Foreign Trade Act.

⁷⁷ Art. 28 of the Foreign Trade Act.

⁷⁸ The Foreign Trade Act provides that products are similar, when, even if not alike in every aspect, they have similar characteristics and composition and, therefore, serve the same functions and are commercially interchangeable with others with which they are compared.

⁷⁹ The Foreign Trade Act establishes that a product is identical to the investigated product when it resembles the latter in every aspect.

those of the national industry,⁸⁰ into Mexican territory at a price below their normal value.⁸¹ “Subsidies” is defined as an incentive improperly granted in a direct or indirect manner by a foreign government to producers, sellers, or exporters of goods in order to strengthen their international competitive position.⁸²

Before a dumping or subsidy investigation is initiated, an injury test (or threat thereof of injury) affecting the national production or the national industry must be met.⁸³ Furthermore, the importation at the dumped price or subsidised price must constitute the direct cause of injury or threat thereof of injury to the national industry. The Foreign Trade Act defines injury as the economic loss or detriment, loss of any normal or lawful profit, and/or the barrier to establishment of a new industry. The threat of injury is defined as the imminent and clearly foreseeable injury to national production. The Foreign Trade Act also requires that the alleged threat of injury be based on facts and not simple allegations, speculation, or remote possibilities.⁸⁴ The Foreign Trade Act sets forth, among others, the following criteria to determine if an injury or threat of injury exists as a result of an international unfair trade practice. In order to determine injury in a dumping case, the UPCI will look at import volumes, effect on prices, effect on the producers and the impact of the imports on national production.⁸⁵ In order to determine threat of injury in a dumping case, the UPCI will examine, among other items, whether there has been an increase in the import volumes and whether the price of the imports is at a level that may negatively impact national

⁸⁰ The term “national industry” or “national production” under the Foreign Trade Act must be understood as comprising at least 25 percent of the domestic production of the investigated product. See art. 40 of the Foreign Trade Act.

⁸¹ Art. 30 of the Foreign Trade Act.

⁸² Art. 37 of the Foreign Trade Act.

⁸³ Arts. 29 and 39 of Foreign Trade Act.

⁸⁴ Art. 39 of the Foreign Trade Act.

⁸⁵ Art. 41 of the Foreign Trade Act.

prices. The UPCI will also look at the current rate of growth of the imports of the investigated product and the current impact of the imports over national production.⁸⁶

In addition to proving the elements that may constitute an unfair trade practice, the Foreign Trade Act requires that the causal link between the unfair trade practice (dumping/subsidies) and the injury or threat thereof be proven beyond a reasonable doubt. If causal link is not proven, the trade practice will not be sanctioned and antidumping duties will not be imposed.⁸⁷ The analysis of the injury or the threat thereof must refer to a period covering at least six months prior to the start of the investigation.⁸⁸ This period may be expanded by the UPCI if it deems it convenient or necessary to better understand the particular circumstances of the alleged international unfair trade practice.

The Foreign Trade Act applies the same principles covering dumping investigations to subsidies investigations. Subsidies may take the form of incentives, grants, allowances, premiums, or any other kind of aid provided in a direct or indirect manner by a government or governmental entity to producers, sellers, or exporters.⁸⁹ The Foreign Trade Act provides that the Ministry of Economy issue a list of measures labelled as unauthorised subsidies.⁹⁰

In addition to antidumping and countervailing duties imposed on goods subject to an investigation, the Ministry of Economy has authority to impose safeguard measures designed to temporarily block imports, under circumstances that threaten to cause or are causing serious injury to national production.⁹¹ Such extraordinary measures are in place to facilitate the adjustment of the national products to the opening of the Mexican market and the

⁸⁶ Art. 42 of the Foreign Trade Act.

⁸⁷ Art. 29 of the Foreign Trade Act.

⁸⁸ Art. 76 of the Foreign Trade Act.

⁸⁹ Torres Landa, *supra* note 62 at 222.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

globalization process. The Foreign Trade Act defines safeguard measures as those that regulate or temporarily restrict the imports of identical, similar, or any goods that compete with those of the national industry.⁹² Examples of safeguard measures regulated by the Foreign Trade Act are tariffs, licences or quotas.⁹³ Tariffs are duties imposed upon exports and imports. Licences are permits issued by the Ministry of Economy for the entrance or exports of goods to and from the national territory. Quotas are measures, which set quantitative limits for goods that may be imported or exported.

The Ministry of Economy may impose safeguard measures when it finds that the import of a specific product causes or threatens to cause serious injury to the national industry of a similar or identical product.⁹⁴ The existence or threat of serious injury shall be determined by way of an investigation pursuant to the Foreign Trade Act. Safeguard measures are only allowed in extraordinary circumstances and shall not exceed four years.⁹⁵ Mexico may also impose temporary safeguard measures within 20 days after the initiation of a dumping investigation provided there is, or will be serious injury if the situation is not remedied expeditiously and that such injury will be difficult to repair.⁹⁶ The Ministry of Economy will determine the duration of such measures provided they do not exceed six months.⁹⁷

2.2.2 Procedural Aspects

The Ministry Economy, through the UPCI, carries out the administrative

⁹² Art. 45 of the Foreign Trade Act.

⁹³ Torres Landa, *supra* note 62 at 222.

⁹⁴ Art. 45 of the Foreign Trade Act.

⁹⁵ Art. 47 of the Foreign Trade Act.

⁹⁶ Torres Landa, *supra* note 62 at 223.

⁹⁷ *Ibid.*

investigations for the existence of dumping and subsidies and either the national industry or the Ministry of Economy can initiate the procedure. The Ministry of Economy will commence, out of its own initiative, a dumping or subsidies investigation when it becomes aware of the existence of certain acts or conduct, or of consequences in the national market and/or economy that lead it to believe that an international unfair trade practice exists.⁹⁸

The national industry can also request that the Ministry of Economy commence an investigation to determine if certain products are being exported under unfair trade conditions. The term “national industry” includes physical or legal entities that manufacture goods, which are similar or identical to the goods that are purportedly being imported under unfair trade conditions. A national industry can also mean an entity that produces goods that directly compete with goods that are being imported under unfair trade conditions. In order to request an initiation of the antidumping investigation, the national industry must prove that it represents at least 25 percent of the domestic industry, which produces or manufactures products similar or identical products, that compete directly with the investigated product.⁹⁹

Thirty days after the petition to initiate an antidumping investigation has been filed by the national industry, the Ministry of Economy must either: (1) publish in the Federal Official Gazette the initial resolution establishing the facts of the investigation and if applicable, the temporary antidumping duty imposed on the product during the investigation period;¹⁰⁰ or (2) publish in the Federal Official Gazette an initial resolution requiring

⁹⁸ Torres Landa, *supra* note 62 at 224.

⁹⁹ *Ibid.* See also Art. 50 of the Foreign Trade Act.

¹⁰⁰ The UPCI will not generally impose antidumping duties at the beginning of an investigation unless there is indisputable evidence linking the unfair trade practice to the injury or threat of injury.

additional evidence from the petitioner. Such information must be received within 20 days or the UPCI will dismiss the investigation.¹⁰¹

Once the initial resolution is published, interested parties will have 30 days to file their defence and allegations before the UPCI. Interested parties include the petitioning producers, importers and exporters of the investigated product and the foreign legal entities that may have a direct interest in the outcome of the investigation. The definition of interested parties pursuant to the Foreign Trade Act is wider in scope than that under NAFTA, which defines interested parties as the exporters or producers of the Party whose goods are the subject of the proceeding. Under the old Foreign Trade Act, exporters and foreign entities were not given standing in dumping and subsidies investigations and were therefore unable to challenge SECOFI's (now the Ministry of Economy) decisions.

The UPCI may request from interested parties, any information or evidence that it deems convenient for the purposes of the investigation.¹⁰² No later than 130 days after the publication of the initial resolution, the UPCI shall issue a "preliminary resolution" where it may impose a temporary antidumping duty, continue the investigation, or terminate the antidumping investigation if there are insufficient grounds or evidence to determine dumping or subsidies.¹⁰³ No later than 260 days after the initial resolution is published in the Federal Official Gazette, the UPCI must issue the "final determination", where it will either impose a final antidumping duty, revoke the temporary antidumping established in the preliminary resolution, or conclude the antidumping investigation without fixing a duty.¹⁰⁴ Once a final antidumping duty is imposed, interested parties may request clarifications from the UPCI as

¹⁰¹ Art. 52 of the Foreign Trade Act.

¹⁰² Art. 54 of the Foreign Trade Act.

¹⁰³ Art. 57 of the Foreign Trade Act

¹⁰⁴ Art. 59 of the Foreign Trade Act

to whether a specific good is included under the scope of the specific antidumping procedure or if such product is beyond the reach of the final antidumping duty.¹⁰⁵

An interested party may also request, during an antidumping investigation, a conciliatory hearing with a view to resolve the controversy in an amicable way.¹⁰⁶ Such a hearing may be requested at any time during the antidumping investigation, but no later than 15 days before the investigation period ends.¹⁰⁷ The UPCI may also hold a conciliatory hearing at any time during the process.¹⁰⁸ A public hearing is also held after the preliminary determination is published and before the final determination is rendered.¹⁰⁹ The purpose of the public hearing is for the interested parties to have the opportunity to discuss their arguments and positions directly before the UPCI. The interested parties will have the opportunity to question and rebut the facts and arguments submitted throughout the investigation and cross-examine one another before UPCI officials.¹¹⁰ An interested party may also request a technical meeting within 5 days of the publication of the preliminary resolution or the final determination.¹¹¹ The objective of the technical meeting is to explain to the interested parties the methodology employed for the calculation of the dumping margins or subsidies, the injury or threat thereof of injury and the causal relationship.

Once the investigation is completed, the UPCI may impose an antidumping duty on the investigated product if there is evidence linking the existence of an unfair trade practice

¹⁰⁵ Art. 60 of the Foreign Trade Act and s. 91 of the Regulations to the Foreign Trade Act.

¹⁰⁶ Torres Landa, *supra* note 62 at 226.

¹⁰⁷ Art. 61 of the Foreign Trade Act and s. 86 of the Regulations to the Foreign Trade Act.

¹⁰⁸ Ss. 86 to 88 of the Regulations to the Foreign Trade Act. The UPCI will usually request the assistance of a member of the Federal Competition Commission to ensure compliance with antitrust statutes either during the hearing or the settlement.

¹⁰⁹ Art. 81 of the Foreign Trade Act and ss. 165, 166 and 170 of the Regulations to the Foreign Trade Act.

¹¹⁰ Art. 81 of the Foreign Trade Act.

¹¹¹ Ss. 84 and 85 of the Regulations to the Foreign Trade Act.

to an injury or threat of injury to the national industry. The duty imposed will be based on the margin determined for each individual producer. A common duty rate will be imposed for any other producer of the involved product coming from the same country or countries subject to the investigation and exporting at the time of the investigation.¹¹² The exact percentage of the antidumping duty will be the difference between the normal value obtained from the investigation and the export price of the “dumped” good.¹¹³ For subsidies, the countervailing duty will be equal to the amount of the benefits granted by the foreign government.¹¹⁴ The duties shall remain in force until the negative consequences of the unfair trade practice on the national industry have been eradicated. Duties will be eliminated after a period of five years from the date on which the duties were imposed provided that neither the UPCI nor the interested parties request a review of such duties.¹¹⁵

The Ministry of Economy may suspend or terminate the investigation without imposing a duty if the exporter of the goods accused of unfair trade practices, voluntarily agrees to modify its prices or agrees to discontinue or limit its exports.¹¹⁶ In a subsidies investigation, the termination or suspension of such investigation will take place if the government of the investigated product eliminates or limits the subsidy.¹¹⁷ Such a settlement will only occur if the negative effects of the unfair trade practice are eliminated. In approving the settlement, the Ministry of Economy will consider: (1) the impact of the settlement on the final prices of the product vis-à-vis the consumer and the availability of the goods involved; (2) the impact of the settlement on the international economic interests of the

¹¹² S. 89 of the Regulations to the Foreign Trade Act.

¹¹³ Art. 62 of the Foreign Trade Act.

¹¹⁴ *Ibid.*

¹¹⁵ Arts. 67 and 70 of the Foreign Trade Act.

¹¹⁶ Art. 72 of the Foreign Trade Act and s. 110 of the Regulations of the Foreign Trade Act.

¹¹⁷ *Ibid.*

country; (3) the impact of the settlement on the national industry's competitiveness, employment and investments; and (4) whether the accused exporters or governments are subject to unfair trade practices investigations or countervailing duties in other countries.¹¹⁸ The Ministry of Economy is responsible for ensuring compliance with the terms of the settlement.¹¹⁹

Interested parties may request an annual review of the duty on the anniversary month of the date on which the duties were imposed by the UPCI. The UPCI may also order a review of the duties imposed *ex officio*.¹²⁰ Other parties may also request an annual review of the duties upon proof of their legal interest in the outcome of the final determination.¹²¹ The UPCI is required to self-initiate a review of the duties if there is a change in circumstances.¹²² The procedure for review is identical to the investigation with the initial, preliminary, and final determinations, conciliation and public hearings, submission of evidence, technical meetings and verification visits.¹²³ During an annual review, the petitioners (foreign producers, exporters or importers of the "dumped good") may request the examination of the individual dumping margin or the elimination or modification of the duty.¹²⁴ In the event that petitioners are national producers, the petitioners may request that the UPCI examine the calculation of a duty to determine whether it should be confirmed or increased.¹²⁵

¹¹⁸ S. 114 of the Regulations to the Foreign Trade Act.

¹¹⁹ Art. 74 of the Foreign Trade Act.

¹²⁰ Ss. 68 and 101 of the Regulations to the Foreign Trade Act.

¹²¹ S. 100 of the Regulations to the Foreign Trade Act.

¹²² S. 99 of the Regulations to the Foreign Trade Act.

¹²³ Regulations to the Foreign Trade Act, *supra* note 121.

¹²⁴ S. 101 of the Regulations to the Foreign Trade Act.

¹²⁵ *Ibid.*

During an annual review, the Ministry of Economy may either: (1) determine that the dumping margin no longer exists and revoke the final determination; (2) substitute new antidumping duties if the review revealed different dumping margins than those originally calculated; (3) reimburse excessive antidumping duties paid by the importers; or (4) if it is determined upon review that the final determination imposed a lower antidumping duty than what should have been imposed, the antidumping duty of lesser amount shall be confirmed and no additional duties shall be paid.¹²⁶

An interested party affected by a final determination of the Ministry of Economy can also challenge the final determination by way of a revocation action. The revocation action is an opportunity for the Ministry of Economy to review its own acts before moving into the realm of litigious proceedings. The revocation action is an administrative appeal that must be filed within 45 days of the final determination.¹²⁷ In a revocation action, the Ministry of Economy can revoke, modify or confirm the antidumping or countervailing duties.¹²⁸ A revocation action is before the Ministry of Economy and must be exhausted before an interested party is allowed to proceed with judicial review of the final determination by the Federal Fiscal Tribunal.

2.2.3 Domestic Judicial Review of Final Determinations

If the Ministry of Economy revoked or modified a final determination, the interested party will be able to resort to a *juicio de amparo* if a valid claim can be made that his or her rights were infringed by the decision of the Ministry of Economy in the revocation action.¹²⁹

¹²⁶ Ss. 105-107 of the Regulations to the Foreign Trade Act.

¹²⁷ Art. 94 of the Foreign Trade Act.

¹²⁸ Art. 95 of the Foreign Trade Act.

¹²⁹ M.A. Velázquez Elizarrarás, *Ley de Comercio Exterior (Análisis y comentarios)*, 1st ed. (Mexico: Themis, 1996) at 95.

The *juicio de amparo* applies in this case because the decision to revoke or modify a final determination is considered final for internal judicial remedies only and not in the context of the NAFTA.¹³⁰ We will see in Chapter 3 of this thesis that the *juicio de amparo* can only apply against final and definitive judgments.

If the Ministry of Economy confirmed the final determination of antidumping or countervailing duties in the revocation action, an interested party still dissatisfied with the decision may request the judicial review of such decision to the Upper Division of the Federal Fiscal Tribunal. The proceeding is known as nullification. Nullification is a judicial review proceeding and not an administrative appeal like the revocation action. In broad terms, judicial review is defined as the control of the legality of an administrative decision or lower civil court decision by a general court of review whereas an appeal is an ordinary remedy whereby a person can request that a superior court modify a lower court decision. As we will see in Chapter 3, a *juicio de amparo* is a complex constitutional instrument combining the characteristics of both appeals and judicial review proceedings.

An interested party may file a nullification action within 45 days of the Ministry of Economy's confirmation of the final determination in a revocation action. In a judicial review proceeding of nullification, the Federal Fiscal Tribunal may confirm, annul, or partially annul the decision of the Ministry of Economy.¹³¹ In reviewing the decision of the Ministry of Economy, the Federal Fiscal Tribunal will rely on the standard of review codified in Article 238 of the Federal Fiscal Code, the same standard of review defined in Annex 1911 of the NAFTA. However, it is important to note that the Mexican standard of review

¹³⁰ *Ibid.*

¹³¹ Art. 121 of the Federal Tax Code and Art. 95 of the Foreign Trade Act.

used by the panels of Chapter 19 is not only made up of Article 238 of the Federal Fiscal Code but also of “the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority” as provided for in Article 1904(3) of the NAFTA.

In reviewing the decision of the Ministry of Economy, the Federal Fiscal Tribunal will rely on Article 238 of the Federal Fiscal Code, which provides as follows:

An administrative determination shall be declared illegal when any one of the following grounds is established: (1) lack of jurisdiction or authority of the agency or official issuing the challenged determination or ordering, initiating or carrying out the proceeding in which the challenged determination was issued; (2) an omission of formal legal requirements by the agency or official issuing the challenged determination which affects the person’s right of proper defence as well as the scope or meaning [outcome] of the challenged determination, or a failure of the agency or official to provide a reasoned determination based upon the record; (3) a violation or defect of procedure by the agency or official issuing the challenged determination, which affects the person’s right of proper defence as well as the scope or meaning [outcome] of the challenged determination; (4) if the facts which underlie the challenged determination do not exist, are different from the facts cited by the agency, or were considered by the agency in an erroneous way; if the challenged determination was issued by the agency in violation of the applicable laws or rules; or if the correct laws or rules were not applied by the agency; and (5) whenever a discretionary determination by an agency falls outside the lawful scope of that discretion.¹³²

The Ministry of Economy may challenge the decision of the Federal Fiscal Tribunal by way of a *recurso de revisión*. The *recurso de revisión* is an ordinary appellate remedy and is only available to the Ministry of Economy. A private party wishing to challenge the

¹³² Art. 238 of the Federal Tax Code. Official translation from Spanish made by the Panel in the antidumping investigation of Mexico into imports of flat coated steel products from the United States of America- MEX-94-1904-01 online: NAFTA Secretariat <http://www.nafta-sec-alena.org> (date accessed: 4 November 2002).

decision of the Federal Fiscal Tribunal must proceed by way of a *juicio de amparo*. However, certain criteria must be met before a *juicio de amparo* can proceed, as will be discussed in the next chapter.

The aggrieved interested party may challenge the decision of the Federal Fiscal Tribunal by means of a direct administrative *amparo* before the collegiate circuit court within 15 days of the issuance of the Federal Fiscal Tribunal's decision.¹³³ The *juicio de amparo* enables judicial review of the decisions of the Federal Fiscal Tribunal. The *juicio de amparo* is a constitutional procedural instrument that fulfills appellate and judicial review functions. It reviews decisions for compliance with the individual rights enunciated in the Mexican Constitution. It is now fitting to examine the basis of the *juicio de amparo* to better understand its interaction with Chapter 19 of the NAFTA.

3. THE MEXICAN JUICIO DE AMPARO

The *juicio de amparo* is considered the most widely used instrument in the Mexican legal system and the most important procedural vehicle for the enforcement of the rights guaranteed in the Mexican Constitution. The word "*juicio*" is translated in this context from the Spanish as procedure or trial and the word "*amparo*" is translated as protection. Such a protection is afforded equally to all private persons, including corporations, whether incorporated in Mexico or another jurisdiction. The *juicio de amparo* aims to achieve several objectives thereby turning it into a complex structure that has been the subject of extensive analysis by both Mexican and foreign academics. The objectives of the *juicio de amparo* can

¹³³ Arts. 21 and 158 of the Law of Amparo.

be summarized as follows:¹³⁴

1. the protection of human rights or “individual guarantees”, a term used in the Mexican Constitution¹³⁵;
2. the prevention of federal interference with state sovereignty and vice versa only when the interference adversely affects the interests of private parties [emphasis added];
3. the protection of the integrity of the Mexican Constitution in connection with violations of the individual guarantees;
4. ensuring that laws are applied in accordance with Article 14 of the Mexican Constitution¹³⁶;
5. the protection of individual guarantees in criminal matters; and
6. the protection of private persons against illegal acts of the public administration.¹³⁷

Each function of the *juicio de amparo* is administered by a specific set of rules. The rules are modified regularly to adapt to the different realities of the time. The purpose of this chapter is to throw light on the *juicio de amparo* in Mexico and to illustrate its importance in the Mexican social, legal and cultural realms. This analysis will set the stage for Chapter 4

¹³⁴ The Mexican jurist, Felipe Tena Ramirez, has divided the various functions of the *juicio de amparo* into these six basic concepts taken from P. P. Camargo, “The Right to Judicial Protection: “Amparo” and Other Latin American Remedies for the Protection of Human Rights” (1971) 3 Lawyer of the Americas 191 at 202.

¹³⁵ Constitución Política de los Estados Unidos Mexicanos de 1917 [hereinafter “Mexican Constitution”].

¹³⁶ Art. 14 of the Mexican Constitution:

No law shall be given retroactive effect to the detriment of any person whatsoever. No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act. In criminal cases no penalty shall be imposed by mere analogy or by a priori evidence. The penalty must be decreed in a law in every respect applicable to the crime in question. In civil suits the final judgement shall be according to the letter or the juridical interpretation of the law; in the absence of the latter it shall be based on the general principles of law.

¹³⁷ P.P. Camargo, “The Right to Judicial Protection: “Amparo” and Other Latin American Remedies for the Protection of Human Rights” (1971) 3 Lawyer of the Americas 191 at 202.

of this thesis, which will consider whether the *juicio de amparo* applies in the context of the dispute resolution mechanism of Chapter 19 of the NAFTA.

The current *juicio de amparo* has undergone various transformations throughout the years to make it the institution that it is today. A review of the origins of the *juicio de amparo* will provide a greater understanding of an institution that is generally considered by most foreign investors and exporters as mysterious and unknown. The first two sections of this chapter will provide an overview of the history of the *juicio de amparo* in Mexico and its importance throughout the Americas. Subsequent sections will discuss the five current functions of the *juicio de amparo*, the parties involved in *amparo* proceedings and the development of the action of *amparo* before the courts of Mexico. Furthermore, a brief overview of the structure of the courts, the significance of decisions and the principle of “the binding precedent” will also be provided. The last sections of this chapter will discuss the appeal of *amparo* decisions.

3.1 Origins

Today’s *juicio de amparo* is an amalgamation of legal influences emanating from several countries.¹³⁸ However, Latin American countries that had fought for independence from Spain were first and foremost influenced by the United States’ system of government and more specifically the principles of judicial review of the constitutionality of laws.¹³⁹ In Mexico, the architects of the *juicio de amparo* were very receptive to Alexis de Tocqueville’s

¹³⁸ H. Fix-Zamudio, “A Brief Introduction to the Mexican Writ of Amparo” (1979) 9 CAL. WEST. INT’L L.J. 306 at 309 [hereinafter “Mexican Writ of Amparo”].

¹³⁹ *Ibid.*

work, “Democracy in America” (*La Démocratie en Amérique*).¹⁴⁰ In addition to the effect of the United States system of government on the development of Mexican judicial review, the systems of other countries also exerted an influence on the advent of judicial review in Mexico.

The principle of judicial review in Mexico was first mentioned in the Mexican Constitution of 1824 when Congress was granted authority to strike down state laws that conflicted with the Constitution. This authority originated from the Spanish Constitution of Cádiz of 1812.¹⁴¹ United States influence was also found in the Mexican Constitution of 1824 in the form of a provision, which conferred upon the Supreme Court of Mexico the authority to decide violations of constitutional and federal provisions. A similar provision existed in the United States Constitution of 1787.¹⁴²

Moreover, given the centuries of colonialism in Mexico, it is inevitable that Spanish law also exerted an influence on the *juicio de amparo*. In fact, the word “*amparo*” derives from antecedents in the Spanish provinces of Castille and Aragon.¹⁴³ The notion of a centralized judiciary, which prevailed throughout the colonial era in Mexico, is also retained in today’s Mexico with the power of judicial review limited only to federal courts. It is interesting to note that although Mexico aspired to resemble the United States’ structure of governmental power, articulated in the United States Constitution of 1787, it refused to grant

¹⁴⁰ Alexis de Tocqueville was a French political scientist who studied the system of judicial review in the United States. The first edition of his work was published in French, by Charles Gosselin in 1835 and in English as “Democracy in America” by H. Reeve in 1835. See also Mexican Writ of Amparo, *supra* note 138 at 309.

¹⁴¹ Mexican Writ of Amparo, *supra* note 138 at 311.

¹⁴² *Ibid.*

¹⁴³ Victor Fairen Guillén, *Antecedentes Aragoneses de los Juicios de Amparo* (Mexico, 1971) and Andrés Lira González, *El Amparo Colonial y el Juicio de Amparo Mexicano* (Mexico, 1972).

state courts the authority of judicial review preferring the centralized judiciary inherited from the colonial period.¹⁴⁴

France also exerted a special influence on Mexico in the realm of constitutional rights and freedoms of individuals. Important events taken from French history are first and foremost the declarations of the rights of man referred to as “individual guarantees” in Mexico’s constitutional texts. In addition, the Mexican *juicio de amparo* contains some elements of the French “cassation” power, discussed in later sections of this chapter¹⁴⁵ and an institution closely resembling the French Conservative Senate referred to in the Mexican Constitution of 1836¹⁴⁶ as the “Supreme Conservative Power” was created exclusively for the protection of the constitutional order. Although this institution was short-lived because of poor organization, it still serves as an example of Mexico’s experience with various styles of judicial review.¹⁴⁷ In 1841, reforms to the Mexican Constitution of 1836 suggested replacing the Supreme Conservative Power with the *reclamo* (demand, or claim).¹⁴⁸ The objective of the *reclamo* was to protect the general rules of the Constitution and more specifically, protect individual guarantees.¹⁴⁹ Although the reform was never passed and incorporated to the Mexican Constitution, it paved the way for the inclusion of the *juicio de amparo* to the Mexican legal order.¹⁵⁰

According to the Mexican author Hector Fix Zamudio, the *juicio de amparo* was the

¹⁴⁴ Mexican Writ of Amparo, *supra* note 138 at 310.

¹⁴⁵ *Ibid.*

¹⁴⁶ The Supreme Court Conservative Power was incorporated to the Mexican Constitution of 1836.

¹⁴⁷ On the Supreme Court Conservative Power in Mexico, see R.D. Baker, “Judicial Review in Mexico: A Study of the Amparo Suit” (Austin: University of Texas Press, 1971).

¹⁴⁸ Mexican Writ of Amparo, *supra* note 138 at 312.

¹⁴⁹ Mexican Writ of Amparo, *supra* note 138 at 310.

¹⁵⁰ See R.D. Baker, “Judicial Review in Mexico: A Study of the Amparo Suit” (Austin: University of Texas Press, 1971) at 18-21.

result of a slow process divided into three successive stages, each one aiming to improve the institution.¹⁵¹ As previously mentioned, the term “*amparo*” first appeared in the Constitution of the State of Yucatán on March 31, 1841, following a proposal drafted in December 1840 by the Mexican jurist Manuel Crescencio Rejón. Rejón, considered the founder of the Mexican *juicio de amparo*, was the first person in Latin America to consider judicial review of the constitutionality of laws as a fundamental legal principle.¹⁵² The *juicio de amparo* was subsequently incorporated federally in the 1847 Amendment Act to the Mexican Constitution of 1824.¹⁵³ Article 25 of the 1847 Amendment Act to the Mexican Constitution of 1824 was based on a proposal drafted by the jurist Mariano Otero, revered as the second father of the *juicio de amparo*. It provided as follows:

The Federal Tribunal will protect any person in the exercise and conservation of the rights which are given to him by his Constitution and by constitutional laws, against any attack from the legislative or executive branches, either Federal or state; but these Tribunals will be limited to providing protection only in the specific case under consideration, without making any general declaration on the law or the act impugned.¹⁵⁴

Article 25 of the 1847 Amendment Act to the Mexican Constitution of 1824 broadened the scope of the *juicio de amparo*. The *juicio de amparo* was no longer an exclusive device for the protection of civil rights but also a means of preventing federal interference with state sovereignty and vice versa.¹⁵⁵ Furthermore, the provision explicitly stated that the protection afforded by an *amparo* decision would exclude *erga omnes* (of

¹⁵¹ Mexican Writ of Amparo, *supra* note 138 at 312.

¹⁵² *Ibid.*

¹⁵³ Camargo, *supra* note 137 at 203

¹⁵⁴ Gaxiola, J., “Mariano Otero, Creador del Juicio de Amparo”, Mexico City, 1937 in Mexican Writ of Amparo, *supra* note 138 at 313.

¹⁵⁵ Camargo, *supra* note 137 at 203.

general effect) declarations about the law or the act complained of. Hence, an *amparo* decision declaring a law unconstitutional would only apply to the party that originally filed the complaint. This principle known as the “Otero Formula” is still alive and well, although it is the subject of extensive criticism by academics. The numerous shortcomings of the Otero Formula will be discussed below.

The last stage of the evolution of the *juicio de amparo* took place with the adoption of the fundamental principles of the *juicio de amparo* outlined in Articles 101 and 102 of the Mexican Constitution of 1857.¹⁵⁶ With that, statutes enacted pursuant to Articles 101 and 102 of the Mexican Constitution of 1857 served to expand the *juicio de amparo* beyond the protection of individual guarantees.¹⁵⁷ The statutes are the *Laws of Amparo of 1861, 1869 and 1882*. It is through these statutes that the *juicio de amparo* begins to take shape. For example, the *Laws of Amparo of 1861, 1869 and 1882* provide that violations committed in a definitive, non-appealable judgment shall be tried in a single instance directly to the Supreme Court and all other matters shall be tried indirectly to the federal district court with leave to appeal to the Supreme Court. These two procedural paths are still present in today’s system.

The *Laws of Amparo of 1861, 1869 and 1882* also provided that the power to adjudicate *amparo* cases would remain solely in the hands of federal courts. This form of centralized judiciary was inherited from the Spanish colonialism’s trend to encourage well-educated jurists to reside in large city centres, such as Mexico City and Guadalajara, and leave inexperienced judges at the helm of state courts.¹⁵⁸ Consequently, the well-educated

¹⁵⁶ Mexican Writ of Amparo, *supra* note 138 at 313.

¹⁵⁷ *Ibid.* at 314.

¹⁵⁸ *Ibid.*

jurists, preferring to retain control of the judiciary, limited the role of state courts and transferred the power of judicial review exclusively to federal courts.¹⁵⁹

A few years later, the Mexican Constitution of 1917 established the basic principles of the current *juicio de amparo*: (1) Article 103 of the Mexican Constitution of 1917 granted *amparo* jurisdiction to the federal courts; (2) Article 107 of the Mexican Constitution of 1917 provided for the operation of the remedy; (3) Article 14 of the Mexican Constitution of 1917 provided for *amparo* proceedings against definitive judgments; and (4) Article 16 of the Mexican Constitution of 1917 outlined the principle of legality and the protective scope of the *juicio de amparo*.¹⁶⁰

The Mexican Constitution of 1917 (hereinafter the “Mexican Constitution”) is still in effect today although subject to regular amendments. Articles 103, 107, 14 and 16 of the Mexican Constitution still form the basis of the *juicio de amparo*. Article 103 of the Mexican Constitution provides that federal courts will resolve all controversies arising out of: (1) laws or acts of the authority that infringe upon the individual guarantees; (2) laws or acts of the federal authority that restrict the sovereignty of the states or the powers of the federal district (Mexico City); and (3) laws or acts of the authorities of the states that interfere with the powers of the federal authority.¹⁶¹ Article 107 of the Mexican Constitution is a lengthy article that provides for the legal framework of *amparo*. Such features include: (1) the requirement that the *juicio de amparo* only proceed at the injured party’s request; (2) that *amparo* decisions only serve to protect private persons and do not provide general statements as to the effect of the law or the acts challenged (Otero Formula); and (3) that *amparo* can

¹⁵⁹ *Ibid.*

¹⁶⁰ Mexican Writ of Amparo, *supra* note 138 at 315.

¹⁶¹ Art. 103 of the Mexican Constitution.

only apply against final non-appealable judgments.¹⁶² The statute enacted pursuant to Articles 103 and 107 of the Mexican Constitution is the Law of *Amparo*, promulgated in 1935.¹⁶³ The *Law of Amparo of 1935* (hereinafter the “Law of *Amparo*”) is still in effect today although frequently amended. It is important to note that all former Laws of *Amparo* passed under predecessor Mexican Constitutions are, like their corresponding Constitutions, obsolete. Article 1 of the Law of *Amparo* incorporates the exact wording of Article 103 of the Mexican Constitution thereby accentuating the constitutional origin of the *juicio de amparo*.

Article 14 of the Mexican Constitution generally provides that laws should not have retroactive effects to anyone’s prejudice and that no one’s life, liberty, lands, possessions or rights be taken away from them without a due process of law before competent courts. Article 14 also provides that in criminal cases, no penalty shall be imposed by mere analogy or by *a priori* evidence. The penalty must be decreed in a law in every respect applicable to the crime in question. In civil matters, the final judgment shall be according to the letter or the legal interpretation of the law and in the absence of the latter, it shall be based on general principles of law.¹⁶⁴ Article 16 of the Mexican Constitution outlines additional procedural guarantees including the guarantee of legality derived from the following language: “No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken”.¹⁶⁵

¹⁶² Art. 107 of the Mexican Constitution.

¹⁶³ *Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*, Federal Official Gazette, January 8, 1936.

¹⁶⁴ Art. 14 of the Mexican Constitution, translated in Mexican Writ of Amparo, *supra* note 138 at 315.

¹⁶⁵ Art. 16 of the Mexican Constitution, translated in Mexican Writ of Amparo, *supra* note 138 at 315.

It is said that the *juicio de amparo* is a mechanism of constitutional control that differs from that of an appeal, a mechanism of control of the legality. There are, however, certain instances in which the *juicio de amparo* will serve as a mechanism of control of the legality for example when *amparo* fulfills the function of judicial *amparo* or *amparo-casación* discussed in section 3.3 of this thesis. One must always keep in mind that the Mexican Constitution is the primary and direct object guiding the *juicio de amparo*. It is also the origin of the *juicio de amparo* because the Mexican Constitution provides the legal framework in which the *juicio de amparo* can operate. As such, the *juicio de amparo* is a constitutional institution in its purest sense.¹⁶⁶

The *juicio de amparo* is an extraordinary measure that attempts to repair a violation committed against the constitutional order to the detriment of a private person. It is a procedure *sui generis* distinct and independent from the initial procedure in which the act complained of may have occurred. The parties to an action of *amparo* include the injured party as the petitioner, the defendant as the responsible authority and any involved third parties.

3.2 Importance of the Mexican *Juicio de Amparo* throughout the Americas

Although the *juicio de amparo* is an institution born in Mexico, it has seen considerable expansion throughout the years and its objectives are universally recognized. The essential principles of the Mexican *juicio de amparo* have been incorporated into international legal instruments such as Article 18 of the American Declaration of the Rights

¹⁶⁶ I. Burgoa, *El Juicio de Amparo*, (Mexico: Porrúa, 1999) at 181.

and Duties of Man¹⁶⁷, adopted in Bogotá in May 1948, and Article 8 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948.¹⁶⁸

In 1969, the fundamental right of judicial protection by way of *amparo* was acknowledged in Article 25 of the American Convention on Human Rights.¹⁶⁹

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

The States Parties undertake to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; to develop the possibilities of judicial remedy; and to ensure that the competent authorities shall enforce such remedies when granted.

The three international provisions mentioned above require that the signatory nations perfect or legislatively introduce, remedies such as the *juicio de amparo* as protective instruments of constitutionally protected human rights.¹⁷⁰ Judicial protection in the Americas can take on different forms and is not always referred to as *amparo*. Other examples of

¹⁶⁷ American Declaration of the Rights and Duties of Man. Article 18: All persons can appear before the courts to petition for their rights. They also have the right to simple and brief proceedings, through which justice may be secured against acts of any authority that violate, in injurious fashion, certain fundamental constitutional rights.

¹⁶⁸ Universal Declaration of Human Rights, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) at 71. Article 8: All persons have a right to an effective remedy before their proper national tribunals, which may protect them against acts violating their fundamental rights as recognised by the constitution of the law.

¹⁶⁹ OAS Official Records, American Convention on Human Rights, OR OEA/Ser.K./XVI/1.1/ Doc. 65, rev. 1, corr. 2, (1970). This Convention was signed by twelve American States at the closing session of the Inter-American Specialized Conference on Human Rights, held in San Jose, Costa Rica, November 7-22, 1969,

¹⁷⁰ See Trejos, L., "Organos y Procedimientos de Protección de los Derechos Humanos en la Convención Americana" [1977] *La Tutela de los Derechos Humanos* at 61.

judicial protection in the Americas include the writ of *habeas corpus* found in North America and in other countries of Latin America, the *mandado de segurança* in Brazil and modified versions of the Mexican *juicio de amparo* in many other Latin American countries.

A number of different academic efforts have been initiated to identify the common principles that can be used to harmonize the different statutory provisions regulating the procedure of *amparo* throughout Latin America.¹⁷¹ Some have attempted to formulate regulatory models of *amparo* for the common use of all Latin American countries. For example, the Argentinean Carlos Sánchez Viamonte proposed that the protective scope of *habeas corpus*, already established in many Latin American countries, be extended to include all human constitutional rights and appear in the form of *amparo*.¹⁷²

In a seminar organized by the United Nations and entitled “*Amparo, Habeas Corpus and Other Similar Remedies*,” held in Mexico in August 1961, the participants observed that countries that have inherited the English juridical traditions in the Americas use the writ of *habeas corpus* to protect individual liberties and freedom of movement as well as a series of special recourses, such as *certiorari*, *mandamus*, *prohibition* and *injunction*.¹⁷³ Conversely, countries which base their institutions on Roman law, are divided into three general groups: (1) the first group uses *amparo* to protect not only individual liberties and freedom of movement but also all other fundamental civil rights; 2) the second group uses a broadened *habeas corpus*, a recourse broader than the North American *habeas corpus* designed to protect not only individual liberties and freedom of movement but also certain identifiable civil rights; and, 3) the third group of countries makes use of both the *amparo* and the *habeas*

¹⁷¹ H. Fix Zamudio, “The Writ of Amparo in Latin America” (1981) 13 The University of Miami Journal of Int’l Law 361 at 389 [hereinafter “Writ of Amparo in Latin America”].

¹⁷² *Ibid.* at 390.

¹⁷³ Amparo, Habeas Corpus and Other Similar Remedies, U.N. Official Records, 1961, ST/TAO/HR/12.

corpus. *Habeas corpus*, strictly speaking, is used to protect individual liberties and freedom of movement and, *amparo* and the Brazilian *mandado de segurança*, are used to protect all other civil rights.¹⁷⁴

The Mexican jurist Hector Fix Zamudio argues that although all judicial means are useful for the protection of human rights, we must consider as essential, “those that have proven their efficacy in the rapid and sure protection of human liberty”.¹⁷⁵ According to Hector Fix Zamudio, the writ of *habeas corpus*, the *juicio de amparo*, the *mandado de segurança* in Brazil, and the judicial review of the constitutionality of laws are adequate means for the protection of fundamental rights and liberties in the Americas.

The Mexican *juicio de amparo* has influenced directly or indirectly the development of *amparo* in several Latin American nations, including Argentina, Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, and Venezuela.¹⁷⁶ Another institution also bearing the distinct imprint of the Mexican *juicio de amparo* is the Brazilian *mandado de segurança*, translated as writ of security.¹⁷⁷

3.3 Current Functions of the *Juicio de Amparo*

The *juicio de amparo* extends to the Mexican constitutional, statutory and administrative dimensions and although in practice it is one instrument, it covers five distinct functions with each function possessing its own characteristics.¹⁷⁸ The five functions of the *juicio de amparo* are: (1) *amparo libertad* to protect life and personal liberty (individual

¹⁷⁴ *Ibid.*

¹⁷⁵ H. Fix Zamudio, “La Protección Procesal de las Garantías Individuales en América Latina”, (1967) 3 Revista Iberoamericana de Derecho Procesal, at 21-22.

¹⁷⁶ Writ of Amparo in Latin America, *supra* note 171 at 362.

¹⁷⁷ *Ibid.*

¹⁷⁸ Writ of Amparo in Latin America, *supra* note 171 at 365.

guarantees); (2) *amparo against laws* to declare laws as unconstitutional; (3) *judicial amparo* or *amparo-casación* to provide for a review of judicial decisions at any level; (4) administrative *amparo* to challenge official administrative acts, including those of administrative tribunals; and (5) agrarian *amparo* to protect the rights of farmers subject to agrarian reform laws.¹⁷⁹ An awareness of the various functions of the Mexican *juicio de amparo* is essential to understanding the intricacies of such an extensive procedural instrument.

3.3.1 Amparo Libertad

When *amparo* is used as a device to protect human rights, it performs functions similar to the English writ of *habeas corpus*. In fact, the writ of *habeas corpus* was first embodied in the 1847 Amendment Act to the Mexican Constitution of 1824 as an *amparo* to protect individual freedom against arbitrary arrest.¹⁸⁰ Although the *juicio de amparo* is generally used as a device to protect all civil rights enunciated in the Mexican Constitution, it is described as *amparo libertad* when it fulfils functions analogous to the writ of *habeas corpus*.¹⁸¹ *Amparo libertad* is meant to be a simple and rapid procedure unlike the other functions of the *juicio de amparo*.

The *amparo libertad* is a remedy against acts that threaten individual liberty outside judicial procedures. Such acts are deportation or exile, or other acts prohibited by Article 22 of the Mexican Constitution.¹⁸² Article 22 provides, in general terms, for the protection against deprivation of life, personal liberty, deportation, banishment and proceedings relating

¹⁷⁹ Mexican Writ of Amparo, *supra* note 138 at 316.

¹⁸⁰ Camargo, *supra* note 137 at 204.

¹⁸¹ *Ibid.*

¹⁸² Camargo, *supra* note 137 at 205.

to liens on property for non-payment of taxes or fines.¹⁸³ The injured petitioner or any other person authorized by the petitioner files the *amparo* petition in the first instance in the federal district court by way of an indirect *amparo*. A judge from the federal district court will then have the authority to order the provisional suspension of the act under attack. The procedure is called “suspension of the act complained of” (*suspensión del acto reclamado*) and is designed to protect the petitioner from further infringement of his or her individual guarantees. The proceedings may be initiated verbally,¹⁸⁴ and at any hour of the day in cases of emergency,¹⁸⁵ and may be filed before an official of either federal or state courts.¹⁸⁶ State judges have authority to suspend acts threatening the freedom or physical well-being of an injured party but are required to transfer the case to the appropriate federal court as soon as it is practicable.¹⁸⁷ There is no limitation period to initiate a claim.¹⁸⁸

The authority subject to the allegations of the petitioner must answer to the charges by delivering to the court an explanatory report.¹⁸⁹ However, the hearing of facts and allegations will take place regardless of such report.¹⁹⁰ Decisions are normally reviewed by collegiate circuit courts but violations of Article 22 of the Mexican Constitution can be appealed directly to the Supreme Court by way of a direct *amparo*.¹⁹¹

¹⁸³ Art. 22 of the Mexican Constitution: Punishment by mutilation and infamy, branding, flogging, beating with sticks, torture of any kind, excessive fines, confiscation of property and any other unusual or overwhelming penalties are prohibited. Attachment proceedings covering the whole or part of the property of a person made under judicial authority to cover payment of civil liability arising out of the commission of an offence or to meet taxes or fines shall not be deemed a confiscation of property. Capital punishment for political offences is likewise forbidden, as regards to other offences, it can only be imposed for high treason committed during a foreign war, parricide, murder with malice aforethought, arson, abduction, highway robbery, piracy and grave military offences translated in Mexican Writ of Amparo, *supra* note 138 at 343.

¹⁸⁴ Art. 117 of the Law of Amparo.

¹⁸⁵ Art. 23 of the Law of Amparo.

¹⁸⁶ Art. 40 of the Law of Amparo.

¹⁸⁷ Arts. 38 and 39 of the Law of Amparo.

¹⁸⁸ Art. 22 (II) of the Law of Amparo.

¹⁸⁹ Camargo, *supra* note 137 at 205.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

The *amparo libertad* is in many ways much broader than the writ of *habeas corpus* because its scope is not only limited to cases of arbitrary arrest or threat of detention but also to all violations listed in Article 22 of the Mexican Constitution.¹⁹²

3.3.2 Amparo against Laws

As mentioned earlier, judicial review in Mexico was very much influenced by United States doctrine and jurisprudence and the principle of constitutional supremacy in the United States undoubtedly inspired the Mexican system of control of the constitutionality of laws. *Amparo* as a mechanism to challenge the unconstitutionality of laws, or “*amparo* against laws”, is often considered the most important function of the *juicio de amparo*. *Amparo* against laws works to prevent the application of a specific law against a specific individual by declaring such law unconstitutional and ordering that the promulgating authorities, along with the officials responsible for the execution of the law, refrain from applying such law to that particular individual.¹⁹³

The principle of the exclusive application of *amparo* decisions to the petitioner is called the Otero Formula. The Otero Formula is outlined in Article 107(II) of the Mexican Constitution and Article 76(I) of the Law of *Amparo*. Article 76(I) provides, in part, as follows:

[...] judgments pronounced in *amparo* proceedings only apply to the private individuals or to the moral, private, and official persons soliciting the writ limiting the effects to their protection and securing, where appropriate, in the special case covered by the petition, without making any general declaration respecting the law or act motivating it.¹⁹⁴

¹⁹² Camargo, *supra* note 137 at 206.

¹⁹³ Mexican Writ of *Amparo*, *supra* note 138 at 318.

¹⁹⁴ Art. 76(I) of the Law of *Amparo*.

The individual impact of the decision means that the law remains in force for everyone else. This is because the Mexican judiciary branch does not have the power to abrogate or derogate a law, a power that is exclusively reserved to Federal Congress.¹⁹⁵ In Canada and the United States, the situation is somewhat different because a Supreme Court decision declaring the unconstitutionality of a law has virtually the same effect as abrogation and requires that the legislative branch amend or abrogate the law in the shortest delay possible. In Mexico, the judiciary only suspends a law if five identical decisions of the Supreme Court agree that such law should be suspended. This rule called the “binding precedent” or *jurisprudencia* will be discussed in subsequent sections of this chapter.

Amparo against laws is an indirect means of judicial review of legislative measures because it does not abrogate laws challenged as unconstitutional. The restriction, outlined in the Otero Formula, limits the effect of a declaration of unconstitutionality of a law, on the parties that have successfully challenged the law.¹⁹⁶ Mexican constitutionalist claim that this is a drawback of the *juicio de amparo* because the effect of a favourable decision merely excuses one individual from compliance with the law and requires that other persons bring analogous actions for similar violations for which the court, in its discretion, may or may not decide to protect them.¹⁹⁷ In fact, there is nothing to prevent the same person from being injured twice by the same law. Critics would like the declarations of unconstitutionality of the law to have general effect *erga omnes* rather than being restricted to the exclusive benefit of the petitioner. This rationale follows the principle of equality under the law. Furthermore,

¹⁹⁵ Camargo, *supra* note 137 at 207.

¹⁹⁶ Mexican Writ of Amparo, *supra* note 138 at 323.

¹⁹⁷ C. Loperena Ruiz, “The Process of Amparo in Commercial Matters” (1998) 6 US-Mexico Law Journal 43 at 44.

individual effects of judgments in *amparo* against laws have resulted in a painfully slow and inefficient system of judicial review.¹⁹⁸

The Law of *Amparo* regulates two procedural types of constitutional review, the action and the recourse of unconstitutionality.¹⁹⁹

3.3.2.1 Action of Unconstitutionality

In an “Action of Unconstitutionality”, the petitioner may challenge ordinary legislative measures such as laws, regulations or decrees on the basis that such measures are contrary to the Mexican Constitution.²⁰⁰ In such an action, the defendants are federal and state officials responsible for the adoption and implementation of the law in question.²⁰¹ This procedural type of *amparo* against laws is an indirect *amparo* because it is brought in the first instance to the federal district court.²⁰² Appeals can also be initiated before the plenary Supreme Court and its four specialized chambers. The structure of the courts will be discussed in later sections of this chapter.

The 1951 amendments to the Law of *Amparo* specify that an Action of Unconstitutionality can only take place when a statute or regulation is self-executing and affects the legal interests of the petitioner immediately upon approval.²⁰³ This is based on the notion that a law that has yet to come into effect is incapable of causing damage to anyone.²⁰⁴ In this case, the petition of *amparo* must be filed within 30 days from the effective date of the

¹⁹⁸ H. Fix Zamudio, “La Declaración General de Inconstitucionalidad y el Juicio de Amparo” [1971] Boletín Mexicano de Derecho Comparado at 53.

¹⁹⁹ Camargo, *supra* note 137 at 206.

²⁰⁰ *Ibid.*

²⁰¹ Mexican Writ of Amparo, *supra* note 138 at 320.

²⁰² Art. 107 (VII) of the Mexican Constitution, Art.114 (I) & (II) of the Law of Amparo and Art.42 (III) & (IV) of the Organic Law of the Federal Judiciary.

²⁰³ Mexican Writ of Amparo, *supra* note 138 at 321.

²⁰⁴ Mexican Writ of Amparo, *supra* note 138 at 319.

statute.²⁰⁵ Paragraph XII of Article 73 of the Law of *Amparo* also provides for situations whereby petitions are filed after 30 days from the effective date in situations where a law must await an implementation phase before coming into effect.²⁰⁶ In both instances, an action of *amparo* can be filed within a period of 15 days from the date the petitioner first becomes aware that his or her interests are affected by the execution of the law.²⁰⁷ Paragraph XII of Article 73 of the Law of *Amparo* also provides that petitioners will not be considered to have consented to the law if the initiation of an *amparo* against laws occurs on the day they are notified that their ordinary action has been dismissed. This provision applies to an ordinary action that is based on the “legality” or lack thereof of the offending act. In this case, the legislator wished to clarify that ordinary remedial measures revolve around the “legality” of acts and not the “constitutionality” of the law or regulation upon which the acts complained of are based.²⁰⁸

3.3.2.2 Recourse of Unconstitutionality

The second means of challenging the constitutionality of the law is through questioning the legality of the judgment and not the constitutionality of the law itself and is referred to as “Recourse of Unconstitutionality”. The recourse is based on Article 133 of the Mexican Constitution:

This Constitution, the laws of the Congress of the Union that emanate there from and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite

²⁰⁵ Art. 22 (I) of the Law of Amparo.

²⁰⁶ Art. 73 (XII) of the Law of Amparo. See also *supra* note 138 at 321.

²⁰⁷ Art. 21 of the Law of Amparo.

²⁰⁸ Mexican Writ of Amparo, *supra* note 138 at 323.

of any contrary provisions that may appear in the constitutions or laws of the States.²⁰⁹

The petitioner is, in this case, asking the court to determine whether a trial or ordinary appellate decision was based on a constitutionally defective law and infringes Article 133 of the Mexican Constitution. One must note that the petitioner is not asking the court to decide whether the law is actually unconstitutional. The petitioner is requesting that a court recognize that a prior judgment was based on a constitutionally defective law. Although the petition differs from the Action of Unconstitutionality, the results may be the same in that both may lead to declarations of unconstitutionality. The Recourse of Unconstitutionality consists of an analysis of a claim asserting that a judgment was based on a defective law. A judge may order measures to satisfy such valid claim and the proceeding may develop into a declaration of the unconstitutionality of the law impugned. If such is the case, the same analysis given in the context of the Action of Unconstitutionality will apply to the Recourse of Unconstitutionality.

The Recourse of Unconstitutionality is a direct *amparo* proceeding to a collegiate circuit court or to the Supreme Court, provided that the lower court decision was appealed through the normal channels.

3.3.3 Judicial Amparo

The judicial *amparo* or *amparo-casación* is a claim to attack decisions in civil, criminal, administrative and labour matters considered to infringe upon the general principles guaranteed by the Mexican Constitution.²¹⁰ The judicial *amparo* is very similar to the French remedy of “cassation” in that it allows for the review and annulment of all appellate

²⁰⁹ Art. 133 of the Mexican Constitution.

²¹⁰ Camargo, *supra* note 137 at 208.

decisions that are inconsistent with the Mexican Constitution.²¹¹ In this particular function of *amparo*, it is the review of the actual decision that takes place. The analysis is based on whether or not such decision respects the principles enunciated in the Mexican Constitution. If an *amparo* is granted, the judge of the first instance is obliged to promulgate a new decision in accordance with the guidelines established by the Supreme Court or by the collegiate circuit courts.

Judicial *amparo* is expressly recognized in Article 14 of the Mexican Constitution:

No law shall be given retroactive effect to the detriment of any person whatsoever.

No person shall be deprived of life, liberty, property, possessions or rights without a trial by a duly created court in which the essential elements of procedure are observed and in accordance with laws issued prior to the act.

In criminal cases no penalty shall be imposed by mere analogy or by a priori evidence. The penalty must be decreed in a law in every respect applicable to the crime in question.

In civil suits the final sentence shall be according to the letter or the judicial interpretation of the law, in absence of the latter it shall be based on general principles of law.

Judicial *amparo* is based on the principle of “control of legality” or “due process of law” and was created to remedy the lack of confidence in the unbiased action of local tribunals.²¹² For example, judicial *amparo* can be brought against: (1) procedural errors committed during the course of the trial (*errores en procedando*), which deprive the petitioner of an adequate defence; and (2) substantive flaws in the actual judgment.²¹³

²¹¹ Mexican Writ of Amparo, *supra* note 138 at 324.

²¹² H. Fix Zamudio, “Diversos Significados Jurídicos del “Amparo” en el Derecho Iberoamericano” (1967) *Revista de Derecho Agrario* at 536-537.

²¹³ Mexican Writ of Amparo, *supra* note 138 at 324.

Judicial *amparo* is a direct *amparo* procedure and is tried before collegiate circuit courts or the Supreme Court. It will be automatically appealed to the Supreme Court when the subject matter is considered of major social, economic or political importance. It is important to note that procedural errors that have affected the final decision of a court do not usually result in the right to *amparo* unless the procedural errors are so highly prejudicial as to cause irreparable injury to the petitioner or to an affected third party.²¹⁴ In such a case, the *juicio de amparo* will be initiated in the first instance in the federal district court and appealed in the second instance to the collegiate circuit courts.²¹⁵ The appeal is before the collegiate courts to alleviate the Supreme Court's historical backlog.

A judicial *amparo* review of a lower court decision is limited to the analysis of questions of law and whether or not the court applied the law correctly.²¹⁶ *De novo* review of a lower court decision in a judicial *amparo* proceeding is not permitted.²¹⁷ Furthermore, as provided for in the last paragraph of Article 14 of the Mexican Constitution, the final decision shall be in accordance with the letter or judicial interpretation of the law. This principle of strict law must be adhered to in all *amparo* proceedings. As in all other functions of *amparo*, the rule of strict law requires that the *amparo* courts confine their attention to, and make their decisions solely on, questions raised in the petition.²¹⁸ The rule of strict law in civil *amparo* cases is articulated in paragraph II of Article 79 of the Law of *Amparo* which provides that: "the action of *amparo* for inexact application of the law against acts of judicial authorities of the civil order is of strict law and, consequently, the judgment

²¹⁴ *Ibid.*

²¹⁵ Art. 114 (IV) and (V) of the Law of Amparo.

²¹⁶ Mexican Writ of Amparo, *supra* note 138 at 325.

²¹⁷ Art. 78 of the Law of Amparo.

²¹⁸ B. Zagaris, "The Amparo Process in Mexico" (1998) 6 US-Mexico Law Journal 61 at 64.

decreed in it must be directed to the terms of the petition without correcting it or adding anything to it.”²¹⁹

These requirements apply not only to corrective substantive defects but also to correcting errors in citing which constitutional guarantees were violated. Accordingly, a petitioner that demonstrated beyond any doubt that his or her rights had been violated under Article 14 will have his or her action dismissed if a violation of Article 16 was claimed in error instead.²²⁰

Although the principle of strict law is not flexible in judicial *amparo*, paragraph I of Article 79 allows for the correction of such types of errors in all other functions of *amparo*.²²¹ According to Bruce Zagaris, “the application of the rule of strict law or *stricti juris* can result in serious injustices since technical oversights on the part of complainant’s counsel, may require the courts to ignore probable, or even flagrant, illegalities [...]”²²² The rule of strict law in a judicial *amparo* is not only incompatible with the access to justice of the individual litigant but also with the ends customarily pursued in the *juicio de amparo*.

3.3.4 Administrative Amparo

Hector Fix Zamudio opined on the state of administrative law in Mexico in the following terms:

“Because there is no uniform system in Mexican law for challenging administrative actions and decisions, the position of those injured by administrative abuse is uncertain. Some hold that the injured party can find relief before an administrative tribunal, while others perceive his or her only

²¹⁹ *Ibid.*

²²⁰ Zagaris, *supra* note 218 at 65.

²²¹ See generally Burgoa, *supra* note 166.

²²² Zagaris, *supra* note 218 at 65.

recourse as being before the same administrative authority. In any case, the *amparo* is always available as a final remedy.”²²³

The administrative *amparo* is available to protect the interests of private parties against acts of the public administration and administrative authorities.²²⁴ The administrative *amparo* is a function of *amparo* used to test the administrative actions of both state and federal officials. It was inspired by a lack of administrative tribunals with general jurisdiction, the only exception being the District Court for Administrative Matters of Mexico City created in 1971 and only applicable to the Mexico City area.²²⁵ In light of such deficiency, the *amparo* courts assumed a *de facto* role of review of administrative proceedings.

The administrative *amparo* was originally used against acts or resolutions of the public administration, with the exception of acts of decentralised bodies or corporations in which the state is a participant.²²⁶ The history of administrative law in Mexico underwent two specific stages. The first stage saw its influence from Spanish colonial traditions as well as from the public law of the United States²²⁷ and was concerned exclusively with the review of administrative acts and decisions before both federal and state courts. The second stage, which began in 1936, is characterized by the creation of the Federal Fiscal Tribunal (*Tribunal Fiscal de la Federación*), an institution inspired by the French “Conseil d’État”.²²⁸ As discussed in the section on Mexican antidumping and countervailing duty law, the Federal Fiscal Tribunal is an administrative body that was originally responsible for the review of

²²³ Mexican Writ of Amparo, *supra* note 138 at 325.

²²⁴ Camargo, *supra* note 137 at 208.

²²⁵ Mexican Writ of Amparo, *supra* note 138 at 325.

²²⁶ Camargo, *supra* note 137 at 209.

²²⁷ Mexican Writ of Amparo, *supra* note 138 at 325.

²²⁸ *Ibid.* at 326.

financial decisions made at the federal level.²²⁹ Its power to review fiscal matters gradually expanded and, with its Organic Law of 1967, it was mandated to review a much broader subject matter and was granted complete autonomy in rendering its decisions.²³⁰ It then became at that point, an agency of administrative justice or rather an administrative tribunal.

The recourse of administrative *amparo* is available to attack final decisions of the Federal Fiscal Tribunal and other administrative tribunals empowered to decide cases challenging final rulings in fiscal and other administrative matters.²³¹ Administrative tribunals in Mexico now include the Federal Fiscal Tribunal, the District Court for Administrative Matters of Mexico City and other local tribunals fashioned after the Federal Fiscal Tribunal in various states. The administrative *amparo*'s review of the decisions that emanate from these tribunals is similar to the procedure of the judicial *amparo* in that it is tried directly to the collegiate circuit courts or the Supreme Court. However, in cases where administrative tribunals do not have authority to review certain acts of officials, the petitioner will be required to initiate an indirect *amparo* and exhaust all ordinary administrative remedies.²³² In this case, the administrative *amparo* will be tried in the first instance in the federal district court with an option to appeal to the circuit collegiate courts or the Supreme Court depending on the amount in controversy and whether the issue is considered to be of major or national importance.²³³ In both direct and indirect *amparo* proceedings, the Supreme Court jurisdiction extends to all cases in excess of USDS20,000.00 and where the amount in controversy is indiscernible, to cases of national or major importance.²³⁴

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ Art. 22 of the Organic Law of the Federal Judiciary Branch.

²³² Mexican Writ of Amparo, *supra* note 138 at 326.

²³³ *Ibid.*

²³⁴ *Ibid.*

The administrative *amparo* is extremely important for the purpose of this thesis because it is the only mechanism used to test the administrative actions of both state and federal officials. Consequently, a foreign investor aggrieved by an administrative decision emanating from the Federal Fiscal Tribunal, may have recourse to an administrative *amparo*. Similarly, any person aggrieved by an administrative action that accrues to the benefit of a foreigner may rely on the administrative *amparo*.²³⁵

3.3.5 Agrarian Amparo

The agrarian *amparo* is a variation of the administrative *amparo*.²³⁶ It has evolved from the 1963 Reform to the Law of *Amparo* and was created for the sole purpose of establishing special rules to protect groups of organised peasants living under the Mexican communal agrarian property.²³⁷ The 1963 Reform to the Law of *Amparo* was enacted for the benefit of farmers of communal villages singled out by the agrarian reform.²³⁸ The agrarian *amparo* is an exceptional procedure available to people who lack the knowledge and economic means to obtain adequate legal advice. It allows for the filing of grievances before the Secretariat of Agrarian Reform against the federal authorities.²³⁹

The provisions contained in the 1963 Reform to the Law of *Amparo* provide for subsidiary representation in the event a farmer-complainant failed to file the petition for *amparo* within the normal 15-day period.²⁴⁰ The Communal Commissariat (*Ejidat*) will provide for such representation and intervene on behalf of any member of the farming

²³⁵ Zagaris, *supra* note 218 at 66.

²³⁶ Camargo, *supra* note 137 at 209.

²³⁷ *Ibid.*

²³⁸ Mexican Writ of Amparo, *supra* note 138 at 328.

²³⁹ Camargo, *supra* note 137 at 209.

²⁴⁰ Art. 213 (II) of the Law of Amparo.

community in defence of their individual or collective agrarian rights.²⁴¹ In addition, the 1963 Reform to the Law of *Amparo* has removed the formal requirements of the petition for agrarian *amparo*. As long as a petition contains the basic information, the court will correct and complete any omissions *ex officio*. This practice known as “supplying the deficiency of the complaint” (*suplencia de la queja deficiente*) is a useful tool that is far removed from the principle of strict law in judicial *amparo*.²⁴² The principle of “supplying the deficiency of the complaint” instructs the court to correct errors or deficiencies in the petition as well as to obtain necessary facts or evidence not initially provided by the parties.²⁴³

3.4 The Action of *Amparo*

3.4.1 *Parties*

The action of *amparo* is the public right of the injured party to set into motion the courts for the purposes of hearing the particular grievance.²⁴⁴ The action of *amparo* is the pivotal component of the *juicio de amparo* and is the exercise of the right of *amparo* before the courts. The *juicio de amparo* is the more encompassing term and refers to the entire procedure established for the judicial protection of individual rights enunciated in the Mexican Constitution.

The petitioner, respondent authorities, interested third parties, and the Federal Public Minister can all participate in an action of *amparo*. The petitioner or plaintiff is described as the injured party or complainant and is a private person, either an individual or a business entity. The petitioner must be a person that has suffered or is currently suffering from

²⁴¹ Art. 213 (II) of the Law of Amparo.

²⁴² Art. 227 of the Law of Amparo and Art. 107(II) of the Mexican Constitution.

²⁴³ Art. 223 of the Law of Amparo.

²⁴⁴ Burgoa, *supra* note 166 at 325.

personal, immediate and direct injury through an act of public authority.²⁴⁵ Under exceptional circumstances, public agencies may initiate *amparo* actions.²⁴⁶

The defendant in an action of *amparo* is the responsible authority (*autoridades demandadas*) as enunciated in Article 103 of the Mexican Constitution. Article 103 provides that federal courts will resolve all controversies arising out of: (1) laws or acts of the authority that infringe upon the individual guarantees; (2) laws or acts of the federal authority that restrict the sovereignty of the states or the powers of the federal district (Mexico City); and (3) laws or acts of the State authorities that interfere with the powers of the federal authority.²⁴⁷ The responsible authority is the authority accused of infringing upon the petitioner's legal or constitutional rights. The term "responsible authority" is defined in Article 11 of the Law of *Amparo* as an authority that dictates, orders, executes, or intends to execute the law of the act complained of.²⁴⁸ Responsible authorities are usually defined in such a way because they execute and potentially order the act contested in the *juicio de amparo*.²⁴⁹

The injured third party (*tercero perjudicado*) or synonymously the interested person (*interesado*) is a person that possesses an interest in the preservation and perpetration of the act complained of.²⁵⁰ The Law of *Amparo* distinguishes various categories of injured third parties. In civil law matters, the injured third party is, for all intent and purposes, the defendant of the plaintiff in an action of *amparo*.²⁵¹ The judicial *amparo* will thus interpose

²⁴⁵ The *amparo* cannot be sought for "indirect" injuries.

²⁴⁶ Public agencies may bring an action of *amparo* to defend their proprietary interests from acts of governmental authorities taken from *supra* note 138 at 336.

²⁴⁷ Art. 103 of the Mexican Constitution.

²⁴⁸ Art. 11 of the Law of *Amparo*.

²⁴⁹ Art. 11 of the Law of *Amparo*.

²⁵⁰ Mexican Writ of *Amparo*, *supra* note 138 at 337.

²⁵¹ *Ibid.*

third parties as the direct adversaries of the plaintiff even though artificially, it is the court under review that will be listed as the defendant. In administrative cases, third party status is afforded to persons who seek the execution of the administrative act complained of. This particular type of third party is only limited to those that register their support and interest via filings prior to the initiation of the action of *amparo*.²⁵²

The Federal Public Minister can obtain third party status but its intervention must be limited to cases involving the public interest.²⁵³ Nevertheless, the Federal Public Minister will not be authorized to introduce evidence, appeal or initiate any other action, which may be brought by the parties to the *amparo* proceeding.²⁵⁴ The Federal Public Minister is more like an auxiliary to the *amparo* judge in that it is permitted to submit briefs and oversee the progress of the proceeding.²⁵⁵ The Federal Public Minister has also, since the 1976 amendments to the Law of *Amparo*, been granted the right of appeal in situations where it formerly appeared as intervener.²⁵⁶ However, such a power may be void of content since the 1976 amendments to the Law of *Amparo* did not include procedural guidelines in such situations.²⁵⁷

3.4.2 The Concept of Authority

It is important to note that the *juicio de amparo* must always proceed against acts of authorities. “Authority” is defined as an attribute of the government and the persons representing such government, to compel obedience with rules and provisions.²⁵⁸ This power

²⁵² Mexican Writ of Amparo, *supra* note 138 at 338.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ Art. 5(IV) of the Law of Amparo

²⁵⁶ Mexican Writ of Amparo, *supra* note 138 at 339.

²⁵⁷ *Ibid.*

²⁵⁸ Perezcano Diaz, *supra* note 9 at 212.

is not inherent to governments but is also derived from the different institutions that compose life in a society. For example, the institution of the family confers the character of authority to the parents and the religious institutions confer authority to priests or ministers of the cult. Equally speaking, the state confers the character of authority to public servants over private persons.²⁵⁹

Article 39 of the Mexican Constitution provides that national sovereignty essentially and originally resides with the people and all public authority emanates from the people and is created for the benefit of the people.²⁶⁰ Article 41 of the Mexican Constitution also provides that people exercise their sovereignty via the system of division of powers of the Union and the states.²⁶¹ The concept of authority emanates from the exercise of the public power by the different agencies of the State. According to Felipe Tena Ramirez, the only holder of sovereignty is the nation and its people. The original holder of sovereignty made use of this power when it constituted a legally organized State. The sovereign people then formulated their fundamental law called a Constitution which gave rise to the structure of the government, created public powers and gave private persons public rights immune to the invasion of authorities, namely individual guarantees”.²⁶² The leading scholar Ignacio Burgoa also wrote that the term “authority” is defined from a legal perspective, as an agency of the State that forms part of its government and that fulfills special functions on behalf of the State. He then added that the concept of authority, in this case, does not imply a particular power but rather an agency of the State constituted by a person (public employee, corporation or partnership) that accomplishes certain acts in the exercise of the powers of the

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ The Union is composed of the federal legislative, executive and judiciary branches.

²⁶² Tena Ramirez, Felipe, *Derecho constitucional mexicano* (México: Porrúa 1991) at 187-188.

Union pursuant to Article 41 of the Mexican Constitution.²⁶³ Hence, the concept of authority includes any agency or official who disposes of a public power and consequently exercises authority.²⁶⁴ The State creates its own authorities by way of legislative instruments that set the perimeters for the organization, structure and function of such authorities.²⁶⁵ According to Burgoa, what distinguishes authorities for purposes of the *juicio de amparo* from those that are not is in the nature of the function that is exercised. Authorities that serve auxiliary functions will generally not be considered authorities for the purposes of the *juicio de amparo*.²⁶⁶ For example, “authority” excludes decentralised public agencies, even though such agencies sometimes have greater power than other agencies highly dependent on the state or federal government apparatus.²⁶⁷

The Supreme Court also defined the term “authority” in its manual on the *juicio de amparo*. The responsible authority is the party against whom federal judicial protection has been claimed, it is the agency of the State that is part of the government and where the act complained of emanates.²⁶⁸ Mexican case law (*jurisprudencia*) has also defined the term “authorities” for the purposes of the *juicio de amparo*, in the following manner:

“The term “authorities” for the purposes of *amparo* includes all persons that dispose of the public power, whether granted by law or by fact and that are capable of taking part in public acts.”²⁶⁹

The Supreme Court, referring to this binding precedent, clarified that an authority for

²⁶³ Burgoa, *supra* note 166 at 183.

²⁶⁴ Mexican Writ of Amparo, *supra* note 138 at 337.

²⁶⁵ Burgoa, *supra* note 166 at 183.

²⁶⁶ *Ibid.*

²⁶⁷ Mexican Writ of Amparo, *supra* note 138 at 337.

²⁶⁸ Burgoa, *supra* note 166 at 183.

²⁶⁹ Tesis jurisprudencial número 300, Apéndice al *Semanario Judicial de la Federación*, 1917-1988, Segunda parte, 519.

the purposes of the *juicio de amparo* must be a state agency, whether a person, legal entity or partnership, which by means of legal or factual circumstances disposes of public power through public acts.²⁷⁰ The concept of authority for the purposes of the *juicio de amparo* has been the subject of extensive discussions in Mexican case law and doctrinal texts. The Supreme Court, in 1998, considered the jurisprudential definition cited above and amended the definition to say that the criteria that must be used to determine whether the act was committed by an authority for the purposes of *amparo*, is whether such authority had the legal ability to make decisions or resolutions that could unilaterally impact upon the legal rights of the petitioner, and whether such authority was empowered to demand compliance of its decisions either by reason of its own constitution or through the use of other authorities.²⁷¹

The *juicio de amparo* exists to protect individuals from the acts of the State accomplished through an abuse of the exercise of public power and which infringe upon the fundamental rights of persons incorporated in the Mexican Constitution. *Amparo* can only proceed against acts of the State. However, not all acts of the State are acts of authority for the purposes of the *juicio de amparo* even if all acts of authority are imputable to the State. Without a delegation of public power by the State to the authority, Article 103 of the Mexican Constitution and Article 1 of the Law of *Amparo* will not apply and a *juicio de amparo* will not proceed.

The definition of authority for the purposes of the *juicio de amparo* will be central to our argument that the *juicio de amparo* cannot proceed against panels established pursuant to

²⁷⁰ *Semanario Judicial de la Federación*, Parte IX, febrero, tesis 3ª. VII/92 taken from Perezcano Diaz, *supra* note 9 at 214.

²⁷¹ Novena época, instancia: Tribunales Colegiados de Circuito from the *Semanario Judicial de la Federación*, Gaceta, tomo VII, marzo de 1998, tesis XIV, 2º. J/17, p. 621, materia administrativa taken from Perezcano Diaz, *supra* note 9 at 215.

Chapter 19 of the NAFTA.

3.4.3 Direct versus Indirect Amparo

The proceedings in an action of *amparo* are in writing without oral presentations and can follow two distinct paths depending on the nature of the original decision. If, after having exhausted all legal remedies, the affected person obtains the decision of a court (state or federal) or an administrative tribunal, the available remedy will be called direct *amparo* because it will be brought directly to the collegiate circuit courts or the Supreme Court.²⁷² Conversely, in all acts not subject to a decision of a court or administrative tribunal, the *amparo* will be indirect in that the affected party will have to first bring the action in the federal district court and subsequently request an appeal to the Supreme Court.²⁷³ The path taken will depend on the particular function of *amparo*.

The single instance or direct *amparo*, must be brought directly before the Supreme Court or the nearest collegiate circuit court. The instance that rendered the contested judgment must be listed as the respondent.²⁷⁴ The presiding judge of the reviewing court will then examine the petition to ensure admissibility and conformity with form and content requirements.²⁷⁵ If the petition is admissible, the Federal Minister is invited to present a written brief.²⁷⁶ Articles 158, 159, 160 and 161 of the Law of *Amparo* expressly provide for direct *amparo* situations.²⁷⁷ As mentioned earlier, direct *amparo* is available when *amparo* fulfills the functions of *amparo libertad*, Recourse of Unconstitutionality in *amparo* against

²⁷² L. Cabrera and W.C. Headrick, "Notes on Judicial Review in Mexico and the United States" (1963) 5 Inter-American Law Review 253 at 260.

²⁷³ *Ibid.*

²⁷⁴ Mexican Writ of Amparo, *supra* note 138 at 331.

²⁷⁵ Arts. 177 and 178 Law of Amparo.

²⁷⁶ Mexican Writ of Amparo, *supra* note 138 at 331.

²⁷⁷ R. Gómez Piedra, "Síntesis de la genesis del amparo" (1996) 8 Nueva Epoca 63 at 91.

laws, judicial *amparo* and administrative *amparo* against decisions from administrative tribunals.

The double instance or indirect *amparo* is tried in the first instance before a federal district judge.²⁷⁸ The proceeding is characterized by oral communication, brevity and procedural efficiency. The judge will determine if the petition has been filed properly before soliciting an answer from the respondent authorities.²⁷⁹ The answer from the respondent authorities must be filed within 5 days. The failure to respond will constitute an admission of the act complained of, a practice similar to the defence at common law.²⁸⁰ Furthermore, all interested third parties must be notified of the petition and answer.²⁸¹ Once the petition is filed, the judge will set a date for the public hearing and the parties will be asked to submit evidence and written briefs.²⁸² In some instances, an opinion by the Federal Public Minister will also be submitted.²⁸³ At the conclusion of the proceeding, the court will render a final judgment, which may be appealed to the Supreme Court or the appropriate collegiate circuit court.²⁸⁴

Article 114 of the Law of *Amparo* outlines six situations where indirect *amparo* applies. The indirect *amparo* will apply: (1) for an Action of Unconstitutionality of the *amparo* against laws; (2) for administrative *amparo* for acts of the public administration not subject to a decision by an administrative tribunal; (3) against acts outside of judicial proceedings or after a decision has been rendered; (4) against acts for which it is impossible

²⁷⁸ Mexican Writ of Amparo, *supra* note 138 at 329.

²⁷⁹ Art. 147 of the Law of Amparo.

²⁸⁰ Mexican Writ of Amparo, *supra* note 138 at 330.

²⁸¹ Art. 147 of the Law of Amparo.

²⁸² Art. 154 of the Law of Amparo.

²⁸³ Art. 155 of the Law of Amparo.

²⁸⁴ Mexican Writ of Amparo, *supra* note 138 at 330.

to seek proper redress within the same legal proceeding; (5) against acts which took place during and outside a judicial proceeding and which adversely affect the rights of third parties; and (6) against laws or actions which overlap into federal or state powers.²⁸⁵

The procedure before the Supreme Court in both direct (*juicio de amparo* proceeding) and indirect *amparo* (appeal of an *amparo* judgment in the federal district court) will be as follows: once the *juicio de amparo* or appeal is filed, the presiding judge will examine the petition for its admissibility and regularity of form.²⁸⁶ If the petition for review is granted, each party, including the Public Minister, will be given 10 days to submit written briefs.²⁸⁷ The case will then be assigned to a judge or a minister (*ministro*) who will be responsible for drafting an opinion (*proyecto de sentencia* or *ponencia*) within 30 days.²⁸⁸ The draft opinion is then circulated to the members of the plenary Court of one of the specialized chambers of the Supreme Court, depending on the issue under review.²⁸⁹ The draft is discussed and voted on in a public hearing.²⁹⁰ If the draft opinion is not accepted unanimously, a justice for the majority will write the corresponding reasons²⁹¹ and dissenting opinions (*votos particulares*) will accompany the court's final disposition of the case.²⁹²

In collegiate circuit courts, appeal of *amparo* judgments or direct *juicio de amparo* proceedings are received in the same manner, except that the period for writing the *ponencia*

²⁸⁵ Gómez Piedra, *supra* note 277 at 91.

²⁸⁶ Mexican Writ of Amparo, *supra* note 138 at 330.

²⁸⁷ Art. 90 of the Law of Amparo.

²⁸⁸ Art. 182 of the Law of Amparo.

²⁸⁹ Mexican Writ of Amparo, *supra* note 138 at 330.

²⁹⁰ Art. 186 of the Law of Amparo. This practice, which is peculiar to the Mexican Supreme Court, has attracted the attention of foreign scholars who find it strange that the hearing excludes the litigants from participation in the final deliberations, and leaves only debate among the judges.

²⁹¹ Art. 188 of the Law of Amparo.

²⁹² Mexican Writ of Amparo, *supra* note 138 at 330.

is much shorter (15 days) and there is no public discussion of the draft opinion or final judgment.²⁹³

3.4.4 Structure of the Courts of Amparo in Mexico

Article 103 of the Mexican Constitution provides that federal courts will resolve all controversies arising out of: (1) laws or acts of the authority that infringe upon the individual guarantees; (2) laws or acts of the federal authority that restrict the sovereignty of the states or the scope of the powers of the federal district (Mexico City); and (3) laws or acts of the state authority that interfere with the powers of the federal authority. Given that Article 103 was promulgated in 1917, practical difficulties have developed over time. For example, the concentration of *amparo* cases to the federal courts, as provided for in Article 103 of the Mexican Constitution, has resulted in a tremendous backlog in the federal courts, and more particularly at the Supreme Court level.²⁹⁴ To remedy the situation, the 1951 amendments to the Law of *Amparo* created the collegiate circuit courts modeled after the circuit courts of appeal of the United States.²⁹⁵ The collegiate circuit courts are mandated to assist the Supreme Court in its jurisdiction over *amparo* proceedings sending only cases of major importance to the Supreme Court.²⁹⁶

The Supreme Court, collegiate circuit courts and federal district courts are the principle tribunals in actions of *amparo*.²⁹⁷ In addition, state courts may act as auxiliaries to the federal courts in certain types of emergency cases.²⁹⁸ Furthermore, the Supreme Court

²⁹³ Art. 184 of the Law of Amparo.

²⁹⁴ Mexican Writ of Amparo, *supra* note 138 at 316.

²⁹⁵ *Ibid.*

²⁹⁶ Baker, *supra* note 150 at 76-78.

²⁹⁷ Mexican Writ of Amparo, *supra* note 138 at 333.

²⁹⁸ *Ibid.*

and the collegiate circuit courts have developed guidelines to improve their effectiveness. These have gradually become part of the governing statutes of the *juicio de amparo*.²⁹⁹

3.4.4.1 Supreme Court and the Concept of *Jurisprudencia*

On January 1, 1995, Federal Congress adopted measures to transform the organization and powers of the federal judiciary. The first reform broadened the Supreme Court's authority to resolve constitutional controversies between federal, state and municipal governments. The second reform established the Council of the Federal Judiciary (*Consejo de la Judicatura Federal*). The Council of the Federal Judiciary is responsible for the governance and administration of all federal courts, except for the Supreme Court and is in charge of the appointment of circuit, federal and state judges by way of a competitive selection process.³⁰⁰

The Supreme Court is the highest court of the nation and the uppermost reviewing authority in the federal judiciary. The Supreme Court has jurisdiction to review ordinary appeals involving questions of federal law and *amparo* cases. The Court is divided into four chambers or *salas* each with a particular expertise namely penal, administrative, civil and labour.³⁰¹ Each chamber has five judges (*ministros*) although four will constitute quorum for each chamber.³⁰² The plenary is comprised of the President (equivalent to the Chief Justice) and all other justices (*ministros*) with the exception of interim judges.³⁰³ The plenary Court has a quorum of fifteen justices.³⁰⁴

²⁹⁹ Baker, *supra* note 150 at 233-38.

³⁰⁰ H. Fix Fierro, "Judicial Reform and the Supreme Court of Mexico: The Trajectory of Three Years" (1998) 6 US-Mexico Law Journal 1 at 1.

³⁰¹ Mexican Writ of Amparo, *supra* note 138 at 333.

³⁰² Art. 15 of the Organic Law of the Federal Judiciary.

³⁰³ Mexican Writ of Amparo, *supra* note 138 at 333.

³⁰⁴ Art. 3 of the Organic Law of the Federal Judiciary.

Supreme Court justices are appointed by the President of the Republic and approved by Senate.³⁰⁵ The Senate has consistently given automatic approval to presidential nominees but this practice has come under scrutiny in the last few years and may change as a result of the current government.

Although Mexican law has no equivalent to the common law rule of *stare decisis*, the Supreme Court and the collegiate circuit courts are nevertheless authorized to issue *jurisprudencia* that applies to all federal courts, state courts, and administrative tribunals.³⁰⁶ The concept of *jurisprudencia* is unique in North America with its origins going back to the Federal Code of Civil Procedure of 1908.³⁰⁷ The concept of *jurisprudencia* was elevated to constitutional status in the 1951 amendments to the Mexican Constitution.³⁰⁸

The Supreme Court and the collegiate circuit courts will issue *jurisprudencia* by holding the same point of law in five consecutive judgments or theses.³⁰⁹ In the Supreme Court, such decisions will require a majority of fourteen justices at plenary session or four justices in each of the four specialized chambers.³¹⁰

3.4.4.2 Collegiate Circuit Courts

The collegiate circuit courts were created by the 1951 Reforms of the Law of *Amparo* for the express purpose of assisting the Supreme Court in the review of *amparo* cases.³¹¹ Pursuant to Article 97 of the Law of *Amparo*, the Council of the Federal Judiciary appoints circuit judges for a six-year term.

³⁰⁵ Art. 96 of the Mexican Constitution.

³⁰⁶ Mexican Writ of Amparo, *supra* note 138 at 346.

³⁰⁷ *Ibid.*

³⁰⁸ Baker, *supra* note 150 at 351-66.

³⁰⁹ Mexican Writ of Amparo, *supra* note 138 at 347.

³¹⁰ *Ibid.*

³¹¹ Mexican Writ of Amparo, *supra* note 138 at 334.

All collegiate circuit courts in Mexico have general *amparo* jurisdiction and hear both direct and indirect *amparo* cases.³¹² Subject-matter jurisdiction is limited to issues considered to be of minor national importance although specific jurisdictional guidelines exist. In both direct and indirect *amparo*, decisions of the collegiate tribunals are *res judicata* unless the decisions involve an interpretation on the constitutionality of federal or state laws as well as international treaties. In such cases, the Supreme Court will retain the right to review the decisions of the collegiate circuit courts.³¹³

3.4.4.3 Federal District Courts

The federal district courts are comprised of one judge that presides and exercises jurisdiction over *amparo* cases and federally regulated criminal matters.³¹⁴ Federal district courts also have jurisdiction over civil cases and administrative law disputes.³¹⁵ It is also important to note that, at the request of a petitioner, federal district courts can share jurisdiction with state courts in the enforcement of federal laws and international treaties that affect the legal interests of private citizens.³¹⁶

As previously mentioned in the section on administrative *amparo*, federal district courts review indirect *amparo* cases relating to the administrative acts of state and federal authorities that cannot be remedied through administrative tribunals.³¹⁷ In addition, federal district courts also hear initial challenges of unconstitutional laws, procedural errors and

³¹² *Ibid.*

³¹³ Arts. 83 (V) & 84(II) of the Law of Amparo.

³¹⁴ Mexican Writ of Amparo, *supra* note 138 at 335.

³¹⁵ *Ibid.*

³¹⁶ Ordinary appeals of federal court decisions, as opposed to *amparo* appeals are brought from the federal district courts to a separate system of appellate courts called the unitary circuit courts. The ordinary appeals are to be distinguished from the appellate body for *amparo* cases, the collegiate circuit courts.

³¹⁷ Mexican Writ of Amparo, *supra* note 138 at 335.

infringements relating to the constitutional separation of powers between state and federal governments.³¹⁸

3.4.4.4 State Courts

State judges serve as auxiliaries to the federal judiciary in *amparo* proceedings under three special circumstances: (1) when the petition alleges acts that threaten physical well-being and life or personal liberty outside a judicial proceeding and a federal district judge is unavailable; (2) when collective agrarian rights are at issue and a federal district judge is unavailable; and (3) where certain actions in criminal matters are challenged, such as an invalid arrest warrant or a service of process, the aggrieved party may select *amparo* relief in a federal district court or in a state court of appeal immediately above the court rendering judgment.³¹⁹ If the state court takes jurisdiction in an *amparo* proceeding, it will proceed in the same manner as a federal district court.³²⁰

3.4.5 Interim Measures

3.4.5.1 Injunctive Remedies

The *amparo* process contains a remedy called “suspension of the act complained of” (*suspensión de los actos reclamados*) which enjoins or suspends the actions of the respondent authority.³²¹ The purpose of this injunctive measure is to avoid the infliction of irreparable harm and to preserve the rights of the petitioner until a final decision is rendered.³²²

³¹⁸ Art. 114 of the Law of Amparo.

³¹⁹ Mexican Writ of Amparo, *supra* note 138 at 336.

³²⁰ Art. 37 of the Law of Amparo.

³²¹ Mexican Writ of Amparo, *supra* note 138 at 339.

³²² *Ibid.*

Injunctive measures are divided into two categories: (1) suspensions sought at the same time as an indirect *amparo*; and (2) injunctive relief to stay the execution of a judgment before the court of first instance.³²³

In the first category, given that the relief is brought during an indirect *amparo* case, the injunctive measure will be filed in the first instance in the federal district court with a possibility of review before a collegiate circuit court.³²⁴ An action called an “official suspension” may be ordered *ex officio* upon threat of death, deportation or other acts prescribed by Article 22 of the Mexican Constitution.³²⁵ An official suspension may also be ordered under more general circumstances when the act complained of threatens irreparable injury.³²⁶ A “normal suspension” can also be granted when the injured party directly petitions the judge and lists all responsible parties. Both official and normal suspensions, although final, may be granted provisionally when the commission of the act complained of is imminent and when the damages are likely to be irreparable.³²⁷ The “provisional suspension” will be in effect until a full evidentiary hearing determines whether the suspension should be granted permanently (*suspensión definitiva*) or dissolved.³²⁸ The provisional suspension resembles the preliminary injunction in Canada and the United States.

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ Art. 123(I) of the Law of Amparo. Art. 22 of the Mexican Constitution provides as follows: Punishment by mutilation and infamy, branding, flogging, beating with sticks, torture of any kind, excessive fines, confiscation of property and any other unusual or overwhelming penalties are prohibited. Attachment proceedings covering the whole or part of the property of a person made under judicial authority to cover payment of civil liability arising out of the commission of an offence or to meet taxes or fines shall not be deemed a confiscation of property. Capital punishment for political offences is likewise forbidden, as regards to other offences, it can only be imposed for high treason committed during a foreign war, parricide, murder with malice aforethought, arson, abduction, highway robbery, piracy and grave military offences in Mexican Writ of Amparo, *supra* note 138 at 343.

³²⁶ Mexican Writ of Amparo, *supra* note 138 at 339.

³²⁷ Mexican Writ of Amparo, *supra* note 138 at 340.

³²⁸ Mexican Writ of Amparo, *supra* note 138 at 341.

These types of suspensions are of major importance in the *amparo* process because they seek to preserve the rights and interests of the plaintiff as well as the onset of further injury. The court also in charge of the indirect *amparo* may alter the remedy at any time to fit the particular circumstances. All suspensions issued may be appealed to the collegiate circuit courts.³²⁹

In the second category, the injunctive relief seeks to stay the execution of a judgment.³³⁰ The procedure is filed directly with the judge rendering the first instance decision³³¹ and the ruling on the request for a stay of execution can be appealed to the collegiate circuit courts or the Supreme Court by way of a complaint.³³² Interestingly enough, the complainant is requesting relief from the offending judge of the first instance.

3.4.5.2 Procedural Inactivity and Termination

Amparo proceedings are generally in writing and unlike the common law, there is no tradition of oral argument. The backlog of *amparo* actions challenging lower court judgments, administrative abuses and, more recently, the constitutionality of laws has resulted in the introduction of a sanction called “Procedural Inactivity”. Procedural Inactivity is imposed on petitioners who periodically fail to renew their claims.³³³ The sanction results in the discontinuance or termination of the action without adjudication on the merits. Discontinuance invalidates the entire proceeding and brings back the complainant to

³²⁹ Art. 139 of the Law of Amparo.

³³⁰ Mexican Writ of Amparo, *supra* note 138 at 341.

³³¹ *Ibid.*

³³² Art. 95 (VIII) of the Law of Amparo.

³³³ Mexican Writ of Amparo, *supra* note 138 at 331.

its original position before the action commenced.³³⁴ By contrast, termination operates explicitly to affirm the lower court judgment.³³⁵

Paragraph V of Article 74 of the Law of *Amparo* also provides that *amparo* actions in civil and administrative matters will be discontinued if, in the first instance, either in an indirect or direct *amparo*, the petitioner fails to reactivate his or her case within 300 days of the initial filing or of any prior request. This procedure is similar to the doctrine of laches at common law. Paragraph V of Article 74 of the Law of *Amparo* also requires that parties to an *amparo* proceeding notify the court when the proceeding is abandoned voluntarily.

3.5 Decisions

An *amparo* decision may grant or deny protection or dismiss altogether the action for lack of sufficient substance on the merits. The rejection of an action means that the act complained of was legal or constitutional whereas the dismissal of an action confirms that the petition cannot be resolved on the basis of the arguments or facts presented. Where a decision grants relief to the plaintiff, it will be called a decision of nullity (*fallo de nulidad*) and will be strictly limited to the immediate parties to the action.³³⁶ In addition to the effects of nullity, *amparo* also has the quality of *mandamus* in that it will instruct the respondents to restore the state of affairs before the violation.³³⁷ It will direct the respondent official to comply with the statutory, regulatory, or constitutional requirements of due process.³³⁸ In this respect, the *amparo* order is similar to the mandatory injunction and the writ of *mandamus* at common law.

³³⁴ Mexican Writ of Amparo, *supra* note 138 at 332.

³³⁵ *Ibid.*

³³⁶ Mexican Writ of Amparo, *supra* note 138 at 344.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

3.5.1 Supplying the Deficiency of the Complaint

Another aspect of *amparo* that has a direct impact on the final decision is the concept of “supplying the deficiency of the complaint” by the judge *ex officio*. If deficiencies are discovered, the judge has the power and sometimes the duty to correct any such omissions.³³⁹ However, the judicial obligation to correct deficiencies in the pleadings only applies to criminal matters before the Supreme Court, litigants in labour disputes, collective and individual actions of farmers in the context of the agrarian *amparo*, minors, and mentally challenged persons.³⁴⁰

Although the principle of strict law is still present in *amparo* proceedings involving parties that are not targeted by the remedial action of “supplying the deficiency of the complaint”, the remedial practice has been somewhat extended to other realms.³⁴¹

3.5.2 Enforcement

A fundamental characteristic of *amparo* is that it can only be enforced against responsible authorities and not private individuals. There are strict requirements contained in the Law of *Amparo* for the enforcement of *amparo* judgments. The *amparo* judge is required to supervise compliance within 24 hours of notice of the decision, although the nature of the act complained of or the inability of the official to comply immediately may prolong that deadline.³⁴² The *amparo* court is empowered to request compliance with the order from the immediate superiors of the respondent authorities if the latter refuses to execute the decree.³⁴³ According to Supreme Court precedent, authorities directly involved in the act complained

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² Arts 104 and 105 of the Law of Amparo.

³⁴³ Art. 105 of the Law of Amparo.

of, as well as all other individuals who, by virtue of their official capacity, participate in the execution of the act, must comply.³⁴⁴ Continued failure to comply, obstruction of compliance, or repetition of the act complained of, authorises the petitioner of the *amparo* to file a complaint before the plenary Supreme Court *en banc*.³⁴⁵ If the complaint is justified, the plenary Supreme Court will direct the official to execute the court order under penalty of dismissal and criminal prosecution.³⁴⁶ Furthermore, the Law of *Amparo* provides that an *amparo* judge or any judge appointed by the relevant collegiate circuit court may direct the execution of the judgment.³⁴⁷ For example, the judge may supervise the execution of the order if the *amparo* has ordered the immediate release of a petitioner incarcerated on criminal charges.³⁴⁸

As discussed earlier, when an *amparo* judgment decrees a law unconstitutional in an *amparo* against laws, Action of Unconstitutionality, the petitioner is the only one protected against the application of the impugned law by the respondent officials named in the complaint.³⁴⁹ In judicial *amparo* judgments, the *amparo* court will direct the respondent judge to reinstate the procedural safeguards violated or to issue another judgment consistent with the *amparo* ruling.³⁵⁰

3.6 Appeals

An appeal is an ordinary remedy available to a private person and characterized by a request to the superior court to modify the decision of the lower court. The Law of *Amparo*

³⁴⁴ Mexican Writ of Amparo, *supra* note 138 at 345.

³⁴⁵ *Ibid.*

³⁴⁶ Arts. 105 and 106 of the Law of Amparo.

³⁴⁷ Mexican Writ of Amparo, *supra* note 138 at 346.

³⁴⁸ *Ibid.*

³⁴⁹ Mexican Writ of Amparo, *supra* note 138 at 345.

³⁵⁰ *Ibid.*

provides for three means of appealing *amparo* judgments: (1) the review (*revisión*); (2) the complaint (*queja*); and (3) the reclamation (*reclamación*). The appeal by review usually lies against decisions of first instance and crucial decisions on *amparo* petitions such as the rejection of the petition or the dismissal of the action without a hearing. The Supreme Court may also hear appeals by review in criminal cases involving acts in violation of the fundamental protections of Article 22 of the Mexican Constitution.³⁵¹ All appeals by review not heard by the Supreme Court are heard by the collegiate circuit courts.³⁵²

The appeal by complaint is available against judicial error not ordinarily subject to review. Appeals by complaint include, among others, procedural errors made during the course of the trial that are not reflected in the final judgment that grants or denies *amparo*, and judicial errors that may have occurred during the course of an appeal by review.³⁵³ Appeals by complaint are also available against responsible authorities that have failed to comply with provisional or final (official or normal) suspensions issued by federal district courts.³⁵⁴

The appeal of reclamation may be brought against the President of the Supreme Court or any of the individual chambers or collegiate circuit courts for errors in the procedure and

³⁵¹ Art. 22 of the Mexican Constitution: Punishment by mutilation and infamy, branding, flogging, beating with sticks, torture of any kind, excessive fines, confiscation of property and any other unusual or overwhelming penalties are prohibited. Attachment proceedings covering the whole or part of the property of a person made under judicial authority to cover payment of civil liability arising out of the commission of an offence or to meet taxes or fines shall not be deemed a confiscation of property. Capital punishment for political offences is likewise forbidden, as regards to other offences, it can only be imposed for high treason committed during a foreign war, parricide, murder with malice aforethought, arson, abduction, highway robbery, piracy and grave military offences in Mexican Writ of Amparo, *supra* note 138 at 343.

³⁵² Mexican Writ of Amparo, *supra* note 138 at 343.

³⁵³ Art. 95(VI) and (VIII) of the Law of Amparo.

³⁵⁴ Art. 95(II), (IV) and (IX) of the Law of Amparo.

assignment of *amparo* cases. The appeal of reclamation is heard before the plenary Supreme Court or the court above the lower court subject to the review.³⁵⁵

4. THE INTERACTION OF THE *JUICIO DE AMPARO* WITH THE BINATIONAL PANELS OF CHAPTER 19 OF THE NAFTA

4.1 The Establishment of a Panel and the Exhaustion of Local Remedies

As previously discussed in Chapter 2, the interested party wishing to challenge a final determination of the Ministry of Economy through the domestic channel is first required to use the revocation action. The interested party must first make use of the revocation action before resorting to the domestic judicial review remedies of nullification and ultimately the *juicio de amparo*. We have just seen, in Chapter 3, that the *juicio de amparo* is a constitutional remedy available in Mexico that not only encompasses the features of an ordinary appeal and judicial review but that also resembles in other respects the extraordinary writs of prohibition, *certiorari*, injunction, and *habeas corpus*.³⁵⁶ The application of the *juicio de amparo* is far-reaching and is meant to protect private persons against laws and acts of the authorities that infringe upon specific rights contained in the Mexican Constitution. In antidumping and countervailing duty cases, the *juicio de amparo* is the last resort of a private party after judicial review (nullification) by the Federal Fiscal Tribunal. Article 1 of the Law of *Amparo* provides that the purpose of this process is to: (1) resolve controversies arising

³⁵⁵ Mexican Writ of Amparo, *supra* note 138 at 343.

³⁵⁶ L. Péreznieto, "Dispute Resolution in NAFTA: A Comparative and Sectorial Review" in Boris Kozolchik Editor, *Toward Seamless Borders Vol. 1, Making Free Trade Work in the Americas* (Tucson: The National Law Center for Inter-American Trade: 1993) at 685.

out of statutes or acts of authorities that violate the constitutional rights of individuals; (2) statutes or federal acts of authorities that violate the sovereignty of the member states of the Federal Union; and (3) statutes or acts of state authorities that interfere with the federal authorities' scope.³⁵⁷ It is also important to keep in mind that following the issuance of a final determination an interested party can also opt out of the domestic channels of review and select other remedies of an international nature to which Mexico is a party.³⁵⁸

For example, the GATT/WTO provides substantive obligations with regard to dumping and countervailing duties. The GATT/WTO implementing legislation includes several codes that set forth the specific guidelines and rules to be followed in antidumping and subsidies investigation. As a member of WTO, Mexico's foreign trade law regime must comply with the various GATT/WTO obligations. Furthermore, pursuant to the *Understanding of Rules and Procedures Governing the Settlement of Disputes* (the "WTO Dispute Settlement Understanding"), which came into force in January of 1995, WTO member governments have the ability to bring a supranational challenge against the Ministry of Economy's decision.³⁵⁹ In contrast with the NAFTA, the GATT/WTO contains substantive antidumping and countervailing duty provisions. A panel established pursuant to the WTO Dispute Settlement Understanding is only required to determine if antidumping and countervailing duty decisions are consistent with GATT/WTO substantive provisions. Such a panel is not concerned with domestic judicial review criteria.

The NAFTA, on the other hand, replaces domestic judicial review with an ad hoc mechanism that applies the standard of review of each of the Parties. Under the WTO

³⁵⁷ Art. 1 of the Law of Amparo translated in Cavazos Villanueva, *supra* note 4 at 127.

³⁵⁸ Torres Landa, *supra* note 62 at 230.

³⁵⁹ Dispute Settlement Understanding - Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Marrakech, April 15, 1994.

Dispute Settlement Understanding, private persons do not have standing before the WTO dispute settlement body. Private persons may request the institution of WTO proceedings from their government, however the decision rests with the government of the interested party as to whether WTO proceedings should be instituted. Once the mechanism is commenced, non-governmental parties have a very limited role. The focus of the WTO at this stage is government-to-government conciliation. This feature contrasts with NAFTA where the participation of private persons is permitted if not encouraged.

The remainder of this thesis will focus on the international remedy articulated in Chapter 19 of the NAFTA and its confrontational relationship with the domestic judicial review remedy of the *juicio de amparo*. It is important to emphasize that, as mentioned above, Mexico is signatory to other trade agreements that incorporate similar mechanisms. However, such agreements will not form part of our discussion.

As discussed in Chapter 2 of this thesis, an interested party can request a review of the final determination using the dispute settlement mechanism of Chapter 19 of the NAFTA. This international remedy is exclusively available for 30 days after the issuance of the final determination after which time a request for an administrative appeal (revocation) and judicial review (nullification) can be made.³⁶⁰ Chapter 19 of the NAFTA sets forth an alternative dispute settlement mechanism whereby final determinations issued by the Ministry of Economy regarding antidumping and countervailing duty law are reviewed by a panel empowered to examine the legality of such resolutions in the same manner as the Federal Fiscal Tribunal. The Chapter 19 panel effectively replaces the domestic judicial

³⁶⁰ Art. 1904(4) of the NAFTA.

review that would otherwise apply with international review panels composed of experts from the two countries.

In accordance with Chapter 19 of the NAFTA, Article 97 (I) of the Foreign Trade Act explicitly precludes the administrative appeal of revocation and the judicial review proceeding of nullification upon a request for the establishment of a binational panel. However, there is no mention in Article 97 of the Foreign Trade Act or in any other statutes, including the Mexican Constitution, of a provision depriving private persons of their constitutional right to protect their individual guarantees pursuant to a *juicio de amparo* and more particularly, when a Chapter 19 panel is constituted.³⁶¹ As a result of such uncertainty, the possibility that the *juicio de amparo* may apply to the decisions of the panel is not a ludicrous one. As we will see later, in examining such possibility, one must examine whether panels are considered authorities for the purposes of the *juicio de amparo*.

After the issuance of a final determination, an interested party will decide whether it would like to challenge the decision through domestic or international means. Pursuant to Article 97 of the Foreign Trade Act and Article 1904(11) of the NAFTA, a party that elects to use the dispute settlement mechanism of NAFTA, within the 30-day period, cannot resort to the review mechanisms provided by domestic laws, namely the administrative appeal of the revocation action and the judicial review of nullification. Articles 97 and 98 of the Foreign Trade Act were implemented in response to Article 1904(15)(c) of the NAFTA. Article 1904(15)(c) provides that each Party shall amend its statutes or regulations to ensure that domestic procedures for judicial review of a final determination are not to be

³⁶¹ Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System: Policy and Legal Implications, as well as Practical Business Risks and Realities, for United States Exporters to Mexico in the Era of the North American Free Trade Agreement" (1994) 25 ST. MARY'S L.J. 885 at 897. See generally arts. 103 and 107 of the Mexican Constitution.

commenced until the 30-day period for the request of a panel expires. Article 1904(15) also provides that as a prerequisite to commencing domestic judicial review proceedings, a Party or other person intending to commence such procedures, shall provide notice of such intent to the Parties concerned and to other persons entitled to commence such review procedures of the same final determination, no later than 10 days prior to the latest date on which a panel may be requested.

Chapter 19 panels are aimed at effectively replacing the judicial review that would otherwise apply in domestic courts. As a result, many authors feel that the success of Chapter 19 depends on compliance with prohibiting domestic judicial review once a panel is constituted as set out in Article 1904(11) of NAFTA. Common sense would dictate compliance with such a rule in order to avoid having decisions that conflict with one another and ultimately impede on the efficient flow of trade. However, the prohibition to resort to domestic remedies immediately after the issuance of a final determination and for a period of 30 days thereafter is more problematic. In fact, private persons wishing to resort to the domestic courts must wait and see whether their adverse party will resort to Chapter 19 of the NAFTA. During that time, an interested party is inhibited from engaging in Mexican judicial review proceedings because Chapter 19 of the NAFTA is given priority and this, even if no panels have yet to be established. This situation causes grave constitutional concerns in Mexico.

A question arises: does the elimination of the right of judicial review, in the foregoing situation, violate the Mexican Constitution? The problem may be illustrated with the following example: in concluding an antidumping investigation, the Ministry of Economy establishes antidumping duties on avocados imported from the United States. The relevant

Mexican industry is dissatisfied with the decision from the Ministry of Economy because it believes that the antidumping duties imposed on the American avocados are too low and should be higher. As a result, it decides to initiate a procedure for domestic judicial review. However, as stated above, Article 1904(15) of the NAFTA prohibits the Mexican industry from exercising its right for a period of 30 days following the date of publication of the final determination. In addition, such right is contingent on whether or not the other interested parties will request the establishment of a panel pursuant to Chapter 19. If the foreign exporter, adverse in interest to the Mexican industry, requests a panel review during the 30 day-period, the Mexican industry will automatically lose, against its will, its constitutional right to challenge the Ministry of Economy's determination by means of domestic judicial review.

Some authors have claimed that the Mexican industry's prohibition to resort to domestic channels of review and the option of a foreign exporter to forego the domestic judicial review proceedings frustrates one of the aspects of the Calvo doctrine, contained in Article 27 of the Mexican Constitution and specified in both customary international law and conventional law. The Calvo doctrine arose as a result of abuses by foreign investors in Latin American countries where certain diplomatic protections had been accorded to foreign investment. Such doctrine called for the elimination of any and all preferential treatment of foreign investors and their investments in Latin America. The Calvo doctrine also required that a foreigner exhaust all local legal avenues as a prerequisite to pursuing international remedies against the host-state. This principle was eventually recognised by customary international law.

Argentine jurist Carlos Calvo fashioned the Calvo doctrine in 1870.³⁶² Article 27(I)

of the Mexican Constitution incorporated the Calvo doctrine in the following terms:

Only Mexicans by birth or naturalization have the right to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for the exploitation of mines or waters. The State may grant the same right to foreigners, provided they agree before the Ministry of Foreign Relations to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto; under penalty, in case of non compliance with this agreement, of forfeiture of the property acquired to the Nation.³⁶³ [emphasis added]

One of the distinctive notes of Article 27 of the Mexican Constitution is that foreigners are given the same rights as Mexicans with regards to the acquisition of certain types of assets and are required to abide like Mexican nationals to the laws and courts of Mexico.³⁶⁴ All individuals, whether national or foreign, enjoy the guarantees of the Mexican Constitution but in return they must obey Mexico's laws and submit such laws for review to its courts.³⁶⁵ The rule contained in Article 27 of the Mexican Constitution presupposes the availability and existence of a national jurisdiction able to settle conflicts originating within its borders and relate to the matters regulated by that norm.³⁶⁶ This is similar to the general legal principle instituting the exhaustion of local remedies as the primary route to resolve the legal differences concerning a foreigner.³⁶⁷ The rule mandating the exhaustion of local remedies or the Calvo doctrine has undergone tests of its validity and durability. However, despite attempts to scrutinize it, the general consensus of the international legal community is

³⁶² Sepúlveda Amor, *supra* note 20 at 581.

³⁶³ Art. 27(I) of the Mexican Constitution.

³⁶⁴ Sepúlveda Amor, *supra* note 20 at 582.

³⁶⁵ Art. 33 of the Mexican Constitution.

³⁶⁶ Sepúlveda Amor, *supra* note 20 at 582.

³⁶⁷ *Ibid.*

that such rule is still a customary norm of international law as well as an element of all international treaties signed by Mexico.³⁶⁸

Several authors have cautioned that the signing of a treaty such as NAFTA, creating an international process for dispute resolution, does not entail an automatic and tacit renunciation of a state's requirements to honour the rule of exhaustion of local remedies.³⁶⁹ However, the rule of exhaustion of local remedies will not be effective if a state waives, in an international juridical instrument, the imperative of exhausting the domestic proceedings.³⁷⁰ This is what has occurred in the context of Chapter 19 of the NAFTA and more particularly in paragraphs (11) and (15)(c) of Article 1904 of the NAFTA. Mexico decided unequivocally to satisfy other national interests before the customary international law rule of exhaustion of local remedies. Such behaviour would have been perfectly acceptable to do if only this principle were simply part of customary international law. In such a case, a Mexican producer would have found it difficult to claim the application of the international doctrine of exhaustion of local remedies in the context of the NAFTA upon such clear intentions by Mexico to waive the rights of its nationals in this particular circumstance. However, the fact that such rule of customary international law is enshrined in Article 27 of the Mexican Constitution is problematic. For example, a Mexican national may be able to assert that Article 1904(11) and (15)(c) of the NAFTA infringe upon its right to the exhaustion of local remedies as articulated in Article 27 of the Mexican Constitution.³⁷¹ The risk that such a constitutional challenge could be brought before the courts of *amparo* is a

³⁶⁸ For example, the *American Convention on Human Rights* reiterates the same principle before the Commission will admit a petition. The *American Convention on Human Rights*, Nov.22, 1969, 1144 U.N.T.S. 123.

³⁶⁹ Sepúlveda Amor, *supra* note 20 at 587.

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

real one that should not be undermined in any way. In such a case, the mechanism for safeguarding the panel review system enunciated in Article 1905 of the NAFTA would likely be triggered by one of the Parties of NAFTA. As a result, Mexico may be faced with having to decide between amending Article 27 of the Mexican Constitution or losing the benefits bestowed under the NAFTA by the complaining Party.

4.2 The Application of the *Juicio de Amparo* to a Decision of a Panel: Are Panels Authorities for the Purposes of the *Juicio de Amparo*?

Once a panel is constituted, the review of the final determination commences pursuant to the rules of procedure for Article 1904 and a final decision is rendered within 315 days of the date a request for a panel is made.³⁷² NAFTA provisions are clear on this issue and preclude judicial review by domestic courts once a decision of a panel is rendered. The last sentence of Article 1904(11) of NAFTA provides that “[N]o Party may provide in its domestic legislation for an appeal from a panel decision to its domestic court”. However, the question remains, is the *juicio de amparo* included in this restriction? Can it apply to panels in the event of a violation of the guarantees contained in the Mexican Constitution? Are binational panels authorities for the purposes of the *juicio de amparo*?

By and large, the modern purpose of *amparo* is to defend private persons, including corporations, against the violation of the rights enumerated in the first twenty-nine articles of the Mexican Constitution, whether by unconstitutional laws or by other arbitrary or illegal acts performed by public authorities.³⁷³ As a result of this expansive goal, the Supreme

³⁷² Art. 1904(14) of the NAFTA.

³⁷³ E. Pallares, *Diccionario de Derecho Procesal Civil*, 534 (1983) at 82-83.

Court is available to review every decision of every other court, dedicating ninety-percent of the Supreme Court's docket to matters involving *amparo*.³⁷⁴

Given its broad purpose, it is no surprise that *amparo*'s breadth can extend to the review of domestic or potentially international arbitration awards. As mentioned in Chapter 3, Article 14 of the Mexican Constitution provides the basis for *amparo*³⁷⁵ and Article 133 recognises international treaties as the supreme law of the land.³⁷⁶ According to the Third Administrative Collegiate Court of the First Circuit (*Tercer Tribunal Colegiado en Materia Administrativa del Primer Circuito*), "Article 133 does not promulgate the notion of the supremacy of international law over national law, but adopts the rule that international law becomes part of national law, and no higher rank is given to international laws than to those laws that the Congress of the Union derived from the Constitution, rather, equal ranking is given to both".³⁷⁷ In other words, according to the Third Administrative Collegiate Court of the First Circuit, international treaties are not immune from domestic judicial review since they are fully incorporated to the domestic legislative order. The argument that international treaties incorporate themselves to the domestic legal order will be analysed in greater detail later on in this section.

³⁷⁴ A. Gonzalez Coslo, *El Juicio de Amparo*, 112 (2ed. 1985) at 60-61.

³⁷⁵ Art. 14 of the Mexican Constitution: No law shall be given retroactive effect to the detriment of any person whatsoever. No person shall be deprived of life, liberty, property, possessions or rights without a trial by a duly created court in which the essential elements of procedure are observed and in accordance with laws issued prior to the act. In criminal cases no penalty shall be imposed by mere analogy or by a priori evidence. The penalty must be decreed in a law in every respect applicable to the crime in question. In civil suits the final sentence shall be according to the letter or the judicial interpretation of the law, in absence of the latter it shall be based on general principles of law.

³⁷⁶ Art. 133 of the Mexican Constitution: This Constitution, the laws of the Congress of the Union derived from the Constitution, and all treaties made in accordance with the Constitution and proposed by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union. The judges of every state shall be bound to the said Constitution, the laws, and the treaties, notwithstanding any contradictory provisions that may appear in the State constitutions or State laws.

³⁷⁷ G. Góngora Pimentel, *Introducción al Estudio del Juicio de Amparo*, 76 (1992) at 77.

The main hurdle for any *amparo* action is establishing that a public authority committed a violation. If there is a public act, an *amparo* can proceed. Conversely, if a court sees the challenged action as a private act, an *amparo* cannot be secured. As we have seen in Chapter 3 of this thesis, the definition of a “public act” is deceptively simple. Public act is defined as the act of a public official taken within the scope of his or her authority.³⁷⁸ The practical application of this definition requires a complicated balancing of interests, and lengthy debate has ensued over what constitutes a public versus a private act.³⁷⁹

There are two opposing views on the ability of courts to grant *amparo* in international arbitration cases.³⁸⁰ Eduardo Pallares is of the view that arbitrators are authorities against which *amparo* may apply. According to Pallares, an arbitrator acts as a judge by applying the law to the case before him or her. Consequently, *amparo* should be able to proceed against an arbitrator because such arbitrator’s work is not otherwise re-examined by a court.³⁸¹ Furthermore, according to Pallares, domestic arbitrators are recognized as public authorities when courts have appointed them.³⁸² This argument does not apply in the context of Chapter 19 of the NAFTA.

On the other hand, authorities from the Mexican Supreme Court have adopted a different position. In several judgments (*ejecutorias*)³⁸³, the Court has flatly held that an arbitrator named by private parties rather than by a court is not a public actor against whom

³⁷⁸ R. de Pina, *Diccionario de Derecho*, (Rafael de Pina Vara ed., 1994) at 47.

³⁷⁹ See generally Pallares, *supra* note 373 at 59-68.

³⁸⁰ M. Treviño Balli and D. S. Coale, “Recent Reforms to Mexican Arbitration Law: Is Constitutionality Achievable?” (1995) 30 Texas International Law Journal 535 at 554.

³⁸¹ See N. Mar, *Guia del Procedimiento Civil para el Distrito Federal*, (1993) 433 at 441.

³⁸² Pallares, *supra* note 373 at 59-68.

³⁸³ For a definition of *ejecutoria*, see R. de Pina, *Diccionario de Derecho*, (Rafael de Pina Vara ed., 1994) at 260.

an *amparo* could proceed.³⁸⁴ The ultimate force of these rulings is not clear, however, since they were addressing only *amparo* decisions targeting an arbitration award rather than the subsequent recognition and enforcement of that award by a court. However, in the context of private arbitration, it is quite clear that *amparo* would not apply given that such a party has agreed to a private dispute resolution that does not involve a public act subject to *amparo*. Furthermore, I agree with the position of several authors that the judicial enforcement of the award does not render the decision of the panel a public act because the judges are only acting as instruments to enforce an award. In addition *amparo* is designed, as its name suggests and as we have seen in the historical portions of this thesis on *amparo*, to protect the vulnerable, not to provide a “highly technical escape hatch through which sophisticated parties can avoid their contractual obligations”.³⁸⁵ According to Treviño Balli and Coale, “experience has proven that the great run of [arbitration] cases involve nothing more than the enforcement of a private contract, a situation that does not involve the kind of public act against which the *amparo* has traditionally provided protection”.³⁸⁶

Although I agree with the position that *amparo* should not apply to the decisions of private arbitrators, the question must still be posed in the context of Chapter 19 of NAFTA because in such a case, the panelists are appointed by the member countries and their decisions affect both private and public interests. According to the Supreme Court, the law can and should guard against egregious violations of constitutional guarantees.³⁸⁷ However, does such a protection extend to private persons submitted to the decisions of panels

³⁸⁴ Relevant decisions of the Mexican Supreme Court are: 2 S.J.F.5a 1131 (1918); 3 S.J.F.5a 879 (1918); 6 S.J.F.5a 922 (1920); 26 S.J.F.5a 236 (1930).

³⁸⁵ Suprema Corte de Justicia, *Manual del Juicio de Amparo* (11th ed. 1993) at 453.

³⁸⁶ Treviño Balli and Coale, *supra* note 380 at 554.

³⁸⁷ *Manual del Juicio del Amparo*, *supra* note 385 at 485-92.

established in the context of international law? Let us examine the nature of the panels of Chapter 19 of the NAFTA to determine whether the panels can be considered public acts to which *amparo* should provide protection.

4.2.1 Legal Nature of the Panel

According to Cavazos Villanueva, “[T]he Mexican constitutional problem essentially boils down to the legal reality that, as legal creatures, the Chapter 19 binational panels, comprising Mexican national and foreign panelists, are not ‘Mexican courts,’ ‘competent Mexican authorities,’ or ‘Mexican arbitration tribunals’, within the strict meaning of the Mexican constitutional scheme but rather, constitute some kind of different legal animal alien to the Mexican Magna Carta.”³⁸⁸ I will seek to demonstrate that, contrary to a number of arguments, it is not possible to constitutionally establish that panels are authorities in accordance with Mexican law and that as a consequence of such, *amparo* should apply to their decisions.

The dispute settlement mechanism of Chapter 19 of NAFTA is the result of a consensus between sovereign States and the binational panels are as a result, international creatures at the service of international law. The fact that the panels engage in a review of domestic laws does not take away their international nature. Chapter 19 panels would not exist if it were not for the common accord of Mexico, Canada and the United States. The governments of each involved Party are responsible for ensuring that panels are properly constituted and without tripartite government intervention, there would not be panels. All that is necessary for the proper functioning of the panels is included in the treaty. The rules

³⁸⁸ Cavazos Villanueva, *supra* note 4 at 128 and see generally Arts. 103 and 107 of the Mexican Constitution.

regulating the procedure of the panels and the code of conduct are also contained within NAFTA. These guidelines are international instruments agreed upon by the three member States. Therefore, the whole procedure for Chapter 19 of NAFTA is contained within the treaty and it would be virtually impossible for one country alone to come up with a mechanism of this nature.

As a result, it would be very difficult to argue that the panels are authorities of the Mexican State if their existence is also the result of the participation of two other sovereign States. In addition, it would be very difficult to argue that panels are creatures of another State whenever they perform functions of review of the final determinations of the first State because of the conflict that would arise from the point of view of international law. In contrast to domestic authorities, which are the creation of a State, binational panels are constituted from the “meeting of minds” of three States. A binational panel is therefore an international mechanism that should not be confused with an agency of the State.³⁸⁹ Binational panels do not exercise public power *per se* and as such, cannot compel parties to comply with their decisions. This, however, does not mean that decisions are not compulsory and that non-compliance does not attract damaging consequences. The decision of a panel is compulsory because the Parties agreed to it,³⁹⁰ and in the event of non-compliance with a decision of a panel; interested parties can resort to the mechanism for safeguarding the system.

Several authors have argued that panels form part of the domestic legal order and are therefore authorities for the purposes of the *juicio de amparo* because of Article 133 of the

³⁸⁹ Perezcano Diaz, *supra* note 9 at 225.

³⁹⁰ See Art. 1136(1) of the NAFTA.

Mexican Constitution. Article 133 of the Mexican Constitution provides that the Constitution, the laws of the Congress of the Union derived from the Constitution, and all treaties made in accordance with the Constitution and proposed by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union.³⁹¹ According to the argument, treaties such as NAFTA are the Supreme Law throughout the Union and as such are automatically incorporated to the Mexican legal system. It follows then that binational panels form part of Mexican law and are therefore granted the character of Mexican authority. This argument however, contains numerous flaws. Firstly, the internal process of the creation of laws should not be confused with the reception of international law by the domestic legal order.³⁹² The fact that the Mexican legal system allows for the incorporation of treaties does take away the character of the treaty as legal instrument of international law.³⁹³ Secondly, whether panels are incorporated within a treaty or a statute does not confer upon them the status of authorities for the purposes of the *juicio de amparo*. If this were the case, we would arrive to the absurd conclusion that all international organizations, starting with the United Nations, are authorities for the purposes of the *juicio de amparo* because they are incorporated to treaties that form part of domestic legislation.³⁹⁴ The same logic would apply to the WTO, the International Court of Justice, and panels established pursuant to Chapters 11 and 20 of NAFTA. Furthermore, if binational panels were considered part of the Mexican domestic legislation, panel decisions reviewing determinations from Canadian and United States authorities would also be authorities for the purposes of the *juicio de amparo*. This would be like conceding that Mexican law allows for

³⁹¹ Translated by author.

³⁹² Perezcano Diaz, *supra* note 9 at 226.

³⁹³ *Ibid.*

³⁹⁴ Perezcano Diaz, *supra* note 9 at 227.

other states to take part in the creation of Mexican authorities. To counter such an effect, an argument could be made that the mere existence of international dispute settlement mechanisms is unconstitutional because it infringes upon national sovereignty. However, such a scenario would be highly problematic for Mexico. Mexico would no longer be able to participate in international mechanisms for the settlement of disputes and consequentially, the creation of international organizations. Hence, the fact that rules for the establishment of panels are included in treaties has nothing to do with the nature of such panels and does not confer upon such panels the quality of authority for the purposes of the *juicio de amparo*.³⁹⁵

Furthermore, if panels are considered authorities for the purposes of the *juicio de amparo*, who would be entitled to request judicial review of the decision? The assumption is that it would be anyone affected by the final determination of the Ministry of Economy but what about Mexican producers and exporters affected by the final determinations of the Canadian and United States investigative authorities? If panels were authorities in accordance with Mexican law, then any private person affected by a decision would be entitled to commence a *juicio de amparo*. The *juicio de amparo* would then no longer be a domestic remedy but would move into the category of international remedies. This would not achieve the objectives of NAFTA or those of the Mexican Constitution and both instruments would be open to serious challenges.

We have now determined that even if the decisions of international instruments can affect the rights of Mexican private persons, the *juicio de amparo* does not apply automatically to all Mexican private persons. For example, if a panel decides that a domestic law contravenes NAFTA, the decision will affect private persons that have benefited from

³⁹⁵ *Ibid.*

such a law. However, the act of the panel, for being a creature of international law, will not be subject to judicial review by means of a *juicio de amparo*. Anything contrary to this conclusion would be like admitting that national courts can review, in accordance with Mexican law, the acts of international courts and adjudicatory bodies in defiance of Mexico's international obligations. Once again, the capacity of the Mexican State as an international subject of law would be diminished by the Mexican legal order.³⁹⁶

Furthermore, the standard of review used by binational panels is also irrelevant in our analysis of the nature of panels. The international nature of the binational panels allows them to review determinations emanating from all three countries. It would be absurd if *amparo* exclusively applied to determinations from the Mexican authorities when the panels reviewing Canadian and United States determinations operate in the exact same manner with identical rules of procedures. The fact that a panel, that is otherwise identical in all other respects, uses a Mexican standard of review does not change the nature of the panel reviewing the Mexican determination and does not turn it into a Mexican authority for the purposes of the *juicio de amparo*.

If, on the other hand, all Mexican private persons were able to resort to the *juicio de amparo*, then a Mexican exporter subject to the decision of a panel reviewing a Canadian or United States determination would be able to rely on the *juicio de amparo*. By the same token, such a panel would have acquired the quality of authority under Mexican law resulting in the extension of *amparo* to all other interested parties. The effect would be such that non-Mexican citizens, affected by a Canadian or United States decision involving a Mexican private person, would be permitted to have access to domestic courts and commence a *juicio*

³⁹⁶ Perezcano Diaz, *supra* note 9 at 228.

de amparo. This would ultimately disadvantage Mexican private persons since the benefits granted to foreigners would not be granted to Mexicans in Canadian and United States courts as provided for in Article 1904(11) of NAFTA.³⁹⁷

4.2.2 Practical Issues

Subjecting binational panels to the *juicio de amparo* would also result in a series of irregularities. For example when and how would a binational panel be summoned in an action of *amparo*? Panels do not have a permanent address or establishment and they do not have representatives. Would all panelists be compelled to respond to the petitioner's grievances or would the president represent the panel before the *juicio de amparo*? Problems would also ensue when compelling non-Mexican panelists. How would they be forced to respond to the allegations listed in a petition, by way of letters rogatory or directly, if we accept the view that panels are Mexican authorities? Another logistical problem is the address to send the petition. Would it be sent to the care of the government agencies that appointed the panelists, namely the Ministry of Economy in Mexico, the International Trade Representative Office in the United States and the Department of Foreign Affairs and International Trade in Canada or to the NAFTA Secretariat offices in each country? In the event that all procedures are sent to any one of those agencies, who will be responsible of ensuring that the panelists are informed of such procedures and transferred to Mexico to appear before federal courts? Assuming that such responsibilities are undertaken by the government agency, what legal basis would exist for fulfilling such tasks?

In one *amparo* decision, the federal district court summoned the panelists using the

³⁹⁷ Art. 1904(11) of the NAFTA: No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic court.

Mexican Section of the NAFTA Secretariat, an administrative unit affiliated to the Ministry of Economy.³⁹⁸ However, there is no legal foundation for such procedure given that the NAFTA Secretariat does not form part of the panels and does not have the legal capacity to represent them.³⁹⁹ In fact, the NAFTA expressly provides that binational panels must not be affiliated in any way to the Parties including the NAFTA Secretariat, an administrative unit constituted by the three members.⁴⁰⁰

Another complication that would arise, in the event that a *juicio de amparo* applies against a decision of a panel, is with respect to the *ad hoc* nature of the binational panel. How will an *amparo* court convene a panel that has dissolved following its review? How would the Mexican federal government be capacitated to re-convene such a panel and ensure the participation of the panelists to the *juicio de amparo*? Even if the panel were still constituted, what powers would a Mexican court have to compel the panelists to appear before an *amparo* court?

Moreover, how would a binational panel represent itself before a Mexican court? Would it have to do so collectively, through its president or through the Mexican panelists? Would the panel be forced to hire a legal representative in Mexico given that panels do not have their own legal department? It seems unlikely that the Ministry of Economy would supply lawyers to the panels considering the independent nature of the panels. In that case, who would pay the lawyers' honoraries? The involved Parties to a dispute are responsible for covering the expenses of the panelists during the review but it is highly unlikely that the involved Parties would also pay for costs relating to the appearance of panelists before a

³⁹⁸ Perezcano Diaz, *supra* note 9 at 229.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

Mexican court in a *juicio de amparo*. Additionally, who would pay the panelists' expenses during the time spent in Mexico for the duration of the *juicio de amparo*? There would be no legal obligation on the governments of Canada and the United States to pay such costs and the government of Mexico may be constrained to cover the expenses.

The impracticalities are such that it would be virtually impossible to compel a panel to appear before a Mexican court in a *juicio de amparo*. Moreover, a court of *amparo* would certainly encounter difficulties in forcing a panel to follow its decision. All the mechanisms for enforcement previously mentioned would have no application to a panel composed of Mexicans, Canadians and Americans. The list of issues outlined serves to reiterate that panels are creatures of international law and their charter is not envisaged to apply to the domestic legal spheres. If such attempts were to be made, the safeguard mechanism to protect Chapter 19 of NAFTA would be triggered and Mexico would be compelled to resolve the constitutional crisis by amending Article 133 of the Mexican Constitution. Nonetheless, Mexican courts have been petitioned to review the final decisions of binational panels by means of a *juicio de amparo*. The next section focuses on the decisions of the courts of *amparo* on this issue.

4.2.3 Analysis of Relevant Amparo Decisions

To date, three *amparo* cases were instigated to analyze the nature of binational panels and determine whether they qualify as Mexican authorities.⁴⁰¹ All cases were in connection with the *antidumping investigation of Mexico into imports of flat-coated steel products from the United States of America*- MEX-94-1904-01 (the "Flat-Coated Steel Case").⁴⁰² In this

⁴⁰¹ Perezcano Diaz, *supra* note 9 at 231.

⁴⁰² Online: <<http://www.sice.oas.org>> or <http://www.nafta-sec-alena.org>.

decision, the panel upheld part of the determination of SECOFI and remanded it with respect to certain parts of the resolution concerning issues about dumping and injury.⁴⁰³ On October 21, 1996, the complainant industries (USX Corporation & Inland Steel Company) commenced a *juicio de amparo* (the “First *Amparo*”) against the final decision of the binational panel in the Flat-Coated Steel Case.⁴⁰⁴ In the First *Amparo*, the complainants alleged that the panel violated their constitutional due process guarantees, provided for in Articles 14 and 16 of the Mexican Constitution.⁴⁰⁵

On March 31, 1997, the 7th District Judge for Administrative Matters in Mexico City (the “7th District Judge”) stayed the proceedings because he was of the view that the decision of the panel was not final given that the panel had remanded the final determination for action not inconsistent with the panel’s decision and SECOFI’s determination on remand was still pending. As we have seen, one of the most important principles of the action of *amparo* is the principle of finality. The *juicio de amparo* should be the last resort and only final decisions can be challenged by this procedure.⁴⁰⁶ The 7th District Judge stated in his judgment that there could not be a review of the panel’s decision because SECOFI had not yet complied with such decision and consequently the decision was not final in accordance with Article 97 (II) of the Foreign Trade Act and as required by Article 114 (II) of the Law of *Amparo*.⁴⁰⁷ The 7th District Judge also stated that *amparo* could proceed against the SECOFI’s implementation of the remand for action by the Panel (determination on

⁴⁰³ Cavazos Villanueva, *supra* note 4 at 129 and *supra* note 13 at 198.

⁴⁰⁴ Amparo 547/96 promovido por USX Corporation e Inland Steel Company, contra actos del Pánel Binacional constituido de conformidad con lo dispuesto en el Artículo 1904 del Tratado de Libre Comercio de América del Norte para resolver el caso MEX-94-1904-01 y del Secretario de Comercio y Fomento Industrial [hereinafter “Amparo 547/96”].

⁴⁰⁵ *Ibid.*

⁴⁰⁶ See generally Burgoa, *supra* note 166 at 280-282 on the principle of “finality”.

⁴⁰⁷ See Amparo 547/96, *supra* note 404 at 48.

remand).⁴⁰⁸ The 7th District Judge of the First *Amparo* did comment on the nature of the binational panels and concluded that binational panels were authorities for the purposes of the *juicio de amparo*. The 7th District Judge's comments stated, generally, the following:

Now that we have determined that the North American Free Trade Agreement forms part of the Mexican legal system as per Article 133 of the Mexican Constitution, which provides that all international treaties are incorporated to the national legislation, and in accordance with Article 1904 of NAFTA, which provides that a tribunal shall be created to resolve a particular case, namely the binational panel constituted to resolve the case MEX-94-1904-01, we can conclude that, by reason of the rules contained with NAFTA which created such panel, and the incorporation of such rules to domestic legislation, a tribunal has been created and integrated to the national legal system. The tribunals created pursuant to Article 1904 of NAFTA have the capacity to compel the investigating authority to certain acts in order to remedy prior wrongdoings. SECOFI has no legal choice but to obey such order since such tribunal was constituted in compliance with Article 1904 of NAFTA and is part of domestic legal order.⁴⁰⁹
[emphasis added]

The 7th District Judge went on to conclude that SECOFI's obligation to comply with the remand for action by the panel will impact upon private persons involved in the proceedings and that the decision of the panel is an act of an authority subject to the *juicio de amparo*.⁴¹⁰ According to the 7th District Judge, the actions of the panel are part of the reality of the Mexican legal order and are an exercise of Mexican public power, which can affect the individual guarantees of private persons.⁴¹¹

The 7th District Judge's analysis is somewhat simplistic and is stricken with the misconception that the incorporation of international law to the Mexican legal order equals

⁴⁰⁸ See Amparo 547/96, *supra* note 404 at 49.

⁴⁰⁹ Perezcano Diaz, *supra* note 9 at 231.

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

the creation of not only Mexican authorities but also Mexican authorities for the purposes of the *juicio de amparo*.⁴¹² To agree with such a stance would be like admitting that all other international structures and entities, including binational panels that review Canadian and United States final determinations in antidumping and countervailing duty law, are Mexican authorities incorporated to the Mexican legal order.

Furthermore, the compulsoriness of the decisions of the panels and the standard of review used by such panels do not assist in determining the nature of the panels. The nature of the panels is determined by examining the instrument that created them, the NAFTA, an international legal instrument celebrated by three sovereign nations: Mexico, Canada and the United States. The functions of the panels derive from the common accord of the three countries. Such entity is not the creation of the Mexican State and it does not exercise public powers; such exercise being reserved to the agencies of the executive, legislative and judiciary branches and the Mexican states. Consequently, panels cannot be considered Mexican authorities because their acts are not imputable to the Mexican state.

Moreover, the judgment mentions that the complainants, USX Corporation and Inland Steel Company, requested the establishment of the binational panel. However, the judgment fails to mention that this fact alone can be relevant ground for dismissal of the action of *amparo* pursuant to Article 1904(11) of the NAFTA unless the NAFTA's provisions are challenged as unconstitutional.⁴¹³ Article 73(XI) of the Law of *Amparo* provides, as a ground for dismissal of an action of *amparo*, "the challenge of an act of an authority that the complainant has previously consented to, expressly or tacitly".⁴¹⁴ In the Flat-Coated Steel

⁴¹² Perezcano Diaz, *supra* note 9 at 232.

⁴¹³ Cavazos Villanueva, *supra* note 4 at 132.

⁴¹⁴ Art. 73 of the Law of Amparo.

Case, the complainants requested the establishment of the panel and therefore accepted the principle of binding force and effect of the decision as provided in Article 1904(9) of the NAFTA: “the decision of the panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel.”⁴¹⁵ The complainants also accepted Article 1904(11) of the NAFTA, which precludes judicial review of the final determination upon a request to establish a Panel. This ground for dismissal certainly applies in situations where the complainant in an action of *amparo* is the same party that requested the establishment of a panel in the first place. The dismissal would also apply to a request to challenge the decision of a panel and to a request to challenge the determination on remand of the Ministry of Economy, by way of an action of *amparo*, in circumstance where the complainant requested the establishment of the panel.

Nevertheless, it is more difficult to dismiss an action of *amparo* against a final determination of the Ministry of Economy, following a remand from action from the panel, when the complainant is not the one that requested the panel but rather the one that was compelled to submit to a binational panel proceeding during the 30-day block period imposed by Article 1904(15) of NAFTA and Article 98 of the Foreign Trade Act. Some authors have argued that in such a case, the Ministry of Economy would have to obey the Mexican court judgment and not the decision of the binational panels.⁴¹⁶ This particular circumstance will be examined in greater detail in the next section.

At the same time as the First *Amparo* proceeding and shortly after the decision of the 7th District Judge, the complainants initiated another *juicio de amparo* against the judgment

⁴¹⁵ Art. 1904(9) of the NAFTA and Cavazos Villanueva, *supra* note 4 at 132.

⁴¹⁶ L. M. Perez de Acha, “Paneles Binacionales ¿Conflicto de Idiosincrasias?” LEX, Mexico City (April 1996) at 20-21.

of the 7th District Judge and the decision of the panel in the Flat-Coated Steel Case (the “Second *Amparo*”). The judgment is pending before the 5th District Judge for Administrative Matters in Mexico City (the “5th District Judge”). Furthermore, a third *amparo* was initiated by one of the complainant corporations against the decision of the panel, which confirmed the determination of SECOFI rendered in compliance with the remand (the “Third *Amparo*”). Judgment for the Third *Amparo* is pending before the 10th District Judge for Administrative Matters in Mexico City (the “10th District Judge”).

Following the decision of the 7th District Judge in the First *Amparo*, the complainants immediately moved for appeal of the decision. In January 1998, the President of the Supreme Court allowed the appeal and in July of 1999, the case was delegated to the First Chamber. The four judges of the First Chamber unanimously affirmed the judgment of the 7th District Judge and rejected the appeal of the complainant corporations.⁴¹⁷

The Supreme Court judges in the First *Amparo* did not explicitly comment on the nature of the binational panels preferring to focus on questions of technicalities. Nevertheless, they did comment that binational panels do not have the capacity to compel the Ministry of Economy to comply with their decisions. A strong argument can then be made that the Supreme Court does not consider panels as Mexican authorities for the purposes of the *juicio de amparo* but the issue remains to be clarified.

4.3 The Application of the *Juicio de Amparo* to a Determination on Remand

As stated above, it is increasingly more difficult to dismiss an action of *amparo* against a final determination of the Ministry of Economy, following a remand for action from

⁴¹⁷ López Ayllón, *supra* note 13 at 199.

the panel, when the complainant is not the one that requested the panel but rather the one that was compelled to resort to a binational panel proceeding during the 30-day block period imposed by Article 1904(15) of NAFTA and Article 98 of the Foreign Trade Act.

Many authors consider that there is no legal basis for a *juicio de amparo* challenging the decision of a binational panel, but that there is a legal basis for the challenge of a final determination of the Ministry of Economy, following a remand from action from the panel, in circumstances when the *juicio de amparo* is instigated by the party forced to resort to the authority of the panel. I agree with this position for the following reasons. First, there are no constitutional, statutory or jurisprudence grounds for dismissing an action of *amparo*, commenced by a domestic producer, against a determination by the Ministry of Economy made in compliance with a binational panel remand, in circumstances when the domestic producer was forced to resort to a binational panel proceeding in the first place.⁴¹⁸ Second, Article 97 (II) of the Foreign Trade Act explicitly states that a determination made as a result of a remand for action by the panel is final. As we have seen in our discussions on *amparo*, the *juicio de amparo* applies against final judgments. Third, the determinations on remand of the Ministry of Economy are acts of a Mexican authority that are not affiliated with the panels in any way.

In my view, it would be extremely difficult to find a justification to prohibit the application of *amparo* in this particular circumstance and a constitutional challenge pursuant to a violation of Article 103 of the Mexican Constitution (the *amparo* provision) could certainly apply against the panel review system and ultimately jeopardize the viability of the system. This is by far the most important constitutional weakness of the NAFTA's Chapter

⁴¹⁸ Cavazos Villanueva, *supra* note 4 at 132.

19 mechanism in Mexico.⁴¹⁹ One possible way to reduce such a risk would be to amend Chapter 19 of the NAFTA by incorporating a clause that would prohibit judicial review, including the *juicio de amparo*, to the determination of the Ministry of Economy following a remand for action from the panel. The challenge of such a provision, as a violation of Article 103 of the Mexican Constitution, may be reduced since an argument could be made that the Mexican government explicitly agreed to waive the constitutional right of *amparo* in favour of greater national interests.

However, such argument is weak in that the Mexican government cannot effectively exclude the constitutional right of the *juicio de amparo* enshrined in Article 103 of the Mexican Constitution. In that sense, Chapter 19 of the NAFTA would not be sheltered from a future constitutional challenge pursuant to a violation of Article 103 of the Mexican Constitution. As we have seen earlier, the guaranteed remedy would be to amend Article 103 and explicitly exclude the application of the *juicio de amparo* to international dispute settlement mechanisms.

4.4 Constitutional Concerns

This section will highlight other potential constitutional challenges that may be brought against the panel review system of Chapter 19 of NAFTA although their risk is not as alarming and imminent as the potential violation of Article 103 of the Mexican Constitution in the particular circumstances outlined above.⁴²⁰ Article 14 of the Mexican Constitution provides that:

No law shall be given retroactive effect to the detriment of any person whatsoever. No person shall be deprived of life, liberty, property, possessions or rights without a trial by a duly created

⁴¹⁹ *Ibid.*

⁴²⁰ Treviño Balli and Coale, *supra* note 380 at 550.

court in which the essential elements of procedure are observed and in accordance with laws issued prior to the act. In criminal cases no penalty shall be imposed by mere analogy or by a priori evidence. The penalty must be decreed in a law in every respect applicable to the crime in question. In civil suits the final sentence shall be according to the letter or the judicial interpretation of the law, in absence of the latter, it shall be based on general principles of law.⁴²¹

Article 16 also provides that "... no one shall be disturbed in his...possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken,"⁴²² and Article 17 states that "...every person has the right to be administered justice by the courts..."⁴²³

According to Humberto Briseño Sierra, a leading Mexican scholar, the basic stumbling block for arbitration is the Mexican Constitution's statement that "ordinary courts are appropriate to administer justice and... special jurisdictions, other than in time of war, are forbidden".⁴²⁴ This statement was developed by jurisprudence and is rooted in the guarantees listed in Articles 14, 16 and 17, coupled with the right enunciated in Article 1 that "... every person in the United Mexican States shall enjoy the guarantees granted by this Constitution, which cannot be restricted or suspended except in such cases and under such conditions as are provided in the Constitution."⁴²⁵ A party forced to resort to the panel review of Chapter 19 of NAFTA and as a result, refused its right to Mexican domestic judicial review proceedings could potentially challenge such prohibition as a violation of the guarantees enunciated in Articles 1, 14, 16 and 17 of the Mexican Constitution. The constitutional

⁴²¹ Art. 14 of the Mexican Constitution.

⁴²² Art. 16 of the Mexican Constitution.

⁴²³ Art. 17 of the Mexican Constitution.

⁴²⁴ H. Briseño Sierra, "Mexico" (1978) 3 Y.B. COM.ARB. at 94.

⁴²⁵ Art. 1 of the Mexican Constitution.

challenge would be possible since there is no exclusion covering such a situation in the Mexican Constitution.

Another potential constitutional challenge involves Article 133 of the Mexican Constitution. Article 133 of the Mexican Constitution provides that international treaties form part of the domestic law without allowing the treaty to supersede the Constitution.⁴²⁶ As such, following a constitutional challenge pursuant to Article 103 and to a lesser extent Articles 14, 16 and 17, an entire international treaty may very well be deemed to violate the individual guarantees of the Constitution.⁴²⁷ Not only could the constitutionality of the entire international treaty be challenged, but the laws implementing those treaties and the application of those laws by administrative authorities would also be in violation of the individual guarantees.⁴²⁸ The possibility of a challenge regarding the constitutionality of the entire NAFTA exists and the best way to eliminate the tension is by way of amendment of Article 133 of the Mexican Constitution.⁴²⁹ For example, Article 133 could be changed to read as follows:

“Mexican laws cannot contradict the established norms in the treaties the country is presently party to, and as long as the treaties are challenged as unconstitutional, they will have supremacy over Mexican law.”⁴³⁰

With the adoption of such a provision, entire international treaties and more particularly the provisions on dispute settlement mechanisms, would be in a less precarious

⁴²⁶ Art. 133 of the Mexican Constitution: This Constitution, the laws of the Congress of the Union derived from the Constitution, and all treaties made in accordance with the Constitution and proposed by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union. The judges of every state shall be bound to the said Constitution, the laws, and the treaties, notwithstanding any contradictory provisions that may appear in the State constitutions or State laws.

⁴²⁷ See generally Góngora Pimentel, *supra* note 377.

⁴²⁸ Treviño Balli and Coale, *supra* note 380 at 551.

⁴²⁹ *Ibid.*

⁴³⁰ Góngora Pimentel, *supra* note 377 at 79.

position.⁴³¹ In addition, courts have not, in the past, been receptive to the argument that the impact of a treaty results in an unconstitutional practice. This pattern suggests that courts will be even less receptive to the more sweeping argument that an entire treaty is unconstitutional.⁴³² Although it is highly unlikely that a whole treaty could be subject to a constitutional challenge, it may be necessary to change the wording of Article 133 of the Mexican Constitution to ensure that treaties do not form part of domestic law. This would avoid the argument that panels form part of the Mexican legal order and are therefore considered Mexican authorities for the purposes of the *juicio de amparo*.

The constitutionality of Chapter 19 of the NAFTA or the NAFTA will have to be dealt with by either the courts or the legislature. As the amount of litigation and arbitration increases, the latent conflict of Articles 14, 16, 17 and 133 of the Mexican Constitution as well as the potential violation of Article 103 in prohibiting the *juicio de amparo* to a determination of the Ministry of the Economy, following a remand for action from the panel, will draw more attention. It is only by constitutional reform or with the creation of *jurisprudencia* that these conflicts will effectively be resolved.⁴³³

Given the recent birth of international dispute settlement mechanisms, such as Chapter 19 of the NAFTA, there has not been time for a significant body of jurisprudence to develop.⁴³⁴ The development of international dispute settlement mechanisms in Mexico will be significantly affected by how courts deal with these issues. It is uncertain how the courts will behave but the experience of the Supreme Court in its decision in the First *Amparo* may serve as an indicator of the tendency to uphold the constitutionality of international

⁴³¹ Treviño Balli and Coale, *supra* note 380 at 551.

⁴³² *Ibid.*

⁴³³ Treviño Balli and Coale, *supra* note 380 at 557.

⁴³⁴ *Ibid.*

treaties.⁴³⁵ It is more likely that the courts will enforce the international treaty without making any ruling on the conflicts listed above. Whatever the outcome of the decisions of the courts, the surest way to avoid a challenge to international dispute settlement mechanisms such as Chapter 19 of NAFTA is to amend Article 133 of the Mexican Constitution and Chapter 19 of the NAFTA to prohibit the application of the *juicio de amparo* to the determinations on remand of the Ministry of Economy.

5. CONCLUSION

This thesis has attempted to shed light on the impact and consequences of Chapter 19 of the NAFTA on the Mexican legal order and more particularly on the constitutional remedy of the *juicio de amparo*. First, a review of the specific elements of Chapter 19 of the NAFTA was made. We saw that Chapter 19 of the NAFTA was the result of intense negotiations and compromise amongst the three governments and that its sole purpose was to serve as an adjudicatory body of review of final determinations in antidumping and countervailing duty law using the standard of review provided by the appropriate domestic laws. Albeit interesting, this thesis did not focus on the application of the Mexican standard of review by the panelists. The focus was squarely on the application of the *juicio de amparo* to the decisions of the panels and to the remands for action by the Mexican administrative authorities. As such, it was important to focus on Mexican domestic judicial review proceedings in antidumping and countervailing duty cases in Mexico. To do so, the thesis went through the different chronological stages of an antidumping case from the initial investigation to the final determination to the appeal known as a revocation action to the domestic judicial review process of nullification. Remaining faithful to this sequence, the

⁴³⁵ *Ibid.*

analysis subsequently focused on the *juicio de amparo* as the ultimate judicial review proceeding provided for in the Mexican Constitution. The portion of the analysis clearly showed how extensive the reach of the *juicio de amparo* really is and how crucial it is to the Mexican legal order, including in the context of the Mexican foreign trade law regime.

Once the sequence of events was clarified and the interaction between Chapter 19 of the NAFTA and the *juicio de amparo* established, an analysis of the constitutional issues surrounding the establishment of a panel was undertaken. We saw that an interested party can request a review of the final determination using the dispute settlement mechanism of Chapter 19 of the NAFTA and that such a remedy is exclusively available for 30 days after the issuance of the final determination after which time a request for an administrative appeal (revocation action) and judicial review (nullification) can be made. In that sense, the Chapter 19 panel effectively replaces the domestic judicial review that would otherwise apply. We examined if the preclusion of domestic judicial review for the 30-day blocking period violated the doctrine of the exhaustion of local remedies. The analysis revealed that the rule of exhaustion of local remedies, embodied in the Calvo doctrine, was clearly waived by Mexico by way of paragraphs 11 and 15(c) of the Article 1904 of the NAFTA. However, my analysis also showed that the customary rule of international law of exhaustion of local remedies was embodied in Article 27 of the Mexican Constitution. The fact that such rule of customary international law is enshrined in Article 27 of the Mexican Constitution is problematic. A constitutional challenge pursuant to a violation of Article 27 is possible and the obvious solution would be to amend such Article to ensure that the benefits bestowed under NAFTA are not lost.

The last portion of the thesis focused on the application of the *juicio de amparo* to the decisions of the binational panels and to the determinations on remand of the Mexican investigative authority. The determination made was that the *juicio de amparo* could not proceed against binational panels constituted pursuant to Chapter 19 of the NAFTA. Although the debate on the legal nature of binational panels is not a trivial one, the answer is quite simple: binational panels are international entities, a condition, which excludes the possibility that they may be considered Mexican authorities. Consequently, their decisions cannot be subject to the constitutional remedy of the *juicio de amparo*. The Supreme Court decision in the First *Amparo* bifurcated the analysis of the nature of the panels, preferring to focus on the finality of the decision of the panel. Although the judgment of the Supreme Court does not constitute *jurisprudencia*, it may well establish a precedent and attract more actions of *amparo* against the decisions of the panel.

Although the *juicio de amparo* would not apply to the final decisions of the panel, the analysis revealed that the *juicio de amparo* could apply to determinations, made pursuant to a remand for action of the panel, in certain circumstances. As such, there are sufficient arguments to defend the position that actions of *amparo* could be taken against the Ministry of Economy's implementation of the decisions of binational panels (determinations on remand).⁴³⁶ Needless to say, in such a situation, the NAFTA's Chapter 19 safeguard mechanism would likely be triggered and consultations would ensue; a special committee would be constituted and, if the Parties are unable to reach a mutually satisfactory solution, the complaining Party would suspend either the operation of Article 1904 of the NAFTA or

⁴³⁶ Cavazos Villanueva, *supra* note 4 at 131.

the application of certain benefits as may be appropriate, vis-à-vis the Party complained against.⁴³⁷ Such a result would jeopardize the interests of the NAFTA.

The same results would also occur upon constitutional challenges to Chapter 19 of the NAFTA pursuant to violations of Articles 27, 103 and 133 of the Mexican Constitution. The other Parties to NAFTA would be swift in their removal of the benefits bestowed upon Mexico as signatory to NAFTA. In order to avoid such challenges, the best way would be to amend Article 133 of the Mexican Constitution to ensure that in the event of conflict between an international treaty such as NAFTA and the domestic legal order, the treaty would prevail. However, an additional amendment to Chapter 19 of the NAFTA would also be necessary since there would still be no legislative measures to effectively prohibit the application of the *juicio de amparo* to the final determinations of the Ministry of Economy, following a remand for action by the panel. In my opinion, this is the only circumstance that would warrant an amendment to Chapter 19 of the NAFTA.

⁴³⁷ Art. 1905 (1), (2), (3), (8)(a) and (8)(b) of the NAFTA.

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