

Draft

**A Seamless Transaction for Insurers of
Motor Carriers Transporting Goods Between
Canada, the U.S. and Mexico**

Note: This paper was presented to the International Insurance Issues (F) Committee of the National Association of Insurance Commissioners (NAIC) at the Summer National Meeting in Boston and again when several members of the committee met in Washington, D.C. on July 28, 1998. The Committee unanimously agreed to receive the paper at the Fall National Meeting in New York on September 14, 1998. It is a working draft subject to revision. Comments have been received from several sources which may be incorporated into the final draft of the paper.

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TABLE OF CONTENTS

Page

I. Introduction and Background

Purpose and Scope
Relevant NAFTA Provisions

II. Possible Solutions

III. Mexico's Civil Law System Compared to the U.S. and Canada's Common Law System

Overview of the Insurance Regulatory Structure and Market in Mexico
Foreign Establishment Provisions
Mexico's Transportation Insurance Requirements
The Treatment of Collisions in Mexico

IV. Use of the Power of Attorney U.S.-Canada

Distinctions between Common and Civil Law Power of Attorneys and Notaries

V. Proposed Use of the Power of Attorney U.S.-Mexico

Recommendation: (1)

VI. Use of Endorsements to Extend Coverage

Texas Licensed Mexican Casualty Companies
Managing General Agents (MGAs)
Recommendation: (2)

VII. Recent Developments in Mexican Insurance Law

Cross-Border Trade
Recommendation: (3)

VIII. Conclusions and Recommendations

Appendices

Appendix 1 – Letter from Comandante Pedro Barriero Ortiz
Appendix 2 -- Canadian Power of Attorney Form
Appendix 3 -- Mexican Power of Attorney Form

A Seamless Transaction for Insurers of Motor Carriers Transporting Goods between Canada, the U.S. and Mexico*

I. Introduction and Background

The North American Free Trade Agreement (NAFTA) established a free trade area in goods, services and investment between the countries of Canada, the United States and Mexico.¹ Noteworthy of the NAFTA is that it is one of the few international agreements to include financial services within its purview. The Agreement defined financial services as “a service of a financial nature, including insurance, and a service incidental or auxiliary to a service of a financial nature.”² One of the specific objectives of the Agreement was the elimination of barriers to trade in, and the facilitation of cross-border movement of goods and services between the territories of the parties.³ In certain areas, including land transportation and insurance, the Agreement provides for the parties to engage in consultations to discuss implementation and further liberalization of the Agreement’s provisions.

Cognizant of the above directive of NAFTA, the National Association of Insurance Commissioners (NAIC) deemed it appropriate to participate in ongoing discussions of an ad hoc working group of insurance associations, transportation officials and later regulators from the three countries, organized to identify potential insurance issues arising as a result of the cross-border movement of goods. The work of the group evolved in part from efforts of the Transportation Consultative Group (TCG) established by the three countries to address non-standards-related, cross-border issues.

The Transportation Consultative Group recognized that lack of standardized insurance policies, practices and coverages were acting as barriers to free trade and agreed to examine the issue. The TCG (working) Group on Cross Border Operations and Facilitation was instrumental in bringing together the following trade groups: The Insurance Bureau of Canada (IBC); (IBC); the American Insurance Association (AIA); (AIA); the National Association of Independent Insurers (NAII); and the *Asociación Mexicana de Instituciones de Seguros, A.C. (AMIS)* to discuss insurance, civil liability and related issues.

Representing the insurance regulatory authorities of the three countries were the NAIC, the Financial Services Commission of Ontario (formerly the Ontario Insurance Commission), and for Mexico, the *Comisión Nacional de Seguros y Fianzas* and its oversight agency, *Secretaria de Hacienda y Crédito Publico*.

The goal of the working group was to identify current insurance related issues that act as an impediment to a “seamless” insurance transaction for motor carriers engaged in cross-border commerce and to consider short and long term solutions, if any. Identified as an impediment to the free flow of goods and services between the countries, was the requirement under Mexican law that civil responsibility in that jurisdiction must be demonstrated by the use of liability insurance issued only by insurance carriers established and licensed in that jurisdiction. Policies issued in the United States and Canada on the other hand are written to provide coverage in the other jurisdiction, but not Mexico. The Texas Department of

(TDI); the author acknowledges the assistance of Jose Montemayor, TDI, Charles Anderson, Financial Services Commission of Ontario, Steven Lingard, Insurance Bureau of Canada (IBC), Gerald W. Bell, National Ass’n. of Insurance, and Maria Lameiro, U.S. Dep’t. of Transportation.

¹ See North American Free Trade Agreement [hereinafter NAFTA], Dec. 17, 1992, Can-Mex-U.S., 32 I.L.M. 289.

² See NAFTA, Ch. Fourteen, Art. 1416.

³ See NAFTA, Ch. One, Art. 102:1. (a).

Insurance on behalf of the NAIC agreed to take the lead in drafting a “white” paper or issue paper regarding select NAFTA tri-lateral insurance issues.

Cross-border motor carrier commerce is a reality in Texas and along the U.S.-Mexico border states and at some point in time will become a reality for North America. Indeed in Texas alone more than 1.5 million trucks crossed Texas’ border from Mexico in 1996, a 22.5 percent increase from 1990.⁴ According to the U.S. Chamber of Commerce, Mexico is now the second leading destination of US exports, ranking only behind Canada; figures showed that in 1997, exports to Mexico increased 26 percent to over \$71 billion. Propelled in part by the exigencies of the market, the above groups had commenced informal dialog to engage in the discussions contemplated by the NAFTA directive.

Purpose and Scope

The purpose of this paper is to discuss and identify legal, regulatory and public policy issues surrounding the provision of seamless insurance for motor carriers transporting goods between Canada, the U.S. and Mexico. For purposes of this study, the term “seamless insurance” should be understood to be insurance providing coverage across borders of the three parties without the necessity of joining two or more policies.⁵

Two specific proposals for providing seamless coverage will be analyzed and considered. (1) This paper will describe and evaluate the power of attorney approach as used in the U.S.-Canada for potential use along the U.S.-Mexico border and to make suggestions for implementation of this and related solutions, as necessary. (2) The paper will also describe and evaluate the proposed use of endorsements written by companies licensed in both Mexico and the U.S. to extend liability coverage for risks in the adjoining jurisdiction and Canada. If appropriate, recommendations for implementation will be made. Either method will require the approval of the government authorities with the pertaining regulatory and enforcement jurisdiction on each side of the border.

In addition, (3) this paper presents a recent development in Mexican law that not only increases the availability of insurance products in Mexico for northbound transporters but also signals another potential opportunity to further the provision of seamless coverages across borders.

Due to the lack of uniformity between the insurance requirements and coverages available in the different states, Texas will be used by way of example. Inherent in this presentation is also the recognition that there are substantial differences in the law, regulatory and liability systems of the three countries. Whereas adoption of a regulatory and liability regime that is uniform among the three countries is an admirable goal, for the present all discussions are subject to current standards and limitations.

Relevant NAFTA Provisions

The NAFTA sets out clearly defined objectives for establishment of the free trade area and places general obligations on the three signatory parties and their sub-national governments. These obligations embody principles requiring national treatment, most favored-nation treatment and market access within the three countries. Country specific commitments to further liberalization as well as restrictions or exceptions to general obligations are set out in the Agreement. In land transportation, Annex 913.5.a-1 requires the parties to engage in consultations on the compatibility of technical standards; and in insurance, Annex 1404.4 requires the parties to engage in consultations on further liberalization of cross-border trade in

⁴ The Bastrop Advertiser, Thursday, February 5, 1998 citing sources: Texas Comptroller of Public Accounts, Texas A&M International University, and City of El Paso.

⁵ Author’s definition.

financial services by January 1, 2000. A sectorial annex to Chapter Twelve (Cross-Border Trade in Services) requires the parties to consider further land transportation liberalization commitments by January 2001. An annex to Chapter Fourteen (Financial Services) requires consultations on further liberalization of cross-border trade in financial services by January 2000.

In the area of land transportation, the parties specifically outlined obligations to facilitate cross-border trade for buses, trucks and railroads. In this regard, the Agreement addresses two major aspects: (1) compatibility of standards-related measures; and (2) market access liberalization. The Land Transportation Standards Subcommittee (LTSS) was established to examine the land transportation regulatory regimes in the United States, Canada and Mexico and to seek to make certain standards more compatible pursuant to a work program included in the Agreement. The NAFTA also sets forth a timetable for the gradual removal of restrictions on cross-border motor carriers operations.

Part III of the NAFTA, Technical Barriers to Trade, provided for the establishment of the LTSS, which is comprised of federal government officials from each party, (U.S. Department of Transportation, Transport Canada and Mexico's transport agency the *Secretaria de Comunicaciones y Transportes* or SCT) and state and provincial officials, to review standards and to make the standards-related measures of the countries more compatible.⁶ To assess progress respecting market access liberalization in the land transportation sector, the parties were directed to consult periodically regarding the gradual phase-out of the access restrictions contemplated in Annex I, and other liberalization commitments.⁷

The land transportation provisions contemplated a gradual phase-out of mutual restrictions on motor carrier operations between Mexico and the United States beginning on December 18, 1995.⁸ On the opening day the United States and Mexico were to have opened their border states to cross-border trucking operations, the United States announced that it would not process Mexican applications for operating authority. Safety concerns compelled the administration to postpone the implementation of NAFTA's transportation access liberalization provisions. Notwithstanding this action, the Land Transportation Standards Subcommittee and the Transportation Consultative Group (TCG) have continued to meet and have made steady progress in the issues addressed, including regulation compatibility, safety concerns and technology exchange.

Like the cross-border provisions applicable to motor carriers, the Financial Services Chapter contains general obligations applicable to cross-border financial providers and to the cross-border provision of financial services. In addition to the obligations to ensure national treatment and most favored nation treatment of providers of the parties, rights of establishment and rights to cross-border trade are recognized.⁹

The Financial Services Chapter provides that investors of a party should be permitted to establish a financial institution in the territory of the other party. The Chapter further provides that no party may adopt any measure restricting an type of cross-border trade in financial services by providers of another party except to the extent the country took an exception through a reservation in a NAFTA annex.¹⁰ The agreement does not provide a comprehensive method or recommendation for government regulation of financial services. Rather the prudential measures exception provides each country the opportunity to

⁶ See NAFTA, Ch. Nine, Annex 913.5.a-1.

⁷ See NAFTA, Ch. Twelve, Annex 1212.

⁸ See NAFTA, Annex I – United States.

⁹ See NAFTA, Ch. Fourteen, Arts. 1404, 1405, 1406.

¹⁰ See *id.*, Art. 1404.

adopt and maintain reasonable measures for the protection of its providers, its financial institutions as well as to ensure the integrity and stability of a party's financial system.¹¹

Again similar to the land transportation provisions, an annex to the Financial Services chapter of the Agreement imposes an obligation on the parties to engage in consultations on the liberalization of cross-border provision of financial services. Annex 1404.4 provides that:

No later than January 1, 2000, the Parties shall consult on further liberalization of cross-border trade in financial services. In such consultations the Parties shall, with respect to insurance: (a) consider the possibility of allowing a wider range of insurance services to be provided on a cross-border basis in or into their respective territories; and (b) determine whether the limitations on cross-border insurance services specified in Section A of the Schedule of Mexico to Annex VII shall be maintained, modified or eliminated.¹²

Under said Schedule, Mexico reserved certain existing privileges and restrictions in cross-border trade in insurance services. Mexico did not reserve certain restrictions on the ability of Mexican residents to purchase from cross-border insurance providers of another party, tourist and cargo insurance except for third party liability and intermediary services incidental to this insurance purchased without solicitation.

The authorities responsible for financial services in the three countries are as follows:

- (a) for Canada, the Department of Finance of Canada and the Financial Services Commission of Ontario;
- (b) for Mexico, *the Secretaria de Hacienda y Crédito Publico*; and
- (c) for the United States, the Department of Treasury for banking and securities and the Department of Commerce for insurance services.

Article 1412 of the Agreement establishes the Financial Services Committee to: (a) supervise the implementation of Chapter 14 and its further elaboration; (b) consider issues regarding financial services that are referred to it by a Party; and (c) participate in the dispute settlement proceedings in accordance with Article 1415. The was established Committee is required to meet annually and inform the NAFTA Commission of its work. It should be noted that until recently this insurance issue had not been raised under this Committee. However, at the request of the U.S. Department of Commerce, the Committee has committed to including insurance on the agenda of their next annual meeting scheduled for October 1998 in Ottawa, Canada.

II. Possible Solutions

Among the solutions discussed by the ad hoc trilateral insurance working group was the possible use along the U.S.-Mexico border of the U.S.-Canada approach whereby insurance companies from the U.S. file a power of attorney with Canada's "gatekeeper/document keeper" designated province. These insurance companies commit to provide the minimum statutory insurance coverages or financial responsibility requirements of the opposing jurisdiction(s) for motor carriers crossing that border.

Another possible solution under discussion in Texas, is seamless coverage through issuance of endorsements which add-on coverage to comply with the opposing jurisdiction's requirements. Many U.S. companies will extend select auto coverages for trips into Mexico through limited or broad

¹¹ See *id.*, Art. 1410.

¹² See NAFTA, Annex VII(A) – Mexico.

endorsements. However, Mexican authorities may or may not recognize the coverage provided by U.S. insurance companies for purposes of complying with Mexican civil responsibility requirements.

III. Mexico's Civil Law System Compared to the U.S. and Canada's Common Law System

To better understand the feasibility of possible solutions described above it is necessary to compare Mexico's legal system to the U.S. and Canadian legal systems. Fundamental differences exist between the Mexican civil law system and the common law systems of the U.S. and Canada, which impact resolution and implementation of the proposed solutions in this paper. While U.S. law, descended from English common law, is a precedent-based way of settling disputes, Mexican law is based on the civil law system, originating in Roman law, passed down through the Napoleonic codes. The civil law system is based on "written law," derived from codes or statutes setting out general principles governing broad areas of law. Whereas in the U.S., lawyers present argument and evidence often in front of a jury for a final determination, in Mexico, a judge receives written arguments and statements, then studies applicable laws to find an adequate solution. Because the judiciary in civil law countries such as Mexico does not interpret and make law as in common law jurisdictions, adherence to form becomes paramount.

Because the legal systems in the U.S. and Canada are for the most part similar, this analysis will limit itself to a general comparison of Mexican and United States law, primarily as it applies to insurance. Because of significant differences between the size of the U.S., Canadian and Mexican insurance markets, information on the Mexican insurance market is also provided, again to help put the discussion in perspective.

Overview of the Insurance Regulatory Structure and Market in Mexico

In Mexico, unlike in the United States, insurance is primarily regulated at the federal level by the *Secretaria de Hacienda y Crédito Público* (Secretariat of Treasury), through the *Dirección General de Seguros y Valores* (General Directorate of Insurance and Securities), which is the entity responsible for granting authorization to operate in the market. However, direct responsibility for regulating the insurance industry falls on the *Comisión Nacional de Seguros y Fianzas* or *CNSF* (Insurance and Banking Commission) a decentralized federal agency created in 1990. The *Asociación Mexicana de Instituciones de Seguros, A.C.* or *AMIS* (Mexican Association of Insurance Institutions) is a voluntary trade group comprised of all the insurance companies in Mexico.

The principal laws that regulate the industry are the *Ley General de Instituciones y Sociedades Mutualistas de Seguros* (General Law of Insurance Institutions and Mutual Companies) [hereinafter *Ley General de Seguros*] and the *Ley General de Contrato* (General Contract Law). Mexican insurers are regulated as to solvency margin rules and investments and are subject to file and use for forms and rates. Just recently the Mexican Insurance and Banking Commission published amendments to the insurance law revising capital requirements and reserve limits.¹³

Under Mexican law, in order to offer insurance or cover risks in Mexican territory, it is necessary to be established as an insurance institution under the law.¹⁴ Branches and agencies law of U.S. and other alien insurers must be established in accordance with Mexican law in order to carry out the business of insurance in Mexican territory.

¹³ Diario Oficial de la Federación (Mexico) [hereinafter Diario Oficial], 4 de junio de 1998.

¹⁴ Ley General de Instituciones y Sociedades Mutualistas de Seguros [hereinafter *Ley General de Seguros*], Capítulo Único, Artículo 3o.

Foreign Establishment Provisions

Parallel to Mexico's accession to the Organization for Economic Cooperation and Development [hereinafter OECD] in 1994 and the NAFTA's entry into force on January 1, 1994, the Mexican government embarked on a structural reform of the insurance regulatory framework in an effort to attract investment into Mexico as well as to achieve a more efficient, competitive and financially sound market. Amendments to the *Ley General de Seguros* encouraged broader participation of foreign financial entities in the Mexican market (November, 1995), made structural reforms to the Social Security Law of December, 1995 (May, 1996), and (3) provided a mechanism for regulation of new insurance operations in Mexico such as managed care operations and catastrophic risks (January, 1997).¹⁵

New rules governing establishment of affiliates of foreign financial institutions were also implemented. Generally affiliates (including insurance companies) are subject to individual and aggregate market share restrictions. The legal reforms of 1995 accelerated the liberalization process by relaxing the restrictions applicable to the acquisition of domestic controlled intermediaries by U.S. and Canadian based financial institutions. During the seven-year transition period established by NAFTA, U.S. and Canadian financial institutions may acquire any domestic controlled financial institution without applying market share limits.¹⁶ All business must be conducted through subsidiaries or joint ventures that comply with requisite Mexican business law.

The timetable for implementing the agreement includes the following:

The aggregate of the authorized capital of all foreign insurance affiliates, measured as a percentage of the aggregate capital of all insurance companies in Mexico, is subject to limits of 6% of market share starting January 1, 1994 with that gradually increasing to 12% by 1999.¹⁷

U.S. or Canadian investors can phase-in an equity interest in a new or existing Mexican insurance company and thereby exempt such Mexican company from the aggregate or individual market caps imposed on foreign insurance affiliates.¹⁸

U.S. and Canadian investors can acquire up to a 30% interest in the Mexican operation by 1994, 51% by January 1, 1998 and 100% by January 1, 2000. On and after January 1, 2000, the percentage requirement of Mexican ownership in these companies shall no longer apply.¹⁹

Notwithstanding the above limits, U.S. insurers that already had an ownership interest of 10 percent or more in a Mexican insurance company as of July 1, 1992 may acquire a controlling interest of up to 100% in such company no later than January 1, 1996 or two years after the date of entry into force of the Agreement.²⁰

The agreement also allows intermediary and auxiliary insurance services to establish subsidiaries with no limits on ownership or market share.

¹⁵ Comisión Nacional de Seguros y Fianzas [hereinafter CNSF], *Recent Developments In the Mexican Insurance Market*, OECD Doc., DAF/AS/WD(97)8, June 23, 1997.

¹⁶Id.

¹⁶NAFTA,¹⁶ See *id.*

¹⁷ See NAFTA, Annex VII(B) -- Mexico, ¶6 at VII-M-15.

¹⁸ See *id.*, ¶7 at VII-M-15, 16.

¹⁹ See *id.*

²⁰ See NAFTA, Annex VII(C) -- Mexico, ¶4 at VII-M-20, 21.

As of the end of the first quarter of 1998, the Mexican insurance market consisted of 66 authorized insurance companies, six pension companies, three mutual companies and three licensed reinsurers.²¹ Of the 66 companies, 18 are part of financial holding groups. Currently 23 insurance institutions are subsidiaries of foreign entities and 14 have foreign capital (up to 49 percent of the common voting stock).²² Subsidiaries account for nearly 7 percent of the market's gross premiums and represent 10 percent of the sector's total capital (174 million dollars).²³

Mexico's Transportation Insurance Requirements

The laws governing liability in the event of an accident in Mexico are set out in various federal criminal and civil codes. The insurance requirements for cargo transportation are set out in Article 68 of the *Ley de Camiones, Puentes y Autotransporte Federal* (Law of Roads, Bridges and Federal Transportation). Article 68 provides that all service concessionaires must insure against damage caused by the vehicle or the cargo to third parties.²⁴ The *Secretaria de Comunicaciones y Transportes* or SCT (Secretariat for Communications and Transportation) recently published insurance requirements for federal passenger, tourism and cargo transportation.²⁵ The transport agency established a minimum coverage per vehicle of U.S. \$69,000 (approximately N\$702,000) for civil liability, the approximate equivalent of 19000 days of minimum wage in the Mexico City Federal District. The annual policy covers third party property damage and personal injury, damages to the federal roadways and miscellaneous damages. It is assumed that the above requirements would also apply to U.S. transporters.

In the case of transportation of hazardous waste, Mexican law requires that cargo be insured from its departure to its delivery and that the insurance also covers risks during the loading and unloading of the cargo.²⁶ Authorities usually require a hazardous waste-cargo company to have N\$700,000 (U.S. \$68,780) of liability insurance. A resolution passed in 1995 required certain transporters of hazardous waste to present proof of insurance or a written guarantee of the ability to pay for damages to the environment for N\$900,000 (U.S. \$88,430).²⁷ Current Mexican law does not require cargo insurance on the cargo itself but as a practical necessity either the carrier or shipper will buy cargo insurance.

The Treatment of Collisions in Mexico

Just as there are differences in Mexico's civil legal system and the common law systems of the U.S. and Canada, Mexico's treatment of accidents also differs. In the United States and Canada, in the absence of criminal negligence or intoxication, generally an accident is a civil matter that does not involve detention of the individual or impoundment of the vehicle. In Mexico however, the laws governing collisions occurring on national highways (considered public roadways of communication) distinguish between accidents causing only property damage to the vehicles and/or damage to the roadway and accidents having criminal implications i. e. resulting in personal injury or death or driving under the influence of alcohol or drugs.

The distinctions are relevant to this discussion because any policy to be effective and responsive to the requirements of Mexican law, must incorporate coverages not typically part of an American or Canadian

²¹ CNSF, Boletín de Análisis Sectorial, Marzo 1998, Año II, Numero 4.

²² *See id.*

²³ *See id.*

²⁴ Ley de Camiones, Puentes y Autotransporte Federal [hereinafter Ley de Camiones], Artículo 68.

²⁵ Diario Oficial, 27 de April del 1998.

²⁶ *See Ley de Camiones, supra.*

²⁷ Diario Oficial, 27 de Noviembre, 1995.

policy. The typical Mexican civil responsibility policy for ex. integrates an extension of coverage which includes a payment bond to cover property damages to the extent of the policy limits as stated in the declaration page of the policy, a guaranteed bail bond in the event of detention of the individual and legal assistance (an extension generally referred to as *Fianza Garantizada y Asistencia Legal*).

It should be noted that under Mexican law, any automobile insurance becomes invalid if Mexican authorities find a driver to be under the influence of alcohol or drugs. Furthermore, exclusions in the policy may void coverage in the event of “negligence” or fraud. Attorneys, retained by the insurance company, protect the insured’s interests in both the civil and criminal proceedings.

Reforms to laws governing the use of public roadways of communication, published in the official bulletin dated December 31, 1996, codified guidelines aimed at clarifying the different situations to be encountered by individuals involved in accidents on Mexico’s national highways.²⁸ According to a Mexican enforcement official, when a motor carrier from the United States legally operates a vehicle inside Mexican territory, the referenced regulations shall apply, treating the American carrier the same as a Mexican national. (For a more detailed analysis of these distinctions in Mexican law, see Appendix 1 – Letter from Comandante Pedro Barreiro Ortiz, Manager of Region XVI PFC, Mexico, Jan. 97).

VI. The Use of the Power of Attorney U.S.-Canada²⁹

The above analysis of the distinct treatment of accidents in Mexico serves to illustrate the difficulties encountered by negotiators and regulators in attempting to harmonize rules and regulations as well as crafting seamless coverage proposals. The mutual recognition by Canada and the U.S. of each other’s motor vehicle insurance policies has been effective because of similarities in the insurance product and the regulatory and legal systems in the two countries. The similarity in regulatory and legal systems allows insurance companies to exchange information to properly assess the risk involved in issuing a policy that can be accepted in the other country.

The typical Canadian personal automobile insurance policy provides coverage within its territory and the United States. Furthermore, Canadian and U.S. companies can enter into business arrangements with each other for the provision of seamless insurance coverage for commercial vehicles operating across that border. The arrangements vary depending on whether the truck is Canadian or U.S. domiciled. To gain entry into the U.S., a Canadian trucker must file certificates of financial responsibility (MCS-90 and Forms E and H) and have proof of insurance. Typically a Canadian insurer enters into an arrangement with an American insurer under which the U.S. insurer does the necessary filings for the Canadian Company and provides proof of insurance. For a U.S. domiciled truck, a “fronting” arrangement is used. The U.S. insurer does the underwriting on the truck and issues the policy and the Canadian insurer reinsures the U.S. insurer, subject to applicable state and reinsurance requirements.

American insurers can insure vehicles operating into Canada by signing the Power of Attorney and Undertaking form (hereinafter Power of Attorney) and filing certificates of insurance with the applicable provincial or territorial motor carrier registrar or regulator. (See Appendix 2- Canadian Power of Attorney and Undertaking) The Power of Attorney denotes compliance with minimum coverage requirements (including statutory accident benefits) in Canada and facilitates acceptance of service. Currently, the British Columbia Superintendent of Insurance acts on behalf of all the Canadian provincial

²⁸ Letter from Pedro Barreiro Ortiz, Comandante, Manager of Region XVI PFC, Chihuahua, Mexico to Gloria Leal, Jan. 97.

²⁹ Info. in this section derived primarily from: Lingard, Steven, *NAFTA and Cross Border Trucking* (presentation of the IBC to the Trinational Insurance Associations meeting, Ottawa, Canada, May 22, 1997) (info. on file with author).

and territorial regulators, in accepting service of notice or process with respect to an action or proceeding against the U.S. company or its insured arising out of a motor-vehicle accident in Canada and its Territories. The form itself merely requires that an officer of the company witness and attest to the affixing of the company corporate seal to the document.

The signatory to the Power of Attorney undertakes to appear in any action or proceeding against it and not to set up a defense to the claim, action or proceeding which would be unavailable if the contract had been entered into in accordance with the laws of Canada. Insurers who are not licensed in Canada, but which have signed the Power of Attorney, can issue to their insureds a Canada Non-Resident Inter-Province Motor Vehicle Liability Insurance Card, a prescribed certificate of insurance (yellow card) which constitutes proof of insurance. Approximately 900 U.S. insurance companies have signed this Power of Attorney.

Distinctions between Common and Civil Law Power of Attorneys and Notaries

In the U.S. and Canada, creation of a valid power of attorney is a relatively simple process usually requiring the execution of a prescribed form witnessed by a notary public or other authenticating official. Creating a foreign power of attorney for use in the U.S. is also a non complicated process. Legalization of the form entails compliance with the requirements of rule 44(a)(2) of the Federal Rules of Civil Procedure and Rule 902(3) of the Federal Rules of Evidence. The rules, which are virtually identical, require that the form be notarized then forwarded to an American consulate official in Mexico for legalization (filing). A power of attorney for use in the U.S. or in Canada need not be authenticated or recorded in a public registry.

In contrast to the U.S. and Canada, a power of attorney for use in Mexico must comply with intricate formalities for recordation of public deeds and strict requirements involving legalization, authentication and protocolization of the document.³⁰ In Mexico, for all practical purposes, all contracts constitute, “public deeds” requiring witnessing by a Mexican notary and recordation of the act in the notary’s records or “protocol”. In contrast to common law notaries, Mexican notaries are attorneys possessing a special appointment by the executive branch of government who perform specialized functions of witnessing, recordation, attestation, and authentication.

V. The Proposed Use of the Power of Attorney U.S.-Mexico

There are generally two forms of powers of attorney used in Mexico, general and special. The general power of attorney in Mexico allows one or more attorneys-in-fact (*apoderados*) to act on behalf of principals in the formation and execution of contracts. Powers of attorney are required to authorize officers and directors of Mexican companies to act on their behalf. General powers of attorney are used primarily in litigation matters, which include authority to accept service and process, for administration or representation of a corporation and for disposition of a company’s assets. Bearers of powers of attorney do not however have inherent authority to bind their companies, although U.S. courts may find apparent authority depending on the facts of a specific transaction.

Special powers of attorney may be drafted to fit specific relationships, transactions or acts. A power of attorney setting out a contractual relationship in the insurance context and providing for acceptance of service or process would be considered a public deed and drafted as a special form, necessitating strict compliance with the requirements of legalization, authentication and protocolization.

³⁰ Info. on power of attorney used in Mexico derived in part from: Celso Gonzalez-Falla, Vinson & Elkins, L.L.P., *Letters Rogatory and Powers of Attorney* (unpublished paper presented at the Fourth Annual Conference, Texas-Mexico Bar Ass’n, Dallas, Texas, Sept. 15, 1997) (paper on file with author).

Mexican laws require translation of the power of attorney into Spanish before the document is presented to the consular official for entry into the notary's records or protocol. If involving a corporation, documents evidencing the signatory's authority to act on behalf of the corporation are also presented to be reviewed by the official. The supporting documents must also be translated into Spanish and certified separately and may include:

- (a) Articles of Incorporation;
- (b) Current Corporation's By-laws;
- (c) Minute Books and other original corporate records of the company;
- (d) Certifications from a Notary Public;
- (e) Resolution of the Stockholders and/or the Board of Directors; and
- (f) Applicable sections of the law of the state of incorporation.

This step is followed by legalization of the power of attorney, which is a chain of certifications which succeeding government officials must sign. An authentication process in Mexico follows. The power of attorney would be sent to the Secretary of Foreign Relations City for authentication of the Mexican consul's signature. A Mexican notary next certifies the Mexican consul's protocolization of the foreign power of attorney. Protocolization, the process of recording the public deed in the notary or consular official's book of protocol, is effected when an official with notarial authority enters the public deed into the protocol.

Mexican judicial and administrative authorities generally consider that a power of attorney granted before Mexican authorities creates a presumption of validity and efficacy. However a power of attorney drafted and granted pursuant to the *Protocolo Sobre Uniformidad del Regimen Legal de Poderes de Washington* (Protocol on the Uniformity of the Legal Regime of Attorney) [often referred to as "Washington Protocol" or Protocol] is also valid in the Mexican Republic, even if granted in a foreign country which is not a signatory to the Protocol. The United States is not a signatory to the Washington Protocol. (See Appendix 3 – Mexican Power of Attorney Form drafted in accordance with the Protocol on Uniformity of Powers of Attorney) There are differences between a the Power of Attorney granted under the Washington Protocol and one granted through Mexican consular authorities. However both require strict adherence to form, format and compliance with all legal requirements.

Recommendation: (1)

Mexico's adherence to the requirements of legalization, authentication and protocolization create practical difficulties in establishing a power of attorney form that could be filed by U.S. companies to extend seamless insurance coverage to trucks entering into Mexico. Development of a uniform proof of insurance form that that would be acceptable to the three parties is a practical solution. Limiting the scope of the use of the proof of insurance form should be given consideration. Conversely, because of the uncomplicated procedure for legalization of a Mexican power of attorney for use in the U.S., filings of powers of attorney by Mexican companies for use in the U.S. may be an attainable solution.

The NAIC should promote development of a uniform insurance liability form that would be acceptable to the three parties.

In addition the NAIC should promote filing of powers of attorney by Mexican companies for use in the U.S. Consideration of a gatekeeper function should include established business and regulatory relationships along the Canadian border and cultural relationships along the Mexican border.

VI. The Use of Endorsements to Extend Coverage

Many U.S. insurance companies will extend the Personal Automobile Policy (PAP) territory of an auto policy for trips into Mexico. Some companies issue endorsements, which add-on coverage to a policy at no charge. In Texas, three types of endorsements are available for border trips and for travel into the interior:

Mexico Coverage-Limited extends the personal automobile policy territory into Mexico within 25 miles of the U.S. border for trips that do not exceed ten days at a time for no additional premium. This insurance pays only if other available insurance will not cover expenses.

Mexico Coverage-Broad extends selected coverages on an auto policy to trips, regardless of time length, that remain within 25 miles of the U.S. border. An additional premium is charged for this coverage.

Mexico Tourist Coverage-Limited requires purchase of liability insurance from a licensed Mexican insurance company. For an additional premium, this endorsement extends the liability coverage provided by a policy for U.S. auto insurance. It only will pay for expenses, if any, that the Mexican liability insurance does not cover i.e. excess coverage only. This endorsement covers trips of any distance and any length of time.

Mexican authorities may or may not recognize the coverage provided by U.S. insurance companies through endorsements. Under Mexican law, an insurance policy must be written by a licensed Mexican company to be recognized in Mexico. (Note that similarly in Texas by example, an insurance policy issued by a Mexican carrier would not be accepted for purposes of compliance with Texas' financial responsibility laws unless the policy was issued by a U.S. licensed subsidiary.) However, the issue is complicated in Mexico due to distinctions in Mexico's auto liability regime. As previously noted, in Mexico an accident can be both a criminal offense and civil matter. If you have an accident in Mexico you must be able to demonstrate the ability to satisfy both civil and criminal responsibility either through insurance from a Mexican licensed insurer, a bond, or other means.

The use of endorsements by U.S. companies is currently problematic as a method for extending coverage into Mexico and for compliance with Mexico's civil and penal responsibilities in the event of an accident. However, the possibility exists that this impediment could be resolved were the endorsements issued by a subsidiary or licensed company established on both sides of the border. That is to say a Chubb, AIG or a Texas licensed Mexican casualty company licensed in the two jurisdictions.

One of these companies could issue an endorsement that extended coverage into Mexico through its licensed Mexican subsidiary or parent company. The endorsement could be drafted to comply with Mexico's civil requirement of third party liability for autos and in the case of cargo transporters, tailored even more specifically. In addition, the endorsement could be drafted to meet Mexico's criminal responsibility requirements for posting of bond, hiring of counsel, etc. In the case of an accident in Mexico, the Mexican company would assumingly have the necessary resources already in place to respond. Such a mechanism would technically comply with the Mexican requirement that insurance to be effective in Mexico be issued by a Mexican licensed company.

Texas Licensed Mexican Casualty Companies

Pursuant to Article 8.24 of the Texas Insurance Code, any insurance carrier lawfully organized under the laws of Mexico, or under the laws of any state thereof, and having a license of the appropriate insurance regulatory authority may issue in the State of Texas, any and all kinds of auto coverage and casualty coverage to be in force only while the insured persons and property are within the boundaries of Mexico. Eight Mexican companies are currently licensed in Texas under this uniquely Texas authorization statute; these companies are generally referred to as Article 8.24 companies or as Mexican Casualty Companies.

Under Article 8.24 a company must file an application with the Texas Department of Insurance, file a copy of the current license from Mexico, deposit with Treasurer of the State of Texas at least \$25,000 in securities (to pay an unsatisfied judgment, if necessary) and pay to the State premium or occupation taxes based on gross premium receipts from insurance policies issued by it in Texas. The Department has the authorization to examine the company's books and its compliance with applicable laws. The company shall underwrite business in Texas only through resident Texas agents duly licensed by the Texas Department of Insurance.

Managing General Agents (MGAs)

The most active Mexican Casualty Companies utilizes the services of a licensed Managing General Agent for distribution and marketing of their products. Pursuant to Texas Insurance Code, Art. 21.07-3, a Managing General Agent means any person, firm or corporation with supervisory responsibility for the local agency and field operations of an insurance company or carrier within the state or who is authorized by a company to accept or process on its behalf insurance policies produced and sold by other agents.

In practice, an MGA interacts with the Mexican insurance system in two ways:

Southbound vehicles - under this scenario, most private passenger and commercial vehicles with American or Canadian plates, can be insured in Mexico (first and third party) under what is commonly referred to as a "tourist policy," said policy being issued on a Mexican policy. The various Mexican insurers that write this coverage most often distribute the coverage through a MGA, or agent that is contractually empowered to recruit other agents. The MGA is in many cases a licensed U.S. agent. There are a number of licensed Texas MGA's who are under contract with Mexican insurers.

Northbound vehicles - under this scenario, most private passenger and commercial vehicles with Mexican plates, can be insured (first and third party) in the United States under what is commonly referred to as a "non-resident" policy, said policy being issued by an American insurer. The American insurer normally contractually appoints an American licensed MGA, and the American MGA in turn appoints various retail agents in Mexico.³¹

Recommendation: (2)

There appears to be potential for provision of seamless insurance through the use of endorsements; particularly from insurers that have subsidiaries or branches in both the U.S. and Mexico. In those cases, a combination of endorsements and powers of attorney may be used to provide joint solutions to a seamless policy across all three countries by using the endorsement concept along the U.S./Mexico and continuing the practice of the use of powers of attorney along the U.S./Canada.

from³¹ See letter from James Douglas Dawson, CPCU, JD, DAWSON y CORREA S.A.DE C.V., MEX GEN AGENT CO to Gloria Leal, 27 November 1997.

The NAIC should promote the provision of seamless insurance through the use of a combination of endorsements and powers of attorney to provide a seamless policy across the three countries.

VII. Recent Developments in Mexican Insurance Law

Pursuant to Mexican federal law, public transport and cargo vehicles transporting on federal highways are required to have liability coverage for third parties, passengers or goods. In addition, there are specific requirements for transporters of hazardous materials and “maquilladora” goods. On the other hand, vehicular insurance is regulated under state law; under Mexican state law there is no mandatory insurance requirement for private automobile owners in any border state.

Until recently, compulsory auto insurance was not required in Mexico except in the urban region of Monterrey, where third party coverage for private vehicles became obligatory three years ago. However, recent developments are expected to significantly impact the insurance market and operations in Mexico. Recently the federal government issued a decree setting out reforms and other regulations applicable to transportation within the Federal District of Mexico.

One of the amendments provides that effective July 1, 1998, all vehicles (bearing Mexico City license tags) traveling on public streets within the Federal District of Mexico, are required to maintain an insurance policy to cover at a minimum civil responsibility for personal injury to third parties.³² The insurance, referred to as *Seguro por el Uso de Vehículos Automotores (SUVA)*, will be set at levels to be determined by the *Secretaria de Comunicaciones y Transporte*. According to its provisions, coverage under *SUVA* is effective should the vehicle be stolen, the driver is under the influence of drugs or alcohol or in the case of motor carriers, and the injury is caused by the cargo being transported.

The regulations also provide for the imposition of fines and in extreme cases, prevention of circulation of the vehicle.

Although compliance and enforcement remains (problematic at this date) the adoption of compulsory motor vehicle insurance for the Federal District is a move slated to boost the underdeveloped Mexican market. According to the Mexican newspaper *El Financiero*, the insurance market is expected to grow significantly as a result of the addition of approximately 10 million drivers in two years.³³ More than 70 percent of the capital’s three million automobiles are uninsured. As proposed, the premium would cost approximately \$275 pesos for a \$250,000 pesos policy. If implemented, state governments are expected to adopt Mexico City’s lead in this matter.

Adoption of compulsory motor vehicle insurance would create major opportunities for the growth and modernization of the insurance industry. Certainly it would go a long way towards establishing the tradition of insurance in Mexico and thereby possibly facilitating long-term discussion of harmonization of insurance standards and requirements between the three countries.

Cross-Border Trade

Other developments worth noting are changes to Mexico’s General Law of Insurance Institutions and Mutual Companies providing that foreign insurers, with a previous authorization from the Secretary of the Treasury and complying with the requirements that it establishes, may enter into insurance contracts in

³² Diario Oficial, Martes 2 de Diciembre de 1997.

³³ Maitland, David, *Compulsory Automobile Insurance Shifts Into Top Gear*, EL FINANCIERO INTERNATIONAL EDITION, April 7-13, 1997 at pg. 9.

Mexican territory to cover risks that occur in foreign territory.³⁴ Current law provides that the practice of any insurance operation in Mexican territory is limited to enterprises organized under Mexican law and prohibits its citizens from entering into contract with foreign enterprises.³⁵ Amendments to Article 3 of that law grant a limited exception to these requirements.

The reforms also stipulate that when no Mexican authorized company can or deems convenient to carry out a certain proposed insurance operation, the Secretariat of the Treasury has discretion to grant a specific authorization so that the coverage may be contracted out directly with a foreign insurer or via a domestic company.³⁶ In addition, the Secretariat of the Treasury will create a registry of foreign insurance companies of good standing and solvency and a history of stability in their market of operation.

The reforms represent a major development in cross-border trade and reflect Mexico's commitment to increase the availability of insurance products to its consumers. In these cases, foreign insurers would be exempt from the establishment restrictions for companies selling coverage for Mexican risks and the restrictions related to offering (soliciting) insurance in Mexico. In effect, the provisions, which have not been implemented and are not NAFTA specific, allow for the registration of foreign insurers, including U.S. and Canadian insurers, to sell and appoint agents to sell in Mexico for coverage in the U.S. and Canada and elsewhere.

This new development mirrors the provisions under Article 8.24 of the Texas Insurance Code (previously referenced) for the licensing of Mexican casualty companies to sell and appoint agents in Texas for coverage effective in Mexico. As a result of this change, it will be possible for U.S. and Canadian insurers to register in Mexico and enter into relationships with Mexican insurers (including appointing them as agents) for the sale of insurance products to provide physical damage, cargo and liability insurance to meet U.S. and Canadian requirements when Mexican motor carriers enter these territories. This new development could facilitate the sale of "bundled" insurance products.

Although the law is not limited to property and casualty coverage, it represents a positive step in the right direction in providing a structure for the development of the seamless insurance policy valid in the three countries. It should be noted that the adoption of the amendments was a response to existing market demand and conditions. In December of 1997, in response to a request from an American company, the Secretariat of Treasury had issued an opinion authorizing the sale of such coverages. The change in the law codifies this practice.

It is perceived that the new law will be positive in terms of combating fraud, as motor carriers truckers in Mexico will now be able to purchase their liability insurance for coverage in the U. S. and Canada from known brokers, rather than at the border from unknown or unauthorized sources.

The NAIC through its Texas representative committed assistance and cooperation in helping the Mexican regulators develop rules to implement this law.

Recommendation: (3)

Under the current reforms, Mexico has taken yet another step towards liberalization of the insurance market. The amendments pertaining to the registration of foreign insurers are of great importance as they increase availability of adequate levels of insurance in Mexico and aid in

³⁴ See Decreto que reforma, adiciona y deroga diversas disposiciones de la Ley General de Instituciones y Sociedades Mutualistas de Seguros [hereinafter Decreto que reforma Ley General de Seguros], January 3, 1997.

³⁵ See Ley General de Seguros, *supra*.

³⁶ See Decreto que reforma Ley General de Seguros, *supra*.

combatting fraud. Furthermore the reforms assure greater participation of foreign insurers in areas previously restricted in turn contributing to the steady growth and stability of the market in Mexico.

The NAIC should monitor developments on Mexican insurance law for impact to the market and for regulatory action as needed. Additionally, the NAIC should encourage our Mexican counterparts to implement the new law changes and make registration of alien insurers a reality.

VIII. Conclusions and Recommendations:

The International Insurance Issues (F) Committee concludes and recommends as follows:

- A. Recommends adoption of the paper as the NAIC position on the identification of barriers and solutions to development of a seamless insurance policy for motor carriers transporting goods and passengers between the countries of Canada, the United States and Mexico;
- B. Recommends adoption of the two solutions proposed in the paper as the NAIC's proposals for implementation of a seamless insurance concept;
- C. Recommends that NAIC continue monitoring the liberalization efforts undertaken by the Mexican government for evaluation of impact on the insurance market and the necessity of recommending regulatory action if any;
- D. Recommends the NAIC's continued participation and cooperation with international negotiators, including the U.S. Department of Commerce, its representative in NAFTA financial services, the U.S. Department of Transportation, its counterparts, the Financial Services Commission of Ontario, the *Comisión Nacional de Seguros y Fianzas*, and industry to continue consultations provided for in the NAFTA; it is also recommended that the NAFTA encourage the participation of the Canadian Council of Insurance Regulators in these discussions;
- E. Recommends the NAIC's continued participation and cooperation with industry, and associations, including the National Association of Independent Insurers, American Insurance Council, Insurance Bureau of Canada and the *Asociación Mexicana de Instituciones de Seguros, A.C.*
- F. Recommends the NAIC assist, as requested and necessary, the *Comisión Nacional de Seguros y Fianzas*, in drafting rules to implement reforms to Mexican law; and
- G. Recommends that the NAIC charge the International Insurance Issues (F) Committee with responsibilities to continue to monitor NAFTA developments and initiate required changes to Model Laws and regulations to facilitate the implementation process.

Final Note

This report was intended to address specific proposals and to outline select insurance issues pertaining to cross-border transportation. This report should not be misconstrued as a final report as developments in the field are ongoing. It is imperative that trade associations, insurance companies, and other interested parties continue to work with state and federal regulators to see that issues are addressed expeditiously.

Appendices