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ABSTRACT

The investment provisions of NAFTA, which establish a liberal investment regime and a hospitable atmosphere for foreign investment amongst its signatories, the United States, Canada, and Mexico, represents a new chapter in Mexico's approach to foreign investment. This Article examines the significance of Mexico's shift to welcoming foreign investment and its concomitant acquiescence to traditional notions of expropriation and compensation espoused by more developed states. The author explores Mexico's historical love-hate

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relationship with foreign investment and its role over the years as leading voice for Third World concerns regarding the potentially exploitive nature of such investment. In this Article, a less flattering view of Mexico's participation in NAFTA emerges, one that perceives the Mexican government as repudiating not only its role as guiding hand in its own economy, but also its place as the leading proponent of the Third World cautionary approach to foreign investment.

TABLE OF CONTENTS

I. INTRODUCTION

The North American Free Trade Agreement (NAFTA)[1] is the first regional trade pact between a Third World state[2] and two

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1. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., Pub. L. No. 103-182, 107 Stat. 2057 [hereinafter NAFTA].

industrialized states.[3] Chapter 11 of NAFTA (Investment Chapter or Chapter 11) establishes a liberalized investment regime that expands the protection of foreign investors and investments beyond any treaty to which any NAFTA signatory is a party. Most of the provisions contained in this Chapter have been fashioned on traditional rules of international law that Mexico had successfully challenged since the end of the nineteenth century and for most of this century. Thus, the provisions in Chapter 11 amount to a repudiation of long-standing differences between Mexico and the United States concerning the protection of foreign investors and investments.[4] Moreover, Chapter 11 will have far-reaching implications in the larger context of international economic relations between Third World and industrialized states.

Throughout the last century, the Third World has opposed traditional rules of international law governing the rights of foreign investors. This opposition has caused significant conflict in North-South relations.[5] In the post-World War II era,

2. "Third World states" or "developing states" consist of a diverse group. Although Mexico is often referred to as a "newly industrialized state," it is still part of the Third World. Third World states, including the newly industrialized states, perceive that their solidarity is necessary because industrialized states have taken advantage of them in the past. *See generally* C. MICHAEL AHO & JONATHAN D. ARONSON, TRADE TALKS: AMERICA BETTER LISTEN 98 (1985) (discussing the diversity of the economic interest of Third World states and how they usually maintain a united front when dealing with the industrial world in economic issues).

3. The term "industrialized states" includes the several states of Western Europe, the United States, Canada, Japan, Australia, and New Zealand. It roughly coincides with the membership of the Organization for Economic Cooperation and Development (OECD). "Although the extent of governmental intervention in the economies of these states varies greatly, all of the states rely substantially on the market forces of supply and demand to determine what shall be produced and how it shall be distributed, and all allow considerable private ownership of the means of production." Harold K. Jacobson & Dusan Sidjanski, *The Continuing Evolution of the Global Political Economy*, *in* THE EMERGING INTERNATIONAL ECONOMIC ORDER: DYNAMIC PROCESSES, CONSTRAINTS, AND OPPORTUNITIES 13, 14 (Harold K. Jacobson & Dusan Sidjanski eds., 1982).

4. *See generally* GARY C. HUFBAUER & JEFFREY SCHOT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS (1992) (studying substance and form of possible NAFTA). For the debate over NAFTA, see Frances L. Ansley, *North American Free Trade Agreement: The Public Debate*, 22 GA. J. INT'L & COMP. L. 329 (1992).

5. The developing states of the "South" sought to engage the industrial states of the "North" in an ongoing dialogue on matters relating to development

developing states asserted their right to "full sovereignty" in the treatment of foreign investment located in their territories and used the United Nations and other multilateral fora to support their claims.[6] On the other hand, the United States and other industrialized states have insisted that, under traditional principles of international law, foreigners and foreign-owned property possess superseding contractual rights.[7] The conflict has sharpened with the increasing prevalence of Transnational Corporations (TNCs),[8] which are the main vehicles of foreign direct investment[9] and major actors in international economic

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and the global economic system. In particular, the developing states stressed that they would seek ". . . to obtain greater equality of opportunity and to secure the right to sit as equals around the bargaining tables of the world." Mahbub ul Hag, *Negotiating a New Bargain with the Rich Countries*, *in* BEYOND DEPENDENCY: THE DEVELOPING WORLD SPEAKS OUT 158 (Guy F. Erb & Valerina Kallab, eds., 1975). The demands by the South have been described as encompassing three broad areas: (1) changes favorable to LDCs in the broad economic principles under which economic interaction currently takes place (for example, nondiscrimination and primary reliance on market forces for determining the terms of trade); (2) specific concessions in, and greater amounts of, aid, including generous treatment of exports from developing states and specific commodity agreements; and (3) greater power in decisionmaking (for example, moving more negotiations to the United Nations where their voices carry more weight). Sidney Weintraub, *What Life is Left in the North-South Dialogue?*, 2 WORLD ECON. 453, 457 (1980); *see also* F.V. Garcia-Amador, *The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation*, 12 LAW. AM. 1 (1980); Timothy W. Stanley, *An Unorthodox View of The North-South Dialogue*, 18 ATLANTIC COMMUNITY Q. 310 (1980).

6. *See infra* notes 42-52 and accompanying text.

7. *See infra* notes 22-52 and accompanying text.

8. *See infra* note 25 and accompanying text. There is a continuing debate in both academic and governmental circles as to the proper definition of the TNC. The discussion focuses on the following issues: the requisite geographical spread (number of states in which the company must be involved); the ties that purport to link the TNC to its component parts (beneficial ownership in contrast to looser bonds, such as licensing or sales arrangements); size, managerial structure (the multinationality of management and its domestic versus international orientation); and ownership patterns (including the level of state involvement). For further discussion of the debate surrounding the definition of the TNC, see Yair Anaroni, *On the Definition of the Multinational Corporation*, 11 Q. REV. ECON. & BUS. 27 (Autumn 1971); Yitzhak Hadari, *The Structure of the Private Multinational Enterprise*, 71 MICH. L. REV. 729 (1973). The TNC is essentially a post-World War II phenomenon, facilitated by the Bretton Woods Institutions, which generally liberalized the world economy, and facilitated the growth of new techniques of communications. DON WALLACE, JR., INTERNATIONAL REGULATION OF MULTINATIONAL CORPORATIONS 5-12 (1976).

9. This Article focuses on "direct" private investment, instead of "portfolio" or "indirect" investment. Jurgen Voss defines direct investment as follows:

relations. Recently, the conflict has intensified with the phenomenon characterized as an emerging de facto system of transnationalization or globalization of economic relations. This change in international economic relations has led to attempts by both Third World and industrialized states to devise international mechanisms to support their respective positions regarding the rights of foreign investors. Third World states have unsuccessfully advocated for control of TNCs, while the United States and other industrialized states have attempted to reaffirm the traditional rules of international law through bilateral arrangements. For these reasons, most Third World states, especially Mexico and other Latin American states, resisted negotiating these bilateral arrangements in the past. They instead have chosen to debate the foreign investment issue in the multilateral arena. This was true until the last decade, when the Third World, lacking other financial alternatives, became more desperate for capital. In recent years, debt-burdened Third World governments increasingly have opened their economies to foreign investment.

To assure a meaningful assessment of the NAFTA provisions, the analytical framework of this Article includes the broader issues implicated in international economic relations; specifically, it addresses the conflict between Third World and industrialized states over the rules governing foreign investment. The obligations contained in NAFTA's Chapter 11 are part of an emerging new pattern of legal rules that promote the traditional principles of international law. Part II of this Article examines the international controversy over legal rules governing foreign direct investment, focusing on the divergence of interests between Third World and industrialized states. Part III focuses on the role of

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> Direct investment means the investment of money, goods or services in a project for entrepreneurial commitment, especially establishing subsidiary companies or takeover of enterprises; capitalizing branches and plants endowments; securing equity holdings with powers of management and control (generally of 25%); making long-term loans with low or partnership-type interest rates in conjunction with equity holdings.

Jurgen Voss, *The Protection and Promotion of Foreign Direct Investment, in Developing Countries: Interests, Interdependencies, Intricacies*, 31 INT'L & COMP. L.Q. 686 (1982). *See also* GERALD K. HELLEINER, TRANSNATIONAL CORPORATIONS, DIRECT FOREIGN INVESTMENT AND ECONOMIC DEVELOPMENT (1986).

foreign direct investment in Mexico's economic development and the evolution of its legal framework for foreign direct investment. This Part also evaluates, from a historical perspective, the role the Mexican government has played in the state's economic development and regulation of foreign direct investment. For the balance of the Article, Parts IV and V discuss the NAFTA investment provisions and the implications for the Third World.

II. THE INTERNATIONAL FRAMEWORK OF FOREIGN DIRECT INVESTMENT: A HISTORICAL POLITICO-ECONOMIC THIRD WORLD PERSPECTIVE

A. *The Nineteenth Century and Rules of State Responsibility to Aliens and Alien Property*

The international regime for foreign direct investment can be fully understood only in the context of the politico-economic factors that typify the international arena. The history of the ever-evolving international framework for foreign direct investment has been molded by the diverse political interests and economic circumstances of developed and developing states.[10] Since the end of the nineteenth century, the developed states have been preoccupied with securing international standards for the protection of the investments of their nationals and firms abroad, fashioned on the traditional rules of the protection of property. These traditional rules were developed from the law of state responsibility of injury to aliens and alien property.[11] The law of state responsibility of injury to aliens and alien property, "inspired by Western laissez-faire ideas and liberal concepts of property,"[12] underlies the traditional principles of customary international law.[13] This doctrine emphasizes restricting the

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10. *See generally* RACHEL MCCULLOCH, ECONOMIC AND POLITICAL ISSUES IN THE NEW INTERNATIONAL ECONOMIC ORDER (Int'l Inst. Economic Research Paper No. 22, 1979) (discussing the economic and political issues underlying the control of foreign capital).

11. *See* Samuel K.B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMP. L. Q. 588, 590 (1988).

12. *Id.*

13. *Id.* Originally conceived as a means of protecting aliens and alien property, the rules subsequently were applied to foreign firms and companies. *See generally* CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928); Georg Schwarzenberger, *The Protection of British Property Abroad*, *in* 5 CURRENT LEGAL PROBS. (George W. Keeton & Georg Schwarzenberger eds., 1952).

extent to which the host state can interfere with private property, thereby protecting the private property of aliens. In this regard, a breach of the international minimum standard "provides a legitimate basis for the exercise by the home State of the right of diplomatic protection of the alien."[14]

In the nineteenth century, when the prevailing rules governing foreign capital were legitimated mainly by treaties and custom, acceptance of these rules by the colonial territories and noncolonial territories economically linked to the European powers[15] ultimately derived from the military[16] and the financial

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14. Asante, *supra* note 11, at 590. For detailed discussion of minimum standard, see Eawintt M. Borchard, *The Minimum Standard in Protection of Aliens*, 33 A.S.I.L. PROC. (1939). As early as Vattel, legal scholars defended the rights of states to protect their citizens abroad. Vattel wrote that "whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen, and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety." 2 EMERIC DE VATTEL, THE LAW OF NATIONS, ch. VI, § 71 (Leiden, 1758). The rule that local remedies must be exhausted before appealing under international law is examined in detail in CASTOR P. H. LAW, THE LOCAL REMEDIES RULE IN INTERNATIONAL LAW (1961).

15. The protection of foreign capital in Africa and Asia was accomplished through the direct intervention of colonial powers. "Where local governments were weak and vulnerable, and where property relations had to be radically restructured, the balancing act was seldom successful . . . The result, in Africa and much of Asia, was the inexorable extension of imperial rule in the late nineteenth century." CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES 16 (1985). Latin American states had been nominally independent since the early 1800s, but remained linked to the European powers through the investment of foreign capital in their territories. These foreign investments included railroads and port facilities. *Id.* at 18. *See also* JOHN H. COATSWORTH, GROWTH AGAINST DEVELOPMENT: THE ECONOMIC IMPACT OF RAILROADS IN PORFIRIAN MEXICO (1981); RICHARD GRAHAM, BRITAIN AND THE ONSET OF MODERNIZATION IN BRAZIL 1850-1914 (1972); BUSINESS IMPERIALISM 1840-1930: AN INQUIRY BASED ON BRITISH EXPERIENCE IN LATIN AMERICA (D.C.M. Platt ed., 1977); WINTHROP R. WRIGHT, BRITISH-OWNED RAILWAYS IN ARGENTINA: THEIR EFFECT ON ECONOMIC NATIONALISM, 1854-1948 (1974).

16. As one author has noted:

> In the nineteenth century . . . interventionary force meant naval force . . . [u]ndeveloped states, weak and isolated as they were, could do little to prevent the successful use of force by Great Britain and other European powers . . . . Port cities could be shelled or occupied without threat of recrimination . . . . Then, too, foreign investments were located where naval force could easily protect them. Direct investments were either

strength of the European powers.[17] Notwithstanding the strength of the European powers and the need for foreign capital by underdeveloped territories, the traditional standard was challenged at the turn of the century by Latin American jurists and the socialist states of Eastern Europe.[18] The Latin American opposition to the implications of the traditional law of state responsibility, developed in the nineteenth century and reinforced in the twentieth, is embodied in the so-called Calvo Doctrine.[19]

> situated along the coast, or, like railroads, dependent upon access to the sea.

LIPSON, *supra* note 15, at 147. Local interventionary force is still used in the twentieth century, but it takes the form of covert force or the capacity to mobilize swiftly for direct military intervention. *Id.*

17. The financial strength of the United Kingdom and the other European powers was exercised mostly against Latin American states; usually for the collection of debt, one European power or the other would invade the Latin American states. This action has been called "gunboat diplomacy."

18. *See* Asante, *supra* note 11, at 589.

19. The Calvo Doctrine, developed by the Argentinean jurist Carlos Calvo, is discussed in varied forms in the following books: EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 795-809 (1915); JAMES L. BRIERLY, THE LAW OF NATIONS 181-83 (2d ed. 1938); CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 168-76 (1928); CHARLES G. FENWICK, INTERNATIONAL LAW 285-94 (3d ed. 1948); 5 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 635-54 (1934); PHILIP C. JESSUP, A MODERN LAW OF NATIONS 110-12 (1948); LINDEN A. MANDER, FOUNDATIONS OF MODERN WORLD SOCIETY 562-69 (1947); MATTHEW M. MCMAHON, CONQUEST AND MODERN INTERNATIONAL LAW 193-97 (1940); 1 LASSA F. OPPENHEIM, INTERNATIONAL LAW 312 (1944); THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES 522-23 (Herbert W. Briggs ed., 1938). This general principle has subsequently been written into investment contracts and national constitutions. As a specific constitutional clause, however, its meaning has varied considerably. Mexico, for instance, excludes diplomatic protection under any circumstances. In contrast, Bolivia grants limited rights of diplomatic protection when justice has been denied. DONALD R. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTERAMERICAN AND INTERNATIONAL LAW AND DIPLOMACY (1955); David E. Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEX. INT'L L. F. 289-90 (1971); Manuel R. G. Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 MARQ. L. REV. 205-19 (1950). Calvo himself wrote extensively on what he considered the international legal injunctions against foreign intervention, whether diplomatic or military. "Il est impossible de découvrir une seule raison sérieuse et légitime qui puisse justifier jusqu' à un certain point ces ingérences européenes dans les affaires interieures de l'Amerique." And, of course, Calvo argues that local rules and judicial decisions regarding foreign investment were "affaires interieures." 1 CARLOS CALVO, LE DROIT INTERNATIONAL 348 (5th ed. 1896); *see also* EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 792-816 (1928); Kurt Lipstein, *The Place of the Calvo Clause in International Law*, 1945 BRIT. Y.B. INT'L L. 130.

The Calvo Doctrine advocates the position that as a matter of international law, no state may intervene, diplomatically or otherwise, to enforce its citizens' private claims in a foreign state.[20] "[T]he Latin American response to the international minimum standard was the doctrine of national treatment."[21]

B. *The Twentieth Century and Emerging Rules for the Protection of Foreign Direct Investment*

1. The Post-World War Period and Emerging Norms Relating to the New International Economic Order

At the turn of the century, the United States joined the European powers in safeguarding foreign capital, utilizing the same measures under the same traditional rules.[22] The emergence of new states from colonial status after World War II,[23]

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20. Asante, *supra* note 11, at 591.

21. *Id.*

22. The United States endorsed traditional property rules to protect its foreign capital abroad soon after gaining independence. *See generally* J. LLOYD MECHAM, THE UNITED STATES AND INTER-AMERICAN SECURITY (1961) (discussing the protection of United States foreign interests abroad); MIRA WILKINS, THE EMERGENCE OF MULTINATIONAL ENTERPRISE: AMERICAN BUSINESS ABROAD FROM THE COLONIAL ERA TO 1914 (1970) (outlining United States policy with regard to foreign investment). United States foreign investment grew dramatically during this period. Although figures are not precise, they indicate about $300 million in United States investments in 1897, a figure that tripled in the next decade. With respect to Latin America, United States corporations made nearly one billion dollars in direct investments between 1897 and 1914. LIPSON, *supra* note 15, at 58.

23. Decolonization led to the creation of a multitude of new states, radically different in their economic, cultural, and social make-up from those of Western Europe. This political independence generated a sense of hope and enthusiasm among new states—feeling that their entry into the global political arena would enable them to acquire the means and substance necessary for their rapid economic development.

> This [politicial independence] was conceded throughout much of South and South-East Asia during the first post-war decade and to many African and some Caribbean territories by the mid-1960s, though the speed of withdrawal should not conceal the extreme reluctance with which Europeans sometimes departed . . . [b]ut once independent, the new

and the sustained attempts of these states to assert their economic independence and restructure their national economies, led to challenges to both the existing legal principles governing foreign direct investment and the legal rules themselves.[24]

Unable to challenge these traditional rules unilaterally, the newly independent states and other less developed states joined forces in multilateral fora, especially the United Nations.[25] To overcome the grand obstacles of bargaining individually, the developing states in 1962 created a caucus as a means of coordinating their views and insuring some degree of solidarity in the international arena. Because seventy-seven states participated in the first meeting of this group in the United Nations, it came to be known as the Group of 77.[26] In 1964, having become sufficiently more numerous to take advantage of their collective voting strength, the developing states managed to secure the establishment of the United Nations Conference of Trade and Development (UNCTAD).[27] While UNCTAD was

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> states very soon encountered the limits which had been imposed on their freedom of action by decades of merchantilist management.

CHARLES A. JONES, THE NORTH-SOUTH DIALOGUE: A BRIEF HISTORY 9 (1983).

24. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2d ed. 1973) (for a historical outline of the evolution of the law of state responsibility for the protection of alien and alien property); S. Azadon Tiewul, *The United Nations Charter of Economic Rights and Duties of States*, 10 J. INT'L L. & ECON. 687 (1976); *see generally* Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1 (1976).

25. *See generally* ROBERT W. COX & HAROLD K. JACOBSON, THE ANATOMY OF INFLUENCE: DECISION-MAKING IN INTERNATIONAL ORGANIZATION (1973); Chadwick F. Alger & David Hoover, *The Feudal Structure of Systems of International Organizations*, *in* PROCEEDINGS OF THE FIFTH INTERNATIONAL PEACE RESEARCH ASSOCIATION (IPRA) (General Conference, Varansi, India, 1975); Stanley Hoffmann, *An Evaluation of the United Nations*, *in* THE PROCESS OF INTERNATIONAL ORGANIZATION 71 (Robert S. Wood ed., 1971); Charles E. Rothwell, *International Organization and World Politics*, *in* INTERNATIONAL ORGANIZATION: POLITICS & PROCESS (Leland M. Goodrich & David A. Kay eds., 1973).

26. The Group of 77, although it today has more than 77 members, still has the same name. This caucusing mechanism has become an important vehicle for securing and maintaining the cohesion among the Third World states that is necessary for effective dealing with developed states. *See* Robert S. Jordan, *Why a NIEO?*, *in* THE EMERGING INTERNATIONAL ECONOMIC ORDER: DYNAMIC PROCESSES, CONSTRAINTS, AND OPPORTUNITIES, *supra* note 3, at 59.

27. Pressures for change in the rules governing international trade led to the concerted efforts of the developing states to convene UNCTAD in Geneva in 1964. UNCTAD itself has generated a considerable amount of secondary literature. A short account of its founding and first meeting is found in MICHAEL ZEMMIT CUTAJAR & ALISON FRANKS, THE LESS DEVELOPED COUNTRIES IN WORLD TRADE (1967).

designed to serve as a forum in which the newly emergent former colonies could bargain collectively with the developed states for more preferential terms of trade, it also became the forum for the developing states to come together to adopt a collective negotiating strategy[28] and to formulate and express a unified Third World position on matters important to them. The creation of UNCTAD marked the emergence of economic development as a major concern of Third World states, with foreign direct investment inextricably intertwined.

While the eventual comprehensive formulation of the Third World's claims regarding foreign direct investment arrived in the 1970s, it was fueled by the expansion of TNCs in the 1960s. A TNC may be defined as a business enterprise composed of a parent company and one or more subsidiaries located in two or more states, organized for the conduct of profitable international production and provision of goods and services.[29] Characterized

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See also A.S. FRIEDEBERG, THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (1968) (describing the first meeting of UNCTAD); Richard N. Gardner, *The United Nations Conference on Trade and Development*, *in* THE GLOBAL PARTNERSHIP 99 (Richard N. Gardner & Max F. Millikan eds., 1968) (for an excellent description of the formation of UNCTAD); 25 ROBERT S. WALTERS, INTERNATIONAL ORGANIZATION AND POLITICAL COMMUNICATION: THE USE OF UNCTAD BY LESS DEVELOPED COUNTRIES, *in* INTERNATIONAL ORGANIZATION 818 (1971) (describing the political framework of UNCTAD).

28. UNCTAD was designed to serve as a forum wherein the newly independent former colonies could have a collective voice. *See* Diego Cordovez, *The Making of UNCTAD, Institutional Background and Legislative History*, 3 J. WORLD TRADE L. 243 (for a discussion of the decision process in UNCTAD). The institutionalization of UNCTAD has provided a precedent for the creation of additional bodies under the auspices of the General Assembly of the United Nations.

29. The term Transnational Corporation (TNC) is used, instead of others such as multinational corporation or multinational enterprise, because that term is in contemporary usage by the United Nations agencies. For example, the 1988 United Nations Code of Conduct on Transnational Corporations provides the following explanation:

> The definition of a transnational corporation is designed to cover all enterprises that operate across national boundaries and in any field of activity, through affiliates or entities in two or more countries. It is immaterial whether the enterprise is *privately-owned*, *state-owned*, or of *mixed undertaking*. Indeed paragraph 2 [of the Code] provides that, for the application of the Code, it is irrelevant whether or not enterprises as described above are referred to in any country as transnational corporations: The intention is thus to ensure that the standards

by an ability to shift capital and resources, the TNC relies on technological innovations, which often result in oligopolistic control of markets.[30] Although the TNC parent and its subsidiaries are incorporated under national laws, the extension of TNC networks across national boundaries prevents municipalities from fully addressing the TNC.[31] This inability of any one state to fully control TNCs, and their status, as major vehicles for foreign direct investment, made TNCs the source of much concern for both industrialized and Third World states. While industrialized states sought to secure stable international regimes for their TNCs, Third World states feared TNC strategies. Third World intellectuals and policymakers focused on the economic and political power TNCs could wield in developing states, including their ability to penetrate class structure, national ideology, and local production bases.[32] In addition, TNCs were criticized as primary perpetuators of extreme economic

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> embodied in the Code are applicable to all *enterprises that operate on a transnational basis*. The importance of a *linkage* between the various affiliates or entities constituting the whole enterprise is also emphasized, the main focus being on the existence of a *decision-making network* that enables one or more entities within the network to exercise *significant influence* over the activities of the others.

The United Nations Code of Conduct on Transnational Corporations, at 8, U.N. Doc. ST/CTC/ser.A/4 (1988) (emphasis added).

30. The TNCs control of advanced technology, together with its managerial skills, its financial resources, and its ability to take advantage of economies of scale, permit TNCs to dominate local competition in domestic markets. HENRY J. STEINER & DETLEV F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 1178 (2d ed. 1976). *See generally* Jurgen Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies*, 31 INT'L & COMP. L. Q. 686 (1982).

31. *See* RAYMOND VERNON, STORM OVER THE MULTINATIONALS 1 (1977).

32. Underdevelopment is a historical process of global development of the international system.

> The evolution of this global system of underdevelopment-development has, over a period of time, given rise to two great polarizations which have found their main expression in geographical terms. First, a polarization of the world between countries: with the developed, industrialized, advanced, 'central northern' ones on one side, and the underdeveloped, poor, dependent, and 'peripheral southern' ones on the other.

Osvaldo Sunkel, *Transnational Capitalism and National Disintegration in Latin America*, *in* TRANSNATIONAL ENTERPRISES: THEIR IMPACT ON THIRD WORLD SOCIETIES AND CULTURES 49, 52 (Krishna Kumar ed., 1980).

dependence, as well as economic, social, and political underdevelopment.[33]

Third World states, suspicious of the impact of foreign direct investments and TNCs on their societies in general, and economic development in particular, called for the following changes: (1) restructuring the system of international organizations; (2) making reforms in the methods and objectives of international regulation; and (3) establishing a new international economic order.[34]

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33. The Indian economist Sanjaya Lall has classified attitudes against foreign direct investment into three categories: (1) the nationalist school, which seeks to limit the excessive profits of TNCs; (2) the *dependencia* school, typical of Latin American thinking on the subject, which views continued economic dependence of the Third World on the United States and Western Europe primarily as the result of foreign investment; and (3) the Marxist perspective, which, in addition to its hostility to the privately-owned nature of TNCs, sees the TNC as a tool of Western imperialism and as a perpetuator of economic contradictions and divisions on a global scale. *See* Charles P. Kindleberger, *The Multinational Corporation in a World of Militant Developing Countries*, *in* GLOBAL COMPANIES: THE POLITICAL ECONOMY OF WORLD BUSINESS 70-71 (George W. Ball ed., 1975); *see generally* SAMIR AMIN, ACCUMULATION OF A WORLD SCALE: A CRITIQUE OF THE THEORY OF UNDERDEVELOPMENT (1974); MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (1979); MAGNUS BLOMSTROM & BJORN HETTNE, DEVELOPMENT THEORY IN TRANSITION (1984); P. EBOW BONDZI-SIMPSON, LEGAL RELATIONSHIPS BETWEEN TRANSNATIONAL CORPORATIONS AND HOST STATES (1990); PETER J. BURNELL, ECONOMIC NATIONALISM IN THE THIRD WORLD (1986); DAN W. NABUDERE, IMPERIALISM, THE SOCIAL SCIENCES AND THE NATIONAL QUESTION (1977); Jorge Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 INT'L ORG. 38 (1961).

34. The first call for a new international economic order was made in connection with the question of permanent sovereignty over natural resources. In 1952, Chile raised this question during the debate on the Draft International Covenant on Human Rights. The debate on the right of self-determination elicited a discussion of economic, social, and political aspects of this right. Somenda K. Banerjee, *The Concept of Permanent Sovereignty Over National Resources: An Analysis*, 8 INDIAN J. INT'L L. 515 (1968). Accordingly, in 1952, the General Assembly of the United Nations passed a resolution on the exploitation of national resources. *Id.* at 519. In 1962, the General Assembly of the United Nations passed the Resolution on the Permanent Sovereignty over Natural Wealth and Resources, G.A. Res. 1803 (XVII), U.N. Doc. No. A/AC.97/5/Rev.2, *reprinted in* 1962 U.N.Y.B. 503-04. On the interpretation and legal implications, see GEORG SCHWARZENBERGER, ECONOMIC WORLD ORDER 40-49 (1970); Banerjee, *supra*; James N. Hyde, *Permanent Sovereignty Over National Wealth and Resources*, 50 AM. J. INT'L L. 854 (1956).

Developing states sought the creation of rules of international law that would promote rapid economic development by insuring they received their fair share of benefits accruing from TNCs in their territories.[35] In 1974, using their majority in the United Nations, these developing states succeeded in passing the United Nations General Assembly resolutions on the Establishment of a New International Economic Order (NIEO).[36]

The NIEO has three dimensions; political, economic,[37] and legal. Politically, the NIEO asserts the primacy of the nation-state.[38] Pursuant to the principles of the NIEO, the nation-state is entitled to exercise full and effective control over its resources, including the right to nationalize foreign assets and other "conditions and requirements calculated to enhance the dignity and authority of the nation-state."[39] Economically, the NIEO calls for "economic justice,"[40] a restructuring of the global economy that would promote rapid economic development by guaranteeing developing states their fair share of the world economy.[41]

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35. The developing states called for a special session of the General Assembly of the United Nations ostensibly to discuss the issues of development and raw materials. At this Sixth Special Session, the developing states called for the establishment of a New International Economic Order. One of the main aspects of this objective was to be attained by, among other things, the formation of producer cartels and the indexation of prices of the exports of developing states to their imports from the developed states. *See United Nations Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Special Sess., Agenda Item 7, U.N. Doc. A/Res/3201 (S-VI) (1974), *reprinted in* 13 I.L.M. 715 (1974); *Program of Action on the Establishment of a New International Economic Order*, G.A. Res. 3202 (S-VI), U.N. GAOR, 6th Special Sess., Agenda Item 7, U.N. Doc. A/Res/3202 (S-VI) (1974), *reprinted in* 13 I.L.M. 720 (1974).

36. *Id.*

37. *See* MCCULLOCH, *supra* note 10; *see also* INTERNATIONAL ECONOMICS STUDIES INSTITUTE, RAW MATERIALS AND FOREIGN POLICY 359 (1976).

38. *See* MCCULLOCH, *supra* note 10.

39. *Id.*

40. *Id.*

41. *See* ESSAYS ON INTERNATIONAL LAW AND RELATIONS IN HONOUR OF A.J.P. TAMNES (H. Meijers & E. W. Venday eds., 1977) (for discussions of the legal effect of the General Assembly Resolutions); *see generally* E. LASZLO ET AL., THE OBJECTIVES OF THE NEW INTERNATIONAL ECONOMIC ORDER (1978); JOHN A. MATHIESON, BASIC NEEDS AND THE NEW INTERNATIONAL ECONOMIC ORDER: AN OPENING FOR NORTH-SOUTH COLLABORATION IN THE 1980S (Overseas Development Council Working Paper No. 4, May 1981); L. MINIC, THIRD WORLD CHALLENGE (1981).

One of the key components of the NIEO is the Charter of Economic Rights and Duties of States,[42] adopted by the United Nations in 1974. The Charter of Economic Rights was conceived originally as the basic framework of fundamental principles for international economic relations between Third World and developed states. It advocates the advancement of more rational and equitable international economic relations, the strengthening the economic independence of developing states, and the necessity for the entire international community to promote economic and social progress in all states, especially developing ones.[43] One of the main principles of the Charter, Article 2 (2), confers on every state the right to regulate foreign investment, including the activities of TNCs within its national jurisdiction; it also confers the right to nationalize alien property upon payment of adequate compensation.[44] The Charter thus challenges traditional principles of customary international law that govern foreign direct investment, such as determining compensation for expropriation or nationalization and settling foreign investment disputes.

Article 2 of the Charter of Economic Rights asserts that the right to nationalize and the standard of compensation are governed by domestic laws and policies, not international law.[45] In this regard, Article 2 has been described as "a classic restatement" of the Calvo Doctrine.[46] While the industrialized states do not object to the developing states asserting their rights to nationalize or to expropriate foreign property, they have expressed substantial concern over the issue of compensation. Industrialized states, particularly the United States, have urged full and adequate compensation for any expropriated party.[47]

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42. *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975), *reprinted in* 14 I.L.M. 251 (1975) [hereinafter *Charter of Economic Rights*].

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* MCCULLOCH, *supra* note 10, at 360.

47. For the United States, the correct standard is "prompt, adequate, and effective compensation" which, for most United States investors, means "fair market value paid in freely transferable dollars." RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 166, 185 (1965). Generally, the traditional position of industrialized states on expropriation is that the taking by a state of

Third World states, while not denying payment of compensation, insist that the decision should rest solely with the expropriating state in accordance with its national laws or policies.[48]

If a dispute arises from the sovereign exercise of nationalization, expropriation, or over any foreign investment matter, Article 2 of the Charter of Economic Rights provides that the dispute be resolved in accordance with the national judicial or arbitral procedures.[49] Industrialized states have opposed this position; they argue that the appropriate approaches are the settlement of foreign investment disputes, international arbitration, or adjudication.[50] The proposition of an independent international authority for the resolution of investment disputes, which has been challenged by Latin American states since the

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alien property is wrongful under international law if any of the following conditions exist: (1) it is not for a public purpose; (2) it is discriminatory; or (3) provision is not made for the payment of prompt, adequate, and effective compensation. GEORG SCHWARZENBERGER, FOREIGN INVESTMENTS AND INTERNATIONAL LAW 4 (1969).

48. In this regard, some developing states have claimed that they are obligated to pay only the book value of the foreign investment, which is the original cost less any depreciation. *See* Don C. Piper, *New Directions in the Protection of American-owned Property Abroad*, 4 INT'L TRADE L.J. 323, 325-30 (1979). Certain developing host states consider the justification for requiring compensation to be the elimination of unjust enrichment to the expropriating state, rather than the duty to give the investor the value of the expropriated property. *See* Eduardo J. de Arechaga, *State Responsibility for the Nationalization of Foreign Owned Property*, 11 N.Y.U. J. INT'L L. & POL. 179, 181-83 (1978).

> What makes the principle of unjust enrichment highly relevant in the field of nationalizations is its equitable foundation, which makes it necessary to take into account all the circumstances of each specific situation and to balance the claims of the dispossessed alien with the undue advantages that he may have enjoyed prior to nationalization . . . [it] requires that the undue enrichment acquired by foreign companies during a period of monopoly or of highly privileged economic position, as, for instance, during a period of colonial domination . . . .

Eduardo J. de Arechaga, *Application of the Rules of State Responsibility to the Nationalization of Foreign-Owned Property*, *in* LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 220, 223 (Kamal Hossain ed., 1980).

49. *See Charter of Economic Rights*, *supra* note 42. Developing states have argued that compensation should take into account the ability of the host state to pay. Piper, *supra* note 48, at 323.

50. *See* JONES, *supra* note 23, at 1-3.

end of the nineteenth century,[51] generally has been rejected by Third World states.[52]

2. The Aftermath

The so-called North-South dialogue,[53] a phrase coined in the 1970s to describe the necessary framework for negotiations between Third World and industrialized states in the aftermath of the adoption of the NIEO and Charter of Economic Rights, now has been referred to as the "North-South stalemate."[54] Although the United Nations has respected the spirit of the declaratory principles of the Charter, particularly by establising the Commission on Transnational Corporations to deal with issues concerning TNCs,[55] very few results have been realized. Third

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51. *See* Aron Broches, *The Experience of the International Centre for Settlement of Investment Disputes*, *in* INTERNATIONAL INVESTMENT DISPUTES: AVOIDANCE AND SETTLEMENT 75 (Seymour J. Rubin & R. Nelson eds., 1985).

52. *See* Alden F. Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131, 137 (1976). The Calvo Doctrine maintains that "aliens are only entitled to those legal rights and privileges enjoyed by nationals, and hence may seek redress for grievances only before local authorities and to the extent permitted by local law." *Id.* As a result, Latin American states held firmly to the position that "disputes involving a Latin state, including arbitrations to which a state is a party, must be adjudicated in accordance with local law." *Id.*

53. *See* JONES, *supra* note 23, at 1.

54. *See generally id.* at 81-114.

55. The United Nations Commission on Transnational Corporations (CTNC) has its origins in E.S.C. Res. 1721, U.N. ESCOR, 53rd Sess., Supp. No. 1, U.N. Doc. E/52-a (1972), which requested the Secretary General to establish a Group of Eminent Persons to study the effects of TNCs on world development and international relations. In the report, the Group of Eminent Persons recommended the creation of a commission on transnational corporations attached to the ECOSOC that would work, *inter alia*, to develop both specific and more general arrangements dealing with TNCs. *Report of the Group of Eminent Persons, The Impact of Multinational Corporations on Development and on International Relations*, U.N. Doc. E/5300/Rev. I, ST ESA/6, at 55 (1974). The CTNC was established pursuant to E.S.C. Res. 1913, U.N. ESCOR, 57th Sess., Supp. No. IA, U.N. Doc. E/5570/add. I (1976). CTNC is composed of forty-eight members, and member-states are elected from the following regional groupings: twelve from Africa; eleven from Asia; ten from Latin America; ten from Western Europe, North America, and Oceania; and five from Eastern Europe. *Id.* In terms of its agenda to date, three issues have received extensive attention from the CTNC: (1) the formulation of the code of conduct on TNCs; (2) the activities of

World states have made various attempts in multilateral fora to introduce new legal norms to govern foreign investment and technology transactions to safeguard their economic interests.[56] To achieve this end, Third World states have vigorously pursued the creation of international agreements and codes of conduct to regulate the activities of TNCs.[57] The various international and regional efforts at creating a multilateral system for the regulation of TNCs stem from concern regarding the negative aspects of their operations. Moreover, the Third World has recognized that national regulation, unaided by some international mechanism, is clearly inadequate to deal with the global strategies of TNCs.[58]

The 1980s witnessed a substantial decline in the flow of direct and indirect investment to Third World states. Specifically, gross foreign direct investment declined during this period from $13 billion in 1981 to $9.5 billion in 1986; in 1987, however, it returned to the 1981 level.[59] The pre-1987 decline was due partially to the perception by industrialized states, especially the United States, that the legal standards for the protection of foreign investment in developing states were unstable[60] following the Third World's call for a NIEO. Consequently, TNCs from

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TNCs in South Africa and Namibia; and (3) the role of transnational banks in the international economy. *See* P. EBON BONDZI-SIMPSON, LEGAL RELATIONSHIPS BETWEEN TRANSNATIONAL CORPORATIONS AND HOST STATES (1990).

56. *See* Timothy W. Stanley, *International Codes of Conduct for MNC's: A Skeptical View of the Process*, 30 AM. U.L. REV. 973, 974 (1981).

57. *Id.*

58. In 1970, the International Court of Justice, in the famous case of *The Barcelona Traction Company* (Belgium v. Spain), acknowledged the lack of international law in this area:

> Considering the important developments of the first half century, the growth of foreign investments, the expansion of the international activities of corporations [in particular of holding companies] which are often multinational, and 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 Company (Belg. v. Spain), 1970 I.C.J. 3, 46-47 (1970).

59. *See* Malcolm D. Rewat, *Multilateral Approaches to Improving the Investment Climate of Developing Countries: The Cases of ICSID and MIEA*, 33 HARV. INT'L L. J. 102 (1992).

60. Some theorists have argued that this lack of a truly international system for TNCs has deprived these corporations of their ability "to pursue 'the true logic of the global economy.'" George Ball, *Cosmocorp: The Importance of Being Stateless*, 6 COLUM. J. WORLD BUS. 25 (1967).

developed home states invested in other developed states rather than Third World states.

By the mid-1980s Third World states with an increased need for capital, and left with few other financial alternatives, began negotiating bilateral investment treaties (BITs) with developed states.[61] Although the BIT movement began slowly, and failed to attract the most developed of the Third World states, such as Mexico, it has grown tremendously in the last decade.[62]

The BIT movement has removed the North-South issue of foreign direct investment and TNC operations from the multilateral fora. Developed states, greatly outnumbered in the multilateral fora, have sought instead to structure stable international environments for foreign direct investment that reaffirmed the traditional principles of customary international law governing the protection of alien property.[63] The political unwillingness of industrialized states to address the issue of international regulation of foreign direct investment and TNCs on a united basis has nearly forced Third World states to utilize the

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61. The first BIT was signed between the Federal Republic of Germany and Pakistan in 1959. Athena J. Pappas, *References on Bilateral Investment Treaties*, 4 INT'L CENTRE SETTLEMENT INVESTMENT DISP. (ICSID) REV. FOREIGN INVESTMENT L.J. 189, 189 (1989). By 1991, there were more than three hundred treaties involving, among them, nearly all the Western industrialized states and over ninety developing states. Mohamed I. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 7 ICSID REV. FOREIGN INVESTMENT L.J. 339 (1992).

62. For a discussion the United States BIT movement, see Kenneth J. Vandevelde, *U.S. Bilateral Investment Treaties: The Second Wave*, 14 MICH. J. INT'L L. 621, 622 (1993); *see also* Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW 655 (1990).

63. Salacuse, *supra* note 62, at 659-60. Selacuse adds:

> [T]he BIT movement as a whole may be seen as part of an ongoing process to create a new international law of foreign investment to respond to the demands of the new global economy that has so rapidly emerged within the last few years . . . . Although BITs themselves only bind the two countries concerned and are probably not sufficiently widespread to constitute customary international law, the process of study, consultation, discussion, and negotiation that has been part of the BIT movement has certainly laid a foundation for the creation of an international investment framework that may eventually attract the consensus of the nations of the world.

Id. at 675.

constraints of the old international economic order. International arrangements such as the General Agreement on Tariffs and Trade (GATT)[64] and the International Monetary Fund[65] have facilitated the flow of foreign investment and the development of TNCs. International minimum standards of state responsibility have protected these entities,[66] thereby eroding the gains of the NIEO and the Charter of Economic Rights.

III. MEXICO: FOREIGN DIRECT INVESTMENT AND ECONOMIC DEVELOPMENT 1910-1993

A. *Historical Role of Foreign Direct Investment in Mexico: An Overview*

Foreign direct investment first assumed a major role in Mexico's economy during the administration of Porfirio Díaz (1876-1911).[67] The ascendance to power of President Díaz brought to Mexico the political stability of a thirty-four year dictatorship and liberal economic policies that welcomed foreign investment.[68] Believing that substantial investments in mining, utilities, and basic industries would bring Mexico into an economic position commensurate with that of industrialized states, this administration established a deliberate policy for

64. *General Agreement on Tariffs and Trade, opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

65. The International Monetary Fund (IMF) is a major force in promoting market-oriented policy reforms and reducing poverty in those states making the transition to market economies. Kim Reisman, *The World Bank and the IMF: At The Forefront of World Transformation*, 60 FORDHAM L. REV. 340 (1992).

66. Traditional principles of customary international law relating to investments revolve around the law of state responsibility for injury to aliens and alien property—this international minimum standard was developed in the nineteenth century. *See* Asante, *supra* note 11, at 590.

67. Although the conquest by Spain of the Aztecs had signaled the importance of the international economy and the external sector in the economic history in Mexico, foreign investment truly assumed a major role in Mexico only during the administration of Porfirio Díaz.

68. By the 1880s substantial amounts of capital began to flow into Mexico from Great Britain and the United States, especially in the areas of production and transportation of primary commodities, mostly minerals. As a result of these investments, the Mexican railroad system grew to a network of over 12,000 miles by 1910. *See* ROGER D. HANSEN, THE POLITICS OF MEXICAN DEVELOPMENT 17 (1971).

attracting foreign investment.[69] President Díaz and the *científicos* embraced an interpretation of economic liberalism that led the Mexican government to open the door to foreign capital.[70] At the end of the so-called *Porfiriato*, foreign investments poured into railroad construction, mining, public utilities, real estate, banking, manufacturing, and commerce.[71] The Mexican economy thrived on exports of primary products, with communications and other infrastructure designed to serve the needs of the mostly foreign owned export companies.[72] Although actual figures are

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69. *See* HISTORIA MODERNA DE MÉXICO EL PORFIRIATO: VIDA ECONÓMICA (Daniel Cosio Villegas ed., 1965) (outlining Mexico's economic growth during the administration of Porfirio Díaz). Foreign investment in Mexico, both direct and indirect, in 1911 has been estimated at United States $1,700 million, of which between $650 million and $1,045 million came from the United States. HARRY K. WRIGHT, FOREIGN ENTERPRISE IN MEXICO 53 (1971). "Whatever the actual figures, it appears that by the end of the Díaz era foreigners probably owned over half of the total wealth of the country and that foreign capital dominated every area of productive enterprise except agriculture and the handicraft industries." *Id.* (citations omitted). *See generally* LEOPOLDO SOLIS, LA REALIDAD ECONÓMICA MEXICANA: RETROVISIÓN Y PERSPECTIVAS 47 (1981) (discussing the history of Mexico's economic growth).

70. *See* WRIGHT, *supra* note 69, at 52. The "*científicos*" were a group of highly educated and modern government managers, who were convinced of the need to achieve economic growth and development through foreign investment. "In the *científicos* interpretation of progress, foreign investors supplied the entrepreneurial spirit and the financing that Mexicans lacked in the short run . . . a program of incentives and promotion of foreign investment was created, and confidence was thus maintained for both national and foreign investors." ROBERT G. NEWELL & LUIS F. ROBIO, MEXICO'S DILEMMA: THE POLITICAL ORIGINS OF ECONOMIC CRISIS 15 (1984).

71. Foreign investment was particularly significant in railroad construction and mining, and, to a lesser degree, in public utilities. WRIGHT, *supra* note 69, at 53. Direct foreign investment, especially North American and British, was oriented principally toward the production and transportation of primary commodities for the export market. *Id.* "Porfiriato" is the term used to refer to the administration of President Porfirio Díaz (1876-1911).

72. VAN R. WHITING, JR., THE POLITICAL ECONOMY OF FOREIGN INVESTMENTS IN MEXICO 59 (1992). In the nineteenth century, foreign investment in Mexico, both direct and indirect, came from Western Europe as well as from the United States, "but by the turn of the century, as the United States embarked upon its imperialist adventures in the Caribbean, investment by the United States had begun to predominate." *Id.* In 1897, thirty-eight percent of all foreign investment in Mexico was from the United States, and twenty-nine percent of all United States foreign investment (direct and indirect) was in Mexico. Most of these investments were in mining and railroads. *See Comité Bilateral de Hombres de*

not available, recent studies suggest that by the end of the *Porfiriato*, foreigners owned over half of the total wealth of Mexico and foreign capital dominated most areas of productive enterprise.[73]

The presence of foreign investors during the *Porfiriato*[74] was largely to blame for many of Mexico's economic ills at the beginning of this century and fueled the Mexican Revolution of 1910.[75] The Revolution established the ideological and political foundation for a fundamentally different state role in the Mexican economy.[76] The new boundaries for the role of the Mexican state were established in the Mexican Constitution of 1917, which placed restraints on foreign economic activities and foreign land ownership.[77] By incorporating the anti-foreign sentiments of the Mexican revolutionaries, the Mexican Constitution emphasized Mexican sovereignty and independence from foreign economic control.

For more than sixty years, the interventionist, nationalist Mexican state, created by the Mexican Constitution, contributed significantly to the regulation of foreign direct investment in Mexico. Indeed, foreign direct investment provided the most direct challenge for state policy during this so-called nationalist period.[78] Yet the Mexican policymakers were able to meet these

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Negocios, México-Estados Unidos, Inversiones Extranjeras Privadas Directas en Mexico 77-81 (México: Comité Bilateral, 1971).

73. WHITING, *supra* note 72, at 59. "[B]y the end of the Díaz era, foreigners probably owned over half of the total wealth of the country and . . . foreign enterprise dominated every areas of productive enterprise except agriculture and the handicraft industries." *Id. See also* WRIGHT, *supra* note 69, at 54. *See supra* notes 69-72 and accompanying text.

74. *See* COATSWORTH, *supra* note 15, at 95-114.

75. *See* NORA HAMILTON, THE LIMITS OF STATE AUTONOMY: POST-REVOLUTIONARY MEXICO 3 (1982) ("The [R]evolution of 1910 destroyed the pre-existing state apparatus and enabled the revolutionary leadership to form a new state within the context of structural options resulting from Mexico's prior development as well as new forces, alliances, and conflicts emerging from the revolution itself.").

76. "The ideals and aims that emerged during ten years of civil struggle—emancipation of the rural and laboring classes and recovery of the country's economic destiny—have been basic to the philosophy of every administration since that time." WRIGHT, *supra* note 69, at 61.

77. *See* CONSTITUCIÓN POLITICA DE LOS ESTADOS MEXICANOS (1917), *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gilbert H. Flanz eds. 1988) [hereinafter MEX. CONST.]. The Constitution promulgated February 5, 1917, has been in effect, with significant amendments, ever since.

78. *See* WHITING, *supra* note 72, at 55. Whiting refers to this period as the "nationalist vision" or "metapreference." He maintains that one of the main

challenges by choosing new policy instruments as new problems with foreign direct investment were identified.[79] Until the economic debt crisis of 1982, Mexico was able to structure a pattern of state action that was not irrational "nor did it reflect passive submission to the preferences of foreign investors."[80]

The evaluation of Mexico's strength and endurance regarding foreign direct investment requires familiarity with the history of Mexican economic development in general and foreign direct investment in particular. From Mexico's economic development strategies of primary product exports[81] to import substituting industrialization,[82] the Mexican state has intervened in the process of Mexico's economic development, and much of that intervention has been against the interests of foreign capital.[83] The result of this interventionist state action is that, although Mexico continues to be one of the largest foreign direct investment hosts among developing states, foreign investment has been limited to those sectors defined by the Mexican government. Foreign direct investment in Mexico has increased steadily since 1940 and rapidly since 1960, as global investment has grown.[84]

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aspects of this nationalist metapreference for local ownership was "foreign ownership to complement nationally owned industries and to produce what state and domestic private firms could not." *Id.*

79. *Id.* at 53.

80. *Id.*

81. The overall growth of the Mexican economy during the thirty-four years of the Díaz administration was reflected in the performance of the state's external sector. Between 1877 and 1910 the value of Mexican exports increased by more than 600%. *See* MIGUEL D. RAMIREZ, MEXICO'S ECONOMIC CRISIS: ITS ORIGIN AND CONSEQUENCES 17 (1989).

82. Import substituting industrialization, the Mexican model for economic development during 1940-1970, called for the development of industry to produce what had formerly been imported. This economic strategy is attributed to "transforming Mexico from a backward rural economy into one of the industrial giants of the developing world." *Id.* at 41-43. However, it also "exacerbated existing structural weaknesses endemic to the Mexican economy" and thus paved the way for future economic crises. *Id.* at 41.

83. WHITING, *supra* note 72, at 53.

84. Mexico is among the developing states that have received the most foreign investment; from 1955 to 1982, net foreign direct investment reached almost $113.5 billion (United States dollars). *See* WILSON P. NUÑEZ, FOREIGN DIRECT INVESTMENT AND INDUSTRIAL DEVELOPMENT IN MEXICO (1990). At the end of 1991, the United States was Mexico's dominant foreign investor, with sixty-three percent of cumulative foreign direct investment in Mexico; Germany was ranked second with approximately six percent, and Canada's share of Mexico's

Nevertheless, Mexico's share of global foreign direct investment has diminished steadily.[85] In comparison to other states, despite its high ranking among developing states, Mexico's dependence on foreign direct investment is only average.[86]

B. *The Constitutional Context*

The 1917 Mexican Constitution[87] embodies the principles of the Mexican Revolution of 1910,[88] including sovereignty and independence from foreign, economic, and political control. The modernization of Mexico during the *Porfiriato*,[89] based on integration in the world market and foreign control of vital sectors of the economy, created a dependent economic structure that limited the Mexican government's control over these sectors, and consequently hampered its ability to direct economic development.[90] By the early twentieth century, the economic

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cumulative foreign direct investment was less than two percent. See REPORT TO THE HONORABLE RICHARD A. GEPHARDT, MAJORITY LEADER, AND TO THE HONORABLE STANDER LEVIN, HOUSE OF REPRESENTATIVES, NORTH AMERICAN FREE TRADE AGREEMENT, UNITED STATES-MEXICAN TRADE AND INVESTMENT DATA (Sept. 25, 1992) [hereinafter GEPHARDT REPORT].

85. GEPHARDT REPORT, *supra* note 84.

86. *Id.*

87. MEX. CONST., *supra* note 77. References to the Mexican Constitution are to the Constitution of 1917, which replaced the Constitution of 1857, signed at Queretaro on January 31, 1917. The Mexican Constitution has been subject to numerous amendments.

88. Wilkie points out that the Revolution of 1910 prescribed the program of state-directed integration of Mexican social and economic life. *See* JAMES W. WILKIE, THE MEXICAN REVOLUTION: FEDERAL EXPENDITURE AND SOCIAL CHANGE SINCE 1910 (1970). "The ideals and aims that emerged during ten years of civil struggle—emancipation of the rural and laboring classes and recovery of the country's economic destiny—have been basic to the philosophy of every administration since that time." WRIGHT, *supra* note 69, at 61. There are numerous books on the Mexican Revolution of 1910. For an account of the Revolution in the context of Mexican-United States relations during that period, see HOWARD F. CLINE, THE UNITED STATES AND MEXICO 113-213 (1963).

89. *See generally* Luis N. d'Olwer et al., *El Porfiriato: La Vida Economica*, *in* 7 HISTORIA MODERNA DE MEXICO 973-1185 (Daniel C. Villegas ed., 1965).

90. During the period spanned by the regime of Porfirio Díaz (1876-1911), it was believed that substantial investments in mining, utilities, and basic industries would bring Mexico into a position commensurate with that of industrialized states. Direct and indirect foreign investment in Mexico in 1911 has been estimated at United States $1,700 million, of which between $650 million and $1,045 million was from the United States. *See* WRIGHT, *supra* note 69. "Whatever the actual figures, it appears that by the end of the Díaz era foreigners probably owned over half of the total wealth of the country and that

penetration of Mexico by foreign enterprises triggered a growing fear of increasing foreign influence.[91] In response to this fear, the Mexican Constitution established the framework for a strong interventionist state[92] and reserved to it exclusive control over the Mexican economic system.[93] These constitutional principles support the restrictive Mexican economic policy toward foreign investment that predominated until a decade ago and continues to influence Mexico's economic development today.[94]

The Mexican Constitution divides the enactment and investment policy implementation authority between the Mexican Congress and the Federal Chief Executive (Executive).[95] Article 73 empowers Congress to encourage the promotion of Mexican investment and regulation of foreign investment.[96] Article 89 compels the Executive to see that laws passed by the Congress are faithfully executed.[97] Amendments to the Constitution in

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foreign capital dominated every area of productive enterprise except agriculture and the handicraft industries." *Id.* (Citations omitted). While foreign capital multiplied the resources of the national government and facilitated the centralization of power, it limited the government's control over these resources and thus the ability to direct economic development. President Porfirio Díaz attempted to modify the dependent economic structure through such measures as partial nationalization of the railroads, and to offset the increasing preponderance of United States interests by encouraging European investment. *See* HAMILTON, *supra* note 75, at 51-52; *see also* John H. Coatsworth, *Los Orígenes del Autoritarismo Moderno en México*, *in* XVI, 2 (62) FORO INTERNACIONAL 205, 207.

91. Many of these enterprises were mineral companies which are still operating today, notably America Smelting & Refining, Cananea Consolidated Copper, the Fresnillo Company, and Compania Minera de Penoles.

92. The final draft of the Mexican Constitution called for an interventionist state over a broad spectrum of activities, expanding the functions of the Mexican state to encompass measures to secure national sovereignty over natural resources, the access of peasant communities to land, and the rights of labor. *See* HAMILTON, *supra* note 75, at 37-38; *see also* WHITING, *supra* note 72, at 61.

93. Articles 25, 26, and 28 of the Mexican Constitution establish the foundation for the economic, political, and social structure of the state. MEX. CONST., *supra* note 77. These articles define the role of the Mexican state in the economy. Julio C. Treviño, *Mexico: The Present Status of Legislation and Government Policies on Direct Foreign Investments*, 18 INT'L LAW. 297, 299 (1984).

94. Whiting maintains that the Mexican Constitution "provided the parameters not only for foreign investment regulation specifically but also for state intervention in the economy more generally." WHITING, *supra* note 72, at 61.

95. MEX. CONST., *supra* note 77, art. 73, § XXIX-F, art. 79.

96. MEX. CONST., *supra* note 77, art. 73, § XXIX-F.

97. Article 89 grants the Executive the power "[t]o promulgate and execute the laws enacted by . . . Congress providing for their exact enforcement in the

1983 further expanded the broad system of government powers to direct the national economic development.[98] These amendments, which were a response to Mexico's economic crisis in 1982,[99] permit the Mexican government to adopt broad measures in economic matters and to reorient the principles governing the actions of the state and private individuals.[100] In recent years, these measures have emphasized the role of private investment as the catalyst for economic development.[101] Accordingly, the Mexican government has actively promoted foreign direct investment as a critical element of its plans for the future growth of the Mexican economy.

Articles 27 and 28 of the Mexican Constitution have set the foundation for most government regulation in the area of foreign

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administrative sphere." MEX. CONST., *supra* note 77, art. 89(I). In addition to indirect control over the legislative process, the President has authority to enact general rules in the form of regulations, which explain and supply detailed precepts for the application of specific laws. *See* WRIGHT, *supra* note 69, at 16-17. Most statutes are supplemented by regulations. Regulatory provisions may not contradict those of the correlative statute and therefore are subordinate. Promulgation and publication are made in the same manner as statutes, and the enactment of a regulation takes the form of a decree. *Id.* Although the political structure of Mexico is beyond the scope of this Article, a few basic principles are essential for an understanding of the legislative process. Mexico has only one primary political party, commonly referred to as the PRI (Partido Revolucionario Institucional). The PRI (or its predecessors) has elected every President, the overwhelming majority of governors, and most positions in the Congress, as well as state and local governments. *See* MARTIN C. NEEDLER, MEXICAN POLITICS: THE CONTAINMENT OF CONFLICT 86-90 (1982); *see also* MARVIN ALISKY, THE GOVERNORS OF MEXICO (1965); PABLO G. CASANOVA, LA DEMOCRACIA EN MÉXICO (1964).

98. Amendments to the Constitution, approved Feb. 2, 1983, *reprinted in* Federal Official Gazette, D.O., Feb. 3, 1983 (amending arts. 16, 25, 27 (§§ XIX, XX), 28, 73 (§§ XXIX-A, XXIX-E, XXIX-F) of the Mexican Constitution); *see also* JOSÉ FRANCISCO RUIZ MASIEU & DIEGO VALDES, NUEVO DERECHO CONSTITUCIONAL MEXICANO 502-04 (1983) (comparing actual and original text of Constitution).

99. *See infra* notes 196-208 and accompanying text.

100. Amendments to the Constitution, approved Feb. 2, 1983, *reprinted in* Federal Official Gazette, Feb. 3, 1983 (amending arts. 16, 24, 26, 27 (§§ XIX, XX), 28, 73, 29D, 29E & 29F of the Mexican Constitution). "The constitutional amendments . . . create a broad system of powers in the Congress and especially in the Federal Chief Executive, and permit the federal government to plan and carry out all the strategy of development of the country in accordance with the National Plan for Development." Treviño, *supra* note 93, at 299 (*citing* MEX. CONST. arts. 25 and 25, as amended).

101. "In accordance with amended Article 26 of the Constitution, the government has insisted that its economic planning be democratically planned based on popular consultations with interested parties." Treviño, *supra* note 93, at 299 n.11.

investment in Mexico since 1917. These Articles largely are directed against foreign interests. Article 27 has three very important provisions that have impacted the regulation of foreign investment in Mexico: (1) national sovereignty over national resources, (2) the implementation of the "Calvo Clause"[102] and, (3) the formation of the so-called "Restricted Zone."[103] Article 27 vests land ownership, water, and subsoil rights in the Mexican state and gives the state the right to regulate the use of national resources to preserve and ensure a more equitable distribution of public wealth.[104] Section I of Article 27 further vests only Mexican nationals with the right to own land, waters, and their appurtenances.[105] The Mexican state may grant the same ownership rights to foreigners if they agree to consider themselves nationals with respect to the property and promise not to invoke the protection of their governments. Violation of this agreement results in forfeiture of the property. This "Calvo Clause" is required not only in all cases in which property is purchased by a foreigner, but also in all contract concessions with the Mexican government.[106]

Article 27 specifically prohibits foreign ownership of land within a zone of one hundred kilometers along the borders and

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102. Mexico excludes diplomatic protection under any circumstances. *See* David E. Graham, *The Calvo Clause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEX. INT'L L.J. 289 (1971); Manuel R. G. Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 MARQ. L.R. 205 (1950); *see generally*, DONALD R. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY (1955); *see also* THE SECRET WAR IN MEXICO: EUROPE, THE UNITED STATES AND THE MEXICAN REVOLUTION (1981); and *supra* note 15 and accompanying text.

103. *See* MEX. CONST., *supra* note 77, ch. I, art. 27.

104. "The nation shall at all times have . . . the right to regulate the utilization of natural resources . . . in order to conserve them and to ensure that there is a more equitable distribution of public wealth." *Id.* ch. I, art. 27.

105. *Id.* ch. I, art. 27, § 1.

106. The Article reads:

> The State may grant the same right to foreigners [to acquire ownership of lands, waters, and their appurtenances], provided they agree . . . 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 property acquired to the Nation.

Id.

fifty kilometers along the shores.[107] This is the so-called "Restricted Zone."[108] Article 28 expressly reserves exclusive control by the Mexican government of "strategic" sectors of the economy.[109] These sectors now include oil exploration, oil refining and pipelines, other hydrocarbons, radioactive materials, electricity, basic petrochemicals, mail, satellite telecommunications, and railways.[110] In the 1920s and 1930s these Articles induced a series of government expropriations in the energy, transportation, and agricultural sectors, which deterred most foreign investment in the Mexican economy for many years.[111]

The recovery of Mexico's "economic destiny," one of the main ideals to emerge during the Revolution of 1910, was reflected in the Mexican Constitution. Until recently, these ideals remained an important component of every Mexican administration. The constitutional constraints on foreign economic activities and foreign land ownership dictated the role of foreign investment in Mexico for more than seventy years.

C. *Liberalism v. Nationalism: The Mexican Model of Development*

The Mexican nationalization of the United States and British-owned oil industry in 1938[112] was significant for both domestic and international reasons. Domestically, the Mexican oil nationalization constituted the core of what became Mexico's national policy toward foreign direct investment and its impact on economic development for most of this century. This policy mandated active participation by the state as a "countervailing

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107. "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." *Id.*

108. *See* MEX. CONST., *supra* note 77, ch. I, art. 27.

109. *Id.* ch. I, art. 28.

110. *Id.*

111. *See* WRIGHT, *supra* note 69, at 62-66.

112. The story of Mexican oil expropriation has been documented in numerous books. For a well-documented summary of the account, see WENDELL C. GORDON, THE EXPROPRIATION OF FOREIGN-OWNED PROPERTY IN MEXICO (1941). For an account of the Mexican viewpoint, see JESUS S. HERZOG, HISTORIA DE LA EXPROPIACION DE LAWS EMPRESAS PETROLERAS (1964) (the author is a member of the Commonwealth appointed by the federal board of conciliation and arbitration). *See also* WRIGHT, *supra* note 69, at 68-70.

force to both foreign investors and their home governments."[113] Internationally, the Mexican nationalization of a basic natural resource proved that a less developed state could take control of a key economic sector, previously controlled by foreign capital, in order to control its economy and economic development.[114]

The Revolution of 1910 had no damaging impact on the Mexican petroleum industry, which by 1921 was predominantly foreign-owned and the second largest in the world.[115] The foreign-owned oil companies largely escaped damage because of their location along the Mexican coastline.[116] Stimulated by wartime demand, the oil companies substantially expanded their production during the Revolution.[117] The oil industry was affected, however, by the demands for social justice, land reform, and control over natural resources espoused by those who opposed the foreign investment policies of the *Porfiriato*.[118]

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113. WHITING, *supra* note 72, at 56. Whiting maintains that the state intervened in Mexico in the process of economic development all along, and that the intervention was against the interests of foreign capital. *Id.* at 57. This state intervention, sometimes referred to as "economic nationalism" has been explained by many economic theorists, but most predominantly in Latin America by the *dependistas* or the Dependency theory. There are numerous books on the Dependency Theory; probably the most noteworthy is FERNANDO H. CARDOSO & ENZO FALETTO, DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA (M.M. Urquido trans., 1979). *See generally* HELIO JAGUARIBE ET AL., LA DEPENDENCIA POLITICO-ECONOMICA DE AMERICA LATINA (1970).

114. As one writer noted, the nationalization of oil "altered the perceptions and subsequent relationships between host countries and foreign investors." PAUL E. SIGMUND, MULTINATIONALS IN LATIN AMERICA: THE POLITICS OF NATIONALIZATION 48 (1980). *See also* DIEGO G. LÓPEZ, PROBLEMAS ECONÓMICAS DE MEXICO (1970).

115. *See* WRIGHT, *supra* note 69, at 62.

116. *Id.*

117. The decline in United States activity during the early part of the twentieth century occurred in part attributable to the uncertainty caused by World War I. Between 1911 and 1926, the only significant increase in foreign investment in Mexico was in the petroleum sector. The foreign investment in this sector jumped significantly from 1911 to 1926, especially United States investment which jumped from $20 million (United States dollars) in 1911 to $206 million in 1929. *See* WRIGHT, *supra* note 69, at 54.

118. SIGMUND, *supra* note 114, at 51. In 1884, Mexico adopted a new mining code that included a provision stipulating that "petroleum and gaseous springs" were to be the "exclusive property of the owner of the land;" subsequent legislation confirmed the 1884 law. *Id.* at 50. This legislation, enacted to promote

Article 27 of the Mexican Constitution, which established Mexico's direct ownership of all subsurface mineral deposits and abolished private property rights in petroleum deposits, was seen as a threat by oil companies to their established property rights.[119] The United States oil companies enlisted the support of the United States embassy to buttress their position.[120] By 1923, the United States government reached an agreement with Mexico that protected foreign properties and assured compensation for any expropriated land.[121] Specifically, Mexico promised that Article 27 would not be applied to oil companies that had engaged in "positive acts" in developing their properties.[122]

During the 1920s and 1930s the Mexican government attempted to negotiate with the foreign-owned oil companies on issues of taxation, drilling permits, and the replacement of fee simple titles by concessions.[123] The oil companies refused to negotiate on any of these issues and continuously sought the support of diplomatic representatives to bolster their position. The United States diplomats considered it their duty under international law to extend diplomatic protection to the property of their nationals abroad.[124]

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economic development by promoting foreign investment, allowed British and United States investors to develop the Mexican oil industry. *Id.* at 51.

119. The Mexican Constitution of 1917 eliminated the mining laws enacted during the administration of Porfirio Díaz. *See* WRIGHT, *supra* note 69, at 63.

120. The United States embassy sought assurances from President Carranza that the provisions of Article 27 of the Mexican Constitution would not be applied retroactively. *See* SIGMUND, *supra* note 114, at 52-53. While the embassy made a lot of threats, the most significant one was armed intervention. *Id.* at 53. *See also* LORENZO MEYER, MEXICO AND THE UNITED STATES IN THE OIL CONTROVERSY 1917-1942 69-70 (Mariel Vasconcellos trans., 2d ed. 1977); Clifford Trow, *Woodrow Wilson and the Mexican Interventionist Movement of 1919*, 1 J. AM. HIST. 46 (1971).

121. *See* LIPSON, *supra* note 15, at 77.

122. *See* SIGMUND, *supra* note 114, at 53. The Bucareli Accords, signed in 1923, were entered into as a condition for United States recognition of the government of President Alvaro Obregon. *Id.* The official United States record of these conferences is U.S. DEP'T OF STATE, PROCEEDINGS OF THE UNITED STATES-MEXICAN COMMISSION CONVENED IN MEXICO CITY, May 14, 1923 (1925). *See generally* HOWARD F. CLINE, THE UNITED STATES AND MEXICO (1971) (discussing the expropriation of the oil industry in 1989 in the context of United States-Mexican relations); ANTONIO GOMEZ ROBLEDO, THE BUCARELI AGREEMENTS AND INTERNATIONAL LAW (Salomon de la Selva trans., 1940).

123. *See* SIGMUND, *supra* note 114, at 55.

124. *Id.*

The attack on the oil companies and other foreign holdings changed during the nationalistic administration of President Lazaro Cárdenas (1934-38). President Cárdenas' policies, a renaissance of the Revolution of 1910,[125] were characterized by the slogan "Mexico for the Mexicans."[126] The most far-reaching result of these nationalist policies was the expropriation of the foreign-owned oil companies in 1938.[127] Although politically the nationalization was a great success,[128] economically the impact was uncertain. Faced with the possibility that other Latin American states would follow in Mexico's footsteps, the oil companies instituted a boycott of Mexican oil, which touched off an increased flight of foreign and domestic private capital.[129]

The oil nationalization was also significant because it generated the United States policies toward nationalization and the formulation of its "prompt, adequate, and effective" standard

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125. The phrase "a renaissance of the Revolution" is used by WRIGHT, *supra* note 69, at 66.

126. *Id.* Wright explains that President Cárdenas wanted to push forward two important revolutionary aims—"redistribution of land and loosening the hold of foreigners on the country's economy." *Id.* at 67. Cárdenas was suspicious of foreign "monopolies" and blamed Mexico's economic problems on foreign investments. *Id.*

127. *Id.* at 68. The oil expropriation resulted in the elimination of "one of the largest blocks of foreign capital in the country" and was hailed by Mexicans as the beginning of their "economic independence." *Id.* *See generally* J. RICHARD POWELL, THE MEXICAN PETROLEUM INDUSTRY, 1938-1950 26 (1956). Ironically, the controversy with the foreign-owned oil companies that led to the expropriation was not about the status of the companies' foreign holdings, but instead, revolved around labor relations. The oil companies refused to comply with the oil union's demands for increased wages; these demands were affirmed by the Mexican Supreme Court. *See* WRIGHT, *supra* note 69, at 68-69.

128. *See* WRIGHT, *supra* note 69, at 68-69.

129. *Id.* at 70. The expropriation by the Cárdenas administration of British (Royal Dutch Shell) and United States (Standard Oil of New Jersey) oil interests, began when workers, frustrated with the oil companies' refusal to grant them higher wages and improve working conditions, decided to go on strike on May 18, 1937. President Cárdenas decided that the dispute should be settled by an industrial arbitration board, which determined that the grievances of the workers were legitimate and awarded them a one-third increase in their wages. The oil companies appealed the decision to the Mexican Supreme Court, which upheld the order. The oil companies challenged the sovereignty of the Mexican state by refusing to obey the Supreme Court's decision. President Cárdenas promptly signed a decree nationalizing the assets of the companies. *See* RAMIREZ, *supra* note 81, at 35.

for just compensation.[130] Although the United States response to the Mexican nationalization was divided, the irony was that this division was founded on United States dominance in Mexico's mining, oil, and foreign commerce.[131] Economic sanctions or military intervention would threaten United States interests in Mexico.[132] The result was lengthy negotiations, which included a letter by United States Secretary of State Cordell Hull to President Cárdenas insisting that Mexico pay "just compensation . . . having a present effective value" to the oil companies.[133]

The Mexican government, rejecting the traditional rule, responded *inter alia*:[134] (a) nationalization was a legitimate exercise of its sovereign right to restructure its economy; (b) the compensation demanded by the United States would constitute an inadmissible fetter upon this right: "[T]he future of the nation could not be halted by the impossibility of immediately paying the value of the property belonging to a small number of foreigners who only seek a lucrative end;" and (c) United States investors were not entitled to higher compensation than Mexican owners. These two opposing views, which emanated from the diplomatic exchanges between the two governments, would characterize their respective positions for almost the entire century.

D. *Economic Development Strategies and Foreign Direct Investment*

1. Import Substituting Industrialization: 1930-1970s

Foreign direct investment contributed significantly to Mexico's implementation of the model of economic development

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130. *See* SIGMUND, *supra* note 114, at 60.

131. *See* LIPSON, *supra* note 15, at 79.

132. *Id.* Lipson states that the "hierarchy was reinforced by the confusion of economic interests . . . [e]conomic relations with Mexico were extensive and profitable—and they were not immediately endangered by the expropriations . . . rigid sanctions would strike directly at the sizeable American investments remaining in the country." *Id.*

133. In his letter, Hull stated: "This does not mean that the government may later pay, as and when it may suit its convenience . . . . My government directs me to inquire . . . what specific action with respect to payments for the properties in question is contemplated by the Mexican government. . . ." SIGMUND, *supra* note 114, at 61. *See also* JOSEPHUS DANIELS, SHIRT-SLEEVE DIPLOMAT 230-34 (1947).

134. Asante, *supra* note 11, at 590.

referred to as "import substituting industrialization" (ISI).[135] The ISI focuses on the development, production, and manufacture of certain intermediate and capital goods to lessen imports and build the local infrastructure to produce goods.[136] After the Mexican Revolution, foreign direct investment severely declined in Mexico, except in the petroleum sector.[137] During the 1930s, the nationalization of the petroleum industry further decreased foreign direct investment. Although the elimination of petroleum holdings was mainly responsible for this drop, the level of investments in other attractive industries and in public utilities

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135. *See* BELA BALASSA, THE PROCESS OF INDUSTRIAL DEVELOPMENT AND ALTERNATIVE DEVELOPMENT STRATEGIES (1980). This author distinguishes two stages in the import-substitution industrialization process. The first stage replaces importation of "nondurable consumer goods" with domestic production. *Id.* at 8. The second stage "involves the replacement of the imports of intermediate goods and producer and consumer durables by domestic production." *Id.* at 10. Balassa concludes that ISI policies work against export of manufactured goods, discourage production, and encourage consumption by the way of exchange rate and commercial policies. *Id.* at 16. *See also* RENO VILLARREAL, THE POLICY OF IMPORT SUBSTITUTING INDUSTRIALIZATION, 1925-1975 (for an excellent account of ISI as an economic development model); *see generally* CLARK W. REYNOLDS, THE MEXICAN ECONOMY (1970) (for an expanded analysis of the Mexican economy); LEOPOLDO SOLÍS, ECONOMIC POLICY REFORM IN MEXICO: A CASE STUDY FOR DEVELOPING COUNTRIES (1981) (for an excellent account of the economic development strategies in Mexico); Edmund V.K. Fitzgerald, *The Financial Constraint on Relative Autonomy: The State and Capital Accumulation, in Mexico 1940-1982*, *in* 1 THE STATE AND CAPITAL ACCUMULATION IN LATIN AMERICA (Christian Anglade & Carlos Fortín eds., 1985).

136. "Narrowly defined import-substitution is the development by the state of policies designed to close a chronic (or structural) deficit between the export of primary products and the import of manufactured goods." JAMES M. CYPHER, STATE AND CAPITAL IN MEXICO: DEVELOPMENT POLICY SINCE 1940 5 (1990). Generally, "import-substitution is a strategy for development which favors the expansion of the internal market, in contrast to orthodox neoclassical doctrines which emphasize development through primary commodity exports (or through following 'market forces')." *Id.* at 6.

137. From 1911 to 1929, United States investment in petroleum jumped, from $20 million to $206 million, while the overall stock of United States foreign direct investment in Mexico increased a small amount, from $616 to $683 million. *See* WRIGHT, *supra* note 69, at 54, 77. The foreign-oil companies escaped major property damage during the Mexican Revolution because of their location along the coastal periphery of the state and by paying for protection. Their production expanded substantially throughout the revolution. "By 1921, Mexico had become the second largest oil producing country in the world," its output of 193 million barrels amounted to a quarter of the world's total. *Id.* at 62.

also declined rapidly.[138] It was not until World War II that foreign investors more actively participated in the Mexican economy,[139] as the demand for raw materials accelerated and the industrial capacity of states diverted to wartime production. Mexico found new markets for primary exports and diminished competition from imports in its domestic markets.[140]

While ISI began as an informal process, it became an explicit governmental policy for achieving rapid industrial growth during the administrations of Manuel Avila Camacho (1940-1946) and Miguel Alemdán (1946-1952). During this period, foreign investment significantly contributed to the Mexican economy, except in the manufacturing sector.[141] In response to international demand, nationalist policies allowed foreign firms to move out of attractive industries and utilities and into manufacturing.[142] In the post-World War II era, Mexican policy makers became more sensitive to the need to protect local industries from foreign domination. President Manuel Avila Camacho took advantage of his extraordinary wartime powers by issuing the Emergency Decree of 1944,[143] which introduced

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138. By 1940, total foreign direct investment from the United States was under $500 (United States) million, "slightly more than one-quarter of the estimate for the mid-1920s." *Id.* at 70. Foreign control in the four areas traditionally dominated by foreign capital—railroads, oil, mining, and electric power had significantly decreased; in fact it was eliminated in railroads and oil. *Id.*

139. The administration of President Cárdenas (1934-1940) set the stage for the arrival of the transnational corporations, which in turn led to the growth of foreign direct investment. *See* BERNARDO SEPÚLVEDA & ANTONIO CHUMACERO, LA INVERSION EXTRANJERA EN MÉXICO 120 (1973).

140. "The virtual halt of imports of manufactured goods that had traditionally been purchased abroad and the increased external demand for Mexican products such as textiles, foodstuffs, fibers, tobacco, and chemicals created excellent opportunities for investment in production facilities to supply Mexico's domestic market and to take advantage of the export possibilities." WRIGHT, *supra* note 69, at 71.

141. "Firms with majority foreign ownership, only 0.58 percent of all firms, accounted for 10.2 percent of all industrial employment and 20.0 percent of both production and investment." WHITING, *supra* note 72, at 69. The author explains that even these figures do not reflect the importance of foreign-owned enterprises in the manufacturing sectors, since by 1972, "majority foreign-owned firms accounted for 52 percent of the assets of the 300 largest manufacturing firms in Mexico." *Id.*

142. *Id.*

143. Emergency Decree of 1944, D.O., July 7, 1944 [hereinafter Emergency Decree].

restraints on the "creation, modification, liquidation and transfer of Mexican stock."[144]

The Emergency Decree exemplified a strong nationalist response by the Mexican government to the growth of foreign investment in the post-World War II era. The Decree granted extensive discretionary control over foreign capital to the Ministry of Foreign Relations,[145] allowing it to mandate both Mexican majority ownership in certain industries[146] and majority Mexican control.[147] The Decree was intended to avoid disrupting the economy by the temporary investments of flight capital. Mexico's booming economy during the World War II attracted an influx of foreign capital, and the Mexican government feared that existing Mexican investments would be displaced by foreign investors. Although the extraordinary powers of the president were lifted in 1945, revocation of the Emergency Decree was accompanied by executive orders relating to state intervention in the Mexican economy that would be retained under the law.

Between 1940 and 1965, foreign direct investment almost quadrupled. By the late 1950s, the nationalist position toward foreign direct investment reflected by the Emergency Decree gave way to a different attitude towards foreign capital.[148] The shift resulted in massive increases of foreign direct investment[149] in various industries, providing the momentum for the investment

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144. ALEXANDER C. HOAGLAND, JR., COMPANY FORMATION IN MEXICO B-2 (1988). *See also* Sandra F. Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AM. INT'L L. 281, 285 (1986).

145. HOAGLAND, *supra* note 144, at B-2; *see also* WRIGHT, *supra* note 69, at 101-03.

146. *See* Michael W. Gordon, *The Joint Venture as an Institution for Mexican Development: A Legislative History*, 1978 ARIZ. ST. L. J. at 173, 183.

147. *See* Maviglia, *supra* note 144, at 285; *see also* ROGER D. HANSEN, LA POLITICA DEL DESARROLLO ECONOMICO 67 (1973).

148. By the late 1950s, foreign capital had become an increasingly important factor in the national economy. Entrepreneurs began to feel threatened economically by the foreign firms active in Mexico and they sought the protection of the state. *See* ECONOMIC ISSUES AND POLITICAL CONFLICT: U.S.-LATIN AMERICAN RELATIONS 20-21 (Jorge I. Dominguez ed., 1982) [hereinafter Dominguez]; *see generally* RAYMOND VERNON, THE DILEMMA OF MEXICO'S DEVELOPMENT 38 (1963).

149. By 1955, foreign investment in Mexico, both direct and indirect, had almost doubled in a decade, from $584 million in 1945 to $919 million in 1955. H. MAY & J. FERNANDEZ, IMPACT OF FOREIGN INVESTMENTS IN MEXICO 63 (1971).

pendulum to swing back during the 1960s under the policy of "Mexicanization."[150]

2. Mexicanization: 1960s

The Mexican government's shift in attitude toward foreign direct investment in the late 1950s, and the subsequent massive increases in foreign capital during this period, led to demands from Mexican industrialists to limit the inflow of foreign capital.[151] Not surprisingly, with the political legacy of foreign investment and Mexico's past vigilance of its economic and political independence, the government pursued and strictly implemented national policies defining and controlling the activities of foreign capital and individuals.[152]

The policy of Mexicanization adopted during the administration of Avila Camacho, which required at least fifty-one percent of all private business and industry in particular, to be owned by Mexican nationals to ensure local control of the economy and local participation in its benefits, was accelerated during the 1960s. During this time President López Mateos (1958-1964) developed economic nationalist policies and expanded the state's role in the Mexican economy in response to a sudden upsurge of foreign investment to more than ten percent of the total. Between 1960 and 1963, exercising the authority granted under the Emergency Decree of 1944, the Ministry of Foreign Relations extended the list of industries in which majority Mexican equity was required to the automotive supply, chemicals (including fertilizers and insecticides), and office equipment industries. The Ministry excluded by legislation foreign

150. The Mexican industrialists were organized, with the Cámera Nacional de la Industria de Transformación (CANACINTRA or CNIT) as the principal outlet for their views. *See* WRIGHT, *supra* note 69, at 78.

151. *Id.*

152. The administration of Lopez Mateos (1958-1964) was so persistent in pursuing its nationalist policies during this period, that the state experienced significant outflow of capital from domestic and foreign sources in 1960 and 1961. *See* Merilee S. Grindle, *Public Policy, Foreign Investment and Implementation Style in Mexico*, *in* Dominguez, *supra* note 148, at 69, 80.

Although President Manuel Avila Camacho (1940-1946) had adopted the policy of requiring Mexican majority ownership (51%) in certain key industries in the 1940s, this policy was not fully enforced until the 1960s. Douglas Bennett et al., *Mexico and Multinational Corporations: An Explanation of State Action*, *in* LATIN AMERICA AND THE WORLD ECONOMY: A CHANGING INTERNATIONAL ORDER 277 (1978).

participation in Mexico's banking, insurance, and other financial institutions.[153] The Mexican government also employed other techniques to displace foreign investment, including discriminatory taxation, awarding government contracts on a discriminatory basis, and the selective use of permits and licenses.[154] The antiforeign investment efforts by the administration of López Mateos had a significant impact on the outflow of capital from domestic and foreign sources in 1960 and 1961.[155] This forced the Mexican administration to take a more conciliatory position toward foreign direct investment, causing the pendulum to swing away from nationalist policies.

3. The Emergence of Contradicting Policies and Transnational Corporations: 1970-1982

By 1970, Mexico had "demonstrated consistent patterns of state intervention in the economy," especially with regard to foreign direct investment, but inconsistencies in the application of that intervention continued.[156] The policy of encouraging Mexicanization through selective enforcement of various instruments affecting majority foreign-owned enterprises (such as discriminatory taxation), continued during the administration of Gustavo Díaz Ordaz (1964-1970).[157] Simultaneously, however, this administration courted both domestic and foreign capital to invest in Mexico's private sector, which resulted in a significant increase in foreign investment, especially from the United States.[158] While Mexican business supported the

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153. *See* Dominguez, *supra* note 148, at 86.

154. *Id.*

155. *Id.*

156. *See* WHITING, *supra* note 72, at 80. According to Whiting, Mexico's patterns of state intervention in the economy was not only as a regulator, but also as an owner (through expropriation) and as a promoter of foreign investment. *Id.*

157. *See* Grindle, *supra* note 152, at 80. President Díaz Ordaz also continued the policies of his predecessors in advocating national control of natural resources and utilities and preserving national control of banking and insurance. *See* WHITING, *supra* note 72, at 78.

158. The increase is mostly attributed to two important policies of the Díaz Ordaz administration:

> [the elimination of] [t]he extensions of the Mexicanization list of the Ministry of Foreign Relations to include fertilizers, insecticides, basic

administration's open attitude toward private capital in general, it demanded more restrictive policies toward foreign investment.[159]

The widespread proliferation during the late 1960s and 1970s of foreign-owned TNCs in Mexico, coupled with the negative sentiments toward TNCs by developing states in the international arena,[160] had a significant impact on Mexico's nationalist position toward foreign direct investment in the 1970s. The Mexican government, like other third world governments, became highly sensitive and critical toward the harmful effects of TNCs.[161] Once seen as sources of technology, employment, training, and entrepreneurial skill, by the 1970s TNCs were perceived as foreign intruders that sought personal profits without considering the social and economic needs of the host state.[162] By the time President Luis Echeverria (1970-1976) took office, the Mexican government was making a more concerted effort to regulate the activities of foreign direct investors and firms. This effort was in response to domestic and international criticisms about the role

> chemicals, and food products, adopted under [President] Lopez Mateos . . . [and the rescission] of the requirement that Mexican companies investing in restricted industries must have a clause excluding foreigners—a requirement aimed at eliminating foreign investment in restricted industries through holding companies.

WHITING, *supra* note 72, at 76. By 1970, nearly three-quarters of all foreign investment was in manufacturing. *Id.*

159. *See* Grindle, *supra* note 152, at 80.

160. *See supra* note 29 and accompanying text.

161. When the TNCs first established subsidiaries in Mexico, the Mexican government expected that the increased flow of foreign direct investment could assist Mexico in developing its economy by injecting external capital into the economy, assisting in the generation of tax revenue and foreign exchange, acquiring and adopting technology and managerial skills to domestic needs, and employing and training nationals.

162. By this time, the *dependistas* were arguing that although some development was possible under the international domination of capitalism, it was "dependent development," and this would produce underdevelopment. The *dependistas* put foreign investment at the center of their analysis, holding that it was the major force of the international domination of capitalism. *See* FERNANDO H. CARDOSO & ENZO FALETTO, DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA (1969); *see generally* CELSO FURTADO, DEVELOPMENT AND UNDERDEVELOPMENT (1964); Fernando H. Cardoso, *Dependency and Development in Latin America*, NEW LEFT REVIEW 83 (July-Aug. 1972); Theotonio D. Santos, *The Structure of Dependence*, AM. ECON. R. PAPERS & PROC. 231 (1970). For an excellent account of the role of TNCs in the dependency theory, see Raymond Vernon, *Multinational Enterprises in Developing Countries: Issues*, *in* DEPENDENCY AND INTERDEPENDENCE IN THE MULTINATIONAL CORPORATION AS AN INSTRUMENT OF DEVELOPMENT—POLITICAL CONSIDERATIONS (1975).

of foreign direct investment in general and TNC operations in particular in the economic development of developing host states.[163]

Although the Echeverria administration remained committed to industrial growth, ISI policies alone were insufficient to attain this goal.[164] The administration therefore began to promote development of export-oriented products and capital goods.[165] To increase its exports, Mexico needed foreign assistance to improve technology, invest in new industries, and manufacture goods for export, while assuring that these foreign interests conformed to Mexican national objectives. Accordingly, the Mexican Congress passed the Law for the Promotion of Mexican Investment and for the Regulation of Foreign Investment (1973 FIL).[166] Its purpose was "to promote Mexican investment and regulate foreign investment in order to stimulate a just and balanced development and consolidate the country's economic independence."[167]

The 1973 FIL did little to discourage foreign direct investment in Mexico during the 1970s. The Mexican government and its agencies still enjoyed too much discretion to expand or limit the possible areas of investment.[168] President Jose Lopez Portillo (1976-1982), pressured by the Mexican business community to encourage domestic and foreign investment in Mexico, responded by applying the 1973 FIL[169] in a very flexible manner, the result of which was to increase foreign direct investment.[170]

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163. During this time, national business organizations became very active in their criticism of foreign direct investment. Grindle, *supra* note 152, at 81.

164. *Id.*

165. *See* PETER MORICI, TRADE TALKS WITH MEXICO: A TIME FOR REALISM 19 (1991).

166. *Ley Para Promover la Inversion Mexicana y Regular la Inversion Extranjera* [Law to Promote the Mexican Investment and Regulate the Foreign Investment], D.O., March 9, 1973 [hereinafter *1973 FIL*]. *See* discussion *infra* part IV.E.1.

167. *See 1973 FIL*, *supra* note 166.

168. *See* WILSON PERES NUNEZ, FOREIGN DIRECT INVESTMENT AND INDUSTRIAL DEVELOPMENT IN MEXICO 15 (1990).

169. *See 1973 FIL*, *supra* note 166. *See* discussion *infra* part IV.E.1.

170. Whiting maintains that:

> The first and most striking result of the [FIL] regulation of foreign investment in Mexico is that contrary to dire predictions, the flow of foreign investment capital into Mexico was not deterred . . . [e]very year

By 1976, Mexico's financial straits mandated more than domestic policy changes. Plagued by massive capital flight, inflation, unproductive experimental development programs, and external account imbalances, the Bank of Mexico had to devalue the Mexican *peso*,[171] forcing the Echeverria administration to seek the help of the International Monetary Fund (IMF).[172] The Mexico IMF Agreement obligated Mexico to change a number of its economic policies as a condition to lending.[173] Although the Agreement had a duration of three years, Mexico ended the Agreement prematurely during the massive oil discoveries of the late 1970s, the so-called "oil boom."[174]

During the oil boom, which was concentrated between 1978 and 1981, Mexico's traditionally restrictive policy toward foreign investment reemerged, nationalistic priorities were emphasized, and significant investment barriers were enforced.[175] The nationalist period did not last long. Mexico launched an ambitious development process based on future oil projections and borrowed heavily from international financial firms to finance its domestic agenda.[176] By 1981, however, oil prices began to drop sharply[177] and the Mexican economy suffered a dramatic decline, leading to the economic crisis of 1982.

> since the law was passed in 1973, the stock of foreign investment has increased at a faster pace than the increases of 1971 and 1972.

WHITING, *supra* note 72, at 101-02.

171. For an analysis of the sources and policy options at the time, see Gerard Bueno, *El Desarrollo de la Economia Mexicana*, *in* OPINIONS DE POLITICA EN MEXICO DESPUES DE LA DEVALUACION (1977). *See generally* CYPHER, *supra* note 135, at 5.

172. The IMF is the principal multilateral organization which plays an increasingly important role in the restructuring of the debt. *See* M. MENDELSOHN, COMMERCIAL BANKS AND THE RESTRUCTURING OF CROSS-BORDER DEBT 12-13 (1983); *see also* Elizabeth S. Stukey, Note, *Economic Interdependence and the Sovereignty of Debtor Nations: A Comparison of Mexican and Argentine Reactions to International Monetary Fund Stabilization*, 8 FORDHAM INT'L L. J. 544, 563 (1985).

173. *See supra* note 135, at 5.

174. *Id.* at 6.

175. *Id.*

176. *See* BANCO DE MEXICO, INFORME ANUAL 36 (1982). *See also*, EL SISTEMA ECONOMICO MEXICANO (Rogelio Montemayor ed., 1982) (describing the growth of Mexico's external revenues from the mid-1970s to 1982, which was due to the discovery and exploitation of huge oil reserves).

177. *See* Reno Villarreal, *De la Industrialization Substitutiva a la Peto, Dependencia Externa y Desustitucion de Importanciones*, *in* EL SISTEMA ECONOMICO MEXICANO (Rogelio Montemayor ed., 1982).

4. The 1982 Crisis and Modern Mexican Foreign Investment Policy

On August 20, 1982,[178] Mexico announced that it could no longer service its debt.[179] This debt crisis[180] severely constrained Mexico's ability to pursue the economic nationalist policies of the past. Accordingly, this crisis has been one of the most significant factors in the turnaround of Mexican economic policy. The turnaround, often referred to as the new "Southern Liberalism,"[181] was precipitated by a series of economic problems. Following a period of impressive growth from the oil discoveries in the 1970s, the Mexican economy suffered a series of drastic reversals precipitated by a sudden fall in the world petroleum price.[182] At the same time, the demand for goods generated by the oil exports had spurred imports, causing imports to increase more rapidly than exports,[183] which resulted in balance of payments difficulties.[184] Additionally, international banks and

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178. *See* Castro Tapia, *Mexico's Debt Restructuring: The Evolving Solution*, 23 COLUM. J. TRANSNAT'L L. 1, 4 (1984); *Mexico Seeks to Stop Paying Debt Principal*, WALL ST. J., Aug. 20, 1982, at 2; Allen Meltzer, *A Way to Defuse the World Debt Bomb*, FORTUNE, Nov. 28, 1983, at 137.

179. Mexico's outstanding foreign debt exceeded $80 billion, 30% of which was due within the year. Steven M. Cohen, *Give Me Equity or Give Me Debt: Avoiding a Latin American Debt Revolution*, 10 U. PA. J. INT'L BUS. L. 89, 94 nn.37-38 (1988) (*citing* Bogdanowicz-Bindert, *World Debt: The United States Reconsiders*, 64 FOREIGN AFF. 259, 262 (1986)). The Mexican government notified the International Monetary Fund, the United States Secretary of the Treasury, and the Chairman of the Federal Reserve Board that it could not meet its debt obligations. *Id.* at 94.

180. The Mexican debt crisis triggered the "world debt crisis." Although commentators have traced the emergence of a full blown debt crisis to a variety of events, most believe that it was Mexico's debt problems that brought the monetary and fiscal crisis to head. *See id.* at 94 n.36 (*citing* DARRELL DELAMAIDE, DEBT SHOCK: THE FULL STORY OF THE WORLD CREDIT CRISIS 6-8 (1985)); *see also* Pedro-Pablo Kuczynsk:, *The Outlook for Latin American Debt*, 66 FOREIGN AFF. 129 (1987) (reviewing the Latin American debt crisis).

181. *See* WHITING, *supra* note 72, at 238. Whiting comments: "Mexico has become a leader in advocating and implementing southern liberalism. This has meant accepting a mixed economy and an active state industrial policy while still fostering an expansion of international trade with relatively free markets." *Id.*

182. BANCO DE MEXICO, INFORME ANUAL 33, 36 (1982).

183. *Id.* at 29, 31.

184. *Id.* at 32, 34.

financial institutions generated a plunge in the supply of money and credit in 1981,[185] and public expenditures on domestic subsidies and numerous state-owned enterprises went unchecked. As a result, Mexico was forced to suspend all debt payments for three months to obtain a rescheduling agreement.[186]

The rapid deterioration and ultimate collapse of the Mexican economy in mid-1982, combined with the world recession, left Mexico with few economic policy choices. In 1982, President Lopez Portillo attempted to revitalize the economy by nationalizing the banks.[187] When President Miguel de la Madrid (1982-1986) took office in December 1982, he set in motion new economic policies oriented toward liberalizing the Mexican trade regime, creating a more favorable climate for foreign direct investment. Accordingly, after years of obdurate Mexican resistance, President de la Madrid announced in 1986 Mexico's entry to GATT.[188]

President Carlos Salinas de Gortari has undertaken a restructuring of the foreign investment policies in Mexico as part of an overall economic reform. Moreover, foreign direct investment is an integral part of President Salinas' National Development Plan (1989-1994) for revitalizing the Mexican economy.[189]

E. *The Legal Framework of Foreign Direct Investment in Mexico*

1. The Law to Promote Mexican Investment and Regulate Investment

The 1973 FIL[190] codified applicable constitutional principles and established a rigid system of regulation over foreign

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185. The international banks and financial institutions, which had been eager to take advantage of Mexico's economic growth during the 1970s, invested heavily with loans during 1977 and 1978. *Id.* at 32. *See generally*, ROBERT E. LOONEY, ECONOMIC POLICYMAKING IN MEXICO 117-222 (1985).

186. *See* Cohen, *supra* note 179, at 95.

187. *Decree Nationalizing the Banks of Mexico*, D.O., Sept. 2, 1982.

188. *See* UNITED STATES INTERNATIONAL TRADE COMMISSION, REVIEW OF TRADE AND INVESTMENT LIBERALIZATION MEASURES BY MEXICO AND PROSPECTS FOR FUTURE UNITED STATES-MEXICAN RELATIONS 1-2 n.16 (1990) (Pub. 2275).

189. These objectives are stated in President Salinas' National Developments Plan (1989-1994). *Plan Nacional de Desarrollo* 1989-1994, D.O., May 31, 1989.

190. See *1973 FIL, supra* note 166.

investment. Mexican policymakers in the early 1970s were concerned about foreign investment and TNC operations on Mexico's economy and had been enlightened by similar concerns in other Latin American nations and the Third World. These policymakers therefore emphasized the need to reaffirm Mexico's sovereignty and economic independence in the 1973 FIL.[191] Accordingly, the FIL set forth the following main objectives: (1) foreign investment should complement Mexican investment; (2) foreign investment should associate with domestic capital, but only on a minority basis; and (3) concentration of foreign ownership by sector or region should be avoided.[192] The purpose of the law was "to promote Mexican investment and regulate foreign investment in order to stimulate a just and balanced development and consolidate the country's economic independence."[193] The themes of economic sovereignty and state autonomy over the control of foreign investment in the 1973 FIL echoed the themes of the Charter of Economic Rights that would be adopted by the United Nations one year later; hardly surprising, since it was Mexico that had proposed the Charter.[194] The FIL established the national boundaries for the regulation of foreign direct investment, while the Charter established the international boundaries.

The framework for the "balanced development" objective prescribed in the FIL is embodied in a regulatory scheme that requires majority Mexican participation in a broad spectrum of economic sectors and activities, while limiting foreign participation to specific designated areas.[195] Accordingly, the 1973 FIL classifies economic activities exclusively reserved for the Mexican government,[196] those reserved to Mexican individuals or

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191. *See* LOONEY, *supra* note 185, at 57.

192. *1973 FIL*, *supra* note 166, art. 1. *See generally* CHANGING LEGAL ENVIRONMENT IN LATIN AMERICA: MANAGEMENT IMPLICATIONS 276-99 (Stuart Holland & Esteban A. Ferrer eds., 1974); Adolfo A. Vizcaino, *The Law on Foreign Investments*, 7 GA. J. INT'L & COMP. L. 33 (1977).

193. *1973 FIL*, *supra* note 166, art. 1.

194. *See* JONES, *supra* note 23, at 57.

195. This was the first time legislation required majority Mexican participation in a range of activities and not just a single activity. *See* Maviglia, *supra* note 144, at 290.

196. *1973 FIL*, *supra* note 166, art 4. Article 4 provides that the following activities are reserved exclusively to the state: oil and gas, basic petrochemicals,

corporations without foreign participation, and those in which foreign participation[197] is specifically limited to less than forty-nine percent.[198] The FIL also contains a general provision limiting foreign participation in new businesses whose activities are otherwise not regulated to a maximum of forty-nine percent.[199] Moreover, the FIL requires governmental authorization for investments that acquire more than twenty-five percent of the equity or more than forty-nine percent of the fixed assets of an existing Mexican company,[200] and for any transaction resulting in the transfer of management to a foreign investor.[201]

The FIL vests the highest authority to regulate foreign investment in Mexico with the National Foreign Investment

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exploitation of radioactive minerals and production of nuclear energy, mining in the particular cases referred to by the applicable laws, electric power, railroads, telegraphic and radiotelegraphic communications, and other activities and industries set forth by specific statutes. *Id.*

197. *Id.* This Article provides that activities reserved to Mexican individuals or corporations without foreign participation, include radio and television, urban and inter-urban transportation and transportation on federal highways, air and maritime transportation, forestry, distribution of gas, and other activities set forth by specific statutes or regulations enacted by the federal Executive.

198. *Id.* art. 5. Foreign investment will be allowed in the following activities or companies in the proportions specified:

> a) Exploitation of minerals. Concessions for exploitation thereof may not be granted or transferred to foreign individuals or corporations. In companies engaged in those activities, foreign investment may participate up to a maximum of 49% in the event of exploitation of minerals subject to ordinary concession, and up to a maximum of 34% in the event of special concessions for the exploitation of natural minerals reserves;
> b) By-products of petrochemicals: 40%.
> c) Manufacturing of automobile components: 40%; and,
> d) Those activities set forth by specific statutes or by regulations published by the Federal Executive.

Id. art. 5.

199. Article 5 further provides:

> In the event where the applicable legal provisions, or regulations, do not require a definite percentage, foreign investment may only participate in a proportion not to exceed 49% of the capital stock of a company, provided however, that the foreign investors do not have, under any title, the power to determine the administration of the company.

Id.

200. *Id.*

201. *Id.*

Commission (FIC).[202] Under its broad discretionary powers, the FIC has the option to increase the maximum forty-nine percent foreign investment limitation whenever it deems the project beneficial to the Mexican economy.[203]

The FIC, which consists of representatives of the Mexican president and seven ministries,[204] served as the screening mechanism for majority foreign equity investment in Mexico until the late 1980s.[205] Pursuant to its statutory powers, the FIC can: (1) increase or reduce the percentage of foreign participation in geographical areas or economic activities when definite percentages are required and establish the terms and conditions under which the investment will be received;[206] (2) set forth specific percentages and conditions for those projects which "may justify special treatment;"[207] and (3) establish "requirements and criteria" for the application of foreign investment laws and regulations.[208]

The 1973 FIL provides exceptions to the forty-nine percent requirement in few instances and only under special circumstances.[209] The FIC bases its decision to grant exceptions on the criteria set forth in the National Industrial Development Plan (NIDP) and the FIL.[210] Each NIDP has provided specific indicators of the attitude and direction to be taken by the incumbent administration toward foreign investment. The few exceptions made by the FIC were in sectors such as tourism, priority industries, advanced technology, capitalization and

202. *Id.* arts. 4, 5, 8, 12. Under the 1973 FIL, all newly created business concerns, both domestic and foreign, must register with the National Registry of Foreign Investment (FIR). Additionally, all foreign concerns existing when the FIL was enacted were required to register. *Id.*

203. *Id.* arts. 1, 5. The burden is on the foreign investor to show that majority foreign equity and control would "stimulate a balanced and equitable development" and "consolidate the economic independence of the country." *Id.* art. 1.

204. *Id.* arts. 1, 5.

205. *Id.*

206. *See id.* arts. 5, 12(I).

207. *Id.* art. 12(I).

208. *Id.*

209. Exceptions to the forty-nine percent limitation on foreign ownership were rarely granted. *See* Jorge Camil, *Mexico's 1989 Foreign Investment Regulations: The Cornerstone of a New Economic Model*, 12 HOUS. J. INT'L L. 1, 2 n.5 (1989).

210. *1973 FIL*, *supra* note 166, art. 13.

investments preserving employment, and for priority activities of Mexican corporations with severe economic problems.

2. The 1989 Regulations

In 1989, pursuant to the constitutional authority under Article 89 of the Mexican Constitution,[211] President Salinas issued the new foreign investment regulations (1989 Regulations),[212] amending the 1973 FIL. The 1989 Regulations repealed all existing regulations, resolutions, and decrees, but did not modify the 1973 FIL itself.[213] The stated purpose of the Regulations is to increase the volume of investment capital and to accelerate the flow of investment capital by deregulating foreign

211. *See* MEX. CONST., *supra* note 77, art. 89(I). Article 89 of the Mexican Constitution grants the President the power to "promulgate and execute the laws enacted by the Congress of the Union, providing for their exact enforcement in the administrative sphere." *Id.* This provision has been interpreted as the "power to enact general rules in the form of regulations *(reglamentos)*. Regulations have the purpose of explaining and supplying detailed rules for the application of specific laws, and most statutes are supplemented in this manner." WRIGHT, *supra* note 69, at 16. Although the President has constitutional authority to issue regulations, there has been considerable debate about the constitutionality of the 1989 Regulations. "One Mexican lawyer has opined that the New Regulations are constitutional, because they (a) do not contravene the Mexican Constitution, (b) were issued by the President under constitutional regulatory powers, and (c) were duly signed by all corresponding members of the presidential cabinet. This lawyer concludes that the final determination on the constitutionality issue corresponds to the Mexican Supreme Court." Legal Opinion addressed by Dr. Luis Miguel Diaz to Lic. Miguel Jauregui, Chairman of the Mexican Legislation Committee, American Chamber of Commerce of Mexico, July 13, 1989 (on file with Mexican Legislation Committee of the American Chamber of Commerce of Mexico City). "Another Mexican lawyer strongly believes that the New Regulations are unconstitutional because both the FIL and the Mexican Constitution have the purpose of regulating and not promoting foreign investment. This argument seems to imply that the president is unable to issue decrees promoting foreign investment." Camil, *supra* note 209, at 13 n.111. *See also* JORGE G. PALACIO, LEY DE INVERSION EXTRANJERA Y SU REGLAMENTO COMMENTADOS, 139-40 (1989).

212. *Reglamento de la Ley para Promover la Inversion Mexicana y Regular la Inversion Extranjera*, D.O., May 16, 1989 [hereinafter *1989 Regulations*].

213. In 1989, when the administration of Carlos Salinas de Gortari decided to change the foreign investment policy in Mexico, it was decided that amending the 1973 FIL would have many political implications for a new administration. Because President Salinas did not garner the substantial influence in Congress to amend the 1973 FIL, the administration elected to use the President's constitutional authority. *See* Camil, *supra* note 209, at 13. *See also* Ignacio Gomez-Palacio, *The New Regulation on Foreign Investment in Mexico: A Difficult Task*, 12 HOUS. J. INT'L L. 253, 262 (1990).

investment procedures. Consequently, the 1989 Regulations do not actively promote foreign investment, for there are no provisions granting incentives such as tax breaks or cost reductions in land.[214] Rather, the intent of the Regulations is to promote foreign investment by simplifying and clarifying the investment mechanisms.[215]

The 1989 Regulations accord foreign investors a broad range of investment opportunities by eliminating the need for prior authorization from the National Foreign Investment Commission, if certain conditions are met.[216] The most significant provision of the 1989 Regulations, Article 5, grants foreign investors the right to acquire up to 100 percent of the shares in an existing enterprise without prior authorization, as long as the investor complies with set conditions and requirements and the activity is not listed in the included classification.[217] The 100 percent

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214. *See* Gomez-Palacio, *supra* note 213, at 259.

215. *1989 Regulations*, *supra* note 212, pmbl. at 11-12.

216. *Id.* art. 5.

217. The activities listed in the "classification," i.e., the "classified" activities, are categorized and marked accordingly as follows: (1) activities exclusively carried out by the state; (2) activities exclusively for Mexican citizens; (3) activities limited to thirty-four, forty, and forty-nine percent foreign ownership; and (4) activities that have no percentage limit on foreign investor control (unclassified activities). *1989 Regulations, supra* note 201, art. 5. The 100 percent clause in Article 5 refers to the unclassified activities. The conditions set forth in Article 5 of the 1989 Regulations are as follows:

> For purposes of the provisions of section (d) of article five of the Law, foreign investors may participate in any proportion in the capital stock of a corporation, in the act of its incorporation for the performance of activities not included in the Classification, and will not require therefore the authorization of the Ministry, provided that:
>
> I. They invest an amount in fixed assets destined for economic activities, appropriate for the corporation in its pre-operational period, not to exceed that established from time to time by the Ministry, for updating purposes.
>
> II. The investments referred to in the preceding fraction are made with financial resources proceeding from abroad, obtained as capital contributions by partners or shareholders, or through financing granted by foreign entities or by credit institutions with resources obtained aboard. If the partners or shareholders of the company being incorporated are foreign investors already established in this country, that they may make said investments with resources proceeding from their own patrimony. That the minimum amount of

provisions of Article 5 contradict the 1973 FIL.[218] These contradictions have caused legal insecurity among foreign investors in Mexico.[219]

The 1989 Regulations constitute a major shift in foreign investment policy in Mexico. The nationalist policies toward foreign direct investment of the 1973 FIL have been replaced by the more open foreign investment regime of the 1989 Regulations.

IV. THE NAFTA INVESTMENT CHAPTER AND MEXICO: NEW RULES GOVERNING FOREIGN DIRECT INVESTMENT

Chapter 11 of NAFTA establishes an open investment regime that expands the protection of foreign investors and property beyond any treaty to which a NAFTA signatory is a party. The NAFTA investment obligations, particularly with respect to treatment, protection against dispossession, and compensation for expropriation of alien property, represent a significant shift in Mexico's position regarding traditional rules governing foreign

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paid-in capital stock be equivalent to 20% of the total investment of fixed assets at the end of the pre-operational period.

III. That the company so incorporated locates the industrial establishments they require for performance of their industrial or manufacturing activities, outside the geographical zones of greatest industrial concentration and subject to controlled growth, as said zones are defined by the corresponding administrative provisions.

IV. That the company so incorporated maintains, as minimum results during the first three years of its operations, a position of equilibrium in its balance of foreign currency. A company will be deemed to have initiated its operations on the date of its obtainment of the first revenue from the commercial sale of its products or from the rendering of its services.

V. That the company so incorporated will generate permanent jobs and establish sustained programs of training, capacitation and personal development for their workmen, in accordance with the applicable legislation.

VI. That the company so incorporated is to make use of adequate technology and to observe all legal provisions in matters of ecology.

A foreign investor will be deemed to have agreed with the requisites established in this article, by the sole fact of his acquisition of a share in a company incorporated in accordance with the regime established by this Article.

Id.

218. *Id.*

219. *See* Camil, *supra* note 209, at 5.

investment. Since the nineteenth century, Mexico has contested vehemently the traditional principles of international law governing the protection of foreigners and foreign property.[220] As previously discussed, the Mexican Constitution[221] embodies the Calvo Doctrine,[222] a direct challenge to the international minimum standard doctrine advocated by industrialized states in international economic relations.[223] Furthermore, in the international arena, Mexico has led the Third World in a call for restructuring international law to support the sovereignty of every state in the treatment of foreign investment located in its territories.[224]

A. *Scope and Coverage: General Overview*

The principles regarding scope and coverage application are found in the NAFTA provisions defining "investors" of the signatories.[225] Under the treaty, an investor of a NAFTA party is defined to include "a NAFTA party or state enterprise thereof, or a national or an enterprise of such [p]arty, that seeks to make, is making or has made an investment."[226] An enterprise of a NAFTA party includes all forms of business entities "constituted or organized" under the laws of that NAFTA party.[227] The provisions of the Investment Chapter cover not only investors from a NAFTA party, but also investors with substantial business activities in NAFTA states.[228] Investment is defined to include ownership and all interests in an enterprise, such as certain loans to an enterprise and equity and debt security of an enterprise.[229]

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220. *See* discussion *supra* part III.A.

221. *See supra* note 77.

222. *See* discussion regarding the Calvo Doctrine, *supra* note 19 and accompanying text.

223. *Id.*

224. Mexico proposed the Charter of Economic Rights for adoption by the United Nations. *See* JONES, *supra* note 23, at 57.

225. NAFTA, *supra* note 1, art. 1139.

226. *Id.*

227. *Id.* art. 1139.

228. *Id.*

229. *Id.* NAFTA provides that "investment" does not mean the following:

(a) claims to money that arise solely from:

Investment covers interests that entitle an owner to share in income or profits of the enterprise, assets of the enterprise on dissolution, real estate, and tangible or intangible property,[230] including intellectual property.

The Investment Chapter covers all areas of investment not addressed in its other chapter.[231] Furthermore, provisions in Chapter 11 not only cover investors from NAFTA states, but also investors with substantial business activities in NAFTA states.

B. *General Treatment Standards*

1. National and Most-Favored-Nation Treatment

The Investment Chapter provides that each NAFTA party must treat NAFTA investors and their investments no less favorably than its own investors and investments.[232] This principle, called a national treatment obligation, ensures the equality of treatment between foreigners and nationals.[233] Furthermore, NAFTA provides that each NAFTA party treat NAFTA investors and their investments no less favorably than it treats investors or investments from third parties.[234] This principle, known as Most Favored Nation, guarantees that treaty-protected investments will be treated at least as favorably by the NAFTA state as nationals and firms from any third state. To illustrate, if Mexico extends a particular benefit to investments from a state like Brazil, it must offer the same benefit to investors from the

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i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan . . . [or]

(b) any other claims to money . . .

Id.

230. *Id.*

231. *Id.* art. 1101.

232. *Id.* art. 1102.

233. Once in effect, NAFTA will accord Mexico the right to continue to screen foreign acquisitions above an initial threshold of $25 million. The threshold figure will be progressively increased to $150 million (in addition to inflation adjustments) over ten years. The impact of screening is likely to have minimal effect because the Mexican companies are small.

234. *Id.* art. 1103.

United States and Canada. These treatment principles apply to all measures relating to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[235] Subject to the agreed exceptions in the annexes,[236] these obligations ensure that a NAFTA party may not subject enterprises to different or more onerous operating conditions simply by virtue of foreign ownership.

NAFTA provides that a NAFTA party must accord the better of either national or Most Favored Nation treatment.[237] This allows the foreign investor to take advantage of whichever standard of treatment is more beneficial, ensuring that the foreign investor will suffer no disadvantage in relation to either host state nationals or to investors from third states. NAFTA expressly prohibits certain commonly encountered impediments to investment, such as requiring that a minimum level of equity be held by nationals or that certain senior management positions be reserved to local nationals.

For Mexico, the national treatment standard is clearly a departure from the requirement of minority ownership and control of the 1973 FIL.[238] As noted previously, the 1973 FIL codified the policy of Mexicanization, mandating that at least fifty-one percent of all private enterprises in Mexico, particularly industry, be owned by Mexican nationals to ensure local control of the economy and local participation in its benefits.[239] The Mexicanization policy governing foreign investment was pursued even before its codification in the 1973 FIL, and was replaced when the 1989 Regulations[240] were issued. Since the 1973 FIL remains intact, however, the liberalized foreign investment scheme of the 1989 Regulations can only be assured by the passage of NAFTA. Since the 1989 Regulations did not change

235. *Id.* arts. 1102, 1103.

236. *Id.* annex I-M. In annex I-M, all the NAFTA parties list existing measures of the NAFTA state that derogate from national and Most-Favored-Nation treatment, or performance requirements obligations. The measures in this section may not be made more restrictive and, if liberalized, may not later be made more restrictive. *Id.*

237. NAFTA, *supra* note 1, art. 1104.

238. *See 1973 FIL, supra* note 166.

239. *See id.*

240. *See 1989 Regulations, supra* note 212.

the 1973 Law, NAFTA will assure that the liberalization of foreign investment in the 1989 Regulations remain intact.[241]

2. Minimum Standard of Treatment

NAFTA requires that the host state accord to investments of a NAFTA party "treatment in accordance with international law, including fair and equitable treatment and full protection and security."[242] The reference to international law in NAFTA signifies a recognition by the parties that customary principles of international law exist external to the treaty. "Fair and equitable" treatment is a classic formulation of international law. While the precise meaning of the phrase is open to a variety of interpretations, an important aspect of this standard is that foreign investors should not lack the protection and security afforded to nationals. Another important implication of the standard is that foreign investors should not, in comparison with nationals, be put at a competitive disadvantage in obtaining permits or authorizations necessary to conduct business operations in the state concerned.

C. *Prohibition of Performance Requirements*

NAFTA prohibits the imposition of performance requirements[243] "in connection with the establishment,

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241. *Id.*

242. NAFTA, *supra* note 1, art. 1105 (1).

243. Generally, "performance requirements" refers to a variety of requirements established by host states concerning the performance of foreign-owned enterprises in their territory. These requirements, imposed by law, regulation, or policy are accorded usually to the investor as conditions for allowing the investment or for granting to it certain privileges. The main examples of such measures are those requiring that a certain proportion of the foreign enterprises production be supplied by local sources, that a certain percentage of the production be exported or sold to local buyers. Other types of government regulations, including controls on transfer of technology and on foreign exchange and equity requirements, as well as a host of other specific measures, such as manufacturing and product mandate requirements, may be considered performance requirements. These requirements are usually applied to foreign investment. *See* STEPHEN E. GUISINGER ET AL., INVESTMENT INCENTIVES AND PERFORMANCE REQUIREMENTS (1985); *see generally* ROBERT E. BALDWIN, THE MULTILATERAL TRADE NEGOTIATIONS: TOWARDS GREATER LIBERALIZATION? (1979); JAMES E. MEADE, TRADE AND WELFARE (1985); G. RUEBER ET AL., PRIVATE INVESTMENT IN DEVELOPMENT (1973).

acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a nonparty in its territory."[244] The list of performance requirements includes export performance,[245] domestic content,[246] domestic sourcing,[247] trade balancing,[248] product mandating,[249] and technology transfer requirements.[250] In addition to prohibiting these requirements, NAFTA prohibits a party from conditioning receipt of incentives in connection with an investment in its territory by requiring the investors of a NAFTA party or a nonparty to (1) give preference to domestic sourcing, (2) achieve a certain level of domestic content, or (3) achieve a certain trade balance by restricting domestic sales to some proportion of exports or foreign exchange earnings.[251] NAFTA allows the NAFTA states, however, to condition the receipt of investment incentives on the location of production facilities, employment, employee training, or expansion of facilities in the NAFTA territory.[252]

The NAFTA prohibition on performance requirements is a departure from the Mexican foreign investment regime under the 1989 Regulations.[253] The 1989 Regulations liberalize foreign direct investment by allowing foreign investment in any proportion without governmental authorization for those activities not explicitly reserved for the state or for Mexican nationals.[254] As a condition to the one hundred percent foreign ownership rule in the 1989 Regulations, however, the foreign investor must maintain a balance in foreign currency operations for the first three years in operation.[255] These criteria resulted from governmental policies designed to encourage foreign investment that would complement and bolster the Mexican economy. The

244. NAFTA, *supra* note 1, art. 1106(1).
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.* art. 1106(3).
252. *Id.* art. 1106(4).
253. *See 1989 Regulations, supra* note 212.
254. *See id.* art. 5.
255. *Id.* arts. 5 (III), 28(I)(b)(iii). The 1989 Regulations, *supra* note 212, set forth additional conditions.

1989 Regulations, while representing a dramatic departure from Mexico's restrictive 1973 FIL, were balanced with the requirements that would promote investment pursuant to Mexico's own self-determined economic development needs.[256]

In the last decade, a number of Third World states have adopted more flexible foreign investment policies, partly because of their need for additional foreign capital to fuel economic growth.[257] The incentive policies to attract foreign capital often were coupled with controls on foreign direct investment as a means of curbing the practices of TNCs.[258] Industrialized states maintain that these performance requirements limit foreign participation in these markets and can be as injurious as restrictive tariffs.[259] In their view, these performance requirements, if left to multiply, could become a serious impediment to a liberal world trading environment.

The issue of restrictive and distorting effects of performance requirements has reemerged in the Uruguay Round of GATT.[260] Although performance requirements have been discussed on several occasions in past GATT rounds, in the Uruguay Round, the United States and some contracting parties to GATT offered certain "proposals" aimed at expanding GATT's institutional structure.[261] One of these new issues, connected with issues of trade-related investment measures (TRIMs), seeks to link investment policy with trade policy and thereby bring within the framework of GATT rules those government investment measures

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256. *See 1989 Regulations, supra* note 212.

257. *See* Edmund M.A. Kwaw, *GATT and the Debate about Investment Liberalization*, *in* THE LAW AND ECONOMIC DEVELOPMENT IN THE THIRD WORLD 113, 114-15 (P. Ebow Bondzi-Simpson ed., 1992).

258. *Id.*

259. *Id.* at 115.

260. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 197 [hereinafter GATT].

261. Complaints about restrictive and distorting trade effects of governmental investment requirements, such as local content requirements, manufacturing requirements and limitations, domestic sales or export requirements, trade balancing requirements, exchange or remittance restrictions, and licensing or technology transfer requirements have been discussed on several occasions in past GATT rounds. *See* Kwaw, *supra* note 257, at 114. A negotiating Group on Trade-Related Investment Measures was established within the Uruguay Round with a mandate to examine the trade restrictive and distorting effects of investment measures. *See Punta Del Este Ministerial Declaration [Ministerial Declaration on the Uruguay Round]*, 33 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 19 (1987).

that have a serious trade restrictive and distorting effect.[262] The objective of the Uruguay Round with respect to TRIMs is to liberalize international investment so that it operates on the same basis as the conduct of international trade.

After having sought input from the business community, the United States offered an illustrative list of TRIMs in its negotiating plan. This extensive plan listed the kinds of TRIMs to be prohibited and basic principles for an agreement. The initial list of TRIMs submitted by the United States was rejected by developing states because it constrained the ability of developing states to control TNCs in their own territory. The coverage of TRIMs accorded in the draft Uruguay Round text has been limited primarily to domestic content and trade balancing requirements.[263]

The performance requirements in the Investment Chapter of NAFTA, which parallel the original United States proposals during the Uruguay Round, are much broader than the GATT TRIMs. Because the Uruguay Round ended without the contracting parties extending GATT to TRIMs, the performance requirements in NAFTA will give the United States a significant amount of leverage during the next Uruguay Round negotiations.

D. *Transfers Relating to Investments*

A foreign investment would be seriously impeded without the ability to transfer capital and profits out of the host state. Consequently, the transfer provision is one of the most important provisions in NAFTA. The NAFTA monetary transfer provision covers five basic issues relating to an investment of a NAFTA party in the territory of another NAFTA party.[264] NAFTA provides that all of these transfers be made "freely and without delay," in "a freely usable currency at the market rate of exchange."[265] This includes transfers to the investor, such as remittance of profits

262. THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS 500, 505 (Sec. D, subjects for negotiation) (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 1986).

263. *See The Draft Decision by the Contracting Parties of the GATT on Trade-Related Investment Measures (TRIMS)* (Dec. 20, 1991).

264. NAFTA, *supra* note 1, art. 1109(1).

265. *Id.* art. 1109(2).

and dividends, the payment of interest and capital gains, management fees, and proceeds from the sale of liquidation of an investment.[266] Transfer provisions in NAFTA also apply to payments under contract for goods or services in an investment to a third party, such as a subsidiary.

Industrialized states consider the ability to make monetary transfers one of the most important provisions in an investment treaty.[267] Nevertheless, chronic balance-of-payment difficulties of most host states, and the host states' need to conserve foreign exchange to pay for essential goods and services, often make them unwilling or unable to grant investors the unrestricted right to make monetary transfers.[268] Most Third World states have exchange control laws to regulate the conversion and currency abroad. For further protection, Third World states either have stipulated a rate of exchange in bilateral arrangements or have referred to IMF exchange regulations.[269] The monetary transfers dilemma exemplifies the conflicting goals of the industrialized and Third World states. While industrialized states seek broad, unrestricted guarantees on monetary transfers, Third World states seek more restrictive options.

The NAFTA provision regarding monetary transfers echoes the guarantees that industrialized states and their investors and firms seek in order to maximize their investment projects. Under NAFTA, foreign investors will be able to make any transfers relating to an investment in a NAFTA state with broad and unrestricted guarantees.

E. *Expropriation and Compensation*

The United States and other industrialized states have maintained that the most dangerous risk to a foreign investor is the expropriation of his property without compensation or with inadequate compensation.[270] In their view, the fear of

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266. *Id.* art. 1109.

267. Most BITs contain monetary transfer obligations providing that transfers be made without delay. *See* Khalil, *supra* note 61, at 360.

268. *See* Salacuse, *supra* note 62, at 669.

269. *Id.*

270. *See generally* Martin Domke, *Foreign Nationalizations: Some Aspects of Contemporary International Law*, 55 AM. J. INT'L L. 595, 603 (1961) (examining the origins of the "prompt, adequate and effective" compensation rule); Norman Girvan, *Expropriating the Expropriator: Compensation Criteria from a Third World*

expropriation and nationalization always has constituted a serious impediment to foreign investment in Third World states.[271] For their part, Third World states, particularly Mexico and the rest of Lain America, as an expression of economic self-determination,[272] have called for a reappraisal of norms of customary international law governing expropriation and nationalization issues.[273] The result has been an international community divided along North-South boundaries that is unable to formulate an effective legal mechanism to deal with this conflict.[274] In the absence of an international consensus, industrialized states have sought to establish legal regimes for protecting foreign investments of their nationals and firms through bilateral arrangements and now through NAFTA. At the same time, they have sought to reaffirm in these agreements traditional principles of international law of nationalization and expropriation, including standards of compensation that reflect the customary international law of an earlier era.

In this context, the NAFTA agreement on expropriation and compensation clearly has fulfilled the United States objectives. NAFTA provisions represent a significant shift from Mexico's longstanding challenge to these principles—a challenge that originated in the nineteenth century and is embedded in the very fiber of Mexico's legal structure. To fully understand the significance of these NAFTA provisions, one must look at various elements of the treaty's expropriation and compensation article,

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Viewpoint, *in* 3 VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 153 (Richard Lillich ed., 1973) (describing the origins of the position of the Western states on expropriations); Leslie L. Rood, *Compensation for Takeovers in Africa*, 11 J. INT'L L. & ECON. 522 (1977) (illustrating particular takeovers in Africa).

271. For the United States and other industrialized states, this fear was intensified in the 1970's by new developments in international law, particularly NIEO. Moreover, a series of expropriations of United States investments during the late 1960s and 1970s underscored the need for strong protection in Third World states. *See* David A. Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L L. 474 (1977); *see generally* William D. Rogers, *Of Missionaries, Fanatics, and Lawyers: Some Thoughts on Investment Disputes in the Americas*, 72 AM. J. INT'L L. 1 (1978).

272. *See Charter of Economic Rights*, *supra* note 42.

273. *Id.*

274. For a treatment of the conflict in expropriations law, see Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. J. INT'L L. 553 (1981).

from an historical perspective, with an emphasis on Mexico and the Third World.

Article 1110 of the NAFTA Investment Chapter provides for the protection of foreign investments against nationalization, expropriation, and other forms of interference that are "tantamount to nationalization or expropriation."[275] The Article covers direct, indirect, and "creeping expropriation."[276] In accordance with traditional principles of international law, the Article provides that investments may not be expropriated except: for a public purpose; on a nondiscriminatory basis; in accordance with due process of law; and upon payment of compensation as specified in the Article.[277]

Generally, the right of a sovereign nation to expropriate foreign property in its territory has not been disputed by Third World and industrialized states.[278] The dispute usually involves one or more of the four specified conditions. The condition most often the source of controversy between the United States and Mexico in particular, and Third World and industrialized states in general, is the condition requiring payment of compensation.

NAFTA provides that adequate compensation is a condition for lawful expropriation or nationalization and that compensation must be paid without delay,[279] equal to the fair market value of the investment immediately before the expropriation took

275. NAFTA, *supra* note 1, art. 1110.

276. "Creeping expropriation" involves measures whereby the government increasingly imposes restrictions and controls, such as, excessive and repetitive tax regulatory measures, on the foreign investment enterprises so as to make it difficult to continue in business at a profit. This leads to the sale or abandonment of the project to the government or local private investors. It is the cumulative effect of the measures which then has a de facto confiscatory effect in that their combined effect results in depriving the investor of ownership, control, or substantial benefits over his enterprise, even when each such measure taken separately does not have this effect. *See* Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID REV. FOREIGN INVESTMENT L.J. 41 (1986); *see generally* Detlev F. Vagts, *Coercion and Foreign Investment Rearrangements*, 72 AM. J. INT'L L. 17 (1978); Burns H. Weston, *Constructive Takings Under International Law: A Modest Foray Into the Problem of Creeping Expropriation*, 16 VA. J. INT'L L. 103 (1975).

277. NAFTA, *supra* note 1, art. 1110(1).

278. There are some regional agreements that are stricter with regard to expropriation. Franziska Tschofen, *Multilateral Approaches to the Treatment of Foreign Investment*, 7 ICSID REV. FOREIGN INVESTMENT L.J. 284, 408 (1992).

279. NAFTA, *supra* note 1, art. 1110(3).

place,[280] including interest from the date of expropriation,[281] and be fully realizable.[282] The compensation must also be fully transferable, as provided by the transfer article.[283]

The NAFTA standard for compensation, providing that the compensation be made "without delay," "equal to the fair market value of the investment," and "fully realizable," is the United States modern version of the Hull formula.[284] Most Third World states oppose such high standards of valuation, and instead argue for "appropriate compensation . . . taking into account . . . all circumstances that the State considers pertinent."[285] In order to understand fully the significance of the compensation standard in light of North-South differences, it is important to discuss each element of the formula.

The NAFTA element "fair market value" for compensation by an expropriating state is the standard advocated by the United States and other industrialized states.[286] The combination of "fair

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280. *Id.* art. 1110(2).

281. *Id.* art. 1110(4).

282. *Id.* art. 1110(3).

283. *Id.* art. 1109.

284. *See supra* notes 117-21 and accompanying text.

285. NAFTA, *supra* note 1, art. 1110(2).

286. *See* Francesco Franconi, *Compensation for Nationalisation of Foreign Property: The Borderland Between Law and Equity*, 24 INT'L COMP. L.Q. 255, 266 (1975). The Mexican Constitution of 1917, Article 27, provides in part, that "[e]xpropriations can only be made by reason of utility and by means of indemnity." MEX. CONST., *supra* note 77, art. 27. Although Mexico asserted that compensation was not due under its own constitution, recompense was required by United States standards. The argument thus ultimately becomes whose standards will govern the controversy. The bottom line on recompense depends on the state's capacity to apply its laws, which will also dictate the form and manner of payment. *See also* Robert K. Goldman & John M. Paxman, *Real Property Valuations in Argentina, Chile, and Mexico*, *in* 3 VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 137-45 (Richard B. Lillich ed., 1973) (an excellent discussion of the constitutional aspects of expropriations and the Mexican valuation process); *see generally* PETER ADRIAANSE, CONFISCATION IN PRIVATE INTERNATIONAL LAW (1956); PAUL A. BARAN, THE POLITICAL ECONOMY OF GROWTH (1957); FREDERICK S. DUNN, THE PROTECTION OF NATIONALS (1932); FREDERICK S. DUNN, THE DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO (1933); CUTHBERT JOSEPH, NATIONALITY AND DIPLOMATIC PROTECTION (1969); CASTOR H. P. LAW, THE LOCAL REMEDIES RULES IN INTERNATIONAL LAW (1961); JOHN C. MCCARTHY, UNITED STATES POLICY TOWARD FOREIGN EXPROPRIATION OF AMERICAN-OWNED PROPERTY (1967); E.I. NWOGUGU, THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING

market value in freely transferable dollars" provides the foreign investor the highest value for the expropriated property.[287] In recent years, the United States and other industrialized states have attempted to incorporate the "fair market value" standard in their BITs.[288]

Third World states challenged the traditional stand in the Charter of Economic Rights and Duties of States, which provides for compensation that is "appropriate" to the circumstances giving rise to the expropriation.[289] Mexico's special standard for compensation employed during the oil nationalizations, excusing expropriations that were "inspired by legitimate causes and the aspirations of social justice," has also challenged the traditional rules. In addition, Latin American states that support the Calvo Doctrine allow their domestic courts to determine the appropriate standard of compensation.[290]

Third World opposition to the fair market value standard has focused on the "ability to pay." Third World states have argued that the problem with the fair market value standard, which reaffirms the traditional rules of customary international law, is that it would "thwart their efforts to carry out badly needed social and economic reforms."[291]

F. *Settlement of Investment Disputes*

Subchapter B of Chapter 11 establishes a mechanism for the settlement of investment disputes between a NAFTA state and an investor of another NAFTA state: through international arbitration in accordance with the International Centre for Settlement of Investment Disputes Convention (ICSID Convention)[292] or the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL Arbitration Rules);[293] or through litigation before the courts of the NAFTA state, at the election of the investor. It represents the first time

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COUNTRIES (1965); MANNARASWAMIGHALA S. RAJAN, SOVEREIGNY OVER NATURAL RESOURCES (1978).

287. Franconi, *supra* note 286, at 266.

288. *Id.*

289. *See* Asante, *supra* note 11, at 599 (*citing* Reply of Mexican Minister of Foreign Affairs dated Aug. 3, 1938, *in* STEINER & VAGTS, *supra* note 30).

290. *Id.*

291. *Id.*

292. *Id.*

293. NAFTA, *supra* note 1, art. 1120(1)(a)-(b).

Mexico has entered into an international agreement providing for investor-state arbitration. An overview of some of the most important provisions is important before discussing the significance of the agreed-upon dispute provisions for Mexico.

1. Coverage

Under the investor-state arbitration mechanism of Article 1116 of NAFTA, an investor of a NAFTA state, on his own behalf, may submit to arbitration a claim for loss or damage resulting from a breach by the NAFTA host state of a treaty provision.[294] Article 1117 permits an investor to assert a claim on behalf of an enterprise that the investor owns or controls directly or indirectly.[295]

Subject to NAFTA, the investor-state arbitration provisions reach actions taken by federal, state, and provincial governments; certain actions by state enterprises; and actions taken by certain state-chartered monopolies when the actions are inconsistent with NAFTA.[296] An investor must bring a claim within three years of when the investor or enterprise first acquired or should have acquired knowledge of the loss or damage.

Subchapter B of Chapter 11 does not require or even encourage arbitration as a first resort, nor does it require an investor to exhaust local remedies. It seeks to preserve the maximum scope for amicable settlement of disputes. Article 1118 therefore promotes initial dispute settlement through consultation or negotiation.[297] If these efforts at an amicable settlement are not successful, then NAFTA provides for the submission of the dispute in accordance with previously agreed procedures.

294. *Id.* art. 1116.
295. *Id.* art. 1117.
296. *Id.* arts. 1116, 1117.
297. *Id.* art. 1118.

2. Submission of a Claim to Arbitration[298] and Conditions Precedent[299]

With certain exceptions, the stage of compulsory arbitration in Article 1120 is reached after six months have elapsed from the date giving rise to the claim. An investor may submit a claim for arbitration under the Investment Chapter only if certain conditions are satisfied. First, the investor (and enterprise, when the claim is submitted on its behalf) must consent to arbitration in accordance with the procedures set out in NAFTA. Second, the investor and the enterprise must waive the right to initiate or continue before any administrative tribunal or court, under the law of any NAFTA state, or other dispute settlement procedures, any proceedings on the measure that is alleged to breach NAFTA, except for proceedings for injunctive, declaratory, or other extraordinary relief not involving the payment of damages. Third, the consent and waiver must be delivered to the host state in writing.[300]

Article 1122 provides that a disputing investor may submit the claim to arbitration under: the ICSID Convention, provided that both the host and the investor's home state are parties to the Convention; the Additional Facility Rules of the ICSID Convention, provided that either host state or the investor's state is a party to the Convention; or UNCITRAL Arbitration Rules. At present, only the United States is a party to the ICSID Convention.

3. Consolidation of Claims[301]

When two or more claims submitted to arbitration have a question of law or fact in common, Article 1126 provides that the claims may "in the interests of fair and efficient resolution of the claims" be consolidated and heard by a tribunal established under the UNCITRAL Arbitration Rules, except as modified by NAFTA.[302] After hearing the disputing parties on whether

298. *Id.* art. 1120.
299. *Id.* art. 1121.
300. *Id.* art. 1121(3).
301. *Id.* art. 1126.
302. *Id.* art.1126(2).

consolidation in a particular dispute meets the criteria of Article 26, the decision to consolidate can be made.

4. Governing Law

Article 1131 provides that an arbitration tribunal must decide the issues of dispute in accordance with NAFTA and applicable rules of international law.

5. Significance to Mexico

The NAFTA investment dispute settlement mechanism represents a significant departure for Mexico with respect to the role of international law in international economic relations. Mexico's distrust of private-state arbitration stems from the Calvo Doctrine,[303] which denies that the state of the owner can intervene on his behalf against the host state. Investment contracts between states and foreign investors commonly include a Calvo Clause[304] under which a foreign investor agrees, as part of his submission to local law, not to seek the diplomatic intervention of his government in any matter arising out of the contract. The Mexican interpretation of these clauses is that the foreign investor is bound by the local rule of law, even in the face of a violation of international law.[305] When foreign investment is concerned, the import of the Calvo Doctrine is that arbitration is an unacceptable yielding of sovereignty. The arbitral procedures in the dispute settlement mechanism in NAFTA will have a significant impact on international economic relations between Third World and industrialized state.

303. *See* the discussion of the Calvo Doctrine, *supra* note 19 and accompanying text.
304. *Id.*
305. *Id.*

V. THE SIGNIFICANCE OF THE NAFTA INVESTMENT PROVISIONS FOR THE THIRD WORLD

The foregoing assessment of the investment provisions in Chapter 11 of NAFTA demonstrates that Mexico's attitude towards foreign direct investment and the role of international law in its regulation have changed significantly. Since the nineteenth century Mexico persistently has challenged the traditional principles of state responsibility, asserting the sovereign interests of the host state. Inspired by the profound transformation in the political structure of the world in the 1960s and 1970s, Mexico led the Third World in challenging the traditional principles that had been established without the Third World's participation and consent. Third World states, contending that political developments had not been followed by economic and social transformation, called for a restructuring of international law. The emergence in the mid-1970s of the proposals for a NIEO was one of the many indicators of the development of a consensus among the developing states on the rules governing North-South economic relations. The purpose of these new legal rules was to replace the structure of international economic relations with a fairer system, in an attempt to close the widening gap between Third World and industrialized states to remove international disequilibria and disparities.

More than two decades after the attack by Third World states on the traditional concept of state responsibility, the Third World is experiencing changing attitudes about foreign investment. Debt-burdened Third World states, in need of capital, have begun to re-open their economy to foreign investment. Like Mexico, these states are entering into arrangements with industrialized states that are reinvigorating traditional rules for international investment protection. But none of these arrangements have the broad scope of protection for foreign investment found in the investment provisions in NAFTA. These provisions reaffirm the traditional principles of international law. The negotiation of NAFTA by a Third World state and two industrialized states is significant for future North-South international economic relations.

A. *Toward A New Framework for the Regulation of Foreign Direct Investment*

The investment provisions in Chapter 11 of NAFTA probably will serve as a model for other treaties between the ninety industrialized and Third World states in future negotiations. While on a theoretical level a trilateral accord is not likely to serve as the basis for the development of customary norms of international law, the combination of the BIT movement and the investment provisions in NAFTA may be seen as part of an ongoing process to create a new international framework for the regulation of foreign direct investment. While NAFTA only binds the three signatories, the powerful position of the United States in the international arena, and of Mexico in the Third World, certainly will promote the NAFTA framework for foreign direct investment and lay the foundation for the creation of an international investment framework that may eventually attract the consensus of both Third World, and industrialized states. For industrialized states, the provisions of the NAFTA Investment Chapter—establishing a secure investment environment through the elaboration of broad rules of fair treatment of foreign investment and investors, removal of barriers to investment by eliminating or liberalizing existing restrictions, and dispute settlement mechanisms for investors and host states—serve to provide a stable environment for their investments abroad, in a manner which responds to the demands of the new interdependent global economy.

Third World states, needing foreign capital and nonindigenous technological expertise to develop their economies and promote growth, will be under more pressure by industrialized states to accept investment protection provisions similar to those enunciated in NAFTA. Using the United States BIT movement as a source of comparison, the states formerly representing the Soviet bloc and the Latin American states, ideologically or legally opposed to the free-market model underlying the BIT, have found that much needed capital for economic development superseded their initial rejection of the BIT.

The provisions in the NAFTA Investment Chapter will also have a significant impact on the new wave of bilateralism for negotiating foreign investment regimes. The United States and other industrialized states consistenly have been utilizing the bilateral approach for negotiating with Third World states for the last decade. While general bilateral commercial agreements have a long history, the specialized bilateral investment treaty is a relatively new phenomenon the origins of which lie in the post-World War II era. The new barriers to foreign direct investment that Third World states erected during the 1960s and 1970s, inspired by nationalistic concepts as permanent sovereignty over natural resources and economic activities and the NIEO,[306] urged the United States and other industrialized states to develop a model and prototype investment treaties to serve as a basis for bilateral treaty negotiations. While the initial attempts during the 1980s appeared successful, in reality it had only moderate success. The underlying open investment regime in NAFTA will encourage other industrialized states to take the bilateral approach.

The problem with the bilateral approach is that Third World and industrialized states are unequal political and economic partners. As such, their primary concern is protecting foreign investment, not addressing the concerns of TNC operations or economic development.

B. *The End of the North-South Dialogue*

The negotiation of the open investment regime in NAFTA between Mexico, one of the most developed Third World states and an opponent of international rules governing property, and the United States, demonstrates the success of bilateralism. The multilateral arena, including the United Nations family of organizations, GATT and others, frequently have been dominated by North-South disagreements. Within this multilateral fora, the industrialized states are greatly outnumbered. As such, with regard to international economic relations, the United States and other industrialized states have attempted to secure legal rules for the protection of their nationals and their property abroad through bilateral arrangements.

The bilateral process, particularly between two states of unequal political and economic power, may have significant implications for Third World states. Mexico's need to reform its

306. *See supra* note 34-41 and accompanying text.

economy was widely publicized. President Carlos Salinas de Gortari travelled to Europe and Asia in search of commitments of foreign capital to spearhead Mexico's economic reforms. Unable to obtain commitment from either state, Salinas' only option was to ask the United States about the possibility of negotiating a trade pact.

The NAFTA investment provisions, reaffirming the traditional rules governing foreign property, do not incorporate any of the concerns of Third World states, particularly regarding the behavior of TNCs in host territories. The Third World states need for capital and technology will force others to enter into similar agreements. Even if this is the case, Third World states should be concerned about the long-term durability of these bilateral arrangements. While the less developing states were the most attracted to bilateral arrangements in the early 1980s, Mexico's negotiation of NAFTA has now placed bilateralism in a different light.

C. *National Sovereignty and Property Rights*

In the promotion for new international rules governing foreign investment, developing states have asserted the right to modify property relations in accordance with national priorities. The open investment regime in NAFTA, with no provisions addressing either development objectives of the host state or TNC operations, in essence places the state in a position in which its sovereignty and autonomy are compromised.

While both Third World and developing states have adopted policies and mechanisms for the promotion and protection of foreign investment through the use of industrial and fiscal incentives and the creation of protective legal regimes, the internalization of the global economy and the interdependence of industries and economies have demonstrated the need for a compromise international regulation scheme. Industrialized states have attempted to formulate this scheme on a bilateral basis assuring that their TNCs have free access to developing states. The lack of national control over economic decisionmaking and the loss to the national economy of high profits are among the most serious effects of foreign direct investment on Third World nations.

VI. CONCLUSION

Chapter 11 of NAFTA represents a major departure from Mexico's previous position on foreign investment and international economic relations. Since the nineteenth century Mexico has challenged the traditional rules of international law governing foreign investment and has pursued a restrictive nationalist position toward the flow of foreign capital. During the 1960s and 1970s, Mexico and other Third World states called for the restructuring of international law in order to equalize international economic relations. While both Third World and industrialized states have made numerous attempts to formulate an international framework for foreign direct investments, few have been successful. In the last decade, Third World states in need of foreign capital and technology have negotiated bilateral arrangements with industrialized states establishing specific rules governing foreign investment. The NAFTA breadth of coverage and the ninety-five specific rules of its Investment Chapter exceed those found in any bilateral or multilateral instrument to which any NAFTA signatory is a party.

[**Editor's Note:** This Article was authored prior to Mexico's passage on December 27, 1993 of the Foreign Direct Investment Law, which implemented many of NAFTA's investment principles.]