FOREIGN DIRECT INVESTMENT IN MEXICO AND THE 1994 CRISIS: A LEGAL PERSPECTIVE*

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* *In Memoriam*: To my father—Luis del Toro—I will continue your struggle for a better Mexico.

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I. INTRODUCTION

Presently, the world is experiencing an unprecedented revival of liberal, free trade theories. Globalization is the word of today. It mirrors the process of economic integration that is occurring worldwide. Markets are no longer isolated—they are interrelated in such a manner that domestic acts that appear to be circumscribed to a specific territory have important consequences abroad.

Within this context, flows of capital become the main factor in the development of specific countries, regions, and the globalized world itself. Mexico, as a participant in this movement, has a specific role to play. Globalization implies the interrelation of markets. Hence, any aspect, such as economic developments, regulations, and policies that Mexico experiences will have consequences within the global community.

The primary focus of this Article is foreign direct investment (FDI) in Mexico. FDI is the flow of capital that mainly multinational corporations (MNCs) supply in their operations throughout the world. This study is divided into three areas of analysis and examines links between economic development and FDI. It also examines how a country like Mexico can enhance FDI to foster economic growth and improve the wealth of its people.

The first area of analysis begins in Part II, which describes the different regulations that have ruled FDI in Mexico since its independence until the present day. First, a historical analysis of the regulation of FDI in Mexico is provided. The reader can see how Mexico has evolved from a protectionist, suspicious viewpoint towards FDI to a policy of FDI promotion. In Part II, the main subject is the past and present regulations governing FDI, such as the 1917 Mexican Constitution, the 1973 Law (*Ley Para Promover la Inversión Mexicana y Regular la Inversión Extranjera*), the 1989 Regulations (*Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*), the 1993 Foreign Investment Law (*Ley de Inversión Extranjera*), the Competition Act (*Ley Federal de Competencia Económica*), the North American Free Trade Agreement (NAFTA), and their institutions.

Part III explains the circumstances under which Mexico has entered into the era of globalization. First, it analyzes the need for capital flows in Mexico to achieve necessary economic development. Second, it shows how Mexico has mainly relied on debt to promote economic growth and the resulting consequences in its economy. Third, it examines the economic difficulties Mexico experienced in 1994 after entering the globalization process. This Part demonstrates how reliance on short-term capital flows influenced the 1994 crisis.

Part IV focuses on the important role FDI plays in Mexico. It studies the advantages of FDI. It compares the effects of FDI with the effects of short-term investments and debt. Hence, after demonstrating that FDI as a long-term investment gives stability to the Mexican economy, the study turns to the different possibilities Mexico has in the domestic and international arena to enhance FDI. It focuses on the impact of the rule of law in attracting FDI and evaluates whether the present domestic system is sufficient to attract efficient capital to the Mexican market, or if more rules, both domestic and international, are necessary.

II. FOREIGN DIRECT INVESTMENT IN MEXICO

A. Introduction

To understand the recent developments in the regulation of FDI in Mexico, one cannot ignore the history from which it has evolved. Mexico[1] is a representative, democratic, and federal republic whose territory covers an area of 1,958,201 kilometers[2] divided into 31 states and the Federal District, with a population in 1994 of 92,202,199.[3] Since its independence from Spain in 1821 until the end of the so-called Mexican Revolution in the 1920s, Mexico has struggled with invasions, coups d'état, and wars. Because of these violent conditions, Mexicans did not have the opportunity to think about social, economic, and political reforms. It was only during the dictatorship of Porfirio Díaz (1876–1911) that the promotion of foreign investment became a primary government policy, and the country flourished with the construction of railroads, some infrastructure, banks, industry, and a stable exchange rate. However, the few benefits of this policy led to the revolution of 1910.[4]

Thus, it was during the *Porfiriato* that FDI came to Mexico. In a short period of time, foreign investment, mainly from American and English capital, dominated the main exporting sectors.[5] It was also during this period that Mexico experienced its first economic boom as an independent nation.[6]

The 1917 Constitution emerged from the revolutionary struggle and remains in force with several modifications.[7]

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1. Mexico's official name is *Estados Unidos Mexicanos*. *See* MEX. CONST. art. 1.

2. *See* CÁMARA NACIONAL DE COMERCIO DE LA CIUDAD DE MÉXICO, MEXICO: DATA AND STATISTICS DIGEST 3 (1993).

3. *See id.*

4. For a detailed discussion of both the economic and cultural impact of the *Porfiriato*, see JULIE A. ERFANI, THE PARADOX OF THE MEXICAN STATE: REREADING SOVEREIGNTY FROM INDEPENDENCE TO NAFTA 1–33 (1995).

5. *See* Lorenzo Meyer, *Desarrollo Político y Dependencia Externa: México en el Siglo XX, in* CRÍTICAS CONSTRUCTIVAS DEL SISTEMA POLÍTICO MEXICANO 18–24 (William P. Glade & Stanley R. Ross eds., 1973).

6. For example, prior to Díaz's ascension, Mexico's railroad infrastructure consisted of 640 kilometers of track. *See id.* at 19. After Díaz's government, Mexico had 19,289 kilometers of track. *See id.* Likewise, before the *Porfiriato*, Mexico had only a few mines and foundries; afterwards, however, Mexico had over 150. *See id.*

7. Promulgated on February 5, 1917, the Mexican Constitution has been modified more than 300 times. *See* RAFAEL I. MARTÍNEZ MORALES, CONSTITUCIÓN

Since this Constitution originated as an agreement among the parties that won the revolution, it departs from individualist doctrine.[8] It considers human rights not as the basis and object of social institutions, but as a group of individual guarantees (*garantías individuales*) the State grants to its inhabitants.[9] The 1917 Constitution creates the concept of social guarantees (*garantías sociales*), which are rights the State grants to certain social classes (contained mainly under Articles 27 and 123) that, as Professor Burgoa states, reflect the fundamental revolutionary aspirations for wealth of the helpless people, peasants, and workers.[10]

Nevertheless, the Mexican economy is, and has been, unstable ever since. It suffers from extremely inadequate income distribution among different regions and economic sectors.[11] A 1994 survey by Forbes magazine stated that prior to the 1994 crisis, Mexico was home to twenty-four billionaires—more than any other country outside the United States, Germany, and Japan.[12] Yet, at the same time, there was a rebellion in the state of Chiapas in which people were struggling and dying of hunger, with nothing to lose and everything to gain.[13]

POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS at xxi, 181–202 (2d ed. 1996) (providing all constitutional amendments up to December of 1996).

8. *See* IGNACIO BURGOA O., EL JUICIO DE AMPARO 130–31 (30th ed. 1992).

9. *See* MEX. CONST. ch. 1 (enumerating individual guarantees including the right to education, the right to work, and the right to organize).

10. *See* BURGOA, *supra* note 8, at 130–31. Regarding the Mexican Revolution, even though the political discourse has been one of a strong sovereign state which finds its origin in the civil war, when one looks to reality the story is different. One author points out: "The [Mexican] state has had remarkable legal-political authority but negligible ability to fulfill the constitutional goals and promises of 1917—to be the provider of mass societal well being." ERFANI, *supra* note 4, at 3.

11. Fernando Carmona states that the uneven income distribution was at its worst in the 1970s. Most likely, economic distribution in the 1970s was worse than in the 1950s. Since then a process of increasing concentration of income that benefits those who earn income by means of capital has been experienced. *See* Fernando Carmona, *Dependencia y Subdesarrollo Económico, in* 2 LA ECONOMÍA MEXICANA: POLÍTICA Y DESARROLLO (1991) 460–61; *see also* Pedro Aspe & Javier Beristain, *Toward a First Estimate of the Evolution of Inequality in Mexico, in* THE POLITICAL ECONOMY OF INCOME DISTRIBUTION IN MEXICO 31, 36–51 (Pedro Aspe & Paul E. Sigmund eds., 1984) (estimating real income inequality in Mexico based upon economic modeling and economic data from 1963 to 1977).

12. *See* Christopher Palmeri & Kerry A. Dolan, *A Tough New World*, FORBES, July 17, 1995, at 122. In 1995, after the crisis, during which the value of the peso was cut in half, Mexico still had 10 billionaires. *See id.* at 122.

13. *See* GEORGE A. COLLIER, BASTA!: LAND AND THE ZAPATISTA REBELLION IN CHIAPAS 2–10 (1994).

Despite the 1917 Constitution and its "nationalistic" approach towards foreigners,[14] FDI since the revolution has been an important factor in the national economy. In the 1940s Mexico initiated the period known as the Institutionalized Revolution.[15] During this period the Mexican economy experienced sustained economic development. This was the result of a mixed economy in which the State acted in an interventionist manner, providing infrastructure in basic branches of the economy such as oil, railroads, and electricity, while participating in several other areas in which the private sector could not or would not participate.[16] The private sector was protected and grew because of this "Import Substitution Regime."[17] However, FDI entered slowly into the Mexican economy during this period, mainly because of American MNCs which also benefited under the protectionist policies. They entered areas in which neither the Mexican government nor the private sector had the capital or knowledge to compete in sectors such as chemicals, steel, automobiles, and machinery.[18] Nevertheless, Mexico's approach to FDI since the *Porfiriato* has been interpreted, mainly by the United States, as attempted domination, and this sentiment can be observed within the 1917 Constitution.[19]

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14. To understand why Mexicans see foreigners as potential enemies, one should study Mexican history. *See* Stephen Zamora, *Allocating Legislative Competence in the Americas: The Early Experience Under NAFTA and the Challenge of Hemispheric Integration*, 19 HOUS. J. INT'L L. 615, 628–31 (1997) (stating that "[j]ust as an affluent person has a difficult time understanding the problems of hunger, in the United States we have trouble understanding the concept of sovereignty precisely because we have never lacked it"). For a brief study of how these feelings contributed to the nationalistic foreign investment rules, see Stewart W. Fisher, Comment, *The Regulation of Foreign Business in Mexico: Recent Legislation in Historical Perspective*, 7 N.C. J. INT'L L. & COM. REG. 383 (1982).

15. This name comes from the formation of the PNR (National Revolutionary Party) which is the father of the current PRI (*Partido Revolucionario Institucional*) which has been the party in power since 1930 (or 1928 depending on the source).

16. *See* Meyer, *supra* note 5, at 38–45.

17. *See id.* at 39.

18. *See id.* at 41.

19. *See, e.g.*, MEX. CONST. art. 27, § I (preventing foreign nationals from purchasing Mexican real estate within 100 kilometers of the borders and within 50 kilometers of the coasts).

B. From the 1917 Constitution to the 1989 Regulations

With respect to the regulation of FDI in Mexico, the 1917 Constitution departs from an individualist theory.[20] Article 27, which defines private property ownership as a social function, restricts the ability of foreigners to take over specific types of property.[21] Furthermore, the "Calvo Clause"[22] was imposed to restrict the enjoyment of real property owned by foreigners.[23] While the Constitution did not contemplate an absolute prohibition on a foreigner's right to hold property, it was used to affect international interests in natural resources.[24] Article 27, however, simply maintains the civil law concept by which all rights to the nation's subsoil belong to Mexico—a principle incorporated in the 1783 *Reales Ordenanzas para la Minería de la Nueva Espana.*[25]

Article 27 of the Constitution states:

> Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transfer title thereof to private persons, thereby constituting private property.
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> . . . .

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20. *See supra* text accompanying note 9.

21. *See* MEX. CONST. art. 27, § I.

22. The "Calvo Clause" refers to the thesis held in 1896 by the Argentinean lawyer Carlos Calvo. *See* DONALD R. SHEA, THE CALVO CLAUSE 17 (1955). It is founded on the notion that a foreigner should not have more or fewer rights or benefits than those bestowed by law to the citizens of a State. *See id.* at 107. It condemns the diplomatic or armed intervention as a legal means to enforce private reclamations. *See id.* at 108–14.

23. *See* MEX. CONST. art. 27 (requiring that foreign nationals purchasing Mexican property enter into a contract with the Mexican Ministry of Foreign Relations agreeing to be considered a Mexican with respect to real estate and agreeing not to invoke the protection of their own country).

24. One example of this situation was the expropriation of oil companies in 1938 by President Lázaro Cárdenas. *See* ERFANI, *supra* note 4, at 53–58. She makes the interesting point that:

> The Cárdenas government's use of the principles of international law and of article 27 of the Mexican constitution to justify the oil expropriation to foreign governments also served to mythologize the "powers" of the postrevolutionary nation-state. Legend surrounding the expropriation has it that the Mexican state used its sovereign legal authority to demonstrate its powers over foreign investors.

Id. at 55.

25. *See* DR. LUIS MIGUEL DÍAZ, GLOBALIZACIÓN DE LAS INVERSIONES EXTRANJERAS: NUEVOS ASPECTOS JURÍDICOS 39 (1989).

> The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them to ensure a more equitable distribution of public wealth, [and] to attain a well-balanced development of the country and improvement of the living conditions of the rural and urban population.
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> . . . .
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> Legal capacity to acquire ownership of lands and waters of the Nation shall be governed by the following provisions: I. Only Mexicans by birth or naturalization and Mexican companies 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 Affairs [Secretaría de Relaciones Exteriores] 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 noncompliance with this agreement, of forfeiture of the acquired property to the Nation.* Under no circumstances may foreigners acquire direct ownership of lands or waters within a zone of one hundred kilometers along the frontiers and of fifty kilometers along the shores of the country.[26]

The first formal set of FDI regulations, besides the Constitution, was the Emergency Decree of 1944,[27] issued by President Avila Camacho using the extraordinary powers that the Constitution gives to the executive to restrict trade in emergency cases.[28] With this Decree, foreigners needed an

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26. MEX. CONST. art. 27, *translated in* Gisbert H. Flanz & Louise Moreno, *Mexico, in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1, 23–25 (Albert P. Blaustein & Gisbert H. Flanz eds., 1988) (emphasis added). The last quoted sentence refers to the so-called *franja prohibida*, or forbidden zone.

27. "Decreto que establece la necesidad transitoria de obtener permiso para adquirir bienes, a extranjeros, y sociedades mexicanas que tengan o tuvieren socios extranjeros," D.O., 7 de julio de 1944 [hereinafter *Emergency Decree*].

28. *See* MEX. CONST. art. 131, para. 2. The emergency in this case was World War II.

authorization issued by the Foreign Affairs Ministry for the takeover of capital invested in a wide range of sectors, such as agriculture, livestock, forestry resources, real estate, and mining concessions.[29]

In 1945 the Mexican government issued a roster of Mexican corporations requiring 51% domestic ownership.[30] In 1947 this was complemented by the creation of an Interministerial Commission[31] to supervise the legality of foreign capital in the country.[32] In 1960 electric power was nationalized. However, it was not until 1973 that the first foreign investment law was enacted in an effort to codify and systematize what had been a confused mass of rules until that time.[33] It was during this period that the "Import Substitution Industrialization" was adopted, by which the Mexican State concentrated its efforts on the promotion of local investment and the creation of state enterprises to promote industrialization.[34]

C. The Law to Promote Mexican Investment and to Regulate Foreign Investment of 1973[35]

It was not until 1973[36] that the first foreign investment law was enacted. It was formulated under Article 73 fracción X of the Constitution, which bestows on Congress the power

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29. *See Emergency Decree*, *supra* note 27, art. 1(a).

30. *See* DÍAZ, *supra* note 25, at 40.

31. This Commission is the predecessor of the National Commission of Foreign Investment created in 1973.

32. From 1947 to 1953 the Interministerial Commission (*Comisión Mixta Intersecretarial*) adopted twelve general rules, which were mainly related to the legal capacity of foreign investors and the accomplishment of the 1944 Emergency Decree. *See* DÍAZ, *supra* note 25, at 40.

33. *See id.*

34. For a more detailed history of the different measures the Mexican State adopted before the 1973 statute, see Paul E. Sigmund, *The Regulation of Foreign Investment in Mexico and Its Impact on Income Distribution*, *in* THE POLITICAL ECONOMY OF INCOME DISTRIBUTION IN MEXICO, *supra* note 11, at 247–50; *see also* Fisher, *supra* note 14, at 390 (stating that the "novelty of the Mexican plan for import substitution was that it created protectionist barriers to importation of goods while relying on the importation of foreign capital and manufacturing skills as a key to industrialization").

35. "Ley Para Promover la Inversión Mexicana y Regular la Inversión Extranjera," D.O., 9 de marzo de 1973 [hereinafter 1973 Law].

36. Within the administration of President Luis Echeverría things began to change; that is, "Under Echeverría there was a reexamination of the arguments for and against foreign investment—and more generally of the whole model of stabilized development [*desarrollo estabilizador*] which had dominated the thinking of Mexican policymakers since the early 1950s." Sigmund, *supra* note 34, at 249–50.

to legislate matters of commerce.[37] The statute directed, as its name indicates, the promotion of Mexican investment and considered foreign investment as supplementary. It was designed "to avoid the sale of already established Mexican-owned companies to foreign investors" and "to restrict and, in most areas of economic endeavor, to deter foreign investment."[38] Its purpose was to promote Mexican investment, to regulate foreign investment, to stimulate a just and balanced economic development, and to consolidate Mexico's economic independence.[39] "Foreign investment" was defined as investment made by foreign individuals, entities, and economic units, as well as Mexican corporate entities which were majority-owned or controlled by foreigners.[40]

The Mexican government wanted to "protect the resources available per unit of labor, [and] . . . its ownership structure[,] . . . [and to] generate mechanisms that guarantee[d] their natiónals' exposure to new technologies."[41] Thus, the 1973 Statute limited four foreign investment categories: (1) activities reserved for the State;[42] (2) activities reserved exclusively for Mexicans or for corporations with an exclusion of foreigners clause in their articles of incorporation;[43] (3) activities in which foreign investment

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37. After three years of criticism about the constitutionality of the statute, Congress published, in December 1982 an amendment to Article 73 of the Constitution. *See* D.O., 3 de febrero de 1983.

38. Miguel Jauregui Rojas, *A New Era: The Regulation of Investment in Mexico*, 1 U.S.-MEX. L.J. 41, 45 (1993).

39. *See* 1973 Law, *supra* note 35, art. 1.

40. *See id.* art. 2.

41. NORA LUSTIG, MEXICO: THE REMAKING OF AN ECONOMY 175 n.46 (1992). With regard to the technology sector, before the 1973 Law was signed, the Mexican legislature adopted the Law on the Registration of the Transfer of Technology and Use and Exploitation of Patents and Trademarks. *See* "Ley sobre Registro de la Transferencia de Tecnología y el Uso y Explotación de Patentes y Marcas," D.O., 30 de diciembre de 1972. Its purpose was to review and approve or disapprove proposed new technology contracts and its effect was buttressed by the passion of the Inventions and Trademarks Law. *See* "Ley de Invenciones y Marcas," D.O., 20 de enero de 1981. For more information about these laws and their effect on U.S. FDI, see Ewell E. Murphy, Jr., *The Echeverrían Wall: Two Perspectives on Foreign Investment and Licensing in Mexico*, 17 TEX. INT'L L.J. 135, 137–44 (1982).

42. *See* 1973 Law, *supra* note 35, art. 4, para. 1. Reserved activities include: hydrocarbons; basic petrochemicals; radioactive minerals and nuclear energy; certain mining; electricity; railroads; telegraph and radiotelegraph communications; and other activities specified by statute. *See id.* art. 4, para. 1(a)–(h).

43. *See id.* art. 4. Reserved activities include: radio and television; certain motor carriers; domestic air and sea transportation; forestry; gas distribution; and other activities specified by statute or executive regulations. *See id.* art. 4, para. 2(a)–(f).

could not exceed a certain percentage set below the maximum of 49%;[44] and (4) all remaining activities in which foreign investment was allowed to be no greater than 49%. However, in practice those restrictions were constantly circumvented by establishing a trust (*fideicomiso*) and through the illegal practices of "namelenders."[45]

The 1973 Law also created both the National Commission of Foreign Investments (CNIE)[46] and the National Registry of Foreign Investments (RNIE).[47] The Commission had the power to issue general or specific resolutions to regulate foreign investment.[48] The Commission is composed of the heads of the Ministries of Commerce and Industrial Promotion; Interior; Foreign Affairs; Treasury and Public Credit; Energy, Mines and State Owned Enterprises; and Labor.[49] It holds mandatory monthly meetings.[50] The Executive Secretary is appointed by the President and is in charge of foreign investment in Mexico.[51] The CNIE had discretionary authority to grant exemptions to the 49% limit of foreign investment in those activities mentioned in the fourth category above, when, "in its judgment," it would be advantageous for Mexico, judged on a case-by-case basis.[52] This discretionary power has been seen as a potential source for corruption even though the goal it was intended to

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44. *See id.* art. 5. Minimum foreign investment activities include: national reserve mining; secondary petrochemicals; automobile components; and other activities specified by statute or executive regulations. *See id.* art. 5, paras. 1(a), 2(b)–(d).

45. *See* LUSTIG, *supra* note 41, at 127–28. "Namelenders" (*prestanombres* or *testaferros*) were Mexican nationals who appeared to own property, but were in fact only nominal owners. *See id.* at 128.

46. *See* 1973 Law, *supra* note 35, art. 11. The official name of the Commission is *la Comisión Nacional de Inversiones Extranjeras* [hereinafter CNIE]. *See id.*

47. *See id.* art. 23. The official name of the National Registry is *el Registro Nacional de Inversiones Extranjeras* [hereinafter RNIE]. *See id.*

48. *See id.* art. 12(I)–(IX). This power is considered to be an unconstitutional attribution because some resolutions have in fact changed the law without following the legislative procedure required by Articles 71 and 72 of the Constitution. One commentator notes that some of the "most controversial [general resolutions were] those by which the Commission gave itself a veto over 'new establishments,' 'relocations,' 'new fields of economic activity,' and 'new product lines' undertaken by 'foreign investors,' including previously existing Mexican companies controlled by foreigners." Murphy, *supra* note 41, at 138.

49. *See* 1973 Law, *supra* note 35, art. 11, para. 1.

50. *See id.* art. 11, para. 2.

51. *See id.* art. 11, para. 3.

52. *See id.* art. 8.

produce, bargaining power, was successfully achieved.[53] The Registry was established as a watchdog to monitor activities and keep statistics of direct and indirect foreign investments.[54] However, its reports were not public: all existing foreign-owned businesses were required to register.[55]

Article 13 of the law stated the Commission would consider a total of seventeen criteria to determine the benefit of a proposed foreign investment, to authorize it, or to grant an exception to the 51% national investment requirement. However, broader discretion was permitted.[56] Nevertheless,

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53. To illustrate the bargaining power that the Mexican state had after the 1973 Law was enforced, see C. W. L. Hill, *IBM in Mexico, in* INTERNATIONAL BUSINESS: COMPETING IN THE GLOBAL MARKETPLACE 195–96 (1994).

54. *See* 1973 Law, *supra* note 35, art. 12(III)–(IX).

55. *See id.* art. 23.

56. *See id.* art. 13(I)–(XVII). These were the criteria and characteristics that foreign investment was to have, under Article 13 of the LIMRIE, to be considered by the Commission:

> I. To be complementary of national investment;
> II. It shall not displace national firms that are operating effectively nor direct the fields that are already covered by them;
> III. Its positive effects under the balance of payments and, in particular, over the increase of exportations;
> IV. Its beneficial effects over employment;
> V. The occupation and capacitation of Mexican technicians and administrative staff;
> VI. The incorporation of local content in the elaboration of products;
> VII. The medium in which they finance their operations with foreign resources;
> VIII. Diversification of investment sources and the need to promote regional and subregional integration within the Latin-American area;
> IX. Contribution to the development of less developed regions and zones;
> X. It shall not imply the creation of monopolies within the national market;
> XI. The capital structure of the economic activity branch that has to do with it;
> XII. The technological and research and development contribution to the country;
> XIII. Its effects over the price levels and the quality of production;
> XIV. Preservation of the social and cultural values of the country;
> XV. The importance of the activity within the national economy;
> XVI. The identification of the foreign investor with the country's interests and its bond with foreign economic decision centers; and
> XVII. In general, the extent to which the investment contributes to the achievement of the objectives of and becomes attached to national development policy.

Id. (author's translation).

all these rules failed to produce a healthier economy or promote more equal income distribution.[57] Furthermore, once a foreign corporation had merged into a 49% basis with a Mexican firm, it:

> escap[ed] the control of the commission—and judging from the complaints on this score by those interviewed at the Ministry of National Properties, it seems that Mexicanization [was] seen by the regulators as an obstacle to the attainment of the other national goals embodied in the criteria listed in Article 13 and applied by the commission.[58]

Thus, the regulations were not effective since they did not achieve the twin goals of developing the national private sector and producing welfare among the population (with a few exceptions).[59] The law was not applied evenhandedly and provoked an outlaw situation where the law did not conform to reality. The opportunity to use the rule of law as an instrument to achieve wealth in Mexico was lost.

The policy towards FDI in Mexico did not shift to a significantly open scheme until 1989.[60] Nevertheless, during the administration of Miguel de la Madrid (1982–1988)[61] the CNIE issued the "Guidelines on Foreign Investments and the Purposes of Its Promotion."[62] This document stated that the 1973 Law did not need any changes.[63] However, in accordance with the "National Development Plan,"[64] the CNIE would promote a policy of the selective promotion of sectors that had been targeted as priorities. Nevertheless, this

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57. *See* Sigmund, *supra* note 34, at 256–59 (discussing examples of the beneficial effects to a small group of families with regard to the policies adopted as a consequence of the 1973 Law and noting "the increasing dominance of a small number of private Mexican industrial groups") (emphasis omitted).

58. *Id.* at 255.

59. *See* Murphy, *supra* note 41, at 143 (stating by 1982 FDI constituted only 4% of all private investment in Mexico and that "[d]uring the 1970's, foreign investors withdrew sixty cents in dividends for each dollar they invested").

60. *See* LUSTIG, *supra* note 41, at 128–29.

61. It was during his administration that Mexico was accepted into the GATT. The agreement was approved by the Senate on October 9, 1986, and published in Diario Oficial on November 26 and 28 of the same year.

62. *Lineamientos sobre Inversiones Extranjeras y Propósitos de su Promoción, 17 de febrero de 1984, in* COMISIÓN NACIONAL DE INVERSIONES EXTRANJERAS, INVERSIONES EXTRANJERAS: MARCO JURÍDICO Y SU APLICACIÓN (1984).

63. *See id.*

64. "Derecto por que se Aprueba el Plan Nacional de Desarrollo 1983–1988," D.O., 31 de mayo de 1983.

document did not change the perceptions of foreign investors.[65]

D. The 1989 Regulations

Between 1976 and 1981, the average annual increase of the Mexican external debt was 43%.[66] In 1982, the current account deficit reached 16.9% of the Gross Domestic Product (GDP).[67] In August of the same year, "a group of highly ranked Mexican officials flew to Washington, D.C. to inform the U.S. [S]ecretary of the [T]reasury that Mexico could no longer meet its international financial obligations. This announcement marked the beginning of the worst international financial crisis since the world depression in the 1930s"[68] for Latin American countries. This situation spurred the Mexican government to change its foreign investment policy.

After the 1982 debt crisis, the Mexican government realized that foreign investment "had become a necessary precondition for growth" and that the pursuit of fiscal discipline, deregulation, and the relaxation of foreign trade and foreign ownership limitations were seen as necessary steps to attract significant amounts of foreign investment."[69] Ultimately, the regulatory framework for foreign investment gave way to a less restrictive regimen.[70]

Since 1986, as a result of Mexico's membership in General Agreement on Tariffs and Trade (GATT) and its entrance into the globalization era, over thirty petrochemical products were reclassified from a basic to a secondary grade.[71] Other economic activities were opened to foreign investment through the CNIE General Resolution that

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65. *See* Rosemary R. Williams, Note, *Has Mexico Kept the Promise of 1984? A Look at Foreign Investment Under Mexico's Recent Guidelines*, 23 TEX. INT'L L.J. 417, 434 (1988). For more detailed information about passage and efficacy of the 1984 regulations, see Jorge Camil, *The Nationalized Banking System and Foreign Debt,* 18 INT'L LAW. 323, 326–29 (1984) (observing how President López Portillo nationalized the banking system response to the crisis of 1982); Julio C. Trevino, *Mexico: The Present Status of Legislation and Governmental Policies on Direct Foreign Investments,* 18 INT'L LAW. 297, 299–302 (1984) (discussing specific provisions of the National Development Plan).

66. *See* LUSTIG, *supra* note 41, at 22 tbl.1-5.

67. *See id.* at 30 tbl.2-1.

68. SEBASTIAN EDWARDS, CRISIS AND REFORM IN LATIN AMERICA: FROM DESPAIR TO HOPE 17 (1995).

69. LUSTIG, *supra* note 41, at 128.

70. *See id.*

71. *See* William A. Orme, Jr., *Mexico Slowly Permitting More Private Participation in Petrochemicals*, HOUS. CHRON., Apr. 10, 1988, at 12.

Systematizes and Updates the General Resolutions.[72] It was a highly criticized method, in Mexico and abroad, which did not give enough confidence and security to foreign investors.[73] Although reform of the 1973 Statute seemed to be essential for President Carlos Salinas's (1988–1994) economic strategy, some political considerations were evaluated. Salinas had just started his administration, having been elected in a very suspicious manner within an already controversial electoral process.[74] The PRI majority in Congress was not enough to legitimize, in the opinion of an aggressive public, reform of a matter that had been very polemic due to social, historic, and security considerations. Therefore, Salinas's administration chose to take advantage of Article 89 fracción I of the Constitution, which bestows the President with the executive regulation power.[75]

On May 16, 1989, the Salinas administration published, in the Official Gazette Diario Oficial, the "Regulations for the Law to Promote Mexican Investment and to Regulate Foreign

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72. "Resolución General que sistematiza y actualiza las Resoluciones Generales ernitidas por la Comisión Nacional de Inversiones Extranjeras," D.O., 3 de febrero de 1988. The National Commission of Foreign Investments issued nineteen general resolutions. However, in February 1988 it issued the General Resolution that Systematizes and Updates the General Resolutions in order to give coherency and certainty to foreign investors.

73. As evidence of the lack of confidence foreign investors had in this method, it was repealed the following year. *See* "Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera," D.O., 16 de mayo de 1989 [hereinafter 1989 Regulations].

74. *See* Brian O'Reilly, *Doing Business on Mexico's Volcano*, FORTUNE, Aug. 29, 1988, at 72.

75. *See* 1989 Regulations, *supra* note 73, MEX. CONST. art. 89 § I (granting the President the power to "promulgate and execute the laws enacted by the Congress of the Union, [and] providing for their exact enforcement in the administrative sphere"). This is the so-called regulatory faculty of the executive, whose nature is formally executive but materially legislative. *See* DÍAZ, *supra* note 25, at 70–79. The constitutionality of the Regulations was debated because they were deemed contrary to the principles settled in Article 27 of the Constitution. *See id.* However, the debate no longer has any consequence, besides a historical one. *See id.* It was unconstitutional because it was contrary to the 1973 Law and Congress did not follow the proper way to amend the basic principles through the legislative power that the constitution requires. Nevertheless, the Regulations gave enough certainty to foreign investors. Official data demonstrates that Mexico received, before 1993, FDI of up to US$34,056.2 million.

Investment Regulations."[76] These Regulations abrogated all prior regulations governing foreign investment.[77]

The 1989 reform established that "the acquisition by foreigners of the equity or assets of Mexican companies not resulting in foreign participation in excess of forty-nine percent is authorized as a general rule. Foreign participation in excess of such limit requires the prior authorization of the [CNIE] . . . ."[78] The Commission's foreign investment authorization process was simplified and the requirements standardized.[79]

A trust mechanism was introduced to allow temporary foreign investment in restricted sectors for a period of up to twenty years, and the automatic renewal of up to thirty years in the case of real estate trusts. Another trust mechanism was created to encourage the participation of foreign capital in the formation of financial capital through the Mexican stock exchange, the "neutral investment" (*Inversión neutra*). Neutral investment was achieved by the use of "so-called neutral shares, which [would] entitle the foreign investor to a share of equity, but without voting power in the corporation."[80]

In sum, the 1989 Regulations differed from the 1973 Law in many ways:[81]

(1) foreign majority ownership was allowed in all sectors not enumerated;[82]

(2) thirty-year trust mechanisms were created to allow foreign ownership in sectors formerly reserved for Mexicans or subject to ownership ceilings;[83]

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76. 1989 Regulations, *supra* note 73. In Mexico, Regulations are norms designed to be in compliance with the guidelines of statutes to make them clearer and more effective.

77. *See id.* Specifically, the regulations abrogated the CNIE's General Resolution that Systematizes and Updates the General Resolutions of 1988. *See id.* transitorio 2 § V.

78. Rojas, *supra* note 38, at 46.

79. *See* LUSTIG, *supra* note 41, at 128–29.

80. *Id.* at 129.

81. For further discussion of the 1973 Law and the 1989 Regulations, see Fausto C. Miranda, *Update on Laws Affecting Business: Mexico*, 7 FLA. J. INT'L L. 39, 43–46 (1992).

82. *See* Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 312 (1994).

83. *See* 1989 Regulations, *supra* note 73, art. 20; Jorge Camil, *Mexico's 1989 Foreign Investment Regulations: The Cornerstone of a New Economic Model*, 12 HOUS. J. INT'L L. 1, 16 (1989).

(3) real estate trusts for industrial, tourist, or residential purposes in the "Restricted Zone" were permitted on a thirty-year renewable basis;[84]

(4) the concept of neutral investment was introduced.[85] Corporations could issue special shares with pecuniary rights only (series "N") for purchase by trusts.[86] The banks would then issue non-voting certificates which could be bought from the stock market or the banks;[87]

(5) the application process was expedited, since investment applications were deemed approved if no response was given by the CNIE within forty-five days;[88] and

(6) the national registry of foreign investment was simplified.[89]

E. The 1993 Foreign Investment Law

Due to the North American Free Trade Agreement (NAFTA)[90] negotiations, Mexico needed to change its legal regime towards foreign investment in order to conform its rules with those thatwere being negotiated.[91] Because of Mexico's hierarchy of laws, international agreements, in accordance with the Constitution, are the supreme law of the nation together with federal laws and the Constitution.[92] Thus, the federal law ruled foreign investment needed to be amended to comply with the NAFTA prior to its entry into

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84. *See* 1989 Regulations, *supra* note 73, art. 20; *id.* at 16–17.

85. *See id.* arts. 5–7.

86. *See id.*

87. *See id.*

88. *See id.* art. 2, para. 2.

89. *See* Juan Francisco Torres Landa R., *The Changing Times: Foreign Investment in Mexico*, 23 N.Y.U. J. INT'L L. & POL. 801 (1991) (describing the trends that Mexico had towards FDI from the nineteenth century to the 1989 Regulations); *see also* Sandrino, *supra* note 82, at 306.

90. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M 289 (1993) [hereinafter NAFTA].

91. *See* Sandrino, *supra* note 82, at 307–12.

92. *See* MEX. CONST. art. 133. Article 133 of the Mexican Constitution reads: *"Esta constitución, las leyes del congreso de la unión que emanen de ella y todos los tratados que estén de acuerdo con la misma, celebrados y que se celebren por el presidente de la república, con aprobación del senado, serán la ley suprema de toda la unión."* The English translation is as follows: "This Constitution, the laws approved by Congress and all the Treaties that are in accordance with the Constitution, signed by the President, with Senate approval, would be supreme law within the union." *Id.*

force.[93] As one OECD publication notes: "[B]y anchoring the Mexican economy in the North American continent and securing its main export markets, the NAFTA provided the stimulus for the new foreign-investment legislation which entered into force on 28 December 1993 [four days before the date of entry into force of the NAFTA]."[94]

On December 27, 1993, the Foreign Investment Law (1993 Law)[95] was published in the Official Gazette.[96] This law abrogated the former Law to Promote Mexican Investment and to Regulate Foreign Investment of 1973.[97] However, since regulations to this Law have not been enacted, the 1989 Regulations are still in force.[98]

To enhance economic development and to make Mexico more competitive in the international investment market, policies concerning foreign investment within the new law are mainly directed towards the following basic objectives:

(1) creation of more and better remunerated jobs;
(2) allowance of the participation of fresh capital into the economy;
(3) allowance for higher quality domestic production through increased competition;
(4) transfer of technology and training of human resources;
(5) assistance to encourage international competitiveness; and
(6) contribution to the economy and social programs through the payment of taxes.[99]

The Statute is divided into eight titles.[100] Title One establishes the definition of foreign investment.[101] Title Two focuses on the acquisition of real estate and the creation of

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93. *See* Marie-France Houde, *Mexico and Foreign Investment*, OECD OBSERVER, Oct./Nov. 1994, at 10.
94. *Id.* at 11.
95. "Ley de Inversión Extranjera," D.O., 27 de diciembre de 1993 *as amended by* D.O., 18 de diciembre de 1996 [hereinafter 1993 Law].
96. The official gazette of Mexico is the *Diario Oficial de la Federacion*. *See* THOMAS H. REYNOLDS & ARTURO A. FLORES, 1 FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD, MEXICO 2 (1989).
97. *See* 1993 Law, *supra* note 95, transitorio 2.
98. *See id.* transitorio 4.
99. F. CISCOMANI F., MEXICO: STRUCTURE AND POLICY OF THE FOREIGN DIRECT INVESTMENT 7 (1994).
100. *See* 1993 Law, *supra* note 95.
101. *See id.* arts. 1–9.

trusts.[102] Title Three refers to the rules of incorporation and modification of corporations.[103] Title Four regulates foreign corporate investment.[104] Title Five creates and defines the concept of neutral investment.[105] Titles Six and Seven refer to the organization, functions, and structure of the CNIE and the RNIE.[106] Title Eight enumerates the available sanctions.[107]

The definition of foreign investment is broad. It includes the participation of foreign investors in the capital stock of Mexican corporations[108] and in Mexican corporations with a majority of foreign capital,[109] as well as the participation of foreign investors in the activities and acts established by the law.[110]

The authorities recognized by the Statute are the CNIE, the RNIE, and the Ministry of Trade and Industrial Promotion (SECOFI).[111] The Statute is proof of a change in the official approach concerning foreign investment: a change from regulation to promotion.[112] The law now stipulates that foreign investors can participate in any proportion of the capital of Mexican corporations, acquire fixed assets, enter into new economic areas or produce new lines of products, open and operate establishments, and extend or relocate the already established ones, except for what is specifically limited within the same law.[113] Thus, activities not enumerated in the following articles—and therefore excluded—are open to investment.[114] The next section of this

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102. *See id.* arts. 10–14 (*La Adquisicion de Beines inmuebles y de los Fideicomisos*).

103. *See id.* arts. 15–16 (*De las Sociedades*).

104. *See id.* art. 17 (*De la Inversion de Personas Morales Extranjeras*).

105. *See id.* arts. 18–20 (*De la Inversion Neutra*).

106. *See id.* arts. 23–36 (*De la Comision Nacional de Inversiones Extranjeras y del Registro Nacional de Inversiones Extranjeras*).

107. *See id.* arts. 37–39 (*De las Sanciones*).

108. *See* 1993 Law, *supra* note 95, art. 2 § II(a).

109. *See id.* art. 2 § II(b).

110. *See id.* art. 2 § II(c).

111. *See id.* arts. 23, 31. SECOFI grants the final economic and legal review of the approvals and recommendations of the National Commission of Foreign Investments. *See id.* art. 24.

112. *See* Houde, *supra* note 93, at 11 (stating that the 1993 Law illustrated an acknowledgment by the Mexican government that foreign investment is key to Mexico's national development).

113. *See* 1993 Law, *supra* note 95, art. 4; *see also* David Hurtado-Badiola, *Financing Commercial Transactions in Mexico: Panel Discussions on Real and Personal Property,* 2 U.S.-MEX. L.J. 167 (1994) (detailing permissible activities for foreign investors).

114. *See* 1993 Law, *supra* note 95, art. 4.

Article describes the different sectors and rules that conform to these exceptions.

1. Participation of Foreign Investment in Different Economic Sectors

Foreign corporations shall obtain authorization from the Foreign Affairs Ministry[115] so they can register in the Public Registry of Commerce. Any person, natural or juridical, that wants to practice any commercial activity within the Mexican jurisdiction needs to be registered.[116]

According to both the Constitution of Mexico and Article 5 of the 1993 Law, the following economic activities are reserved to the State because they are deemed to be strategic to the country:

- petroleum and other hydrocarbons;[117]
- basic petrochemicals;[118]
- exploitation of radioactive minerals;[119]
- generation of nuclear energy;[120]
- electricity;[121]
- radiotelegraphy;[122]
- postal services;[123]
- issuance of bills of exchange;[124]
- minting of coin;[125] and

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115. *See id.* art. 17, para. 2. The Ministry shall issue the authorization no later than 15 working days after the application. *See id.*

116. *See id.* art. 17, para. 1. Article 17 incorporates the provisions of the Mercantile Corporations General Act to facilitate registration procedures. *See id.*; "Ley General de Sociedades Mercantiles," D.O., 4 de agosto de 1934, arts. 250–51.

117. *See* 1993 Law, *supra* note 95, art. 5 § I. A decree which reforms several provisions of the Regulatory Law of Article 27 of the Constitution in the petroleum area was published in the Official Gazette in May of 1995 and allows the transport, storage, and distribution of gas (with prior authorization) by private and social sectors. *See* "Decreto por el que se reforman y adicionan diversas disposiciones de la Ley Reglamentaria del Artículo 27 Constitucional en el ramo de petróleo," D.O., 11 de mayo de 1995.

118. *See id.* art. 5 § II.

119. *See id.* art. 5 § V.

120. *See id.* art. 5 § IV.

121. *See id.* art. 5 § III. Any investor (foreign or Mexican) can participate in the generation and importation of electricity when they are not considered public services. *See* "Resolución general número 5 que establece las reglas para la participación de la inversión extranjera en las actividades del sector de energía eléctrica, que no constituyen servicio público," D.O., 22 de septiembre de 1993.

122. *See* 1993 Law, *supra* note 95, art. 5 § VIII.

123. *See id.* art. 5 § IX.

124. *See id.* art. 5 § XI.

- control, supervision and surveillance of ports, airports, and heliports.[126]

According to Article 6 of the 1993 Law, the following economic activities are reserved for Mexican nationals or Mexican corporations adopting a foreigners' exclusion clause:[127]

- radio and television broadcasts, other than cable;[128]
- national passengers ground transportation, tourism, and loading transportation, excluding courier and packaged goods service;[129]
- urban and interurban automotive transportation on federal highways;[130]
- retail sale of gasoline and liquefied petroleum gas;
- credit unions;[131]
- development banking institutions;[132] and
- professional and technical services.[133]

Finally, Article 7 of the same act states the different percentages in which foreign investors may participate in certain sectors, namely:

- up to 10% in production cooperatives;[134]
- up to 25% in national air transportation and aerotaxi transportation;[135] and
- up to 30% in the following: financial holding companies; commercial banks; stock brokerage firms; stock exchange specialists; insurance companies; general deposit warehouses; financial surety companies; foreign exchange companies; financial leasing companies; financial factoring companies; limited scope financial institutions; investment companies; manufacturing and commercialization of explosives, artificial fireworks, small arms, cartridges,

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125. *See id.* art. 5 § XII.
126. *See id.* art. 5 § XIII.
127. *See id.* art. 6. The foreigners' exclusion clause is a commitment included in the articles of incorporation to prohibit direct or indirect foreign investment in the company, including a Mexican corporation with a foreigners' admission clause. *See id.* art. 2 § VII.
128. *See id.* art. 6 § III.
129. *See id.* art. 6 § I.
130. *See id.* art. 6 § II.
131. *See id.* art. 6 § IV.
132. *See id.* art. 6 § V.
133. *See id.* art. 6 § VI.
134. *See id.* art. 7 § I.
135. *See id.* art. 7 § II(a)–(b).

and munitions; publishing and printing national circulation newspapers; fishing in internal and coastal waters and in the exclusive economic zones; port administration and services of pilotage to ships; navigation companies engaged in commercial exploitation of ships for internal navigation and cabotage; and fuel and lubricant supply for boats, aircrafts, and railroad equipment.[136]

However, with the approval of the CNIE, foreign investment may have a majority interest in corporations engaged in the economic activities listed below if the value of the assets of the relevant corporation exceeds the sum to be annually determined by the Commission:

- port services for ships to effect their inland navigation operation;
- shipping companies engaged in the exploitation of ships solely for high seas traffic;
- management of air terminals;
- private education services at the pre-school, primary, secondary, upper-middle, upper, and combined levels;
- legal services;
- credit information companies;
- securities classification institutions;
- insurance agents;
- cellular telephone;
- construction of pipeline for the transportation of oil and products derived therefrom; and
- drilling of oil and gas wells.[137]

On the other hand, Article 9 of the law specifies that authorization for the participation of foreign investment within the capital of Mexican corporations by the Commission is only necessary when the participation is more than 49% in corporations whose assets are more than $85 million pesos (approximately US$11,486,486) in 1996.[138]

2. Real Property

Mexican corporations with a foreign exclusion clause or Calvo Clause can own land for non-residential purposes

136. *See id.* art. 7 § III.
137. *See id.* art. 8.
138. *See id.* art. 9, transitorio 10.

within the Restricted Zone.[139] Such acquisitions by companies that adhere to the Calvo Clause must be registered with the Foreign Affairs Ministry.[140] However, a foreign investor must still use a trust to acquire real property rights in the Restricted Zone.[141] The Foreign Investment Law extends the period to a fifty-year renewable term, increased from thirty years.[142] The authority in charge of permitting such acquisitions by a fiduciary institution is the Foreign Affairs Ministry.[143] It considers any social and economic impact that the operation may produce for the Nation.[144] If the Ministry does not deny an authorization after thirty working days, it is deemed to have been accepted.[145]

3. *Neutral Investment*

As discussed above, the Mexican government created a new instrument to attract foreign capital to the Mexican market through the 1989 Regulations.[146] This new instrument for investment is the *inversión neutra* which gives economic rights to its holders with limited corporate rights.[147] The goal is to capitalize the Mexican Stock Exchange Market and to provide corporations with an alternative market from which to seek financial assistance other than financial credit institutions.

However, it also gives speculators a way to make short-term investments other than FDI which, as proven later in this study, creates output, wages, and, in general, helps to

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139. *See* 1993 Law, *supra* note 95, arts. 2 § IV (defining the restricted zone), 2 § VII (defining the foreign exclusion clause), 10 § I (requiring registration).

140. *See id.* "The roots of this restriction can be traced back to 1847 when Mexico lost half of its territory to the United States." Fernando Orrantia, *Commercial Contracts, Including Joint Ventures, Acquisitions, and Real Estate, Under Mexican and United States Law,* 15 LOY. INT'L & COMP. L.J. 951, 954 (1993). For more details on the Mexican legal tradition regarding real estate transactions see *id.* at 951–54.

141. *See* Orrantia*, supra* note 140 at 954.

142. *See* 1993 Law, *supra* note 95, art. 13.

143. *See id.* art. 14.

144. *See id.* In the author's opinion, this little clause gives broad discretion to the Foreign Affairs Ministry, if the objective was such they should have issued some parameters. The discretion could produce corruption. Thus it should be revoked or ruled.

145. *See id.* art. 14, para. 2.

146. *See id.* arts. 18–22.

147. *See id.* art. 19. One commentator defines neutral investment as "a non-participatory financial investment that is not characterized as foreign investment for the purposes of the limitations provided by the law." David Hurtado Badiola, *Summary of Recent Legislative and Administrative Developments in Mexico*, 2 U.S.-MEX. L.J. 65, 70 (1994).

develop a healthier Mexican economy. Nevertheless, neutral investment, whereby the investor gains no corporate rights or control, gives foreign investors the opportunity to invest in corporations where direct participation in the sectors reserved to the State and Mexicans was formerly precluded.

This form of investment is simple: a financial institution (fiduciary) issues a *certificado de participación ordinario* (certificate of ordinary participation) which is a title of credit (negotiable instrument) issued by a fiduciary institution.[148] These titles of credit represent the right to a proportional part of the rent produced by stocks, rights, or goods the fiduciary institution holds,[149] which in this case are the "N" shares that integrate the fiduciary patrimony. The issuance is made on the Mexican Stock Exchange Market, or by the fiduciary institution, where foreign investors can acquire them. The neutral investment is neither Mexican nor foreign.

Furthermore, the Foreign Investment Law opened the possibility for foreign participation in the capital of financial institutions such as commercial banks, financial groups, and brokerage houses, constituted by "A" or "B" shares, which are otherwise reserved for Mexicans.[150] However, this is subject to the previous opinions of the National Banking and Securities Commission, the Ministry of Finance and Public Credit, and SECOFI.[151]

The neutral investment regime achieved its principal objective: to attract foreign investment. In January 1994 investment in the stock exchange market was at US$3,173.3 million.[152] However, in January 1995 portfolio investment dropped to US$-187.6 million, indicating a capital flight of exceptional proportions.[153] Thus, Mexico's reliance on portfolio investment without simultaneously raising a

148. *See* 1993 Law, *supra* note 95, art. 19.

149. "Ley General de Títulos y Operaciones de Crédito," D.O., 27 de agosto de 1932, art. 228.

150. The ability to purchase these shares was made possible by amendments to the *Ley de Institutciones de Crédito*. "Ley de Institutciones de Crédito," D.O., 23 de diciembre de 1993, D.O., 15 de enero de 1995. These amendments allow foreign banks to establish subsidiaries in Mexico.

151. *See* "Resolución General número 3 que establece criterios y mecanismos especiales para la aplicación de diversas disposiciones del Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera en Relación con la inversión neutra," D.O., 9 de agosto de 1990, *modified by* "Resolucion General que Adiciona la Resolucion General Numero 3 de la Comision Nacional de Inversiones Extranjeras," D.O., 1 de abril de 1992.

152. *See* SECOFI, EVOLUCION DE LA INVERSION EXTRANJERA EN MEXICO (1995).

153. *See id.*

significant amount of counterbalancing FDI provoked a financial crisis in Mexico.[154] This could happen in any country under similar circumstances.

4. *The* Comisión Nacional de Inversiones Extranjeras—*A New Approach*

As previously discussed, the CNIE was and still is the authority in charge of resolving the flight of foreign investment. While the deregulation regime of the new Act gives foreigners a wider range of investment opportunities, the Commission maintains oversight of investments under Articles 8 and 9 of the Act.[155] The law does not establish any proceedings in which due process rights are guaranteed and thus, is unconstitutional. It also gives the Commission overly broad discretion. On the other hand, the authority to issue general resolutions is still the law. This is a legislative faculty, and has not been brought before the Supreme Court because of the individualistic nature of the *Juicio de Amparo,* Mexico's constitutional control system.[156]

As a consequence of Mexico's entrance into the globalization era, the Commission's criteria, used to authorize a specific foreign investment, decreased from seventeen items to four.[157] However, there is still a certain amount of discretion, which remains objectionable and subject to extralegal influences. The Commission also has the power to prevent foreign investment for national security reasons.[158] Moreover, to give foreign investors more certainty and to assure a healthier market, the Commission can only impose requirements that do not distort international trade.[159] Hence, performance requirements are no longer permitted.[160]

The significant changes made to the Foreign Investment Rules were part of a general strategy by the Mexican State that had as its primary goal the entry into force of the

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154. *See id.*

155. *See* 1993 Law, *supra* note 95, arts. 8–9.

156. *See id.*

157. *Compare* 1993 Law, *supra* note 95, art. 29, *with* 1973 Law, *supra* note 35, art. 13.

158. *See* 1993 Law, *supra* note 95, art. 30.

159. *See id.* art. 29, para. 2 (deterring the use of performance requirements, an important part of the Mexican policy toward foreign investment, to achieve bargaining power); *see also* Hill, *supra* note 53, at 212.

160. ERFANI, *supra* note 4, at 177.

NAFTA, so as to place Mexico in the global competition for capital.[161] As Julie A. Erfani points out:

> In anticipation of NAFTA . . . the Mexican government under the Salinas administration passed two laws curtailing executive authority to regulate commerce and private property. In 1991, the government enacted a stringent new law, the Industrial Property Act,[162] to protect intellectual property, including that of foreign firms. Moreover, in 1993 the government passed a Foreign Investment Law that, among other things, eliminated government-imposed performance requirements on firms and opened up more sectors of the Mexican economy to foreign investors.[163]

Finally, as one can observe from reading the Foreign Investment Act, foreign investors who wish to invest in Mexico's market, within any sector that is not excluded, can do so by opening a Mexican branch office or a subsidiary.[164]

F. The NAFTA: The Entrance of Mexico into the Globalization Era

The NAFTA, signed by Canada, Mexico, and the United States, entered into force on January 1, 1994.[165] The NAFTA's "objectives are much more expansive than trade alone: The agreement is designed to remove barriers to investment among the three countries."[166] The NAFTA

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161. *See* Badiola, *supra* note 147, at 68–71 (summarizing the different Mexican rules that changed with the implementation of the NAFTA); *see also* Luis Perera, *New Legal Framework for Foreign Investment in Mexico*, 2 SAN DIEGO JUST. J. 42, 42 (1994) (stating that the 1993 Law was used as a negotiating instrument in the NAFTA negotiations). The 1993 Law was a result of President Salinas's "economic plan and the passage of this Act by Congress, at the same time the NAFTA negotiations began. Indeed, this law was a very important tool for Mexico's passage of the NAFTA by the Mexican Congress and assisted the passage by the United States Congress and the Canadian Parliament." *Id.*

162. *See* "Ley de Fomento y Protección de la Propriedad Industrial," D.O., 27 de junio de 1991.

163. ERFANI, *supra* note 4, at 177 (footnote added).

164. *See* Jorge Camil, *Commercial Contracts, Including Joint Ventures, Acquisitions, and Real Estate, Under Mexican and United States Law,* 15 LOY. INT'L & COMP. L.J. 951, 956–63 (1993).

165. *See* NAFTA, *supra* note 90. In Mexico, the agreement is called *Tratado de Libre Comercio* and is usually known as the TLC.

166. SIDNEY WEINTRAUB, NAFTA: WHAT COMES NEXT? xxi (1994); *see also* Gregorio Estrella, *Current Mexican Investment Possibilities, Foreign Investment in Mexico: Rules, Regulations, and Implementation by Regulatory Agencies*, 15

Chapter 11 deals with investment and related matters.[167] The NAFTA was a precursor to the integration of investment within a bilateral or multilateral economic agreement.[168] This implies that all three parties recognized investment was necessary to complement the dynamics of the three economies and that the ties between trade and investment are strong.

According to Daniel Price, a U.S. negotiator of the investment chapter, barriers to investment should be construed as barriers to trade, which is why it was considered essential to create a specific chapter that governed issues related to investment.[169] He notes that the objectives of Chapter 11 are to "establish a secure investment environment through the elaboration of clear rules of fair treatment of foreign investment and investors; [to] remove barriers to investment by eliminating or liberalizing existing restrictions; and [to] provide an effective means for the resolution of disputes between an investor and the host government."[170] In Article 1102—which follows the spirit of the entire agreement in other areas[171]—the NAFTA obliges the three parties to provide national treatment to investors from the other parties,[172] and in Article 1103 it obliges them to provide most-favored-nation (MFN) treatment to investors within the North American market.[173] Furthermore, any party has the right to be given the better of the two treatments (MFN or National).[174]

The NAFTA, founded under Article XXIX of the GATT[175] as a free trade area, is defined as "a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products

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LOY. L.A. INT'L & COMP. L.J. 935, 947 (1993) (stating that Mexico felt that the NAFTA was a key to its future economic development).

167. *See* NAFTA, *supra* note 90, ch. 11, at 639.

168. *See* Sandrino, *supra* note 82, at 327.

169. *See* Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727 (1993).

170. *Id.*

171. *See* NAFTA, *supra* note 90, arts. 301, 308, 1003, 1202, 1405–06, 1703 (requiring most-favored-nation or national treatment).

172. *See id.* art. 1102, at 639.

173. *See id.* art. 1103; *see also* GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT 80 (1993).

174. *See* NAFTA, *supra* note 90, art. 1104, at 639.

175. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

originating in such territories."[176] The parties are committed to do everything possible to remove all potential obstacles to free trade and, as in the case of the NAFTA, to encourage investment.[177] Therefore, to achieve these goals, the NAFTA follows the principles of national and MFN treatment,[178] even though, within the multilateral context, regional agreements are the most important exception to the MFN principle on which the GATT is founded.[179] This exception is due to the recognition that such agreements can promote faster economic integration. Paragraph four of Article XXIV of the GATT says: "[T]he purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories."[180]

1. The NAFTA and the Foreign Investment Law

Although the NAFTA "strongly reinforces Mexican economic reforms designated to improve the investment climate in [the] country,"[181] Chapter 11 had to be implemented within the Mexican legal system. To do that the Salinas administration considered the 1973 Law obsolete and decided to send a foreign investment bill to Congress, which became the Foreign Investment Act of 1993, as well as other laws to be discussed later in this Article.[182]

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176. *Id.* art. XXIV(8)(b).

177. *See* Price, *supra* note 169, at 727.

178. MFN treatment promotes non-discriminatory access to markets, transparency, and welfare-increasing international trade policies. It is the cornerstone of the GATT system under Article I. *See* GATT, art. I. It is complemented by the national treatment obligation, which is another non-discrimination principle, stated in Article III of the GATT. *See id.* art. III; *see also* Robert E. Herzstein, *China and the GATT: Legal and Policy Issues Raised by China's Participation in the General Agreement on Tariffs and Trade*, 18 L. & POL'Y INT'L BUS. 371 (1986) (discussing the central GATT concepts in terms of trade negotiations with China).

179. *See* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 90–96 (1995). There has been a recent discussion regarding the convenience of the celebration of Regional Economic Agreements instead of continuing the globalization process through the use of the already existing multilateral agreement (GATT). *See id.*

180. GATT, art. XXIV(4).

181. HUFBAUER & SCHOTT, *supra* note 173, at 79.

182. *See* Programming and Budget Secretariat (SPP), Plan Nacional de Desarrollo 1989–1994 (SPP 1989), at 88. At the beginning of the Salinas administration, the attitude toward foreign investment changed from a selective promotion to a permanent and liberalized promotion. In the *Plan Nacional de Desarrollo* (PND) 1989–1994, it was established that foreign direct investment is beneficial to Mexico for the following reasons: (1) it creates direct and indirect permanent well paid jobs; (2) it provides the country with fresh resources for a

The liberalization of the current national legislation should apply to investments outside North America. However, the only instance where the NAFTA provides more extensive liberalization to North American investors is in the realm of foreign equity caps.[183] As seen above, Article 1102 provides that NAFTA investors can have 100% equity participation in Mexican companies outside the strategic areas.[184] Thus, where foreign participation is subject to ceilings under the 1993 Law, NAFTA investors will eventually have full access.

However, even though investments, other than in strategic areas, are permitted on a 100% basis and without any prior authorization, any investment that exceeds the limit that the CNIE imposes under Article 9 of the 1993 Law, and certain activities referred to in Annexes I and II of the NAFTA, are excluded.[185] Article 1111(1) is very clear on this issue:

> Nothing in Article 1102 [providing national treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Party, such as a requirement that investors be residents of the Party or *that investments be legally constituted under the laws or regulations of the Party*, provided that such formalities do not materially impair the protections afforded by a Party to investors of another Party and investments of investors of another Party pursuant to this Chapter.[186]

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healthier financing of corporations; (3) and it provides modern technologies to the industrial plant and enforces the exportation efforts of Mexico.

183. *See id.*

184. *See* NAFTA, *supra* note 90, art. 1102, at 639. Additionally, Article 1101 states: "A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities." *Id.* According to Annex III, the economic activities are the same as covered under Article 5 of the Foreign Investment Law. *Compare* NAFTA, Annex III, at 759, *with* 1993 Law, *supra* note 95, art. 5. If the State gives any concession under any of these activities, it does not imply that the State resigns to control them; thus, the principle of national treatment does not apply. *See* NAFTA, *supra* note 90, Annex III, § B(1), at 760.

185. *See* 1993 Law, *supra* note 95, arts. 6, 8–9.

186. NAFTA, *supra* note 90, art. 1111(1), at 642 (emphasis added). One commentator summarizes the article this way:

> Under Article 1111, member nations may adopt or maintain measures that prescribe special formalities regarding the establishment of

Hence, within the formalities created under the laws of Mexico, the prerequisite of previous authorization by CNIE within certain sectors provided by the Foreign Investment Law is present. Nevertheless, once a sector has been liberalized it cannot be subsequently restricted, even if it was a totally restricted sector before the NAFTA.

Nevertheless, the ceiling set in Article 9 of the Foreign Investment Law is different for NAFTA Parties.[187] In accordance with Annex I, the threshold for CNIE review is US$25 million until the end of 1997, US$50 million until the end of 2000, US$75 million until the end of 2003, and US$150 million after the year 2003.[188]

The NAFTA's Chapter 11 applies to both the Parties' individuals and the Parties' corporations.[189] A Party may, however, deny benefits to a corporation of another Party when the corporation is owned or controlled by a non-Party—which avoids the use of ghost corporations by non-Parties to reap NAFTA benefits.[190] However, under the 1993 Law any foreign investor could be subject to the law.[191]

> investments by investors of another nation. For example, a nation may require that investors be residents of that nation, or that investments be constituted under the laws and regulations of the nation. Special measures may be prescribed as long as the formalities do not impair the substance of the benefits given under Chapter Eleven. Article 1111 also allows a member nation to require investors to provide routine business information concerning investments in its territory for statistical or informational purposes.

Rodolpho Sandoval, *Chapter Eleven: Investments Under the North American Free Trade Agreement*, 25 ST. MARY'S L.J. 1195, 1199 (1994) (footnotes omitted).

187. *See* 1993 Law, *supra* note 95, art. 9, transitorio 10 (requiring CNIE approval when foreign investors seek to acquire more than 49% of a Mexican corporation with assets greater than US$11.5 million).

188. *See* NAFTA, *supra* note 90, Annex I, at 719.

189. *See id.* art. 1101(1)(a)–(b), at 639.

190. *See id.* art. 1113(2), at 642. In the first part of Article 1113 there is another exception for a Party's corporations that are controlled by a non-Party's nationals if: (1) the non-Party does not have diplomatic relations with that Nation, or (2) the Nation adopts or maintains measures to prohibit transactions with the non-Party. *See id.* art. 1113(1)(a)–(b), at 642. The U.S. government has gone so far as to try to impose such a restriction on NAFTA parties with the Helms-Burton Act. *See* Pub. L. No. 104-114, 110 Stat. 785 (1996) (to be codified at 22 U.S.C. § 6021). However, this Article does not give grounds for the United States to do such a thing. *See* Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 431 (1996) (critiquing legislative compliance with international law).

191. *See* 1993 Law*, supra* note 95, art. 2 §§ II–III.

The definition of investment in the NAFTA is broader than in the 1993 Law.[192] It is closer to the one settled on under Bilateral Investment Treaties (BITs).[193] In fact, Chapter 11 of the NAFTA is like a BIT inserted into a trade agreement.[194] It contains not only the participation of corporations but also refers to the transfer of assets between a parent and its subsidiary, intellectual property, real estate, and the like. However, as one author points out, it is not a conceptual definition, it just enlists various activities. This creates confusion because there could be other activities that are not included.[195]

2. Performance Requirements

Performance requirements are controls that host countries impose on the subsidiaries of multinational corporations (MNCs) on the basis that acceptance of such preconditions helps them to maximize the benefits of FDI and minimize its risks.[196] As already seen, the 1993 Law prohibits any performance requirements.[197] Nonetheless, NAFTA negotiators inserted a specific provision prohibiting certain performance requirements for an investment of a Party, and

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192. *Compare* NAFTA, *supra* note 90, art. 1139, at 647–48 (providing definitions of relevant terms used in Chapter 11 of the NAFTA), *with* 1993 Law, *supra* note 95, art. 2 § I.

193. Known in Spanish as *Acuerdos para la Promoción y Protección Recíproca de Inversiones* (APPRIs).

194. For more information regarding BITs, see generally Pamela. B. Gann, *The U.S. Bilateral Investment Treaty Program,* 21 STAN. J. INT'L L. 373 (1985); Michael R. Reading, *The Bilateral Investment Treaty in ASEAN: A Comparative Analysis*, 42 DUKE L.J. 679 (1992).

195. *See* V.C. García Moreno, *La Inversión en el TLC (Capítulo XI)* (unpublished manuscript, on file with the author at the National Autonomous University of Mexico-U.N.A.M.).

196. *See* Price, *supra* note 169, at 729. Mr. Price continues:

> The prohibition on performance requirements [in the NAFTA] serves two goals. First, it eliminates trade distortions that arise from the imposition of performance requirements. Hence a Party is prohibited from imposing such requirement[s] even on its own investors. Second, it ensures a degree of entrepreneurial autonomy: sourcing and sales decisions are based on the investor's judgment, not by the dictates of the host government.

Id.

197. *See* 1993 Law, *supra* note 95, art. 29 (enumerating what criteria the CNIE must use and demanding that any requirements imposed upon investors must not disrupt international trade).

even a non-Party, in its territory.[198] Article 1106 prohibits restrictions which require a Party:[199]

(a) to export a given level or percentage of goods or services;
(b) to achieve a given level or percentage of domestic content;
(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.[200]

Along with this rule, the NAFTA also prohibits the receipt or continued receipt of an advantage in compliance with certain performance requirements similar to those mentioned above.[201] However, there are some exceptions. Conditioning

198. *See* NAFTA, *supra* note 90, art. 1106(1), at 640.
199. *See id.* art. 1106(5).
200. *Id.* art. 1106(1)(a)–(g).
201. *See id.* art. 1106(3). The requirements listed are:

(a) to achieve a given level or percentage of domestic content;
(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;

an advantage on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development within a country's territory is permitted.[202] Other exceptions covered in Annex I are in the communications sector,[203] the automotive industry,[204] the *Maquiladora* sector,[205] and the transportation sector.[206] In addition, there are exceptions with respect to export promotion and foreign aid programs,[207] procurement by a Party or a state enterprise,[208] and requirements imposed by an importing Party relating to the content of goods necessary to qualify for potential tariffs or preferential quotas.[209] Furthermore, there are some restrictions that are permitted to protect the environment,[210] health,[211] and social concerns.[212]

> (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
>
> (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

Id.

202. *See id.* art. 1106(4), at 640.
203. *See id.* Annex I, at 720–23.
204. *See id.* Annex I, at 726–27.
205. *See id.* Annex I, at 727.
206. *See id.* Annex I, at 733–41.
207. *See id.* art. 1108(8)(a), at 641 (providing that prohibitions settled under Article 1106(1)(a)–(c) and (3)(a) and (b) do not apply).
208. *See id.* art. 1108(8)(b) (providing that prohibitions settled under 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) do not apply).
209. *See id.* art. 1108(8)(c) (providing that prohibitions settled under 1106(3)(a) and (b) do not apply).
210. *See id.* art. 1106(6), at 640. Provisions in Chapter 11 of the NAFTA clearly state that increased investment should not come at the expense of the environment. *See id.* Article 1114 provides:

> 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
> 2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.

Id. art. 1114, at 642.

211. *See id.* art. 1106(2), at 640.
212. *See id.* art. 1106(4). Article 1106(4) could be construed as one of the few social development clauses inserted in the NAFTA. Article 93(3) of the Treaty of Rome gives the Commission the discretionary power to exempt prohibited state

Finally, performance requirements that impede a firm to appoint the management it wishes are not permitted.[213] However, it is permissible to require that a majority of the board of directors, or any committee thereof, be of a particular nationality, providing that the measure does not materially impair the ability of the investor to exercise control over the investment.[214] Mexico specifically has some other exceptions that apply to this prohibition within production cooperative corporations,[215] in the manufacture and commercialization of explosives, firearms, cartridges, munitions and fireworks corporations,[216] religious services,[217] air transportation,[218] and water transportation.[219]

3. Transfers

Traditionally, Mexico has not restricted the transfer of profits by MNCs operating within its territory. Mexico also left the final decision of whether to reinvest its profits with foreign investors, removing suspicious transfers of funds from parents to subsidiaries. In general, the NAFTA reaffirms this principle by establishing that "[e]ach Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay."[220] Moreover, each Party "shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of the transfer . . . ."[221]

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aids in three areas: (1) aid for very depressed regions; (2) aid to promote the execution of an important project of common interest or to remedy a serious disturbance in a Member State's economy; and (3) regional and sectorial aid. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 93(3), 298 U.N.T.S. 11, 51. The NAFTA, on the other hand, does not create any institution to foster social development in areas that need help, such as the cohesion fund in the European Union (EU). For more information on this topic, see Dr. Hans-Jorg Niemeyer, *State Aids and European Community Law*, 15 MICH. J. INT'L L. 189 (1993); *see also* HUFBAUER & SCHOTT, *supra* note 173, at 105–09 (discussing the need for the NAFTA to create a fund to finance regional development "to deal with the problems created in the wake of expanded North American commerce, [or else] the idea of freer trade would be discredited").

213. *See* NAFTA, *supra* note 90, art. 1107(1), at 640.
214. *See id.* art. 1107(2).
215. *See id.* Annex I, at 719–20.
216. *See id.* Annex I, at 728–29, 733.
217. *See id.* Annex I, at 733.
218. *See id.* Annex I, at 734.
219. *See id.* Annex I, at 740.
220. *Id.* art. 1109(1), at 641.
221. *Id.* art.

However, a Party may, as an exception, prevent a transfer through the non-discriminatory application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;[222]
(b) issuing, trading or dealing in securities;[223]
(c) criminal or penal offenses;[224]
(d) reports of transfers of currency or other monetary instruments;[225] or
(e) ensuring the satisfaction of judgments in adjudicatory proceedings.[226]

The NAFTA Article 2104 authorizes a Party to restrict or prevent transfers when it experiences serious balance of payments difficulties and adopts or maintains economic policies consistent with International Monetary Fund (IMF) consultations.[227]

4. Expropriation

States have the internationally respected right[228] to take property, provided that it is for a public purpose.[229] However,

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222. *Id.* art. 1109(4)(a).
223. *Id.* art. 1109(4)(b).
224. *Id.* art. 1109(4)(c).
225. *Id.* art. 1109(4)(d).
226. *Id.* art. 1109(4)(e).
227. *See id.* art. 2104, at 700–01 (governing balance of payments).
228. *See* HUGH M. KINDRED ET AL., INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 549 (5th ed. 1993) (recognizing the customary international law right "of a state to expropriate foreign property for a public purpose related to its internal needs"). The author notes, however, that:

> expropriation measures that are arbitrary or discriminatory or which are motivated by considerations of a political nature unrelated to the internal well being of the taking state are illegal.
>
> . . . .
>
> What amounts to expropriation and what measure of compensation must be paid under international law are questions that have not yet been settled.

Id.
229. *See* MEX. CONST. art. 27; NAFTA, *supra* note 90, art. 1110, at 641. Article 1110 states:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
> (a) for a public purpose;
> (b) on a non-discriminatory basis;

if there is a takeover, compensation shall be paid.[230] While the description of this issue is relatively simple, in practice it raises many questions. For example, what is considered to be public purpose? How shall the compensation be determined? When shall it be paid?

Internationally, the Charter of Economic Rights and Duties of States says:

> 1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
> 2. Each State has the right:
>
> . . . .
>
> (c) To nationalize, expropriate or transfer over ownership of foreign property, in which case *appropriate compensation* should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.[231]

However, it has also been recognized, mostly by developed nations, that a State has the right to protect its citizens whenever they are injured by a foreign State. The

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> (c) in accordance with due process of law and [international law]; and
> (d) on payment of compensation [equal to the fair market value and paid without delay].

Id. However, "public purpose" is not defined and this could produce problems in the future.

230. *See* RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK 1020 (3d ed. 1995) (noting that the right to compensation is assured, but conflicts over the appropriate measurements, and questions of timing, how much, and in what form compensation will take dominate the taking of foreign property).

231. *Charter of Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, art. 2, at 50, U.N. Doc. A/9631 (1974) (emphasis added).

institution of "diplomatic protection" developed from this idea.[232]

The NAFTA states that compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place and shall be paid without delay and be fully realizable.[233] Thus, the NAFTA is the first multilateral treaty involving developed and developing countries that adopts "Hull Doctrine ideals and consensual international arbitration mechanisms as the standard means for determining compensation."[234] This is an extremely significant shift in Mexican policy. Traditionally, developing countries, led by Mexico, have opposed the fair market value standard and have advocated one of compensation appropriate to the circumstances giving rise to the expropriation, as in the U.N. Charter.[235]

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232. *See* Justine Daly, *Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico after the NAFTA*, 25 ST. MARY'S L.J. 1147, 1161–66 (1994).

233. *See* NAFTA, *supra* note 90, art. 1110, at 641.

234. Daly, *supra* note 232, at 1174.

235. Traditionally the United States scope has been that of "adequate, effective, and prompt compensation," known as the Hull Formula in honor of Cordell Hull (U.S. Secretary of State). However, the Third Restatement of the Foreign Relations Law of the United States does not entirely resemble the Hull Formula:

> A state is responsible under international law for injury resulting from:
>
> (1) a taking by the state of the property of a national of another state that
>
> (a) is not for a public purpose, or
> (b) is discriminatory, or
> (c) is not accompanied by a provision for just compensation;
>
> For compensation to be just under this subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national;
>
> (2) a repudiation or breach by the state of a contract with a national of another state
>
> (a) where the repudiation or breach is (i) discriminatory; or (ii) motivated by non-commercial considerations, and compensatory damages are not paid; or
> (b) where the foreign national is not given an adequate forum to determine his claim of repudiation or breach, or is not compensated for any repudiation or breach determined to have occurred; or
>
> (3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.

Mexico changed not only its policy under the NAFTA, but also its policy with respect to foreign and national investors in general, although the changes were made specifically for the NAFTA. The Expropriation Act[236] does not distinguish between foreign and national investors, except in the case of the Calvo Clause.[237]

5. *Dispute Settlement*

The NAFTA does not create an autonomous institution with authority over the governments of the Parties. It expressly provides that no Party shall allow for enforcement of the Agreement by domestic legal proceedings involving a private right of action.[238] Hence the dispute settlement system,[239] to protect the rights of investors against possible violations of the Agreement by a State, has been indispensable. It is of such importance that one author states:

> The long-term success or failure of [the NAFTA] will depend in large part on the effectiveness of its dispute settlement system. In the highly politicized world of international trade law, a system that can resolve disputes and promote compliance with legal obligations will go far in advancing [the] NAFTA's substantive goals of economic integration. A weak or underutilized system, on the other hand, is likely to

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RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).

236. "Ley Federal de Expropiación," D.O., 22 de diciembre de 1993. It was reformed from the previous law, in force since 1936, in the "Decreto que Reforma, adiciona y deroga disposiciones de diversas leyes relacionadas con el Tratado de Libre Comercio de América del Norte," D.O., 22 de diciembre de 1993 (decree which reforms, adds, and derogates several laws related with the NAFTA).

237. Mexico's adherence to the Calvo Clause has been, in the words of Justine Daly, "[o]ne of the underlying reasons for the strained foreign investment relations that Mexico has experienced with traditionally capital-exporting states." Daly, *supra* note 232, at 1150.

238. *See* Jack I. Garvey, *Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L L. 439, 445 (1995).

239. The NAFTA has three main dispute settlement systems. First, Chapter 20 establishes general institutional arrangements and dispute resolution procedures. *See* NAFTA, *supra* note 90, ch. 20, at 693–99. Second, Chapter 19 relates to antidumping and countervailing duties. *See id.* ch. 19, at 682–93. Third, and most important to this Article, is Chapter 11, which deals with investments. *See id.* ch. 11, at 639–49.

> undermine [the] NAFTA's legitimacy and inhibit further progress toward hemispheric integration.[240]

The dispute settlement system is a mechanism that assures equal treatment among investors of the Parties in accordance with international reciprocity and due process before an impartial tribunal.[241] It has no precedent in any previous multilateral agreement.[242]

Traditionally, Mexico has not favored settling disputes with investors within an international forum. However, with its entrance into the competition[243] to attract FDI, it was necessary for Mexico to accept the use of arbitration as an instrument to settle disputes with foreign investors rather than resorting to the national courts where investors might fear bias.[244] Furthermore, the use of arbitration is an alternative way to avoid using power-oriented methods by home state governments to protect the Calvo Clause objective, which is to avoid foreign state intervention in the manner of diplomatic protection.[245] Alternative dispute

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240. David S. Huntington, *Settling Disputes Under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407, 407 (1993).

241. *See* NAFTA, *supra* note 90, art. 1115, at 642.

242. *See* David Gantz, *Resolución de Controversias en Materia de Inversiones Extranjeras en el TLCAN*, *in* RESOLUCIÓN DE CONTROVERSIAS COMERCIALES EN AMÉRICA DEL NORTE 151 (Jorge Witker V. ed., 1994).

243. For a discussion of the actual competition worldwide, see Montek S. Ahluwalia, *India's Quiet Economic Revolution*, COLUM. J. WORLD BUS., Spring 1994, at 6, 7 (noting the dramatic change in India's industrial licensing policy favoring foreign investment); Barbara Campbell Potter, *China's Equity Joint Venture Law: A Standing Invitation to the West for Foreign Investment?*, 14 U. PA. J. INT'L BUS. L. 1, 27–36 (1993) (discussing China's difficulties in attracting foreign investment). *See generally* Jeffery Atik, *Investment Contests and Subsidy Limitations in the EC*, 32 VA. J. INT'L L. 837 (1992) (discussing European Community (EC) member states' efforts to secure continued flows of FDI); Cheryl W. Gray & William J. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1 (1995) (discussing foreign investments and legal reforms in Central and Eastern European countries).

244. Traditionally, conflicts between investors and States were settled in conformance with national laws. However, as a consequence of pressure from MNCs, today the tendency to use alternative methods, such as arbitration, is very common. *See* David Wippman, *Dispute Resolution*, 7 FLA. J. INT'L L. 93, 102 (1992) (explaining recent developments in arbitration in Latin America as an alternative dispute resolution procedure).

245. *See* Daly, *supra* note 232, at 1150.

> The Calvo Doctrine, named after the famed Argentine jurist, Carlos Calvo, encompasses two basic concepts: (1) the requirement of absolute equality of the treatment of aliens with the treatment of nationals, meaning that aliens have resort to local remedies only, and (2) the policy of nonintervention of the alien's state of nationality.

resolution methods promise flexibility, confidence, speed, and neutrality.[246]

Investors[247] can initiate Chapter 11 procedures when a State has breached an obligation covered under Chapter 11, related to State enterprises[248] or monopolies,[249] and a specific investor has suffered loss or damage due to that breach.[250]

The affected investor may submit the claim for arbitration six months after the events give rise to the claim, after attempting consultation or negotiation,[251] under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID)

Id. However, the same author notes: "Because Mexico has agreed to the Chapter Twenty dispute resolution procedures, which are a form of diplomatic protection, any future Mexican administration could not attempt to reject diplomatic protection or assert the Calvo Doctrine without being in breach of the NAFTA." *Id.* at 1188.

246. *See* J. Witker, *Panorama General de Solución de Controversias en el Comercio Internacional Contemporáneo*, *in* RESOLUCIÓN DE CONTROVERSIAS COMERCIALES EN AMÉRICA DEL NORTE, *supra* note 242, at 17.

247. As provided by Article 1117, an investor has the right to claim if a breach affects its investments in a corporation of the breaching Party in which the investor has ownership or control. *See* NAFTA, *supra* note 90, art. 1117, at 643.

248. *See id.* art. 1503(2), at 663–64. That article states in pertinent part:

> 2. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.

Id.

249. *Id.* art. 1502(3)(a), at 663. Article 1502(3)(a) provides:

> 3. Each party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any privately-owned monopoly that it designates and any government monopoly that it maintains or designates:
>
>> (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions or impose quotas, fees or other charges.

Id.

250. *See id.* arts. 1116, 1120, at 642–43.

251. *See id.* art. 1118, at 643.

Convention[252] or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.[253] However, to exercise this right to an arbitration proceeding, the investor must first waive the right to initiate or continue a proceeding before any court or administrative tribunal under the law of any Party,[254] except proceedings for an injunctive, declaratory, or other extraordinary relief not involving the payment of damages.[255] The right to initiate an arbitral proceeding under Chapter 11 lapses after three

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252. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID]. To understand the origin of the ICSID, one author states:

> [The] ICSID was established over 25 years ago under a multilateral convention, prepared by the World Bank, known as the 1965 Washington Convention or the ICSID Convention. In accordance with this convention, ICSID provides facilities for the conciliation and arbitration of legal disputes arising out of an investment between a member country of ICSID and a national of another member country. The World Bank sponsored the establishment of ICSID in the belief that the availability of a dispute settlement machinery of this kind could help to promote increased flows of international investment. The jurisdiction of ICSID tribunals is based on the mutual consent of the parties to the dispute. Membership of ICSID does not by itself imply acceptance by the state of such jurisdiction. Consent of the host state to submit a dispute to ICSID or the actual submission of a dispute to ICSID deprives the state of the investor from exercising diplomatic protection in his favour until such time as the host state fails to comply with the award rendered against it. Furthermore, ICSID tribunals apply, in the absence of agreement by the parties on applicable law, the law of the host state and such rules of international law as may be applicable. And the host state may require the foreign investor, as a condition of the state's acceptance of ICSID's jurisdiction, to exhaust local remedies. In member countries, ICSID tribunal awards have the finality of decisions of their national courts and are not subject to review by such courts. The World Bank covers the cost of ICSID's Secretariat which charges the parties to a dispute only the actual cost of the proceedings including a per diem for the arbitrators. Since it was opened for signature in 1965, over 120 countries have signed the ICSID Convention. Of these, 110 countries have also ratified the ICSID Convention and have thus become members of ICSID. The member countries include some 80 developing countries.

IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: "THE WORLD BANK GUIDELINES" 97 n.68 (1993).

253. United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, *reprinted in* 15 I.L.M. 701 (1976).

254. "A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention." ICSID, *supra* note 252, art. 26, 17 U.S.T. at 1281, 575 U.N.T.S. at 176.

255. *See* NAFTA, *supra* note 90, art. 1121(1)(b), at 643.

years.[256] Overall, the dispute settlement procedure in Chapter 11 has been recognized as an effective and modern system by jurists from the three different Parties.[257]

The arbitral award is enforceable only between the parties and with respect to the particular case.[258] The NAFTA provides a period of time for full enforcement of the award.[259] If a Party fails to comply with the award, the affected Party may initiate a panel procedure under Chapter 20 or may seek enforcement under the ICSID Convention, the New York Convention,[260] or the Inter-American Convention.[261]

One Mexican lawyer has said that arbitration

> is currently the best way to settle controversies that have their origin in international trade. . . . Nonetheless, although the recognition and enforcement of a foreign arbitral award is not a complex matter in Mexico City, this is not the case in the rest of the country because judges are not used to having to recognize and enforce them.[262]

Hence, enforcement, even under the NAFTA, could still be a difficult task to overcome in these undeveloped (juridical and economic) areas of Mexico. However, if a Party does not fulfill its obligations after an award has been reached under Chapter 11, the investor still has the right to ask its State to initiate Chapter 20 proceedings.[263] Finally, a resolution against a CNIE decision for which an investment is not accepted could not be challenged within the dispute settlement proceedings, nor under the dispute system of Chapter 20.[264]

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256. *See id.* arts. 1116(2), 1117(2), at 643.

257. *See The Joint Working Group of the American Bar Association, the Canadian Bar Association, and the Barra Mexicana Report on Dispute Settlement Procedures in the North American Free Trade Agreement*, 27 INT'L LAW. 831 (1993).

258. *See* NAFTA, *supra* note 90, art. 1136(1), at 646.

259. The time periods are 120 days in ICSID Convention cases and three months under ICSID Additional Facility Rules and UNCITRAL Arbitration Rules cases. *See id.* art. 1136(3).

260. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

261. Inter-American Convention Comercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 [hereinafter Inter-American Convention].

262. Leonel Pereznieto Castro, *Resolution of an International Transaction Under Mexican Conflict of Laws Principles*, 7 FLA. J. INT'L L. 427, 432 (1992).

263. *See* NAFTA, *supra* note 90, arts. 1136, 2008, 2020, 2022, at 646, 695, 698.

264. *See id.* Annex 1138.2, at 649.

G. *Competition Law as the Last Regulatory Scheme in an Era of Deregulation*

> [I]t is widely agreed that international markets, as domestic ones, cannot simply be left to themselves. They need a coherent regulatory framework ensuring that the expected benefits of the market economy are not undermined by the behavior of governments and private actors and that common goods and public interests are safeguarded.[265]

In Mexico, as other countries such as Canada and the United States, antitrust legislation is considered to be within the "national interest" rules, which means these countries believe competition and its regulation protect values and interests deemed important for domestic and international reasons. Moreover, under the new market contestability theory, competition rules become more important in fostering efficient markets and competing for investment, avoiding the existence of barriers to entry or any other competition-distortive behavior produced by governmental or private action.[266] However, competition policies are authority acts, and as such, they have to be regulated by rules of law to avoid excessive discretion. This is a basic principle in the theory of law, and is one of the principles which has sustained the effectiveness of law.

1. *MNCs and Competition Law*

Host governments, as in Mexico's case, are worried about the willingness of MNCs to operate in their market because of the enormous economic power MNCs.[267] A MNC can use the funds of its parent company to subsidize its costs and achieve enough market power to monopolize the market or act in an anticompetitive manner.[268]

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265. Lawson A. W. Hunter & Susan M. Hutton, *Where There Is a Will, There Is a Way: Cooperation in Canada-U.S. Antitrust Relations*, 20 CAN.-U.S. L.J. 101, 110 (1994) (quoting Christopher Bail, *Coordination and Integration of Competition Policies: A Plea for Multinational Rules*, *in* COMPETITION POLICY IN AN INTERDEPENDENT WORLD ECONOMY 279, 280 (Kautzenbach et al. eds., 1993).

266. *See* David P. Fidler, *Competition Law and International Relations,* 41 INT'L & COMP. L.Q. 563, 565–70 (1992).

267. However, competition policy was not a significant concern for Mexico throughout most of its history. *See* Joshua A. Newberg, *Mexico's New Economic Competition Law: Toward the Development of a Mexican Law of Antitrust*, 31 COLUM. J. TRANSNAT'L L. 587, 587 (1994).

268. *But see* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (rejecting Zenith's argument that Japanese firms operating in the United States conspired to depress American television prices by using profits

This does not mean that antitrust or competition laws should be construed as measures to protect the national market; their aim is to protect the competitive process, not competing firms.[269] These laws protect consumers rather than other social goals such as the creation or maintenance of jobs or the protection of small and mid-sized enterprises.[270] However, indirectly, competition laws could have political goals, such as the deconcentration of economic power by private or governmental enterprises; otherwise, such firms would justify their anticompetitive behavior on the basis that there is no regulation of business practices.[271]

Therefore, competition laws, directly and indirectly, should produce better products, decreased production costs, more and better services, and decreased prices for consumers.[272] On the other hand, the effects that antitrust policy should have on the marketplace are better income distribution within the market, increase in the budget for research and development of products, increased consumer welfare, more rational use and distribution of resources, and decreased monopoly power.[273] Hence, preserving competition is a means to obtain the goals of antitrust laws, which include consumer welfare, the promotion of low prices, choices among products, and innovation. Competition should also be preserved because it provides society with the maximum output that can be achieved at any given time with the resources available.[274] Thus, competition laws can be viewed as one of the last counterbalance instruments that States, and society in general, have to regulate the conduct of firms, especially the powerful MNCs.

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generated in Japan to subsidize their American operations because such a strategy was economically implausible).

269. *See* Newberg, *supra* note 267, at 598.

270. *See* Natrona Serv., Inc. v. Continental Oil Co., 598 F.2d 1294, 1297–98 (10th Cir. 1979).

271. *See* Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 383 (1965).

272. *See, e.g.*, Lawrence L.C. Lee, *Taiwan's Antitrust Statutes: Proposals for a Regulatory Regime and Comparison of U.S. and Taiwanese Antitrust Law*, 6 IND. INT'L & COMP. L. REV. 583, 591 (1996).

273. *See id.* On the contrary, Robert Bork suggests that antitrust policy has deviated from its objectives in four different ways: (1) moving away from the ideal of free market towards the regulated market; (2) steering from political decision by democratic process to political choice by courts; (3) concern about group welfare instead of general welfare; and (4) moving from the ideal of liberty and reward according to merit to one of equality of outcome and reward according to status. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 418 (1978).

274. *See* BORK, *supra* note 273, at 422, 425.

2. *The Ley Federal de Competencia Económica*[275]

Since 1917 the Mexican Constitution has been concerned with the protection of competition within the Mexican market.[276] However, it was not until this decade that a competition or antitrust act was included. The Mexican Constitution states:

> In the United Mexican States there shall be no monopolies or restrictions to free competition [*estanco*s] of any kind, nor exemption from taxes under the terms and conditions provided by law. Equal treatment shall be given to prohibitions under the guise [*título*] of protection to industry.
>
> Consequently, the law shall punish severely and the authorities shall effectively prosecute every concentration or cornering in one or a few hands of articles of prime necessity for the purpose of obtaining a rise in prices; every act or proceeding which prevents or tends to prevent free competition in production, industry or commerce, or services to the public; every agreement or combination, in whatever manner it may be made, of producers, industrialists, merchants, and common carriers, or those engaged in any other service, to prevent competition among themselves and to compel consumers to pay exaggerated prices; and in general, whatever constitutes an exclusive and undue advantage in favor of one or more specified persons and to the prejudice of the public in general or of any social class.[277]

The objectives of the Competition Law are to promote economic efficiency, to avoid monopolistic practices, and to protect the competitive process and the freedom of individuals within economic activities.[278] The Competition Law establishes, as unauthorized practices, "absolute monopolistic practices" and "relative monopolistic practices."[279] The absolute monopolistic practices are considered null (*nulidad absoluta*). Thus, anybody has the right to ask for its invalidation. Such practices would not

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275. D.O., 24 de diciembre de 1992 [hereinafter Competition Law].
276. *See* MEX. CONST. art. 28.
277. MEX. CONST. art. 28, *translated in* Flanz & Moreno, *supra* note 26, at 32–33.
278. *See* Competition Law, *supra* note 275, art. 2.
279. *Id.* arts. 8–9.

have any juridical effects because they are considered anticompetitive practices. These practices, known as horizontal practices, are the formation of monopolies, the formation of cartels, agreements for the division or share of markets, and the manipulation of public auctions. Such horizontal practices should not be called monopolistic because, in *stricto senso,* they are not monopolies concerning sole actors, but oligopolies, since they involve the action of more than one economic agent. As such, they should be referred to as oligopolistic practices. On the other hand, there are "relative monopolistic practices," which are not always anticompetitive. To be considered anticompetitive, these practices have to gain substantial market power. These are known as vertical practices.

The Competition Law defines relative monopolistic practices as: "the acts, contracts, covenants or combinations of which the objective or effect is or could be to displace unduly to other market agents, substantially prevent their access or establishes exclusive advantages to one or more persons."[280] To prove a relative monopolistic practice, the authority in charge of the inquiry has to find that the actor has the potential to develop substantial market power beyond the relevant market, and that it affects goods or services in the relevant market.[281]

Criteria for the determination of the relevant market include:

(1) the possibility to substitute the good or service for others (of national or international origin), considering the technological possibilities, if the consumers have substitutes, and the length of time for the substitution;
(2) the distribution costs of the good;
(3) the costs and the possibilities for the consumers to go to other markets; and
(4) the federal, local and international normative restrictions that could limit access to the consumers to other supply sources or the access of the supplier to alternative clients.[282]

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280. *Id.* art. 10. In Spanish: "*los actos, contratos, convenios o combinaciones cuyo objeto o efecto sea o pueda ser desplazar indebidamente a otros agentes del mercado, impedirles sustancialmente su acceso o establecer ventajas exclusivas en favor de una o varias personas.*" *Id.*

281. *See id.* art. 11.

282. *See id.* art. 12, §§ I–IV.

Considerations for the determination of substantial market power in the relevant market include the actor's participation in that market, and whether it can fix or set prices unilaterally or restrict the supply in the relevant market without any possibility of the competitors to counteract such a market power, the existence of barriers to market entry, and the existence and power of competitors.[283] The relative monopolistic practices the law classifies are vertical division of markets, restrictions to the selling price, tied selling, exclusivity contracts, denied trade, and boycotts.[284]

a. Mergers and Acquisitions

The Competition Law also regulates mergers, a typical mode of entry for MNCs. They are known as *concentraciones* and are regulated in Chapter III of the Act. Notice of *concentraciones* must be given to the *Comisión Federal de Competencia Económica* (Commission)[285] before they occur. The Competition Law prohibits:

> a merger with or acquisition of control over another firm, or any other act joining together companies, associations, stockholders, business partnerships, trust companies or assets in general, which is carried out between competitors, suppliers, customers, or any other economic agents, whose purpose or effect is to diminish, harm or impede competition with respect to identical or substantially similar goods and services.[286]

The Commission shall consider the relevant market as well as the potential competitors, the market power, and the

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283. *See id.* art. 13, §§ I–III.

284. *See id.* art. 9.

285. The Commission is an administrative autonomous body within SECOFI. It is authorized to: "(1) conduct investigations initiated at the request of interested parties or by the Commission itself, of competition law violations; (2) issue administrative rulings and assess penalties for such violations . . . ; (3) render advisory opinions regarding competition law questions; and (4) participate in the negotiation of international agreements regarding competition policy." Newberg, *supra* note 267, at 590–91 (footnote omitted).

286. Competition Law, *supra* note 275, art. 16. In its original version, the article provides: "[*S*]*e entiende por concentración la fusión, adquisición del control o cualquier acto por virtud del cual se concentren sociedades, asociaciones, acciones, partes sociales, fideicomisos o activos en general que se realice entre competidores, proveedores, clientes o cualesquiera otros agentes económicos.*" *Id.*

degree of concentration of the relevant market,[287] to determine if a merger should be sanctioned. If the Commission finds that the merger constitutes an anticompetitive behavior, then it will either condition the merger according to the Commission's discretion or order partial or total deconcentration, termination of control, or suppression of the acts.[288] Nevertheless, mergers and acquisitions do not necessarily imply anticompetitive behavior and, furthermore, with the increasing appearance of MNCs, corporations merge to improve efficiency and competition within national and international markets.

However, there are some cases in which notice of acquisitions or mergers shall be given to the Commission before they occur. Its approval may be required to register in the Public Register of Trade[289] when:

> (1) the transaction is worth over [US]$48 million (12 million times the basic minimum wage applicable within the Federal District); (2) the acquiring firm acquires more than 35% of the assets or shares of a target firm with assets or annual sales in excess of [US]$48 million . . . ; or (3) two or more of the parties to the transaction have assets or annual sales in excess of US$192 million (48 million times the basic minimum wage applicable within the Federal District) and the transaction entails the acquisition of capital or assets in excess of [US]$192 million.[290]

The Commission has a forty-five-day period after receipt of notification to issue a resolution or the inaction is deemed an affirmative resolution.[291]

b. Sanctions

Sanctions are established in the Competition Law under Articles 35 through 38. In Mexico it is necessary under the

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287. *See id.* art. 18, §§ I–II.
288. *See id.* art. 19.
289. *Registro Público de Comercio.*
290. Newberg, *supra* note 267, at 594–95 (translating Article 20 of the Competition Law). The *salario mínimo vigente en el Distrito Federal* is 21 pesos per day, subject to changes in the minimum wage and to currency fluctuations. *See id.* at 594 n.41.
291. The notification must include the relevant legal documents for the transaction, the most recent financial statements of the parties, and any other information necessary for the analysis of the transaction. *See* Competition Law, *supra* note 275, art. 21 § I. The President of the Commission could extend the period up to 60 more days in exceptionally complex cases. *See id.* art. 21 § IV.

Competition Law for the anticompetitive act to have an effect on the marketplace.[292] The Commission shall consider, through the imposition of a fine, the gravity of the anticompetitive act, the damage caused, the signs of intent, the participation of the transgressor in the market, the size of the affected market, the length of the practice, past acts of the transgressor, and the economic capacity of the transgressor economic capacity.[293] Hence, monopolistic activities in and of themselves are not an offense, even though they have a lucrative effect. However, it is an offense if the lucrative effect is obtained by means of monopolistic activities, because in a monopolistic market the gains are anticompetitive and they are superior to the normal gains in a competitive market.

Under Mexican legislation, anticompetitive actions are not criminal offenses per se*,* as in Canada and other countries. The Commission, after administrative proceedings, shall establish the sanction in accordance with the law it considers appropriate. Under this procedure the Commission resolves the claims presented by the affected Party or Parties.[294] The Commission, in a plenary session, passes the final resolution by majority vote.[295] After receiving the claim, the Commission must notify the possible transgressor of the inquiry, attaching copies of the claim. The defendant has thirty days to answer the claim or what he alleges to be his rights by attaching the necessary proof.[296]

After the evidentiary stage, the Commission sets a period of thirty days for hearings, which can be either oral or written.[297] Once the records are integrated, the Commission shall dictate a resolution within sixty days.[298] The Commission's resolution could impose a sanction if it finds the defendant is guilty of predatory pricing as a relative monopolistic practice. The sanction could consist of:

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292. *See id.* arts. 36–38.

293. *See id.* art. 36.

294. In cases of relative monopolistic practices or mergers, only the affected persons and the Commission itself have the right of action to initiate an inquiry. *See, e.g.*, Newberg, *supra* note 267, at 597 n.62. On the other hand, when it is an absolute monopolistic practice, any person and the Commission have the right. *See, e.g.*, *id.*

295. The Commission is composed of five commissioners. *See* "Reglamento Interior de la Comisión Federal de Competencia," D.O., 12 de octubre de 1993, art. 14.

296. *See* Competition Law, *supra* note 275, art. 33 § III.

297. *See id.*

298. *See id.* art. 33 § IV.

(1) suspension, correction, or suppression of the practice;[299]
(2) partial or total disconcentration;[300]
(3) a fine not exceeding the equivalent of 7,500 times the minimum wage in force in the Federal District of Mexico if the evidence is false;[301]
(4) a fine not exceeding the equivalent of 375,000 times the minimum wage in the case of absolute monopolistic practices;[302]
(5) a fine not exceeding the equivalent of 225,000 times the minimum wage for relative monopolistic practices;[303]
(6) a fine not exceeding the equivalent of 225,000 times the minimum wage in the case of unauthorized mergers or acquisitions, and 100,000 times the minimum wage if no notification is made with regard to the merger or acquisition;[304] and
(7) a fine not exceeding the equivalent of 7,500 times the minimum wage for individuals who participate directly in the monopolistic practice, on behalf of juridical persons (firms).[305]

c. Remedies

In Mexico, the authority in charge of proceedings against anticompetitive behavior is the Federal Commission of Competition, formed by five commissioners, experts in antitrust law, who are designated by the President.[306] This state organ is an administrative organ that has technical and operative autonomy to dictate its resolutions, but depends on a Ministry of Commerce and Industry Promotion for its budget and hierarchy.[307] Thus, the proceedings before the Commission are administrative, not judicial. It is formally an administrative authority that has material judicial (quasi-judicial) functions.

The Commission is authorized to:

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299. *See id.* art. 35 § I.
300. *See id.* art. 35 § II.
301. *See id.* art. 35 § III.
302. *See id.* art. 35 § IV.
303. *See id.* art. 35 § V.
304. *See id.* art. 35 § VI.
305. *See id.* art. 35 § VII.
306. *See id.* arts. 23–25.
307. *See* Newberg, *supra* note 267, at 590 (discussing the composition and nature of the Commission).

(1) conduct investigations initiated by interested parties or by the Commission on its own initiative;[308]
(2) issue administrative rulings and assess penalties for such violations;[309]
(3) give advice regarding competition law questions;[310] and
(4) participate in the negotiations of international agreements to which competition matters are subject.[311]

After a resolution has been reached by the plenary session of the Commission, the affected person has the right to interpose a remedy for reconsideration[312] before the Commission, as in every administrative proceeding. This remedy has to be interposed within thirty days after the notification of a resolution.[313] Regarding this right, the law does not specify the different resolutions the Commission could reach. Hence, the parties have the right to interpose by using the reconsideration remedy against any of these resolutions.[314]

The remedy, if admitted, has the effect of revoking, modifying, or confirming the contested resolution. The judgment will contain the settlement of the contested action, the legal foundation, and the resolution's aims.[315] The remedy should be in writing, directed to the President of the Commission, and should contain the contested facts with the necessary proofs attached.[316]

The immediate effect of the interposition of the remedy is the suspension of the resolution's execution.[317] If necessary, a guarantee has to be given before the suspension of the execution, to attest to the possible damages the suspension could cause to a third party.[318] The Commission has sixty days after the interposition of the reconsideration remedy to notify the party regarding the resolution of a remedy.[319] If the Commission does not receive a resolution within this period

308. *See* Competition Law, *supra* note 275, art. 15.
309. *See id.* art. 24 § III.
310. *See id.* art. 24 § V.
311. *See id.* art. 24 § VIII.
312. *See id.* art. 39.
313. *See id.*
314. *See id.*
315. *See id.* art. 39, para. 2.
316. *See id.* art. 39, para. 3.
317. *See id.* art. 39, para. 4.
318. *See id.*
319. *See id.* art. 39, para. 5.

it shall be understood that the party confirms the contested act or resolution.[320] This last provision, contained in the last paragraph of Article 39, is onerous. It is contrary to the legal principle contained in Article 16 (*prinicipio de legalidad*) of the Mexican Constitution, which states that every resolution of an authority needs foundation and motivation if it affects an individual and his or her possessions, family, and other rights.[321] Thus, this provision is unconstitutional because it is not in accord with the constitutional guarantee.

However, any individual affected by a confirmation by silence can ask for the protection of the Supreme Court of Mexico's *Juicio de Amparo*, the Mexican constitutional judicial control system.[322] One might speculate that the confirmation by silence provision was enacted to enable individuals to use the *Juicio de Amparo* as a last resort after final resolution by the Commission. If the objective is to expedite the proceedings, the *Amparo* will not do so; in fact, the proceedings will be lengthened. Furthermore, its unconstitutionality undermines the Commission.

In addition, under the resolution of the reconsideration remedy, a party has the right to interpose the *Juicio de Amparo*, that in this case is the *Amparo indirecto or bi-instancial*. This gives the parties two chances to interpose the *Juicio de Amparo*, first, against the administrative act of reconsideration, and second, against the law itself.

Another available remedy, in this case a civil remedy, benefits the economic agents who have suffered damage or prejudice as a consequence of anticompetitive behavior. They can initiate a civil trial to obtain compensation and recover the losses and correct the prejudices that occurred as a result of the anticompetitive behavior.[323] This trial is conducted in a regular court, which may award damages of up to double the amount established by the Commission, though the judge is not legally bound to do so.[324]

320. *See id.*

321. *See* MEX. CONST. art. 16.

322. "Ley de Amparo Reglamentaria de los Articulos 103 y 107 de la Constitucíon Politica de los Estados Unidos Mexicanos," D.O., 10 de enero de 1936, art. 1 § I.

323. *See* Competition Law, *supra* note 275, art. 38.

324. Panel discussion, *Part Two: The U.S. and Mexican Companies Agree Upon Some Vertical Restraints of Trade in Their Contract*, 4 U.S.-MEX. L.J. 89, 97 (1996) (remarks of Michael W. Gordon).

H. Other Rules Affecting FDI

Upon examining these rules, two important conclusions can be drawn. One is that Mexico has shifted from its former state-oriented, protectionist policy towards the encouragement of FDI. The other is that this shift is permanent, with a basis in federal laws and international obligations.

1. Domestic Level

Mexico's permanent shift towards FDI can also be seen in several other acts and laws enacted by the Mexican government before and after the NAFTA. Among the acts and laws are the following:

- Promotion and Protection of Industrial Property Law;[325]
- Mexican Federal Copyright Law;[326]
- General Law of Ecological Equilibrium and Environmental Protection;[327]
- International Trade Law;[328] and
- Decree for the Development and Operation of the Maquiladora Industry for Exportation.[329]

In addition to these laws, and in accordance with its NAFTA obligations within the Investment chapter, Mexico has already liberalized several sectors. The Mexican Navigation Act[330] provides that Mexican shipping companies can be

325. "Ley de Fomento y Proteccíon de la Propiedad Industrial," D.O., 27 de junio de 1991. This new law affects several areas:

> (1) it significantly broadens patent protection, [chemicals and pharmaceuticals]; (2) it extends the term of patent protection to 20 years commencing from the date of filing the patent application, or to 14 years commencing from the date of issuance; (3) it extends the term of trademark registrations from five years to ten years; and (4) it increases sanctions for improper disclosure of trade secrets.

Hurtado Badiola, *supra* note 147, at 66–67 (1994). For a more detailed discussion of Mexican intellectual property laws, see Richard E. Neff, *Mexican Copyright Protection: Proposals for Better Legislation and Enforcement*, 2 U.S.-MEX. L.J. 51 (1994).

326. "Ley Federal de Derechos de Autor," D.O., 31 de diciembre de 1956, *as amended by* D.O., 17 de julio de 1991.

327. "Ley General de Equilibrio Ecológico y la Protección al Ambiente," D.O., 28 de enero de 1988.

328. "Ley de Comercio Exterior," D.O., 27 de julio de 1993.

329. "Decreto para el fomento y operación de la Industria Maquiladora de Exportación," D.O., 22 de diciembre de 1989 [hereinafter *Maquiladora* Law].

330. "Ley de Navegación," D.O., 4 de enero de 1994.

100% foreign-owned. Such companies may register and flag vessels as Mexican, but on-board personnel must be Mexican by birth. The Airport Infrastructure Law[331] governs the privatization of airports. The limit on foreign participation is 49% with the possibility of 100%. On May 11, 1995, the Law Regulating Article 27 of the Mexican Constitution was amended to permit foreign and private sector participation in transportation, storage, and distribution of natural gas.[332] On May 12 of the same year, Article 28 of the Constitution was amended to remove railroad services as a strategic activity. Finally, the Federal Telecommunications Law ended the Telmex monopoly and allows grants of concessions in satellite communications to companies that can have up to 49% foreign equity.[333] Thus, the following sectors are no longer reserved to the State: satellite communications; railroads; and control, inspection, and surveillance of maritime and inland ports and airports.[334]

2. *International Level*

Mexico will continue to promote an international free trade and investment policy. To attract more capital flows and promote exports and domestic investment abroad, Mexico has already signed free trade agreements and BITs and is in the process of negotiating others.[335] For example, Mexico signed a free trade agreement with Chile, who is being considered for NAFTA membership.[336] Mexico has also signed three other agreements with Bolivia,[337] Costa Rica,[338] and

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331. "Ley de Aeropuertos," D.O., 22 de diciembre de 1995.

332. "Decreto por el que se reforman y adicionan diversas disposiciones de la Ley Reglamentaria del Artículo 27 Constitucional en el ramo del petróleo," D.O., 11 de mayo de 1995.

333. "Ley Federal de Telecomunicaciones," D.O., 7 de junio de 1995, art. 12.

334. *See* Alberto de la Parra Z., *Mexico: Privatization Laws*, LATIN FIN., Jan. 11, 1997, at A25, *available in* LEXIS, News Library, Latfin File.

335. *See* Kevin G. Hall, *Mexico, Europe Step Gingerly into Trade Talks,* J. COM., July 23, 1997, at 3A, *available in* LEXIS, News Library, JOC File.

336. *See* Thomas Andrew O'Keefe, *Potential Conflict Areas in Any Future Negotiations Between MERCOSUR and the NAFTA to Create a Free Trade Area of the Americas*, 14 ARIZ. J. INT'L & COMP. L. 305, 305 (1997); Melissa Ann Miller, Note, *Will the Circle be Unbroken? Chile's Accession in the NAFTA and the Fast-Track Debate*, 31 VAL. U. L. REV. 153, 181 (1996)

337. "Decreto por el que se aprueba el Tratado de Libre Comercio entre Estados Unidos Mexicanos y la República de Bolivia," D.O., 28 de diciembre de 1994.

338. "Decreto por el que se aprueba el Tratado de Libre Comercio entre Estados Unidos Mexicanos y la República de Costa Rica," D.O., 21 de junio de 1994.

Colombia and Venezuela.[339] Mexico is presently negotiating a free trade agreement with Nicaragua[340] and a multilateral agreement with Guatemala, Honduras, and El Salvador.[341] In South America, Mexico is negotiating free trade agreements with Ecuador[342] and Peru,[343] and is updating its agreements under the Common Market of the South (MERCOSUR).[344] In other regions, Mexico is in the process of negotiating with the EU to sign a free trade agreement.[345] Presently, Mexico has signed BITs with Spain[346] and Switzerland.[347]

III. FDI AND THE CRISIS OF DECEMBER 1994

The above examination of the main rules that govern FDI in Mexico has provided the juridical basis needed to better understand the direction that Mexico has chosen to enhance its economy. The second part of this article focuses on Mexico's reliance on foreign investment to achieve the economic growth necessary for the welfare of its people. It discusses Mexico's need for capital, the crises of 1982 and 1994, the role of FDI in these processes, and the future significance of the FDI.

A. *The Need for Capital in Mexico*

The 1995–2000 National Development Plan (PND)[348] recognizes the importance of FDI for Mexico. One of the PND's goals is to rely on foreign investment as an instrument of support for Mexico's development while avoiding the risks from excessive dependence on short-term foreign

339. "Decreto por que se aprueba el Tratado de Libre Comercio entre los Estados Unidos Mexicanos y las Repúblicas de Colombia y Venezuela," D.O., 16 de diciembre de 1994.

340. *See* Andy Zipser, *Review and Preview: CAFTA, Anyone?,* BARRON'S, Apr. 18, 1994, at 13.

341. *See* "Programa de Política Industrial y Comercio Exterior," D.O., 31 de mayo de 1996 [hereinafter PPICE]; Ruben Mata, *U.S. Bilateral Trade Growth with Mexico Faces Mixed Prospects in 1995*, MEX. TRADE & L. REP., Apr. 1, 1995, at 12, 14.

342. *See* PPICE, *supra* note 341, § III.7.

343. *See id.*

344. *See id.*

345. *See id.*

346. "Decreto por el que aprueba el Acuerdo entre los Estados Unidos Mexicanos y el Reino de Espana para la Promoción y Protección Recíproca de Inversiones," D.O., 20 de diciembre de 1995.

347. "Decreto por el que aprueba el Acuerdo entre los Estados Unidos Mexicanos y la Confederación Suiza para la Promoción y Protección Recíproca de Inversiones," D.O., 20 de diciembre de 1995.

348. "Decreto por el que se aprueba el Plan Nacional de Desarrollo 1995–2000," D.O., 31 de mayo de 1995 [hereinafter PND].

investment.[349] In addition to the PND, there is also the Mexican government's decree entitled the "Industrial Policy and Foreign Trade Program,"[350] which regulates the PND within specific sectors.[351] As President of the University of the Americas, Enrique Cárdenas has noted: "Mexican economic development has been closely connected to the foreign sector through most of its history. From colonial times to the present, the export sector has been instrumental in either

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349. *See id.* § 5.5.5. To achieve this goal, the PND calls for the following:

> (1) Stability and certainty, within the financial, and economic evolution of the country through fiscal, monetary, financial and currency exchange policies;
> (2) A stable real exchange rate, in accordance with an expansion of exports and a balanced current account in the short-term balance of payments;
> (3) A stable and attractive real yield to both foreign and national investors;
> (4) The same treatment for national and foreign investment to avoid a) foreign investment receiving subsidies at the expense of the national economy and b) making investment unattractive to foreign investors;
> (5) The procurement of foreign resources oriented towards productive direct investments, eliminating rule barriers that, without any juridical justification, exist for foreign participation in the productive activity;
> (6) The promotion of conditions to encourage long-term investments and to discourage the flight of capital; and
> (7) The establishment of juridical security and certainty to direct foreign and national investment.

See id.

350. PPICE, *supra* note 341. This Program states the policies Mexico will follow in the future:

> 1) Macroeconomic stability and financial development;
> 2) Creation and improvement of infrastructure and human resources;
> 3) Promotion of production chains;
> 4) Improvement of the technological infrastructure;
> 5) Economic deregulation;
> 6) Export promotion;
> 7) International trade negotiations; and
> 8) Competition.

Id. § II (entitled *Objetivos y Estrategias de la Política Industrial* or Objectives and Strategies of the Industrial Policy).

351. *See id.* arts. 3, 4. From the PPICE joint treatment of trade and industrial policy, we may infer that the Mexican state, in accordance with the recent international trend, recognizes the importance of investment on trade.

promoting economical growth or creating recessions and crises in the balance of payments and composition."[352]

1. National Conditions

Mexico needs high economic growth rates to recover from the accumulated residues of past years' lack of growth to be able to confront the increasing population and improve employment opportunities.[353] According to the Ministry of Commerce and Industrial Promotion, Mexico's economy needs to grow at an average annual rate of at least 5%.[354] The necessary growth can only be achieved if the rates of investment are at least 24% of the gross national product (GNP) (*Producto Interno Bruto*).[355]

Because of the protectionist system that reigned in Mexico before the 1990s, the industrial sector did not grow sufficiently. Some public services, such as telecommunications, transportation, basic petrochemical goods, and gas and electricity, have not been strong enough to meet the current requirements of the economy.[356] Thus, investment flows are necessary to create and expand Mexico's infrastructure and permit future economic development.[357] Furthermore, within the globalization

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352. Enrique Cardenas, *Contemporary Economic Problems in Historical Perspective*, *in* MEXICO'S SEARCH FOR A NEW DEVELOPMENT STRATEGY 1 (Dwight S. Brothers & Adele E. Wick eds., 1990).

353. *See id.* at 46. By the end of the present century it is estimated that Mexico will have 105 million inhabitants. *See id.* An estimated 1.5 million jobs must be created annually to cover this estimated population growth and those presently unemployed. *See id.*

354. *See* PND, *supra* note 348, § 5.1.

355. *See id.*

356. *See, e.g.,* Daniel Fisher, *Mexico About to Produce Enough Gas for Its Own Use*, HOUS. CHRON., Feb. 16, 1997, at 11E (stating that in 1995 Mexico imported 84 million cubic feet of natural gas from the United States and exported 37 million cubic feet daily).

357. President Zedillo, in a speech before the Senate on January 3, 1995, announced a program to overcome the crisis of 1994:

> El crecimiento y el empleo exigen que el país construya una infraestructura adecuada. Debemos reconocer con toda honestidad que el país todavía arrastra importantes carencias en materia de infraestructura que limitan su potencial de crecimiento y de generación de empleos. Debemos reconocer con igual honestidad que el gobierno federal no cuenta con los recursos suficientes para emprender por sí solo la edificación de la infraestructura para un desarrollo integral y equilibrado entre las regiones del país.

Ernesto Zedillo, "Mensaje a la Nación Pronunciado por el Presidente Ernesto Zedillo Ponce de León el 3 de enero de 1995," at *Acuerdo de Unidad Para* context, the volatility of the financial market is an unavoidable reality; thus, it is necessary for Mexico to become more economically stable to attract long-term investments and promote internal revenue.[358] This will create the macroeconomic stability needed to attract future FDI. Mexico, like many other developing countries, does not have enough internal revenue, and foreign investment is necessary to make up for the shortfall.[359]

Another important sector Mexico needs to develop is technology.[360] To compete on an international level, Mexico needs capital for research and development. Mexico's Foreign Investment Law promotes the establishment of MNCs, which are the main economic source of technological knowledge. With the new Protection and Promotion of Industrial Property Act[361] and the NAFTA,[362] intellectual property rights now enjoy greater protection. Thus, transfer of technology arrangements should grow as well. It will also be necessary to promote the use of new machinery and equipment, as these

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Superar la Emergencia Económica (speech before the Mexican Senate, 1995). The English translation is as follows:

> Growth and employment demand that Mexico build an adequate infrastructure. We shall honestly recognize that the country is significantly lacking an infrastructure that limits our potential growth and the creation of jobs. We shall honestly recognize as well that the federal government does not have enough resources to build the necessary infrastructure by itself for an integral and equilibrated development among the country's regions.

Id. (author's translation). For a discussion of the problems created by Mexico's poor infrastructure, see Chiang-feng Lin, *Investment in Mexico: A Springboard Toward the NAFTA Market—An Asian Perspective*, 22 N.C. J. INT'L L. & COM. REG. 73, 92 (1996).

358. *See* PPICE, *supra* note 341.

359. *See* Anthony M. Vernava, *Latin American Finance: A Financial, Economic and Legal Synopsis of Debt Swaps, Privatizations, Foreign Direct Investment Law Revisions and International Securities Issues*, 15 WIS. INT'L L.J. 89, 145 (1996) (concluding that "Latin America must increase its share of worldwide FDI by macroeconomic liberalization that foreign investors perceive as effective and by open markets").

360. *See* PPICE, *supra* note 341, § III.4 (entitled *Mejoramiento de la Infraestructura Tecnológica para el Desarrollo de la Industria* or Improvement of the Technological Infrastructure for the Development of Industry).

361. *See* "Ley de Fomento y Protección de la Propiedad Industrial," D.O., 27 de junio de 1991.

362. The direct sale of intellectual property rights from foreign firms is uncommon. However, the best way to attract new technologies to an economy is through FDI. Within this context, the NAFTA enhances the establishment of FDI and thus, the transference of technology.

items embody new technological developments or are necessary for their implementation.[363]

Due to its current account deficit,[364] Mexico had to devalue its currency in 1994 and as a result, inflation became another problem for the national economy.[365] It is necessary to reduce this deficit to reactivate economic growth.[366] In 1996 Mexico's accumulated external debt was approximately US$80 million in the public sector alone.[367]

Finally, it has been said that Mexico's need for foreign investment to complement national investment is necessary to correct the current account deficit. This deficit was caused, according to some commentators, by private investment growing faster than the capacity to generate savings.[368] Whatever the reason, "The key task of Mexican economic policymakers in the 1990s is to promote the restructuring and growth of the Mexican economy while keeping inflation under control. Investment, generated both from domestic savings and from foreign sources, will be the primary engine of growth."[369] In sum, Mexico continues to have many economic problems—a low gross domestic product, increasing inflation, a large external debt, and a current account deficit.[370]

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363. Furthermore, labor adapts to the most advanced machinery and equipment and permits future development of new industrial technologies. *See* PPICE, *supra* note 341, at 96.

364. *See* Joel Millman & Pamela Druckerman, *Mexico Moves to Cool Down Peso Demand,* WALL ST. J., Sept. 24, 1997, at 9. The "current account" is a broad trade measure including the import and export of goods and services. *Id.* Analysts anticipate Mexico's current account deficit for 1997 will reach US$6 billion. *See id.* To attractively price exports, a country must prevent its currency from growing too strong, as a strong currency makes a country's products more expensive abroad. *See id.*

365. *See* Lawrence Kudlow, *King Dollar's Manifest Destiny*, WASH. TIMES, Sept. 9, 1997 at A15.

366. *See* Zedillo, *supra* note 357.

367. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 856 (116th ed. 1996); Gerald D. Prager, Comment, *Pemex at the Crossroads: A National Oil Industry in Crisis,* 15 HOUS. J. INT'L L. 115, 130 n.92 (1992).

368. *See* Millman & Druckerman, *supra* note 364.

369. GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 19 (1992).

370. The same problems have existed since the 1980s. *See generally* Angus Maddison, *Comparative View of Mexico's Adjustment and Growth Problems, in* MEXICO'S SEARCH FOR A NEW DEVELOPMENT STRATEGY, *supra* note 352, at 27–37 (analyzing Mexico's economic difficulties during the 1980s and the underlying causes).

2. The Competition for FDI

The flows of capital and trade worldwide have grown quickly. During 1980 to 1992, FDI grew at an annual rate of 12.5%.[371] However, competition to attract new FDI is fierce for both developed[372] and developing countries.[373] Furthermore, with the entry of China, India, and Eastern European countries into competition for FDI, Mexico's efforts to attract capital flows[374] must be redoubled. In 1993 China attracted almost 40% of the FDI destined for developing countries.[375] Latin America, in second place, attracted only 28%.[376]

Competition is also apparent in the area of export promotion. Developed nations expend great amounts of capital to promote exports.[377] Mexico, however, has two main programs to promote exports: the *Maquiladora*[378] program and the Temporary Imports to Produce Export Goods Program (PITEX).[379] However, as a result of the NAFTA, these programs will change by the year 2001.[380]

Thus, Mexico must be more competitive for FDI, considering that relative comparative advantages are no longer the basis for foreign investment and that markets become more interrelated every day. Mexico must compete more effectively against developed and developing countries

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371. *See* PPICE, *supra* note 341, § I.1. Another study estimates that from 1983–1989, worldwide FDI increased at an annual rate of 28.9%. *See* Edward M. Graham & Paul R. Krugman, *The Surge in Foreign Direct Investment in the 1980s, in* FOREIGN DIRECT INVESTMENT 13, 13 (Kenneth A. Froot ed., 1993).

372. Within the period from 1980 to 1992, developed countries attracted 78% of FDI. *See* PPICE, *supra* note 341, § I.1.

373. *See id.* Some developing countries had annual rates of FDI greater than the world average—specifically, growth for Southeast Asian countries was more than 16%. *See id.* In 1993 those countries attracted 67% of FDI within the developing world. *See id.*

374. *See id.*

375. *See id.*

376. *See id.*

377. *See id.* § III.6. Canada invests the most capital in exports. *See id.* at tbl.111.6.1.

378. *Maquiladoras* are "in-bond production facilities engaged in processing or secondary assembly of imported components for reexport." HUFBAUER & SCHOTT, *supra* note 369, at 91. For a discussion of the history and development of the *maquiladora* industry, and its influence on imports, exports, and the NAFTA, see *id.* at 91–105.

379. "Decreto que Establere Programa de Importación Temporal para Producir Artículos de Exportación," D.O., 3 de mayo de 1990.

380. In accordance with NAFTA Annex 401 (Mexico's reservation list) and Article 19 of the *Maquiladora* Law, the *maquiladora* industry will be allowed to introduce its products completely within the Mexican market seven years after the entry into force of the NAFTA in 1994.

to attract the foreign capital necessary for economic growth. The concept of competition is now broader, as it is understood to include the ability of a market to adapt to the contestable markets theory.[381] The goal is improved market contestability to attract more efficient investment flows.[382] Thus, Mexico should become an active promoter of the insertion of competition rules within the multilateral trade agenda, namely, the World Trade Organization (WTO) and the OECD.

3. Conclusion

The conditions explained above are important factors, considering the past and present course of the Mexican economy. Chief among them is Mexico's need for capital to promote national growth. Nevertheless, methods of raising capital have changed—from stimulating private (national or foreign) investment in the country, to reliance on commercial international bank loans to foster public spending. The next part of this Article traces this phenomenon through Mexico's most recent economic crises. The last Part explores the possibilities presented by FDI to foster economic growth, and introduces the legal instruments that can be used to attain that goal.

B. The Debt Crisis and the IMF "Conditions"

For three decades, from 1940 to 1970, the Mexican economy had stable and sometimes rapid growth, based principally on a mixed economy in which the state had a planning role.[383] However, in the late 1980s some

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381. According to some commentators, the optimal form of industrial organization is a perfectly contestable market characterized by costless entry and exit. *See* Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. REG. 111, 113 (1984). In such a market, the entrant would encounter no obstacles in production techniques, or perceived product quality relative to the incumbent. *See id.* at 114. Thus, entry would be judged simply on the basis of the incumbent's prices. *See id.*

382. *See id.*

383. *See* EDWARDS, *supra* note 68, at 1. After World War II, "most Latin American countries followed a development strategy based on a high degree of protectionism, government-led industrialization, and broad involvement of the state in economic activities." *Id.* It was believed that this high level of government involvement would be successful in placing Latin America among the likes of industrialized nations. *See id.* From 1950–1980, growth was achieved at an annual rate of 6%—a figure "significantly" greater than that of industrialized nations and only slightly behind East Asian nations. *See id.*

developments undermined Mexico's economy:[384] "Mexico was going through particularly difficult economic circumstances [including] high inflation of close to 160 percent annually, a public sector deficit of 16 percent of GDP, a large external debt representing almost half of GDP, low growth rates, and a lack of competitiveness . . . ."[385] In August 1982 Mexico announced that it could not fulfill its international financial obligations.[386] The main cause was the extraordinary amount of foreign borrowing from commercial banks that occurred between 1975 and 1982.[387] Nevertheless, there were other factors, such as the increase of world real interest rates, the decline of commodity prices,[388] the recession in the United States,[389] the overvaluation of the peso,[390] and capital flight.[391]

It was during the administrations of Presidents Luis Echeverría and José López Portillo (1970–1982) that the government asked for huge amounts of funding from international and commercial banks to finance public

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384. *See id.* at 1–4. The developments that led to these economic problems were as follows:

> First, excessive protectionism and generalized government controls greatly encouraged rent-seeking activities and created a rigid economic structure unable to react rapidly to changing world economic conditions. Second[,] . . . the combination of increasing burdens on public sector budgets and inefficient tax systems reduced government's ability to provide social services efficiently and generated an increasing degree of inequality. . . . Third, as a result of weak public finance structures [Mexico was] forced to rely on inflationary financing as a way to bridge government expenditures and revenues. And fourth, . . . exports were greatly discouraged . . . .

Id.; *see also* ERFANI, *supra* note 4, at 59–125 (exploring the implementation and disastrous results of various economic programs in Mexico from 1940–1976).

385. Pedro Aspe Armella, *Responding to Transformations in the Developing World*, *in* FIFTY YEARS AFTER BRETTON WOODS: THE FUTURE OF THE IMF AND THE WORLD BANK: PROCEEDINGS OF A CONFERENCE HELD IN MADRID, SPAIN, SEPTEMBER 29–30, 1994, at 126, 127 [hereinafter FUTURE OF THE IMF] (James M. Boughton & K. Sarwar Lateef eds., 1995).

386. *See* EDWARDS, *supra* note 68, at 17. "This announcement marked the beginning of the worst international financial crisis since the world depression in the 1930s." *Id.*

387. *See id.* Commercial banks began lending heavily to developing nations after the oil shock in 1973. *See id.*

388. *See id.* at 22.

389. *See* Alexander C. Hoagland, Jr., *Overview: Perspective from an American Lawyer in Mexico*, 18 INT'L LAW. 287, 288 (1984).

390. *See* EDWARDS, *supra* note 68, at 22–23.

391. *See* ERFANI, *supra* note 4, at 144. Mexico experienced capital flight of US$2,958 million in 1980 and US$10,914 million in 1981. *See id.*

expenditures[392] and promote the oil industry, in which new oil reserves were found.[393] The government accepted the idea that Mexico needed to attract capital to supplement domestic savings and finance higher rates of capital accumulation. The problem was that the government relied primarily on flows from multilateral institutional and foreign commercial banks and did not give private flows a significant role.[394] However,

> The public foreign debt crisis of 1982 was not only a vestige of the Echeverría and López Portillo borrowing and spending years. The debt crisis was also linked to the stabilizing growth strategy, which had fostered an economically powerful private financial sector insistent, by the early 1980s, on siphoning public credit off into dollar accounts rather than employing it in productive investment.[395]

Moreover, Mexico's production of exportable goods declined while the need for imports increased.[396] Also, the growing debt service deficit constituted as much as four-fifths of the current account deficit between 1977 and 1981.[397]

Thus, in September 1982 banks were nationalized in Mexico[398] after closing the foreign exchange markets and

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392. *See id.* at 128–29.

> [S]tate-owned enterprises jumped from a total of 175 in 1971 to 458 in 1976. Total current public expenditures increased from 8 percent of GNP in 1966–1972 to 10.7 percent in 1973–1975. Federal government expenditures grew dramatically from 41 billion pesos in 1971 to 145 billion in 1975, a 250 percent increase.

Id. at 129.

393. *See* EDWARDS, *supra* note 68, at 18. There was a discovery of large oil reserves and the government borrowed based on the promise of the revenues. *See id.* Half of the Mexican debt accumulated during the Portillo administration. *See id.*

394. *See id.* at 46; *see also* ERFANI, *supra* note 4, at 129 (noting that extreme government spending was financed mainly through loans from foreign commercial banks).

395. ERFANI, *supra* note 4, at 128. "Massive foreign public borrowing to finance public spending in combination with private sector investment slowdowns and capital flight eventually led to contradictory economic policies after 1973 and then to dire economic crisis in 1976." *Id.* at 132.

396. In fact, the import substitution program did not work to alleviate Mexico's balance of payments problem. *See* Sigmund, *supra* note 34, at 250. It only replaced imports of consumer goods with imports of machinery, capital goods, and basic grains. *See id.*

397. *See* ERFANI, *supra* note 4, at 143; *see also* Camil, *supra* note 65, at 323–29 (providing an in-depth examination of the changes in Mexico's banking system from 1971–1983 and their impact on foreign debt).

398. *See* Hoagland, *supra* note 389, at 288.

freezing some US$12 billion time deposits in Mexican banks.[399] Then the unthinkable happened: The government announced a moratorium on the payment of its foreign debt until the end of 1984,[400] and for the first time in recent Mexican history, the Mexican Central Bank announced implementation of the exchange controls system,[401] which changed by decree on December 13, 1982, into a system of partial control.[402]

However, after realizing it was not only a short-term financial crisis, but also a structural debt crisis, the IMF announced delivery of an emergency package of US$5 billion.[403] Due to its nature and origin, the 1982 crisis could be considered irregular because most of the indebtedness of Mexico and other Latin American countries was owed to commercial banks.[404] Thus, it was not only a matter of restructuring the debt with government creditors—Mexico also had to consider the restructuring of commercial bank

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399. *See id.* at 287.

400. *See* LUSTIG, *supra* note 41, at 26. Another measure the government took to manage the crisis was the use of quantitative trade restrictions during 1982–1984. *See* EDWARDS, *supra* note 68, at 32. This resulted in a reduction in imports of intermediate inputs and decreased economic activity and growth. *See id.* For more information on the devastating economic and social effects of the 1982 crisis, see Hoagland, *supra* note 389, at 287–95.

401. *See* Fernando A. Vázquez Pando, *Legal Aspects of Mexican Exchange Controls*, 18 INT'L LAW. 309, 310 (1984). The new system implemented the following controls:

> (a) all payments to be made by residents of Mexico to nonresidents were subject to the authorization of the appropriate authorities; (b) no payment in foreign currency was authorized within Mexico and obligations in foreign currency payable in Mexico had . . . to be paid in Mexican currency; (c) all foreign currency received by residents in Mexico was required to be converted into Mexican currency at the applicable rate of exchange; (d) the import and export of Mexican and foreign currency required the prior authorization of the appropriate authorities; and (e) different rates of exchange were established taking into consideration different kinds of transactions.

Id.

402. *See id.* at 312, 319–21.

403. *See* EDWARDS, *supra* note 68, at 20. In December 1982 the IMF gave final approval to a US$4 billion loan to Mexico. *See id.* at 21.

404. *See id.* at 18 (stating that the crisis was somewhat surprising given the lack of warnings prior to 1982); *see also* ERFANI, *supra* note 4, at 144 (stating that Mexico's public debt was financed primarily by private institutions); *International Debt: Focus on Mexico,* 82 AM. SOC. INT'L L. 479, 479–81 (1988) [hereinafter *Focus on Mexico*] (remarks of Roger Thomas) (commenting that Mexico faced markedly different circumstances during the 1982 debt crisis than other Latin American countries who had faced debt crises).

credits.[405] This led to the participation of the IMF, official creditors, and commercial bank creditors to build a framework to restructure the debt.

On August 27, 1983, Mexico signed an agreement with the IMF and various commercial banks to reschedule its debt.[406] Regardless, the damage was already done. The result was a reduction in foreign funds of about 40% between 1981 and 1983 in all of Latin America and a major turnaround in the trade balance.[407] Government obligations increased in real value due to currency devaluations, making it impossible to pay off the debt. In fact, studies showed it was not possible for Mexico and some other Latin American[408] countries to pay just the interest on the debt in the short-term.[409] Hence, the goal was to facilitate the entrance of new money and the restructuring and reduction of debt through structural reforms to allow faster recovery and sustainable growth.[410]

It was not until 1989, under the Brady Plan,[411] that the crisis was confronted in all of Latin America in a more

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405. *See Focus on Mexico*, *supra* note 404, at 479 (remarks of Roger Thomas). "This was a new problem and one which the international banking, regulatory and legal communities addressed reasonably well, considering that there were very few precedents available in the early years of the crisis." *Id.*

406. *See* EDWARDS, *supra* note 68, at 21.

407. *See id.* at 23.

408. The Latin American countries affected by the debt crisis were Argentina, Brazil, Bolivia, Chile, Costa Rica, Colombia, El Salvador, Ecuador, Honduras, Guatemala, Guyana, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. *See id.* at 25 tbl.2-3.

409. *See id.* at 32. These studies suggest that "[a] typical major debtor needed financing in the form of new money for about five years to experience some recovery in real consumption (2 percent a year) and in real income (4 percent a year)." *Id.* at 32.

410. *See id.*

411. The Brady Plan was announced on March 10, 1989, by U.S. Secretary of the Treasury Nicholas Brady. *See* LUSTIG, *supra* note 41, at 56. The Plan was a debt reduction agreement with commercial banks, with a focus on debt service reduction. *See id.* Under the Plan, debtor countries refinanced prior debts for longer terms and lower face values. *See* EDWARDS, *supra* note 68, at 79. "Typically, principal payments on these new securities were backed by thirty-year, zero-coupon U.S. treasury bills, and interest payments were subject to rolling three-year guarantees . . . ." *Id.*

Mexico was the first country to reach an agreement with commercial banks under the Plan. *See* LUSTIG, *supra* note 41, at 56. Savings in cash flow were US$1 billion per year for the first five years under the Plan—approximately 10% of interest payment obligations. *See id.* While these savings were "unimpressive," economists and government officials believed that the indirect effects of the Plan on the private sector would increase "confidence, encourage capital repatriation, and, therefore, produce lower interest rates and encourage economic growth." *Id.* For a discussion of the debate surrounding the success of the Brady Plan, see Helmut Reisen, *The Brady Plan Adjustment* homogenous and effective way. Previously, on July 22, 1986, Mexico had already reached a stand-by agreement with the IMF to forestall its US$97.6 billion debt obligation.[412] Efforts to reduce the consequences of the crisis were varied. After basing growth on public expenses, some efforts were made to cut public expenditures,[413] which, together with the huge indebtedness, were the main causes of the crisis. During the administration of Miguel de la Madrid (1982–1988),[414] a stabilization program that combined fiscal and credit constraints, along with an exchange rate anchor and income policies, was made with the support of Mexico's largest labor union and representatives of the private sector.[415] Along with these stabilization measures, Mexico's program continued—it privatized several state-owned companies,[416] deregulated economic activities, reformed its legal system, and entered into negotiations with many countries to promote trade via free trade agreements and to open its economy.[417]

This occurred with the worldwide recognition that the debt crisis and the economic problems within the region were not only a short-run liquidity problem, but also that the structuralist theory was no longer effective in a globalized world. It was evident that as a region they needed to rely on

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Incentives, *reprinted in* HELMUT REISEN, DEBT, DEFICITS AND EXCHANGE RATES: ESSAYS ON FINANCIAL INTERDEPENDENCE AND DEVELOPMENT 55 (1994).

412. "A stand-by agreement is a negotiated arrangement." Alison B. Sander, Recent Development, 28 HARV. INT'L L.J. 157, 157 & n.1 (1987). The foundations for the agreement are laid when "an IMF delegation will visit the country on a fact-finding mission and begin negotiations . . . . The negotiated terms are then embodied in a letter of intent. Failure to meet the performance criteria identified in the letter of intent usually will result in inability to receive funds under the agreement." *Id.* In its letter of intent Mexico first compromised "to reduce its public spending deficit by increasing revenues and by decreasing public expenditures on goods and services." *Id.* at 158. The agreement "also [took] a partial step toward moving the Mexican economy in the direction of more free trade." *Id.*

413. *See, e.g.,* EDWARDS, *supra* note 68, at 26 (stating that Mexico and other Latin American countries reduced public expenditures by more than 20% from 1982 to 1986).

414. *See* ERFANI, *supra* note 4, at 163.

415. *See* EDWARDS, *supra* note 68, at 39. The agreement was called the *Pacto de Solidaridad Social* and was signed in December of 1987. *See id.* With this program, inflation was reduced from 159% in 1987 to 8.6% in 1993. *See id.*

416. *See id.* at 39–40. Selling the state-owned enterprises was not only a plan to generate badly needed capital, but also was part of a larger strategy to shift Mexico's economy to a market-oriented one. *See id.* The financial sector, including banks, was liberalized later in 1990 with the publication of the "Ley de Instituciones de Crédito," D.O., 19 de julio de 1990.

417. For an inside view of Mexico's stabilization period, see Cardenas, *supra* note 352, at 17–23 (discussing the economic and social costs of the implemented policies).

openness, freer markets, deregulation, and privatization policies.[418]

Adoption of these policies was a precondition imposed by the IMF, the World Bank, and the U.S. Treasury for assistance.[419] These institutions imposed further conditions for the release of funds, including trade liberalization,[420] exchange rate action, tax reform,[421] financial reform,[422] public enterprise reform,[423] and privatization.[424] In this way, the IMF and the World Bank tried to condition the loans with stabilization programs to protect growth.[425]

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418. *See* EDWARDS, *supra* note 68, at 48. One commentator, Enrique Iglesias, "refers to this phenomenon as the emergence of a 'trend toward convergence' and identifies four fundamental components: (a) macroeconomic stability, (b) trade openness, (c) poverty alleviation, and (d) a reduced role for government." *Id.* (citation omitted).

419. *See id.* at 55. There has been some debate over whether these policies were freely adopted. *See id.* One author believes these institutions played a role but "they do not deserve central billing in this process." *Id.* Also, the former director of the World Bank Group, A.W. Clausen, has commented: "The two Bretton Woods institutions are in the best position in the world to extol the virtues—*in a non-'conditional' way*—of the advantages of liberalizing economic regimes." *Establishing a Vision for Promoting Economic Development, in* FUTURE OF THE IMF, *supra* note 385, at 66, 70 (excerpt from keynote address of A.W. Clausen at a 1994 meeting of the World Bank and Boards of the Governors of the Fund held in Madrid, Spain). For a discussion of the conditions attached to the implementation of these reforms, see Tony Killick, *Adjustment and Economic Growth, in* FUTURE OF THE IMF, *supra* note 385, at 139, 146–58.

420. *See* Sander, *supra* note 412, at 158. In an IMF evaluation, Mexico achieved the following until 1993 in this area: "Major [trade reform] since 1985; coverage of nontariff barriers reduced from 90 to 17 percent; tariff range 0–20 percent; [and] tariff average 13 percent." EDWARDS, *supra* note 68, at 62–63 tbl.3-2.

421. *See* Sander, *supra* note 412, at 158. Again, an IMF evaluation found that Mexico had accomplished "fiscal adjustment since 1985; tax reforms; [and] improved tax administration." EDWARDS, *supra* note 68, at 62–63 tbl.3-2; *see also* Armella, *supra* note 385, at 129 ("The main elements of the tax reform were the reduction in the number of taxes and in tax rates, the widening of the taxpayer base, and the strict enforcement of fiscal laws to fight fiscal evasion.").

422. *See* Sander, *supra* note 412, at 158. The IMF evaluation found that since 1986, Mexico's capital accounts were open, banks had privatized, and no credit allocation had taken place. *See* EDWARDS, *supra* note 68, at 62 tbl.3-2.

423. *See* Sander, *supra* note 412, at 158.

424. *See id.* The IMF reported that 100 state-owned enterprises had been sold and forty were to be privatized during 1996. *See* EDWARDS, *supra* note 68, at 62 tbl.3-2. In December 1982 there were 1,115 parastatals; however, in December 1988 there were 449. *See* ERFANI, *supra* note 4, at 163. P. Aspe Armella (former Minister of Finance of Mexico) has stated that the number of state-owned enterprises in 1982 was 1,155 and decreased by the end of 1994 by more than 80%. *See* Armella, *supra* note 385, at 130.

425. "A new concern . . . is the need to design adjustment programs that avoid adverse distributional effects." Manmohan Singh, *The IMF and the World Bank in an Evolving World, in* FUTURE OF THE IMF, *supra* note 385, at 35, 39.

The macroeconomic stabilization programs were structured upon the following strategies:

(1) Reducing the burden of the foreign debt through debt-equity swaps, debt-conversion schemes, debt restructuring and voluntary debt-reduction agreements with commercial banks in a consensual manner;[426]
(2) Reducing the public sector deficit through tax reforms, expenditure cuts, and privatization of state-owned enterprises;
(3) Implementing consistent domestic credit policies;
(4) Designing exchange rate policies consistent with anti-inflationary efforts; and
(5) Giving credibility to the programs by assuring that reforms would be sustained through time.[427]

The second part of the restructuring plan was to create instruments by which the debt would be disaggregated, enabling commercial banks to use their debt as a financing instrument, thereby solving the problem of the huge debt owed to them by Mexico.[428] This, as will be seen later, was one of the contributing causes of the latest debt crisis in Mexico.

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426. *See* EDWARDS, *supra* note 68, at 70. The agreements made between Mexico and the commercial banks provided

> that no bank [was] to have a preferred position, that no bank [was] to get out of its loans before every other bank [got] out of its loans, and that if any bank [was] paid in advance of any other bank, [Mexico became] obligated to make sure that every other bank [was] paid a pro rata share of the amount owed to it.

Focus on Mexico, supra note 404, at 480 (remarks of Roger Thomas).

427. *See* EDWARDS, *supra* note 68, at 70. For a more thorough discussion of the macroeconomic measures implemented in Latin America after the 1982 debt crisis, see *id.* at 69–114. Some effects of the stabilization measures of the de la Madrid administration included an "acute reduction in real wages, deterioration in basic social indicators such as nutrition and health, loss of human capital, deterioration in income distribution and the consequent impoverishment of the middle classes." *Id.* at 17–18 (footnote omitted). Moreover, from 1981–1983, public and private investment normally used for growth and maintenance of productive capacity decreased by 9% of GNP. *See id.* at 18. For a discussion of the decrease in Mexico's standard of living since the financial crisis of 1982, see Leopoldo Solís, *Social Impact of the Economic Crisis*, *in* MEXICO'S SEARCH FOR A NEW DEVELOPMENT STRATEGY, *supra* note 352, at 43–52.

428. *See Focus on Mexico*, *supra* note 404, at 479–80 (remarks of Roger Thomas).

C. The December 1994 Crisis

After successfully managing the 1980s crisis in Mexico by following the restructuring program from the IMF, the World Bank, and the U.S. Treasury, Mexico was an example for indebted countries to see what and how policies should be followed to achieve economic growth.[429] Moreover, Mexico became the "golden boy" of economic reform, structural adjustment, and privatization.[430]

Apparently Mexico was doing very well in dealing with the debt crisis and shifting into a healthier economy. Inflation was reduced from 160% in 1987 to 8% in 1993.[431] GDP grew steadily from approximately US$334 million in 1992 to US$377 million in 1994.[432] Under the Brady Plan, the face value of net foreign debt decreased by US$7 billion,[433] with an annual average reduction in transfers to the rest of the world, from 1989 to 1994, of more than $4 billion per year.[434] This allowed Mexico to regain access to voluntary capital markets.[435] Tax reform,[436] the renegotiation of the external debt,[437] and the privatization process[438] allowed Mexico to reduce its net public debt from 82% of GDP in 1982 to 30.8% in early 1994.[439]

However, Mexico's economic growth was insufficient.[440] Its GDP grew an average of only 2.9% between 1990–1994.[441]

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429. *See* EDWARDS, *supra* note 68, at 296.

430. *See* Cynthia C. Lichtenstein, *The Mexican Crisis: Who Should be a Country's Lender of Last Resort?*, 18 FORDHAM INT'L L.J. 1769, 1770–71 (1995).

431. *See* EDWARDS, *supra* note 68, at 72 tbl.4-1.

432. *See* Vernava, *supra* note 359, at 159 app. IV.

433. *See* Reisen, *supra* note 411, at 61. Moreover, under the Brady Plan, the present face value of debt service payment decreased by US$14.1 billion. *See id.* However, the face value of foreign debt remains unchanged and foreign debt has actually increased in market price. *See id.*

434. *See* EDWARDS, *supra* note 68, at 81.

435. *Cf. id.* ("[T]he 1989 debt-reduction agreement allowed Mexico to grow, on average, at a rate 2 percentage points above what would have been attained in the absence of the agreement.").

436. *See* EDWARDS, *supra* note 68, at 96–97.

437. *See* Reisen, *supra* note 411, at 55–65.

438. *See generally* PAUL HOLDEN & SARATH RAJAPATIRANA, UNSHACKLING THE PRIVATE SECTOR: A LATIN AMERICAN STORY (1995) (examining the macroeconomic and incentive reforms, institutional adaptation, and barriers to growth in the privatization of Latin America and the Caribbean).

439. *See* Stephen Timewell, BANKER, March 1995, at 38, *available in* LEXIS, News Library, Allnws File.

440. *See* Solís, *supra* note 427, at 48. As early as the 1990s, some Mexican specialists had already pointed out that Mexico needed an annual average growth of just 1.8% to provide employment to the then 4 million already unemployed workers. *See id.* Furthermore, to recover to the 1981 level of per

Along with this, Mexico developed a huge current account deficit,[442] which was a contributing factor to the 1982 debt crisis. The business sector felt the reduction of expenditures and needed to attract capital from other sources, such as foreign capital.[443] Moreover, interest rates increased in the United States, which had adverse consequences on the Mexican economy, including capital flight.[444]

Mexico's currency was overvalued because of the enormous flow of foreign capital. When a country's currency is overvalued, FDI is deterred because of the subsequent dangers of devaluation.[445] Thus, the FDI decrease in Mexico prior to the crisis, together with the decrease and exit of short-term investments, resulted in pressure on Mexico's balance of payments.[446]

The misalignment of the peso could not be sustained indefinitely, and on December 20, 1994, the Mexican government announced a US$.53 adjustment in the exchange rate of the peso vis-à-vis the U.S. dollar.[447] This resulted in a huge devaluation, although Mexican officials denied it.[448] At that time, the exchange rate was a narrow-band exchange rate, which approximates a fixed rate.[449]

With the devaluation of the peso came the increased flight of capital,[450] triggering a new crisis which appeared to

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capita income, the additional growth average needed to be more than 3% annually. *See id.*

441. *See* EDWARDS, *supra* note 68, at 297.

442. *See id.* This debt exceeded 7% of GDP in 1993 and in 1994. *See id.*

443. *Cf. id.* at 298 (noting that large inflows of capital made Mexico "vulnerable to foreign capital volatility").

444. *See id.* at 299.

445. *See* EDWARDS, *supra* note 68, at 298 (discussing foreign investors' unwillingness to invest in the face of a devaluation threat).

446. For an economic analysis of how devaluations affect the balance of payments, see JOHN D. PITCHFORD, THE CURRENT ACCOUNT AND FOREIGN DEBT 45–57 (1995); *see also* HOLDEN & RAJAPATIRANA, *supra* note 438, at 31.

447. *See* Rafael Medina Cruz and Robert Melendez, *Government Announces Devaluation of Peso*, Latin American Daily Report (FBIS), at 22 (Dec. 21, 1994).

448. For example, Foreign Relations Secretary Jose Angel Gurria Ordonez claimed the expansion of the peso exchange rate was a corrective measure and not a devaluation. *See* Georgina Solis, *Peso Devaluation Not to Affect Foreign Investment*, Latin American Daily Report (FBIS), at 16 (Dec. 23, 1994); *see also People Urged Not to Buy Dollars Out of Panic*, Latin American Daily Report (FBIS), at 34 (Dec. 22, 1994) (noting that José Madariaga Lomelin, President of the Mexican Bankers Association, also denied the devaluation).

449. *See* HOLDEN & RAJAPATIRANA, *supra* note 438, at 31.

450. "Once it is perceived that the current exchange rate is unlikely to persist, overvalued currencies breed capital flight, leaving less resources available for domestic investment and growth." Helmut Reisen, *On Liberalizing the Capital Account: Experiences with Different Exchange Rate Regimes, in* DEBT,

be potentially worse than the 1982 crisis. The Mexican government announced that the devaluation was only a corrective measure and would not effect foreign investment.[451] However, by December 1994, the Mexican public was already feeling the consequences of these measures.[452]

1. Short-Term Foreign Investment As a Cause of the 1994 Crisis

Paradoxically, the debt crisis and the programs to fight against it, together with other circumstances,[453] had itself occasioned the 1994 Mexican crisis. As a consequence of economic adjustment and its need for capital, Mexico attracted an extraordinary amount of foreign capital. Thus, foreign exchange became overabundant and caused an overvaluation of the real exchange rate.[454]

While Mexico previously had a fixed exchange rate, in the 1990s it widened the band and the currency became overvalued.[455] The narrow-band exchange rate, "which at endpoints of the band mimics a fixed rate," could not stand under the pressure of large capital outflows from Mexico's balance of payments.[456]

DEFICITS AND EXCHANGE RATES: ESSAYS ON FINANCIAL INTERDEPENDENCE AND DEVELOPMENT, *supra* note 411, at 88.

451. *See* Solis, *supra* note 448.

452. *See* Marcos Chavez, *Article Warns Against Adverse Effects of Devaluation*, Latin American Daily Report (FBIS), at 22 (Dec. 28, 1994). One author, accurately commenting on the possible adverse effects of a devaluation, believed it would cause

> immediate panic among investors, who will enter the foreign exchange market and deplete international reserves, prompting an increase in domestic interest rates, which will be hiked in an effort to prevent a flight of capital and to restore balance within the financial sector. In turn, this hike in interest rates will increase the price of money and the cost of domestic public and private debt payments, which will exacerbate the payment problems faced by those seeking credit and bank loans.

Id.

453. *See* EDWARDS, *supra* note 68, at 298. Contributing factors to the 1994 crisis included the Chiapas rebellion, the murders of the official party's presidential candidate and General Secretary, the use of exchange rate policy as an anti-inflationary tool (which also provoked an overabundance of foreign capital), and the issuance of short-term debt by the government. *See id.* at 298–99.

454. *See id.* at 8.

455. *See* HOLDEN & RAJAPATIRANA, *supra* note 438, 30–31.

456. *Id.* at 31.

Because of Mexico's dependence on short-term portfolio investment, the peso became overvalued and the current account deficit continued to increase.[457] Mexico needed more capital. The problem was that it was already financed by large capital inflows.[458] Nevertheless, no corrective measures were taken,[459] even though prior to the crisis, World Bank staff had pointed out the danger of relying on massive inflows of foreign capital.[460] According to the World Bank, Mexico's

> current account deficit remains very high. . . . Underlying the large current account deficit has been a fall in private domestic saving, indicating that foreign capital inflows have in effect financed an increase in domestic consumption. . . . [P]roductivity growth has so far been insufficient to offset the loss of external competitiveness implied by the peso appreciation . . . [and] with current account deficits of over $20 billion supported by even higher levels of foreign capital inflows, Mexico is vulnerable to foreign capital volatility.[461]

The majority of the foreign capital inflow was in the form of short-term investment, not FDI.[462] Furthermore, in 1994

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457. *See* Enrique R. Carrasco & Randall Thomas, *Encouraging Relational Investment and Controlling Portfolio Investment in Developing Countries in the Aftermath of the Mexican Financial Crisis*, 34 COLUM. J. TRANSNAT'L L. 539, 560 (1996). A crumbling trade balance (from a US$1.7 billion surplus in 1988 to US$1.9 billion in early 1990) was the cause of the current account deficit. *See id.* Mexico's strategy was to finance the deficit with current account surpluses. *See id.* Private investment was the source of funds to be applied to the current account deficit. *See id.*

458. According to one commentator:

> While large current account deficits can take place for a limited period of time, they cannot be maintained in the long run. This is a matter of arithmetic. A current account deficit of the magnitude of Mexico's would eventually require that the country devote 100 percent of its GNP to pay interest (and dividends) to foreign holders of Mexican securities.

EDWARDS, *supra* note 68, at 329 n.9.5.

459. Some have commented that no corrective measures were taken because of the upcoming electoral year and because of President Carlos Salinas's aspiration to become President of the WTO. *See Money Meltdown: Accurate Data Could Avert Economic Disasters*, DALLAS MORNING NEWS, July 2, 1995, at 2J.

460. In addition, foreign investors chose other markets over Mexico's "politically unstable" market, and the first net capital outflow since 1992 occurred. *See* Carrasco & Thomas, *supra* note 457, at 561–62.

461. EDWARDS, *supra* note 68, at 298 (quoting WORLD BANK, TRENDS IN DEVELOPING ECONOMIES (1994)) (alterations in original) (citation omitted).

462. *See* Carrasco & Thomas, *supra* note 457, at 556–57.

the rebellion in Chiapas,[463] the murder of the PRI's presidential candidate, Luis Donaldo Colosio M.,[464] and the murder of the PRI General Secretary, José Francisco Ruíz Massieu,[465] instilled fear in foreign investors,[466] and they withdrew their investments. This resulted in major declines in the stock of international reserves held by Mexico's Central Bank—from US$30 billion in February 1994 to US$5 billion in December 1994.[467] In mid-December investors became aware of the precarious situation of the Bank of Mexico: "Those who were better informed massively sold pesos and attacked the Bank of Mexico's international reserves. By then it was too late, as the very low level of international liquidity . . . had left Mexico with very little room for maneuvering."[468]

It also appears that factors other than short-term foreign investments caused the crisis—short-term domestic investments also fluctuated at the first signs of a possible devaluation. The IMF reported that "'[t]he available data show that the pressure on Mexico's foreign exchange reserves during 1994, and in particular just prior to the devaluation, came not from the flight of foreign investors or from speculative position-taking by these investors, but from Mexican residents . . . .'"[469] However, while Mexican investors were an important factor in the crisis, domestic capital flight was just a contributing cause, as the crisis went beyond merely devaluation. The main cause was structural.

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463. *See* EDWARDS, *supra* note 68, at 298.

464. *See* ECONOMIST INTELLIGENCE UNIT, MEXICO: COUNTRY PROFILE, 1994–1995, at 5 (1994) [hereinafter COUNTRY PROFILE]. In 1994 the Mexican stock market plunged from a record high of 2,881 points on February 2 to 1,957 points on April 4 as a result of Colosio's assassination and the devaluation. *See* Peter C. Du Bois, *Bolsa Bulls Run Again as Mexican Election Promises PRI's Return to Power*, BARRON'S, Aug. 15, 1994, at 23.

465. *See* EDWARDS, *supra* note 68, at 298.

466. *See id.* at 298–99. A group of U.S. mutual fund managers (Weston Forum) pressured the Mexican government not to raise peso interest rates. *See id.* at 299. Consequently, the Mexican government "followed a policy of targeting peso nominal interest rates, by determining a maximum yield on domestic currency treasury securities (CETES), above which the Treasury would not sell them." *Id.*

467. *See id.* "Higher interest rates in the United States during 1994 also contributed to the reduction in capital flows into Mexico." *Id.*

468. *Id.* at 299–300.

469. Clay Chandler, *IMF Ties Peso Crisis to Mexican Investors*, WASH. POST, Aug. 21, 1995, at A1 (quoting an IMF report). According to the IMF report, "Mexican residents' net sales of domestic stocks and bonds and other peso-denominated assets may have totaled as much as $4.7 billion in December, accounting for more than two-thirds of the $6.7 billion decline in Mexico's reserves of dollars and other stable currencies that month." *Id.*

It is not clear why Mexico did not impose exchange controls to counter the crisis, as the IMF Agreement allows a country to do so if it has a temporary exchange crisis.[470] If there is an exchange crisis, IMF members are free to restrict capital flows within their jurisdiction.[471] However,

> to do so would violate the new rules of the game of what [is called] "the internationalized capital markets." The possibility that one might impose exchange controls precludes one from access to these capital markets because the last thing that any mutual fund manager can tolerate is the possibility that he or she might not be able to quickly dump a holding and shift elsewhere.[472]

Just prior to the devaluation, Mexico's foreign exchange reserves decreased from US$25 billion in 1993 to US$6.5 billion in December 1994.[473] Moreover, before the crisis, an OECD publication warned that the Mexican economy was relying too much on temporary (hot) flows, such as portfolio investment, and that Mexico's dependence on such short-term capital inflows made it "vulnerable to quick reversal in the event of change in investor sentiment."[474]

While many factors influenced the abundance of short-term foreign investment, the following discussion focuses on debt restructuring. Through the promotion of macroeconomic policies, Mexico raised interest rates to attract foreign investors, offering higher returns on investment than were available in more developed nations.[475] The reforms increased

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470. *See* Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39, *as amended by* Amendment of the Articles of Agreement of the International Monetary Fund, May 31, 1968, 20 U.S.T. 2775, 726 U.N.T.S. 266, *as amended by* Second Amendment of the Articles of Agreement of the International Monetary Fund, Apr. 30, 1976, 29 U.S.T. 2203, 15 I.L.M. 546; *see also* SHIHATA, *supra* note 252, at 81 (noting that while the IMF takes a liberal approach to investment capital, restrictions may still be applied).

471. *See* Lichtenstein, *supra* note 430, at 1775.

472. *Id.* (footnote omitted).

473. *See* Carrasco & Thomas, *supra* note 457, at 563–64.

474. HELMUT REISEN, *The Case for Sterilized Intervention in Latin America*, *in* DEBT, DEFICITS AND EXCHANGE RATES: ESSAYS ON FINANCIAL INTERDEPENDENCE AND DEVELOPMENT, *supra* note 411, at 205, 208. Mexico received net inflows of US$8.5 billion in 1990 compared to US$22.7 billion in 1992. *See id.* at 210 tbl.12.2. Cool inflows (FDI) accounted for US$2.6 billion in 1990 compared to US$6.2 billion in 1992. *See id.* However, warm to hot inflows (short-term investments) accounted for US$5.9 billion in 1990 compared to US$16.5 in 1992. *See id.*

475. *See* Carrasco & Thomas, *supra* note 457, at 557–59.

short-term investment (from US$5.4 billion in the late 1980s to US$67.9 billion in 1993) and the account deficit.[476] Because of some of the instruments used to restructure the debt, such as debt-equity swaps,[477] Mexico became a large recipient of foreign capital inflows seeking short-term returns.[478] The last reason for the large inflow of short-term foreign investment was the recent liberalization. The neutral investment channel, which fosters portfolio investment,[479] was incorporated into the Mexican legal system in 1989.[480]

Mexico was experiencing foreign exchange volatility, making long-term financing difficult to obtain; therefore, businesses cut investments relying on internally generated funds and short-term foreign investment.[481] By 1992, 50% of foreign investment was in the stock exchange market.[482]

2. Market-Based Debt Reductions

The most common financial instrument used in Latin America, including Mexico, after the 1982 crisis to attract foreign investment was the debt-equity swap.[483] The debt-equity swap serves two functions: it allows a company to pay less than the real full cost of an investment and it is a debt management tool, allowing debtor countries' governments to retire foreign debt at a discount.[484]

The benefits of relying on debt-equity swaps for the economy are unclear. Often they do not result in additional foreign investment, but just exchange one type of liability for

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476. *See id.* at 557–60. Macroeconomic policies, among other factors, led to a US$91 billion net capital inflow between 1990–1993, with portfolio investment accounting for approximately two-thirds. *See id.* at 560.

477. *See* Vernava, *supra* note 359, at 106–07 (discussing debt-equity swaps employed between 1985–1993).

478. *See* HOLDEN & RAJAPATIRANA, *supra* note 438, at 34.

479. Portfolio investments are typically "placed through the capital market without entrepreneurial commitment, are relatively short-term and made only for the sake of capital yield." Jürgen Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies*, 31 INT'L & COMP. L.Q. 686 (1982).

480. *See* Regulations, *supra* note 73, arts. 13–15.

481. *See* LUSTIG, *supra* note 41, at 11–12.

482. *See Mexico*, LATIN AM. BUS. NEWS WIRE, Feb. 15, 1993, *available in* 1993 WL 2514190 (stating that Mexico received US$50.21 billion in foreign investment by the end of 1992); Richard J. Shapiro & Roger D. Lorence, *New Financial Products Draw Investors to Mexican Markets*, 4 J. INT'L TAX'N 141, 141 (1993) (stating that the Mexican stock market received over US$27.7 billion in foreign investment in 1992).

483. *See* EDWARDS, *supra* note 68, at 70.

484. *See* Vernava, *supra* note 359, at 105.

another, producing higher domestic debt.[485] They are inflationary because they usually require local currency or local debt if the investment is additional, or demand foreign exchange if it is not.[486] As some authors have noted:

> A naive view . . . sees this as a transaction that simultaneously cancels some of the country's external obligations and generates a capital inflow. This is a misleading picture on both sides. The obligation has not been canceled through a swap—it has been exchanged for a different obligation. Moreover, there has been no capital inflow: any investment by the firm that makes the swap is in effect being financed by the country's domestic savings, not by externally supplied resources.[487]

A debt-equity swap is not beneficial when it is additional or causes "round tripping." Round tripping occurs when a firm that engages in a swap converts the proceeds of the swap into foreign currency to buy equity in secondary markets, that is, an equivalent amount of capital leaves the country as was contracted for in the swap.[488] "Additionality" is a problem if the debt-equity swap finances an investment that would have taken place in any case, that is, with or without the swap.[489] In sum, the market-based instruments used to restructure debt are not solutions to debt problems, nor are they the best means to attract capital. They may "prove more expensive for a debtor country than just repaying the debt itself; by exchanging bad debt for good equity, debtor countries transform a finite debt obligation into an 'open-ended foreign exchange drain.'"[490]

Mexico sought to reduce its foreign debt between 1986 and 1987 through a debt conversion program.[491] While this program was modestly successful,[492] swaps are not enough to accomplish meaningful and lasting change in the total debt. Another short-term investment instrument that caused

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485. *See id.* at 96.

486. *See id.*

487. S. CLAESSENS ET AL., MARKET-BASED DEBT REDUCTION FOR DEVELOPING COUNTRIES 31 (1990).

488. *See* Thomas M. Reiter, Note, *The Feasibility of Debt-Equity Swaps in Russia*, 15 MICH. J. INT'L L. 909, 934 (1994).

489. *See* Vernava, *supra* note 359, at 114.

490. Reiter, *supra* note 488, at 934.

491. *See* Nicolas Kublicki, *The Greening of Free Trade: NAFTA, Mexican Environmental Law, and Debt Exchanges for Mexican Environmental Infrastructure Development*, 19 COLUM. J. ENVTL. L. 59, 124 (1994).

492. *See id.*

the crisis was the issuance of short-term debt by the Mexican government as "sterilized intervention"[493] to avoid the breakdown of the economy caused by hot capital flows. This did not work. As one author stated: "Short-term debt represents a true danger under free capital mobility. In these circumstances rumors, 'news,' or (temporary) losses in confidence can result in very massive redemptions of government debt, generating serious liquidity problems."[494]

This kind of remedy was the final cause of the crisis. To finance the increased external deficit on Mexico's current account, the government issued short-term dollar-indexed treasury securities.[495] Thus, once confidence in the Mexican economy began to decline, short-term investments slowed and the liquidity of the central bank was unable to cover the short-term external debt.[496] Hence, the Bank of Mexico ran out of reserves and the devaluation occurred.[497]

In sum, Mexico's reliance on foreign capital inflows caused an overvaluation of the real exchange rate. Furthermore, because of the short-term nature of foreign investment, Mexico's economy became highly sensitive, which, together with an unsustained growth and the exchange rate policies resulted in a shortage of capital reserves. The subsequent issuance of short-term debt precipitated the crisis. Thus, one of the core problems was the short-term nature of the overwhelming flow of foreign capital into the Mexican market.

Mexico has adopted two approaches to improve the economy after a crisis: the debt-based system before the 1980s, and the short-term foreign investment (including market-based debt reduction) system after the 1982 crisis, resulting in the 1994 crisis. As noted by one commentator:

> In the past five years, perhaps the restructuring has made some time to solve the liquidity problem, but

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493. *See* REISEN, *supra* note 474, at 217–20.

494. EDWARDS, *supra* note 68, at 302.

495. Such securities are known as "*tesobonos*." *See* Edwin M. Truman, *The Mexican Peso Crisis: Implications for International Finance*, 82 FED. RESERVE BULL. 199, 201 (Mar. 1996). "*Cetes*" are short-term government securities with value that is not linked to the dollar. *See id.*

496. For a discussion of the issuance of short-term investment in the form of Eurobonds issued by the Mexican private sector, see generally Duncan N. Darrow et al., *Restructuring Strategies for Mexican Eurobond Debt*, 16 NW. J. INT'L L. & BUS. 117, 114 (1995) (concluding that the best solution for Mexico's inability to meet their international obligations is to restructure debt rather than initiate bankruptcy or suspension of payments proceedings).

497. *See* Carrasco & Thomas, *supra* note 457, at 9.

> unless we find a way to solve the underlying international trade problems, rescheduling is no solution at all. We cannot continue rescheduling forever while the total amount of debt increases annually. If we are to continue borrowing to service part of the debt, I think that we will find no solution. I think that the debt crisis has become a crisis because it is regarded only as a debt crisis, instead of being placed in the broader context of its relationship with international trade, international investment, etc. Unless we are able to develop some kind of solution that takes this broader context into account, the debt crisis will never be solved. The current approach is rather like treating a patient for his fever rather than his illness. If we focus our attention on the fever, the ill person may become a corpse in a very short time.[498]

To prevent the sick patient from becoming a corpse, Mexico has already taken some steps, including its entrance into the GATT, its signing of NAFTA, and the reform of its foreign investment rules. However, as seen in this Part, there are still some steps to take. Mexico needs to attract more efficient capital into the country to prevent further crises. Part IV explores the different options that Mexico has to attract FDI as the most effective means to promote growth, in contrast with debt and short-term investments.

IV. AN ALTERNATIVE SCHEME TO ENHANCE (LONG-TERM) FOREIGN DIRECT INVESTMENT

> *En su etapa actual de desarrollo, México requiere del uso complementario del ahorro externo, el cual debe dirigirse a la inversión productiva más que a la obtención de altos rendimientos de corto plazo, para evitar que el retiro repentino de los capitales del exterior ponga en peligro la estabilidad financiera y el crecimiento económico sostenido.*[499]

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498. *Focus on Mexico*, *supra* note 404, at 484–85 (remarks of Fernando A. Vazquez Pando).

499. PND, *supra* note 348. This passage states: Within its current development stage, Mexico needs the complementary use of foreign capital, which shall be directed to productive investment more than to the attainment of short-term high yields, to avoid abrupt take-offs of foreign capital that threaten financial stability and sustainable economic growth. *See id.*

Developing countries have several options to attract foreign capital to supplement domestic savings and investment, including borrowing abroad or attracting foreign direct investment and portfolio investment.[500] The safest choice is FDI. Kieler Studien states:

> [I]t is widely acknowledge[d] that debt inflows involve higher risks for the recipient country than FDI inflows. Debt-service schedules are fixed ex ante and are typically not related to the country's ability to pay. . . . In sharp contrast, the payment of dividends to foreign investors is closely related to the host country's economic performance. The servicing of non-debt creating capital inflows is more flexible because FDI provides for risk sharing between the host country and foreign investors.[501]

This final Part focuses on the importance of FDI on developing countries such as Mexico, as a means to promote growth. As this Article's viewpoint is a legal one, it examines the relationship between the rule of law, FDI, and how a country can attract more FDI through means other than capital flows such as short-term investment and debt, which are problematic when relied on for economic growth. Finally, it examines the latest international developments in this area and how they can benefit Mexico.

A. FDI as a Long-Term Investment Remedy

FDI is the transfer of resources, including intellectual property and management, in return for claims on all or part of the future profits, from a foreign firm to a host country. Hence, it is both an industrial and a financial phenomenon.[502]

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500. For an analysis of debt and FDI from the perspective of the firm and the host country, see generally KIELER STUDIEN, DEBT VERSUS EQUITY FINANCE IN DEVELOPING COUNTRIES (1989).

501. *Id.* at 1.

502. *See* Donald R. Lessard, *The Financial Component of Foreign Direct Investment: Implications for Developing Countries*, *in* DIRECT FOREIGN INVESTMENT: COSTS AND BENEFITS 131, 131 (Richard D. Robinson ed., 1987). The financial contribution of FDI includes "(1) the capital provided by the foreign firm, (2) the risks assumed by the foreign firm, and (3) the improved economic performance of the project or enterprise due to the incentives provided by the ownership/contractual structure." *Id.* at 132.

Lending from commercial banks has proven to be a heavy burden for Mexico.[503] Mexicans suffered a decrease in their standard of living because of debt service requirements. Hence, Mexico needs to share the risks of financing its economic growth with the agents of FDI, the MNCs, and through means other than loans and short-term investments. There are three reasons why heavy reliance on bank finance is undesirable:

> (1) [It] entails variations in debt service requirements that only accidentally correspond to changes in the borrower country's ability to service debt;
> (2) [It] requires repayment regardless of the performance of the borrowers' macroeconomies or specific projects or programs, and hence shifts risk only through default; and
> (3) [It] provides lenders with no stake in the outcome of the borrowers' macroeconomies or specific projects or programs, and, hence, does not give any responsibility for the selection or execution of programs or projects to the suppliers of capital.[504]

However, financing economic growth and the current account deficit through portfolio investment has some negative consequences. First, in comparison with FDI, "it is not possible for direct foreign investors to sell a plant in an exchange market."[505] But in the case of a mutual fund or institutional investor:

> if the global bond fund or the equity emerging markets fund manager determines that . . . Mexico no longer seems able to add performance to the fund or even will substantially detract, the tesobonos in the bond fund are dumped on the market as are the shares of Mexican companies.[506]

Hence, the Central Bank would have to use its reserves to defend the peso and the country's reserves would flow out "as quickly as they were added to by the portfolio investors."[507]

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503. *See Mexico Gets New IMF Loan*, CALGARY HERALD, May 28, 1989, at F6, *available in* 1989 WL 4685958.

504. Lessard, *supra* note 502, at 147.

505. Lichtenstein, *supra* note 430, at 1774.

506. *Id.*

507. *Id.*

FDI brings the following benefits to host countries:[508]

(1) it provides a source of foreign finance after the breakdown of commercial bank lending;[509]
(2) it contributes to development, transferring technology[510] and know-how,[511] as well as promoting a more efficient share of risk than other means of attracting capital;[512]
(3) the creation of jobs;[513]
(4) the creation of welfare;[514]
(5) it substitutes for financial aid, loans, and portfolio investment as a means of attracting capital;[515] and finally,

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508. *See* Joseph M. Grieco, *Foreign Investment and Development: Theories and Evidence*, *in* INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL? 35–37 (Richard E. Feinberg & Valeriana Kallab eds., 1986) (providing a description of the "Proponents of Foreign Direct Investment School").

509. *See* Helmut Reisen, *Public Finance in Developing Countries and the Attraction of Foreign Capital*, *reprinted in* DEBT, DEFICITS AND EXCHANGE RATES: ESSAYS ON FINANCIAL INTERDEPENDENCE AND DEVELOPMENT, *supra* note 411, at 66; *see also* Theodore H. Moran, *The Future of Foreign Direct Investment in the Third World*, *in* INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL?, *supra* note 508, at 3, 12.

510. *See* Reisen, *supra* note 509, at 66.

511. *See* Rachel McCulloch, *New Perspectives on Foreign Direct Investment, in* FOREIGN DIRECT INVESTMENT, *supra* note 371, at 37, 40–41 (explaining that firms engage in FDI instead of exporting, licensing, and other modes of entry because of lower production costs or import restrictions).

512. *See* Reisen, *supra* note 509, at 66; *see also* Lessard, *supra* note 502, at 131.

513. Mexico needs the creation of 1,200 new jobs per month to surpass the current deficit in job creation. *See* Raúl Llanos Samaniego, *En 10 anos se podría abatir el déficit de empleo, dice el CCE*, JORNADA, July 17, 1996 <http://unam.netgate.net/jornada/1996/jul96/960717/larios.html>. However, there is a debate over the effects FDI could have on jobs when made in the form of mergers or acquisitions with domestic companies. *See* McCulloch, *supra* note 511, at 47–48. In this case, the domestic firm may be eliminated, resulting in a loss of jobs. *See id.* at 47. Therefore, FDI is merely replacing workers. *See id.* Nevertheless, in accordance with Michael Porter's theory of the "stages of competitive development," labor is the first endowment or factor that attracts FDI. *See* MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 678–80 (1990).

514. *See* Richard S. Eckaus, *A Survey of the Theory of Direct Investment in Developing Countries*, *in* DIRECT FOREIGN INVESTMENT: COSTS AND BENEFITS, *supra* note 502, at 111, 115. Under the Hecksher-Ohlin-Samuelson Model, with international trade (including the movement of capital), both the host country and the receiving country will experience an increase in their aggregate welfare. *See id.* However, "it has been demonstrated . . . that, while aggregate welfare would be improved by foreign investment, the welfare of the nationals in the country receiving the investment might not change or might even decline." *Id.*

515. *See* George T. Ellinidis, *Foreign Direct Investment in Developing Countries and Newly Liberalized Nations*, 4 J. INT'L L. & PRAC. 299, 306–08 (1995).

(6) the creation of growth.[516]

Despite the potential benefits of FDI, the opposite view held by the *dependence* school (dependency theory), states that FDI has the following negative effects on host countries' economies: "[MNCs] soak up local capital for their projects rather than bring in many new resources; . . . they use inappropriate technologies developed in response to the labor/capital proportions in the home country; . . . they drive domestic producers out of the market,"[517] and concentrate income and increase foreign indebtedness.[518] Nevertheless, the empirical data indicate that they were further away from reality than the pro-FDI advocates, even though the debate has not ended.[519]

Another relevant issue regarding FDI is its potential power to respond to improved government policies[520] and other factors, making it more attractive to countries. FDI responds to factors such as: (1) geographic location; (2) natural resources; (3) market size; (4) labor and other factor supply; (5) regulations and the enforcement of law; and (6) macroeconomic policies.[521] Hence, a country could attract or repel FDI depending on how these factors are developed.[522] Along with these factors, one should consider the "coping capacity" of a country; "that is, the ability to exploit and indeed create opportunities [as a result] of the collaborative synergism between the state and society, and of their joint ability to take advantage of the MNCs' assets for national development," and its influence on the decision of MNCs to invest in a defined market.[523]

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516. World Bank studies assume a linear relationship between investment and growth. *See* W. EASTERLY ET AL., HOW DO NATIONAL POLICIES AFFECT LONG-RUN GROWTH? 8, 27 n.606 (1992) (explaining how FDI plays a crucial role in facilitating economic growth in developing countries, with specific reference to Japan's and Southeast Asia's experiences).

517. Moran, *supra* note 509, at 4 (discussing the debate between proponents and critics of FDI).

518. *See* Grieco, *supra* note 508, at 37–39 (describing the *dependencia* school).

519. *See generally* Davis J. Encarnation & Louis T. Wells, Jr., *Evaluating Foreign Investment*, *in* INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL?, *supra* note 508, at 61–66; *see also* Grieco, *supra* note 508, at 44–56.

520. *See* Reisen, *supra* note 509, at 66.

521. *See id.* at 71.

522. *See id.*

523. Steve Chan & Cal Clark, *Do MNCs Matter for National Development? Contrasting East Asia and Latin America, in* FOREIGN DIRECT INVESTMENT IN A CHANGING GLOBAL POLITICAL ECONOMY 166, 180 (Steve Chan ed., 1995). It has been argued that "a tradition of domestic cooperation enhances effectiveness in recruiting and leveraging MNCs for national development." *Id.* at 181.

Another issue that appears to influence a MNC's decision to invest directly in a country is the opportunity for portfolio diversification to reduce risks and increase average returns.[524] It seems that MNCs choose FDI in the absence of reliable stock markets or other channels in which to acquire foreign equity (such as debt-equity swaps).[525] Hence, for Mexico it appears encouraging that FDI could steadily replace short-term investments and its risks.[526] In the end, short-term investors, like FDI investors, are interested only in the direct benefits they receive, such as the payment of cash dividends.[527]

In conclusion, as economies become interrelated, countries should enhance their created assets and lower their costs of doing business to attract foreign investment into their markets. In the case of Mexico, the aim should be to attract FDI to promote economic growth, to foster its competitiveness, and to diminish and prevent the causes and effects of the last crisis.

B. FDI's Role After the Crisis

After the devaluation of the peso, Mexico suffered because of the decrease in domestic private investment. However, in the long run, the devaluation could promote export-oriented industries, which will help create a positive balance of payments.[528] For this to happen, Mexican firms need investment capital. As World Bank officials have remarked: "[A]s countries move to restructure their economies in the adjustment phase [we are again in an

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524. *See* MARTIN G. GILMAN, THE FINANCING OF FOREIGN DIRECT INVESTMENT: A STUDY OF THE DETERMINANTS OF CAPITAL FLOWS IN MULTINATIONAL ENTERPRISES 12–13 (1981). MNCs have the ability "to be able to operate across national frontiers and exchange control procedures in order to maximize their profits from a currency fluctuation, or to protect themselves from its consequences." *Id.*

525. *See* Eckaus, *supra* note 514, at 121–22.

526. *See* Encarnation & Wells, *supra* note 519 (urging screening measures to prevent harmful foreign investment).

527. *See, e.g.,* Thomas Lee Hazen, *The Short-Term/Long-Term Dichotomy and Investment Theory: Implications for Securities Market Regulation and Corporate Law*, 70 N.C. L. REV. 137, 139 (1991) (noting the focus of U.S. corporations on short-term profits).

528. *But see* Ajay Chhibber et al., *Reviving Private Investment in Developing Countries: Major Themes, in* REVIVING PRIVATE INVESTMENT IN DEVELOPING COUNTRIES: EMPIRICAL STUDIES AND POLICY LESSONS 1, 7 (Ajay Chhibber et al. eds., 1992) ("An overvalued exchange rate is beneficial only in the short run. The lower growth of exports due to the overvaluation, lowers overall growth and reduces investment in the longer run.").

adjustment phase], a recovery in private investment, particularly in the tradable goods sectors, is critical for restoring overall capital formation and growth."[529]

Moreover, as a World Bank survey demonstrates, FDI is a separate factor of production, which complements domestic capital.[530] It has been demonstrated that the marginal product of the capital of FDI is higher if the ratio of foreign to domestic capital is lower.[531] Hence, capital is often invested from regions "where it is in surplus and has a declining rate of return to regions where it is relatively scarce and can gain a higher rate of return."[532] On the same basis, and in accordance with the stages theory of competitive development,[533] FDI fosters two "factor endowments" in an economy: labor and efficient capital.[534] These factors are necessary for a country to enhance its comparative advantages and later, to create growth and achieve competitiveness.[535] Once FDI has promoted trade, a country receives more hard currency, which in turn contributes to the formation of domestic savings.[536] With the 1994 crisis and the misalignment of the peso, the Mexican government inadvertently stopped the process of growth driven by the previously opened economy.

FDI can be deterred not only by foreign exchange difficulties, but also by the underlying reasons for the need for capital. Thus, FDI is not attracted if its capital inflows will finance consumption or capital flight instead of profitable investment, as was the case before the crisis.[537]

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529. *Id.* at 3.

530. *See* PORTER, *supra* note 513, at 670–71.

531. *See* ROBERT GILPIN, U.S. POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT 116 (1975).

532. *Id.*

533. *See* PORTER, *supra* note 513, at 545. The stages theory of competitive development postulates that there are "four broad attributes of a nation that shape the environment in which local firms compete that promote or impede the creation of competitive advantage." *Id.* at 71. These attributes are factor conditions; demand conditions; related and supporting industries; and firm strategy, structure, and rivalry. *See id.*

534. *See id.* at 73–86.

535. *See id.* FDI is introduced by MNCs, which are some of the main actors in international trade. *See id.* at 18.

536. At this stage the country's factor endowments shift from low-skilled labor to a more capital abundant economy. *See id.* at 548–52.

537. *See* David J. Goldsbrough, *Investment Trends and Prospects: The Link with Bank Lending, in* INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL?, *supra* note 508, at 173, 182–83; *see also* EDWARDS, *supra* note 68, at 302 (commenting on the necessity of a country like Mexico to gain productivity

The current task is to attract needed capital to promote private investment. The safest way of doing this is through FDI in the form of joint ventures, mergers, or acquisitions between domestic firms and MNCs,[538] as well as licensing agreements, management contracts, franchising agreements, and turnkey projects.[539] Whereas the cause is at the same time the effect, FDI can help stabilize the exchange rate. Additionally, MNCs need stable exchange rates to engage in long-term investments,[540] even though it appears that restrictions on capital transfers are more important for MNCs than exchange rate volatility when considering entry into a market.[541]

This export-oriented approach becomes real within the NAFTA context. While Mexico, Canada, and the United States created the North American market, MNCs will need access to avoid tariffs or other barriers to entry.[542] Mexico could become an important recipient of FDI seeking to enter the North American free trade zone if the comparative advantages to its two partners are taken into account. Thus, FDI, and its corresponding influx of capital, will combine with Mexico's capital to foster the export-oriented Mexican sector.[543] One should take into account that a country's competitiveness relies in large part on its ability to attract FDI.[544] New capital

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as a means to stabilize the economy, and the country's lack of productive growth during the early implementation of the economic reforms).

538. However, parent companies will experience some difficulties when contributing loans to Mexican subsidiaries. *See* Howard S. Engle, *International Developments*, 22 J. CORP. TAX'N 273, 276 (1995). For example, a devaluation in currency, when the risk is borne by the parent of a foreign subsidiary, may effect tax deductions depending on when the loss was realized. *See id.*

539. *See* Charles P. Oman, *New Forms of Investment in Developing Countries, in* INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL?, *supra* note 508, at 131, 131–32.

540. *See* GILMAN, *supra* note 524, at 31 (stating that interest rate fluctuation in one country will force investors to reallocate stock portfolios). Unstable exchange rates are attractive for short-term investments where, if successful, they can obtain a large return speculating against an unstable currency. *See id.* at 23–35 (discussing the relation between short-term capital investment and the spot and forward exchange markets).

541. *See* Cynthia Day Wallace, *Foreign Direct Investment in The Third World: U.S. Corporations and Government Policy, in* FOREIGN DIRECT INVESTMENT IN THE 1990S: A NEW CLIMATE IN THE THIRD WORLD 148, 156 (1990).

542. *See* GILPIN, *supra* note 531, at 116.

543. In fact, just before the crisis the export sector was doing very well and the NAFTA appeared to contribute to the success: In the first nine months of 1994 there was a positive growth of 2.9%. *See* COUNTRY PROFILE, *supra* note 464, at 5.

544. *See* Marc Minikes & John Foyt, *Will the Peso Peg be Held?*, 1 UCLA J. INT'L L. & FOREIGN AFF. 431, 463–64 (1997).

can help a country "upgrade its economic capabilities and allow it to export goods emphasizing its comparative advantages."[545]

Moreover, the Mexican Government reaffirmed the need for FDI in the "Economic Emergency Program" (AUSEE) implemented after the 1994 crisis.[546] The goal of the AUSEE was to reduce the current account deficit to US$14 billion.[547] This would require a US$14 billion capital account surplus, consisting mainly of FDI, and a US$5 billion trade deficit with the United States.[548]

Hence, FDI could make three main contributions to the future of the Mexican economy by: (1) fostering the export-oriented sector;[549] (2) balancing the deficit in the current account;[550] and (3) promoting economic growth.[551] Another factor that Mexico needs to cultivate is its international competitiveness, in which FDI could play a role.[552] To accomplish this, Mexico needs a different approach towards FDI; that is, not to consider it as foreign aid, but to recognize investment as the private investor's desire to make a profit. MNCs energize an economy to increase domestic savings;

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545. *Id.*

546. *See* Deborah L. Riner, *Prognoses & Ponderings: Latest Economic Forecasts by Experts*, BUS. MEX., Mar. 1995, *available in* LEXIS, Busfin Library, ABI File.

547. *See id.*

548. *See id.* The Mexican government subsequently enacted two more programs, the PARAUSEE and the less restrictive Alliance for Economic Recovery (ARE), in an attempt to stabilize the Mexican economy after the 1994 crisis. *See Mexico—New Economic Program Aims for Modest Gains in Shift Towards Growth*, LAGNIAPPE LETTER, Nov. 10, 1995, *available in* LEXIS, Market Library, Promt File. Because of the public's lack of confidence in the ARE's stated goals, the peso declined following its introduction. *See id.*

549. *See* Ellinidis, *supra* note 515, at 308. By fostering the export-oriented sector, Mexican companies benefit if they are integrated in a productive chain within the sector. *See* PPICE, *supra* note 341.

550. *See* Sidney Weintraub, *The Promise of United States-Mexican Free Trade,* 27 TEX. INT'L L.J. 551, 562 (1992) (noting that in 1990 and 1991 enough capital entered Mexico to finance the current account deficit and strengthen foreign exchange reserves).

551. *See* Ellinidis, *supra* note 515, at 306. "Developing a long-lasting relationship with foreign investors bolsters a country's reputation and credit worthiness. This serves to encourage further foreign investment which increases the flow of hard currency into the country due to the initial capital outlays and potential tax revenues generated through domestic taxation regimes." *Id.* at 307.

552. For a descriptive survey about the relation between trade liberalization and FDI in developing countries and its impact on competition for FDI, see Manuel R. Agosin & Francisco J. Prieto, *Trade and Foreign Direct Investment Policies: Pieces of a New Strategic Approach to Development?*, TRANSNAT'L CORPS., Aug. 1993, at 63.

they should not be held responsible for any shortage of capital and the resulting economic hardship it would provoke. Doing so would open wounds only recently closed. The process of economic growth should be one in which all market participants (including national, foreign, and government) collaborate, each one playing its respective role.

C. The Rule of Law and FDI

Investment laws are very important factors for MNCs' market entry decisions.[553] Therefore, the importance of BITs becomes obvious as a means to revert to distortive host investment laws. In Mexico, with the 1993 Law and the NAFTA, this is no longer of concern to direct investors. Moreover, it is now accepted that rules and government policies which create incentives for MNCs are effective. However, incentives that are trade distortive should be avoided.[554]

> [It is now accepted] that state and market can play a mutually supportive rather than mutually exclusive role in [the economic growth process]. The state, through its subsidies [permitted by international law] to domestic producers and its recruitment of MNCs as carriers of production assets . . . can promote and foster comparative advantage. However, in the final analysis the state cannot itself create and sustain such advantage. That task has to be fulfilled by the private sector, which has to be ready, eager, and able to respond to the market signals and the government's incentive programs.[555]

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553. *See* Wallace, *supra* note 541, at 157.

554. *See, e.g.,* NAFTA, *supra* note 90, ch. 11, at 639; *see also supra* notes 239–61 and accompanying text. *But see* Stephen Guisinger, *Host-Country Policies to Attract and Control Foreign Investment*, *in* INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL?, *supra* note 508, at 170 (discussing reasons for the minimal effect of performance requirements on investment).

555. Chan & Clark, *supra* note 523, at 181 (citation omitted). It has been noted that

> Latin America [has] a weaker entrepreneurial tradition and a less equitable socioeconomic base. Moreover, the improvement of human-capital stock has not been accorded a high priority in either state policy or social values. These countries thus have had greater difficulty in 'leveraging' the contributions of MNCs to stimulate economic takeoff, social mobility, or income redistribution.

Id. at 184.

In fact, the discussion of whether the allocation of economic activities should be determined entirely by market forces is useless. Governments should take coordinated actions with economic agents to help markets work efficiently.[556] Mexico should adopt this approach to avoid risks, thereby enhancing the efficiency of capital markets within its capabilities.

Indeed, to prevent or fight against market failures,[557] governments have laws and policies. For example, the overvaluation of the Mexican currency was produced by a market failure. The government can and should seek, in coordination with the private sector, policies to avoid such risks that affect both the country and investors.

> The debate over the impact of inward direct investment in host countries is now entering a new phase as markets and production become increasingly internationalized. Moreover, not only are [MNCs] taking a global view of their strategies—and view the locational attributes of countries from this perspective—but countries also are beginning to recognize that their industrial strategies and competitive postures must take on an international dimension. . . . [T]he resulting allocation of activity [should be] consistent with that which the countries in which they operate are seeking to achieve.[558]

However, the problem is to find out how and where government policies and regulations came into the marketplace. The answer to "where" is in the macroeconomic field. This means governments are responsible for assuring a fair level of economic certainty to economic agents through low inflation, competitive markets, and a *healthy balance of payments*, among other factors. Also necessary is the efficient allocation of a country's scarce resources[559]—capital in the case of Mexico.

The more difficult question is "how." States should not require producers of wealth to act against their own interests; they should act in a manner consistent with upgrading the performance of economic agents as if they were acting in a

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556. *See* Agosin & Prieto, *supra* note 552, at 69; John H. Dunning, *The Eclectic Paradigm of International Production: A Restatement and Some Possible Extensions*, 1 J. INT'L BUS. STUD. 1, 4 (1988).

557. *See, e.g.,* KLAUS W. GREWLICH, DIRECT INVESTMENT IN THE OECD COUNTRIES 47–72 (1978) (discussing national approaches to direct investment).

558. Dunning, *supra* note 556, at 24.

559. *See* Agosin & Prieto, *supra* note 552, at 66.

perfect market.[560] One way to achieve this is by setting up an institutional and legal framework so that markets can function efficiently. Mexico has already done this with the issuance of the *Ley de Inversión Extranjera* and its partnership with Canada and the United States in the NAFTA, as well as the other free trade agreements that it has entered. However, within the multinational sphere there are still some important measures to account for to create the most attractive environment for MNCs and to foster the entry of efficient capital into Mexico.[561]

Besides foreign investment laws, there are two other areas in which government could play an enhancing role. Governments can first guarantee a stable, competitive exchange rate; and second, provide legal and institutional arrangements regarding competition policy. Both are competitiveness-enhancing measures and necessary conditions for healthy economic growth.

Mexico's new approach to competition laws has previously been discussed,[562] but some issues must still be addressed. First, MNCs are naturally attracted to concentrated markets.[563] Hence, government policy should concentrate on maintaining and fostering competition so that the maximum gains from MNCs to the domestic economy will be realized.[564] Second, the competition rules should be applied in a nondiscriminatory manner to both nationals and multinationals. The role for the rule of law and government should be to set a framework establishing the limits for acceptable, effective market conduct that deters

560. *See id.* (noting that developing markets are "inefficient in identifying long-term, potential comparative advantage" and encouraging government intervention through trade and FDI policies).

561. Besides this statement, other types of government intervention are described by Agosin and Prieto, as follows: "[T]here is an important role for government intervention in identifying industries with long-run promise, steering investment resources in their direction, acting to complete or create markets and investing in the creation of complementary assets in which the private sector is likely to under-invest . . . ." *Id.*

562. *See supra* notes 265–324 and accompanying text.

563. *See* GREWLICH, *supra* note 557, at 41–42; Steve L. Snell, Note, *The Development of Competition Policy in the People's Republic of China,* 28 N.Y.U. J. INT'L L. & POL'Y 575, 620 (1996).

564. *See* Moran, *supra* note 509, at 22 ("Developing countries can greatly enhance their prospects for receiving substantial gains from foreign capital if they undertake policies consciously aimed at fostering competition among foreign firms, between foreign firms and national enterprises, and between imports and goods locally produced by foreign enterprises.").

anticompetitive behavior.[565] Third, as MNCs are difficult to view in a narrowly defined market, the harmonization of competition rules[566] should be raised within the WTO and more specifically within the NAFTA,[567] recognizing that markets are no longer defined by only domestic factors.

1. Recent Developments in the International Arena

Presently, investment is seen as an important factor to achieve the interrelation of markets and to give more velocity to the globalization[568] process.[569] This movement is led by MNCs. As Sir Leon Brittan, Vice President of the European Commission, has written:

> Investment is recognized for what it is: a source of extra capital, a contribution to a healthy external balance, a basis for increased productivity, additional employment, effective competition, rational production, technology transfer, and a source of managerial know-how . . . . [C]apital is recognized as a scarce resource that no country can afford to drive away.[570]

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565. *See* Alden F. Abbott, *Joint Production Ventures: The Case for Antitrust Reform*, 58 ANTITRUST L.J. 715, 730 n.40 (1989); Moran, *supra* note 509, at 22.

566. The goal of harmonization laws is to promote compatibility between the two nations' competition laws, but not to promote perfect harmonization. *See* Ivan R. Feltham et al., *Competition (Antitrust) and Antidumping Laws in the Context of the Canada-United States Free Trade Agreement,* 17 Can.-U.S. L.J. 71, 161 (1991) (arguing that harmonization laws do not require identical rules, rather a coherence of underlying principles).

567. *See* Hunter & Hutton, *supra* note 265, 108–09, 114–15 (pointing to recent efforts towards harmonization within the NAFTA).

568. Globalization is characterized by:

- International trade in both goods and services . . . growing faster than domestic output in most countries and certainly in the world economy as a whole[;]
- [FDI] growing faster than national investment[;]
- International financial flows . . . growing at a much faster rate than domestic financial transactions[; and]
- International trade, investment and finance . . . all occurring at the same time and through the same agent, the transnational corporation.

Agosin & Prieto, *supra* note 552, at 64.

569. "During the 1980s, world FDI increased at around 3 percent annually, more than three times the rate of world exports and four times as fast as world GDP." Leon Brittan, *Investment Liberalization: The Next Great Boost to the World Economy*, TRANSNAT'L CORPS., Apr. 1995, at 1, 3.

570. *Id.* at 2.

Within the international arena there is a tendency to view FDI as a public policy issue. There have been developments in the regulation of the financial activities of MNCs at both the national and international levels. The OECD has developed guidelines,[571] as has the World Bank.[572] The GATT[573] has already included investment in its forum and, at the regional level, the NAFTA has a chapter specifically addressing investment issues.[574]

This is because of the nature of a MNC's behavior: it enters or exits a market with outstanding speed in response to factors influencing costs and revenues. This increases competition and attracts MNCs to markets that need their capital,[575] technology, management, and other assets which a state may lack or have in undeveloped form. To attract MNCs, states have to develop and foster their assets (factor endowments) or comparative advantages to attract MNCs and their capital—as in the case of Mexico.

2. Lack of a Multinational Agreement in FDI

Globalization and the world economy have successfully achieved growth sustained by the institutional framework created after World War II. These institutions are the IMF World Bank for financial cooperation and the GATT for trade cooperation.[576] Nevertheless, there is no binding multilateral agreement for investment.[577] "Developing a broad framework

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571. OECD, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: THE 1984 REVIEW OF THE 1976 DECLARATION AND DECISIONS 28 (1984).

572. *World Bank: Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, Sept. 21, 1992, 31 I.L.M. 1363, 1379.

573. *See* GATT arts. III, XI, XVI, XVII (referencing national treatment, the elimination of quantity restrictions, subsidies, and state trading enterprises, respectively); *see also* Theodore H. Moran & Charles S. Pearson, *Do TRIPs Trip Up Foreign Investment? An International Business Diplomacy Perspective*, *in* FOREIGN DIRECT INVESTMENT IN THE 1990S: A NEW CLIMATE IN THE THIRD WORLD, *supra* note 541, at 28, 58 (concluding that TRIPs is not a significant deterrent to FDI).

574. *See* NAFTA, *supra* note 90, ch. 11, at 639.

575. In fact, developing countries have become an attractive host for half of the world's FDI during the 1990s. *See* Brittan, *supra* note 569, at 3.

576. The vision of a multinational institution to oversee the GATT began with the Havana Charter in 1948, which initiated a draft agreement to create the International Trade Organization (ITO). *See* Raymond Vernon, *The World Trade Organization: A New Stage in International Trade and Development*, 36 HARV. INT'L L.J. 329, 330 (1995). The vision of the Havana Charter was realized with the creation of the WTO in 1995. *See id.* at 329.

577. *See* GREWLICH, *supra* note 557, at 73–104 (referencing a survey of different multinational efforts made before 1978, including the Havana Charter,

for international investment would help stabilize the global economic system while giving direction and coherence to the regulatory environment facing transnational business."[578] Furthermore, a multilateral investment agreement would help to avoid repeating the struggles experienced by MNCs, host countries, and home countries during the 1970s, when expropriations and confrontations between host countries and MNCs were common.[579] However, there is a forum for dispute settlement on FDI matters created by the World Bank and the ICSID,[580] to which Mexico is not party.[581]

Presently, the rules for FDI are so diverse that to follow or enforce them is almost impossible. There are binding rules[582] such as domestic investment laws and BITs, and regional agreements such as the NAFTA and the EU,[583] and one limited multilateral agreement, the GATT's Trade Related Investment Measures (TRIMs).[584] However, there are several nonbinding (soft law) regulations concerned with FDI: the 1976 OECD Declaration on International Investment and

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U.N. Initiatives, the OECD Code of Liberalization of Capital Movements, and the OECD Declaration on International Investment and Multinational Enterprises).

578. John M. Kline, *International Regulation of Transnational Business: Providing the Missing Leg of Global Investment Standards,* TRANSNAT'L CORPS., Feb. 1993, at 153, 153.

579. *See id.*

580. *See* ICSID, *supra* note 252, 17 U.S.T. at 1270, 575 U.N.T.S. at 160.

581. To attract FDI as long-term investments, and in accordance with Chapter 11 of the NAFTA, *see* NAFTA, *supra* note 90, art. 1120, at 643, Mexico should become part of the ICSID.

582. The binding nature of these rules is reinforced with dispute settlement procedures to make them effective. *See, e.g.*, David Lopez, *Dispute Resolution Under NAFTA: Lessons From The Early Experience*, 32 TEX. INT'L L.J. 163 (1997) (discussing the results of initial attempts to use dispute settlement mechanisms under Chapter 19 and the labor and environmental side agreements of the NAFTA).

583. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 67, 298 U.N.T.S. 3, 42 (noting the pillar of what is now the European Union: the free movement of capital).

584. Under TRIMs, no GATT Member shall apply any trade related investment measure that is inconsistent with the national treatment principle or the obligation of general elimination of quantitative restriction. *See* Agreement on Trade-Related Investment Measures, Apr. 15, 1994, art. 2, 108 Stat. 4809, 4815, 1 URUGUAY ROUND TRADE AGREEMENTS, H.R. Doc. No. 103-316, at 804 [hereinafter TRIMs Agreement]. Furthermore, the TRIMs Agreement provides an "illustrative list" of TRIMs which are contrary to the GATT, including local content requirements, sourcing, some trade balance requirements, and import and export restrictions. *See* TRIMs Agreement, Annex 1. Nevertheless, it does not contain measures "such as technology transfer requirements." MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 292 (1995).

Multinational Enterprises,[585] the World Bank's Guidelines on the Treatment of Foreign Direct Investment,[586] the U.N. Conference on Trade and Development (UNCTAD) Code on Restrictive Business Practices,[587] the U.N. Consumer Protection Guidelines,[588] the U.N. Code of Conduct on Transnational Corporations,[589] and the International Labour Organisation (ILO) Tripartite Declaration on transnational corporations (TNCs) and Social Policy.[590]

Regarding domestic laws, there are now substantive similarities among different investment regimes for FDI throughout the world. Although they are different, their

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585. The OECD Declaration on International Investment,

> [a]dopted in 1976, . . . contains four distinct elements woven into a balanced overall package of instruments designed to address key issues for international cooperation. The Declaration is a political undertaking, supported by legally-binding Decisions of the OECD Council, that provides active follow-up procedures covering notification, policy monitoring, review and consultation.
>
> The four elements of the Declaration are as follows:
> —a *National Treatment* instrument provides that OECD members should treat foreign-controlled enterprises operating in their territories no less favourably than domestic enterprises in like situations;
> —*Guidelines for Multinational Enterprises* that establish voluntary standards of conduct representing the collective expectations of OECD governments as to the behaviour of such enterprises;
> —an instrument on *Investment Incentives and Disincentives* that encourages transparency and provides for consultation and review; and
> —an instrument on *Conflicting Requirements*, designed to avoid or minimise the imposition by OECD governments of conflicting requirements on TNCs and providing a forum for consultation.

William H. Witherell, *The OECD Multilateral Agreement on Investment*, TRANSNAT'L CORPS., Aug. 1995, at 1, 4; *see also* GREWLICH, *supra* note 557, at 88–90 (analyzing the binding/non-binding nature of this Declaration).

586. For a discussion of the World Bank Guidelines during the final stages of implementation and their prospective impact, see IBRAHIM F.I. SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES 139–52 (1993).

587. G.A. Res. 63, U.N. GAOR, 35th Sess., 83d plen. mtg. at 123, U.N. Doc. A/Res./35/63 (1980).

588. G.A. Res. 248, U.N. GAOR, 39th Sess., 106th plen. mtg. at 179, Annex, U.N. Doc. A/Res./39/248 (1985).

589. *Code of Conduct on Transnational Corporations*, U.N. ESCOR, June 2, 1983, Doc. E/C.10/1983/S/5 (1983); *see also* Carsten Thomas Ebenroth & Joachim Karl, *International Investment Contracts and the Debt Crisis*, 22 INT'L LAW. 179, 180 (1988) (noting that the Code of Conduct was formed to prevent interference by transnational corporations in less developed countries).

590. *See* Kline, *supra* note 578, at 160–61.

standards and procedures are similar. Due to the current shift the world has experienced towards the interrelation of markets within the globalization era, principles once irreconcilable are starting to become homogenous throughout the world.[591]

Within this array of agreements, codes of conduct, and domestic rules, "No agreed global framework on FDI principles exist[s][592] to help gather and channel these disparate elements into a supportive structure for transnational business policy."[593] The same author further explains that this

> may lead enterprises to opt for short-term gains that can result from unresponsive or even abusive behaviour in relation to public policy goals and needs. Lacking an applicable set of transnational business standards, disappointment and frustration from unmet or misplaced expectations could again make national policy makers suspicious of [MNC] actions.[594]

Nevertheless, after years of proposals for a multilateral agreement to regulate FDI,[595] the prospect of negotiating more FDI issues has been tabled for future WTO negotiations. Furthermore, the OECD is working on a Multilateral Agreement on Investment (MAI) of a free-

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591. *See* Michael A. Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment*, 26 L. & POL'Y INT'L BUS. 673, 688–706 (1995) (referencing a study of legal structures that rule FDI in the international community, including the United States, Canada, the United Kingdom, Portugal, Poland, Japan, South Korea, Thailand, Argentina, Mexico, and Nigeria).

592. The International Court of Justice has already noted this important lack of a uniform framework for FDI on the multinational level:

> Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations[,] . . . and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane.

Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 4, 47–48 (Feb. 5).

593. Kline, *supra* note 578, at 161.

594. *Id.* at 163.

595. *See* Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 L. & POL'Y INT'L BUS. 633, 654–55 (1995).

standing nature[596] so as to permit non-OECD members to participate.[597] One important issue that arises, however, is which of these organizations is better suited for the task. Perhaps they should work together and reach a final agreement within the WTO[598] forum because it is a more representative and customary negotiating forum.[599]

> In its progress report to Ministers, the MAI Negotiating Group says that since talks began last September, key building blocks of the Agreement have been defined, such as investment protection, national treatment, Most Favoured Nation treatment, and transparency. Mechanisms for achieving standstill and rollback of existing restrictions and

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596. The chairman of the MAI Negotiating Group, Mr. Frans Engering, said "accession by non-Members to the MAI would certainly not be a matter of 'take it or leave it', but would be the result of negotiations with each country on the terms of its accession, including its agreed list of reservations." *Intergovernmental Agreement: Opening to Non-Members for Investment Agreement*, *OECD Letter*, June 1996, at 3.

597. OECD members have reaffirmed the commitment to reach the Agreement in 1997. *See Multilateral Investment Negotiations on Course, OECD Letter*, July 1996, at 9 (visited Nov. 11, 1997) <http://www.oecd/org/publications/letter/0506.html>; *see also OECD Goes to Work on Investment Agreement*, J. ACCT., Jan. 1996, at 8.

598. The European Commission has proposed to start a debate about common rules designed to nurture and encourage FDI within the EU. *See FDI Rules Needed*, BUS. EUR., Jan. 30, 1995, at 3, *available in* LEXIS, Busfin Library, ABI File.

599. *But see* Thomas L. Brewer & Stephen Young, *Towards a Multilateral Framework for Foreign Direct Investment: Issues and Scenarios*, TRANSNAT'L CORPS., Apr. 1995, 69, 75 (noting that the OECD is in a better short-run position to progress on FDI issues, but that the WTO is in a better position to progress on issues regarding the implementation of TRIMs). "The relatively small size and industrial-country bias of OECD's membership, though, is changing: Mexico has joined, the Republic of Korea has indicated an interest in joining, and several countries of Central and Eastern Europe are likely to become members in the coming years." *Id.* at 75. The OECD provides a "basic framework" for a multilateral investment treaty. *See* William H. Witherell, *Investment, Services, Taxation and Competition*, 30 BUS. ECON. 29, 30 (1995). Witherell further notes:

> The choice of the OECD as the forum for negotiation would not foreclose the agreement being transferred elsewhere at a later stage, e.g., to the WTO if and when it appears that the broader membership of that organization is ready to accept the high standards of liberalization and investment protection that would be the objectives of this agreement. Participation of other like-minded non-OECD Member countries in such an agreement would enhance its effectiveness by enlarging its sphere of influence.

Id.

resolving state-to-state or investor-to-state disputes have also been outlined.[600]

Even though Mexican domestic law is governed primarily in accordance with existing multilateral regulations, the Mexican authorities should play an active role in the preparation, negotiation, and adoption of the MAI to procure an even playing field for Mexico as a host country and to promote the principles already addressed in its laws for the protection of MNCs' rights. Moreover, in relation to the 1994 crisis, Mexico should address the problem of keeping short-term speculative capital under control within the multilateral forum (namely the OECD) and provide more certainty for the capital markets, besides the encouragement of FDI as long-term investments. This point needs further development to build a proposal for a possible legal regime to govern FDI with the participation of host countries, home countries, and the different sectors within them—including the academic, governmental, and investment sectors.[601]

Finally, the Mexican crisis of 1994 was not solely a domestic problem—it had international causes and effects.[602] It is in the interest of the global community to find a solution.[603] "If anyone doubted the systemic importance of [the United States stabilizing the Mexican economy], they need only have watched markets around the world over the last few days, and observed the co-movements of markets in other countries with the markets in Mexico . . . ."[604]

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600. *Multilateral Investment Negotiations on Course*, *supra* note 597, at 9.

601. One reason for the necessity of increased regulation is that

> markets have become more volatile in recent years, causing investors to focus increasingly on near-term performance . . . . [T]he proliferation of short-term derivative instruments has exacerbated this problem. As investors demand superior near-term results, corporate managers feel compelled to shore up current earnings, often at the expense of investing for the future.

Hazen, *supra* note 527, at 137 (emphasis omitted).

602. *See* Lee C. Buchheit, *Cross-Border Lending: What's Different This Time?*, 16 NW. J. INT'L L. & BUS. 44, 55 (1995). Mexico's crisis hurt LDC markets worldwide. *See id.* This phenomenon was called the "Tequila Effect." *See id.*

603. *See* Lawrence H. Summers, *Our Mexican Challenge,* 26 L. & POL'Y. INT'L BUS. 979, 980 (1995) (commenting on how it was appropriate for the United States to intervene in Mexico's 1994 crisis because of the effects of the crisis in markets worldwide); *see also* Buchheit, *supra* note 602, at 55.

604. Summers, *supra* note 603, at 980. For a proposal from the short-term investors, see Rory Macmillan, *Towards a Sovereign Debt Work-Out System,* 16 NW. J. INT'L L. & BUS. 57, 106 (1995). The author concludes:

3. Protection Against Risks[605]

Enterprises that decide to go abroad face an increase in opportunities, such as access to larger markets, diversification of their portfolios, higher rates of return, and lower costs. However, doing business in an international framework market presents risks, such as devaluation, monetary restrictions, expropriations, nationalization, and civil wars. "The vulnerability of some of the largest potential investment projects to major contractual changes is sufficiently great that special guarantees . . . may be needed to enable the projects to be launched in the first place."[606]

Hence, to improve the investment climate, it is necessary to protect foreign investors against risks. The way in which the guarantees can be offered are as diverse as law permits. They can be offered by states concluding international agreements, by the signing of BITs between importing and exporting-capital countries, or in the form of a multilateral agreement. The home country can also extend the guarantees to its own investors or to specific foreign investors.[607]

a. Multilateral Investment Guarantee Agency

Mexico needs to foster FDI, more than it has since the last two crises, to reach an optimal rate of growth. The global community still lacks a multinational legal instrument to guarantee investors against some existing non-commercial risks. This additional element would improve the flow of FDI.

> Despite numerous popular arguments that the nation state is becoming obsolete because capital and trade flows make borders irrelevant [with which I do not agree], *the legal structure is far from supranational.* Numerous commissions and quasi-courts exist, but with the notable exception of the Court of Justice in the European Union, these are either subject to political influence so that the rule of law is weak . . . or they are specialized technical tribunals (like the World Trade Organization).

Id. (emphasis added).

605. Risk has been defined as the perception that "as the return and capital gains on foreign-currency assets are denominated in [host] currency, the increasing amount of home currency used to finance a given level of foreign-asset accumulation will increase proportionately the expected variance of the return and capital gains in the home currency." GILMAN, *supra* note 524, at 80.

606. Moran, *supra* note 509, at 16.

607. *See* A. A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 70–128 (1962) (describing the development and history of the different instruments that had been used to give state guarantees to foreign investors until the 1960s). As an example of nationally sponsored insurance agencies, there is the U.S. Overseas Private Investment Corporation (OPIC). *See* Overseas Private Investment Corporation Act, 22 U.S.C. §§ 2191–2200b (1994).

Recently, Mexico has experienced many social, political, and economic difficulties. The murders of Colosio and Ruíz Massieu,[608] the Chiapas rebellion,[609] the increasing disparity in income distribution,[610] and the 1994 crisis, among others,[611] have made the already difficult quest for a better Mexico even more so. Such risks obviously frighten foreign investors; even short-term investors are doubtful about investing in an environment such as Mexico's.

> Among the factors that could cause larger flows of investment to developing nations, improvement of the investment climate and reduction of perceptions related to political risks are fundamental prerequisites. In this context, the creation of the Multilateral Investment Guarantee Agency (MIGA) comes as a major policy initiative that has considerable potential to remove barriers to international investment and give a new vigor to the development process.[612]

The Multilateral Investment Guarantee Agency (MIGA),[613] sponsored by the World Bank, was created in 1988. Its objective is to "encourage the flow of investments for productive purposes among *member countries*[,] . . . thus supplementing the activities of the International Bank for Reconstruction and Development . . . and other international development finance institutions"[614] and complementing government-sponsored and private investment guarantee

608. *See* EDWARDS, *supra* note 68, at 298 (noting that the assassinations, along with other "negative political events[,] translated into major declines in the stock of international reserves held by the Bank of Mexico").

609. *See* COLLIER, *supra* note 13, at 10 (describing the Chiapas rebellion).

610. *See id.* at 140 (noting that in 1988, 40% of the Mexican population lived below the poverty line).

611. *See, e.g.,* Roy A. Karaoglan & Mike Lubrano, *Mexico's Banks After the December 1994 Devaluation—A Chronology of the Government's Response*, 16 NW. J. INT'L L. & BUS. 24, 32 (1995) (noting the liquidity problems of Mexican banks during the crisis).

612. Ibrahim F. I. Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guarantee Scheme,* 21 INT'L LAW. 671, 694 (1987).

613. Convention Establishing the Multilateral Investment Guarantee Agency, *opened for signature* Oct. 11, 1985, 24 I.L.M. 1605 (entered into force Apr. 12, 1988) [hereinafter MIGA]. For a detailed analysis of this institution, see generally IBRAHIM F.I. SHIHATA, MIGA AND FOREIGN INVESTMENT: ORIGINS, OPERATIONS, POLICIES AND BASIC DOCUMENTS OF THE MULTILATERAL INVESTMENT GUARANTEE AGENCY (1988).

614. MIGA, *supra* note 613, art. 2, at 1608 (emphasis added).

programs.[615] The risks the MIGA insures against are currency transfer limitations, expropriation, war and civil disturbance, and breach of contract involving host nation and investor.[616] The MIGA may also cover additional risks such as terrorism and kidnapping on a case by case basis.[617] In guaranteeing an investment, the MIGA must consider the economic soundness of the investment and its contribution to development in the host country, as well as whether there are new projects of a medium- or long-term nature.[618] Moreover, the MIGA considers the investment conditions in the host country, as well as the availability of fair, equitable, and nondiscriminatory legal protection for the investor.[619]

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615. *See id.* arts. 19, 21, 24, at 1614–16.

616. *See id.* art. 11, at 1611–12; *see also* SHIHATA, *supra* note 613, at 131 (noting that the MIGA differs from national guarantee programs because it provides coverage for breach of contract in addition to expropriation coverage).

617. *See* MIGA, *supra* note 613, art. 11(b), at 1612; *see also* SHIHATA, *supra* note 613, at 138.

618. *See* MIGA, *supra* note 613, art. 12, at 1612. Article 12 provides in pertinent part:

> (a) Eligible investments shall include equity interests, including medium- or long-term loans made or guaranteed by holders of equity in the enterprise concerned, and such forms of direct investment as may be determined by the Board.
>
> (b) The Board, by special majority, may extend eligibility to any other medium- or long-term form of investment, except that loans other than those mentioned in Section (a) above may be eligible only if they are related to a specific investment covered or to be covered by the Agency.
>
> . . . .
>
> (d) In guaranteeing an investment, the Agency shall satisfy itself as to:
>
> (i) the economic soundness of the investment and its contribution to the development of the host country;
> (ii) compliance of the investment with the host country's laws and regulations;
> (iii) consistency of the investment with the declared development objectives and priorities of the host country; and
> (iv) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment.

Id.

619. *See id.* art. 12(d)(iv), at 1612. Risk insurance is not only available from the MIGA, but also from a number of sources, including nationally sponsored insurance agencies like OPIC in the United States and private insurers. *See* Paul E. Comeaux & N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance,* 15 N.Y.L. SCH. J. INT'L & COMP. L. 1, 32–48 (1994).

The NAFTA guarantees this treatment for North American investors.[620]

The MIGA was created in response to the 1980s crisis and is founded on the idea that "the heavily indebted countries needed to rely more on private enterprise and foreign private investment, an expandable growth resource that would not compound their debt problems."[621] It fills the gaps against noncommercial risks that private investment insurance does not cover.[622] Both developed and developing countries are members of the MIGA.[623]

Mexico has not taken advantage of the international effort made to alleviate the distrust of investors to engage in long-term projects where potential noncommercial risk is perceived.[624] It seems that Mexico has not joined the MIGA because some think this will give Mexico a "risky" image. However, no one seems to think that not joining the MIGA worsens the country's image.[625]

b. Exchange Risks (Devaluation)

The IMF allows a country to establish exchange controls if it is suffering a temporary exchange crisis,[626] such as Mexico's crisis of 1994. Although Mexico has historically been receptive to an exchange control policy[627]—even after

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620. *See* NAFTA, *supra* note 90, art. 1105, at 639.

621. *MIGA: The Mission and the Mandate* (visited Aug. 8, 1997) <http://www.miga.org/mandate.htm>.

622. "[Insurance] agencies are often unable or unwilling to provide the . . . coverage that foreign investors need. . . . [F]or example, [private insurance] is often limited by restrictive eligibility criteria. In addition, types of coverage offered by private insurers often exclude currency transfer and war risks, and are short term." *MIGA, Introduction* (visited Aug. 25, 1997) <http://miga.org/profile/prof001.htm>; *see also* Ellinidis, *supra* note 515, at 299–300.

623. *See MIGA, MIGA Member Countries (141)* (visited Aug. 8, 1997) <http://www.miga.org/members.htm>.

624. By October 21, 1997, Mexico had not joined the MIGA, nor had it considered fulfilling membership requirements. *See id.* (excluding Mexico from list of member nations). Other countries in the same position are Cuba, Iceland, Liechtenstein, Andorra, Monaco, Austria, Netherlands, Antilles, Chad, Liberia, Central African Republic, Iraq, Iran, Afghanistan, Somalia, Thailand, Brunei, Australia, New Zealand, and North Korea, among others. *See id.*

625. Interview with Dr. Oscar Santamaría, Mexican Trade Commissioner (BANCOMEXT), in Montreal, Can. (July 24, 1996).

626. *See* Stephen Zamora, *Exchange Control in Mexico: A Case Study in the Application of IMF Rules*, 7 HOUS. J. INT'L L. 103, 108 (1984).

627. In its recent history, exchange controls were established after the debt crisis to avoid the already astonishing capital flight the economy was suffering due to the crisis. *See* Carlos R. Valencia Barrera & Rodrigo Sanchez-Mejorada Velasco, *Fundamentals of Doing Business with Mexico After the Exchange*

the last crisis—exchange control is not contrary to international law. Nevertheless, "the existence, or possibility of future imposition, of exchange controls constitutes a major obstacle to [FDI],"[628] and foreign investors are reluctant to enter a market if there are no guarantees that could absorb or ameliorate the risk. The coverage of currency inconvertibility by the MIGA includes restricting currency transfers outside of the host country, excessive delays in acquiring foreign exchanges caused by the host government, and deterioration in conditions governing the conversion and transfer of local currency. Insurance consists of the payment of compensation for the losses the investor suffered because of these causes. Nevertheless, devaluation is not covered.[629]

> Insurance programs provided by developed nations and the World Bank do not provide protection against the devaluation of the host nation's currency. Investors must look to the private insurance market to obtain coverage for such risks. Companies such as Lloyd's of London, Citicorp International Trade Indemnity, and American International Underwriters provide such coverage.[630]

Devaluation of currency incurs legal problems because monetary depreciation erodes the value of the currency, together with legal rights and obligations.[631] "Continuous monetary instability affects all legal institutions, including law and order in the economic field, taking into account the delays of the law and legal uncertainties."[632]

Hedging against exchange risks is not an easy task for firms. The most common method is the use of forward contracts.[633] However, for FDI investors the contract period is not long enough,[634] thus making it costly. There are other instruments as well, such as forward options,[635] currency

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Control, 14 ST. MARY'S L.J. 683, 700 (1983); *see also* Zamora, *supra* note 626, at 103–04.

628. FATOUROS, *supra* note 607, at 49.

629. *See* Comeaux & Kinsella, *supra* note 619, at 41.

630. Ellinidis, *supra* note 515, at 315 (footnotes omitted).

631. *See* Eliyahu Hirschberg, *The Legal Aspects of Devaluation of Currency in Modern Times,* 87 COM. L.J. 183, 183 (1982).

632. *Id.*

633. *See* GILMAN, *supra* note 524, at 18.

634. Commonly, "The forward market for maturities longer than six months is usually thin in any currency." *Id.*

635. *See id.* Forward options are also called "forward exchange" where two parties agree to exchange currency and execute a deal in the future.

swaps,[636] exchange repurchase agreements, and risk guarantee agencies.[637] In Mexico, in 1991—prior to the crisis—the Bank of Mexico authorized broker-dealers to offer a limited form of currency exchange contracts, which hedged against expected devaluations of the peso.[638] However, devaluation is an ordinary risk (commercial) that has to be faced by every businessman investing abroad or even domestically. What MNCs can protect against is the possibility of the imposition of an exchange control as a consequence of devaluation.

V. CONCLUSIONS

In conclusion, FDI has the potential power to contribute to the economic development of Mexico. Moreover, it reduces the negative effects that other capital flows have on the economy, namely loans from commercial banks and short-term investments. Nevertheless, it is also clear that to take advantage of FDI flows, Mexico needs to create a more stable economic environment. This implies a sound macroeconomic policy, and most importantly, a fair distribution of income, which could be the biggest unresolved problem that Mexico has.

After analyzing the different rules in Mexico that regulate FDI, and realizing that the rule of law plays an influential role in FDI, one could note that Mexico is on the right track. Domestic regulations are in conformity with international standards and they have already proven to be efficient in the attraction of foreign capital in the form of direct investment.

However, in relation to the 1994 crisis, Mexico should address the problem of how to keep short-term speculative capital under control within the multilateral forum, namely the OECD, and how to increase stability in the capital markets. This is a point that needs further development so as to build a proposal for a possible legal regime to govern FDI, with the participation of host countries, home countries, and the different sectors among them (academic, governmental, and investment). I hope this Article might in some way help to raise the subject for further negotiations within the multilateral organizations.

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636. *See id.*

637. *See id.* at 18–20.

638. This was the beginning of a series of future options, which create instability in capital markets and should be raised within the multilateral forum. *See* Mark H. O'Donoghue et al., *Mexico Faces the Question of Swaps*, INT'L FIN. L. REV., Nov. 1994, at 19, 20.

Furthermore, Mexico needs alternative methods to foster FDI. The most important is that which has been mentioned above. Second, and due to its lack of an internationally accepted risk guarantee institution, Mexico should become a member of the MIGA. Its entrance could have a positive impact on MNCs and thus, attract more FDI. Third, Mexico should also become a member of the ICSID, thus giving more certainty to foreign investors.

Finally, accepting that the contestable markets theory has the potential to rule the globalization process in the next century, Mexico needs to actively participate within the multilateral forum, promoting the principles that have already been adopted in its domestic competition law. It should also reach agreements with its trade and investment partners to create clear and internationally-accepted competition rules to prevent distortive private and public behavior within its markets, namely, the North American market, and those which could be developed in the future as a consequence of trade and investment agreements.