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ARTICLES

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INVESTOR-STATE TRIBUNALS AND CONSTITUTIONAL COURTS: THE MEXICAN SWEETENERS SAGA

Sergio Puig*

Abstract. *This article tackles the complex question of the relationship between international and domestic adjudicatory bodies. It does so by analyzing the debate between liberals and developmentalists over the effects of investor-state arbitration tribunals on domestic courts. For liberals, investor-state tribunals are a positive complement to domestic judicial institutions for their ability to "de-politicize" investment disputes, leading to economic policy stability that encourages foreign investment. For developmentalists, the same international alternatives reduce institutional quality by allowing powerful actors such as powerful corporations to skirt local judicial institutions. Through a comprehensive analysis of the negotiations of Chapter Eleven of NAFTA and the recent cases in the sweeteners conflict between Mexico and the United States, this article attempts to address how investor-state arbitration tribunals and constitutional courts interact and affect each other. The case study reveals two important lessons to this debate: i) scholars arguing against investor-state arbitration on the grounds of "circumvention" of domestic courts may do well to calibrate the debate of the use of remedies as one of added remedial possibilities in complex litigation; ii) those defending investor-state arbitration on the grounds of "de-politicization" of investment disputes may do well to consider the veto power wielded by international adjudicatory bodies that impact the judiciary and political systems of the host country.*

Key Words: *Investor-state arbitration, international law, sweeteners, private international law/conflict of laws and Mexican Constitutional Court.*

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Resumen. *Este artículo aborda la compleja relación entre los órganos jurisdiccionales nacionales e internacionales. El artículo lo hace mediante el análisis del debate entre liberales y desarrollistas sobre los efectos de los tribunales de arbitraje inversionista-Estado en los tribunales nacionales. Para los liberales, los tribunales inversionista-Estado son un complemento positivo a las instituciones judiciales nacionales por su capacidad de "des-politizar" controversias relativas a inversiones, lo que conlleva a la estabilidad de la política económica que fomenta la inversión extranjera. Para los desarrollistas, las alternativas internacionales tienden a reducir la calidad institucional, ya que permiten a los actores poderosos evitar que las instituciones judiciales locales, apoyándose en la adjudicación supranacional. A través de un análisis exhaustivo de las negociaciones del capítulo XI del TLCAN y los casos recientes en el conflicto de edulcorantes entre México y los Estados Unidos, este artículo intenta abordar cómo los tribunales de arbitraje y los tribunales constitucionales interactúan y se influyen mutuamente. Este estudio de caso pone de manifiesto dos lecciones importantes al debate presentado: i) los académicos que argumentan en contra de arbitraje inversionista-Estado con base en la idea de "elusión" o "sustitución" de los tribunales nacionales pueden calibrar su crítica sobre el uso de los recursos como un debate de posibilidades adicionales de recuperación en el complejo campo de litigio estratégico, ii) los académicos que defienden el arbitraje inversionista-Estado sobre la base de "despolitización" de las controversias sobre inversiones pueden entender a los organismos internacionales decisorios como jugadores con poder de veto, capaces de afectar en la política judicial interna.*

Palabras clave: *Arbitraje inversionista-Estado, derecho internacional, endulcorantes, derecho internacional privado, Suprema Corte de Justicia de México.*

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I. Introduction

How do investor-state arbitration tribunals and constitutional courts interact and affect each other? On the one hand, constitutional courts, the branch of government tasked with final constitutional oversight, are typically separate and distinct from ordinary judiciary. Constitutional courts are considered fundamental to the political stability of their respective nations because they are, to a large extent, responsible for the social acceptance of the constitution and fundamental autochthonous norms and address the tensions between complex political structures and interests. Constitutional courts are by definition political. On the other hand, investor-State arbitration tribunals arguably help to "de-politicize" investment disputes by allowing individuals or corporations to proceed directly against a State in an international forum. In effect, investor-State arbitration allow States to increase economic policy stability for the sake of promoting foreign direct investment ("FDI"). Because investor-State arbitration is founded upon international law arguably it may remedies normally available in local courts.

Through an analysis of the Mexican sweeteners saga, four investor-State arbitration proceedings part of a larger, sensitive and politically charged economic conflict between two of the parties to the North American Free Trade Agreement ("NAFTA"), this paper aims to contribute to this ongoing debate through an empirical assessment of the relation between investor-State arbitration tribunals and the Mexican Supreme Court. To this effect, the article applies a case study method and describes the national and international proceedings brought by corporations arising from two important and controversial measures adopted by the Mexican Government in the sweeteners sector (sugar and high fructose corn syrup or HFCS): (i) an expropriation decree of half of the countries' sugar mills; and (ii) an openly discriminatory tax on the use of HFCS. Against this background, the article examines the relationship

between domestic and international adjudicatory bodies in politically sensitive contexts through administrative and constitutional law lenses.

Section 1 of this paper reviews the policy debate around international alternatives to adjudicatory bodies. It examines the provisions that deal most directly with the relationship between national courts and international tribunals in investment claims. The article follows by analyzing NAFTA's flexible, "investor-friendly" model of accession known as "no-U-turn" rule, a departure from other models contained in most international investment agreements ("IIAs"). It also discusses how some accession models may be bypassed —under specific conditions— by means of a Most-Favored-Nation ("MFN") clause.

Section 2 describes Mexico's record in Chapter Eleven proceedings and introduces the case study. Specifically, this section discusses the ways in which the Mexican Highest Court and Chapter Eleven arbitration tribunals analyzed the disputes around similar issues. The analysis shows some degree of "dialogue" between national and international adjudicators. Not only did Mexico's high court allow wider incorporation of international standards as part of the nation's constitutionally protected rights, but investor-state tribunals recognized the fundamental role of the Mexican Supreme Court of Justice.

In addition, the case study offers a nuanced recount of the relationship between political courts and investor-state arbitration and the ways in which supranational adjudicatory bodies may affect domestic politics by empowering and expanding remedies available to foreign investors. This has two important implications: (i) scholars who oppose investor-state arbitration on the grounds that they "circumvent" local courts should reconsider the debate regarding the use of remedies as one of added remedial possibilities in complex litigation strategies rather than fatal binary choices; and (ii) scholars who defend investor-state arbitration on the grounds of "de-politicization" should address the role of international adjudicatory bodies as players with veto power affecting local judicial and political interests. Based on such findings, Section 3 revisits the policy debate around the wide array of models that dispense with the local remedies rule and argues for a treaty-specific legal/institutional analysis to understand the effects and construct the rules of coordination between domestic and international adjudicatory bodies.

II. The New Debate about International Alternatives to Adjudicatory Bodies

International investment law has emerged from a proliferation of multilateral and bilateral investment agreements ("IIAs").[1] Many of these treaties

[1] K. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 Am. J. Int'l L. 621 (1998).

provide for investor-State arbitration as the means to settle disputes between investors and the host country.[2] The North American Free Trade Agreement's ("NAFTA") Investment Chapter (Chapter Eleven), is no exception; in fact, the NAFTA accord has arguably produced more academic commentary than any other IIA.[3]

The main purpose of IIAs is to protect and promote the flow of FDI. A chief concern that arose when the system for protection of FDI was developed was the need for effective mechanisms for resolving disputes with host governments.[4] Prior to the advent of investor-State arbitration, foreign investors had to: (i) resort to protection by their own governments (*e.g.,* diplomatic protection after all local remedies had been exhausted); (ii) adjudicate in the host nation, where effective rule of law sometimes faced serious challenges; or, (iii) absorb the costs of adverse government action through political risk insurance.[5]

To avoid these less desirable options for investors, IIAs typically grant the possibility of direct enforcement of international law against host governments.[6] To enable this system of private right of action, IIAs typically relax the local remedies rule of customary international law which requires parties to obtain a final decision from a nation's highest court before elevating a claim internationally.[7] Because the local remedies rule was used in the past

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[2] See UNCTAD Analysis of BITS, UNCTAD, BIT/DTT database *available at* http://www.unctadxi.org/templates/Page____1007.aspx (last visited November 18, 2011).

[3] *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605, 702 [hereinafter NAFTA] Article 1120. Under Article 1120 of NAFTA, Investors may initiate an arbitration proceeding. Theoretically, the arbitration proceeding can be conducted under the following rules: A) ICSID Convention; B) Additional Facility Rules of ICSID; and C) UNCITRAL Arbitration Rules. Under the present ratification patterns of ICSID Convention, this cannot be applied to the disputes.

[4] I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, I ICSID Review, Foreign Investment Law Journal (1986). *See also* Robert B. Shanks, *Lessons in the Management of Political Risk: Infrastructure Projects (A Legal Perspective)*, in Managing International Political Risk 83, 93 (Theodore Moran ed., 1998).

[5] *See* generally, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005).

[6] *See* Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 B.Y.I.L. (2003) 151 at 170. The Court of Appeal for England and Wales also espoused the view that investors under both the NAFTA and bilateral investment treaties were asserting rights of their own rather than a mere procedural power to enforce the rights of their State, *See* Republic of Ecuador v. Occidental Exploration and Production Co. [2005] EWCA Civ 1116, [2006] QB 432 at paras. 14-22.

[7] *See* A. A. Cançado Trindade, *Exhaustion of Local Remedies in International Law Experiments Granting a Procedural Status to Individuals in the First Half of the Twentieth Century*, 24 Neth. Int'l L. Rev. 373, 391 (1977). *See* also Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?,* 102 AJIL (January 2008) 1 at 65-74.

to reduce the number and scope of international disputes, the relaxation of the rule opens the possibilities for multiple and (sometimes) simultaneous proceedings at both, the international and domestic levels.[8]

1. *The Debate: Liberals vs. Developmentalists*

The provisions for direct enforcement of international law by foreign investors against the host State have provoked a new debate about the impact on domestic institutions.[9]

Liberal scholars argue that investor-State arbitration has been a resounding success, as measured by the increase in investment and welfare gains. They claim that without the prospect of compulsory arbitration multi-national corporations may not sink substantial capital in host States since they could not withdraw or simply suspend delivery and write-off a small loss as might a trader in a long-term trading relationship if a dispute arises. Many liberal scholars see these mechanisms as necessary to ensure economic stability and prevent the State of the investor's nationality from intervening in the controversy between an investor and a host State, for instance by attempting to pressure the host State into some kind of settlement. In this sense, liberal scholars see investor-State arbitration as a *complement* to domestic judicial institutions for its ability to "de-politicize" investment disputes and effectively encourage foreign investment.[10]

In contrast, many development (and some legal) scholars argue that international adjudicatory bodies such as investor-state arbitration tribunals serve as a substitute for domestic institutions and a backlash to the institutional

[8] J. H. Knox, *Horizontal Human Rights Law,* 102 AJIL 1-47 (2008). For an analysis of the new challenges of the internationalization of justice in the Mexican context, see Eduardo Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*, available http://biblio.juridicas.unam.mx/libros/7/3033/14.pdf (last accessed May 1, 2012) (analyzing the effects of the Mexican Constitutional reform of July of 2011 and the jurisprudential dialogue between Mexican courts and the Inter-American Court of Human Rights.)

[9] W. S. Dodge, *National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata under Chapter Eleven of NAFTA*, 23 Hastings Int'l & Comp. L. Rev. 357 (2000).

[10] *See* Thomas W. Walde, *The "Umbrella" Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. World Invest. & Trade 183, 185-86 (2005) (discussing BITs as part of a "culture of commitment"). Without trying to address this important debate, it is relevant to recognize validity to the notion that investor State arbitration, as another example of international legalization, has an ideological character. This phenomenon is salient in international economic law with the proliferation of judicial and quasi-judicial institutions. Thus, to some extent, this expansion attempts to separate the politics involved in law creation and adjudication, as a form of denying that the work of judges and arbitrators is also ideologically based, particularly when the stakes are high. In practice, international tribunals play a critical role in the development of international law.

development of courts in developing nations.[11] Several experts have expressed concerns about a model that seems to "circumvent"[12] or "bypass"[13] domestic courts.[14] Their views are that this substitution may have perverse and unintended effects on domestic institutions. For instance, in the words of International Court of Justice ("ICJ") Judge Bernardo Sepulveda, by removing from national jurisdiction claims that domestic courts should resolve themselves, investor-state arbitration "diminishes the validity of th[e] country's juridical order."[15] Other commentators have asserted that this "circumvention," among others, discourages domestic courts from improving,[16] and prevents them from deciding increasingly important matters.[17]

In recent years, this debate has been fomented with some quantitative evidence. For instance, based on the meta-analysis of several years of data on institutional quality produced by the World Banks, Chicago Law School Professor Tom Ginsburg has concluded that investment arbitration:

> […] is rooted in international, extra jurisdictional substitutes for domestic institutional quality. These substitutes […] have expanded even more rapidly than domestic investments in governance, and allow powerful actors to avoid local judicial institutions. Local judicial institutions, in turn, face insufficient incentives to compete with the global alternatives. In an era of global investment flows, powerful players can exit local jurisdictions with poor institutions. This means that developing countries can find themselves in a trap of low-quality institutions, wherein no political coalition can form to support institutional im-

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[11] Ginsburg, *International Substitutes for Domestic Institutions*, 25 International Review of Law & Economics 107, 107-123 (2005).

[12] Bernardo Sepulveda Amor, *International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 Hous. J. Int'l L. 565, 581 (1997). Judge Sepulveda concluded at the time that: "Mexico's best option seems to be to avoid allowing an international arbitral judge to decide issues regarding the kind of treatment owed to a foreign investor. Mexico has its own juridical order capable of giving full satisfaction to the obligations contained in the NAFTA —including, of course, those in Chapter 11 […] The primacy of domestic laws and national courts is one of the necessary expressions of sovereignty."

[13] *See* Héctor Fix-Fierro & Sergio López-Ayllón, *The Impact Of Globalization on the Reform of the State and the Law in Latin America*, 19 Hous. J. Int'l L. 785 at 797 (1997) concluding that: "[…] from the economic point of view, a consequence of globalization is precisely the attempt to escape the authority of national institutions, including the court system. Thus, we witness a proliferation of dispute settlement mechanisms and institutions whose goal is to bypass the national court systems. Consequently, domestic courts are kept from deciding increasingly important matters, and this means a relative loss of power for them as national institutions."

[14] *Cfr.* W. S. Dodge, *Loewen v. United States: Trials and Errors under NAFTA Chapter Eleven*, 52 DePaul L. Rev. (2002) 563 (arguing that review by international tribunals is not an effective way to correct trial errors, and Chapter 11 should be changed to require, or at least to encourage, the exhaustion of domestic appeals before resorting to NAFTA arbitration).

[15] Sepulveda, *supra* note 12, at 566.

[16] Ginsburg, *supra* note 11, at 108-109.

[17] Fix-Fierro & López-Ayllón, *supra* note 13, at 781.

> provement. Indeed, the presence of international alternatives to adjudicatory or regulatory bodies may reduce local institutional quality under certain conditions.[18]

As presented by professor Ginsburg, this debate is cast in binary terms, one of *complementarity* or *substitution* of adjudicative bodies. The policy implications are clear: if, on the one hand, investor-state arbitration complements domestic courts, the strategy of signing IIAs with private right of actions for investors may be viewed as a positive development in international law. If, on the other hand, evidence indicates circumvention and hence *substitution*, alternatives are needed to help adjudicate complex, politically-charged disputes in ways that can support the development of domestic institutions.

While this debate may be productive, it is not sufficiently nuanced. For instance, bringing an international claim against a sovereign is expensive and may limit or prevent future investment opportunities in the host country, and is therefore mostly used only as a mechanism of last resort after attempts to resolve the dispute within the local judicial system. In other cases, it may be futile to even attempt to resolve the dispute by making use of local judiciaries either because of lack of neutrality, expertise or simply because a strong precedent exists. More importantly, IIAs often have different accession models; some even require years of litigation in domestic courts before permitting international arbitration. Moreover, the corporate structures may give rise to multiple proceedings before different bodies for identical measures. This may raise questions of abuses of process and forum-shopping, or even worse, duplicative relief if suits in different *fora* proceed successfully, however, not necessarily claims of circumvention. A proper evaluation must depart from an understanding of the complex relationship between domestic and international tribunals and their rules of coordination. Whereas development scholars often take what I would call an external look at the investor-state arbitration regime, the inquiry of the relationship between domestic and international tribunals should be thought of as an internal legal/institutional analysis. This is largely missing in the literature.

My interest is in developing the insight that politically-charged cases often involve significant interactions between local judiciaries and international tribunals, even when not readily aparent. The startegic considerations of litigants, judges and arbitrators generate a fluid relationship between national and international adjudicative bodies not adequately addressed in this debate. In developing this notion, my goal is to explore how politically-charged cases are decided by constitutional courts when the same issues are also before investor-state arbitration tribunals. My broader interest is to explore different methodological approaches towards a better understanding of the relationships between national and supranational adjudication bodies and the effects each has on the other.

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[18] Ginsburg, *supra* note 11, at 108-109.

I'm interested in Mexico because it has a federal judicial review system for the protection of individual rights guaranteed under the Mexican Constitution, known as the *amparo*. The *amparo* proceeding allows petitioners to request certain remedies, including provisional measures, for violations of constitutional rights including property rights or claims of discrimination. An *amparo* may end up before the Mexican Supreme Court and can be brought in regard to, among others, any law or action by authorities that allegedly violates the Mexican Constitution (more recently also for violation of human rights treaties). In this sense, the court is distinct from the ordinary judiciary. Given the complexities of political life in Mexico, this court has addressed the tensions between old political structures and interests derived from Mexico's democratic transition. Most notably, after the victory of Vicente Fox in 2000, the first time in seventy-one years that the hegemonic PRI lost control of the executive branch, Mexico found itself with a divided government, and a deluge of constitutional cases revisited the political and structural organization of Mexico.

2. *Doctrine: National and International Proceedings in International Law*

Investment treaties contain different provisions that either directly or by implication dispense with the local remedies rule. These provisions take varied forms and significantly impact the relationship between domestic courts and international tribunals. This section first examines the origins of the requirement to exhaust local remedies as a condition for an international claim. Next, it briefly discusses some of the various forms that these provisions take in investment agreements. While the distinction of the different models may be blurred by the effects of MFN clauses in IIA, as explained below, to allow the importation of a more advantageous model to avoid local judicial institutions, specific conditions must first be satisfied. Finally, this section reviews NAFTA Article 1121 and the interpretation to this article by Chapter Eleven arbitration tribunals.

A. *Background on the Exhaustion of Local Remedies Rule*

The exhaustion of local remedies is an ancient principle of international law that precedes the modern nation-state. According to Borchard, it was applied to the practice of reprisals as early as the ninth century and was subsequently incorporated into the law of diplomatic protection, and confirmed repeatedly by international commissions.[19] Today, it is regarded as a proce-

[19] *See* E. Borchard, The Diplomatic Protection of Citizens Abroad, 14 (Banks Law Publishing, 1915). Borchard notes that: "[…] the exhaustion of local remedies does not mean that the decisions of local courts are binding on international tribunals. The doctrine of *res*

dural or jurisdictional pre-condition (rather than a substantive condition for finding a breach) for bringing a claim before an international tribunal.[20]

The International Court of Justice ("ICJ") has recognized this rule as part of customary international law. In the *Interhandel Case*, the ICJ pointed out that "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."[21] This means that unless the injured alien has completely exhausted its appeals and has obtained a final decision from the highest court of the host State to which it has a right to resort, no government may be held accountable for its transgressions.

The principal premise of the local remedies rule is "that the host or respondent State must be given the opportunity of redressing the alleged injury" before it could be made responsible under international law.[22] Professors Louis Sohn and R. R. Baxter explained a number of other reasons for the existence of this procedural requirement for the presentation of international claims, including the often cited deference to the law of the State that affected the alien, even though that State may be responsible for some wrong to her. The authors also stressed the importance of: "[…] forcing the maximum number of cases involving aliens into municipal courts and their disposition under the watchful eyes of foreign governments should lead to a wider incorporation of international standards into municipal law, with consequent beneficial effects for the legal protection of aliens."[23]

The idea articulated by Professors Sohn and Baxter implicitly recognizes that international bodies may affect municipal courts and a preference of impartial protection of aliens by able municipal courts. In effect, the procedural

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judicata is also a well established principle in international law. However, it seems that at least the customary international law rule of *res judicata* extends only to the effect of the decision of one international tribunal on a subsequent international tribunal. The decisions of domestic courts, by contrast, have not been given *res judicata* effect by international tribunals."

[20] Some argue that the exhaustion of local remedies is also a substantive obligation. See discussion in Andrea K. Bjorklund, *Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence*, in NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects (Todd Weiler Ed. 2004). Bjorklund concludes that: "the *proceduralists* have won the debate. It is clear that acts outside denials of justice can form the basis for international claims and that state parties can waive the requirement of exhaustion of local remedies. Moreover, in the investment treaty context that fact is explicit —most treaties set forth a list of potential violations, such as a failure to provide national treatment or an expropriation not in accordance with international law. The 'procedure versus substance' distinction nevertheless continues to arise, in NAFTA cases and elsewhere."

[21] *Interhandel Case* (Switz. v. U.S.), 1959 ICJ 5, 27 (Mar. 21).

[22] C. F. Amerasinghe, Local Remedies in International Law 11 (Cambridge Studies in International and Comparative Law 1990).

[23] Louis B. Sohn and R. R. Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens*, 1961, in F. V. García-Amador *et al.*, Recent Codification of the Law of State Responsibility for Injuries to Aliens, 1974, at 262 [hereinafter, Recent Codification].

requirement at issue also seeks to improve the standard of protection of aliens by exposing cases involving aliens in national courts.

The exhaustion of local remedies rule may be excused only in limited circumstances, such as when resorting to the remedy would have been manifestly ineffective or obviously futile.[24] As put by professor Amerasinghe "the test is obvious futility or manifest ineffectiveness, not the absence of reasonable prospect of success or the improbability of success, which are both less strict tests."[25]

A treaty may, of course, dispense with the exhaustion of local remedy requirement. Many conventions and treaties, including a large number of IIAs, have done exactly that.[26] There is, however, some academic debate over how explicit the dispensation must be. In the *Case Concerning Elettronica Sicula SpA,* a chamber of the ICJ found itself "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of words making clear an intention to do so."[27] The Iran-U.S. Claims tribunal, on the other hand, read the Iran-U.S. Claims Settlement Declaration as waiving the local remedies rule by implication.[28] As analyzed below, Chapter Eleven of NAFTA arguably can be read as making clear the Parties' intention to waive the local remedies rule.[29]

B. *Models to Dispense with the Local Remedies Rule*

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention) was a legal innovation that enabled a system of private right of action without the need of exhaustion of local remedies or diplomatic protection. Under Article 26 of the Convention, ICSID signatories maintain the right to require the prior exhaustion of local remedies, however, in the absence of an express requirement the State is deemed to have consented to such forum to the exclusion of any other remedy, including domestic courts. Commenting on the Convention, the then World Bank General Counsel stated that, "Recourse to arbitration and conciliation represented a development, and not a mere codification of existing international law."[30]

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[24] *Norwegian Loans Case* (France v. Norway), 1957 ICJ at 39-42 (separate opinion of Judge Lauterpacht).

[25] Amerasinghe, *supra* note 22, at 195.

[26] Recent codification, at 263.

[27] *Case Concerning Elettronica Sicula SpA (*ELSI) (U.S. v. Italy), ICJ Rep 15 (July 20, 1989).

[28] *American International Group, Inc. and The Islamic Republic of Iran*, Award No. 93-2-3 (19 Dec. 1983), reprinted in 4 Iran-U.S. Cl. Trib. Rep. 96 (1983).

[29] Meg Kinnear, Andrea Bjorklund & John F.G. Hannaford, Investment Disputes Under Nafta: An Annotated Guide To Nafta Chapter 11 (Second Update, Kluwer Law ed., 2009) 12-Article 1121 [hereinafter Kinnear *et al.*].

[30] ICSID Secretariat, History of the ICSID Convention Vol. II-1, 21-23. The General

Based on Article 26 of the ICSID Convention, different investment treaties have given rise to different types of provisions that dispense, partially or entirely, with the local remedies requirement. Most IIAs provide for a "fork-in-the-road" approach.[31] Under this model, foreign investors are required to choose at the outset whether to litigate in local courts or arbitrate an international claim. Having made the election to seize domestic remedies, the investor is no longer permitted to raise the same contention before an investment arbitration tribunal.[32]

International agreements may contain provisions requiring investors to pursue national remedies (courts or administrative authorities) for some time before their claims can be submitted to investment arbitration.[33] Guatemala, for example, requires the "exhaustion of local administrative remedies"[34] as a condition of its consent to arbitration of international claims brought under the ICSID Convention.[35] Argentina, on the other hand, requires (in several IIAs) that investors submit their dispute to municipal courts for a period of time before commencing international arbitration proceedings.[36] In the former case, the absence of taking the dispute to the local administrative remedies may affect the jurisdiction of ICSID. In the latter case, if the investor fails to submit the dispute to municipal courts for the required period of time, the claim may not be within the competence of the tribunal.[37] In both cases, there will be an impediment to the consideration of the merits of the dispute.

Counsel's comments on Article II Section 1 of the Draft Convention in form of a Working Paper were distributed to the Executive Directors on March 12, 1962.

[31] Alejandro Escobar, *Introductory Note on Bilateral Investment Treaties Recently Concluded by Latin American States*, 11 ICSID Review, Foreign Investment Law Journal 1 (Spring 1996), at 86.

[32] According to a commentator, this reflects a conscious policy to preclude an exhaustion requirement that in effect would permit "appeal" from national courts to an arbitral body. K.S. Gudgeon, "Arbitration Provisions of U.S. Bilateral Investment Treaties" in S. Rubin & R.W. Nelson eds., *International Investment Disputes: Avoidance and Settlement* (United States: West Publishing Company, 1985) American Society of International Law: Studies in Transnational Legal Policy No. 20 at 51.

[33] *See, e.g.*, BIT U.S. Argentina Article II(2)(c) of the Argentina-United States BIT.

[34] Information *available at* http://icsid.worldbank.org/ICSID/FrontServlet (last accessed November 28, 2011).

[35] Article 26 of the ICSID Convention specifically does away the local remedies rule "unless otherwise stated." *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, Mar. 8, 1965, 17 U.S.T. 1270, 1298-99, 1357-64, 575 U.N.T.S. 160, 229-35 [hereinafter ICSID Convention] at Article 26.

[36] Article 8 of the unofficial English translation of a BIT between Italy and Argentina states, in paragraph 3, as follows: "3. If a dispute still exists between investors and a Contracting Party, after a period of 18 months have elapsed since notification of the initiation of the proceeding before the national courts indicated in paragraph 2, such dispute may be submitted to international arbitration."

[37] The ICSID Convention refers to the terms jurisdiction of the Centre and competence of the tribunal and not to the traditional (and theoretically complicated) distinction between ju-

Other agreements provide for a combination of different procedural rules that affect the local remedies rule. The new Germany-China Bilateral Investment Treaty requires:

> [f]irstly, the issue [to] undergo administrative review under Chinese domestic law and secondly, international arbitration proceedings may commence at the earliest three months from the start of this procedure […] However, if the case is brought (voluntarily) to a Chinese domestic court, the arbitration proceedings may commence only as long as the action can still be withdrawn unilaterally.[38]

Mexico is not a party to the ICSID Convention. NAFTA, however, provides for a more permissive model often referred to as a "no-U-turn" rule or waiver model. As will be explained with more detail in the next section, Chapter Eleven of NAFTA demands that investors waive their right to initiate or continue before any administrative tribunal or court under the law of any Party any further proceeding in relation with the measure involving the payment of damages.[39]

Independently of these models, recently, a number of investment claims have been brought invoking investment treaties that have not been concluded between the host State and home State of the investor. The treaties may contain different clauses of consent to arbitration and include different types of provisions that dispense with the local remedies requirement. In most of these cases, the investment claim has been filed relying on a treaty-based MFN clause to import the provisions that the host State has included in a treaty entered into with a third State. This has created some debate regarding the operation, application and limits of the provisions that dispense with the local remedies rule.[40]

The 1978 UN's International Law Commission ("ILC") draft articles on MFN clauses provide limited guidance on the question of importation of provision containing the consent to arbitration through an MFN clause. The ILC work concludes, in draft Article 4, that to be triggered the MFN treat-

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risdiction and admissibility. For a remarkable discussion on the topic see J. Paulsson, *Jurisdiction and Admissibility*, Global Reflections on International Law, Commerce and Dispute Resolution, November 2005. (For Jan Paulsson to understand whether a challenge pertains to jurisdiction or admissibility, "one should imagine that it succeeds: If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse. If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final" —footnote omitted.)

[38] Rudolf Braun & Pascal Schonard, *The New Germany-China Bilateral Investment Treaty*, 22 ICSID Review, Foreign Investment Law Journal (2007) at 276.

[39] NAFTA Article 1121.

[40] *See* Ch. Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 The Law and Practice of International Courts and Tribunals 1 (2005).

ment must have been accorded "in an agreed sphere of relations."[41] Under draft Article 9, a beneficiary State acquires under an MFN clause "only those rights which fall within the subject matter of the clause."[42] But, determining the subject matter of the clause is the very question underlined in the attempts to import a treaty to overcome the local remedies requirements. In other words, in its very essence the problem is a matter of treaty interpretation.

When it comes to treaty interpretation, international tribunals have maintained that MFN treatment may be claimed only following the *ejusdem generis* principle recognized in the ILC's work.[43] For example, early in the twentieth century, an Umpire under the British-Venezuela Mixed Claims Commission rejected access to the Commission on the basis of an MFN clause because the undertakings with respect to the administration of justice applied only to the "respective rights before the courts of justice established by the local laws of each nation."[44] In the decision, the Commissioner also noted:

> His Britannic Majesty's agent asserts that by virtue of Article IX of the treaty of 1835 between Venezuela and Great Britain the subjects of the high contracting parties shall, in the territory of the other nation, enjoy the same privileges, prerogatives, and rights as those of the most-favored nation. This is true, but said clause can only apply to the matters purposely designated in the article which contains this stipulation, [however] said clause is not applicable to these mixed commissions, which are of a very extraordinary nature.[45]

In the *Case Concerning Rights of Nationals of the United States of America in Morocco*, the ICJ recognized in 1952 that "jurisdictional" rights may be established by the mechanism of an MFN clause. However, the jurisdictional right involved was not one of access to a particular dispute resolution system, but the right of a foreign government to exercise some extra-territorial powers. Four years later, the Commission of Arbitration deciding the *Ambatielos Claim* re-affirmed that "the most-favored-nation clause can only attract matters be-

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[41] *International Law Commission, Draft Articles on the Most-Favoured-Nation Clause,* U.N. Doc. A/33/10 (July 1978) [hereinafter ILC Draft Articles].

[42] *Id.*

[43] The *ejusdem generis* principle states that an MFN clause (a country that has been accorded MFN status may not be treated less advantageously than other country) can apply only to matters belonging to the same subject category as the treaty containing the MFN clause itself. *See*, *e.g.*, *Siemens A.G. v. Argentina*, ICSID ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 99. *Cfr.*, *Salini Costruttori SpA & Italstrade SpA v. Jordan*, Decision on Jurisdiction, ICSID ARB/02/13, November 15, 2004, ¶ 66. (The tribunal in *Salini* expressed concern over the extension of the clause, and concluded that ICSID dispute settlement for contracts was not included in Article 3 of the Jordan-Italy BIT because it did not expressly include dispute settlement.)

[44] *Aroa Mines Case (on merits)* IX R.I.A.A., at 402-445, *available at* http://untreaty.un.org/cod/riaa/cases/vol_IX/402-445.pdf (last accessed November 28, 2011).

[45] *Id.*

longing to the same category of subject as that to which the clause itself relates" which could involve "the administration of justice."[46] However, this conclusion related to a context where each signatory State made explicit the substantive undertakings that commerce and navigation would not be impeded by denial of justice in domestic courts and the contracting Parties to the basic treaty had pledged their "intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favourable nation".[47] In both cases, the issue of access to arbitration *did not* arise.

In the ICSID context, the issue of treaty clause importation to avoid or to "cure" the failure to commence (or continue for some time) a claim in national courts before proceeding to investment arbitration arose for the first time in *Maffezini v. Kingdom of Spain.* In this case, Spain objected to the tribunal's jurisdiction because the investor had failed to submit the case to the domestic courts in Spain for a period of 18 months before bringing an investment claim as set forth in the Argentine-Spain BIT.[48] The tribunal agreed that the Claimant did not have to first submit their claims to domestic courts. The tribunal reached this finding without explaining why acceding to the eighteen-month period was less favorable *treatment* than direct access to arbitral proceedings. It also noted that for the importation to operate: "[…] the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters."[49]

Not all subsequent tribunals have followed the *Maffezini* analysis.[50] According to *Special Rapporteur* McRae and ICSID's Secretary-General Meg Kinnear,

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[46] *Ambatielos* (Greece v. U.K.), Award of 6 March 1956, 12 R. Int'l Arb. 83 (Commission of Arbitration) at 107 concluding: "[…] it cannot be said that the administration of justice, in so far as it is concerned with the protection of [the rights of traders], must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes 'all matters relating to commerce and navigation'."

[47] *Id.*

[48] *Emilio Agustín Maffezini v. Spain* (Case No. ARB/97/7), Decision on Jurisdiction of January 25, 2000 at 69.

[49] *Id.* at 56. As pointed out by Professor McRae in the current ILC work regarding MFN clauses: "the tribunal in Maffezini saw potential problems with their decision and sought to limit its scope with a number of exceptions. But the principle on which those exceptions are based is not made clear in the decision nor is it clear whether such exceptions are exclusive." *Report of the International Law Commission*, 60th Session, U.N. Doc. Supp. A/63/10 [hereinafter ILC 60th Session - 2008].

[50] *See* Meg Kinnear, A further update on Most-Favoured-Nation Treatment- in Search of a Constant Jurisprudence, Fordham J. Int'l L., 2009, concluding that: "The net result of [MFN] jurisprudence is that the early cases on the 18-month waiting period (Maffezini, Siemens, Gas Natural, Suez, AWG and National Grid) follow the Maffezini logic and use MFN to waive the waiting period. On the other hand, the two most recent cases (Wintershall and TSA) take a different tack, stressing the precise words of the applicable BIT and resulting in an outcome that

it is clear that a consistent interpretation of MFN provisions has not emerged, nor is it clear that a single theory can reconcile the MFN decisions importing dispute resolution clauses.[51] However, most Tribunals have agreed that to be imported, not only the subject of the dispute must overlap with an area covered by the MFN clause; it must be able to be characterized in the same terms as those protected by the clause. Since an MFN clause may be broad in scope and treatment can result in serious disadvantages, in some circumstances the importation of a treaty is permissible.

The decision in *Maffezini* has spawned similar claims and resulted in investors trying to pick and choose from amongst the benefits that third States investors receive from the other contracting party and States trying to craft MFN clauses in their IIAs that will not have broad-ranging consequences. The question, however, remains one of treaty interpretation and the inclusion of a MFN clause should not *per se* create a super-treaty provision that allows treaty shopping to exempt the requirements to use local judicial institutions (or others) before acceding to investor-state arbitration. Thus, whatever view one takes on *Maffezini* and on the decisions that do not follow its main finding like *Plama Consortium Ltd. v. Bulgaria*,[52] it remains that the dispensation of the local remedies rule through an MFN clause is not automatic and depends on the context of each case and the particular treaty.

C. *NAFTA's Waiver and Conditions Precedent to Submission of a Claim to Arbitration*

The NAFTA Parties did not explicitly dispense with the exhaustion of local remedies in the text of the Agreement. NAFTA Article 1121 subsections (1)(b) and (2)(b) require, as a condition precedent to bringing a claim, that the investor and/or the investor on behalf of the enterprise that is owned or controlled by investor comply with certain procedural requirements.[53] Specifically, these provisions require the disputing party (investor and/or enterprise) to:

> […] waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach [...] except for proceedings for injunctive, declaratory or

is more consistent with the holding in Plama [which] held that 'the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed'."

[51] *Id. See also* ILC 60th Session – 2008.

[52] Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 at 223 (concluding: "MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.)

[53] *See* NAFTA, Article 1121 subsections (1)(b) and (2)(b).

> other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.[54]

In other words, the NAFTA model allows foreign investors to bring claims without first exhausting local remedies; in some circumstances, it even permits simultaneous or subsequent use of domestic and international fora. This model is a departure from the "fork-in-the-road" approach included in the initial draft of the *travaux préparatoires.* Such approach would have granted investors the right to initiate a claim "provided that the national or company concerned has not submitted the dispute for resolution" under the courts or administrative tribunals or accordance with any applicable previously agreed dispute settlement procedures.[55]

In fact, the history of the NAFTA negotiations suggests that the waiver model is a *compromise* between the three Parties to the treaty. On the one hand, the U.S. —consistent with its practice at that time— probably included the "fork-in-the-road" provision in NAFTA's first draft to ensure its nationals (often in the position of capital exporters) a mechanism outside the domestic jurisdiction of the State involved in the dispute. Canada and Mexico opposed this model for different reasons. In the draft of Jan. 16, 1992, Mexico suggested adding a provision that disputes under Chapter Eleven should "not be subject to the dispute settlement provisions" of NAFTA.[56] The draft of March 6, 1992 also included a paragraph expressing its preference for the "Domestic Judicial Enforcement of the Rights of Investors."[57] Canada, on the other hand, in the Jun. 4, 1992 draft, proposed the inclusion of a provision similar to the waiver to avoid the potential problem of litigating "substantially the same matters" in both the arbitration proceeding and in national courts and administrative tribunals.[58]

The net result of the negotiations was the incorporation of a "no-U-turn" rule that has given rise to questions of interpretation,[59] but that addressed

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[54] *Id.* The drafters anticipated one instance in which the waiver would not be required. "Only where a disputing investor of control of an enterprise: (a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and (b) Annex 1120.1(b) shall not apply."

[55] NAFTA, *travaux préparatoires* of Dec. 1991 *available at* http://www.naftalaw.org/commission.htm (last accessed November 29, 2011).

[56] NAFTA, *travaux préparatoires* January 16, 1992 *available at* http://www.naftaclaims.com/Papers/02-January161992.pdf (last accessed December 5, 2011).

[57] NAFTA, *travaux préparatoires* March 6, 1992 *available at* http://www.naftaclaims.com/Papers/05-March061992.pdf (last accessed December 5, 2011). The suggested inclusion of Mexico read as follows: "MEX [Article : Domestic Judicial Enforcement of the Rights of Investors 1. Each Party shall provide investors of the other Parties access to an impartial judicial system with authority to enforce the rights of investors established under this Agreement.]"

[58] NAFTA, *travaux préparatoires* June 4, 1992 *available at* http://www.naftaclaims.com/Papers/11-June041992.pdf (last accessed December 5, 2011).

[59] See generally, W. S. Dodge, National *Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven Of NAFTA*, 23 Hastings Int'l & Comp. L. Rev. 357; B.

three main issues raised by the Parties to the Agreement during the negotiations: (i) the importance of an impartial mechanism for the settlement of investment disputes; (ii) the recognition of the convenience of impartial domestic judicial systems with authority to enforce the rights of investors; and (iii) the preference of a system to avoid multiple litigation that could give rise to double redress for the same matter.

Even if one adopts the position that "it is not fruitful to try to infer too much from the unexplained [drafting] history,"[60] the Agreement's language is clear and does not discount subsequent or even concurrent or simultaneous uses of forums to challenge the same *measure.* The ordinary meaning of the relevant terms of Chapter Eleven are permissive; foreign investors can therefore seek damages, an injunction, or declaratory relief in domestic court or other dispute settlement procedures prior to bringing a NAFTA claim. This said, at any point within the three-year limitation (Articles 1116(2) and 1117(2)), the investor may choose to waive its right to initiate or continue any dispute settlement procedures with respect to the measure, "except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages,"[61] before domestic *administrative tribunals* or *courts* and bring a Chapter Eleven claim instead.

Interpreting these provisions, the tribunal in *International Thunderbird Gaming Corporation v. Mexico* maintained that:[62]

> In construing Article 1121 of NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.[63]

H. Oxman & W. S. Dodge, A*rbitration —NAFTA-Jurisdiction— Waiver of Right to Initiate or Continue Other Legal Proceedings-Effect of Pursuing Municipal Law Claims in Municipal Court*, 95 Am. J. Int'l L 186 (2001); J. S. Lee, *No Double-Dipping Allowed: An Analysis of Waste Management, Inc. v. United Mexican States and the Article 1121 Waiver Requirement for Arbitration Under Chapter 11 Of NAFTA*, 69 Fordham L. Rev. 2655 (2001).

[60] *Cattle Consolidated Canadian Claims v. United States*, NAFTA Chapter 11/UNCITRAL, Final Award.

[61] NAFTA Article 1121.

[62] Similar positions have been maintained by Canada and Mexico. Indeed its 1128 submission in the *Waste Management v. Mexico*, Canada expressed that "the purpose of NAFTA Article 1121 is to avoid a multiplication of proceedings, forum shopping and double jeopardy." Mexico, on the other hand, maintained as its litigation position in that same case that the waiver "of domestic damages claims" provided in Article 1121 of NAFTA was intended "as an absolute condition precedent for submission of a claim to arbitration." See *Waste Mgmt. Arbitration* documents *available at* http://www.naftaclaims.com/disputes_mexico_waste.htm (last accessed December 6, 2011).

[63] *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006 ¶ 118 [hereinafter Thunderbird Award].

Contrary to what this finding suggests, there are several critical issues that should be taken into account in construing Article 1121. The first reason for the existence of this provision can be found in its title (*i.e.*, Condition Precedent to Submission of a Claim to Arbitration) and is to trigger the operation of the consent to arbitration established in the subsequent article (*i.e.*, Article 1122: Consent to Arbitration) as an impartial mechanism outside of the law of any Party. This is the *raison d'entre* of this provision and while at least one Tribunal interpreted this as a formal prerequisite to the formation of a valid agreement between the disputing parties,[64] both the tribunal in *Mondev International Ltd. v. United States* and *International Thunderbird Gaming Corporation v. Mexico* agreed that a failure to submit the waiver is a technicality that can be cured by the investor. The tribunal in *Mondev International Ltd. v. United States* concluded:

> It may be that a distinction is to be drawn between compliance with the conditions set out in Article 1121, which are specifically stated to be "conditions precedent" to submission of a claim to arbitration, and other procedures referred to in Chapter 11. Unless the condition is waived by the other Party, non-compliance with a condition precedent would seem to invalidate the submission, whereas a minor or technical failure to comply with some other condition set out in Chapter 11 might not have that effect, provided at any rate that the failure was promptly remedied. Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope (footnotes omitted).[65]

The second rationale is that held by most commentators and, probably, reflects Canada's concerns with avoiding simultaneous or concurrent remedies, including any type of dispute settlement procedures (*e.g.*, mediation, commercial arbitration, etc.) that can lead to double redress for the same *measure*. The focus here is on the term measure not only because NAFTA obligations extend to measures (*i.e.,* regulations, procedures, requirements, or practices taken by the State Parties), but also because a single measure can give rise to domestic or international adjudication based on different causes of action that may or may not give raise to monetary damages. In other words, the same facts can give rise to different legal claims. "The similarity

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[64] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2 NAFTA Ch. 11 Arb. Trib. (Apr. 10, 2001) *available at* http://www.naftaclaims.com/disputes_canada_pope.htm (last accessed December 6, 2011).

[65] *See Mondev International Ltd. v. United States*, Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2, http://www.state.gov/documents/organization/14442.pdf at ¶ 44. *See also* Thunderbird Award citing *Mondev* with approval ¶ 117. (The tribunal joins the view of other NAFTA Tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner.)

of prayers for relief does not necessarily bespeak an identity of causes of action."[66]

Considering that under Mexican law the Agreement is a self-executing treaty and, therefore, also domestic law, Mexico requested the inclusion of Annex 1120.1. With this provision the possibility of two identical causes of action is avoided.[67] Furthermore, the tribunal in *Waste Management v. Mexico*, the case where this provision was analyzed more thoroughly after the claimant tendered a waiver with a peculiar language, read the focus of Article 1121 in the measure differently:

> For purposes of considering a waiver valid when that waiver is a condition precedent to the submission of a claim to arbitration, it is not imperative to know the merits of the question submitted for arbitration, but to have proof that the actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA […] In effect, it is possible to consider that proceedings instituted in a national forum may exist which *do not relate to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA*, in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA[68] (emphasis added).

However, arbitrator Keith Highet in his dissent in this case pointed out that "domestic causes of action by definition differ from international causes of action, and a violation of domestic law will not always also be an international wrong."[69] Since two causes of action may originate proceedings under different jurisdiction (domestic or international),[70] a domestic proceeding challenging exactly the same measure could coexist simultaneously with an arbitration proceeding under NAFTA.[71]

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[66] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21 Award, July 30, 2009 at ¶ 62.

[67] NAFTA Article 1121.

[68] *Waste Mgmt. Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award of 2 June 2000, 40 ILM 56, 73 (2001) 847 ¶27 [hereinafter Waste Mgmt. 1 Award].

[69] Kinnear *et al.*, *supra* note 32, 1121 citing ¶ 19 of Waste Mgmt. Award.

[70] Article 27 of the Vienna Convention of the Law of Treaties and article 32 of the Article on State Responsibility are both cemented in the idea that national and international adjudication is exercised under different mandates. Article 27 states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Article 32 states: "The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations." The ICJ in the *Elettronica Sicula S.p.A.* (ELSI) case, ICJ Rep. 1989, 15-121; ILM 28 (1089), 1109, reaffirmed this principle: "124. …[i]t must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise."

[71] *Cfr.* Waste Mgmt. 1 Award, *supra* note 68, at 101.

The two considerations explained above make sense from the text of Article 1121 subsections (1)(b) and (2)(b) of NAFTA. Indeed, the history of the negotiations discussed above shows how investor-state arbitration makes State parties to IIAs more prone to direct claims for compensation. However, the consent is not an unconditional access to arbitration or permission for double redress for the same allege improper conduct. Moreover, it does not result in the combination or amalgamation of domestic and international causes of action.

A fresh look into the second part of Article 1121 subsections (1)(b) and (2)(b), the history of the exhaustion of local remedies rule, and the *travaux préparatoires* of NAFTA reveal a third rationale to take into account in the construction of the rule at issue. This part sets forth —in general terms— that *certain* proceedings do not have to be waived or discontinued if arbitration is selected. This language probably reflects Mexico's preference for domestic judicial enforcement of the rights of investors to stimulate the use of the constitutional proceeding know as *amparo* by foreign investors. The waiver does not mandate claimants to relinquish: "[…] proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."[72]

This phrasing is also a reminder that the powers of international tribunals are far more limited than the powers of domestic courts and administrative tribunals. The key advantage received with arbitration is the recourse to a mechanism that is not an agency of the government against which it seeks compensation (which may only include monetary damages, restitution of property and applicable interest).[73] However, Tribunals under NAFTA have limited jurisdictional powers for other types of relief such as extraordinary, injunctive or declaratory, and, arguably, no way to force compliance with such types of orders.[74]

ILC *Special Rapporteurs* Sohn and Baxter recognized the beneficial effect of adjudicating the cases involving aliens in domestic courts in their remarkable work that gave origin to the Articles on State Responsibility. Likewise, the Mexican government, the only developing Party to NAFTA, expressed its preference for the domestic judicial enforcement of the rights established under the Agreement arguably to maintain the disposition of cases involving aliens in municipal courts. Thus, the second part of Article 1121 subsec-

[72] NAFTA Article 1121.

[73] NAFTA Article 1135.

[74] Article 1134 of NAFTA, which refers to Interim Measures of Protection, establishes the following: "A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation."

tions (1)(b) and (2)(b) may be read as an attempt to manage and set limits to the functions of domestic and international adjudicators. This provisions grant administrative tribunals or courts under the law of the disputing Party a broad range of coexistence, even when the challenged measure is the same.

For this reason, NAFTA offers foreign investors has a menu of strategic options to conduct proceedings in domestic and international forums, including: (i) it may seek damages (or declaratory or injunctive relief) in domestic courts on domestic law grounds and subsequently bring a claim for damages before a Chapter Eleven tribunal; (ii) in Mexico only, it may seek damages in a domestic court on NAFTA grounds, but will then be barred from bringing a claim before a Chapter Eleven tribunal; (iii) it may bring a claim for damages before a NAFTA tribunal directly, but must waive its right to initiate or continue claims for damages in domestic courts on domestic law grounds other than NAFTA and its right to initiate or continue claims for damages before other dispute settlement procedures; (iv) it may bring a claim for damages before a NAFTA tribunal and simultaneously or subsequently seek declaratory or injunctive relief in domestic courts on domestic law grounds; or (v) it may bring a claim for damages before a NAFTA tribunal, while the enterprise —which is not owned or controlled directly or indirectly— seeks relief in domestic courts.

Unlike other investment treaties, an investment claim cannot proceed on a contractual basis for the simple reason that the tribunal's jurisdiction must be founded on NAFTA. No so-called "umbrella clause" in the treaty which, under certain circumstances, may leverage a contractual claim as an investment claim. Therefore, arbitral tribunals under Chapter Eleven must determine whether a claim has an autonomous existence outside a contract.[75]

In a nutshell, while the exhaustion of local remedies is a traditional rule of customary international law, this may be dispensed with by the agreement between States. Different agreements have led to various models included in different IIAs where importation of a more beneficial model requires specific conditions to operate. One of these models is the NAFTA waiver which includes a "no-U-turn" rule that permits a menu of strategic options for simultaneous and/or subsequent uses of domestic and international for a under specific conditions.

D. *Local Remedies and Pragmatic Considerations before the Submission of a Claim Under NAFTA*

Without trying to exhaust this topic, foreign investors —at least under NAFTA Chapter Eleven— should be mindful of the possible consequences

[75] *Cfr.* Loewen, Opinion of Christopher Greenwood, Q.C. (Mar. 26, 2001), at ¶ 44. According to Professor Greenwood there is a plausible reading of NAFTA's article 1121 to waive local remedies for acts other than judicial acts. This does not exclude a claim for mistreatment of domestic court under the theory of denial of justice (commended by Article 1105).

of not accessing local remedies prior to arbitration. Arbitral tribunals, rightly or wrongly, may consider the use of local remedies as a factor that affects the *impact* of the breach in the interest protected by NAFTA. For example, for a claim for indirect expropriations such as regulatory takings protected under Article 1110 (Expropriation) to be meritorious, the taking or expropriation must be "a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof."[76] This means, as put by the decision in *Glamis v. United States*, that: "[…] the threshold examination is an inquiry as to the degree of the interference with the property right. This often dispositive inquiry involves two questions: the severity of the economic impact and the duration of that impact."[77]

The question of the severity of the harm inflicted by the measure in breach of the Agreement is —according to the tribunal in *Glamis v. United States*— part of the substantive standard of Article 1110. As such, the use of available remedies in domestic courts to mitigate the impact of the measure could be a determinant factor to the materialization of the substantive violation. In other words, if the degree of harm could have been affected by a relief available to the investor, the expropriation may not be an act attributable to the State. Of course, an important question (outside of the scope of this work) would be why, if at all, should the investor have the burden of trying to limit the impact and the extent of the efforts that the investor needs to show.

Another possibility is that Tribunals consider the availability of remedies in the assessment of costs. Since there is broad discretion under different arbitration rules (*e.g.,* ICSID Additional Facility and UNCITRAL) arbitral Tribunals may consider the options available in domestic courts when allocating the cost of the arbitration, especially when States are successful in the proceedings. Admittedly, the tendency under NAFTA has been to divide the expenses equally considering whether parties acted expeditiously and efficiently.

Finally, with respect to violations of Article 1105 (Minimum Standard of Treatment) in its modality of denial of justice, the availability to and use of local remedies could be relevant to the question whether this standard was complied with by the State. As the tribunal in *Loewen v. Unites States* stated: "decision[s] which can be challenge[d] through the judicial process does not amount to a denial of justice at the international level."[78]

In such cases, tribunals may consider that legitimate concerns exist that States will suffer from not having a chance to correct the wrong to the judicial

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[76] *Fireman's Fund Insurance Company v. Mexico* 15 ICSID Case No. ARB(AF)/02/01 at ¶.

[77] *Glamis Gold Ltd v. United States* (NAFTA/UNCITRAL) Final Award of June 6, 2009 at ¶ 356.

[78] *Loewen Group Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Final Award (June 26 2003), in 42 ILM 811(2003) at ¶ 159. This finding has been criticized by many scholars *e.g.*, Jan Paulsson, Denial of Justice in International Law (Cambridge University Press, 2005 at 306).

process. If that is the case, the local remedies rule would be treated as an element of the substantive standard, as the *Waste Management II v. Mexico* tribunal did by concluding that in some specific contexts the "local remedies rule is incorporated into the substantive standard" of the Agreement.[79]

While tribunals should resist the temptation of factoring in the local remedies rule in the analysis of a substantive violation of the treaty, investors and scholars should also take into account that this happens. In many cases tribunals consider the availability of remedies in assessing a breach of the standard, evaluating reparations or when allocating the costs of the proceedings. Likewise, the policy debate regarding the accession to investor-state arbitration should consider the different models of accession, the strategic options provided by the treaty and the context of their negotiation. Moreover, this debate should also acknowledge the circumstances under which investor-state tribunals may consider the availability of local judicial institutions and the potential consequences of not pursuing local remedies prior to bringing an international claim.

III. Case Study: Mexico and Sweeteners Sector

Since NAFTA went into effect, approximately sixty notices of intent to submit claims to arbitration against the three NAFTA Parties have been reported. Of these claims, Mexico has been the respondent in twelve cases. ICSID has registered ten cases conducted under the Arbitration (Additional Facility) Rules and has administrated two cases under the UNCITRAL model rules. There have not been any other reported proceedings against Mexico under NAFTA.

As illustrated in the following table all disputes against Mexico (with a notable exception) challenged: (i) a measure that —at some point— was reviewed by a Mexican court; or (ii) a judicial act itself. In *Bayview Irrigation Dist., et al. v. Mexico*, the sole case involving a measure not reviewed by a Mexican court, the claimants' investment in question was exclusively made in the United States. As a result, the tribunal sided with Mexico and dismissed the claim for lack of jurisdiction due to the territorial location of the investment.[80] Most notably, the tribunal gave full weight to the Mexican Constitution and applicable Mexican Law to establish that the claimants could have no property rights over waters in Mexican rivers.[81]

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[79] *Waste Management v. Mexico*, Award, 30 April 2004 ¶ 97.

[80] *Bayview Irrigation Dist. et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1 (Jan. 19, 2005), *available at* http://naftaclaims.com/Disputes/Mexico/Texas/TexasClaims_NOA-19-01-05.pdf (last visited December 6, 2011). The tribunal noted at ¶ 104, that: "[…] a salient characteristic [of Chapter Eleven] will be that the investment is primarily regulated by the law of a State other than the State of the investor's nationality, and that this law is created and applied by that State which is not the State of the investor's nationality."

[81] Bayview Award at ¶ 118.

FIGURE 1: CHAPTER ELEVEN CASES AGAINST MEXICO[82]

Case	*Measures adopted by*	*Economic/Business Sector*	*Domestic Courts*
1. METALCLAD CORP.	E	Services Waste-Disposal	Yes
2. ROBERT AZINIAN *ET AL.*	E & J	Services Waste-Disposal	Yes
3. MARVIN R. FELDMAN	E	Commercial Cigarette Export	Yes
4. WASTE MANAGEMENT I	E & J	Services Waste-Disposal	Yes
5. WASTE MANAGEMENT II	E & J	Services Waste-Disposal	Yes
6. FIREMAN'S FUND	E	Services Insurance	Yes
7. GAMI	E	Commercial Sweeteners Sector	Yes
8. THUNDERBIRD	E	Services Wager Games	Yes
9. CPI	L	Commercial Sweeteners Sector	Yes
10. ADM/TLIA	L	Commercial Sweeteners Sector	Yes
11. CARGILL	L & E	Commercial Sweeteners Sector	Yes
12. BAYVIEW *ET AL.*	E	Water Rights	No

It is notable that four of the twelve claims brought against Mexico are related to regulatory actions taken in the commercial sweeteners sector. In the following section, this paper discusses the cases brought in this sector.

1. *Background of NAFTA's Sweeteners Conflict*

On the eve of November 3, 1993, a day before President Clinton formally submitted the implementing legislation of NAFTA to the U.S. Congress for approval, two draft letters were produced (one in Spanish and one in English). The letters were initialed by the chief NAFTA negotiators from Mexico and the U.S., and contained NAFTA side-agreement on sweeteners.[83]

Disagreement regarding the content of the letters, combined with the maladministration of the sugar program in Mexico and the domestic politics in both countries, made the issue of market access and integration for sweeteners (HFCS and sugar) one of the two most contentious of NAFTA (the other is arguably the Softwood Lumber dispute). Some aspects of this conflict have tested all the dispute settlement mechanisms of NAFTA and the WTO, as well as the Mexican courts and agencies, including Mexico's and Canada's Supreme Courts.[84]

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[82] In this figure: E=Executive / L=Legislative/ J=Judicial.

[83] H.R. 3450, 103rd Cong., 1st Sess. (1993) (enacted) (letters on file with author).

[84] After fifteen years, the status is as follows: the U.S. blocked the selection of NAFTA panelists (Chapter Twenty) to examine the legality of U.S. quotas on Mexican cane sugar under the side-letters, and Mexico imposed anti-dumping duties against U.S. H.F.C.S. that WTO and NAFTA panels condemned. Mexico also attempted some and approved other non-trade restrictions like labeling and import permit requirements against H.F.C.S. to counterattack

It is in this context that the Mexican Government adopted two measures purportedly aimed at protecting the Mexican sugar industry.[85] First, in September 2001, Mexico's then President Vicente Fox issued an expropriation decree ("the Decree"),[86] expropriating 27 of the country's 61 sugar mills. The Decree was reportedly issued to alleviate the crisis in the Mexican sugar sector and aimed at "avoiding the sector's collapse."[87]

Four months later, in January 2002, the Mexican Congress approved a tax on the use of HFCS on soft-drinks ("Tax").[88] By taxing the sale of soft-drinks or syrups made with HFCS, while exempting those made with Mexican sugar, the Tax openly discriminated against the HFCS producers and distributors in Mexico (almost exclusively U.S. investors).[89]

Not surprisingly, the Decree and the Tax were a significant source of litigation, both in Mexican courts and in NAFTA Chapter Eleven proceedings. Each tested the main provisions designed to protect investors, including the conditions under which a valid expropriation can occur in the case of the Decree, and the limits of discrimination based on nationality in the case of the Tax. The next section will analyze the different proceedings brought before domestic courts and investor-state arbitration challenging both measures.

2. *The Proceedings Against the Decree*

A. *Proceedings before the Mexican Supreme Court*

Following the expropriation, many sugar mill owners instituted *amparo* proceedings in Mexican courts.[90] Among them was Grupo Azucarero Mexicano,

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the rising consumption of H.F.C.S. in Mexico. Finally, in 2002 the Mexican Congress passed a 20 percent tax on soft drinks using sweeteners other than cane sugar. Three U.S. companies, in their capacities as U.S. investors, invoked the investor-state dispute mechanism of NAFTA. See Joost Pawelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA 'Spaghetti Bowl' Is Cooking*, 9 J. Int'l Eco. L. 1-10 (2006).

[85] There were other measures adopted, *i.e.* the AD duties, permit requirements and corn import restrictions but for purposes of this paper will not be discussed.

[86] *Decreto por el que se Expropian por Causa de Utilidad Pública, a Favor de la Nación, las Acciones, los Cupones y/o los Títulos Representativos del Capital o Partes Sociales de las Empresas Propietarias de 27 Ingenios Azucareros*, published in Diario Oficial de la Federación, Sept. 3, 2001 [hereinafter Decree]. *See also* USDA, Mexico Sugar: "Mexico Expropriated 27 Sugar Mills," 10 September 2001, at 1.

[87] *Id.* Decree *supra* note 81, at Considerations ¶¶ 3 and 6.

[88] *Ley de Impuesto Especial sobre Producción y Servicios* [L.I.E.P.S.] [Law on the Special Tax on Production and Services), Article 32 [D.O.], 1 de enero de 2002 (Mex.) [hereinafter Tax].

[89] Tax Articles 2, 3 and 8. The 20% tax on the soft-drink translated into an estimated tax burden for using H.F.C.S. of more than 400%, because the sweetener only amounts to approximately 5% of the final cost of the soft drink. *See* WTO Panel Report on Mexico – Measures on Soft Drinks and Other Beverages, WT/DS308/R, circulated on 7 October 2005.

[90] *Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados*

S.A. de C.V. ("GAM"), a Mexican holding company that indirectly owned several sugar mills. GAM succeeded in obtaining limited relief. The Court of Appeals annulled the expropriation of three out of the five seized mills of GAM and were returned to GAM by the government.[91]

Two related cases brought by different petitioners and domestic owners of sugar mills ended up on the Supreme Court docket.[92] In these two cases, the sugar mill owners (the petitioners) argued that the Decree was illegal because it breached Article 27 of the Mexican Constitution (Protection of Property Rights). The petitioners further contended that Mexico's Constitution and international obligations required that any investor affected by an expropriatory measure should be granted a hearing *prior* to the actual expropriation. As relief, the petitioners requested the invalidation of the Decree (*vis-à-vis* the petitioners) and the restitution of their sugar mills.[93]

The Supreme Court sided with the petitioners and invalidated the Decree. The court held that a consistent interpretation of Articles 14 (due process) and 27 (protection of private property) of Mexico's Constitution granted the right to a *prior hearing* to those affected by any expropriation.[94] While the Article 27, which constitutionally regulates expropriations, does not mention the need for a *prior hearing*, the Court read the additional requirement of prior hearing derives from Article 14 which relates to due process. This rather controversial reading, certainly at odds with the textual reading of Article 27 which clearly states that only the *amount of compensation offered* is subject to judicial review and not the decision to expropriate, was revisited by the Court in a different case years later.

Unidos Mexicanos [L.A.] [Amparo Law, Implementing Articles 103 and 107 of the Constitution of the United States of Mexico], as amended 17 de mayo de 2001 [D.O.] 10 de enero de 1936 (Mex.). An *amparo* may be brought in regard to: (1) any law or action by authorities that violates an individual right guaranteed under the Mexican Constitution or federal laws; (2) laws or federal official actions that violate or restrict the sovereignty of the states or that of state laws; or (3) official actions that invade the sphere of federal authority.

[91] GAM and its Mexican controlling shareholder, Mr. Juan Gallardo, challenged the constitutionality of Mexico's Expropriation Law and of the Expropriation Decree via an *amparo* proceeding. In seeking to annul the *Decree*, GAM contended, among other grounds, that the Mexican authorities did not prove the public purpose that the government claimed to justify the expropriation of GAM's mills. The decision over some of the several mills owned by GAM was settle. *See GAMI Investments, Inc v Mexico*, Final Award, *Ad hoc*—UNCITRAL Arbitration Rules; IIC 109 (2004), signed 15 November 2004 [hereinafter Gami Award].

[92] María Teresita Machado *et al.* AR 1132/2004, S.C.J.N. (pleno) and Fomento Azucarero Mexicano *et al.*, AR 1132/2004, S.C.J.N. (pleno) *available at* http://www.scjn.gob.mx (discussed below).

[93] *Id.*

[94] Alejandro Faya Rodríguez, *Major Expropriation Case Decided by the Mexican Supreme Court of Justice: The Due Process Requirement and its Correlation with International Treaties* available http://www.economia.gob.mx/pics/pages/1227_base/NAFTIRExpro (last accessed December 6, 2011). Mr. Faya argues that the Expropriation Law, as it stands, is not unconstitutional.

B. *NAFTA Chapter Eleven Proceeding*

On April 9, 2002, the minority shareholder of GAM, GAMI Investments Inc. ("GAMI") brought a claim under Chapter 11.[95] GAMI was a U.S. corporation that indirectly owned 14.18% of the shares of GAM, the Mexican holding company.[96] As a result, GAMI brought its claim under NAFTA Article 1116, as a U.S. investor on its own behalf (investor of a Party).[97]

GAMI argued that Mexico breached three NAFTA provisions.[98] First, GAMI contended that Mexico breached Article 1110 (Expropriation) when it indirectly expropriated GAMI's share value in GAM.[99] Second, it argued that Mexico breached Article 1105 (Minimum Standard of Treatment) due to Mexico's arbitrary implementation and application of its sugar regime.[100] Third, GAMI argued that Mexico breached Article 1102 (National Treatment) by treating GAMI and GAMI's investment in GAM less favorably than Mexican investors in the sector.[101]

As a consequence of the alleged NAFTA violations, GAMI requested the tribunal to award monetary damages and applicable interest, fees and expenses for not less than US$42 million.[102]

GAMI faced an initial difficulty in proving its case before the NAFTA tribunal. As the owner of five sugar mills, GAM had sought the restitution of three mills before the Mexican courts. During the NAFTA proceeding, the Mexican Court of Appeals rendered its decision annulling the Decree *vis-à-vis* GAM and ordering the restoration of three mills.[103] In light of the Mexican court judgment, Mexico unsuccessfully moved to dismiss the NAFTA proceeding. In the Award, the tribunal acknowledged GAMI's independent right of action under NAFTA and concluded that whether GAMI: "[…] has

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[95] *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL Case), Memorial, *at* http://www.economia.gob.mx/pics/pages/5500_base/VIII_GAMI_Investment_Co_20080603.pdf (last accessed December 6, 2011) [hereinafter GAMI, MEMORIAL].

[96] At the time of the expropriation, GAM indirectly owned several sugar mills.

[97] *See* NAFTA Article 1116. *See also* GAMI, MEMORIAL ¶ 11.

[98] GAMI, MEMORIAL ¶ 1.

[99] *Id* at ¶¶ 132-46. Interestingly, GAMI acknowledged that although Mexico did not formally seize GAMI's shares in GAM, Mexico's expropriation of these five mills rendered GAMI's investment in GAM virtually worthless because the five mills constituted substantially all of the productive assets of GAM, assets that account for virtually the entire value of GAMI's investment, depriving the investment of substantially all its value, constitutes an indirect expropriation or a measure tantamount to an expropriation of GAMI's shares in GAM.

[100] *Id.* at ¶¶ 74-107.

[101] *Id.* at ¶¶ 108-31.

[102] *Id.* at ¶¶ 149-50. (GAMI asks the tribunal to award compensation in an amount not less than US$27.8 Million, the value of GAMI's interest in GAM on 2 September 2001. In addition, GAMI requested interests on this sum compounded from 3 September 2001 until payment, plus attorneys' fees, expenses, and the costs of the arbitration proceedings.)

[103] GAMI AWARD at ¶ 8.

suffered something tantamount to expropriation [under the NAFTA was a question that] […] arises prior to any analysis of quantum [and] relates to the substantive determination of a breach […]."[104]

The tribunal also recognized that the Decree was likely inconsistent with the *norms* of NAFTA, "but a conduct inconsistent with the norms of NAFTA is only a breach of NAFTA if it affects interests protected by NAFTA".[105] Using this rationale, if the investor wanted to succeed in its expropriation claim internationally, it needed to show that Mexico's conduct impaired the value of GAMI's shareholding to such an extent that it must be deemed tantamount to expropriation.[106] Pursuant to this argument, the tribunal dismissed GAMI's claim; in its view, the investor had failed to prove the effects of the measure on the value of GAMI shares in GAM.[107] While noting that GAMI neglected to give any weight to the remedies available to GAM, the tribunal concluded that no evidence existed that GAM's value as an enterprise had been destroyed and impaired.[108] In its analysis the tribunal alluded to the concurrent proceedings and the unsynchronized but simultaneous resolution of them, adding that: "[t]he overwhelming *implausibility* of a simultaneous resolution of the problem by national and international jurisdictions impels consideration of the practically *certain* scenario of unsynchronized resolution."[109]

The NAFTA tribunal also rejected GAMI's claims under Articles 1102 and 1105. Since the main goal of this work is to analyze the relationship of the courts and the arbitral tribunals, this article will limit analysis to the treatment of the expropriation claim, which was also the focus of the Mexican Supreme Court.

Figure 2: Proceedings Against the Decree

Decree	*NAFTA Investment Arbitration Proceedings*	*Mexican Supreme Court Proceedings*
Parties	GAMI (minority shareholder of GAM)	Sugar Mill Owners (*e.g.*, GAM)
Applicable Law	NAFTA Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation).	Mexican Constitution Articles 27 (Protection of Property), and 14 (Due Process of Law).
Relief Requested	Damages (US$42 Million)	Invalidation of the Decree and Restitution of Property
Outcome	Claims rejected by Tribunal	Decree invalidated by the Supreme Court for lack of hearing to petitioners

[104] *Id.* at ¶ 123.

[105] *Id.* at ¶ 129.

[106] *Id.* at ¶¶ 128-133.

[107] *Id.* The tribunal concluded at ¶ 133 that the "assessment of their effect on the value of GAMI's investment is a precondition to a finding that it was taken."

[108] *Id.* at ¶ 132.

[109] *Id.* at ¶ 119. Emphasis in original.

3. *The Tax Proceedings*

A. *Proceedings before the Mexican Supreme Court*

Several HFCS producers and distributors challenged the Tax in Mexican courts soon after it was enacted. Among them was CPIngredientes ("CPI Mexico"), the local subsidiary of Corn Products International ("CPI"), a U.S. company which would later bring one of the NAFTA claims discussed below.[110] Some soft-drink producers/distributors (*e.g.*, La Perla de la Paz) also instituted *amparo* proceedings in Mexico's federal courts.[111]

In their *amparo* petitions, the HFCS and soft-drink producers and distributors contested: (i) the discriminatory nature of the Tax under the principle of tax equity and proportionality contained in Article 31(IV) (Fiscal Contributions); and (ii) the monopolistic effects of Tax (in favor of the sugar industry) as a violation to Article 28 (Antitrust) of the Constitution. As relief, the petitioners requested the annulment of the Tax.

Three months after its enactment, President Vicente Fox issued a decree temporarily suspending the Tax, relying on a rarely applied provision of the Federal Tax Code (Codigo Fiscal Federal) under which taxes can be suspended to prevent damages to an economic sector. In a proceeding called *controversia constitucional*,[112] however, the Chamber of Deputies challenged the President's suspension decree before the Mexican Supreme Court. The Chamber of Deputies argued that in suspending the Tax, the Executive had exceeded its mandate in breach of the principle of separation of powers set forth in different Articles of the Constitution.[113] The Chamber of Deputies requested the invalidity of the suspension decree, and the consequent re-establishment of the Tax.

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[110] *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/1), Claimant's Memorial *available at* http://www.economia.gob.mx/pics/pages/5500_base/II_Corn_Products_International_20080603.pdf (last accessed December 6, 2011) [hereinafter CPI MEMORIAL] ¶ 73.

[111] Amparo in review 797/2002, La Perla de la Paz, S.A. de C.V., Feb. 7, 2003 (opinion unanimously by four votes); *see also* other petitioners Amparo in review 1029/2003, Embotelladora de Tampico, S.A. de C.V. and others, January 23, 2004 (unanimously by four votes); Amparo in review 505/2003, Supermercados Internacionales Heb, S.A. de C.V., Feb. 27, 2004 (unanimously by four votes); Amparo in review 2168/2003, Embotelladora Tarahumara, S.A. de C.V., Mar. 26, 2004 (five votes); Amparo in review 165/2004, Refresquera Internacional, S.A. de C.V., Mar. 26, 2004 (five votes). This amparos are the basis of Jurisprudencia 57/2004 from Supreme Court [hereinafter JURISPRUDENCIA 57/2004].

[112] The *controversia constitucional* allows certain political actors (*e.g.,* 1/3 of Chamber of Deputies, Political Parties or Governors) to challenge directly to the Supreme Court among other measures, Presidential decrees on the grounds of a Constitutional breach.

[113] *See* Mexican Constitution, Articles 72, 73 and 89 available in English at http://www.ilstu.edu/class/hist263/docs/1917const.html (last accessed September 26, 2009).

For HFCS producers like CPI Mexico, the battle in the Mexican court proved to be unsuccessful. By placing the legal effect of the Tax on the soft-drink bottlers themselves, rather than on the HFCS producers and distributors (who were bearing the main economic burden), it was impossible for the latter to mount a successful challenge against the Tax in Mexican courts. The claims were thereby rejected by a Chamber of the Supreme Court for lack of legal standing because, under Mexican law in effect, only the individuals or entities directly affected by the Tax had legal standing before Mexican courts.[114]

In spite of this outcome, the *amparo* claims brought by the soft-drink distributors like La Perla de la Paz *et al.* were ultimately referred to the same Chamber of the Supreme Court that heard CPI Mexico's *amparo* suit. The Chamber ruled that "it was clear that the Tax established different standards of treatment."[115] However, the Court held that the Tax did not breach Mexican constitutional law because there was a valid reason for the different standard of treatment. In reaching its decision, the Court examined the motivations of the Congress and concluded that Congress "sought with [the Tax] to protect and not affect the domestic sugar industry, since many Mexicans depend on it to make a living."[116] According to the Court, because the discrimination was intentional on the part of Congress, it was consistent with the principle of fair taxation established in the Constitution![117]

In the *controversia constitucional* brought by the Chamber of Deputies, discussed above, the Supreme Court (in full) first held that the President was entitled to suspend taxes in specific cases.[118] However, the Court concluded that by suspending the Tax, the President had utterly disregarded Congress' "clear […] non-tax related purpose […]."[119] As a result, the Court ruled that by suspending the Tax, the President had disregard its extra-fiscal objective (*i.e.*, the protection of the domestic sugar industry) as reflected in the legislative record and thus exceeded the Constitutional authority of the Executive branch.[120]

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[114] Decision of the Supreme Court of 25 August 2004 in *Amparo en Revisión* 756/2004, *Arancia-Corn Products SA de CV* [hereinafter Supreme Court Decision, CPI Mexico].

[115] Jurisprudencia 57/2004 (Novena Época).

[116] *Id.*

[117] *Id.*

[118] *See* Sentencia relativa a la controversia constitucional 32/2002, promovida por la Cámara de Diputados del Congreso de la Unión, en contra del Titular del Poder Ejecutivo Federal, 17 de julio de 2002, at 36 [hereinafter Supreme Court Suspension Decision].

[119] The Supreme Court concluded that: "legislator's intent when extending the aforementioned tax to gasified waters, soft drinks, hydrating drinks and other taxed goods and activities, when they use fructose in their production rather than cane sugar, was that of protecting the sugar industry." Supreme Court Suspension Decision at ¶ 100.

[120] *Id.*

B. *The NAFTA Chapter Eleven Proceedings*

Four U.S. companies brought three investment claims under NAFTA: (i) CPI,[121] (ii) Archer Daniels Midland Company (ADM) jointly with Tate & Lyle Ingredients Americas, Inc. (TLIA),[122] and (iii) Cargill, Inc.[123] The four companies were producers and/or distributors of HFCS in Mexico. The claims were brought under Article 1116 as U.S. corporations (investor of a Party) that wholly own a Mexican company; and on behalf of an enterprise that the investor owns or controls directly or indirectly. Since Mexico's efforts to consolidate the separate claims into a single proceeding failed, the three cases were conducted and decided separately.[124]

The four different claimants argued that the Tax was inconsistent with Articles 1102 (National Treatment), 1106 (Performance Requirements), and 1110 (Expropriation) of the NAFTA. In addition, Cargill also claimed a violation to Articles 1103 (Most-Favored Nation Treatment) and 1105 (Minimum Standard of Treatment) as a consequence of a series of measures prior to the adoption of the Tax.[125] In total, the four claimants sought monetary damages and applicable interest, fees and expenses for not less than US$575 Million.[126]

In response, Mexico argued that the Tax was as a "legitimate countermeasure" adopted in response to a prior U.S. violation of the NAFTA.[127] The Mexican affirmative defense argued that the U.S. had breached NAFTA pro-

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[121] CPI Memorial on the Merits at ¶¶ 4-6.

[122] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5) *available at* http://www.economia.gob.mx/pics/pages/5500_base/A_D_M_v4.pdf (last accessed October 6, 2009) [hereinafter ADM/TLIA Memorial] ¶¶ 4-7.

[123] *Cargill, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), *available at* http://www.economia.gob.mx/pics/pages/5500_base/IV_Cargill_Incorporated_20080605.pdf (last accessed October 6, 2009) [hereinafter Cargill Memorial] ¶¶ 4-5.

[124] *See* discussion in Yulia Andreeva, *Corn Products v. Mexico: First NAFTA (Non)-Consolidation Order,* 8 Int. A.L.R. N 78-81 (2006); Order of Consolidation *available at* http://ita.law.uvic.ca/documents/Corn_Archer_order_en.pdf (last accessed October 6, 2009).

[125] *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), *available at* http://www.economia.gob.mx/pics/pages/5500_base/Cargill_notific_de_int_esp_20080604.pdf (last accessed October 7, 2009) [hereinafter Cargill Notice].

[126] Amounts requested: CPI, US$350 Million; ADM/TLIA, US$100 Million; and Cargill, US$125 Million.

[127] In Mexico's view, the Tax was a temporary and proportionate countermeasure intended to return the Mexican market to the *status quo* before the NAFTA, pending resolution of the dispute. Mexico further asserted that its use of the Tax a countermeasure was a matter that precluded unlawfulness in its conduct, and hence, precluded Mexico's international responsibility. *Archer Daniels Midland Company v. United Mexican States* (Final Award) (Nov. 21, 2007) *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC782_En&caseId=C43 (last accessed December 6, 2011) [hereinafter ADM/TLIA Final Award] ¶ 106.

visions: (i) Chapter Three and the side-letters on sugar by denying market access for Mexico's sugar surplus to the U.S. market; and (ii) Chapter Twenty by frustrating the dispute settlement mechanism under such chapter by refusing to appoint an arbitrator in the State-to-State dispute.[128] Mexico also responded individually to each of the claims made by the different investors.

Unlike the domestic proceedings, where the Mexican courts dismissed the cases brought by HFCS producers for lack of standing, the three NAFTA tribunals found jurisdiction to hear the claims against the Tax. The three tribunals also held that Mexico had breached Article 1102 (National Treatment) and dismissed the claims under Article 1110 (Expropriation).[129] In addition, the ADM/TLIA and Cargill tribunals found the Tax to be in breach of Article 1106 (Performance Requirements).[130] The Cargill tribunal also found a breach of Article 1105 (Minimum Standard of Treatment) as consequence of the other related measures.[131]

Interestingly, in the process of assessing Mexico's defense, the Tribunals faced the question of whether the international law on countermeasures was applicable to claims under Chapter Eleven. The ADM/TLIA tribunal decided that, as a general matter, countermeasures may serve as a defense in this type of proceedings if certain conditions are met.[132] However, the tribunal concluded that the Tax was not a valid countermeasure because it had not been adopted to induce compliance by the United States with NAFTA.[133] It also found that the Tax did not meet the proportionality requirements for countermeasures under customary international law.[134] Conversely, the Tribunals in the claims brought by CPI and Cargill found that the doctrine of countermeasures, devised in the context of relations between States, is not

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[128] *Id.* ¶ 77. Mexico argued that by delaying the appointment of its panelists, the U.S. had prevented Mexico from submitting the dispute over sugar access to the Chapter 20 panel.

[129] ADM/TLIA Final Award ¶ 304. *Corn Products International, Inc. v. The United Mexican States,* ICSID Case No. ARB(AF)/04/01 (NAFTA): Decision on Responsibility (redacted version) *available at* www.ita.org (last accessed June 6, 2009) [hereinafter CPI Decision on Responsibility] at ¶ 193; and *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2 (NAFTA) -Award, 18 September 2009 [hereinafter Cargill Award] at ¶¶ 554, 558.

[130] *Id*.

[131] Cargill Award ¶ 556.

[132] ADM/TLIA Final Award ¶ 123. Mr. Arthur Rovine did not agree with this reasoning *See* Concurring Opinion Of Arthur W. Rovine on Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC783_En&caseId=C43 (last accessed December 7, 2011).

[133] ADM/TLIA Final Award ¶ 127. The tribunal also identified the following conditions for the imposition of countermeasures in this case: 1) a breach of the NAFTA; 2) that the Tax was enacted in response to the alleged U.S. breaches and was intended to induce compliance with the NAFTA obligations; 3) that the Tax was proportionate measure; 4) The Tax did not impair individual substantive rights of Claimants.

[134] ADM/TLIA Final Award ¶¶ 152-160.

applicable to investor-State claims under Chapter Eleven of NAFTA.[135] In light of the three decisions, the conferral of rights under Chapter Eleven of NAFTA can be viewed in two incompatible ways. First (adopted by the ADM/TLIA tribunal), as a species of "delegated espousal,"[136] and second (adopted by the CPI and Cargill Tribunals) as a species of "third-party contract beneficiaries" of the rights conferred by NAFTA.[137]

In all three decisions, the tribunals held that the Tax was discriminatory and in violation of Article 1102.[138] For the Tribunals, the discrimination was clearly based on nationality both in intent and effect. The tribunal in CPI's arbitration also added that "an intention to discriminate is not a requirement" to find a violation of Article 1102. Similar to the Cargill tribunal, it concluded that the countermeasure defense was in itself evidence of the discriminatory intent of the Tax.[139] The tribunal in ADM/TLIA looked more thoroughly at the Congressional activity prior to the adoption of the Tax to determine that the Tax was successful in its legislative goal of "afford[ing] protection to the production of cane sugar, which is in line with [other] measures taken by Mexico before the imposition of the Tax."[140]

NAFTA's national treatment provision focuses on discrimination based in nationality *vis-à-vis* other investors considered to be in like circumstances.[141] While the three Tribunals relied on the economic sector standard as comparator, the ADM/TLIA tribunal also determined that all circumstances in which the treatment was accorded are to be taken into account.[142] The Cargill tribunal dismissed the relevance of the economic circumstances because they were unrelated with the Tax allege rationale (to put pressure on the U.S. government).[143] Finally, the CPI tribunal, noting the fierce competition between sugar and HFCS and the crisis in the Mexican sugar sector, concluded that: "[d]iscrimination does not cease to be discrimination, nor to attract the international liability stemming there from, because it is undertaken

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[135] CPI Decision on Responsibility ¶¶ 170-8 and Cargill Award ¶ 429.

[136] Robert Anderson IV, *Ascertained in a Different Way: The Treaty Power at the Crossroads of Contract, Compact, and Constitution*, 69 Geo. Wash. L. Rev. 189, 243 (2001).

[137] Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working?* 59 Hastings L.J. 241, (2007) [hereinafter Bjorklund, Competition]. Also, Thomas Wälde, *Energy Charter Treaty-based Investment Arbitration - Controversial Issues*, CEPMLP, University of Dundee (2005) (discussing that under the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects investors have a right to bring claims against States). See also, Francisco González de Cossío, *Investment Protection Rights: Substantive or Procedural?,* 2 ICSID Review, Foreign Investment Law Journal (2011).

[138] ADM/TLIA Final Award ¶ 304; CPI Decision on Responsibility ¶ 193; Cargill Award ¶ 554.

[139] CPI Decision on Responsibility ¶¶ 135-43; Cargill Award ¶¶ 219-20.

[140] ADM/TLIA Final Award ¶ 212.

[141] *See* DiMascio & Joost Pauwelyn, *supra* note 6, at 89.

[142] ADM/TLIA Final Award ¶ 197.

[143] Cargill Award ¶¶ 211-14.

to achieve a laudable goal or because the achievement of that goal can be described as necessary."[144]

In short, the proceedings against the Tax can be summarized as shown in the following table:

FIGURE 3: PROCEEDINGS AGAINST THE TAX

TAX	*NAFTA INVESTMENT ARBITRATION PROCEEDINGS*	*MEXICAN SUPREME COURT PROCEEDINGS*
Parties	U.S. investors and their investments: (a) CPI (b) ADM/TLIA (c) Cargill	Different Class of Petitioners: (a) HFCS (*e.g.*, CPI Mexico) (b) Soft Drink Producers (*e.g.*, La Perla de la Paz) (c) Chamber of Deputies
Applicable Law	NAFTA Articles: (a) 1102 (National Treatment) (b) 1106 (Performance Requirements) (c) 1110 (Expropriation)	Mexican Constitution Articles: (a) 31(IV) (Fiscal Contributions) (b) 28 (Antitrust) (c) 72, 73 & 89 (Separation of Powers).
Relief Requested	Damages (US$550 Million between all Claimants)	Tax removal and invalidation of suspension decree
Outcome	Tax in breach of 1102 (ADM/TLIA, CPI and Cargill) Tax in breach of 1106 (ADM/TLIA and Cargill) Total awards: 170 Million (approx.).[145]	Tax maintained by Supreme Court because discrimination had an "extra-fiscal" objective.

4. *Investor-State Arbitration in a Politicized Context: Domestic Courts and International Tribunals?*

What lessons can the Mexican sweeteners saga tell us about the relationship between eminently political courts and international arbitration tribunals attempting to de-politicize investment disputes?

While the tensions between international and national remedies should not be downplayed, their relationship is more fluid than the binary story of cooperation or substitution often expressed in the debate between liberals

[144] CPI DECISION ON RESPONSIBILITY ¶ 142.

[145] Information available at http://amlawdaily.typepad.com/amlawdaily/2009/09/mayer-brown-scores-biggestever-nafta-award-in-mexican-sugar-case.html (last accessed December 7, 2011); Cargill US$77.3 Million, CPI US$58.4 Million (pending revision), and US$33.5 Million.

and developmentalists.[146] The complexities shown should encourage researchers not to transport the analysis of international private rights of action onto a model where the selection of investment arbitration means the abdication of national courts and *vice-versa*. Therefore, more theorizing is required, incorporating the understanding of the pragmatic and strategic use of national courts and international tribunals, as well as the different functions and the limitations imposed by different jurisdictional mandates. This should invite a careful intra-legal/institutional analysis that acknowledges the different rules of coordination of specific treaty systems in their context, in particular the model of accession to investor-state arbitration. From this intra-legal/institutional perspective, the policy debate around the waiver of local remedies rule can be re-framed as an analysis of calibrated rules that create incentives in complex litigation scenarios, with the participation of an enlarged pool of veto players. This, I argue, avoids the unhelpful dichotomy in the debate between liberals and developmentalists (*i.e.,* domestic or international) and helps to formulate a more nuanced critique of the idea of de-politicization via international adjudicatory bodies by understanding the concurrent role of both domestic courts *and* international tribunals.

A. *Pragmatism, Fluidity and Restraint*

The sweeteners saga shows how advocating for the adjudication of claims of foreign investors exclusively in national courts based on the idea of "circumvention" of domestic judicial institutions obfuscates the complexity of investment conflicts and judicial politics. Even in well-developed court systems it is difficult to ask domestic courts to become islands of commendable independence and competence in highly politicized environments.[147] For example, in the cases brought against the Tax, the historic ties of the Mexican sugar sector, combined with the ambivalence of the U.S. government in the sweeteners sector due to the Mexico-U.S. conflict, certainly informed the Court's decision on the Tax. For the Mexican Supreme Court to make a decision without the lens of the larger diplomatic conflict would have meant ignoring a fundamental contextual aspect of the dispute, putting its legitimacy at risk at a key moment and inviting an overrule by political actors. These tensions certainly resulted in the inclusion of extremely formalistic and peripheral or incongruent considerations by the Court in the Tax decisions.[148] However,

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[146] Ginsburg, *International Substitutes for Domestic Institutions*, *supra* note 11, at 120-123.

[147] *See, e.g., Raymond Loewen and The Loewen Group v. United States of America*, NAFTA/ICSID (AF) Tribunal, Case. No. ARB(AF)/98/3, Final Award, June 26, 2003, at ¶9. Loewen claimed, not without reason, that a trial court in Mississippi that decided based on extensive nationality-based, racial and class-based testimonies and comments in breach of article 1105.

[148] Supreme Court Suspension Decision at 37. (Reversing its own precedent which required taxes to have a revenue collection motive and not only an "extra-fiscal goal.")

the Court succeeded in avoiding a potentially disastrous clash between the legislative and the executive over constitutional powers by focusing on the veto power over taxation rather than the powers over foreign affairs or international commerce.

Equally valid is to say that judicial politics in high courts do not always are adverse to foreigners. Indeed, foreign investors might pay the price of their own subjective apprehensions about a domestic judicial system by resorting too quickly to use international tribunals. For example, when ruling on the validity of the Expropriation Decree, the Court limited the Executive branch's power in expropriation cases, taking a controversial reading of the Mexican Constitution. The court was preoccupied by the use of this powerful mechanism and lack of compliance with judicial orders by a former mayor of Mexico City and —at the time— a front runner in Mexico's Presidential race.[149] While GAMI benefited indirectly from this controversial decision (GAMI ultimately won back the expropriated mills), the cost of the unsuccessful case before an investment tribunal could have been, for the most part, avoided.[150]

Moreover, the contention that foreigners take advantage of international tribunals to the detriment of local institutional capacity is not readily supported by the case study. Such contention, as illustrated by the case study fails to recognize the different factors involved in complex litigation and adjudicative decision-making. In most NAFTA cases, including those involving the sweeteners sector, the same investor (or its local enterprise) pursued domestic remedies before submitting a claim under Chapter Eleven without being required to do so by NAFTA. In the international claims brought against

[149] The reasons for this limitation were clearly expressed in the decisions concerning the expropriating mills. Indeed, the Court admitted that the main problems with compliance with court decision by the Executive branch involved expropriation cases. The timing (6 months before the 2006 Mexican Presidential elections) and some of the arguments made clear that the decision of requiring "prior hearing" the Court attempted to tie the hands to the populist agenda of Mr. López Obrador former mayor of Mexico City and —at the time— front runner in Mexico's Presidential race. *See supra* note 92, at ¶ 102 (changing a long-standing precedent, introducing the prior hearing requirement for conducting valid expropriations and ruled in favor of the owners of expropriated property).

[150] On February 20, 2004 the disputing parties in *GAMI v. Mexico* were informed of the decision that annulled the expropriation of three mills. Given that the Decree was adopted in September 3, 2001, this final decision of the Mexican Court was issued within the 3 year limits to bring a NAFTA claim. For example, in *G.G.S. Howland v. Mexico*, reprinted in J. B. Moore, History and Digest of International Arbitrations to which the United States Has Been a Party (6 vols., Washington, DC: US Government Printing Office, 1898) p. 3227, the Claimants were able to prosecute their international claim notwithstanding an ostensibly favorable Mexican Supreme Court judgment restituting to them a significant quantity of wax which had been wrongfully seized by customs officials. In the international proceeding, the Mexican commissioners argued that the Mexican judgment had finally disposed of the merits of the case. The umpire disagreed and ordered compensation for damages and costs. In the same manner sense, *GAMI* could have waited the Court's decision and either bring a claim against the compensation as a violation of 1105 or its original claim within the 3 year period.

the Tax, the investors forcefully pursued local options prior to bringing the NAFTA claims.[151] While the Decree was being challenged in Mexican courts by several owners of the expropriated mills, GAMI adjudicated the investment claim before an arbitral tribunal.

Arguments exist both in favor of and against extending strategic options to foreign investors by granting direct remedies against states. However, another lesson of the case study is that whatever we think is the right answer to such extension, a distinction remains between the possibilities of national and international decision-makers. This distinction is informed by the respective jurisdictions and mandates, and does not prevent judges and arbitrators from recognizing the existence and some commonalties in their functions.[152] This means that arbitrators may give respectful (or intrusive) consideration to domestic courts as an expression of national law.[153] In *GAMI v. Mexico*, for example, the arbitral tribunal recognized the Supreme Court as a "source of congruent application of national law and the government agencies as guardians of the legitimate goals of policy."[154] Moreover, while referring to the decision that ruled on the expropriation as a matter of Mexican law, the tribunal deferred to the decision of the Court as an authoritative expression of national law.[155] Furthermore, in the *ADM/TLIA v. Mexico* case arising out of the Tax, the tribunal relied on the Supreme Court's decision on the constitutional controversy as evidence of the Mexican Congress' protectionist intent, arguably the main issue of the investment claim.[156]

Conversely, constitutional courts may use international law language and international tribunals' decisions in justifying their findings. For example, in revoking the Decree the Mexican Supreme Court also attempted to unify Mexico's expropriation case law with international law as developed by investor-state arbitration practice. Notably, when ruling on this issue, the Su-

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[151] As discussed in section 2, HFCS producers like CPI Mexico tried, but could not mount a successful challenge in local courts, among others, because the Tax was designed to leave them without legal standing. *See supra* note 109, Supreme Court Decision, CPI Mexico.

[152] *See, e.g., Metalclad v. Mexico*. In such cases whether denial of a construction permit violated the NAFTA Article 1105 depended in part on whether the municipality had authority under Mexican law over hazardous waste matters. In *Azinian v. Mexico*, by contrast, the question of whether a municipality had grounds under Mexican law to repudiate a concession contract had been adjudicated by the Mexican courts, and the tribunal was able to rely on their decisions in rejecting the investor's expropriation claim.

[153] A. M. Slaughter, *Focus: Emerging Fora for International Litigation (Part 2)-A Global Community of Courts*, 44 Harv. Int'l L. J. 191 at 219 ("A global community of courts, animated largely by persuasive authority, personal contacts, and peripatetic litigants, is a more realistic and desirable goal"). For a survey of how the NAFTA offers an opportunity for harmonization of laws in North America, *see* Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 Ariz. J. Int'l & Comp. L. 401, 409-414 (1995).

[154] Gami Award at ¶ 41.

[155] *Id.* at ¶ 8.

[156] ADM/TLIA Award at ¶ 146.

preme Court looked at NAFTA and international law to conclude that the requirement of a prior hearing in expropriation: "[…] is also consistent with the principle of non-discrimination for reasons of nationality […] which, as applied to this case, would have led the authorities to grant the national companies, the same conditions provided for foreigners in NAFTA […].[157]

Finally, the interactions between national and international adjudicatory bodies may also work to signal to the domestic legal community the existence of problems in the congruence, transparency and effectiveness of domestic institutions; it may even encourage systematic reforms. For example, in *GAMI v. Mexico*, the tribunal rendered a sharp critique of the administration of the sugar program and the mills expropriation conducted by the Mexican Government.[158] In *CPI v. Mexico*, the formalistic system in Mexico led the tribunal to diplomatically criticize the approach taken by the Mexican courts in rejecting cases brought by the HFCS producers for lack of legal standing.[159] In the years after these cases, the Mexican sugar program was amended[160] and several efforts followed to expand the accessibility, scope and effectiveness of the *amparo* proceedings in Mexico.[161]

These repeated, respectful and coordinated interactions between the Mexican Supreme Court and NAFTA tribunals do not mean that an international system of private right of standing is problem-free. However, a careful analysis of the cases brought under NAFTA shows that the "circumvention" argument made most often by the developmentalists is in fact debatable. Moreover, the case study supports a degree of "dialogue" between domestic and international adjudicatory bodies that requires further analysis and theorizing.[162] Arguably, the outcome observed is animated by adjudicative pragmatism, fluidity and restraint not captured by the debate as framed by devel-

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[157] This is not a sound finding of the Mexican Supreme Court. Although the IIAs signed by Mexico, and also the NAFTA were not the subject-matter of the dispute involving the Decree, the Supreme Court suggested that holding that there was no need of "prior hearing" could lead to the unconstitutionality of such treaties, because they would be granting preferential rights to foreigners over nationals; this based on the incorrect assumption that a due process requirement set forth in the NAFTA, included the Governments' obligation to grant prior hearing to investors in expropriation cases. María Teresita Machado *et al.* AR 1132/2004, S.C,J.N. (pleno) and Fomento Azucarero Mexicano et al., AR 1132/2004, S.C,J.N. (pleno) at http://www.scjn.gob.mx (last accessed June 26, 2009).

[158] Gami Award at ¶ 98.

[159] CPI Award on Liability at ¶ 119 "it would be the triumph of form over substance to hold that the fact that the tax was structured as a tax on the bottlers, rather than the suppliers of sweeteners, precluded it from amounting" to a violation of the NAFTA.

[160] *Ley de Desarrollo Sustentable de la Caña de Azúcar* [L.D.S.C.A.] [Law on the Sustainable Development of Sugarcane] [D.O.] 22 de agosto de 2005 (Mex.).

[161] *See* A Forthcoming Rights Revolution in Mexico? Available in http://www.comparativeconstitutions.org/2011/06/forthcoming-rights-revolution-in-mexico.html (last accessed June 26, 2011).

[162] Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harvard International Law

opmentalists. As I explain below, the debate not only ignores the importance of the rules of coordination between national and international adjudicators but the strategic actions of litigators and the effects of judicial politics and how the choices of theses actors are structured by the institutional setting in which they are made.

B. *Polity and International Adjudicatory Bodies*

There is general agreement in contemporary political science and legal academicians that "institutions matter". However, consensus breaks down when analysis focuses on the outcomes of specific institutional structures. The debate between liberals and developmentalists over the relationship and effects of investor-state tribunals exemplifies this lack of agreement. For liberals, investor-state tribunals (and international adjudicatory bodies in general) are a positive complement to domestic judicial institutions for their ability to "de-politicize" investment disputes, leading to economic policy stability that encourages foreign investment. For developmentalists, the same international alternatives reduce institutional quality because they allow powerful actors to avoid local judicial institutions by relying on supranational adjudication.

The main insight the sweeteners saga brings to this debate is that to explain the relationship between national and international adjudicatory bodies, a proper analysis should address how these supranational bodies affect and disrupt the domestic polity around property rights protection, taxation and business regulation, due process, international affairs etc. This often means understanding the strategic considerations of courts, acting in politicized environments and interested in seeing their decisions stand and not being overruled by political actors. It can also mean understanding that judges can act strategically in the sense that their choices depend on their perceptions about the choices of other actors. Further, it means understanding the strategic decisions of litigants and how their choices and the choices of decision makers are structured by the institutional setting in which they are made. Thus, while the developmentalists' critique misses the point of analyzing investor-state arbitration without acknowledging or over-simplifying the institutional setting with respect to models of accession to international adjudication as well as the litigants' strategic processes, the liberals defense oversimplifies the idea of de-politicization in investment disputes, adamantly defending IIAs without addressing the different ways in which investor-state arbitration actually affects judicial politics around specific normative issues by expanding corrective options to foreign investors.

It is perhaps the lack of that conversation that forms the center of tensions existing among policy analysts, developmental specialists and political science

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Journal 191 (2003). For a similar conclusion in the Mexican context, see Ferrer Mac-Gregor, *supra* note 8, at 425 (referring to "*Diálogo Jurisprudencial" [Jurisprudential dialogue]*).

and law academicians on the convenience of supranational adjudication. The complex methodological question at the heart of analyzing this issue involves making sense of many variables, different preferences on outcomes and choices and the strategies available to the actors involved. As identified by Helfer and Slaughter, effective supranational adjudication includes making sense of the autonomous domestic institutions and their responsiveness to different interests.[163]

By looking at the parallel proceedings addressing the same measures through the eyes of both a constitution court and investor-state arbitration tribunals, this work captures the complexity of that endeavor and the importance of conceptualizing international tribunals through administrative and constitutional law lenses. It also shows how the power of international tribunals goes beyond their decisions, or their ability to encourage dialogue, but in their ability to disrupt strategic interactions between different institutions, including local judiciaries, when they exert jurisdiction over claims. This is a delicate task that international tribunals play, especially when analyzing blurred zones of discretion. Accordingly, adventurist arbitrators going beyond the proper scope of their jurisdiction in a sensitive case may disturb the polity, beyond the delegated authority and generate a backlash against supranational adjudication. For example, the decision of the tribunal in the *Cargill v. Mexico* proceeding to compensate for losses suffered by the investor in its capacity as producer and exporter of its product into Mexico will likely trigger this backlash.[164] This decision seems to go beyond the jurisdictional authority of investor-state tribunals and expands the power of these supranational bodies dramatically into a delicate terrain of international trade, an area usually reserved to inter-state relations.[165]

How then can this conversation be enabled by inter-disciplinary academia? One solution could be to complement statistical inference, regression analysis and case studies with rational choice models. Rational choice models have been influential in shaping our understanding of why states enter into investment treaties, but underutilized in analyzing how they affect judicial and institutional politics. To understand ways in which different institutions affect policy outcomes and strategic decisions, centuries ago constitutional writers introduced the concept of veto players. The veto player concept stems from the idea of "checks and balances" in classic constitutional texts of the eighteen and nineteen century.[166] Prior analyses relying on veto player models

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[163] Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 278 (1997).

[164] Mexico v. Cargill, Incorporated, 2011 ONCA 622.

[165] Mexico v. Cargill, Incorporated, Factum of the Appellant, Court of Appeal File No. C52737. According to Mexico this decision will allow small investment to convert losses suffered by production facilities in one NAFTA country into losses suffered by the small investment in another NAFTA country.

[166] A veto player is an individual or collective actor whose agreement is required for a

provide some insight of how policy stability in certain areas leads to the inability of governments to change the *status quo*, even when such changes are necessary or desirable.[167]

Academicians should understand and explore the trade-offs created by supranational adjudication bodies. Investor-state arbitration may be effective to spawn economic policy stability, to animate investment decisions and to institutionalize diplomatic affairs. Yet, it may also effect in domestic institutions by delegating jurisdiction to and concentrating power in a limited pool of international experts in *international* dispute settlement. The case study illustrates the need to empirically assess these trade-offs and understand how by extending or limiting the reach of its delegated authority, by exercising or declining its competence and jurisdiction, by consolidating or splitting common claims, for example, investor-state tribunals act similarly to veto players affecting, among others, judicial politics around specific issue areas. In this context, if fostering a constructive dialogue between national and supranational decision-makers is a desirable outcome, the debate over the rules of coordination and access to investor-state arbitration seems to assume greater importance. Researches should include in this analysis the complexities of different models of accession, and the strategies that the models may spawn, aware of the institutional setting in which are made and the specific context of treaty negotiations.

IV. Revisiting the Debate of the Rules of Accession to Supranational Adjudication

In commemoration of Chapter Eleven's tenth birthday, Professor Bjorklund stated that "[a]s arbitrations multiply, the wisdom of having waived the local remedies rule will likely become over more questionable."[168] She considered the "blanket waiver with respect to an undefined class of prospective cases"[169] an unwise decision of the NAFTA governments. Consequently, Professor Bjorklund advocates "[r]estoring a local remedies rule that includes a reasonable, but strict time-frame for those remedies to ensue, or provides a reasonable tolling period of the statute of limitations, while still maintaining a right for an individual to bring a claim directly should those remedies fail, and argues that such a rule has the potential to balance the rights of investors against the rights of state parties."[170]

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change in policy. While investor state tribunals do not have powers to. See Lijphart, Patterns of Democracy (New Haven: Yale University Press, 1999).

[167] G. Tsebelis, *Decision Making in Political Systems: Veto. Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25.3 British Journal of Political Science 289-325 (1995).

[168] Bjorklund, *supra* note 20, at 285.

[169] *Id.*

[170] *Id.*

In spite of the skepticism towards NAFTA's "no-U-turn" model, the evidence presented here suggests that restoring the local remedies rule is not a pressing reform to Chapter Eleven of NAFTA. For Mexico, the least developed country of the three parties, the measures challenged before arbitral tribunals had been challenged also in domestic courts. Investor-state has been used as a remedy of last resort and cases did not multiply as predicted in spite of an "investor-friendly" model which gives foreign investors enough flexibility to bypass domestic courts.

What seems therefore counterintuitive is that NAFTA's "investor-friendly" model is compatible with an extensive use of local remedies, an outcome of special interest for development scholars. The reason may be that investor-state arbitration under NAFTA is well calibrated and supports the possibility of litigation strategies consisting in pursuing available remedies at both levels, domestic and international. The two different levels can indeed coexist under a model that focuses on proceedings with respect to a same *measure* as oppose to proceedings regarding a same *dispute*.[171] Moreover, allowing three years from the date when the investor should have discovered the breach and injury to bring a claim permits investors to seek remedies before domestic courts without statute of limitation concerns. Canadian investors, for example, took advantage of the three-year rule and filed suits in the U.S. federal courts challenging domestic law, and then subsequently alleged the same measure to be a violation of NAFTA.[172] Thus, the flexibility of bringing national claims without distressing a claim for damages under Chapter Eleven may facilitate the use of a national court during that three-year period. Moreover, by limiting the jurisdiction of an arbitral tribunal to damages resulting as a consequence of a breach of NAFTA, if the breach affects an interest protected by NAFTA itself, domestic courts' retain their broader jurisdictional mandate, an element of special interest to the parties involved in the negotiations of the Agreement.[173]

From a policy perspective, it is important to not treat lightly the debate over the forms of accession to investor-state arbitration. If the preferred outcome is the use of local remedies prior to the submission of international claims, policy-makers should excerpt some lessons from NAFTA or the trea-

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[171] *Cfr.* Ch. H. Brower, II, *Structure, Legitimacy, And Nafta's Investment Chapter*, 36 Vanderbilt Journal of Transnational Law 37 at ¶ 59: "[…] tribunals are overstepping their mandates by acceding to the extravagant claims […] Chapter 11 introduces a sort of constitutional indeterminacy by establishing no clear division of labor between tribunals, municipal courts, and the Free Trade Commission."

[172] Greg Anderson, *Can Someone Please Settle this Dispute? Canadian Softwood Lumber and the Dispute Settlement Mechanisms of the NAFTA and the WTO,* 5 The World Economy, May 29, 2006 at 585-610.

[173] *Azinian, Davitian & Boca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, NAFTA Award of 1 November 1999.

ties that reproduce this model.[174] Scholars may compare and contrast with other models of accession such as fork-in-the-road or eighteen-months-rule, and how the different models affect the incentives to litigate cases in domestic courts. This admittedly requires greater understanding of the strategic considerations involved in litigation and the institutional settings involved.

From a doctrinal perspective, arbitral tribunals disappointed by the expansive use of investor-state arbitration without first addressing the dispute in domestic courts should be discouraged from improperly incorporating the local remedies rule into the substantive standard of the violation.[175] This approach is problematic because it would reinstate the local remedies rule that, in most cases, was waived by a state subject to certain specific conditions.[176] However, in analyzing the importation of a provision containing the consent to arbitration through an MFN clause, tribunals too should understand investor-state arbitration as a strategic option in dispute settlement in comparing the treatment. This option should be understood in its institutional context subject to specific conditions and as a product of negotiations of different interests and, in many occasions, calibrated to incentivize certain strategic decisions in complex, politically-charged litigation. Thus, it should not be presumed that this balance can be easily disrupted by an investor selecting at will from an assorted menu of options provided in other treaties, negotiated with other State parties and in other circumstances. Uncritically allowing investors to import the advantageous aspects of dispute settlement provisions denies the important and contextual facets of the specific models of accession to arbitration and its consequence for the dialogue between national and international institutions. Improperly importing even simply a time limit

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[174] The exception correspond to the cases brought under the United States-Dominican Republic-Central America Free Trade Agreement (CAFTA). These cases are Railroad Development Corporation v. Republic of Guatemala (ICSID Case No. ARB/07/23); Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No. ARB/09/12); and Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador, (ICSID Case No. ARB/09/17). Information *available at* http://icsid.worldbank.org/ICSID/FrontServlet. The model under CAFTA requires a similar version of the waiver to initiate or continue any proceeding with respect to any measure alleged to constitute a breach of CAFTA. *See* Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004, Hein's No. KAV 7157 Article 10.18.

[175] *Parkerings-Compagniet AS v. The Republic of Lithuania*, ICSID Case No. ARB/05/8 (Lithuania-Norway BIT), Award, 11 September 2007. (In Parkerings v. Lithuania, the claimant argued that by repudiating an agreement for the management and operation of the public parking system of Vilnius City, the respondent expropriated claimant's investment. The tribunal decided that only if the investor was deprived, legally or practically, of the possibility to seek a remedy before the appropriate domestic court, could the tribunal decide whether the taking occurred. Since respondent showed no objective reason not to bring a case before a Lithuanian domestic court, the tribunal dismissed the claim.)

[176] Ch. Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration,* 4 The Law and Practice of International Courts and Tribunals 1 (2005).

from one mechanism into the other may completely change the incentives of the litigants, expanding the power of international tribunals beyond their delegated authority.

Finally, investor-state tribunals have an important role but are granted limited jurisdiction. In this important role, tribunals have the potential of affecting judicial and institutional politics. The derogation of the local remedies rule via IIAs has added more pressure to cement our understanding of the rules that coordinate the interaction between national courts and international dispute settlement mechanisms. These rules, like the local remedies rule have important consequences to domestic institutions. Looking at this debate from a constitutional and administrative law perspective enables our understanding of supranational adjudicators as part of a transnational epistemic community acting as new veto players. These new veto players, in many cases, affect institution in charge of politically-charged matters such as constitutional courts.

V. Conclusions

The debate between liberal and developmentalist scholars over the effects of investor-state tribunals in domestic institutions is another attempt to systematize our understanding of the transformative goals and the developmental effects of international law. This debate evidences how international law must balance claims seeking respect for national institutions against the need for sustaining stability, neutrality and expertise in an increasingly globalized environment. Just as NAFTA Chapter Eleven has given scholars and practitioners the opportunity to explore this intricacy of international law, the Mexican sweeteners saga has given several possibilities to understand more deeply how international and domestic institutions interact and affect each other.

The question of the relationship between domestic courts and international tribunals is not only of academic interest; it has practical, doctrinal and policy implications. While statistical meta-analysis has an incredible value and potential for improving and render clarity to this debate, some quantitative research in international economic law may miss the complexities of law in action demonstrated in this article. Thus, empirical scholars should resist the temptation of taking seemingly similar international treaties without understanding the internal legal/institutional context. This is by no means a claim against well-crafted empirical research, but a call to complement quantitative research with careful case studies and rational choice models. Moreover, in understanding the balance between the developmental and transformative goals of international law, legal scholars could benefit from the constitutional and administrative law approaches to international law evidenced in this analysis.

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THE "WAR ON DRUGS" AND THE "NEW STRATEGY": IDENTITY CONSTRUCTIONS OF THE UNITED STATES, U.S. DRUG USERS AND MEXICO

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Abstract. *On narcotics control policy, the Obama Administration's "New Strategy" represents a rupture with the hitherto prevailing narrative of the "War on Drugs," whose origins date back to the Nixon Administration. While the latter emphasized prosecution at home and military cooperation abroad, the former balances education and treatment with law enforcement at the domestic level as it admits U.S. limitations towards Mexico in the international arena. This article employs discourse analysis on particular speech pieces by the U.S. executive branch since 1971. In doing so, it finds identity constructions of the "self" and the "other" articulating difference signifiers around a nodal point. Henceforth, the War on Drugs depicts an epic scenario in which the United States has been a virtuous and sufficient actor defending American values from irrational criminals while helping its flawed and deficient southern neighbor cope with its own shortcomings. Needless to say, this strategy has reached no decisive achievement and has protracted for nearly 40 years. On the other hand, the New Strategy portrays the United States as a limited entity providing U.S. teenagers, convalescent drug users and low-level offenders with healthcare and education in order to reduce consumption. Meanwhile, the new U.S. identity acknowledges and underscores its responsibility providing weapons and money fuelling Mexico's narco-trafficking. This reconstruction of identities shows that both neighbors can no longer believe in fairy tales about drug policy and must start addressing their issues of public health and social exclusion as the fallible States they are.*

Key Words: *Drug control policy, White House, US-Mexico relations, organized crime, war on drugs, discourse analysis, Barack Obama, public health.*

Resumen. *En materia de política antinarcóticos, la nueva estrategia de la administración Obama rompe con la, hasta hace poco, narrativa dominante de guerra contra las drogas. Mientras que ésta se enfocó en criminalización en casa y cooperación militar afuera, aquélla balancea educación y tratamiento con*

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aplicación de la ley domésticamente mientras Estados Unidos admite limitaciones hacia México en la arena internacional. Este artículo emplea el análisis del discurso sobre ciertos textos oficiales del Poder Ejecutivo de Estados Unidos desde 1971. En el proceso se encuentran construcciones de identidad sobre el "yo" y el "otro," articulando significantes diferenciados alrededor de un punto nodal. Así, la "Guerra contra las drogas" describe un escenario épico en el que Estados Unidos fue un actor virtuoso y suficiente, defendiendo valores americanos contra criminales irracionales mientras ayudaba a su viciado y deficiente vecino sureño a lidiar con sus propios defectos. Esta estrategia no alcanzó ningún logro significativo y se prolongó durante casi 40 años. Por otro lado, la "nueva estrategia" ilustra a Estados Unidos como una entidad limitada, proveyendo tratamiento y educación a jóvenes, a adictos convalecientes y a infractores menores para reducir el consumo de drogas. Asimismo, esta nueva identidad de Estados Unidos reconoce y subraya su responsabilidad al solapar flujos de armas y dinero que facilitan la narcoviolencia en México. Esta reconstrucción muestra que ambos países no pueden seguir creyendo cuentos de hadas en política antinarcóticos y deben comenzar a encarar sus asuntos de salud pública y exclusión social como los Estados falibles que son.

Palabras clave: *Política antinarcóticos, Casa Blanca, relaciones México-Estados Unidos, crimen organizado, guerra contra las drogas, análisis del discurso, Barack Obama, salud pública.*

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I. Introduction: The War on Drugs and the New Strategy

In May 2009, White House Drug Czar Gil Kerlikowske called "to completely and forever end the war analogy, the War on Drugs."[1] The U.S. War on Drugs

[1] Wall Street Journal, *Q & A with the New Drug Czar,* http://online.wsj.com/article/SB124233331735120871.html (last visited February 18, 2012).

was first proclaimed in 1972 by Richard Nixon, who defined narcotics as "public enemy number one," initiating drug control policy framed in terms of National Security at home and abroad.[2] This approach criminalized illegal drug users using mostly law enforcement agencies within the United States and establishing mainly military partnerships with "transit" and "source" countries.[3] With its ups and downs, the War on Drugs witnessed estimated figures of US$117.6 billion spent on narcotics in the United States by 1999.[4] In 2008, 20.1 million US citizens reported having used any kind of illegal drug in "the past month" at least once.[5] Outside the United States, after participating militarily in different countries such as Colombia and Afghanistan, the last episode of the War on Drugs in Mexico shows this country is facing a spiral of violence with approximately 50,000 drug trafficking-related deaths since 2006.[6] Furthermore, Mexican cartels operate "in more than 230 US cities."[7]

In this light, the 40-year-old War on Drugs has failed to defeat "public enemy number one" in its entirety. Illegal drug use still has millions of U.S. consumers whilst narco-violence moved from Cali and Bogotá to Ciudad Juárez and Monterrey, just on the border with the United States. In this scenario, Mr. Kerlikowske's claim represents a noteworthy change in the discourse on the narcotics policy.

The Obama administration reconstructed U.S. discourse on drug policy with Mexico by not expressing it any longer as the War on Drugs. Its New Strategy favors education and treatment over law enforcement in dealing with narcotics use.[8] The main goal of the 2010 National Drug Control Strategy (hereinafter NDCS) is to reduce the use of drugs by 15 percent in the next five years.[9] Abroad, the New Strategy still involves shrinking military coopera-

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[2] Andrew B. Whitford & Jeff Yates, Presidential Rhetoric and the Public Agenda: Constructing the War on Drugs, 71 (Johns Hopkins University Press, 2009).

[3] Adam Isacson, *The U.S. Military in the War on Drugs*, *in* Drugs and Democracy in Latin America: The Impact of U.S. Policy 15-60 (Coletta Youngers & Eileen Rosin eds., Lynne Rienner, 2005).

[4] Rand Corporation, How Goes the "War on Drugs"? An Assessment of U.S. Drug Problems and Policy (2005), http://www.rand.org/pubs/occasional_papers/2005/RAND_OP121.pdf (last visited February 18, 2012).

[5] National Institute on Drug Abuse, *National Survey on Drug Use and Health: National Findings*, http://oas.samhsa.gov/nsduh/2k7nsduh/2k7Results.cfm#Ch2 (last visited February 18. 2012).

[6] Bbc.co.uk, *Q&A: Mexico's drug-related violence*, http://www.bbc.co.uk/news/world-latin-america-10681249 (last visited February 18, 2012)

[7] Office of National Drug Control Policy [Hereinafter ONDCP], 2009 National Southwest Border Counternarcotics Strategy 1 (2009), http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/swb_counternarcotics_strategy09.pdf .

[8] Ondcp, 2010 National Drug Control Strategy III (2010), http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs2010_0.pdf.

[9] *Id.*

tion with Mexico while providing funding and expertise through the Mérida Initiative.[10] However, the 2009 National Southwest Border Counternarcotics Strategy (hereinafter NSBCS) "also recognizes the role that the outbound flow of illegal cash and weapons plays in sustaining the cartels;" thus establishing U.S. responsibility for resources fueling narco-bloodshed on Mexican soil.[11]

This article examines how the War on Drugs identities regarding actors and roles differ from those constructed in the New Strategy. Thus, this article claims for a discursive change in the identity of the United States with respect to Mexico on drug control policy. It does so through a constructivist approach as it envisions international relations going beyond the material capabilities of power as a cause of policy-making, towards power conceived as discourse.[12] Power is manifested through discursive representations highlighting certain discourses and overshadowing alternative ones.[13] When discourse is constructed and accepted, determinate policy-scenarios are enabled.[14] The realm of international relations is a social construction built on intersubjectivity and language.[15] Unlike neorealism and neoliberalism which envision States and their environments as exogenous and closed identities fighting for either survival or hegemony, constructivism looks for meaning construction since individuals in society require meaning for their actions.[16] Meaning is neither exclusive of the individual nor of society, but is constructed on the practices and reproduction of both entities.[17] Constructivism sees a world of social relations, in which identities are constructed through production and contestation of meaning.

The proposed method analyses the identity constructions of the "self/other" binary regarding the United States and Mexico on the War on Drugs and the New Strategy.[18] Inside the identities of the "self" and the "other" are entangled a series of differences and equivalences constructing meaning in

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[10] Ondcp, 2009 Nsbcs 5 (2009).

[11] *Id.* at 1.

[12] Christina Rowley & Jutta Weldes, *Identities and US Foreign Policy in* US Foreign Policy 183, 184 (Michael Cox & Doug Stokes eds., Oxford University Press, 2008).

[13] Christopher Browning, Constructivism, Narrative and Foreign Policy Analysis 16 (Peter Lang, 2008).

[14] Karin Fierke, *Constructivism in* International Relations Theories: Discipline and Diversity 166, 177 (Tim Dunne et al. eds., Oxford University Press, 2007).

[15] Michael Barnett, *Social Constructivism in* The Globalization Of World Politics 251, 259 (John Baylis et al. eds., Oxford University Press, 3rd ed., 2007).

[16] Christian Reus-Smit, *Constructivism in* Theories of International Relations 209, 213 (Scott Burchill et al. eds., Palgrave 2nd ed., 2001).

[17] Marlene Wind, *Nicholas Onuf: The Rules of Anarchy in* The Future of International Relations: Masters in the Making 237, 238 (Iver B. Neumann & Ole Waever eds., Routledge 1997).

[18] David Campbell, Writing Security: US Foreign Policy and the Politics of Identity 21 (Manchester University Press, 1998).

negative ways utilizing "floating signifiers" and a "nodal point."[19] Whereas the logic of difference accentuates the disparities between signifiers, the logic of equivalence emphasizes the similarities between them.[20] The use of a nodal point enables the construction of a superior identity vis-à-vis the "other," producing a hierarchy of identities.[21] The nodal point is the United States constructing itself as the top actor with floating signifiers around its fixed position. The United States has active agency as a speaking, and policy-making actor on the content of signifiers such as "help" and "sovereignty," thus producing a shared discourse with its "other" (Mexico) on narcotics policy.

Since the power of language is pivotal in this article, a discourse analysis to disentangle these articulations of meaning inside U.S. and Mexican identities is essential. The materials to be examined are salient addresses by different U.S. presidents ranging from Richard Nixon to Barack Obama and others by U.S. executive branch officers. In 1988, the Office of National Drug Control Policy (hereinafter ONDCP) was created to set goals and measures on a timely basis by producing NDCSs.[22] Thus, this article focuses on selected addresses and official documents produced by members of the U.S. executive branch and NDCSs by the ONDCP.

When the features of the War on Drugs and the New Strategy are analyzed and contrasted, it is possible to say that the latter is a reconstruction of the former.[23] The United States is still the top actor, but the "self" and the "other" identities changed prompting a different scenario; thus, a change in U.S. identity becomes plausible and this also reaches Mexico's identity: "So long as there is difference, there is a potential for change."[24]

Finally, although the New Strategy is not a radical rupture from the War on Drugs, it seeks to reduce the focus on criminalization and militaristic measures. The War on Drugs observed the rise of cartels, the corruption of public institutions on both sides of the border, the skyrocketing of prices of illegal drugs, and a death toll of thousands of Mexicans annually.[25] The argument presented here demonstrates past drug policies based on articulations of meaning creating identities of a virtuous, sufficient and certain country vis-à-

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[19] Ernesto Laclau & Chantal Mouffe, Hegemony and Socialist Strategy: Towards a Radical Democratic Politics XI (Verso, 2001).

[20] Rodolphe Gasché, *How Empty can Empty be? On the Place of the Universal in* Laclau: A Critical Reader 17, 22 (Simon Critchley & Oliver Marchart eds., 2004).

[21] Roxanne L., Doty, Imperial Encounters: The Politics of Representation in North-South Relations 66 (Routledge, 1996).

[22] Gary Fisher, Rethinking Our War on Drugs: Candid Talk about Controversial Issues 1 (Greenwood, 2006).

[23] Michael Clifford, Political Genealogy after Foucault: Savage Identities 6 (Routledge, 2001).

[24] Ted Hopf, *The Promise of Constructivism in International Relations Theory*, 23 International Security 171, 180 (1998).

[25] Peter H. Smith, Drug Policy in the Americas, 11 (Westview, 1992).

vis its flawed, deficient and uncertain neighbor. The identity changes for the United States and Mexico reminds us that both countries are fallible States prone to contingencies. Therefore, the best way to tackle the drug problem is by addressing public health and social exclusion on both sides of the border under the banner of honesty between neighbors.

II. Constructions of War on Drugs

> [...] And Nixon was sitting there as usual in his kind of reflective quiet way. And he looked out the window of the helicopter, and he turned to Bud and me and whoever else was there, and he pointed —we were flying over Brooklyn then— and he said, "You and I care about treatment. But those people down there, they want those criminals off the street." And that was the way he said it. And it was probably 99.9% right.[26]

This section draws on a corpus of speech pieces in which the identity constructions of the "self/other" binary represented actors and threats equally at the domestic level and in the international arena. Initially, the Nixon administration paved the way to create the drug threat inside and outside the United States. Later, in the Carter's message to the Congress in 1977, the then president spoke of decriminalizing the use of marijuana, a proposal that in the end died in Congress.[27] After Carter's failure, the Reagan administration completely endorsed contempt towards illegal drugs as threats against U.S. values.[28] The following administrations continued along the already constructed path: drug use in the United States is a crime to be prosecuted, Mexico and other States are weak transit countries to be helped, and it is the duty of the United States to cope with such threats by providing help and cooperation as a positively sovereign and virtuous State.

1. *The Nixon Administration*

As the War on Drugs implies both domestic and international battlefields, its birth inscribed meaning to domestic and foreign "others."[29] During his nomination speech in 1968, Richard Nixon declared this before the rising

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[26] Pbs.org, *Interview: Myles Ambrose on Frontline Show Drug Wars,* http://www.pbs.org/wgbh/pages/frontline/shows/drugs/interviews/ambrose.html (last visited February 19, 2012).

[27] Jeremy Kuzmarov, The Myth of the Addicted Army: Vietnam and the Modern War on Drugs 168 (University of Massachusetts Press, 2009).

[28] William Elwood, Rhetoric in the War on Drugs: The Triumphs and Tragedies of Public Relations 29 (Greenwood, 1994).

[29] Robert Putnam, *Diplomacy and Domestic Policies: The Logic of Two-Level Games*, 42 International Organization 427, 457 (1988).

crime rates scourging the United States: "Our new Attorney General will be directed to launch a war against organized crime in this country […] The wave of crime is not going to be the wave of the future in the United States of America."[30]

This declaration foresaw the "get-tough" crime policy and is important since social constructions including identities, policies and threats are not created inside a vacuum apart from the social environment.[31] In his 1971 Message to the Congress on Drug Abuse Prevention and Control, Nixon shaped the "domestic other:" "Narcotic addiction is a major contributor to crime. The cost of supplying a narcotic habit can run from $30 a day to $100 a day [...] Untreated narcotic addicts do not ordinarily hold jobs. Instead, they often turn to shoplifting, mugging, burglary, armed robbery, and so on."[32]

There is a causal articulation from drug use to crime based on economic and criminal patterns like "the costs of supplying" and "armed robbery." Those criminal addicts "have lost control over their lives due to their predisposition to consume beyond their means."[33] The boundary between "us" and "them" is constructed over an economic principle: rationality. "They," the drug-consumers, are irrational and unreliable; "we," the non-consumers, are rational and reliable.[34] The first pair of floating signifiers articulated through the logic of difference, "irrationality/rationality," appears. Nixon now signifies the nature of the threat: "America has the largest number of heroin addicts of any nation in the world. And yet, America does not grow opium —of which heroin is a derivative— nor does it manufacture heroin, which is a laboratory process carried out abroad. This deadly poison in the American life stream is, in other words, a foreign import."[35]

The deadly poison haunting irrational consumers with deviant behavior manifested through addiction and crime is a foreign import. This poison endangers "American life." The second pair of floating signifiers, "death/life," stems from this point. The manner in which Nixon calls the poison-exporting countries follows:

> Fifth, I am asking the Congress to amend and approve the International Security Assistance Act of 1971 and the International Development and Hu-

[30] Richard Nixon, *Nomination acceptance address* (1968), http://www.presidentialrhetoric.com/historicspeeches/nixon/nominationacceptance1968.html (last visited February 19, 2012).

[31] Harry Gould, *What is at Stake in the Agent-Structure Debate? in* International Relations in a Constructed World 79, 80 (Vendulka Kubálková et al. eds., M.E. Sharpe 1998).

[32] Richard Nixon, *Special message to the Congress on drug abuse, prevention and control* (1971), http://www.presidency.ucsb.edu/ws/?pid=3048 (last visited February 19, 2012).

[33] Pablo Vila, Border Identifications: Narratives of Religion, Gender and Class on the US-Mexico Border 272 (University of Texas Press, 2005).

[34] Kelly Szott, *(De)constructing Boundaries: Affective Economies, Biopolitics and Drug Users*, 4 The NY Sociologist 38, 42 (2010), *available at* http://newyorksociologist.org/09/Szott09.pdf.

[35] Nixon, *supra* note 32.

> manitarian Assistance Act of 1971 to permit assistance to presently proscribed nations in their efforts to end drug trafficking [...] I intend to leave no room for other nations to question our commitment to this matter.[36]

Those nations were deemed proscribed and condemned. Even then, they were expecting U.S. assistance and by no means was the United States going to allow any doubt about its determination to combat the trafficking of this poison. Since these nations cannot control their exports, they need U.S. assistance boosted by a mix of generosity and concern.[37] Hence, we can observe a third pair of signifiers: "weakness/willpower." Nixon carries on: "Narcotics addiction is a problem which afflicts both the body and the soul of America […] We have fought together in war, we have worked together in hard times, and we have reached out to each other in division- to close the gaps between our people and keep America whole."[38]

The U.S. soul is asserted through its conviction to triumph and to fight domestic criminals and foreign poison. This establishes U.S. willpower. However, since drug addiction "afflicts both the body and the soul of America," there is yet another issue. Nixon talks about crime and death infringed on the American body, as well as threatening American soul with irrationality and weakness. Where then is the US body? Indeed, asserting U.S. willpower is enough to endorse the United States as the nodal point and superior actor "simply because soul and body are always each other's immediate expression."[39] The United States cannot be a proscribed and weak nation because it has willpower. Nonetheless, by showing the U.S. body's discursive representation, the State apparatus, we can add another pair of differences and complete a meaningful articulation:

> The U.S. Customs agents with whom I met today at the International Bridge between Texas and Mexico are representative of the many thousands of dedicated Federal, State, and local law enforcement officials engaged in our total war against drug abuse all across this country -men and women to whom every American owes a debt of gratitude for their efforts to defeat the menace which is truly "public enemy number one" […] Keeping heroin and all dangerous drugs out of the United States is every bit as crucial as keeping out armed enemy invaders.[40]

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[36] *Id*.

[37] Doty, *supra* note 21, at 130.

[38] Nixon, *supra* note 32.

[39] Michel Foucault, Madness and Civilization: A History of Insanity in the Age of Reason 88 (Richard Howard trans., Tavistock, 1965).

[40] Richard Nixon, *Statement about drug abuse law enforcement* (Change the format to regular letter) (1972), http://www.presidency.ucsb.edu/ws/index.php?pid=3590&st=enemy&st1=invaders (last visited February 19, 2012).

Once settled the U.S. body, incarnated in its number of dedicated officials, it also established its capacity for keeping out a threat comparable to enemy invaders. Since enemy invaders encroach on a specific territory, the last difference pair is "aggression/defense."[41] Therefore, the United States, as nodal point, uses the logics of equivalence and difference, grouping the floating signifiers to construct the "self" and the "other." Around the "other," we have: drug addiction, irrationality, death, weakness and aggression. Around the "self," the United States, rationality, life, willpower and defense are contained. This articulation left the United States not only as the nodal point, but at the top of the hierarchy of identities against domestic/foreign "others."[42] In this sense, the United States must prosecute criminals through law enforcement and must help proscribed nations through international cooperation, all based on the defense of U.S. life and rationality.

2. *Carter and Reagan: Contestation and Reproduction*

The Carter administration's decriminalizing discourse on marijuana consumption and Reagan's "religious" discourse offer an interesting dialogue to better understand contestation and reproduction of a meaningful narcotics policy. While the former failed to achieve congressional success, the latter beheld no obstacles towards the creation of the ONDCP.[43]

In his 1977 message on drug abuse to the Congress, Carter offered an alternative in drug control policy:

> Penalties against possession of a drug should not be more damaging to an individual than the use of the drug itself; and where they are, they should be changed. Nowhere is this clearer than in the laws against possession of marijuana in private for personal use. We can, and should, continue to discourage the use of marijuana, but this can be done without defining the smoker as a criminal.[44]

This excerpt shows the fragmentation of two discursive representations established in Nixon's discourse: the criminal issue and the drug issue. In Nixon's narrative, drug traffickers and users were indistinctively criminals; meanwhile, all drugs, regardless of their harmful potential, were equally mortal. Although Carter also attempted to reduce marijuana use, he tried to differentiate between dealers and users, and between "soft" and "hard" drugs.[45]

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[41] Franke Wilmer, The Social Construction of Man, the State and War: Identity, Conflict and Violence in the Former Yugoslavia 75 (Routledge, 2002).

[42] Doty, *supra* note 21, at 42.

[43] Kuzmarov, *supra* note 27.

[44] James Carter, *Drug Abuse Message to the Congress* (1977), http://www.presidency.ucsb.edu/ws/index.php?pid=7908#axzz1XhqPyFmD (last visited February 19, 2012).

[45] Shane Blackman, Chilling Out: The Cultural Politics of Substance Consumption, Youth and Drug Policy 185 (Open University Press, 2008).

If strategies of "otherness" are depicted as "deviating from or falling below or failing to live up to the standards of subjectivity;"[46] then Nixon's discourse radicalized and homogenized the threat as criminal and deadly. Carter's discourse tried deconstructing the monolithic signifiers which formed Nixon's discursive bedrock. However, by 1978, many parent associations and U.S. Congress did not think the same and the proposal for decriminalization fell apart.[47]

In contrast with the Carter Administration, the Reagan Administration endorsed Nixon's discourse by keeping the war, crime and poison discursive representations: "The time has also come for major reform of our criminal justice statutes and acceleration of the drive against organized crime and drug trafficking [...] This administration hereby declares an all-out war on big-time organized crime and the drug racketeers who are poisoning our young people."[48]

As stated before, meaning is constructed via production, contestation and reproduction of discourses. The Nixon Administration produced the scenario, whereas Jimmy Carter contested certain aspects of it. What makes the Reagan administration noteworthy is its reproduction on the War on Drugs. Reproduction appears when there is a discursive crisis that arises from questioning previously constructed boundaries.[49] This rupture is manifested because "if the other, is the other, and if all speech is for the other, no logos [discourse] as absolute knowledge can comprehend dialogue and the trajectory toward the other."[50] Carter questioned the criminal construction of the "domestic other" by dividing it into the "dealer/user" dichotomy, opening this unclosed construction even more. Later, the reproduction by the Reagan Administration would also add another pair of difference signifiers reinforcing the "strategies of otherness."[51] Now, Ronald and Nancy Reagan speak together:

> NR: […] Drugs steal away so much […] so much to shake the foundations of all that we know and all that we believe in […] So, open your eyes to life: to see it in the vivid colors that God gave us as a precious gift to His children […]
>
> RR: [...] Can we doubt that only a divine providence placed this land, this island of freedom, here as a refuge for all those people on the world who yearn to breathe free? […] So, won't you join us in this great, new national crusade?[52]

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[46] William Connolly, *Taylor, Foucault and Otherness*, 13 Political Theory, 365, 371 (1985).

[47] David Musto, The American Disease: Origins of Narcotic Control 264 (Oxford University Press, 1999).

[48] Ronald Reagan, *Address before a Joint Session of the Congress on the State of the Union* (1983), http://www.presidency.ucsb.edu/ws/index.php?pid=41698 (last visited February 19, 2012).

[49] Campbell, *supra* note 18, at 136.

[50] Jacques Derridá, Writing and Difference 121 (Routledge, 2001).

[51] Campbell, *supra* note 18, at 137.

[52] Ronald Reagan, *Address to the Nation on the Campaign against Drug Abuse* (1986), http://www.

Belief, God, divine providence and crusade. This discourse attaches another level of danger to the menace. Narcotics not only threaten U.S. rationality and life, but also jeopardize the "American Civil Religion:" the privileged relationship between God and the United States.[53] The War on Drugs reached a level of spirituality by producing another pair of difference signifiers: unfaithfulness/faithfulness. When Carter denaturalized the criminal identity of the drug holder, the "other's" signifiers became unanchored. By adding a new pair of differences, the Reagan administration re-articulated Nixon's constructions over the same nodal point, the United States, therefore underpinning the U.S. position and its values at the top of the hierarchy again.[54] The criminal aspect remains a monolithic threat menacing U.S. rationality, life and now, faithfulness.

3. *The H.W. Bush Administration on the Foreign "Other"*

Although the H.W. Bush Administration echoes in the constructions made by the prior administration, the enactment of the first NDCS allows for the analysis of the identity of the foreign "other."[55] The 1989 NDCS shows the articulations constructed between Latin American countries and the United States in the War on Drugs. This text included a chapter on "International Initiatives," which starts as follows: "The source of the most dangerous drugs threatening our nation is principally international. Few foreign threats are more costly to the U.S. economy. None does more damage to our national values and institutions or destroys more American lives [...] Drugs are a major threat to our national security."[56]

The H.W. Bush Administration recalls the foreign origin of the "deadly poison" that jeopardizes U.S. rationality, life and faithfulness. This export also threatens Latin American countries in a different way: "Intense drug-inspired violence or official corruption have plagued a number of Latin American countries for years: in more than one of them, drug cartel operations and associated local insurgencies are a real and present danger to democratic institutions, national economies, and basic civil order."[57]

The U.S discourse stopped naming producer and transhipment countries as "proscribed." Now, insofar as they have "democratic institutions, national economies and basic civil order," they have become nation-states just like the United States. Hence, a different identity based on different signifiers surges.

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presidency.ucsb.edu/ws/index.php?pid=36414&st=&st1=#axzz1XhqPyFmD (last visited February 19, 2012).

[53] Elwood, *supra* note 28.

[54] Doty, *supra* note 21, at 87.

[55] Whitford & Yates, *supra* note 2, at 63.

[56] Ondcp, 1989 NDCS 61 (1989) https://www.ncjrs.gov/pdffiles1/ondcp/119466.pdf.

[57] Ondcp, *supra* 56, at 2.

Nonetheless, the core signifier of the nation-state, its sovereignty, is articulated with different floating signifiers between Latin American countries and the United States.[58]

So far, the U.S. body has been expressed through "dedicated officers" that "keep out enemy invaders" imposing a "debt of gratitude" on Americans. Thus, the "official corruption" tag on Latin American countries is salient in the construction of U.S. identity and its foreign counterpart. Latin American countries hold "negative sovereignty" since their freedom and self-determination are constrained by their own lack of skill to protect their populations and to avoid damaging other countries.[59] As a counterpart, the United States holds "positive sovereignty" because its freedom and self-determination are product of its reasoning and skill to be its "own master" unconstrained as a responsible agent.[60] Invoking "official corruption," a pair of difference signifiers "flaw/virtue" has been established. The description continues in the H.W. Bush's 1989 Address to the Nation: "In Colombia alone, cocaine killers have gunned down a leading statesman, murdered almost 200 judges and 7 members of their supreme court. The besieged governments of the drug-producing countries are fighting back, fighting to break the international drug rings."[61]

Although the War on Drugs always conveys the threat drugs pose to American values, rationality and life, Colombia in this case is still represented as an inferior actor. Since cocaine killers assassinated public officers before the eyes of its powerless government, we can say that "the monopoly of the legitimate use of physical force in the enforcement of its order" is successfully challenged by the cartels.[62] Unlike Colombia, the United States has "many thousands of dedicated officers keeping out enemy invaders." A second pair of signifiers, "deficiency/sufficiency" on the prevalence of legitimate force is established. The 1989 NDCS continues: "To the greatest extent possible, we must also disrupt the transportation and trafficking of drugs within their source countries, since the interdiction of drugs and traffickers en route to the United States is an immeasurably more complicated, expensive, and less effective means of reducing the drug supply to this country."[63]

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[58] Christian Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, 27 Review of International Studies 519, 520 (2001b).

[59] Robert H. Jackson, Quasi-States: Sovereignty International Relations and the Third World 28 (Cambridge University Press, 1990).

[60] *Id.* at 29.

[61] George Bush, *Address to the nation on the National Drug Control Strategy*, George Bush, Address to the Nation on the National Drug Control Strategy (1989), http://www.presidency.ucsb.edu/ws/index.php?pid=17472&st=&st1= (last visited February 19, 2012).

[62] Max Weber, The Theory of Social and Economic Organization 141 (Free Press, 1947).

[63] Ondcp, *supra* note 56, at 62.

By gauging its capabilities against the situation, the United States is able to assess the procedures to follow. It interprets its own agency and gives rational appraisal over the dire situation of Latin American countries, placing its agency on them.[64] US agency establishes a third pair of differences: uncertainty/certainty.

H.W. Bush states: "We will help any government that wants our help. When requested, we will for the first time make available the appropriate resources of America's Armed Forces. We will intensify our efforts against drug smugglers on the high seas, in international airspace, and at our borders."[65]

Finally, U.S. procedures for "International Initiatives" are clear. Whereas U.S. flows to Latin American countries are understood in terms of help through military support, the northbound flows to the United States continue to be deadly poison. The last pair of signifiers regarding these flows is "harm/help." The United States again works as the nodal point by starting to use the logic of equivalence to attach its own cluster of floating signifiers, and the logic of difference to interpret the "other." The United States renders itself in an articulation of virtue, sufficiency, certainty and help. Meanwhile, Latin American countries contain flaw, deficiency, uncertainty and harm.

The United States was constructed as an actor able to exert its agency in the international arena compared to other countries that may be deemed sovereign, but lack the privileged U.S. reasoning and wherewithal, thus diminishing the agency of the latter.[66] The United States is a generous actor that brings help to Latin American countries by assisting them to cope with their deficiencies. As will be shown, the United States brings something more than help to its foreign "other."

4. *The Clinton and W. Bush Administrations: Mexico*

The War on Drugs also provides another interpretation of those negatively sovereign States: that of the "transit" or "source" country. This denomination also implies that its holder is situated in an inferior position regarding the action agent, otherwise known as the object/subject pair in strategies of "otherness."[67]

The Clinton administration regarded Mexico in these terms: "Current estimates indicate that as much as 70 percent of all cocaine coming into the United States is trans-shipped through Mexico and then across the U.S.–Mexico border."[68] Therefore the "transit" country interpretation enables a new War on Drugs procedure:

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[64] Gil Friedman & Harvey Starr, Agency, Structure and International Politics 6 (1997).

[65] George Bush, *supra* note 61.

[66] Doty, *supra* note 21, at 44.

[67] Campbell, *supra* note 18, at 65.

[68] Ondcp, 1996 NDCS 31 (1996), https://www.ncjrs.gov/pdffiles/strat96.pdf.

> Aggressive Use of the Annual Certification Process: Certification involves evaluating the counternarcotics performance of countries that have been defined as major drug-producing or drug transit countries [...] For countries that are not certified, the United States cuts off most forms of assistance and votes against loans by six multilateral development banks.[69]

Certification is an instrument of the U.S. Congress to assess funds authorization to "transit" and "source" countries based on a report made by the executive branch.[70] This mechanism ensures that the "transit/source" countries also speak the War on Drugs discourse regarding narcotics as poison and drug traders and peasants as criminals.[71] Thus, the subject/object pair in the U.S./transit-country dichotomy allows the creation of a "geography of foreign other" which reinforces the United States as the master of the object with negative sovereignty.[72] Mexico becomes a geographical zone "that may be needed for operational use."[73]

By 1997, the Congress pushed Bill Clinton to decertify Mexico in view of some Mexican officers' relations with drug-cartels.[74] Thomas Constantine, the then DEA administrator, declared: "The major civilian law enforcement institutions in Mexico, the Mexican, the federal judicial police, which the government has said is dysfunctional as a result of corruption […] And at the present point in time, we just haven't found an institution that we feel we can share that information with."[75]

Again the United States resorted to the "flaw/virtue" binary to depict its relation with a transit country. Then Mexican President Ernesto Zedillo called the certification an offense and proposed that the United States should apply this procedure to itself. The Mexican Congress called the certification an act of "imperial arrogance."[76] Finally, Clinton solved the dilemma between the U.S. Congress and the Mexican government by certifying Mexico claiming:

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[69] *Id.* at 18.

[70] Russell Crandall, Driven by Drugs: US Policy Toward Colombia 43 (Lynne Rienner, 2002).

[71] Julie Ayling, *Conscription in the War on Drugs: Recent Reforms to the US Certification Process*, 16 International Journal of Drug Policy, 376, 377 (2005).

[72] David Campbell, *The Biopolitics of Security: Oil, Empire and the Sports Utility Vehicle*, 57 American Quarterly 943, 948 (2005).

[73] Doty, *supra* note 21, at 92.

[74] Riordan Roett, *El proceso de certificación y la relación México-EU*, Este País (April, 1997), at 73, http://estepais.com/inicio/historicos/73/5_ensayo_el%20proceso_roett.pdf (last visited Februrary 20, 2012).

[75] Thomas Constantine, *Interviews on Frontline Show Murder, Money & Mexico* (1997), http://www.pbs.org/wgbh/pages/frontline/shows/mexico/interviews/constantine.html (last visited February 20, 2012).

[76] Bill Spencer, *Drug Certification*, 6 Foreign Policy in Focus 1 (1998), *available at* http://www.fpif.org/reports/drug_certification (last visited February 20, 2012).

> I certified Mexico because in the last year, we have achieved an unprecedented level of cooperation on counternarcotics […] Our military cooperation has improved dramatically as we have expanded antidrug training and assistance on drug interdiction […] And the Zedillo administration immediately arrested and prosecuted its drug czar when they discovered he had been corrupted by a major drug ring.[77]

Clinton uses the transit country construction quoting certification, military cooperation and corruption. Since intersubjectivity is taken as the common understanding of "norms, identities and discursive patterns," they should be shared by the social actors.[78] After this diplomatic trouble involving both countries, Ernesto Zedillo concluded: "We are not a drug-producer country. We are a transit zone and we are victims of those who produce and consume drugs."[79] The then Mexican President thus endorsed the War on Drugs discourse on the "other:" drug dealers and users are criminals alike while countries other than the United States are either "source" or "transit" countries with all the implications of these identities. Now Mexico itself plays its role as the foreign "other" in the War on Drugs.

The division between U.S. interpretations of negatively sovereign States and transit countries is also artificial. In the 2007 NDCS, the W. Bush Administration articulated both discourses over Mexico's identity:

> Across the Southwest Border in Mexico, drug trafficking and associated violence pose a grave threat not only to the health and safety of the Mexican people, but to the sovereignty of Mexico itself […] This lawlessness is fueled by Mexico's position as the primary transit corridor for most of the cocaine available on American streets […] DEA and other U.S. law enforcement agencies have developed highly productive relationships with key Mexican counterparts that are yielding positive results.[80]

Sovereignty is again a floating signifier. Mexico's sovereignty is associated with negative sovereignty signifiers: flaw, deficiency, uncertainty and harm; plus its "objectification" as a transit country reflected on its "lawlessness." On the other hand, the United States contains virtue, sufficiency, certainty and help; plus its "subject" position turns the United States into the speaking and

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[77] William Clinton, *Statement on House of Representatives action on narcotics certification for Mexico* (1997), http://www.presidency.ucsb.edu/ws/index.php?pid=53863&st=&st1= (last visited February 20, 2012).

[78] Samuel Barkin, Realist Constructivism: Rethinking International Relations Theory 27 (2010).

[79] Interview with Ernesto Zedillo President of Mexico on NBC Show Nightly News in New York City, NY (1998), https://a248.e.akamai.net/7/1635/50139/1d/origin.nbclearn.com/files/nbcarchives/site/pdf/5993.pdf (last visited February 20, 2012).

[80] Ondcp, 2007 NDCS 33 (2007), http://www.cicad.oas.org/Fortalecimiento_Institucional/eng/National%20Plans/ndcs07USA.pdf.

policy-making agent in this relationship. Thereby, Mexican agencies can only achieve good results when helped and in cooperation with the United States through the "DEA and other U.S. law enforcement agencies."

Mexico might be the country most coerced by the United States in drug control policy.[81] However, discourses must be shared socially in order to work and the War on Drugs is no exception. Mexican governments chose to perform the role assigned for Mexico in that U.S. discourse. In doing so, they have militarized drug policy on Mexican soil causing power abuse and human rights violations.[82] In 2006, without any U.S. coercion, Mexican President Felipe Calderón launched a new "Mexican Drug War" and so far casualties reach approximately 50,000 during his tenure, which ends in December 2012.[83] It is clear that this U.S. discourse on Latin American countries and Mexico, tagging them "proscribed," "source" or "transit," has lasted many years since the Nixon days to the W. Bush days. Nevertheless, those discursive representations could not be protracted without the performance of States like Mexico along the lines of this War on Drugs script.

III. Reconstructions of the New Strategy

"Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past."[84]

The Obama administration changed U.S. identity on drug control policy by replacing the War on Drugs with the New Strategy. U.S. identity expressed itself as a positively sovereign State helping weak States abroad; and as a defender of U.S. life, rationality and faithfulness by prosecuting criminals at home. The Obama administration aims to reduce drug consumption by balancing education and treatment with law enforcement towards drug users, potential users and dealers. In the international arena, its drug policy seeks to reduce the southbound flow of U.S. weapons and cash empowering cartels. This denaturalizes the War on Drugs discourse in which the only southbound flow was "help" to transit countries. Nonetheless, none of these policy patterns are new. Prior administrations talked about domestic drug use reduction and exterior responsibilities. What is salient about the Obama administration is its reconstruction in which features that were overshadowed by the War on

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[81] William Walker III, *International Collaboration in Historical Perspective*, in Drug Policy in The Americas 265, 273 (Peter H. Smith ed., Westview 1992).

[82] Peter Andreas, Border Games: Policing the US-Mexico Divide 68 (Cornell University Press, 2009).

[83] Nora Hamilton, *Mexico in* Politics of Latin America: The Power Game 285, 332 (Harry Vanden & Gary Prevost eds., Oxford University Press, 3rd ed., 2009).

[84] Karl Marx, The Eighteenth Brumaire of Louis Bonaparte 84 (Foreign Languages Publishing House, 1960).

Drugs claim salience over law enforcement and military cooperation. In the New Strategy, the U.S. identity is portrayed through its reciprocity to give support to the U.S. people and its limited power towards its southern neighbor, Mexico.

1. *"Domestic Others"*

The Obama Administration divides the "domestic other" among the drug user, the potential user and the dealer and reconstructs identities for each one: "It [drug use] touches each one of us, whether we know a family member, a friend, or a colleague who suffers from addiction or is in recovery, a police officer working to protect the community, or parents striving to keep their child drug free."[85]

The drug user is portrayed as a being in recuperation, the potential drug user is mainly a teenager, and the dealer is still a criminal to be chased by police officers. By August 2009, Obama settled the way to define the drug user identity: "Every year, Americans across the country overcome their struggles with addiction. With personal determination and the support of family and friends, community members, and health professionals, they have turned the page on an illness and sought the promise of recovery."[86]

In this excerpt, there is an illness discourse using words such as determination, recovery, and support. This domestic "other" is differentiated through a more complex process of differentiation from "we," the "healthy people." Illness could refer to a physical, psychological or even a social state but generally implies a temporary episode and the promise of recovery.[87] The domestic "other" as a sick-being looking for recovery portrays a differentiation process that is not as radical in relation to the "other" constructed by the "strategies of otherness;" because the content of "illness" is recovery, determination and support.[88] Thus, the first suggested pair of floating signifiers in this "self/other" relation is the "support/convalescence" pair.

The way the United States should assist drug users is as follows:

> A healthcare environment in which care for substance abuse is adequately covered by public and private insurance programs is necessary. People with ad-

[85] Ondcp, 2010 NDCS, v (2010), http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/ndcs2010.pdf.

[86] Barack Obama, *Presidential Proclamation: National Alcohol and Drug Addiction Recovery Month* (2009), http://www.whitehouse.gov/the_press_office/Presidential-Proclamation-National-Alcohol-and-Drug-Addiction-Recovery-Month/ (last visited February 20, 2012).

[87] Judith Lorber & Lisa Moore, Gender and the Social Construction of Illness 7 (Altamira, 2002).

[88] Lene Hansen, Security as Practice: Discourse Analysis and the Bosnian War 39 (Routledge, 2006).

> dictions must take the responsibility to seek help and actively maintain their recovery [...] Treatment must become a reliable pathway not just to cessation of drug use, but to sustained recovery, meaning a full, healthy, and responsible life for persons who once struggled with addiction.[89]

Here, the United States manifests itself through its duty to offer adequate social networks to address drug addiction. While users have "responsibility to seek help and maintain their recovery," the United States will provide healthcare. This creates a relationship of trust between the drug user and its nation-state which could be termed as one of general reciprocity because "involves mutual expectations that a benefit granted now should be repaid in the future."[90] The United States gives healthcare and waits for the citizen's recovery; and the citizen gives self-commitment and waits for a healthy life through the use of U.S. healthcare. This raises the "reciprocity/self-commitment" pair.

On the "self/other" relation between the United States and potential drug users, the 2010 NDCS aims at teenagers:

> Drug prevention must become a bigger priority for communities, with support from all levels of government [...] Factors that protect children against initiating drug use are increased by adopting a community-based response […] We have a shared responsibility to educate our young people about the risks of drug use, and we must do so not only at home, but also in schools, sports leagues, faith communities, places of work, and other settings and activities that attract youth.[91]

U.S. youth are the target for drug use prevention through education. In the War on Drugs, U.S. teenagers were considered another object at stake in the battle between the United States and the "enemy invaders," as George H.W. Bush once said: "we will not surrender our children."[92] In the New Strategy, the United States protects its teenagers by means of education and prevention covered by family, society, and State institutions. U.S. youth should be educated to develop "civic virtue," the ways that make social interaction meaningful and reproduce the State normative to prevent drug use, abuse and addiction.[93] Thereby, the suggested difference pair is orientation/innocence. This is the U.S. role in prevention: "Finally, the role of high-quality

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[89] Ondcp, *supra* note 85, at 8.

[90] Robert Putnam, Making Democracy Work: Civic Traditions in Modern Italy 172 (Princeton University Press, 1992).

[91] Ondcp, *supra* note 85, at 8.

[92] George Bush, *Remarks at an Antidrug Rally in Billings, Montana* (1990), http://www.presidency.ucsb.edu/ws/index.php?pid=18693&st=surrender&st1=children (last visited February 20, 2012).

[93] Jean Elshtain, Women and War 62 (University of Chicago Press, 1995).

schools and the nexus between academic failure and drug and/or alcohol use among youth should not be neglected [...] Certainly, high-quality schools can both reduce student drug and alcohol use and have a positive effect on academic achievement and school environments and climates."[94]

The State helps teenagers resorting to reciprocity through educational institutions, but the complementary signifier in this case is the teenager's interest for self-actualization. Because "autonomous self-actualization is actually impossible,"[95] the teenager as the domestic "other" will achieve her/his self-actualization through schools provided by the United States. In these institutions, they will be taught how to develop civic virtue. Hence, the "reciprocity/self-actualization" pair is established.

The U.S. procedure towards drug dealers remains criminalized: "Incarceration is appropriate for drug traffickers and drug dealers. For some lower-level offenders, however, intense supervision in the community can help prevent criminal careers while preserving scarce prison space for those offenders who should be behind bars."[96]

These lines fragment the criminal identity into lower-level and higher-level offenders as the Obama administration claims to use "incarceration judiciously." By complementing incarceration with alternative sentencing like community supervision, the New Strategy adds another State control mechanism.[97] Thus, alternatively to absolute incarceration, the Obama administration established the difference signifiers lower-level offense.

Finally, the United States works as the nodal point vis-à-vis the domestic "others" and their floating signifiers. The United States provides support and reciprocity towards the drug user containing and self-commitment. The United States also offers orientation and reciprocity to U.S. teenagers containing innocence and self-actualization. The United States controls and establishes community surveillance towards lower-level offenders. Therefore, the United States performs as the top actor in the hierarchy of identities by using alternative control mechanisms other than incarceration, such as healthcare, public education and community supervision.[98] This identity construction of the United States as a physician, teacher and supervisor contains relations of power, knowledge and technology to wield control.[99] However, it broadens the possibility for individuals to achieve a healthy life via self-commitment and self-actualization. There are more possibilities for preventing and treating ad-

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[94] Ondcp, *supra* note 85, at 9.

[95] Elizabeth Dauphinee, *Emmanuel Levinas*, *in* Critical Theorists and International Relations 238 (Jenny Edkins & Nick Vaughan-Williams eds., Routledge, 2009).

[96] Ondcp, *supra* note 85, at 9.

[97] Petrus Spierenburg, *Punishment, Power and History: Foucault and Elias*, 28 Social Science History 607, 617 (2004).

[98] *Supra* at 626.

[99] Thomas Papadimos & Stuart Murray, *Foucault's 'Fearless Speech' and the Transformation and Mentoring of Medical Students*, 3 Philosophy, Ethics and Humanities in Medicine 2 (2010).

diction in the United States for the domestic "other" at a school or a clinic, or by doing community service, rather than being inside a cell.

2. *Collaboration with the Neighbor (Still Transit) Country*

The Obama Administration kept using the "transit country" articulation to name Mexico as the foreign "other." Nevertheless, its identity construction of the United States quoting words previously used to construct the "transit country" is noteworthy.

Recalling the War on Drugs discourse presenting the U.S. identity as a virtuous, sufficient, certain and helpful nation-state, the next declaration by Secretary of State Hillary Clinton is problematic: "Our insatiable demand for illegal drugs fuels the drug trade […] Our inability to prevent weapons from being illegally smuggled across the border to arm these criminals causes the deaths of police officers, soldiers and civilians."[100]

This affirmation denaturalizes what seemed to have been exogenously given, quoting the prior administration: "this lawlessness is fueled by Mexico's position as the primary transit corridor."[101] What seemed to be an exclusive consequence of Mexico's official corruption and weakness in the use of legitimate force is now sponsored by U.S. incapability to reduce the demand for illegal drugs and prevent weapon-smuggling across its borders. In this sense, the War on Drugs depicted the "self" as positively sovereign and virtuous vis-à-vis the deficient and negatively sovereign foreign "other," rewriting its meaning in order to legitimate State action and reproduce this hierarchy of identities.[102] Thus, the United States attempted to obscure that which is inherent to any State: that it is a fallible and contingent entity. If the State were perfect and could achieve complete security for its population, then its rationale would be accomplished and it would cease to exist.[103] Now that the United States itself is recognized through the "fallible entity" signifier, the Obama administration denaturalizes the "help" signifier: "[T]his strategy provides a plan to support the dedicated efforts of the Mexican Government in its fight against the cartels by addressing the role that the United States plays as a supplier of illegal cash and weapons to the cartels."[104]

Before, the United States helped through certification and military cooperation. Now, the role of the United States is that of "the supplier of illegal cash and weapons to the cartels." This U.S. supply has a material explanation according to the 2010 National Drug Threat Assessment by the Department

[100] NYtimes.com, *Clinton says US feeds Mexico Drug Trade by Mark Landler* (2009), http://www.nytimes.com/2009/03/26/world/americas/26mexico.html (last visited February 20, 2012).

[101] ONDCP, *supra* note 80, at 33.

[102] Campbell, *supra* note 18, at 11.

[103] *Id.* at 12.

[104] ONDCP, *supra* note 10, at 3.

of Justice, which asserts that the arms are acquired in Arizona, California and Texas from "Federally Licensed Firearms Dealers."[105] Furthermore, this supply has a regulatory explanation lodged in the 2nd Amendment of the U.S. Constitution, which states that "the right of the people to keep and bear arms, shall not be infringed."[106] Hence, the "help/harm" binary to describe U.S.-Mexico flows is denaturalized. The United States not only provides help, but also exports harm, and its incapability to curb the flow of weapons to Mexico is understood in terms of a self-restriction imposed by its own Constitution. Thus, the signifier "self-constraint" is established.

The first part of Hillary Clinton's declaration is expanded in the 2010 NDCS: "However, it is not just the demand for drugs that occurs in America; the production of drugs is also increasingly becoming a domestic problem. The five most common substances with which American youth initiate use are largely produced in the United States: alcohol, tobacco, marijuana, prescription drugs, and inhalants."[107]

When the United States recognizes itself as the producer of illegal drugs, such as marijuana, the affirmations made in 1971 and 1989 by Nixon and H.W. Bush regarding the foreign nature of the poison are denaturalized. Simply put, the laws of supply and demand would look for cost-effective solutions within the United States, and a cost-effective mechanism was to domestically produce supply for the insatiable demand.[108] Now, not only does the United States export "harm" by supplying the cartels with arms and money, but it also produces its own "harm." As the United States has become a "source" country, it could possibly be a "transit" country susceptible towards drug cartels "largely based in Colombia and Mexico."[109] Moreover, the 2009 NSBCE suggests a new identity for those organizations:

> Intelligence derived from criminal investigations clearly indicates that U.S.-based street gangs are involved in both the receipt of narcotics from drug trafficking organizations and the smuggling/trafficking of weapons to them. The increase in gang involvement in illicit trafficking has the potential to increase Southwest border violence exponentially, while contributing to the profitability and growth of international gangs such as MS-13, Latin Kings, and Mexican Mafia.[110]

U.S.-based street gangs, international gangs, MS-13 and Latin Kings. These concepts also denaturalize constructions of cartels as being mostly

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[105] Department of Justice, National Drug Threat Assessment 16 (2010), http://www.justice.gov/ndic/pubs38/38661/38661p.pdf

[106] Nara, *Constitution of the United States: Bill of Rights*. http://www.archives.gov/exhibits/charters/bill_of_rights.html

[107] Ondcp, 2010 NDCS 8 (2010).

[108] Smith, *supra* note 25, at 1.

[109] Ondcp, *supra* note 107, at 63.

[110] Ondcp, 2009 NSBCS 29 (2009).

"Mexican Drug Trafficking Organizations"[111] of the War on Drugs. MS-13 and Latin Kings are indeed U.S.-based gangs conformed of 10,000 to 25,000 members each just within the United States, and many of their members are U.S. citizens.[112] These street gangs coordinate criminal webs in partnership with other organizations that form transnational drug networks able to "gather and analyze intelligence about government enforcement activities."[113] The construction of the Mexican cartel yields the way to the transnational drug network capable of acknowledging and challenging U.S. drug control policy. In the previous "transit country" identity, cartels challenged Colombia and Mexico as both States were deficient in their use of legitimate force, but also because their flaws were manifested by official corruption. The construction of U.S.-based gangs implicated with transnational criminal networks gathering intelligence to counter U.S. policies opens the gate to the corruption of U.S. officials. As a result, the 2009 NSBCS also enshrines measures to cope with corruption:

> Attack corruption involving domestic public officials along the Southwest border [...] Public corruption undermines faith and confidence in government, eroding trust in institutions upon which the Nation's democratic system is based […] Investigating, prosecuting, and deterring corruption on all levels along the US borders is vital to combating transnational organized crime and protecting national security.[114]

Corruption has ceased to be exclusive of the foreign "other" as it now affects the United States itself.[115] Nonetheless, U.S. corruption is a marginal and treatable pathology. It is marginal because it appears "along the US borders;" and is treatable because the United States has set a multi-agency response with "FBI-led Border Corruption Task Forces" to cure this pathology not only along the U.S.-Mexico border, but also inside the United States.[116] Unlike the War on Drugs in which official corruption evidenced the "transit" country's flaws and deficiencies, U.S. official corruption cannot represent the same thing since the United States can deal with it.

In the War on Drugs, the words that built the identity of negatively sovereign States like "production," "transit," "criminal organizations" and "cor-

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[111] Ondcp, 2007 NDCS 35 (2007).

[112] Karen Kinnear, Gangs: A Reference Handbook 189-195 (ABC-Clio, 2009).

[113] Michael Kenney, *Drug Traffickers, Terrorist Networks and Ill-Fated Government Strategies*, in New Threats and New Actors in International Security 69, 78 (Elke Krahmann ed., Palgrave, 2005).

[114] Ondcp, *supra* note 110, at 23.

[115] Robert Leiken, *Controlling the Global Corruption Epidemic*, 105 Foreign Policy 55, 67 (1996).

[116] FBI, *Combating Border Corruption: Locally and Nationally* (2010), http://www.fbi.gov/news/stories/2010/may/border_050710 (last visited February 20, 2012).

ruption" implied an articulation of flaw, deficiency, uncertainty and harm. When those same words are used to articulate the U.S. identity in the Obama Administration, a fallible entity facing self-constraint and dealing with marginal and treatable pathologies is constructed. This is a discursive change that takes into account the fact that the U.S. identity in the War on Drugs referred to a utopian version of virtue, sufficiency, certainty and help. Thus, this article suggests that in the Obama Administration, the U.S. identity constructs itself not only in relation to domestic and foreign "others," but also in a complex differentiation process from the previous U.S. identity.[117] The ideal vision of the United States as model of the aforementioned qualities pervading the War on Drugs died in its failure to defeat "public enemy number one." A new U.S. identity as a fallible State facing self-constraint to deal with marginal and treatable pathologies has emerged. Therefore the U.S. identity is an unclosed and dynamic construction necessarily prone to change.[118]

In the New Strategy, Mexico is constructed in the same fashion as the United States in the 2009 NSBCS, and on the whole, in the same fashion as in the War on Drugs. "Mexico remains a major transhipment location […] Mexico is also a major foreign source of marijuana and methamphetamine."[119] Whereas transnational criminal rings find their U.S.-based branches in street gangs, their Mexican counterparts are constructed as "major organizations" operating over vast amounts of Mexican territory like "the West Coast, the Gulf Coast and the Central Region."[120] Moreover, the 2009 NSBCS also talks about the need to "[a]ttack foreign official corruption that supports drug trafficking and related crimes."[121]

In the New Strategy, both the United States and Mexico are constructed by using "criminal organizations," "official corruption" and "production and transit of drugs." Nevertheless, the logic of difference now overcomes a difference based on difference signifiers, *i.e.* the "flaw/virtue" pair, towards a logic of difference understood as "an irreducible difference in opposition to a dialectical opposition, a difference "more profound" than a contradiction."[122] Hence, the difference will be lodged in the degrees and intensity of limited power between both neighbors.[123] Because the New Strategy puts both States under conditions of the same nature, the United States is understood as a fallible State with self-constraint dealing with marginal and treatable patholo-

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[117] Hansen, *supra* note 88, at 39.

[118] Yannis Stavrakakis, Lacan and the Political 80 (Routledge, 1999).

[119] Ondcp, *supra* note 110, at 17.

[120] *Id.* at 21.

[121] *Id.* at 24.

[122] Jacques Derridá quoted in Branka Arsic', *Active Habits and Passive Events or Bartleby* in Between Deleuze And Derridá 144 (Paul Patton & John Protevi eds., Continuum, 2003).

[123] William Desmond, Art, Origins, Otherness: Between Philosophy and Art 144 (State University of New York Press, 2003).

gies on one hand. On the other, Mexico is rather a more fallible State with more self-constraint dealing with less marginal and less treatable pathologies. This is also a rather complex differentiation process than depicting Mexico inherently as "transit" country, flawed and deficient. The United States presents itself again as the nodal point and at the top of the hierarchy of identities, thereby establishing policy patterns:

> Mexican President Felipe Calderon has embarked on a courageous campaign to break the power of the drug cartels operating in his country. Through the Merida Initiative, the United States is supporting Mexico's efforts and helping to strengthen law enforcements and judicial capacities in the region […] There has also been a significant increase in violence within Mexico, making the need for a revised National Southwest Border Counternarcotics Strategy all the more important as part of a comprehensive national response.[124]

Nevertheless, this policy comes from a fallible State, the United States, towards an even more fallible State, Mexico, which is at best casted as courageous. In this light, the transition of the drug-inspired violence from Cali to Ciudad Juárez, on the US southern border; can be basically understood from the stubbornness to apply policies based on Manichean identities of a virtuous, sufficient and helpful nation-state vis-à-vis the flawed, deficient and harmful transit countries.[125] As seen in the last section, U.S. and Mexican Governments agreed to comply with their respective War on Drugs roles. The United States could blame the "transit" country for exporting deadly poison and Mexico could wait for help from its virtuous neighbor to get rid of criminal gangs and official corruption. Now, both fallible States have different agencies based on their respective degrees of limited power to truly collaborate on the basis of their domestic duties.[126] In U.S.-Mexico relations, no magical and quick solution will be offered as noted by Lorenzo Meyer:

> Today, some U.S. political circles are acquainted with the fact that their southern neighbor is facing serious troubles. Because, albeit it is not yet a failed State, its economy, security, polity and educative systems are badly failing […] If, notwithstanding and in function of the security of its great southern frontier, Washington were to propose helping Mexico to alleviate its situation, it is simply quite little what the United States could do for its poor neighbor.[127]

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[124] Ondcp, *supra* note 110, at 4.

[125] Luiza Bialasiewicz et al., *Performing Security: The Imaginative Geographies of Current US Strategy*, 26 Political Geography 405, 419 (2007).

[126] Emanuel Adler, Communitarian International Relations: The Epistemic Foundations of International Relations 198 (Routledge, 2005).

[127] Lorenzo Meyer, *Seen from Washington* (2009), http://cedan.ccm.itesm.mx/category/ques-norteamerica (last visited February 20, 2012).

It is a common assumption to say that the War on Drugs was doomed to failure because no matter how many "transit countries" the United States could help militarily, another drug supply would emerge to meet U.S. demand.[128] However, for Mexico, if the U.S. demand/supply of illegal drugs/weapons were to finally cease to exist, is that going to make Mexico a safer country for its population? Could not the criminal gangs import their weapons from another place and switch to other activities like people smuggling to reach other international markets?[129] Whereas only the United States, Germany and Japan had more billionaires on the Forbes lists than Mexico by 1994; 65 percent of the Mexican population is plunged into extreme poverty.[130] This excluded percentage of the population may immigrate illegally to the United States, enter the informal sector, join criminal gangs or simply starve.[131] In this light, former President Zedillo's declarations about Mexico as a victim and transit zone of drug-trafficking enabled Mexico to wait for help from the north of the Rio Grande. In the War on Drugs, Mexican administrations could evade responsibility by using its role as a "transit" country while U.S. administrations could blame the flawed, deficient and uncertain Mexico for exporting deadly poison.[132] This may have allowed the administrations of both countries to avoid far-reaching measures in drug control policy and general governance.

The victimization of the "transit" country and the enactment of the United States as superior were founded on a difference logic based on pairs of contradictory differences like flaw/virtue, deficiency/sufficiency, uncertainty/certainty and harm/help. When the New Strategy constructs Mexico and the United States using the same concepts of "criminal gangs," "official corruption" and "transit and production of drugs," the logic of difference is based on degrees of limited power. Therefore, the United States and Mexico basically differ over their grades of fallibility, self-constraint and on the marginality and treatability of their pathologies. A limited U.S. aims at decreasing its domestic demand/supply of illegal drugs/weapons, thus rendering Mexico accountable for the causes and effects of drug-trafficking on its own territory. In this sense, although the New Strategy is less heroic and dramatic than the War on Drugs, it represents honest policy-making from one neighbor to the other.[133]

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[128] Fisher, *supra* note 22, at 2.

[129] Phil Williams & Dimitri Vlassis, Combating Transnational Crime: Concepts, Activities and Responses 57 (Routledge, 2001).

[130] Hamilton, *supra* note 83, at 326.

[131] José Ramos García, Relaciones México-Estados Unidos: Seguridad Nacional e Impactos en la Frontera Norte 40 (University of Baja California Press, 2005).

[132] Guadalupe González & Marta Tienda, The Drug Connection in US-Mexican Relations 6 (University of California Press, 2004).

[133] Abraham Lowenthal, *Renewing Cooperation in the Americas, in* The Obama Administration and the Americas: Agenda for Change 1, 12 (Abraham Lowenthal et al. eds., 2009).

3. *Reconstruction*

The New Strategy highlights features of U.S. drug control policy that were obscured in the War on Drugs. As the New Strategy did not emerge independently from its predecessor, its constructions are stabilized and constrained by the War on Drugs discourse.[134] Insofar as the New Strategy is understood as a reconstruction of the War on Drugs, the following quotes by previous U.S. administrations make it possible to trace the discursive roots of the former in the whispers of the latter:[135]

> So we must also act to destroy the market for drugs, and this means the prevention of new addicts, and the rehabilitation of those who are addicted (Nixon administration).[136]
>
> These polydrug organizations dealing in cocaine, Mexican heroin, marijuana, and methamphetamine, attempt to corrupt law enforcement officials on both sides of the border to facilitate their smuggling operations (Clinton Administration).[137]
>
> The United States Government recognizes the role that weapons purchased in the United States often play in the narcoviolence that has been plaguing Mexico (G.W. Bush Administration).[138]

Prevention and treatment were topics first suggested by Richard Nixon, while the Clinton and W. Bush administrations invoked U.S. corruption and weapons supply.

Perhaps the most surprising speech comes from H.W. Bush in 1989:

> But let's face it; Americans cannot blame the Andean nations for our voracious appetite for drugs. Ultimately, the solution to the United States drug problem lies within our own borders —stepped-up enforcement, but education and treatment as well. And our Latin American cousins cannot blame the United States for the voracious greed of the drug traffickers who control small empires at home. Ultimately, the solution to that problem lies within your borders. And yet good neighbors must stand together. A world war must be met in kind […] Allies in any war must consult as partners.[139]

By 1989, George H.W. Bush had already concluded that the United States and Latin American countries should work first in their homelands instead

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[134] Lars-Erik Cederman & Christopher Daase, *Endogenizing Corporate Identities: The Next Step in Constructivist IR Theory*, 9 European Journal of International Relations 5, 12 (2003).

[135] Clifford, *supra* note 23, at 6.

[136] Nixon, *supra* note 32.

[137] Ondcp, 1996 NDCS 32 (1996).

[138] Ondcp, 2008 NDCS 47 (2008).

[139] George Bush, *Remarks at the International Drug Enforcement Conference* (1989), http://www.presidency.ucsb.edu/ws/index.php?pid=16974&st=face&st1=voracious (last visited February 20, 2012).

of blaming the foreign "other" for drug-trafficking. Why were domestic and feasible measures to reduce drugs demand and save many Latin American and U.S. lives obscured in drug policy?

H.W. Bush answers this question in his own speech: by stepping up law enforcement at home and by confronting a "World War" abroad. Wars are particular social constructions when understood as periods of crisis enabling the hegemonic production and reproduction of the "self/other" identities.[140] They are special because "warfare is simultaneously accepted and constrained."[141] Warfare is accepted for the nation-state because it has the legitimate use of force to pursue its interest which theoretically is in the interest of its population, and it is constrained because there should be the construction of identities to inscribe meaning to the acting characters.[142] A "War" discourse ponders belligerent and law enforcement identities over healthcare and education identities.[143] In this sense, the War on Drugs attached the meanings of "enemy invaders" and "deadly poison" to narcotics. These "enemy invaders" use flawed and deficient countries as a transit zone to reach the United States harnessing Mexican and Colombian cartels. Once in the United States, the "enemy invaders" reach individuals to turn them into irrational, unfaithful and aggressive criminals threatening U.S. rationality, life and faithfulness.

In this kind of warfare, the United States must defend its rational and healthy population by jailing criminals at home, and helping deficient "transit" countries by giving them military cooperation abroad. In the War on Drugs, the United States cannot jail U.S. youth for smoking cannabis sativa, but it can jail irrational criminals for breaking the law by smoking deadly poison. A fallible State cannot certify and help another more fallible State, but the positively sovereign United States, virtuous, sufficient and certain can certify and help corrupt "transit" and "source" Latin American countries. In the War on Drugs, the U.S. identity as a positively sovereign and as a moral defender of American values acted as a big nodal point giving unity to a series of heterogeneous elements such as treatment and education.[144]

This phrase encapsulates the drug policy reconstruction in the Obama Administration: "The importance of domestic law enforcement, border control, and international cooperation against drug production and trafficking cannot be overstated. These traditional approaches to the drug problem remain essential, but they cannot by themselves fully address a challenge that is inherently tied to the public health of the American people."[145]

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[140] Rowley & Weldes, *supra* note 12, at 199.

[141] Alexander Wendt, Social Theory of International Politics 283 (Cambridge University Press, 1999).

[142] José Merquior, Foucault 11 (University of California Press, 1987).

[143] Campbell, *supra* note 18, at 7.

[144] Stavrakakis, *supra* note 118, at 80.

[145] Ondcp, 2010 NDCS, 7 (2010).

When the Obama administration uses a previous discourse to reconstruct new identities, one criticism is whether there is a repetition of previous ones.[146] However, the New Strategy traced the War on Drugs genealogy to rescue those heterogeneous features that were shadowed by the past U.S. identity.[147] By reconstructing the U.S. identity by means of support, orientation and surveillance on the basis of reciprocity towards U.S. citizens, healthcare and education measures are balanced with the dominant punitive discourse.[148] Equally, the reconstruction of the U.S. identity as a fallible State_vis-à-vis the more fallible "other," prompts the United States and Mexico to see, in H.W. Bush's words, that the solution "lies within their own borders."

IV. Conclusion: Once the War is Over

> It does not matter whether the war is actually happening, and, since no decisive victory is possible, it does not matter whether the war is going well or badly […] But when war becomes literally continuous, it also ceases to be dangerous […] War, it will be seen, is now a purely internal affair […] The war is waged by each ruling group against its own subjects […].[149]

This quote offers one interpretation of the War on Drugs: when a war has protracted for nearly 40 years without entirely defeating the enemy, danger becomes naturalized, and the war focuses on the population. The warfare construction first implied attaching meaning to discursive subjects and then enabled procedures to deal with those subjects. A host of natural and chemical substances with hallucinogenic, depressive, disinhibiting or addictive effects on the human body were depicted as "deadly poison" when referred to as inside the United States, and as "enemy invaders" when outside. The War on Drugs articulated two discourses with a common characteristic: the United States is the top actor in the hierarchy of identities and is the policy-making actor on U.S. soil and in the international arena.[150]

Unlike previous U.S. discourses in which material objects like missiles were deemed threatening when linked to rivals like the Soviet Union,[151] the War on Drugs constructs narcotics as a threat by granting them metaphysical powers. The "deadly poison" prowls around U.S. streets turning people into criminals

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[146] Karin Fierke & Knud Jorgensen, Constructing International Relations: The Next Generation 45 (M.E. Sharpe, 2001).

[147] Clifford, *supra* note 23, at 7.

[148] Michael Shapiro, Reading the Postmodern Polity: Political Theory as Textual Practice 107 (University of Minnesota Press, 1992).

[149] George Orwell, 1984 192-197(Penguin, 1977).

[150] Doty, *supra* note 21, at 98.

[151] Jutta Weldes, Constructing National Interests: The United States and the Cuban Missile Crisis 22 (University of Minnesota Press, 1999).

who commit robbery and shoplift. But crime is just one side of a bigger threat menacing U.S. life, rationality and faithfulness. The United States responds to this by incarcerating these criminals through law enforcement. When the deadly poison is outside the United States, it becomes "enemy invaders" trying to encroach upon the U.S. homeland. Here, narcotics wield their metaphysical powers to use Latin American countries surrounding the United States as transit and source zones. These countries are flawed, deficient, and uncertain; their legitimate use of force is weak, official corruption is endemic, and they cannot assess their situation. They just export harm. The United States, on the other side of the border, is a positively sovereign country supported by generosity and concern to certify and help proscribed nations.

This war has lasted long enough and its discourse has triumphed over attempts to decriminalize the domestic "other" from the Nixon era to the W. Bush days. As with any other discourse, in order to be meaningful, the War on Drugs found acceptance in "transit countries." Mexican President Felipe Calderón provides an example:

> I'd like to point out that this isn't a "war on drugs" in the Nixon sense, but this is against criminal organizations that seek —through violence and threats— to collect rents on legal and illicit businesses in a community. Drug trafficking is a part of that. But this battle goes beyond it. To return authority to government and the citizens that elected it in each community in Mexico and take it away from the criminals.[152]

Although Calderón is declaring that his is not a Nixon-fashion "War on Drugs," he is actually speaking the War on Drugs discourse. Drugs threaten U.S. rationality, life and faithfulness. But they threaten Mexico in terms of its legitimate use of force and its corrupt structure since criminal organizations take advantage of Mexico's flaws and deficiencies as a transit country. Mexican governments speak the War on Drugs discourse insofar as they struggle to "return [challenged] authority to government" using militarized force to counter cartels. When President Zedillo endorsed the transit country role, he made the War on Drugs discourse meaningful by embracing the United States as the virtuous, sufficient, and certain State that would help Mexico get rid of its drug-related shortcomings. As a transit country, Mexico is fully entitled to ask for U.S. utopian help in order to reach a decisive victory in the War on Drugs.

After 38 years of a continuous War on Drugs, both neighbors started to fight against their own populations. In the United States, the number of people jailed for drug-related crimes has increased 12 times since 1980.[153] While

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[152] Wall Street Journal, *Felipe Calderón: Interview Transcript*, http://online.wsj.com/article/SB10001424052748703957904575252551548498376.html (last visited February 20, 2012).

[153] Human Rights Watch, Incarcerated America: Human Rights Watch Backgrounder 1 (2003), http://www.backspace.com/notes/images/us042903.pdf.

in Mexico, approximately 50,000 Mexicans have died in its drug war since 2006. Furthermore, a policy that should have been devised to cope with the real jeopardizing effects of drug use like addiction and overdose death was devised to criminalize possession and trade.

For this reason, when Drug Czar Gil Kerlikowske claimed to end the War on Drugs, he added: "Regardless of how you try to explain to people it's a war on drugs, or a war on a product, people see a war as a war on them, a war on individuals and we're not at war with people in this country so I think we need to be more comprehensive."[154]

As a result of the end of war, the 2010 NDCS divested drugs from their metaphysical powers. The United States deals with potential drug users, drug users and minor offenders by providing them with healthcare, education and community surveillance. Since the United States portrays itself on the basis of reciprocity, the nation-state will help as long as there is a response from the citizen. Although this U.S. identity implies mechanisms of power, it offers alternatives for dealing with drug use other than mere incarceration, a high expression of coercion.[155]

Will the New Strategy be upheld? New information confirms it will. The 2011 NDCS regards its predecessor in these terms: "[i]n its inaugural *Strategy* published last year, this Administration embarked upon a new approach to the problem of drug use in the United States."[156] The document also speaks about the Fair Sentencing Act, newly approved legislation that eliminates penalty discrimination between crack cocaine and powder cocaine which used to fall under a form of racial profiling.

Moreover, the Merida Initiative, which provides Mexico with military equipment and training from U.S. agencies, has had fewer funds from Fiscal Year 2010 to 2012. The money disbursed from the International Narcotics Control and Law Enforcement Programs (INCLE) and Foreign Military Financing (FMF) went from $549.25 million in 2010 to $256.5 million in 2012 according to the State Department.[157] At least in the short and medium run, the military option in Mexico will not be much supported with U.S. public resources.

The United States has also changed in relation to Mexico. When the 2010 NDCS and the 2009 NSBCS describe the United States as consumer and supplier of drugs and weapons, it also constructs itself with the words attached to transit countries: criminal organizations, corruption, and transit and production of narcotics. The identity of the positively sovereign country

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[154] Kerlikowske, *supra* note 1.

[155] Mark Colvin, Crime and Coercion: An Integrated Theory of Chronic Criminality 85 (Palgrave, 2000).

[156] Ondcp, 2011 NDCS III (2011), http://www.whitehouse.gov/sites/default/files/ondcp/ndcs2011.pdf.

[157] Department of State, Congressional Budget Justification: Foreign Operations (2012), http://www.state.gov/documents/organization/158267.pdf.

gives way to a U.S. identity prone to having limitations and constraints imposed by its own Constitution and the inherent boundaries characteristic to the nation-state. Therefore, the difference with Mexico lodges in degrees of limited power and not in quality.

Once the war is over and the United States emerges as a fallible State, the landscape will also change for Mexico. For a country whose official name is United Mexican States, having had governments that thought that by only tying Mexico's economy to that of its northern neighbor in the NAFTA would fix its economy, this is not a minor issue.[158] The negative effects of drug consumption in the United States on Mexico may disappear, but without far-reaching solutions the millions of marginalized Mexicans will continue to be lured by immigration, the informal sector and crime.[159] Mexico should stop fearing the social environment in order to become more concerned about the consequences of its own free choices.[160] The Mexican people should ask their State why a country capable of producing the wealthiest man on earth has to face narco-bloodshed on its own territory. The Obama administration endeavors pragmatic and honest measures by curbing the demand for drugs and the supply of weapons; nonetheless the New Strategy only offers domestic and limited policies to Mexico, not utopian help.

As Jimmy Carter once said: "This is not a message of happiness or reassurance, but it is the truth and it is a warning."[161] This warning must be posed to both the United States and Mexico in order to bury epic discourses in which the Rio Grande became the natural border between virtue and flaw. The New Strategy represents one scenario in which both neighbors have serious concerns: a massive problem of public health in the U.S. case, and a massive problem of social exclusion in the Mexican case. Starting from this point both the United States and Mexico can stop "cooperating" and start to collaborate as fallible States that represent the interests of their populations and not fight them.

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[158] Gary Hufbauer & Jeffrey Schott, Nafta Revisited: Achievements and Challenges 4 (Peterson Institute Press, 2005).

[159] Adalberto Santana, El narcotráfico en América Latina 157 (Siglo XXI, 2004).

[160] Jean-Paul Sartre, The Transcendence of the Ego: A Sketch for a Phenomenological Description 28 (Routledge, 2004).

[161] James Carter, *Address to the Nation on Energy and National Goals* (1979), http://www.presidency.ucsb.edu/ws/index.php?pid=32596&st=truth&st1=warning (last visited February 20, 2012).

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WHY HAS THE TRANSITION TO DEMOCRACY LED THE MEXICAN PRESIDENTIAL SYSTEM TO POLITICAL INSTABILITY? A PROPOSAL TO ENHANCE INSTITUTIONAL ARRANGEMENTS*

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Abstract. *Over the past two decades, Mexico has gone from an authoritarian regime to an electoral democracy. Although this change is undoubtedly positive, the institutional engineering in place and the balance of power among institutions has led to increased political instability and a latent risk of political paralysis. There is substantial literature asserting that these problems may be connected to the core characteristics of presidential systems; however, I demonstrate that in the Mexican case, it is also due to the electoral rules derived from the reforms of the 1990s and the subsequent electoral results. To substantiate this claim, I present the historical conformation of the presidential, political and electoral systems, as well as the balance of power derived from later system structures and the problems that can trigger instability. Finally, in response to the vast amount of literature that asserts that presidential systems generally shift to a parliamentary or semi-presidential system to perform better, I present an original formula based on relatively simple and feasible political reforms that can enhance the Mexican presidential system and prevent political paralysis.*

Key Words: *Balance of power, democracy, presidential, parliamentary, amd Semi-presidential systems, institutional arrangements*.

Resumen. *Durante las dos décadas pasadas, México ha transitado de un régimen autoritario a una democracia electoral. Aun y cuando dicho cambio*

* Acronyms and terms: COFIPE, Federal Code of Institutions and Electoral Procedures; IFE, Federal Electoral Institute; MCs, Members of Congress; MSD, Multi Seat District; PAN, National Action Party; PRI, Institutional Revolutionary Party; PRD, Democratic Revolutionary Party; PR, Proportional Representation; PVEM, Green Party; SSD, Single Seat District; TEPJF, Federal Electoral Court (also known as TRIFE).

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es sin duda positivo, el entramado institucional conjuntamente con el balance de poder entre instituciones ha generado en el sistema inestabilidad política creciente y riesgo latente de parálisis institucional. Vasta literatura señala que estos problemas pueden ser originados por las características propias de los sistemas presidencialistas, sin embargo demostraré que para el caso mexicano este es resultado fundamentalmente de las reglas electorales derivadas de las reformas de los años noventa, y los resultados derivados de estas reformas. Para fundamentar esta aseveración, en este trabajo presentaré desde una perspectiva histórica la configuración de nuestros sistemas presidencialista y electoral. Asimismo mostrare el balance de poder derivado de la configuración de los sistemas mencionados y los peligros generados por esta configuración que detonaron la inestabilidad. Finalmente y contrario a la vasta literatura que asegura que los sistemas presidenciales están condenados a transitar a un sistema parlamentario o semi-parlamentario a fin de operar de mejor manera, presentare una formula innovadora basada en una relativamente simple y posible reforma política que reforzara el sistema presidencialista mexicano y ayudara a evitar la parálisis política.

Palabras clave: *Balance de poder, democracia, sistemas presidencial, parlamentario y semi-presidencial, arreglos institucionales*.

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I. Introduction

Many scholars have argued that Mexico completed its transition to democracy in the year 2000 when the country experienced its first alternation in power. This was an important feature which Mexico was lacking in order to be classified as a democratic country. Although there is some debate as to what type of democracy Mexico is, this discussion is outside the scope of this article.

This article argues that even though the Mexican presidential system has been moving forward over the last two decades to enhance democracy and its political institutions, there are still some latent dangers due to the institutional arrangements of the system, some of which are derived from the historical conformation of the regimes and others from core characteristics of the presidential system. Specifically, the main claim of the article at hand is that a transition to democracy can lead the Mexican system to the real possibility of political paralysis characterized by legislative gridlock regarding structural reforms and the risk of ungovernability, generated by the separation of powers and the absence of cooperation among institutions. To substantiate this claim, this article studies the shift in the balance of power among institutions —as a consequence of the electoral results of 1997— combined with the institutional arrangements set in place: plural rule for electing the president, the absence of reelection for legislators, and the separation of powers with no incentives for cooperative games.

As citizens decide on the distribution of power by casting their votes, it is possible to engineer a policy-oriented solution to the problem by improving existing institutional arrangements. More specifically, this article argues that the following three specific reforms to institutional arrangements are required to enhance governability in Mexico: (i) establishing a second round runoff for electing the president; (ii) reinstating legislative reelection; and (iii) introducing an alternative mechanism to foster cooperation among institutions. We believe these reforms will give way to a different set of arrangements that will lead to enhanced governability.

In the first section of this article, I will briefly discuss the core institutional arrangements which define presidential systems. I will also present some of the debate in literature regarding the dangers that can derive from such institutional engineering. Throughout the discussion, I will sometimes compare this system with others for the sake of clarity.

The second section of this article provides a brief overview of the development of the institutional arrangements under Mexico's post-revolutionary presidential regime. I point out that before the transition to democracy there was a significant gap between *de jure* and *de facto* powers. I then describe the role of the opposition in the democratization process, to finally analyze the evolution of electoral engineering from 1990 to 2006, in which major reforms were made to the system to bring about an important shift in the balance

of power by democratizing institutions and effectively separating the powers central to presidential systems.

In the third section, I argue that the new configuring derived from electoral reforms, combined with old institutional and constitutional arrangements, left the system exposed to: (i) legislative gridlock (in terms of structural reforms), (ii) political instability, due to low legitimacy of mandate; and (iii) ungovernability, making it more difficult for the government to put forward and successfully champion its agenda. The last part of this section focuses on providing what, in my perspective, are the reforms needed in terms of institutional engineering to overcome the perils that can still be found in the system.

Although I am well aware of many other things deemed necessary to enhance democracy and governability, the rationale behind this analysis is that addressing the proposed reforms will generate a more balanced and standardized political system and, more importantly, it will create a system aimed at fulfilling citizens' needs.

II. Presidential Systems

In the institutional engineering of democratic political regimes, countries can be classified in one of two categories, often referred to as "pure" regimes:[1] parliamentary and presidential. Many scholars have argued that the latter type of system tends to be more unstable than the former and therefore, parliamentary systems are considered superior.[2] Some empirical analyses have suggested that parliamentary regimes are longer-lived and democracy is more likely to survive under such regimes.[3] Other authors have shown that whether countries opt for one system or the other, they tend to add certain variations to it. This variability has led to a somewhat inadequate definition of these regimes. The most distinct spin-off of the presidential system was classified by Duverger in 1970 as a semi-presidential system.[4]

Whether there are three main criteria for defining presidential systems[5] or two features that stand out of such systems,[6] most scholars agree that these

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[1] Alfred C. Stepan & Cindy Skach, *Constitutional Frameworks and Democratic Consolidation: Parliamentarism versus Presidentialism*, 46 (1) World Politics 1, 1-22 (1993).

[2] In the debate of political regimes, there is no clear consensus on which type of system performs the best. However, it seems to be widely accepted that the success of a system in a country or a region depends on many different factors, such as historical background, education, economic stability, inequality, number of parties, and so forth.

[3] Stepan and Skach, *supra* note 1.

[4] Proponents of semi-presidentialism have argued that this system is unique and that it is neither a mixed system nor a transition from one pure system to the other. Authors claim this system arises from constitutional engineering. *See* Pasquino, in Elgie 7-8 (1999).

[5] Giovanni Sartori, Comparative Constitutional Engineering, an Inquiry into Structures, Incentives and Outcomes (MacMillan Press Ltd., 2nd ed., 1997).

[6] Juan J. Linz, *Presidential or Parliamentary Democracy: Does it make a Difference?*, *in* The Failure

systems embody the following characteristics: both the congress and the president are in power for a fixed term as the result of a direct (or direct-like)[7] election and interaction between both branches is independent of the other (*i.e.*, both have a popular mandate and neither the president can disband the congress nor can congress dismiss the president and his cabinet). [8]

The separation of powers is a result of the first characteristic. Because of this separation, the president is responsible and accountable for the executive branch, and has the power to appoint and dismiss his cabinet without the approval of congress (There are some exceptions as in the case of the United States where congress ratifies certain appointments). Lijphart[9] defines this idea as a one-person executive in a presidential system. According to Linz,[10] one of the drawbacks of this core characteristic of presidential system is what he calls the "winner takes all" factor. In other words, the president completely controls the executive branch and cabinet appointments, thus taking all while the losing candidate loses all. Przeworsky[11] also argues in favor of Linz's argument, stating that presidential systems form a zero-sum game because a president is in a position to establish a government that does not include losers. Under this system, the losing candidate cannot even be part of government as he can in the case of the parliamentary system, in which the runner-up becomes the leader of the opposition. Thus, victory seems to be greater and defeat is also more pronounced in presidential systems whereas the rules of the parliamentary system multiplies the payoff and the loser is encouraged to remain active in the democratic game. Carpizo[12] dismisses the "winner takes all" argument because this position is largely unattainable in situations in which the president does not have the majority in one or both chambers. Furthermore, in response to those who say parliamentary systems are more stable, Carpizo counters that setting up government under a parliamentary system with several political parties requires forming coalitions that are not always stable. This in turn can bring about constant changes in the cabinet and thereby political instability. Along this same line, Cheibub et al.[13] contend that when no party holds a congressional majority in a presidential system,

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of Presidential Democracy 3-87 (Juan Linz and Arturo Valenzuela eds., John Hopkins University Press, 1994).

[7] In some cases (*i.e.* United States), the president can be selected by an electoral college.

[8] Some constitutions grant the congress the power of impeachment, although it is highly unlikely for a president to be convicted.

[9] Arend Lijphart, *Presidentialism and Majoritarian Democracy: Theoretical Observations*, in The Failure of Presidential Democracy, *supra* note 6, at 91-105.

[10] Linz, *supra* note 6.

[11] Adam Przewoski, Democracy and the Market: Political and Economical Reforms in Eastern Europe and Latin America (Cambridge University Press)(1991).

[12] Jorge Carpizo, *México: ¿sistema presidencial o parlamentario?*, 1 Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional 49-84 (1999).

[13] Jose Cheibub & Fernando Limongi, *Democratic Institutions and Regime Survival: Parliamentary and Presidential Democracies Reconsidered*, 5 Annual Review Of Political Science 151-179 (2002).

coalition governments take shape more than half the time, and even more frequently if no single party holds more than a third of the seats in congress. Most democratic presidential systems have a system of checks and balances since each branch has its own source of authority as well as an independent mandate from the people. This characteristic points at a second drawback of presidential systems, something Linz[14] calls "dual democratic legitimacy." This means that both the congress and the president can claim democratic legitimacy, although the latter's is often considered more encompassing since congress only represents part of the population[15] while the president represents the country as a whole. Regardless of which branch claims to have more legitimate power, checks and balances can minimize or even eliminate the "winner takes all" effect, especially in the case of a divided congress. Checks and balances may differ *de facto* and *de jure* and in certain circumstances, *e.g.*, when the president's party holds the majority in congress, the president tends to dominate the legislative branch as well.

Linz[16] also asserts that presidential regimes are rather rigid compared to parliamentary systems when dealing with a possible change in power if the president fails to deliver or has lost the confidence of congress or his own party. In the presidential system, the president is elected for a fixed term and will stay in power until the end of that term; whereas in the parliamentary system, if a prime minister has lost the confidence of parliament, it is highly unlikely he will remain in power. For the sake of argument, let us say that Linz's argument presupposes a president who begins his term with his party's confidence and that congress gives him the benefit of the doubt before losing the support of one or both. In this case, Linz's concern can even be taken a step further to illustrate a situation in which the president never actually obtained the confidence of congress. Presidential systems with many political parties participating in elections have shown that a president can be elected with low percentages of popular support. Moreover, the support a president receives in a general election can significantly differ from that of congress since voters may cast votes for candidates from different parties. Even more worrisome is the fact that after a controversial election, a president can assume power under polarized circumstances that stem from low legitimacy levels.

Proponents of presidentialism claim that "accountability" is a strong point in favor of these systems.[17] Since citizens directly elect their president, they know exactly who they voted for, who they granted the power to govern to and who is responsible for government. In contrast, voters in parliamentary systems do not actually know beforehand what parties will be part of the governing coalition or who their leader will be, especially under minority governments. Thus, in terms of accountability, parliamentary systems spread

[14] Linz, *supra* note 6.

[15] Either a constituency, a state (under federal systems), or both (under bi-cameral systems).

[16] Linz, *supra* note 6.

[17] *Id.*

the responsibility among the prime minister, the cabinet and the parliament, whereas in presidential regimes, responsibility is easy to attach to the president. Linz's criticizes presidential systems that do not allow the president to run for re-election because in his view, "a president who can not be re-elected is unaccountable."[18] Furthermore, it can be said that the diffusion of sharing responsibility is even greater in presidential systems than in parliamentary regimes since the president can "accuse" congress of not letting him govern properly and pursue his agenda because congress blocks the required reforms.

So far, the discussion about presidential regimes has been addressed from the executive's standpoint, as it is in most literature. However, congresses in presidential systems have been claiming a more preponderant role in the public sphere as a collegiate policy maker. Most policies targeting the society are currently entitled by a piece of legislation or a congressional act. The budget cycle is a clear example of enhanced legislative power over the policy-making process and increased control over checks and balances since congress has taken on a more effective role in all the stages of the process: preparation, approval, execution, and accountability/review. Moreover, in budget execution, congress has gained more power over government expenditure policies by regulating social programs and grounding them in law. For instance, in the United States, only about one third of all federal spending is controlled in the annual appropriation process while spending for entitlement programs is determined by their enabling laws.[19] These laws impose a significant constraint on government policy-making. In order execute his agenda, the president needs to act and cooperate with congress. On the flipside, Carpizo[20] stresses that under the traditional parliamentary system, namely the British one, if a single party attains the majority in the House of Commons, the leader of the winning party becomes prime minister and controls the parliament. Therefore, the legislative branch exerts no control whatsoever over the executive branch due to both party discipline and the fact that most MPs do not want anticipated elections.

If we agree that, in theory, presidential systems are more difficult to successfully perform because of core institutional arrangements, several questions should be considered: Is presidentialism incapable of delivering? Is there a way to improve a presidential regime? Some scholars (*e.g.*, Linz) argue that the answer to a presidential system's problems lies in its evolution to a parliamentary system, while others (*e.g.*, Sartori)[21] propose a "less drastic" change (in terms of constitutional engineering) to a semi-presidential or "alternating presidentialism" system. In this article, I will argue that Sartori's view is probably more appealing in the case of Mexico. In the next section,

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[18] *Id.*

[19] Ian Lienert and Moo-Kyung Jung, *The Legal Framework for Budget Systems,* 4 (3) OECD Journal on Budgeting 1, 1-483 (2004).

[20] Carpizo, *supra* note 12.

[21] Sartori, *supra* note 5.

I will briefly describe the structure of the Mexican system before going on to present my proposals to reform key institutional arrangements.

III. Transition to Democracy: Evolution of Institutional Arrangements and the Balance of Power

Since its independence the history of Mexico has been characterized by an unstable political order and a long list of "monarchs" and "warlords." However, Mexico is different from other Latin American histories in that it has never been under military dictatorship. Mexican regimes may have been rather authoritarian —led by a man with either a military or civil background— but political institutions have never been subjected to military rule. Although Mexico did hold regular elections, they was dominated by a single party in power for more than six decades because of the following mechanisms: a) an all-powerful president who, according to some scholars, had both constitutional and "*meta-constitutional*" powers (see Meyer, 1993; Carpizo and Cordova, 1985); and b) frequently changing electoral rules, which helped exert control over congress. Using Merkel's[22] theoretical concept of democracy, these circumstances fit perfectly into one of his four types of "defective democracies:" delegative democracy.[23]

It is necessary to know several key historical facts to understand the current institutional arrangements in the Mexican presidential system and the evolution of the balance of power among institutions over the last two decades. This section will cover these facts, though the following description is not intended to be a comprehensive review of Mexican history; rather, it is a somewhat subjective overview of historical episodes that help understand how the system is conformed.

1. *Post-Revolutionary Period: Conformation of Presidential Power*

As a result of President Santa Ana's eleven terms in office and Porfirio Díaz's three decades in power during the so-called "*Porfiriato*," one of the

[22] Wolfgang Merkel, *Embedded and Defective Democracies*, 11 (5) Democratization 33-58 (2004).

[23] Merkel's theory of democracy is based on the argument that the term "electoral democracy" is normative and theoretically inadequate to define whether a country can be classified as democratic or not —as it only takes into account the existence of free and fair elections. He states that for a country to be classified as democratic, it must fulfill at least five main features internally and three features externally. If the country meets all these criteria, it can be classified as an "embedded democracy," whereas if the country fails to comply with even one of them, it should be considered a 'defective democracy', divided into four types of such democracies eg. exclusive, domain, illiberal and deelegative democracies.Merkels' definition of a "delegative democracy" is a system characterized by a weak legislature and judiciary, in which these two branches only have limited control over the executive branch and the president can circumvent the parliament and influence the judiciary.

principal demands of the 1910 revolution was that of banning presidential re-election. Porfirio Díaz's long period in power was to a large extent possible due to his restrictive policies of sharing and distributing the economic benefits with a small elite group of politicians, businessmen, bankers and landowners. By distributing the rents of the economic growth among these key groups, Díaz secured his permanence in power. However, the same policy that kept him in power was also responsible for his exile. Large groups of peasants and a growing working class, who were earning no rent from these elitist policies, organized and started to mobilize themselves and attack the government, demanding equal privileges for all. After Díaz's exile, his successors, first Madero and then Huerta, tried to address the demands of the newly organized groups, particularly the small farmers via a land reform that aimed at significantly redistributing land. However, an unstable environment and the inability to deliver on the promises resulted in Madero's assassination while Huerta was overthrown and exiled. As a result, two revolutionary movements emerged: the constitutionalists, led by Carranza; and the anti-constitutionalists, divided into two different groups in northern and southern Mexico led by Villa and Zapata, respectively. Carranza defeated these groups and garnered support by "forging alliances with groups that were committed to far-reaching social reforms."[24] Consequently, the 1917 Constitution (which is still in effect) was comprehensive in terms of including several of the new stakeholders, such as peasants, the working class, and businessmen. However, in terms of institutional arrangements, the text of the constitution enhanced the president's powers and placed him in a higher position than congress.

The same practices of patronage and rent distribution remained in place during the subsequent presidencies of Obregon (1920-1924) and Calles (1924-1928). However, in terms of political organization, by the end of the 1920s, around 150 parties had emerged, each demanding a share of the rents and insisting the revolution benefit them too. Obregon was reelected in 1928 —against the revolutionary demand of no re-election— thanks to a reform Calles carried out by convincing the congress to amend the constitution so as to allow reelection for non-consecutive terms. Obregon was then assassinated which resulted in Calles' reemerging as the strongest political figure in the country. President Calles was aware that the history of warlords and monarchs was still fresh in people's minds. Thus, instead of following Obregon's path, Calles decided to become the man behind the power and establish what is known in Mexico's history as the "*Maximato*."[25] Calles appointed the next three Mexican presidents who were each under his command.

Calles knew the benefits of patronage politics and as an experienced leader who was well versed in forming coalitions, he unified most of the 150 par-

[24] Stephen H. Haber et al., Mexico Since 1980 (Cambridge University Press, 2008).

[25] The Maximato is the period between 1928 and 1934. This period was characterized by a very strong leadership in the figure of Calles, who was called "*El jefe máximo de la Revolución*" (the supreme leader of the revolution).

ties into a single party, the PNR (which is now known as the PRI) by creating a common ground to deliberate on and solve the ever-increasing demands. This unification was made possible by creating a *de facto* single-party system with a single figure as its head. Calles' last appointee in 1934 was President Lázaro Cardenas, who turned out to be a drawback for "*el jefe.*" Even though Cardenas concurred with the idea of maintaining a single figure at the head of the party and the government, he believed this figure ought to be the incumbent president. Since Cardenas's presidency, some of the practices established within the single party in power became practically institutionalized within the PNR party. These practices, or more precisely meta-constitutional powers, include: presidential appointment of the president's successor (as well as appointing governors and candidates for both chambers) and absolute control of the official (PNR) party. Both of these practices were in place until the end of the 20th century. "Until the 1990s, the PRI held an effective monopoly on the exercise of the political power. Indeed, the line between the party and the government blurred to the point that they were often viewed as one and the same."[26]

Thus, President Cardenas severed the bond with the long history of long-term presidents and weak presidents, who sometimes remained in power for even less than a year, in a politically unstable environment emanating from pre- or post-revolutionary processes. Cárdenas legitimized and enhanced the power in hands of the president as Meyer[27] describes in the following lines: "[t]he presidential power under the new Mexican regime was only consolidated since General Lázaro Cárdenas (1934-1940). Then and only then, could the president have absolute constitutional and meta-constitutional powers."[28] Some of the meta-constitutional powers Meyer refer to are: control over institutions, courts, local governments, congress, mass media and even some of the minor political parties. Cardenas did impose one limit on these powers, namely a term limit, which he respected at the end of his mandate.

The same presidential powers were transferred from president to president over the following 60 years under the shelter of same party.[29] Some questions that arise at this point are: How did the PRI manage to keep their power so effectively? If the PRI was so powerful, what caused its defeat? The following section will attempt at answering both of these questions.

2. *Role of Parties and Congress in the Process of Democratization*

The "official" party (PRI) continued to grow over the following years to gradually include a wider range of social sectors. In 1938, the party had

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[26] Haber, *supra* note 24.

[27] Lorenzo Meyer, *El presidencialismo: del populismo al neoliberalismo*, 55 (2) Revista Mexicana de Sociología 57, 57-81 (1993).

[28] My translation of Meyer, *supra* note 27.

[29] The PNR became the PRM in 1938 and finally the PRI in 1946.

already built up strong bases in the working class, peasants the armed forces and many social organizations. Scholars track the creation of corporatism in Mexico to this particular point in time. Corporatism was the main way of controlling and keeping power primarily through co-optation and repression. Over the following decades, the system ran smoothly not only because of the president's and the "official" party's absolute power, but also due to sustained economic growth attributed to the import substitution model. Between 1954 and 1970, the GDP grew at an average rate of 6.7% a year.[30]

With such overwhelming power over political institutions and social sectors, how can the downturn of the PRI's monopoly of power be explained? Three primary factors that had an impact on the PRI's political hegemony can be attributed to the party's decline: (1) the student mobilization in the late 1960s; (2) the economic shocks of the late 1970s and early 1980s; and (3) the electoral reforms (in response to a growing opposition and a greater need for legitimization).

The 1968 student mobilization —which was brutaly repressed— took place on the verge of the Olympic Games in Mexico. This public mass repression had a significant impact on the official party hegemony. These events made the population aware of the limits of the power exerted by the "authoritarian regime" (or their absence). The social movement did not only include riots and social protests, but also brought in more participation from the intellectual sector as more and more scholars began to oppose the regime.

The economic shocks in the late 70s and early 80s also had a major impact on the political support of the official regime. During this period, the import substitution model and state-led industrialization proved to be deficient. According to Meyer,[31] the problem can be traced back to the need for investing in the inefficient industrial sector, which was incapable to export its goods. Hence, the government's response to this was to go into external debt. This was possible through readily available private loans, as well as resources offered at that time by international financial institutions. Pastor[32] asserts that in the 1970s, the International Monetary Fund relaxed the conditions to access funds. Due to these developments, by the second half of the 70s, the Mexican economy had blatant over-borrowing, inflation (27%) and a significant devaluation of its currency (76%) in 1976. The change in government the same year was blessed by the 1977 discovery of "Cantarell" —an important oil reservoir. High international oil prices raised government expectations and so it continued to borrow —using oil as collateral— and spend even more over the following years. However, in 1982, a sudden drop in oil prices left the indebted Mexican government in one of the worst economic crises in its his-

[30] Source: INEGI [National Institute of Statistics and Geography], Banco de Información Económica [Economics Information Bank].

[31] Meyer, *supra* note 27.

[32] Manuel Pastor, *Latin America, the Debt Crisis, and the International Monetary Fund*, 16 (1) Latin American Perspective 79-110 (1989).

tory, leading the country to default on its external debt. Thus, the absence of rents to distribute and the extreme impact it had on all sectors of the society eroded popular support for the PRI.

As a change in power was virtually unthinkable, the only possible way the opposition could start incrementally gaining ground in the political arena was through congress. Since its founding in 1939, the PAN (*Partido Acción Nacional*) has been the main opposition to the PRI. "In the 50s and 60s, with a distinctive ideology and opposite to that of the Mexican Revolution, the PAN obtained visibility and public adepts. However, over that period, its role was merely testimonial."[33]

Although underrepresented in congress, the PAN started to change the dynamics of the political scene. The PRI instituted certain electoral reforms in the 30s, 40s and 50s to enhance presidential control over institutions. These moves alienated the opposition, who, in a strategy that paid off, decided to stop playing the "democratic" game by not proposing presidential candidates and refusing to take the seats won in congress. Hence, the PRI party —always concerned with maintaining the formalities of the democratic game— had to make sure of keeping up appearances. In response, the government offered political liberalization in exchange for the continued participation of opposition parties in the electoral arena.[34]

In the early 60s, the race towards a more democratic system began. However, the dominant party intended to maintain its hegemony and so passed a reform in 1962 to introduce the so called "*diputados de partido*" [party deputies], which was a form of proportional representation (PR) to ensure the participation of other parties. As summarized by Molinar Horcasitas et al.:[35]

> The party deputy system was a two-tier system, with linkage between the tiers to limit the number of seats that a party could win from the list tier […] The nominal tier included 178 seats in SSDs [single seats districts], chosen by plurality in which any party could compete. The list tier was reserved for minority parties, defined as parties with 2.5% or more of the national vote, but which had won fewer than twenty SSDs […] parties were entitled to five seats if they reach the legal threshold of 2.5% of the national vote; then they received one seat for each 0.5% […].

Since the PRI party was confident of its absolute dominance over SSDs, it created the incentives for minority parties to join the democratic game. However, the system established clearly favored minority parties at the expense of

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[33] José Woldenberg, *Estados y partidos: una periodizacion*, 55 (2) Revista Mexicana de Sociología 83-95 (1993).

[34] Juan Molinar Horcacitas & Jeffrey Weldon, *Reforming Electoral Systems in Mexico* in Mixed-Member Electoral Systems – The Best Of Both Worlds? 209-230 (Matthew S. Shugart & Martin P. Wattenberg eds., Oxford University Press, 2003).

[35] *Id.*

the PAN. In 1977, the "*diputado de partido*" system was abandoned in favor of an actual mixed system. The seats in the chamber of deputies/congress were increased to 300 for SSDs and 100 for multi-seat districts (MSDs), which were assigned according to each party's lists. Further reforms were carried out by the ruling party, but now with some negotiation with the opposition. One outcome of these bargaining processes was the 1986 electoral law. Electoral reforms evolved in such a way that delayed the democratization process as they created a rather divided opposition that competed against each other for seats in congress rather than joining forces to overthrow the PRI. Eventually, though, electoral competition arrived.

According to some scholars, the 1988 election under the new law marked the opening to political competition. The PRI faced two strong opposition parties, the historically second strongest party, the PAN, and a coalition of left-wing parties supporting a candidate of the PRD party founded by former PRI members. The PRI was declared the winner with 50.74% of the votes. This was the lowest number of votes received by the incumbent party in its history. And, for the first time ever, the PRI lost its qualified majority in the chamber of deputies required to make constitutional reforms. For Molinar Horcasitas et al.,[36] this moment in time marked the evolution of politics in Mexico and shifted the debate towards political liberalization.

3. *Electoral Reforms of the 1990s and the Subsequent Balance of Power*

Since the 1988 results, further reforms were introduced to the federal electoral law with each party pulling in a different direction. The PRI wanted to restore its former hegemonic position while the opposition parties led by the PAN and the PRD wanted to create a more independent electoral body. In the negotiation process, the PAN accepted a reform which largely benefited the PRI in 1991. However, PAN had two different goals: first, to ensure that winners —of federal states governorships— would be recongnized as such; and second, to make the electoral body more independent. These efforts brought about the creation of the Federal Electoral Institute (IFE), which in 1996 became completely independent.

The 1996 reform and the enactment of the COFIPE[37] (Federal Code for Institutions and Electoral Procedures) were designed to guarantee a fair process and reassert the importance of political parties. Although there has been a series of further reforms to the COFIPE, the voting system used for seats in congress has remained the same, a mixed system with 300 SSDs and 200

[36] *Id.*

[37] Código Federal de Insituciones y Procedimientos Electorales [C.O.F.I.P.E.] [Federal Code for Electoral Institutions and Procedures], Diario Oficial de la Federación [D.O.] 1996 (Mex.).

MSDs.[38] The threshold for PR seats was increased to 2% of the national vote and the cap for overrepresentation was set at 8%.

The results of Chamber of Deputies elections between 1988 and 2009 in Table 1 below clearly show that since 1988 congress has been characterized by the absence of a majority (except in the 55th legislature) and a clear multi-party system with three main parties and some minor parties. Thus, the presidential regime a single party in power and controlling the Chamber of Deputies was no longer in place. Therefore, any president who wanted to carry out a specific agenda would now have to seek support from one or two of the opposition parties.

Table 1. Conformation of the Chamber of Deputies by Legislature 1988-2009

	LIV	LV	LVI	LVII	LVIII	LIX	LX	LXI
Party	*1988-1991*	*1991-1994*	*1994-1997*	*1997-2000*	*2000-2003*	*2003-2006*	*2006-2009*	*2009-2012*
PAN	101	89	119	121	213	151	206	143
PRI	262	320	300	239	211	224	104	237
PRD		41	71	125	51	97	126	71
PT			10	7	6	6	16	13
PVEM				8	11	17	19	21
Others	137*	50			8	5	29	15
Total	500	500	500	500	500	500	500	500

* Others in 1988 stands for the Frente Democrático Nacional, a big coalition of left parties which was disolved after the instalation of the chamber.

Sources: Instituto Federal Electoral, www.ife.org.mx; and for 1988 Cámara de Diputados, www.cddhcu.gob.mx.

The main goal of the electoral reforms of the 1990s was to create a clear, fair and trustworthy legal framework that coincided with the new conditions of plurality and competition. The creation of the IFE and the Federal Electoral Court (TEPJF)[39] was key in achieving the results shown in Table 1. This influence was not just due to their establishing clearer electoral processes, but also their sanctioning and legitimizing election results.

After the results of the Chamber of Deputies elections, presidential power eroded to the point of implosion. The PRI was no longer capable of main-

[38] Composition of the chamber was enlarged from 400 to 500 (100 more MSDs) in a reform carried out in 1986.

[39] Tribunal Electoral del Poder Judicial de la Federación [T.E.P.J.F] [Federal Electoral Court].

taining hegemonic power over institutions. The 1994 election results were proof of a plural population. Though the PRI won the presidential seat, the PAN party consolidated itself as the PRI's main opposition, and PRD remained as a third rival (*see Table 2*). The scenario changed in 2000 when the PAN presidential candidate won the election. These results were unequivocally a show of citizens' commitment to the transition to democracy. The change of power was effected through the so called "*voto util*," which meant that people basically cast their votes for the candidate with more probability of winning against the PRI. People also used their prerogative for a "split vote" by then voting for their preferred party for seats in congress.

Table 2. Presidential Election Results
(1994-2006)

Presidential Elections			
Party	1994-2000	2000-2006	2006-2012
PAN	25.92	43.40	35.89
PRI	48.69	36.80	22.26
PRD	16.59	17.00	35.31
Turnout	77.16	63.97	58.55

Source: IFE, www.ife.org.mx.

The scenario changed again in 2006 in what has been considered the narrowest and most contentious election ever. This time the PRI dropped to the third place —going from 48% of total votes in 1994 to 22% in 2006. In my opinion, this suggests that the "*voto útil*" was used once again as the two parties at the "extremes" of the political spectrum fought for the presidential seat. After much deliberation, the TEPJF declared PAN candidate Felipe Calderón by a difference of just 0.58%. This decision was received with a series of riots and other forms of public protest, particularly in Mexico City, for almost a year. In such an extremely polarized political situation, Congress also showed signs of division.

Hence, for almost 20 years now,[40] citizens have opted to choose their leaders and representatives from different parties, reflecting the country's transition from a somewhat authoritarian regime with a hegemonic party in power to an electoral democracy.[41]

[40] These 20 years span from 1994 to 2012 since the elections to replace the members of Congress who were elected in 2009 will be held in 2012.

[41] Although I agree with Merkel's sound and solid new theory on the analysis of democracy, the merits of the somewhat contentious and imperfect the term "electoral democracy" is beyond the scope of this paper.

Among the many problems new regimes have to face, there is a lack of coordination and cooperation between the executive and legislative branches. This often leads to legislative gridlock, particularly when dealing with "structural reforms" that aim at significantly reforming the constitution or federal laws.

IV. Remaining Threats to Mexican Presidentialism: A Proposal to Enhance the System

However, there are still potential threats to presidentialism Characterized by Sartori as "genius" and "unique,"[42] Mexican presidentialism has consistently adjusted its institutional arrangements to ensure that the system will continue to work: the "winner-takes-all" situation from an executive perspective, and few inducements to engage in cooperative games with the executive, from a legislative standpoint. Thus, legislative gridlock is still a possibility that can hamper attempts to bring about the presidential agenda, as is poor performance resulting in less political stability.

This final section is divided into two sections: the first section addresses the institutional arrangements that can increase the risk of political instability and poor performance from both executive and legislative perspectives; the second section briefly proposes a possible course of action to enhance the institutional arrangements needed to foster cooperation and encourage good performance.

1. *Remaining Threats to Democracy in Mexico*

As Carrillo and Lujambio[43] have pointed out, unusual situations call for greater cooperation/more negotiation among political parties, which in fact entails a new institutional learning process for the polity.[44] Thus, the new balance of power has presented the Mexican system with the new challenge of engaging in cooperative games with the opposition and institutions. In my opinion, the lack of cooperation between the executive and legislative branches, especially in the current administration, has augmented possibility of legislative gridlock. Although the polity has shown maturity in the effective separation of powers environment, the institutional arrangements and the electoral results opened the door for such pitfalls.

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[42] *ESPIRAL: Interview with Giovanni Sartori* (Oct. 11, 2009).

[43] Ulises Carrillo & Alonso Lujambio, *La incertidumbre constitucional. Gobierno dividido y aprobación presupuestal en la LVII Legislatura del Congreso mexicano, 1997-2000*, 60 (2) Revista Mexicana de Sociología 239-263 (1998).

[44] *Id.*

In its bicameral legislative system, the Mexican Constitution gives both chambers and the president the power to present initiatives on almost all matters.[45] The chambers[46] have to approve all initiatives by absolute majority, unless a two-thirds vote has been established in the constitution. Upon its approval in congress, the bill is sent to the executive, who in the absence of comments will officially publish the bill which at the moment of publication becomes a law. The Constitution also establishes a president's power of veto, which congress can only override with two-thirds in both chambers. Only then will the bill become a law.

With these institutional arrangements and the distribution of seats in congress shown in Table 1 since the 2000 and 2006 presidential elections, the possibility of legislative gridlock has been present: the president's party (PAN) did not have the majority, controlling 213/500 and 206/500 seats, respectively. Thus, simple math shows that neither could the president pass legislation without a legislative coalition, nor could the opposition in congress override a presidential veto. After the 2003 and 2009 mid-term elections the conformation of congress changed, leaving the PAN with less than one third of seats and the president in an extremely weak position with no legislative power whatsoever.

As Barracca pointed out,[47] President Fox "experienced the frustrations of trying to rule with a divided government" as he failed to pass important and polemical pieces of legislation, which were blocked by the PRI and the PRD. When President Calderón took office, he showed more sensibility in the bargaining process by negotiating with the opposition in congress —mainly with the PRI— to approve a tax reform at the end of 2006. In 2008, President Calderon embarked on a major reform in the energy sector, the same one former President Fox had attempted to pass when in office, and succeeded. However, the reform was diluted to such an extent that President Fox considered it a Pyrrhic victory in view of what had originally been sent to congress.

The separation of powers and the shift of power towards congress —due to the distribution of a similar number of seats among the three main parties— have changed the Mexican hyper-presidential system to one with a strong separation of powers. Furthermore, the plurality rule for electing the president under the 3+ effective parties system has caused an even split of the votes for the main parties' candidates (one third of the votes for each party).

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[45] Some exceptions are the Revenues Law and the Budget decree in which the lower chamber has the prerogative of initiating the process and the upper chamber (Senate) is responsible for its review.

[46] One exception is the ratification of international treaties, which only need to be approved by the Senate.

[47] Steven Barracca, *Is Mexican Democracy Consolidated?*, 25 (8) Third World Quarterly 1469-1485 (2004).

Thus, as seen in the 2006 presidential election, the difference between the runner-up and the winner can be as little as less than one percentage point. Why can strong separation of powers and close electoral competitions be such an aberrant arrangement?

The fact that the president has to make an effort in bargaining to pass legislation should not be a problem; it is in fact a feature of the separation of powers that is intended to generate more measured policies. As stressed by Mainwaring et al.,[48] party discipline makes it easier for the president to negotiate with party leaders, rather than having to negotiate with individual MCs, thus simplifying the process. However, Cheibub[49] asserts that disciplined parties can hinder the president's ability to form a coalition to approve specific legislation, as in the case of Mexico. Mexico's specific institutional engineering can turn this apparently positive effect into something negative. The combination of strong partisanship with the absence of reelection creates a system in which MCs prefer to follow the party line than that of citizens since MCs cannot be punished with not being reelected by voters, but can be penalized with not being promoted to higher positions by their party leader.

To better illustrate the high level of party discipline in Mexico, I have developed a simple index which, although imperfect, gives a sense of how disciplined parties are when voting on important reforms. The index is based on the following:

— I collected a data set with information on all the votes cast for each constitutional reform between 1998 and 2010 and divided it by legislature;
— The total votes were classified by party (the three main parties plus one of the minor parties, the PVEM)[50] and the way each party member cast his or her vote (for, against or abstention) was further analyzed;
— The simple formula $PD_i = Mv*100/Tv$ was applied to this information with PD_i standing for Party Discipline of Party i; Mv, for the majority of party members voting the same way; and Tv, for the total number of votes that party emitted.
— Finally, all the Legislatures were then added to obtain an average for each party.

[48] Scot Mainwaring et al., *Presidentialism and Democracy: A Critical Appraisal*, 29 (4) Comparative Politics 449-471 (1997).

[49] José A. Cheibub, *Minority Governments, Deadlock Situations, and the Survival of Presidential Democracies*, 53 (3) Comparative Political Studies 284-312 (2002).

[50] I make special mention of the PVEM because it is a party that has consistently met the 2% threshold and by a significant margin (7-8%). Moreover, since 2000, it has established electoral coalitions with both major parties, the PAN and the PRI.

Table 3. Index of Party Discipline

Party Discipline (1997-2010)

Legislature	PRI	PAN	PRD	PVEM	N° Reforms
LVII	99.6	89.4	94.1	100	22
LVIII	91.7	98.1	99.7	95.5	8
LIX	97.8	99.6	98.2	99.4	25
LX	95.6	99.0	91.7	99.2	25
LXI	100	95.4	100	97.3	2
Index 0-100*	96.95	96.29	96.76	98.30	82

* Where 0 is no discipline and 100 is full discipline.

Source: data from Cámara de Diputados, www.cddhcu.gob.mx.

As seen in the results in Table 3, the voting tendencies of each party have been consistent in five legislatures. Taking a closer look, the PAN was the least disciplined party during the 57th Legislature when it was part of the opposition, but that once in power (from 58th Legislature onwards), party discipline increased significantly. The PRI party had almost 99.6% of party discipline when it was last in power, but it became an opposition party, discipline dropped to 91%.

Unlike Lijphart's[51]assertion that presidential systems discourage multipartyism and cohesive parties, as shown in Table 3, the Mexican case is different: parties are the only institutions that can promote candidates for public office, and so party cohesion is strong. In fact, members who do not align themselves with party leadership are dismissed or tend to withdraw from the party to join or found a different party (as in the case of the schism in the PRI, which led to the creation of the PRD).

Incentives for MCs are set up so that MCs clearly align themselves with party leadership. Therefore, if we assume that parties' main concerns —especially for the opposition— is to have access to power (whether executive or legislative) and a successful government increases the odds of remaining in power, opposition party leaders will not engage in cooperative games, MCs will tend to become office-seekers, and citizens will be left out of the equation. Likewise, under such circumstances, as Carrillo et al. pointed out,[52] the opposition has no incentives to cooperate: if they do with successful results, the president will take all the credit, increasing his chances (or those of his party) of staying in power, but if the opposite occurs, all the members of the opposition will share in the failure.

Further concern is presented by the number of "effective parties" in the Mexican presidential system. According to Weldon,[53] the effective number of

[51] Lijphart, *supra* note 9.

[52] Carrillo et al., *supra* note 43.

[53] Jeffrey A. Weldon, *The Consequences of Mexico's Mixed-Member Electoral System, 1988-1997*,

parties (*Nv*) in Mexico has increased with each electoral reform from 1988 to 1997, culminating in an *Nv* of 3.42 in 1997, a figure that has remained almost the same. This is partially due to the fact that low 2% threshold required to remain in the democratic game has created an array of parties coming in and out of the game over the years. Thus, the PAN, the PRI, and the PRD can be considered the three *Nv.* The PVEM, a party that has consistently appeared on the ballots since 1997 and increased its number of seats by forging alliances with one of the three main parties, still lags behind the three major parties. For the sake of simplicity, I will only take into account the *Nv* = 3.

Statistical analysis in Cheibub's work (2002), as well as his argument, suggests that the effective number of political parties increases the likelihood of a minority government. However, the author asserts that it is not the *Nv* that affects presidential systems in terms of the survival of the regime, but rather circumstances of very low pluralism. This opinion is shared by Sartori,[54] in what he calls "moderate pluralism," which "encompasses between three and five relevant parties."

For Cheibub,[55] it is not the existence of <3 *Nv* <5 that is the problem *per se*, but rather the distribution of power (number of seats shared) among these parties, which can lead to a break down in the system since each party will try to put forward its preferred policy. Furthermore, he stresses, any coalitions created within this context would be unstable. To prove that cases in which <3 *Nv* <5 are more likely to generate an even distribution of seats, he develops the "index of equiproportionality" from the total number of seats held by the three major parties weighed against the number of seats held by the largest party. In his own words:[56]

> This last measure is an index of equiproportionality among the three largest parties, at least in the range of cases in which the largest party gets more than 30% of the votes. In this range, the closer this number is to 1, the more concentrated is the distribution of strength among the three largest parties; the closer it is to 3, the more evenly divided are the seats held by the three largest parties.

Replicating the index to reflect the recent composition of the Mexican congress since the alternation in power confirms Cheibub's assertion. Table 4 shows that in three out of four elections, the index was above 2.10 whereas only in one (2009), it was 1.90, which is still relatively high. It should be noted that the index of equiproportionality decreases in mid-term elections (when only the lower chamber is elected), but in presidential elections, the president's party usually emerges as the strongest.

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in Mixed-Member Electoral Systems – The Best of Both Worlds?, *supra* note 34, at 447-476.

[54] Giovanni Sartori, Parties and Party Systems: A Framework for Analysis (Cambridge University Press, 1976).

[55] Cheibub, *supra n*ote 49.

[56] *Id.*

Table 4. Index of Equiproportionality by Election (2000-2006)*

	Presidential Election		*Midterm Election*	
	2000	*2006*	*2003*	*2009*
PAN	213	206	151	143
PRI	211	104	224	237
PRD	51	126	97	71
Total	475	436	472	451
Index 1-3	2.23	2.12	2.11	1.90

* The table shows the number of MCs resulting from each election, not the final configuration of the chamber.

Hence, we can say that the Mexican system is one with 3+ main parties with an even distribution of power in which coalitions —but not long-lasting ones— can be formed for specific initiatives, making it possible for the opposition to blackmail the president's party. This encumbers the president's capacity for implementing his agenda, or at least the cost increases when it needs to go through congress, and therefore can lead to poor government performance if the president does not meet the demands of the opposition.

2. *Enhancing the Mexican Presidential System*

Throughout this article I have attempted to depict a somewhat clear, though not complete, picture of the Mexican presidential system since its creation and the rationale of its composition as it stands today. Presidentialism in Mexico has evolved in two different directions: 1) as a strategic response from the incumbent party to growing pressure from the opposition, which consisted of reforming the electoral system in such a way that discouraged collaboration among opposition parties and reinforced the hegemony of the party in power;[57] and 2) as an array of somewhat collaborative efforts made by the three main parties to promote more equal competition, independent electoral institutions and fair and democratic elections.

However, as shown above, some threats persist: (i) low levels of legitimacy for the executive branch, (ii) party-oriented and office-seeking legislators; and (iii) a lack of cooperation. As a result, there is much need for improvement. The final section of this article presents some reforms that can be made to

[57] Alberto Díaz-Cayeros & Beatriz Magaloni, *Mexico: Designing Electoral Rules by a Dominant Party, in* Handbook of Electoral System Choice 145-154 (Joseph Colomer ed., Palgrave Macmillan, 2004).

institutional arrangements to address each of the abovementioned threats and therefore enhance the Mexican presidential system.

A. *Endowing Legitimacy to the Executive Mandate*

The combination of plurality rule and three political parties with different positions on the political spectrum has brought the system to the precarious situation in which the president won the election by less than one percent.[58] To solve this first problem, one proposal would be to change the current presidential election rules to a majority rule with a second-round runoff. This would legitimize the president without harming the plural nature of the system. As Colomer says,[59]

> An electoral system based on the majority principle which tends to produce a single, absolute winner and subsequent absolute losers, must be considered a more risky choice […] The corresponding results to be found in a long-term historical perspective should thus be increasing numbers and proportions of electoral system choices in favor of those formulas and procedures producing multiple winners, as well as a relative reduction of existing electoral systems producing a single absolute winner.

A second round runoff would give winners more legitimacy: if no candidate receives an absolute majority in the first round, the two candidates with the most votes will go on to a second round —forcing both candidates to forge a stable coalition.

Even though I believe this would be the best solution for Mexican presidentialism, some drawbacks of this system must be mentioned. A second round runoff can give rise to new political parties, either because they expect to reach the second round or simply because they want to be part of a winning coalition and thus have a stake —however minor— in government. Nevertheless, with this practice, small parties can come to blackmail parties that make it to the second round. To prevent a "flood" of small political parties, the minimum threshold to be considered a political party should be doubled from 2% to 4%. A second caveat is related to turnout. A second round is likely to produce lower turnout, so if the system is already experiencing low levels of participation, the second round may not give a clear winner. To avoid such problems, the second round should coincide with legislative elections. Finally, a second round is perhaps more costly for citizens. Good cam-

[58] In 2006, the runner-up candidate from the PRD refused to recognize the results of the elections and challenged presidential authority, electoral institutions and the electoral body (IFE) itself. He began a show of "peaceful" resistance which lasted for almost a year.

[59] Joseph Colomer, *The Strategy and History in Electoral System Choice*, in HANDBOOK OF ELECTORAL SYSTEM CHOICE, *supra* note 57, at 3-80.

paign regulations and caps on resource allocation can minimize this effect, but not entirely. I also believe the supplementary vote should be analyzed in more detail as it represents an option for an instant runoff system, which can help avoid a costly second round.

B. *Reorienting Legislators towards Their Constituencies*

The constitutional prohibition of immediate reelection for all elected offices is a threat that hinders a political system from performing effectively. As mentioned in the second section of this article, the ban on reelection was put forward at the time of the Mexican revolution and still has a negative connotation in people's minds. In terms of congress, consecutive reelection was abolished in 1933, perhaps as the executive branch's way of enhancing its power in response to a more assertive congress.

In congress, the division of labor generally leads its members to acquire a certain degree of specialization that can benefit an institution. By sharing activities, giving unequal influence in different areas to different members of the institution, incentives are created for members to get to know their areas, developing specialized knowledge and accumulating relevant current information.[60]

In the absence of consecutive reelection, MCs have a three-year term limit which has several negative consequences: (i) it hampers their professionalization by not allowing them to advance in terms of a legislative career; (ii) it reduces their desire to engage in long-term policies (or projects); (iii) in most cases, it severs bonds with their constituencies from their very first day in office because MCs are not accountable to their constituents; (iv) their loyalties, as well as their interests, lie with the party; (v) the combination of points iii and iv transforms legislators into office-seekers; and (vi) a side effect is that it limits the possibility of carrying out civil service work with strong technical skills because senior staff is also constrained by the term limit.

Those defending the ban on consecutive reelection claim that the effects are not that negative since MCs can run for that same office again three years later. Furthermore, they point out, an MC can serve a 6-year term as Senator and then immediately be elected to the Chamber of Deputies, thus ensuring a 9-year period in congress, equal to three consecutive terms in the lower chamber. Lujambio[61] disputes these opinions with evidence showing that between 1933 and 1995, only 379 (9%) out of 4,227 PRI MCs have been reelected (either by moving from one chamber to the other, or being elected again in a non consecutive period) at least once. Similar information for the

[60] Kenneth A. Shepsle & Mark S. Bonchek, Analyzing Politics. Rationality, Behavior and Institutions (W.W. Norton and Company, INC) (1997).

[61] Alonso Lujambio, Federalismo y Congreso en el Cambio Político de México (Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México) (1996).

PAN demonstrates that only 52 (11%) of 455 MCs from this party have been reelected since 1946.

Therefore, I propose reinstating consecutive reelection in both chambers, in the lower chamber for a maximum of three terms (12 years), and make it concide with one consecutive reelection in the senate (2 periods of 6 years). By granting greater independence from the centralized influence of their political parties, MCs will be able to redirect their attention to their constituents. This reform further aims at making MCs more accountable and more identifiable to citizens since less than the 5% of the population know who their representatives in congress are.

Although I am well aware of the perils that some scholars associate with reelection, I am confident that the advantages are greater than the disadvantages.

C. *Fostering Cooperation among Branches*

Of all the threats to the system and proposals to remedy the situation, I consider fostering cooperation the most complex. As discussed in the first section of this article, the separation of powers can bring some positive effects (checks and balances) to the regime, but it also has some negative aspects, the most contentious being the lack of cooperation among the different branches of power. We have discussed throughout this article we have given the historical and institutional reasons behind the breakdown of Mexico's institutional engineering.

Some scholars propose that presidential systems should abandon such institutional arrangements and move towards a parliamentary system (*i.e.* Linz, Valenzuela).[62] Others have hinted that semi-presidential systems are more stable and solve some of the core problems of presidential systems (*i.e.* Elgie [1999, 2007], Sartori [1994, 1997], Lijphart [1994]).

Changing institutional arrangements from one system to another depends on specific aspects inherent to each country (history, momentum, balance of power, and so on). Sartori[63] presents an alternative to the multi-cited systems: "alternating presidentialism" or "intermittent presidentialism." This system entails what he calls a "double engine," that is, a parliamentary system as the primary engine and a presidential system to be implemented when the former fails.

Sartori[64] proposes this type of institutional arrangement for Mexico, stating that it would suit the country better than a semi-presidential system: "my suggestion […] relates to the stage at which Mexico will be confronted with the reinforcement of parliament and executive-level transformation."[65] Even

[62] Linz, *supra* note 6.

[63] Sartori, *supra* note 5.

[64] *Id.*

[65] *Id.*

though I concur with Sartori's "prediction" that Mexico would face the challenge of reinforcing parliament, as is the case today, I do not fully agree that it would be easy to implement this particular arrangement because presidential and parliamentary system constitutions simply require the presence of a prime minister or president, respectively. I believe alternating presidentialism would be difficult to understand and complicated to implement. It would most likely not be seen as a positive change, but rather an institutional breakdown.

Sartori's proposal would increase competition since the president would be waiting for the parliamentary system to fall apart so he can take it over. Therefore, I propose an alternative solution that could foster cooperation among institutions: unlike "alternating" systems, this would entail "coexistence" so that the system can work as a presidential or semi-presidential one in terms of election results. This could be achieved by instating three features: (i) a Head of Congress; (ii) congressional ratification of cabinet members; and (iii) line item veto and earmarked (preferential) initiatives.[66]

A Head of Congress (HC) has to some extent already been included in the Mexican Constitution, which names the president of the Chamber of Deputies the president of the congress. Therefore, only a slight change in name would illustrate the change in its new functions. The HC would be selected from the 500 MCs and elected by a two-thirds vote in the chamber, thus garnering the confidence and support of the legislature. The president of the Chamber of Deputies would remain in place and aid the HC with procedural duties of the chamber. The HC's main function would be to act as a liaison between the executive and legislative branches. The HC would be included in cabinet meetings but not have a vote. In situations of a divided government, the HC could find common ground to put forward a shared agenda, or simply champion the congress agenda. In such cases, the government would be more semi-presidential.

Cabinet ratification by the legislature is nothing new. My specific proposal is to introduce the ratification process as a constitutional requirement. Appointments would still be a presidential prerogative, but the cabinet would be ratified by a simple majority vote in the chamber. A recent collaborative study carried out by the Institute for Legal Research of the National Autonomous University of Mexico (UNAM) and the Mexican Senate proposed that certain cabinet members (those deemed as being more involved in national and foreign policy) should be ratified by the Senate and others, by the Chamber of Deputies. Although I do not focus on the role of the Senate in this article, I subscribe to this combined process of ratification for cabinet members. Dis-

[66] By the time this article was written, the Mexican congress began discussions regarding political reform that touches upon certain aspects addressed in this article, such as the reelection, line item veto, earmarked initiative and ratification of cabinet by congress, among others. Before the publication of the article, congress enacted a constitutional reform (November 2011) introducing some of these features while leaving others for further analysis and deliberation.

missal should still be the prerogative of the executive, but if two thirds of the cabinet opposes the dismissal, the HC would then have the decisive vote.

Finally, line item veto and earmarked or preferential initiative should be introduced. Even though the presidential power of absolute veto tends to reinforce the executive's power (control over the legislative process), an absolute veto tends to reduce the likelihood of its being implemented. Also, an absolute veto dismisses an entire initiative when perhaps most of it might be approved or even desired by the president. With a line item veto, the president would be able to publish pieces of good legislation and remove (veto) the unsustainable parts, without having to restart the complete legislative process. In terms of preferential initiatives, this has been also proposed by the president. Just as the so-called "pocket veto" was recently eliminated from the constitution thus prohibiting the president from keeping an initiative approved by congress from being published, the preferential initiative would allow the president to present a specified number of initiatives per legislature for congress to discuss in a timely manner. This would prevent congress from having gatekeeper powers over relevant initiatives.

Table 5 shows the possible scenarios for the proposed reforms. The most likely outcome is scenario number 3, as a runoff tends to create a coalition government and a coalition may be expected to perform the same way it does in congress. However, if citizens decide to split their votes (as has been happening), scenario number 4 would be more likely. The third column shows that in scenarios 1 and 3, the system would be expected to work like a presidential system —though with a coalition in the former. Meanwhile, scenarios 2 and 4 would be under a more semi-presidential system under the leadership of an HC (or prime-minister in semi-presidential systems), which according to Elgie and Moestrup[67] would be the most desirable outcome —at least under a semi-presidentialism system.

Table 5. Possible Scenarios under the New Institutional Arrangements

	Electoral Outcomes		
	Executive	*Legislative*	*System Type*
Scenario 1	Single Party	Majority	Presidential
Scenario 2	Single Party	Divided	Semi-presidential/ shared power
Scenario 3	Coalition	Majority Coalition	Presidential/coalition in government
Scenario 4	Coalition	No Majority	Semi-presidential/ shared power

[67] Robert Elgie & Sophia Moestrup, *The Choice of Semi-Presidentialism and its Consecuences*, *in* Semi-Presidentialism Outside Europe. A Comparative Study 237-248 (Robert Elgie & Sophia Moestrup eds., Routledge) (2007).

In an effort to rectify some discrepancies that may result from the separation of powers, I believe a combination of the three reforms can reinforce both the executive and legislative branches, as well as, and more importantly, foster cooperation among institutions under a different set of institutional arrangements. Depending on the specific circumstances (stemming from electoral results), the system may work as a purely presidential system while in others, it may work like semi-parliamentary system.

IV. Conclusions

Over the past two decades, the Mexican political system has undergone several reforms to adapt the presidential regime to the new conditions of pluralism and citizens' increased demands for accountability. As a result, the system has experienced a significant transformation on establishing more democratic institutions. Granting independence to each of these institutions to ensure an effective separation of powers has clearly been a positive step towards democratization in Mexico, despite its long history of authoritarian regimes. With the new balance of power and institutional setting, the system has succeeded in becoming an electoral democracy, but still does not have adequate institutional engineering.

Since the PRI instituted electoral reforms that were mainly aimed at enhancing the party's power over other institutions and were reactions to the political atmosphere of the time and growing demands from the opposition, the reforms had some unexpected outcomes and thus the path towards democracy has been harmful. Regardless of the debate as to which system is better or more effective, institutional arrangements under presidentialism generally present some dangers that need to be addressed. The Mexican system is no exception, though I believe a measured shift toward a parliamentary system would be less dramatic and therefore preferable.

My proposal attempts to correct certain discrepancies that persist in the institutional engineering of Mexico's presidential system by: (i) introducing a second-round runoff to address issues of legitimacy; (ii) introducing reelections so that MCs become more accountable to their constituencies than being mainly guided by party interests as mere policy-seekers; and (iii) establishing a new institutional setting that would foster cooperation among branches by instituting: a) a "Head of Congress", which would be in charge of the liaison with the executive and occasionally embrace further responsibilities (when the system becomes more semi-presidential); b) the requirement of cabinet ratification by the congress to create a sense of co-responsibility in the executive's performance, and; c) the line item veto and preferential or earmarked initiative leading to a more timely legislative process for structural reforms.

These are not only desirable reforms for better government performance and political stability in Mexico; they are also feasible since they do not require major changes in institutional arrangements. Some proposals have already been proposed and are gaining more and more support in the political sphere and more importantly from the civil society.

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THE DEVELOPMENT OF THE MEDIA AND THE PUBLIC SPHERE IN MEXICO

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Abstract. *This article reviews the development of the Mexican media, both broadcast and print, through an analysis of their current legal framework, culture, ownership structure and common practices. It is based on archival research, interviews and a review of the available literature. Its analytical framework is based on concepts of the theory of deliberative democracy developed by contemporary philosophers such as Jürgen Habermas, James Bohman, Jane Mansbridge and Joshua Cohen. Within this framework, it argues that the major obstacles to democracy in Mexico, which include social and economic inequalities, patronage and a weak rule of law, also constitute obstacles to the deliberative development of the Mexican media.*

Key Words: *Mexican media, deliberative democracy, public sphere, democracy in Mexico.*

Resumen. *El presente artículo es un estudio del desarrollo deliberativo de los medios de comunicación mexicanos, tanto electrónicos como impresos, a través del análisis de su marco jurídico vigente, cultura profesional y su estructura de propiedad. Esta investigación se basa en la recopilación y análisis de archivos, la realización de entrevistas y la revisión del estado de la cuestión sobre el objeto de estudio. Su marco analítico se basa en conceptos específicos de la teoría de la democracia deliberativa desarrollada por los filósofos políticos Jürgen Habermas, James Bohman, Jane Mansbridge y Joshua Cohen. Dentro de este marco, su argumento es que los obstáculos mayores para la democracia en México, que incluyen las desigualdades sociales y económicas, la cultura clientelar y la debilidad del estado de derecho, constituyen también obstáculos para el desarrollo deliberativo de los medios de comunicación mexicanos.*

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Palabras clave: *Medios de comunicación mexicanos, democracia deliberativa, esfera pública, democracia en México*.

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I. Introduction

This article evaluates the actual and potential contribution of the Mexican media to the development of a public sphere based on core concepts and definitions of deliberation provided by Habermas, Bohman, Mansbridge and Cohen. It explores the extent to which the three elements of the "ideal deliberative procedure" (ideal speech situation, discourse ethics and fair preference aggregation) are fulfilled in the Mexican public sphere and assesses the quality of "civic dialogue." The element of "fair preference aggregation" will be considered indirectly, according to the degree in which the Mexican media order the electoral institutional system toward this fairness. The article ends by judging the extent to which structural deficiencies in Mexico have deterred the deliberative development of its media by encouraging a culture of patronage, allowing the persistence of bias in favor of politically and economically powerful interests, and hindering the rule of law.

Ideally, the media should encourage diversity, access for civil society, a more public service approach to content, civic journalism, a balanced coverage of the perspectives of civil society and the promotion of reasoned debates within and between civil society and public authorities. This would encourage civic dialogue, support the elements of the "ideal deliberative procedure" (the ideal speech situation and discourse ethics) in the Mexican public sphere and contribute indirectly to fair preference aggregation in the Mexican electoral system. Through a review of literature, the analysis of the legal framework, a case study of the debate on the reform to this framework, interviews and archival research, this article examines the current structure and culture of

the Mexican media and evaluates to what extent it contributes to developing a deliberative public sphere in Mexico.

According to the contributions of Habermas, Bohman, Mansbridge and Cohen to the theory of deliberative democracy, the deliberative quality of decision and opinion-making processes depends on fulfilling the counterfactual assumptions of communication (the "ideal speech situation"), implementing "discourse ethics," and fairly gathering preferences in case rational consensus is impossible to achieve in these processes. Cohen[1] and Habermas[2] have established that the "ideal deliberative procedure" should be bound only by "assumptions of communication" (the "ideal speech situation") and rules of argumentation ("discourse ethics"), and that the outcome should be "free and reasoned agreement among equals."

An "ideal speech situation" as defined by Bohman is an "ideal situation of communicative equality among deliberators" in which all speakers enjoy equal opportunity to speak, to initiate any type of utterance or interaction, and to adopt any role in the communication or dialogue.[3] This implies that the exchange of arguments (deliberative communication among speakers) should be *free, equal, plural* and *inclusive* and that in principle, any deliberation can be considered procedurally democratic, fair and legitimate if it fulfills these "counterfactual assumptions" or "principles" in the deliberative communication among speakers.

However, fulfilling the conditions for an "ideal speech situation" is not enough to achieve an "ideal deliberative procedure." We also need to conform to "discourse ethics" in the exchange of arguments among deliberators. These are defined by Habermas as "communicative conditions of argumentation that make impartial judgment possible."[4] This means that deliberators should (a) justify proposals and positions by means of arguments, (b) duly respect the different arguments given in the deliberation, (c) be open to the participation of other deliberators, (d) authentically mean what they say in the deliberation (be truthful), (e) frame arguments in terms of the common good, and (f) aim to eventually achieve rational consensus, even if they end their deliberations through majority rule.[5] Turning to the realm of representative democracy, Mansbridge describes "civic dialogue" as the "pre-deliberative

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[1] Joshua Cohen, *Deliberative Democracy*, in Deliberation, Participation and Democracy. Can the People Govern? 219-236 (Shawn W. Rosenberg ed., Palgrave Macmillan, 2007).

[2] See Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 304-308 (Cambridge: Polity Press, 1996); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in Democracy and Difference. Contesting the Boundaries of the Politica 72-75 (Seyla Benhabib ed., Princeton University Press, 1996).

[3] See James Bohman, Public Deliberation, Pluralism, Complexity and Democracy 120 (Cambridge, Massachusetts: MIT Press, 1996).

[4] Habermas, *supra* note 2, at 230.

[5] Jurg Steiner *et al.*, Deliberative Politics in Action: Analyzing Parliamentary Discourse 1-42 (Cambridge University Press, 2004).

act of sharing information about perspectives," and defines the "fair preference aggregation" as a "regulative criterion that prescribes equal power for each participant in decision-making processes."[6]

II. Importance of the Media in Developing a Deliberative Culture in the Public Sphere

The media is perhaps the most important space in which communicative interaction among citizens can take place, and where citizens can influence each other to develop reasoned opinions on public affairs. As Daniel C. Hallin argues, if we find a tradition of advocacy reporting, the instrumentalization of privately owned media or the politicization of public broadcasting in a given political community, the transition to democracy in this community becomes difficult to achieve.[7] The democratic nature of a political community depends on the way opinions about public affairs are shaped and formed in the public sphere. So in order to assess the deliberative quality of the Mexican public sphere, it is important to consider the fairness of the processes by which Mexican citizens arrive at an opinion on public issues and through which those opinions are taken into account in decision-making processes. The first aspect is related to fulfilling the "ideal speech situation" (communicative equality) and exercising "discourse ethics" in the public sphere, while the second is related to the rule of law to achieve fair preference aggregation through the Mexican electoral system.

In this regard, important aspects of the democratic transition in Mexico are restrictions on freedom of speech in the Mexican media, the prevailing culture, the kind of partisan journalism that has been practiced, and the limited degree of citizens' access to public information and opportunities to have their voices heard.

If democracy is conceived as a forum rather than a market, the analysis of the public sphere becomes indispensable to understand the deliberative content and potential of a particular political regime, because it is precisely there, in the public sphere, where citizens form their public opinion and can fully exercise their freedom and equality to influence the outcome of the decision-making processes carried out in representative political institutions. At the same time, fair preference aggregation in voting is meaningless if citizens are unable to exercise civil liberties such as freedom of speech and freedom of association, and thereby form independent opinions which inform their

[6] Jane Mansbridge, *Deliberative Democracy or Democratic Deliberation?*, in Deliberation, Participation and Democracy. Can the People Govern? 254-263 (Shawn W. Rosenberg ed., Palgrave Macmillan, 2007).

[7] See Daniel C. Hallin & Papathanossopoulos Stylianos, *Political Clientelism and the Media: Southern Europe and Latin America in Comparative Perspective*, 24 Media, Culture and Society 3-5 (2002).

vote. The democratic quality of the renewal of positions in formal political institutions resides not only in the transparency of the electoral process (the fair preference aggregation), but also in the real exercise of the procedural and substantive values of deliberative democracy (fulfilling the ideal speech situation and exercising discourse ethics) in the public sphere. If the process through which opinions on public issues are formed is manipulated, exclusive, biased and lacking in transparency, a political system will be imbued with an undemocratic character since the actions of a small number of people will unduly influence citizens' attitude toward specific policies or laws.

In order to improve the deliberative quality of the Mexican public sphere, various conditions are necessary: a) citizens' willingness to participate in this sphere, b) sufficient political awareness among citizens to influence opinion-making processes, c) a reasonable degree of equality in terms of resources and opportunities of access to means of social communication, d) the development of civic journalism, e) the dissemination of trustworthy information in the media. It is also essential to consider the social and economic forces that decide the kind of information to be disseminated by the media since this power can substantially influence citizens' opinions about public affairs and push decision-making processes in representative political institutions in particular directions for reasons of electoral advantage.

In order to further Mexico's transition to democracy, it is therefore necessary to promote the development and transformation of its public sphere. This requires reforming the legal framework in which the media operate, as well as its ownership and journalistic culture. There is also the need to foster a public service approach in using the media and restrain the market approach, which has had negative consequences in the process of transforming Mexico's political regime.

Among the negative consequences of an excessive market approach to the Mexican media we find: a) a deepening of inequalities in resources, opportunities and capabilities among Mexicans as regards political participation through the media, b) an alienation of civil society from politics, c) conflicting interests between the owners of the media and the community as a whole and d) broadcasting of programs that do not contribute to citizens' deliberative culture, but disseminate social values that are destructive to democracy.

Although the Mexican Constitution has established principles to enable the federal government to guide the use of the media in the interest of the entire community, secondary law does not establish the rules, institutions and methods through which these principles are to be implemented. As a result, secondary law does not promote a deliberative approach to democracy in the media. On the other hand, Mexico needs to promote more diversity and competition within commercial broadcasting media to limit the power of the business elite that controls them. More powers and rights need to be granted to cultural broadcasting media, especially the right to find sponsors that en-

able them to produce high quality programs that enhance the political culture of Mexicans and allow them to contribute effectively to the opinion-making process of the public sphere.[8]

Historically speaking, the owners of the media and the members of the post-revolutionary regime created a system of mutual favors in order to preserve their privileges. This system is an obstacle to the development of a deliberative public sphere. Mexico's post-revolutionary political regime encouraged an oligarchic ownership of broadcasting media, whose extreme profit-oriented logic discouraged civic journalism and encouraged low quality journalism. In practical terms, the logic of broadcasting media owners was contrary to the logic of public service set forth in the Constitution for the use of this kind of media. Unfortunately, this system of mutual privileges has undermined the balance, diversity and plurality of broadcasting media and has made Mexico's transition to democracy even more difficult to achieve.[9]

III. Debate in the Public Sphere and the Media in Mexico

In order to assess the contribution of the media to the deliberative quality of the Mexican public sphere, I explore two arguments: the first is a theoretical and normative argument on the conditions, principles and characteristics of the media that contribute to the deliberative development of the public sphere, regardless of its context; and the second is an argument on the specific conditions and factors Mexico needs to develop suitable media for its transition to democracy.

In the first debate, Hughes and Lawson affirm that pluralism and diversity in the ownership of the media contribute to democratic transitions,[10] while McCleneghan and Ragland insist that these principles should not be restricted to commercial broadcasting media, but should also apply to public service and community broadcasting media.[11] These scholars implicitly seek to improve communicative equality (the "ideal speech situation") in the public sphere as a means to further democracy.

Parkinson argues that political debate in the media is commonly misinformed and based on "rickety opinions"; that the media focus on the "horse race" of electoral politics rather than on issues, institutions and ideas; and

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[8] See Ernesto Villanueva, *Public Media: Approximations for a Normative Model for Mexico*, 4 Comparative Media Law Journal 134 (2004).

[9] See Hallin & Stylianos, *supra* note 7, at 181.

[10] See Sallie Hughes & Chappell Lawson, *Propaganda and Crony Capitalism: Partisan Bias in Mexican Television News*, 39 (3) Latin American Research Review 83-85 (2004).

[11] See J. Sean Mceneghan & Ruth Ann Ragland, *Municipal Elections and Community Media*, 39 The Social Science Journal 207-208 (2002).

that powerful interests can dominate or distort the agenda of the media.[12] He implicitly criticizes the lack of discourse ethics in the media to achieve the common good. Staats argues for the independence and autonomy of the media, not only from political authorities, but especially from corporate power, which exercises news censorship through advertising, especially in countries where there is a market approach to ownership.[13] In order to avoid a situation in which the public media can be used as a political instrument for partisan propaganda, some models of social representation, especially in Europe, have emerged for governing broadcasting boards.[14] Again, such measures arguably seek to enhance communicative equality among citizens through the media.

In the United States, the influence of corporate companies in news reporting is decisive, especially if advertising is the main source of revenue for this kind of media. To reduce this, Villanueva has proposed the power of corporate companies be limited by encouraging commercial and non-commercial media to obtain alternative sources of funding.[15]

The transformation of journalistic culture has been proposed as an indispensable condition to promote democracy and develop a deliberative public sphere. Parkinson advocates "civic oriented journalism,"[16] which entails various practices in the media, such as creating deliberative spaces to promote debate on public issues, discussing thematic news and disseminating cultural programs that provide high quality information on public issues.[17] Civic journalism promotes the deliberative quality of the public sphere by encouraging a common good approach, the authenticity and the objective of rational consensus (exercising discourse ethics) in public opinion-making processes.

Civic engagement and participation in communicative interaction have been discussed as independent variables in academic literature and as important factors for the democratic transformation of the public sphere since they constitute conditions for different voices of society be heard and taken into account in the public-opinion making process.[18] In other words, these values are indispensable for enhancing communicative equality (the "ideal speech situation") among citizens in the public sphere. Jerit, Barabas and Bolsen have

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[12] See John Parkinson, *Rickety Bridges: Using the Media in Deliberative Democracy*, 36 (1) British Journal of Political Science 176 (2002).

[13] See Joseph L. Staats, *Habermas and Democratic Theory: The Threat to Democracy of Unchecked Corporate Power*, 57 (4) Political Research Quarterly 590 (2004).

[14] See Paul Linnarz, *Freedom of the Press Experienced – The Model of the German Bundespressekonferenz e. V as an Opportunity for Latin America*, 4 Comparative Media Law Journal 54 (2004).

[15] See Villanueva, *supra* note 8, at 134.

[16] See Parkinson, *supra* note 12, at 179.

[17] See David D. Kurpius & Andrew Mendelson , *A Case Study of Deliberative Democracy on Television: Civic Dialogue on C – SPAN Call in Shows*, 79 (3) Journalism and Mass Communication Quarterly 588 (2002).

[18] See Peter Dahlgren, *In Search of the Talkative Public: Media, Deliberative Democracy and Civic Culture*, 9 (3) The Public 20-22 (2002).

argued that when there is an adequate information environment, citizens enjoy more opportunities to learn about politics, thus enhancing their political knowledge; but this environment depends heavily on media coverage, which determines the kind of issues that are given prominence in the public sphere.[19]

Staats argues that public opinion is authentic if citizens can both express and receive opinions in the public sphere, if they are able to respond to the comments or opinions of others and if they find outlets for effective action. He contrasts this with a "pathological" condition of public opinion in the public sphere in which not every citizen can express his or her views on public affairs, citizens are prevented from responding to opinions or criticism for whatever reason, and the media are controlled and infiltrated by agents in favor of the governing regime.[20] Staats implicitly argues that this pathological condition exists when there is insufficient communicative equality in the public sphere for citizens to express their opinions.

Dalhgren argues that the easy access to means of social communication by different groups of civil society under a suitable legal framework, and the creation of social spaces for public discussion constitute appropriate means to overcome the pathological condition of public opinion in the public sphere.[21] In other words, he promotes measures that enhance communicative equality among citizens so that public opinion may become truly democratic.

Beyond this, the debate on the media and the public sphere extends to the question of whether it should be approached as a market governed by the laws of supply and demand, or as a public service working for the general interest of society. For example, Keane assesses the benefits and disadvantages of the market approach to the media and compares it with the public service approach aimed at developing a truly democratic public sphere.[22] Hughes and Lawson argue that the market approach, which does have some positive features, should be limited through the implementation of public service obligations placed upon the owners of commercial media in order to moderate the owners' extreme profit mentality.[23] Such public service obligations are implicitly aimed at promoting communicative equality in the public sphere so that governments are subjected to democratic control.

Against this background, the empirical debate on the media and Mexico's transition to democracy has identified a range of factors that have variously promoted and prevented the development of Mexico's public sphere. According to Wallis, one positive factor that helped Mexico's transition to democracy was its economic liberalization, which led to the privatization of

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[19] See Jennifer Jerit, Jason Barabas & Toby Bolsen, *Citizens, Knowledge, and the Information Environment*, 50 (2) American Journal of Political Science 266 (2006).

[20] See Staats, *supra* note 13, at 586.

[21] See Dahlgren, *supra* note 18, at 12.

[22] See John Keane, The Media and Democracy, 116-121 (Cambridge: Polity Press, 1991).

[23] See Sallie Hughes & Chappel Lawson, *The Barriers to Media Opening in Latin America*, 22 Political Communication 18 (2005).

a second national television broadcasting company, an action that brought competition into this area, which had been monopolized by the corporate power of Televisa (*Televisión Vía Satélite*, S.A.).[24] Wallis argues that the new competition for audience preferences between the two national television broadcasting companies encouraged them to improve their news reporting style and provide more diversity and pluralism in their content. Nevertheless, they did not substantially improve the quality of information since most of their news remained episodic, focused on the immediate events of the day rather than on an in-depth analysis of the background.[25]

Hughes and Lawson argue that an important factor that has undermined freedom in Mexico's public sphere, especially recently, has been violence against journalists. According to these authors, these repressive measures have not been exercised exclusively by political authorities, but especially by powerful social and economic forces seeking to protect privileges threatened by the dissemination of information.[26] They also argue that this violence has proliferated because of the weakness of the rule of law, which allows crimes against free press to go unpunished.[27] Addressing a related issue, Azurmendi called for the decriminalization of challenges to honor, personal and family privacy, and individual image, since their status as crimes has "chilled assertive journalism" and discouraged journalists from disclosing information on corruption, particularly in States where the level of transparency is low and access to public information is constantly made difficult by local authorities.[28] The enforcement of the law for these offences has served more to intimidate journalists than for any higher public purpose.

On a similar issue, Ventura considers the protection and confidentiality of journalists' sources essential for the protection of access to public information in Mexico, especially when the lack of transparency in some federal agencies hinders such access.[29] He argues that journalist-source confidentiality is not fully acknowledged or protected in the Mexican legal and judicial system in relation, for example, to uncovering corruption in public affairs, which constitutes an obstacle to free journalism.[30] In fact, crimes against the free journalism have become an effective means to curtail freedom of speech and promote self-censorship.[31] Fear has spread among journalists over reprisals

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[24] See Darrin Wallis, *The Media and Democratic Change in Mexico*, 57 (1) Parliamentary Affairs 120 (2004).

[25] See *id.*

[26] See Hughes & Lawson, *supra* note 23, at 11.

[27] See *id*. at 17.

[28] See Ana Azurmendi, *The Decriminalization of Interferences in the Rights to Honour, Personal and Family Privacy, and one's own image*, 8 Comparative Media Law Journal 3-29 (2006).

[29] See Adrián Ventura, *Professional Secrecy in Journalism is Essential to Freedom*, 4 Comparative Media Law Journal 113-128 (2004).

[30] See *id.* at 119.

[31] See Patricia Muñoz Ríos, *Falta la protección a periodistas en México,* La Jornada, October

for making public information regarding the collusion of public authorities and prominent figures in drug trafficking, for example, which has effectively silenced them in recent times.[32] Such crimes are a serious threat to the development of a deliberative public sphere in Mexico, probably more than the low level of transparency and limited access to public information in certain federal agencies, since they constitute a worse deterrent for free journalism.[33] These crimes completely undermine the "ideal speech situation" in the public sphere, and facilitate the re-emergence of authoritarianism in Mexico.

More broadly, Villanueva argues that adequate access to public information is an essential condition for Mexico's transition to democracy, the accountability of its political system and the prospects for alternation in power.[34] Hughes and Lawson argue that the legal framework in Mexico must ensure transparency, even-handedness in granting broadcasting concessions and impartiality in legal supervision of these concessions.[35] All these proposals, aimed at enhancing communicative equality among citizens in the public sphere through the media, reflect the shortcomings of the present situation in Mexico in this regard.

IV. Constitutional and Legal Framework

Article 25 of the Mexican Constitution stipulates the principle of the country's general interest in economic activities and confers the management of national development to the Mexican State. This is mandated to support a democratic regime and allows the Mexican State to regulate the media in the general interest of Mexico.[36] Although Article 25 implicitly grants public authorities the power to guide media activity to benefit the country's democratic development, these constitutional powers are not exercised to a significant extent.

The Constitution also guarantees political parties permanent access to the media for purposes of electoral campaigns.[37] This measure secures a thresh-

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25, 2011, *available at* http://www.jornada.unam.mx/2011/10/25/política/013n1pol (last accessed 14 January 2012).

[32] See AFP, "*Ser reportero en Ciudad Juárez*", (June 22, 2011), *available at:* http://noticias.univision.com/mexico/noticias/article/2011-06-22/ser-reportero-en-ciudad-juarez#ax221jTlok3cJ (last accessed 14 January 2012).

[33] See Bianca Calderón & Fernando Herrera, *Mexico Ranked Number Fifth most Dangerous Country for Journalists,* Project Censored's Media Freedom International, November 25, 2011, *available at* http://www.mediafreedominternational.org/2011/11/21/mexico-ranked-number-fifth-most-dangerous-country-for-journalists/ (last accessed 14 January 2012).

[34] See Ernesto Villanueva, *The Right of Access to Information and Citizenship Organisation in Mexico*, 1 Comparative Media Law Journal 12 (2003).

[35] See Hughes & Lawson, *supra* note 23, at 18.

[36] Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, Article 25, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

[37] See *id.* Article 41, III.

old of communicative equality among political parties in the media. Federal electoral law (*Código Federal de Instituciones y Procedimientos Electorales*) regulates political parties' access to the media and establishes principles for broadcasting political propaganda during and outside electoral campaigns. At the same time, the law grants the Federal Electoral Institute (IFE)[38] the power to dictate guidelines for radio and television news programs as regards reporting on candidates and parties during electoral campaigns. This is intended to guarantee political parties equality and fairness during the media coverage of electoral campaigns: "There has been a tendency in the national media to give equal treatment to political parties. IFE has monitored equal treatment in the media for each political party. At a local level, the media tend to be more partial. At a national level, the media have treated political parties on more equal terms."[39]

Another relevant legal regulation for the development of a deliberative public sphere in Mexico is the *Ley de Imprenta* or Press Act. The goal of this law is to define the limitations on the freedom of the press in keeping with the principles of the Constitution. While this law requires respect for the honor and constitutional attributes of public authorities, it distinguishes between the concept of "harsh criticism" and offences to these ethical values. Therefore, severe scrutiny and criticism of public actions are not considered an offence if based on facts and rational grounds. In this way, it guarantees a fair degree of freedom of speech in order to subject the actions and statements of public authorities to criticism.[40] In this respect, it encourages the use of discourse ethics in Mexico's public sphere.

On the other hand, the debate surrounding the role of criminal law in the democratic development of the media in Mexico deals mainly with two aspects: a) the rules that punish abuses of freedom of speech (such as calumny and defamation) committed by journalists and b) the rules that punish crimes against free journalism. Not long ago, a serious political debate took place in Mexico about the decriminalization of offences to public image, such as slander, calumny and defamation, in an attempt to encourage free, serious and professional journalism. As a result of this debate, the Mexican Congress approved a legal reform in which the jurisdiction for these offences moved from criminal courts to civil courts.[41]

The administrative law regulating broadcasting media falls under two overlapping federal administrative regulations, the Federal Radio and Television Act and the Federal Telecommunications Act. The second regulations

[38] Instituto Federal Electoral [I.F.E.] [Federal Electoral Institute]. Hereinafter IFE.

[39] Interview with Lorenzo Córdova Vianello in Mexico City (March 29, 2006).

[40] See Ley de Imprenta [L.I] [Press Act] Article 6, Diario Oficial de la Federación [D.O.], 12 de abril de 1917 (Mex.).

[41] A. Torre & A. Zárate, *Aprueba Senado despenalizar el delito de calumnia*, El Universal, March 6, 2007, available at: http://www.eluniversal.com.mx/notas/410689.html (last accessed 10 June 2009).

are more comprehensive and regulate not only broadcasting media, including the Internet, but also the long distance communication industry, which comprises both the fixed line and mobile telephone industries.[42]

The Federal Radio and Television Act classifies the kinds of broadcasting licenses and concessions that can be granted.[43] It also sets forth the obligations placed upon owners of these concessions and licenses.[44] Neither this Act nor the Federal Telecommunications Act imposes any public service obligations on the owners of commercial broadcasting concessions, either to promote the participation of civil society in public debate, or to compel that presidential debates be broadcast during election campaigns as a public service.[45]

One core feature of the Radio and Television Act is that the owners of commercial concessions are given the right to carry advertising while other kinds of concessions and licenses (official and cultural stations and training schools) are prohibited from doing so.[46] This prohibition reinforces the oligarchic structure and ownership of the Mexican broadcasting media as it discourages diversity and plurality and hinders the development of alternative media capable of producing programs conducive to the cultural and deliberative development of Mexico:

> The State media are prohibited from commercially developing of their services, as only the branches of the media which are explicitly profit-oriented can do so, despite the fact that the State sector budget of State media is limited in order to support the existence of the latter. The private media do not want to share the advertising market with other media, which is an unacceptable position for us as lawmakers in the Mexican Congress. They do not want any kind of competition or obstacle that prevents them from making the greatest profit possible.[47]

The exclusive nature of this right opens the door to the development of an extreme profit mentality, since the commercial broadcasting media tend to focus more on audience size than on their contribution to country's cultural and deliberative development. It is also the main reason for broadcasting media (especially *Televisa* and *TV Azteca*) owners' reluctance to opening up to competition and diversity, since it goes directly against their interests.[48]

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[42] See Ley Federal de Telecomunicaciones [L.F.T.] [Federal Telecommunications Act], *as amended* [D.O.] 17 de abril de 2012 (Mex.).

[43] See Ley Federal de Radio y Television [L.F.R.T.] [Federal Radio and Television Act], *as amended*, Article 13 [D.O.] 9 de abril de 2012 (Mex.).

[44] See *id*. Article 17.

[45] See *id.* Article 21.

[46] See Claudia Salazar, '*Piden al Senado corregir la minuta por beneficiar sólo a televisoras*', Reforma, February 14, 2006, *available at:* http://busquedas.gruporeforma.com/reforma/Documentos/DocumentoImpresa.aspx?DocId= (last accessed 10 May 2007).

[47] Interview with Felipe de Jesús Vicencio, Senator, in Mexico City (June 10, 2006).

[48] See Gazcón, V., *Eduardo Pérez Motta dijo que una mayor competencia en el mercado de TV abi-*

In the debate about the appropriate legal framework for the broadcasting media which took place in late 2005 and early 2006, members of the Mexican Congress from different political parties, as well as representative members of Mexican civil society, complained that the proposed reforms to the Radio and Television and Telecommunications Acts would favor the concentration of the radio, telecommunications and television industry in the hands of a few: "As long as this bill fails to recognize the role of State media and non-profit media, democracy is weakened because Mexico loses the opportunity of consolidating a State media system that creates a balance, so that these media become the arm of the State, and create a State telecommunications policy."[49]

Senator Felipe de Jesús Vicencio deemed that this bill failed to promote plurality and diversity within the broadcasting media. He also stated that the bill was intended to weaken the role of State and non-profit media as balanced and complementary sources with the potential to increase the number of voices in Mexico's public sphere:

> State and non-profit media are very important in reshaping the public sphere (*espacio público*). [They are] crucial factors for democratic deliberation, since they are decisive factors in the public sphere in which these democratic deliberations take place. That is why I believe this bill falls short of guaranteeing that all the elements necessary for the development of democracy in the public sphere will be fulfilled.[50]

Vicencio's main complaint concerned the fact that the new legal framework would enable the existing commercial radio and television broadcasting companies to expand into the telecommunications industry, without having to enter a bidding process under which they would be forced to compete with other companies for new concessions. By following a simple procedure before the corresponding authorities, existing commercial radio and television broadcasting companies would be allowed to obtain concessions in the telecommunications industry:

> The business approach prevailed in this bill, and even in this respect this bill represented a setback since it does not allow telecommunications businesses to take up wavelengths not used by the existing radio and television industry, nor does it allow the reverse effect or inverse capability by which telecommunications concession owners can be granted radio or television concessions. This entire situation reveals who the intellectual authors of this bill are because not even the plan for industrial expansion is equal, since it favors just one sector of the industry, just those in the radio and television sector.[51]

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erta en el país sería benéfico para los usuarios y anunciantes, Reforma, December 12, 2006, *available at:* http://busquedas.gruporeforma.com/reforma/Documentos/DocumentoImpresa.aspx?DocId= (last accessed 20 May 2007).

[49] See Vicencio (Inteview), *supra* note 47.

[50] *Id.*

[51] *Id*

The existing commercial radio and television broadcasting companies take their commercial concessions to mean that the concessions also include the possibility of using spare bandwidth to offer telecommunications services. The companies claim they have the legal right to the bandwidth spectrum itself, not the particular kind of services they are licensed to exploit. The opponents of the bill argued that their legal right resided in the kinds of services that they could offer, and did not extend to providing services other than radio and television broadcasting. Any spare bandwidth which had not been used by a broadcasting company, they reasoned, should be returned to the Mexican State so that it could be distributed fairly, favoring plurality and competition in telecommunications.[52]

In addition, the bill did not consider for granting commercial radio and television broadcasting concessions the programming offered by the applicant or the diversity of the programming secured overall, as part of its criteria for this aim, but only the amount of money that could be raised by granting concessions. This further encouraged the dominant broadcasting companies to invest more resources in the telecommunications industry:

> This bill explicitly refers to the media as an industry, rather than a public service. It does not consider their activity an activity in the public interest (in that they offer information and stand as a means of communication in society). The authors of this bill are trying to enforce the maxim that the best industrial policy is the one that does not exist and allows maximum freedom among competitors in this industry.[53]

Senator Vicencio regretted that the bill approached television and radio broadcasting purely as a market, and that the Mexican State refrained from regulating this activity in public interest and in pursuit of the common good. He also believed that with this bill the Mexican State was renouncing its constitutional responsibility to guide radio and television broadcasting toward advancing Mexico's democratic development.[54]

In Mexico, collusion between broadcast media owners and public authorities and the culture of patronage derived from it constitute the main obstacles to attaining communicative equality among the plural and diverse voices in Mexico's public sphere. This bill reflected these obstacles, and set out to close rather than open communicative spaces to Mexico's civil society and public service broadcasting.

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[52] See A. Cruz Martínez, *La Ley Televisa bloquea desarrollo de radios comunitarias, según expertos*, La Jornada, May 17, 2007, *available at*: http://www.jornada.unam.mx/2007/05/17/index.php?section=politica&article=008n1pol (last accessed 17 May 2007).

[53] See Vicencio (Inteview), *supra* note 47.

[54] *Id.*

V. Journalistic Culture and the Emergence of a Deliberative Public Sphere in Mexico

The evolution of the media and journalism in Mexico during the 20th century took place within the context of a post-revolutionary authoritarian regime, which deliberately restricted the emergence of free media so it could keep hold of its power. The regime used an effective mixture of blunt and subtle tactics to prevent autonomous, critical and independent media that could have fostered a deliberative public sphere in Mexico from developing.

The general strategy used by the post-revolutionary regime to prevent the emergence of this kind of media in Mexico can be summarized in one word: patronage. Co-optation through patronage covered both owners and journalists, making the media part of the rent-seeking system of this regime. This strategy effectively prevented the media from challenging the regime by implementing a system of privileges and rewards to sympathetic owners and journalists.[55]

Lawson summarizes this privilege and reward system with the following examples. For instance, the regime granted to sympathetic owners of broadcasting media: a) concessions, b) subsidized contributions, c) government advertising, d) protection from further competition, and e) expanded business opportunities. With all these enticements, the regime effectively discouraged any defiance from these owners.[56] Similarly, the regime gave sympathetic owners of the press: a) tax breaks, b) subsidized utilities, c) free service from its news agency, d) bulk purchasing, e) below market rate loans and f) cheap newsprint. If these enticements were not enough to discourage them from criticizing the regime, this regime still had recourse to tougher methods such as tax audits, threats, harassment and violent retaliation. In fact, these methods became more common as the press became more assertive and less corrupt.[57]

The authoritarian post-revolutionary regime not only colluded with private media owners, but also corrupted, blackmailed and repressed journalists in order to prevent the rise of a professional culture that could have harmed its legitimacy.[58] At the same time, journalists were deliberately kept dependent to facilitate co-optation, and if they wanted to improve their living standards, opportunities and career development, they had to accept the unwritten rules of the regime.[59] If journalists did try to follow an independent and critical editorial line despite all the tactics used to absorb them into the patronage system of the post-revolutionary regime, the regime could employ repressive

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[55] See Chapell Lawson, Building the Fourth Estate: Democratization and the Rise of a Free Press in Mexico 26 (Berkeley: University of California Press, 2002).

[56] *Id.* at 28.

[57] See *id.* at 32.

[58] See *id.* at 34-37.

[59] See *id*

measures, which ranged from ostracism to murder. The Mexican establishment was not interested in providing reliable political information that could help people understand core public issues, as this could reflect badly on the nature of the regime.[60]

The post-revolutionary regime permanently monitored the media to prevent the dissemination of any information that could dramatically turn public opinion against it. This monitoring comprehended various tactics, such as ensuring the right spin on political coverage, discouraging the propagation of alternative political viewpoints or reporting official responses to events without any background or orienting context.[61]

However, despite all the means at the regime's disposal to co-opt and repress owners and journalists and to control, monitor and manipulate information, in the mid-1970s, Mexico saw the emergence of independent, autonomous and free journalism, which began to challenge the regime in the public sphere.[62] Perhaps the most important reason for the transformation of journalistic culture in Mexico was that some journalists began to focus more on civil society activities than on the official elite discourse of the post-revolutionary regime to report more accurately on Mexican civic, social and political reality. This transformation meant that alternative views could be heard in Mexico's public sphere and the regime's control over the public agenda was challenged.[63]

Another important reason for the emergence of free journalism was the slow but sure process of opening the press and radio broadcasting to competition in the mid-1970s, which encouraged the creation of professional journalistic standards to attract the greatest possible readership or audience, and obtain more substantial revenues from advertising. This new situation implied that Mexico had already established an audience and readership base, which could provide financial viability to professional and independent journalism. At the same time and as a consequence of increasing competition, upcoming newspapers' desire to attract the greatest number of readers by enhancing their credibility, which also incited the transformation in the journalistic culture of the entire press, as old newspapers tried to challenge the new independent journalism by improving their own journalistic standards.[64]

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[60] See *id.* at 50-52. Chappell H. Lawson summarized the touchy issues for the former post-revolutionary regime: a) economic mismanagement, b) official corruption, c) collusion with drug trafficking, d) electoral fraud, e) opposition protests, f) political repression and g) Mexican military.

[61] See *id.* at 40-45.

[62] See Philip George, The Presidency in Mexican Politics 89 (London: McMillan Academic and Professional Ltd, 1992).

[63] See Needler, Martin C., Mexican Politics: The Containment of Conflict 56 (Westport: Praeger Publications, 1995).

[64] See Lawson, *supra* note 55, at 80-92.

Another factor that encouraged competition within the press was the fact that after the presidential term of Carlos Salinas de Gortari, journalists stopped receiving payments from government agencies securing favorable coverage.[65] This forced them to look for other sources of funding and, since independent journalism was increasingly enjoying financial viability because of both its readership and advertising revenues, journalists increasingly became more critical, independent and autonomous of the regime, as well as more willing to challenge its dominance in the public sphere.[66] We could argue that this new situation encouraged journalists to apply some elements of discourse ethics in the public sphere, such as critical thinking with a view to the common good. In the long term, the regime's enticements or tactics to buy off journalists were becoming increasingly less relevant to their career prospects. Rather, it was more important for them to have credibility if they were to achieve their professional goals.[67]

Competition encouraged not only the development of credibility in newspapers and journalists, but also their assertiveness, independence, commitment to public service, civic approach, plurality and diversity. In summary, it encouraged a journalistic culture that was more in accordance with the deliberative development of the public sphere.[68] At the same time, the improved level of information enhanced the deliberative quality of the opinion-making process in Mexico since newspapers started to cover issues that were awkward for the regime but important in terms of general interest for the country. This improved the quality of discourse ethics practiced in the public sphere.

This new situation also promoted diversity and a plurality of perspectives in the media, enhancing communicative equality, and little by little rendered the regime's strategy of patronage based on rewards and punishments less effective.[69]

In this context, the defeat of the post-revolutionary regime in 2000 transformed the environment in which the media operated. The new regime does not employ the tactics of the previous regime as it is in its best interest not to be identified with it; the new regime is committed, in principle, to a different logic: the logic of free vote through informed public opinion. Nevertheless, the post-revolutionary regime bequeathed to the new one a media set-up that still poses some challenges to Mexico's democratization process, like a legal framework that favors the concentration of broadcasting media ownership and a journalistic culture that still resorts to corrupt practices to manipulate

[65] See *id.* at 76.

[66] See *id.* at 89.

[67] See *id.* at 80.

[68] See *id.* at 89-90.

[69] See *id.*

the opinion-making process in the public sphere, especially at local levels of government.[70]

> The media have put obstacles in the way of the release of reliable information, and there are sometimes problems of manipulation, ethical problems. There is still complicity between the government and private interests. The press has improved although we still have these kinds of problems. The media have their own agenda, they have their own ways of understanding reality, [and] they give priority to what they consider most important according to their agenda.[71]

VI. Development of the Broadcast Media

The concentration of broadcasting media ownership has roots that date back to the presidential term of Miguel Alemán Valdés when the first commercial television concessions were granted. The first commercial concession, XHTV Channel 4, was granted in 1950 to Rómulo O'Farril, a close associate of President Alemán; the second, XEW TV, Channel 2, was granted to Emilio Azcárraga Vidaurreta; and the third to Guillermo González Camarena, an engineer and inventor who had developed color TV technology and started the first experimental broadcasting in 1946.[72] These entrepreneurs eventually became a close-knit team that exercised control over the emergent industry, and merged in 1955 to form the company *Telesistema Mexicano*, in which Azcárraga, O'Farril and González Camarena officially held 45, 35 and 20 percent of the shares, respectively. González Camarena later sold his shares to Emilio Azcárraga Vidaurreta.[73]

In 1968, the *Fomento de Televisión*, S.A. company, which was associated with *Televisión Independiente de México*, part of the Alfa Group, was granted the concession for Channel 8; and the *Corporación Mexicana de Radio y Televisión*, owned by Francisco Aguirre Jiménez, also the owner of *Organización Radio Centro*, was granted the concession of Channel 13 XHDF.[74]

In 1972, Channel 8 merged with *Telesistema Mexicano* to form a new company *Televisión Vía Satélite* S.A. (*TELEVISA*), with *Telesistema Mexicano* holding 75 percent of the shares and *Televisión Independiente de México* the other 25 percent. In 1982, the Alfa Group sold its shares to *Telesistema Mexicano*, leaving the ownership of Channel 8 and of *TELEVISA* in its hands.[75]

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[70] See Hughes and Lawson, 'Propaganda and Crony Capitalism: Partisan Bias in Mexican Television News' 88-95.

[71] Interview with Ernesto Villanueva, in Mexico City (March 24, 2006).

[72] See F. Mejía Barquera, *Cronología e historia minima de la television mexicana. Apuntes para una historia de la televisión mexicana*, *available at:* http://www.video.com.mx/articulos/historia_de_la_television.htm (last accessed 10 May 2007).

[73] See *id.*

[74] See *id.*

[75] See *id.*

The history of Channel 13 XHDF evolved quite differently because the federal government expropriated this channel in 1972, and in 1983 it joined Channel 8 from Monterrey, Channel 2 from Chihuahua and Channel 11 from Ciudad Juárez to form the *Productora Nacional de Radio y Televisión* (*PRONARTE*) network. Along with *Televisión de la República Mexicana* (*TRM*) and Channel 22 from Mexico City, this network went on to form a state-owned group called *IMEVISION* (*Instituto Mexicano de Televisión*).[76] However, as part of the process of economic liberalization carried out by President Carlos Salinas de Gortari between 1988 and 1994, *IMEVISION* was privatized and sold to Ricardo Salinas Pliego, the owner of the Salinas Group, who transformed it into *TV Azteca*, with two national channels: Seven and Thirteen.

As this record shows, television broadcasting was dominated by powerful State and a small number of corporate interests. However, there are now four hundred and sixty-eight local television channels in Mexico. States like Sonora, Coahuila, Chihuahua and Tamaulipas have more than thirty local channels, which speaks volumes for the level of initiative shown by local communities keen on opening spaces for communicative interaction. Most of these channels are commercial concessions with a local scope.[77] Apart from these local television channels, there are some two hundred cable companies that broadcast multiple closed circuit channels from different parts of the world, especially from the United States of America. Together, these cable companies form an association called *CANITEC*, which claims to reach 10 million households in Mexico and handle 500,000 internet subscriptions.[78]

These cable companies broadcast the main cultural and civic channels of Mexico such as *TV UNAM*, the *Judicial Channel*, the *Congress Channel*, and *Channel 40*, as well as international news channels such as *CNN*, *CNN en Español*, *Fox News*, *BBC*, *RAI*, *TV5Monde*, *Antena 3*, *DW*, *CBS*, and *ABC*, from which Mexicans have access to international perspectives. By instruction of the IFE, these channels are shut down three days before federal elections take place, in order to guarantee equal coverage among political parties, as well as the fairness of the process.

The *Congress Channel*, founded in 2001, is only broadcast via cable, although there has been a recent initiative to broadcast it via national networks. It represents a new stage in the development of a deliberative public sphere in Mexico, since it is solely dedicated to broadcasting the deliberations of the Mexican Congress and to producing programs with high civic, cultural and political content, as well as news programs. It has its shortcomings in its

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[76] See *id.*

[77] See Cámara Nacional de la Industria de la Radio y la Televisión, Dirección de Información e Investigación, http://www.cirt.com.mx/estaciones_concesionadas_asc.html (last accessed 14 January 2012).

[78] See CANITEC [Cámara Nacional de la Industria de Telecomunicaciones por Cable], http://www.canitec.org (last accessed 14 January 2012).

limited audience and inexperience in designing programs with civil society participation, but these problems can be overcome.[79]

The Federal Judicial Power has also acquired its own channel to broadcast Supreme Court deliberations and provide cultural programs related to the law, although again only on cable. This channel also constitutes a space for a deliberative public sphere, since experts are constantly discussing ideal laws that would secure the common good and enhance the general interest of the country. However, sometimes the debates are quite technical and do not encourage contributions from non-legal experts.[80]

After the 2006 elections, *Televisa* and *TV Azteca* changed their programming to promote civic dialogue, discussion and better knowledge of public issues in Mexico. For example, *TV Azteca* released programs like *En Contexto*, *Entre 3*, *La Entrevista con Sarmiento*, *Frente a Frente* and *Animal Nocturno* while *Televisa* released programs like *Alebrijes: Aguila ó Sol*, *Punto de Partida*, *Tercer Grado*, *Contrapunto* and *Notifiero*.

En Contexto and *La Entrevista con Sarmiento* feature interviews and civic dialogue with key figures from social, political, cultural and economic movements in Mexico. *Entre 3* offers information and analysis, along with plural and open discussions about relevant Mexican public issues. *Frente a Frente* has guest speakers answering questions from members of the public, enhancing discursive interactivity and plurality. All these programs are broadcast on Channel Thirteen of *TV Azteca*, aired every weekday at midnight.[81]

Alebrije: Aguila ó Sol is an educational program, in which three host journalists provide comments and opinions on recent economic issues. *Punto de Partida* offers political analysis through interviews and in-depth reports, although from a limited range of contributors.[82] *Contrapunto* claimed to be the only purely deliberative program from *Televisa*, since it was focused on discursive interactions between social leaders, political actors and analysts, who discuss proposals and weigh their positions. It was led by four recognized intellectual leaders of Mexico. Along with *Tercer Grado* and *Notifiero*, these programs were broadcast on Channel 2 of *Televisa*, on weekdays at 11:30 pm.[83]

Televisa and *TV Azteca* are competing in this area with Channel 40 and Milenio Televisión, which are the main television channels entirely dedicated to civic journalism in Mexico, and have attracted a number of experienced journalists and scholars to participate in their programs. Channel 40's and

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[79] See *Bienvenido al Canal del Congreso. La visión del diálogo*, http://www.canaldelcongreso.gob.mx/nueva imagen/home.php (last accessed 14 January 2012).

[80] See Suprema Corte de Justicia de la Nación, *Canal Judicial*, http://www2.scjn.gob.mx/red/canaljudicial/ (last accessed, 14 January 2012).

[81] See *Programación Azteca 13,* http://www.tvazteca.com.mx/programacion/13.shtml (last accessed 17 May 2007).

[82] See *Esmas. Noticieros,* http://www2.esmas.com/noticierostelevisa/index.php (last accessed 12 August 2008).

[83] See *Canal de las Estrellas*, http://www.esmas.com/canal2 (last accessed 17 May 2007).

Milenio Televisión's contributions to enhancing the informational environment in Mexico and increasing Mexican people's opportunities to learn about politics has been very positive in recent times.[84] Channel 40 reinforces an interactive approach to the news, constantly inviting individuals with varying perspectives to comment on current issues, and allowing them enough time to develop arguments at length. This channel also features programs completely devoted to debates, analyses and extensive reports, which provide Mexican people with better opportunities to understand public issues and develop an informed point of view. On the other hand, Milenio Televisión is a television channel fully dedicated to news broadcasts in which we also find analyses, interviews, discussions, debates, chronicles, reports, insightful guests and comments.

Despite the concentration of Mexican television ownership at a national level, there have been recent initiatives at local levels and through cable TV that have enhanced communicative equality and discourse ethics in the Mexican public sphere.

Radio broadcasting in Mexico has also recently experienced noticeable progress in freedom of speech, political analysis, diversity, pluralism and critical approaches to information. Popular journalists such as Carmen Aristegui, Ricardo Rocha, Oscar Mario Beteta, Eduardo Ruiz Healy, Pedro Ferriz de Con, and Ciro Gómez Leyva enjoy a more interactive and discursive space within radio broadcasting than on television broadcasting, since they constantly receive input from the public, carry out interviews and provide political analyses at the same time. There is very strong competition between radio news programs, which has encouraged journalists to develop new methods to attract an audience.

Nevertheless, all these journalists and radio news programs were preceded by an iconic figure in critical radio broadcasting in Mexico, José Gutiérrez Vivó, a journalist who started the *Monitor* radio news program in 1974, precisely at the peak of the repressive power of the post-revolutionary regime, and who since then has fought to open radio broadcasting to the different voices and expressions of civil society, and used discursive methods to analyze the news.[85]

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[84] See *Proyecto 40*, http://www.proyecto40.com (last accessed 14 January 2012) and *Milenio Televisión, available at:* http://www.milenio.com/mileniotv (last accessed 14 January 2012).

[85] On May 24, 2008, Radio Monitor, the company owned by José Gutiérrez Vivó, stopped its broadcast due to a worker strike, as the company was unable to pay workers several fortnights worth of wages owed to them. The problem started when Radio Centro (the company that bought the services of Radio Monitor) did not fulfil its agreement to settle its legal conflict with Radio Monitor through an international referee, and did not acknowledge the conflict resolution pronounced by this referee, which compelled Radio Centro to pay 21 million dollars to Radio Monitor. Due to this lack of payment, Gutiérrez Vivó, in turn, could not pay his workers and providers their corresponding wages and the compensations due. See Redacción, "Regresa el periodista José Gutiérrez Vivó" (March 11, 2011), *available at:* http://eleconomista.com.mx/sociedad/2011/03/21/regresa-periodista-jose-gutierrez-vivo.

Monitor was once a very prestigious and influential radio program in Mexico because it would interview leading figures from social, economic and political spheres, giving listeners access to plural perspectives about Mexico. Although its collaborators and analysts may have had a common profile and ideology, this was somehow compensated by the fact that the program was open to the contribution of a variety of guests and the public.

Mexico is experiencing a wave of fascination for radio news programs, with the most prestigious press and television journalists constantly looking for a space on radio to present their own style and contribution to information analysis.[86] *Grupo Fórmula*, *Grupo Imagen*, *Grupo Radio Centro*, *Televisa Radio*, *Grupo MVS*, *Grupo Radio Difusoras Capital*, *NRM Comunicaciones* are some of the national radio broadcasting companies competing strongly in this industry.

In terms of newspapers, Mexico now enjoys more diversity, plurality, quality, independence and autonomy than during the post-revolutionary era, thanks to the effort of journalists who have struggled to develop their professional culture and their approach to journalism. Newspapers like *El Financiero*, *La Jornada* and *Reforma* or weekly journals like *Proceso* have become very influential in Mexico's public sphere thanks to the quality of information and the analysis given on economic, political, cultural and social issues.

For example, *Reforma* is a relatively recent (1993) national newspaper that focuses more on releasing privileged information on official corruption and involvement in drug trafficking, as well as providing detailed information about political and economic events in Mexico, although its degree of analysis may not be as in-depth as that of *El Financiero* or as detailed as that of *La Jornada*. This newspaper is supposed to be on the right of the ideological spectrum, although sometimes it provides lengthy comments and editorials from left-wing sympathizers.[87]

Soledad Loaeza, a leading scholar from *El Colegio de México*, considers that *Reforma* focuses on sensationalism and scandal rather than on the analysis of Mexico's social, economic and political reality:

> Political issues are replaced by a culture of complaints. The press is full of this culture of complaints instead of a culture of information. The same happens in the case of television and radio. The media in Mexico believe that their obligation is to make claims and they do not distinguish the difference between complaint and information. Complaints are a product of information, but it is not the role of the press to judge those suspected of a crime, but to inform; I think they are confused.[88]

There are other national newspapers, such as *Excélsior, Milenio, Diario Monitor, Rumbo, El Economista, El Universal, Unomasuno, La Prensa*, which benefit pro-

[86] See *Grupo Fórmula*, http://www.radioformula.com.mx (last accessed 14 January 2012).

[87] See Reforma, http://www.reforma.com (last accessed 14 January 2012).

[88] Interview with Soledad Loaeza in Mexico City (May 19, 2006).

fessionally from the strong competition between them in order to gain the greatest readership possible. Although each possesses its own position within the ideological spectrum, all of them have developed better political and economic analyses of Mexico and have released crucial information on public issues that has enriched the informational environment of Mexico's public sphere.

Although they have their own agendas, sometimes seem to be biased or have their journalists co-opted by authorities at certain times, the quality of information has improved as well as their analyses of issues. There has certainly been a positive evolution in their use of freedom of speech, which has contributed to the development of an improved informational environment, and furthered the democratic transition in Mexico.

In addition to national newspapers, which are distributed in Mexico City and other major cities in the country, there are several local newspapers, which are as important on a local level. Although it is difficult to give an exact number of local newspapers in Mexico, the *Asociación Mexicana de Editores de Periódicos* reports there are at least 100, covering more than 200 cities.[89] Newspapers like *Siglo 21* or *El Norte* provide input to public debate by releasing crucial information on public issues and enhancing a rational critical perspective.[90]

However, local newspapers have suffered much more violence than national ones from criminal organizations hostile to the exposure of their activities. Even directors of local newspapers have been victims of terrible violence in an effort to curtail investigative reporting and freedom of speech. Kidnappings, murders and threats are the principal tools criminal organizations use in order to suppress freedom of speech on specific issues locally: "At the presentation of its annual report yesterday in Brussels, the International Federation of Journalists considered Mexico the most dangerous country in Latin America for those journalists who deal professionally with issues related to crime and corruption."[91]

For example, in Nuevo Laredo, Tamaulipas, violence against independent journalism has been very effective in silencing information related to the activities of drug trafficking mafia, so much so that despite the fact that violence has increased, it has not been recently reported in local newspapers. Criminal organizations have become the greatest challenge to freedom of speech in

[89] See Asociación Mexicana de Editores de Periódicos, http://www.amed.com.mx/historia.php (accessed 14 January 2012).

[90] See Felipe Cobián, *Carcomido por adeudos mercantiles, bancarios y fiscales, "Siglo 21" agoniza por desviaciones financieras de su dueño*, Proceso, August 10, 1997. See also El Norte.com, http://www.elnorte.com (last accessed 12 August, 2008).

[91] Gabriel León Zaragoza, *México, país más peligroso de AL para informar sobre crimen y corrupción*, La Jornada, January 3, 2007, *available at*: http://www.jornada.unam.mx/2007/01/03/index.php?section=politica&article=005n1pol (last accessed 24 May 2009).

Mexico, since their threats are effectively silencing information about their activities and the involvement of public authorities:

> 2007 has been marked by the murder of Amado Ramírez, a correspondent of Televisa in Acapulco for fourteen years and a presenter of the Al Tanto radio program in the port city of Guerrero. This murder has all the hallmarks of an intimidating and silencing message of the worst possible kind that could be given to the Mexican press: death as the supreme form of censorship. The consequences of this crime are evident: the radio station Radiorama Acapulco decided to suspend its broadcasting of Al Tanto.[92]

In this way, local newspapers exemplify how the culture of impunity undermines the conditions of communicative equality among Mexicans and the practice of discourse ethics in the public sphere, since they are ruthlessly silenced if they dare release information about the causes, origins, activities and agents of drug trafficking in Mexico.

Finally, there has been growing use of the Internet as a source of disseminating information. It is not hindered by constraints of time and space. However, its disadvantage is that not every person, especially in poorer countries, has access to it, since it supposes a threshold of resources and education to research information. Nevertheless, the deliberative development of Mexico's public sphere has been encouraged through the Internet because it has posed better opportunities to exercise the right to reply or to enhance discursive interaction among journalists, public authorities and the Mexican people. Besides, the Internet also offers the opportunity to create virtual forums through which citizens can participate, give input to public debates and influence their fellow citizens to take a certain stance on public affairs.[93]

The Internet also offers access to alternative points of view to those of the traditional media and is a space for virtually every possible position in public affairs. Nevertheless, its biggest shortcoming stems from the lack of time and resources Mexicans have to research these alternative points of view. What is clear is that every day, the Internet is becoming a more relevant means of social communication that influences a large sector of Mexican civil society, particularly the middle class youth, who are the most assiduous users of the Internet in Mexico.

According to one internal study carried out by the PAN [National Action Party] during the 2006 federal elections, middle class youth overwhelmingly prefer obtaining their political information from the web rather than from watching television or listening to the radio. They are also fonder of research-

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[92] Pablo Cabañas Díaz, *Impunes, los 31 asesinatos contra los periodistas*, Forum en Línea, May, 2007, http://forumenlinea.com/articulos/articulo04.html (last accessed 17 May 2007).

[93] Interview with Felipe González Lugo in Mexico City (December 13, 2005). For example, the National Action Party (PAN) possesses various virtual forums in which their members can participate, exchange ideas and dialogue about political issues.

ing independent and alternative information on the web than of visiting the traditional media websites.[94]

The Internet offers extraordinary opportunities to create a deliberative opinion-making process in Mexico, since it offers to citizens the space to express themselves on public issues and share their thoughts with other people, via email or by creating virtual forums or blogs. The Internet is evolving into the leading means of social communication for deliberative democracy due to its interactivity and the virtually infinite space it offers for all possible perspectives in politics, thus facilitating an ideal deliberative space for Mexican citizens and the formation of a deliberative opinion-making process in Mexico's public sphere.

In short, the Internet primarily enhances communicative equality (the ideal speech situation) among Mexicans, and can also encourage the use of discourse ethics in Mexico's public sphere, since the positions circulated online can be better subjected to public reason through this enhancement of communicative equality that the Internet facilitates.

VII. Conclusions

Mexico's structural conditions (social, economic and cultural) have encouraged a culture of patronage and clientelism within the Mexican media, which along with the weakness of the rule of law, has hindered any significant contribution to the deliberative development of Mexico's public sphere. Especially during the post-revolutionary era, the government openly exercised patronage over media owners and journalists to receive favorable coverage and established a culture of *cacicazgo* within the media, which undermined freedom of speech, favored censorship, manipulated public opinion and encouraged impunity for violations of constitutional rights. In brief, it weakened the rule of law and obstructed the democratic nature of these media. However, significant changes have taken place, and we can clearly distinguish two current opposing tendencies in the Mexican media.

On the one hand, there is a positive tendency in which the media, especially radio broadcasting and the press, have improved the quality of their political reporting and analyses, although they are still at the early stages of acquiring better deliberative practices. There is more evidence of civic journalism within the broadcast media, even from *Televisa* and *TV Azteca*, and more diversity, quality, professional culture and public service orientation in newspapers. Furthermore, the new regime at the federal level does not employ –at least not at the same extent– the subtle methods that the post-revolutionary regime used to control the media. These are all positive factors that contribute to the deliberative development of Mexico's public sphere.

[94] Interview with Federico Doring in Mexico City (February 14, 2006).

These factors all enrich the "ideal speech situation" in Mexico's public sphere, better dispose Mexican media and citizens to justify their participation in this sphere with reference to the common good (better "discourse ethics"), and contribute to fair preference aggregations within citizens' decision-making processes (elections) since voters can be better informed than they were before. All these factors reflect the improved deliberative quality of the Mexican media.

On the other hand, the opposite tendency in the Mexican media consists of the wave of violence against assertive journalists who have denounced the activities of criminal organizations and the involvement of some public authorities. This tendency is especially encouraged by the weakness of the rule of law in Mexico that leaves these crimes unpunished. Obviously, this impunity undermines the "ideal speech situation" in the Mexican public sphere because the voice of criticism is increasingly being silenced arbitrarily. This is a great challenge even for the Mexican State, since criminal organizations are threatening every person who interferes in its activities, no matter his or her position in government or within the media. The State needs to design and implement measures to enforce the rule of law and punish crimes against journalists effectively.

Another challenge for the deliberative development of the Mexican media is the oligopoly in television broadcasting, in which competition, diversity and plurality should be encouraged, as well as the access of representative groups of civil society to its ownership, in order to open television broadcasting to the many voices of civil society. This oligopoly is a direct result of the culture of patronage over broadcasting media that has been promoted since the birth of the post-revolutionary regime in an effort to better control the information released. Unless this oligopoly is effectively overcome, an ideal speech situation cannot be fully realized within Mexico's public sphere and discourse ethics cannot be completely encouraged within it.

In summary, both challenges substantively undermine the deliberative quality of the Mexican media. However, the Internet in Mexico has become an extraordinary tool that offers people many opportunities to obtain plural and diverse information and that allows alternative perspectives in the public sphere to be heard. The Internet is especially relevant for enhancing the informational environment and increasing opportunities for people to learn about public issues. Moreover, it has the potential to become the most suitable means of social communication for discursive interaction among citizens, which is indispensable for the deliberative development of Mexico's public sphere.

As we can observe, the Mexican media have experienced a mixed evolution in the extent to which they promote deliberative democracy in the public sphere. The positive tendency of the media offers opportunities to foster civic dialogue, the "ideal speech situation," "discourse ethics" and fair preference aggregation (indirectly for the political institutional system) within Mexico's

public sphere. Furthermore, it offers opportunities to improve the quality of discourse ethics and public reasoning, which constitute the essence of deliberative democracy.

On the other hand, the negative tendency observed in some media (violence against journalists, weak rule of law to protect them, oligopolies, limited access for civil society) discourages all the aforementioned elements of an "ideal deliberative procedure" for Mexico's public sphere.

There are two possible solutions to this negative tendency in the Mexican media. The first concerns the enforcement of the rule of law to diminish the silencing power of organized crime over the Mexican media, a very complex task. This cannot be accomplished simply by introducing harsher punishments for organized criminals since it involves multiple aspects extending across the economy, the financial world, public administration and national and international security. The second concerns the implementation of public policies that encourage competition within the broadcasting media, allow advertising in non-commercial media and establish democratic criteria for granting concessions. All these measures could discourage the culture of patronage within these media, which unfortunately has discouraged communicative equality among Mexicans in the public sphere and has favored conditions for manipulating public opinion.

Given all the previous arguments, it is difficult to define extent to which the Mexican media promote the development of deliberative democracy in the public sphere. These media have certainly evolved positively from a closed and authoritarian environment to a more open and democratic one, but there are still many challenges and 3regressive practices that must be overcome if they are truly to encourage democratic deliberations in the public sphere. As the Mexican media are on their way to enhance the "ideal speech situation" and "discourse ethics" in the public sphere (and thus on their way to also enhance fairer preference aggregation within electoral decision-making processes), we can argue that their deliberative quality, though uneven, is better than minimal, though not enough to promote let alone guarantee "ideal deliberative procedures" consistently in the Mexican public sphere.

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GLOBAL POLITICS

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Abstract. *This article is about the great changes that have happened in recent years in international politics as well as the challenges that these thorough transformations imply. Some examples of great significance are the fall of the Berlin Wall (1989), the attack on the New York World Trade Center's twin towers and the Pentagon (2001), and the crash of Wall Street (2008). These are historical events that have had practical and theoretical repercussions for different humanistic disciplines like political science, law and international studies. The author's purpose is to analyze both practically and theoretically the new paradigms of global politics. The impact of globalization on Latin America is given special attention. The author concludes by presenting some alternatives in order to resolve the dilemmas posed by globalization.*

Key Words: *Globalization, democracy, neorealism, populism, terrorism, third way, neoliberalism, national State, cosmopolitism.*

Resumen. *Este artículo aborda los grandes cambios que se han registrado en los últimos años en la política internacional, así como los retos que han reportado esas magnas transformaciones. Ejemplos de las mutaciones de gran significado de las que habla esta investigación son: la caída del muro de Berlín (1989), los ataques terroristas contra las torres gemelas de Nueva York y el pentágono en Washington (2001) y la debacle financiera de Wall Street (2008). Como se aprecia, son acontecimientos de carácter histórico que han tenido repercusiones tanto de orden práctico como de naturaleza teórica para distintas disciplinas humanísticas, como la ciencia política, el derecho y el estudio de las relaciones internacionales. Lo que el autor se propone es analizar tanto en términos prácticos como en términos teóricos los nuevos paradigmas de la política global. Cabe agregar que aquí también se toma en consideración el impacto de la globalización para América Latina. Por último, se presentan algunas alternativas de solución con vistas a resolver los dilemas planteados por la globalización.*

Palabras clave: *Globalización, democracia, neorealismo, populismo, tercera vía, terrorismo, neoliberalismo, Estado nacional, cosmopolitismo.*

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I. Three Main Impacts

In this essay, I start off with a basic statement: the international order created after the World War II has changed due to three contemporary and central phenomena: the fall of the Berlin Wall in 1989, the attack on the New York World Trade Center's twin towers in 2001 and crash of Wall Street in 2008.

The fall of Berlin Wall roused feelings of hope and enthusiasm. Those scenes of thousands of people gathered around eastern European city squares to express their rejection of bureaucratic authoritarianism and to ask for the end of Soviet domain over their countries have been engraved in our memories. The statues of Marx, Lenin and Stalin were brought to the ground. The expansive wave of liberation soon reached the Soviet Union itself in 1991, when it split. The threat of an atomic outbreak between the so-called Free World and the Communist bloc was also attenuated since one of the principal rivals ceased to exist.

There were reasons for believing in a positive future. The first signs were encouraging: nations such as Poland, Hungary and Czechoslovakia, willingly accepted constitutionalism, the division of power, political parties, a competitive election system, freedom of the press, the protection of civil rights and freedom of assembly. However, hope and enthusiasm fell when aberrant happenings began taking place, such as inter-ethnic fighting in former Yugoslavia.

As Jürgen Habermas stated, a recovery revolution (*Nachholende Revolution)* took off in the midst of the bicentennial commemoration of the French Revolution (1789-1989).[1] However, around the same time, some communities

[1] Jürgen Habermas, La Rivoluzione in Corso (Milano, Feltrinelli, 1990). This author is considered one of the most influential thinker of our time. He was part of the Frankfurt school. Which means he was the youngest disciple of Erik Horck Heimer (the founding father

began to vent their hatred against their neighbors based on ancestral tribal rivalries.

On one side, civil society led the liberation movement, as defined by the English term which was less worn out than "democracy". Lenin said that proletarian democracy would be a thousand times more democratic than bourgeois democracy, and so it was used as communist leaders' rhetoric throughout stage of Soviet domination. For many years, civil groups disseminated clandestine resistance and anti-bureaucratic dictatorship propaganda. On this civil mobilization, Michael Ignatieff, for example, states:

> The philosophical study groups in basements and boiler rooms, the prayer meetings in church crypts, and the unofficial trade union meetings in bars and backrooms were seen as a civil society in embryo. Within those covert institutions came the education in liberty and the liberating energies that led to 1989. In the revolutions of that year —in Hungary, Poland, Romania, East Germany, Czechoslovakia, and the Baltics— civil society triumphed over the state.[2]

It was the way to push forward a democratic project, in the liberal sense of the term, distinct from the domination scheme imposed by Stalinism.

The revival of civil society was in fact linked to the recovery of liberal-democratic culture. After the unforgiving work of clandestine propaganda and pacific mobilizations —with the well-known repressive counterattacks— civil society put even more pressure and ended up breaking the barriers that had been raised to guarantee safety and the continuity of the system. As John A. Hall says: "Civil society was seen as the opposite of despotism, a space in which social groups could exist and more —something which exemplified and would ensure softer, more tolerable conditions of existence."[3] This coincides with what René Gallissot stated: "In the field of motion, of agitation and emancipatory action, intended to break with oppressive situations in the name of democracy, the formula of 'civil society' is immediately useful to legitimate protest."[4]

With the fall of communism, liberal and democratic ideals rose again and the path towards political modernity was retaken. During the bicentennial festivities of the fall of the Bastille (1989), François Furet accurately said: "We

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of this school). Two other disciples of Horck Heimer were Theodor Adorno and Herbert Marcuse. Among the many books Habermas has written the most significant in my opinion is: The Structural Transformation of the Public Sphere (Cambridge, Massachusetts, The MIT Press, 1998).

[2] M. Ignatieff, *On Civil Society: Why Eastern Europe's Revolution Could Succeed*, 2 Foreing Affairs 74, 128 (1995).

[3] John A. Hall, *In Search of Civil Society*, in J. A. Hall, Civil Society (Theory, History, Comparison) 1 (Oxford, Polity Press, 1995).

[4] René Gallissot, *Abus de société civil: étatisation de la société ou socialisation de l'État*, 2 L'Homme et la Societé 4 (1991).

keep drifting apart from the French Revolution, however, each day we live more and more in the world that was created by it. A new closeness has risen from the distance."[5]

The recovery of political modernity through the vindication of liberal democracy and civil society contrasts with the position certain supposedly progressive circles adopted on witnessing the fall of Soviet communism and abandoned the claims embodied by a collective proletarian spirit of an economic nature. This time, the main subject focused on ethnic groups with cultural backgrounds. This vindication serves as the principal basis for the fights for independence of certain communities throughout the world, such as: the French-speaking area of Canada, especially the Quebec province; the Basque provinces settled in Spain and France; the Zapatistas from Chiapas in Mexico; the independence-movement in Northern Ireland; the Chechens against Russian domination; and Tibet facing the Chinese occupation. No matter how different these examples may be, those who defend nationalistic or ethnicity vindications lump them all together. This explains the boost in multiculturalism over the last years.

In theoretical terms, for Charles Taylor, the fight for recognition is reflected in the anti-modern and conservative position, which upholds collective rights based on tradition and a yearning for a mythical past. This concept is based on the idea of identity, a sense of blood belonging. Thus, the lack of recognition or distorted recognition can become a form of oppression. Recognition is viewed as a human necessity. For Taylor, this necessity is located not in the individual field, but in the collective one. In his opinion, the way individual identity is interpreted should change to be seen not as isolated entity, but as members of certain ethnic community the same way the *Volk* (the people) must be true to themselves, in other words, to their culture. If the fight for Afro-American civil rights in the 1960s under Martin Luther King was a fight for equality, the struggle for ethnical belonging rights led by various local leaders, is now the fight to be different: "With the politics of equal dignity, what is established is meant to be universally the same, an identical basket of rights and immunities; with the politics of difference, what we are asked to recognize is the unique identity of this individual or group, their distinctness from everyone else."[6]

Taylor distinguishes two types of orientations in public actions. On one side, the respect to the principle of equality encourages treating people the same regardless of their differences, while on the other, the respect to the principle of diversity forces individuals to be treated differently taking their special traits into account. In both cases, there are advantages and disadvantages: "The reproach the first makes to the second is just that it violates the

[5] F. Furet, *Prefazione*, in Dizionario Critico della Rivoluzione Francese XL (F. Furet & M. Ozouf, eds., Milano, Bompiani, 1988).

[6] Charles Taylor, *The Politics of Recognition*, in Multiculturalism 38 (Amy Gutman ed., New Jersey, Princeton University Press, 1994).

principle of nondiscrimination. The reproach the second makes to the first is that it negates identity by forcing people into a homogeneous mold that is untrue to them."[7] Taylor attacks the so-called liberal stance, identified with principle of equality, for acting under false neutrality which, in reality, as it is an expression of a hegemonic culture, and leans toward the communitarian side to introduce differentiation criteria and a specific approach towards diversity.

One of the distinctive arguments of Taylor's thesis, which has been reiterated by his followers, is that liberalism is in fact a particular culture that defends a false universalism: "Liberalism is not a possible meeting ground for all cultures; it is the political expression of one range of cultures, and quite incompatible with other ranges."[8] But then, Taylor's argument changes directions when he asks supposedly "particular" culture to admit diversity politics. The disqualification of liberalism reaches the point of saying that it is in fact a fighting credo against other cultures: "All this is to say that liberalism can't and shouldn't claim complete cultural neutrality. Liberalism is also a fighting creed."[9]

By confronting equalities and differences, Taylor's multiculturalism resorts to the sophism that liberal egalitarianism is insensible to differences. But that is not true because the structure of liberalism is such that it raises equality in the political field while allowing for differences and dynamic pluralism in the civil order. The existence of civil society could not be understood in any other way. By clarifying the liberal perspective and the relationship between equalities and differences, we realize that multiculturalism aims at establishing differences in the political order so as to set up autonomous collective bodies unconnected to the national State, while finding it awkward to speak of civil society as a real space in which group differences have proliferated from the very beginning. Summing up, multiculturalism asks that differences be respected in the political sphere, leading to the creation of new self-sufficient identities that break the integrity of the national State; they are not interested in enrolling or coexisting with the differences that are part of civil society. The entreaty, however, is not new; modern times have seen attempts of conservative restoration that are reminiscent of the medieval system.

The implied solution is separatism and for the unacknowledged national State to defend the restoration of a pre-modern world, imagined as a peaceful and harmonious world. However, it is a well-known historical fact that the co-existence of cultures has not been peaceful at all, but involved —and continues to involve— bloody conflicts. In this strategy, Taylor's position remains ambiguous between ideological-political confrontation and an attempt to come to an agreement with the "dominant culture", which he loathes. There are sections in which Taylor shows his leanings towards conflict and

[7] *Id.* at 43.

[8] *Id.* at 62.

[9] *Id.*

others in which he is willing to compromise. An uncertainty of this nature makes his approach extremely weak and explains why his followers also fall, politically and ideologically, into the same ambiguity between the threat of war and a reticent invitation to dialogue.

Regarding the fall of the Twin Towers, the numerous images of the planes diverted by Islamic extremists crashing into the World Trade Center have remained embedded in my memory. The fundamental thesis of Professor Benjamin Barber, of the University of Rutgers, is that, after the collapse of authoritarian socialism, at least two phenomena have come to once again test the model of civilization, namely, tribalism and mercantilism: "Jihad pursues a bloody politics of identity, McWorld a bloodless economics of profit."[10] An explanation of the strengthening of tribal identities is that when faced with the collapse of some States, people retreat to the more immediate references due to the uncertainty and fear of the unknown. Ralf Dahrendorf has referred to this problem as follows:

> There is the re-emergence of the tribe, of primordial ties and emotions. Communism was among other things a homogenizing —some would say, a modernizing— force. Now that is gone, older national and religious ligatures come to the fore. Since people have little to hold on to, and even less to eat, they fall for prophets who fill their minds and hearts with the hatred of others in the name of self-determination.[11]

Tribalism provides certainty in the midst of a world that is falling apart. It is like retreating to the more immediate in view of the collapse of a social system that could no longer stand.

Meanwhile, the overflowing economic activity represents the limitless greed manifested through aggression and the desire to accumulate. The consequence is that: "In being reduced to a choice between the market's universal church and a retribalizing politics of particularist identities, peoples around the globe are threatened with an atavistic return to medieval politics…"[12] The attacks of September 11, 2001, reveal fundamentalists' desire to return to a kind of obscurantism.

Jihad and *McWorld* are not self-limiting democratic powers. On the contrary, they are forces trying to eat up everything in their path. They act as polar opposites: one pulling at parochial hatreds and the other towards global market consolidation; one tries to alter national boundaries in an effort to reclaim tribal areas while the other is trying to make national borders porous from the outside. Despite their contradictory natures, "Yet Jihad and

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[10] Benjamin Barber, Jihad vs. Mcworld 8 (New York, Ballantines, 1999).

[11] Ralf Dahrendorf, After 1989 (Morals, Revolution and Civil Society) 10 (New York, St. Martin's Press, 1997).

[12] See Barber, *supra* note 10, at 7.

McWorld have this in common: they both make war on the sovereign nation-state and thus undermine the nation-state's democratic institutions."[13]

Jihad ideologists attack democratic politics arguing that the nation-state is an "illusory community" and citizenship is an "abstraction." What matters to them are the foundations of collective affiliation. *McWorld* theorists criticize democratic politics, arguing that the nation-state is an awkward device and citizenship a trifle. For them, there are only consumers to be caught up in marketing networks. To this, Barber responds: "Neither the tribal circle nor the traffic circle, neither the clan nor the mall, offers adequate public space to the kind of democratic community that can provide citizens both identity and inclusion."[14]

For Barber, it is essential to put the current problem in its proper terms, keeping in mind that there are three powers in every society: cultural, economic and political. The challenge is the assimilation of economics and politics into the cultural-anthropological field (*Jihad*) or the confinement of culture and politics within an economic framework (*McWorld*). In contrast, the liberal art of separation is the way to identify the presence of different spaces in which human activity unfolds.

The factor that may work against these polarizing trends is civil society. Therefore, to promote democratization, civil society should extend its activities to encompass international affairs. It is already the case with environmental groups, associations defending human rights, cultural exchange groups and an endless list of other organizations that have made globalization a phenomenon that goes beyond economic interdependence or racial ties.

We must pay attention in the political sphere. Globalization must be improved through the democratization of the international power. The best formula is that: "global democracy needs confederalism, a noncompulsory from of association rooted in friendship and mutual interests; confederalism depends on members states that are well rooted in civil society, and on citizens for whom the other is not synonymous with the enemy."[15]

There is no justification for committing criminal acts, and much less when religious purity is invoked against civilization as a whole. Those who planned, sponsored and perpetrated the slaughter knew they were not against an economic symbol, *McWorld*; the purpose was to truncate the life of defenseless people of close to eighty different nationalities —to spread panic inside and outside the United States. So it would be more appropriate to speak of *Jihad* vs. *Universitas Civium* instead of tribalism against economic globalization.

It should be recalled that there were several serious conflicts between 1989 and 2001: the Persian Gulf War, the ethnic massacres in Rwanda, the previously mentioned war in the Balkans, the brutality in East Timor, and so on.

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[13] *Id*. at 6.

[14] *Id*. at 288.

[15] *Id.* at 291.

However, without downplaying these phenomena, it is certain that they had a regionally bound overtone, while attacks in northeastern United States have an all-embracing profile. I concur with the conceptual clarity of Susan Sontag: "[…] the terrorism that realized such a signal success on September 11 is obviously a global movement. This terrorism can not be identified with a certain state or even with devastated Afghanistan [...] Like the modern economy, the mass culture and pandemic sicknesses (*e.g.* AIDS), terrorism knows no borders."[16] This new tone is not due to the aggression against the world's most powerful country; the matter lies in the proof of a complex and widespread network of terrorist organizations —spread throughout at least sixty nations— with the role of acting on mystical reasons at an international level.

As Giovanni Sartori has pointed out: "The, say, old school suicide bombers, were sacrificed for their country, are local. Their cause was specific and limited. Suicides in New York and the Pentagon, and those who will follow their steps, are global beings and their homeland is the Koran as well as their religious faith. They are not fighting for the place they were born, but for an Islamized world that fights and punishes non-believers."[17] This limiting creed endangers the enlightened reform that had been noted in the immediately preceding years. On this risk, Martin Kramer thinks:

> What happened […] was the opposite: a dangerous slide toward a medieval holy war. To stop the regression, the moderate majority will have to argue against the mobilization of the Islamic religion for war [...] But it is impossible to deploy religion to justify killing and self-immolation, without undermining the foundations of the religion itself. In the pained expressions of decent Muslims, there is more than regret at America's loss. There is a growing realization that the men who brought down the twin towers put Islam in peril.[18]

Islamic spirituality is at the same time, used and sacrificed for the sake of a radical political cause.

Fear of a violent death has always presented as a limit to avoid facing others and to establish an agreement on which civil status was established according to the contractual tradition founded by Hugo Grotius and Thomas Hobbes and supported by John Locke, Baruch Spinoza, Jean Jacques Rousseau and Immanuel Kant. It means that every man fears his own death. With variations in interpretation, but following the same methodological pattern, theorists of natural law have centered their concern on the need to leave the State of Nature in which there is no constituted authority or common power, by reaching an agreement to end this unpleasant situation and attain the political status that would allow the public authority to ensure a better, more stable supported life.

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[16] Susan Sontag, *Modernidad y Guerra Santa,* 287 Nexos 62 (2001).

[17] Giovanni Sartori, *Oíd los críticos, Oriana tiene razón*, El Universal, October 20, 2001.

[18] Martín Kramer, *El secuestro del Islam,* 35 Letras Libres 24 (2001).

The Natural Law school of thought lay the foundations of modern political thought and, with it, the doctrine of the rights of man and of the citizen. But after the terrorist attacks of September 11th, death is no longer a constraint. This phenomenon is a factor that alters the direction of policy and launches a new interpretation challenge for both domestic politics and foreign policy.

Regarding collapse of Wall Street in 2008, this financial phenomenon revealed our position as between two eras. The old order, the period denominated by neo-liberalism, the main premise of which is that the market cannot be wrong and the government cannot be right, is dying. A new order, in which Wall Street plays a less important role and Washington plays a stronger function, is emerging. Within this framework, a political struggle is taking place both nationally and internationally because there are interests and groups who took great advantage of the neoliberal model. However, we now need to see to the interests of a much broader sector of society that is calling for the establishment of a fairer development model nationally and internationally.

The fall of stock markets in 2008 is not a superficial problem but a structural one. It is the end of the formula that started in the late seventies and early eighties with Ronald Reagan and Margaret Thatcher, and was emulated in almost all the world: the dismantling of the *Welfare State* based on privatization, blind faith in the market, tax reduction especially for the more affluent groups, and replacing the so-called social-democrat pact with the law of supply and demand as its supreme canon. According to neoliberalism theorists like Friedrich von Hayek and Robert Nozick, these measures give full freedom to our societies and encourage economic growth. We already saw where it would end: in one of the gurus and enforcers of neoliberalism Alan Greenspan's admission that von Hayek and Nozick may have been wrong.

The model of neo-liberalism development that was previously considered insurmountable and imposed its conditions over the last three decades, came to its breaking point. The financial crisis began on Wall Street and literally spread around the world. It is no accident that Joseph Stiglitz, Nobel Prize in Economics in 2001, has compared the collapse of Wall Street to the fall of the Berlin Wall in 1989:

> The globalization agenda has been closely linked with the market fundamentalists —the ideology of free markets and financial liberalization. In this crisis, we see the most market-oriented institutions in the most market-oriented economy failing and running to the government for help. Everyone in the world will say now that this is the end of market fundamentalism. In this sense, the fall of Wall Street is for the market fundamentalism what the fall of the Berlin Wall was for communism —it tells the world that this way of economic organization turns out not to be sustainable. In the end, everyone says, that model does not work. This moment is a marker that the claims of financial market liberalization were bogus.[19]

[19] Interview by Nathan Gardels with Joseph Stiglitz, "Stiglitz: The Fall of Wall Street Is to

Some may think this statement is out of proportion. However, the parallelism is precise in its meaning: the two events, as opposites as they are (right and left respectively), represent the failure of a not only an economic model, but also of a way of thinking, a certain way of perceiving the world: both types of totalitarianism, one by State and the other by the market, have left a reprehensible mark on history.

Another great icon of neoliberalism, Francis Fukuyama, had to admit that this model could no longer be upheld. In an article published a few days after the financial crash in October 2008, Fukuyama wrote: "[…] under the mantra of less government, Washington failed to adequately regulate the financial sector and allowed it to do tremendous harm to the rest of the society."[20] The 700 billion dollars that the U.S. Congress allocated to stave off the crisis are proof that the State has to repair the damaged caused by the market. But here the paradox is that said amount was to save the banks rather than ordinary citizens. Therefore, many protest banners against the current crisis expressed indignation: "Bail out the People, not the Banks." It would be unfair that after suffering the excesses of neoliberalism, the contributors would have to pay the debts of the banks.

Dean Baker has studied the fallaciousness of the so-called "market fundamentalism". Baker, a co-director of the Economics and Public Policies Investigation Center, sustains that conservatives are as in favor of State intervention as the progressives are. The difference is that conservatives favor State intervention to redistribute the wealth upward, that is, to the population with higher wages: "The Right has every bit as much interest in government involvement in the economy as progressives. The difference is that conservatives want the government to intervene in ways that redistribute income upward."[21] The progressives, on the other hand, are in favor of State intervention to redistribute the wealth downward. Another notable difference is that the right wing has been skillful at hiding interventions, making people believe that the mechanisms that redistribute wealth upward up are those that naturally obey market laws. The left wing has played into this game because if it is accepted that interventionism favoring the higher wage levels is none other than the product of the way free market works, the progressive forces are at a political disadvantage.

Therefore, the strategy to be used consists of proving the existence of upward interventionism and showing that the resource for holy market laws is nothing but the conservatives' defense in favor of privileged groups. The results of that conservative maneuver are: a brutal concentration of power and wealth in just a few hands, low or zero economic growth, massive unemploy-

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Market Fundamentalism What the Fall of the Berlin Wall Was to Communism." *Global Services of Los Angeles Times*, Sindicate/Tribune Media, September 16, 2008, *available at* http://www.huffingtonpost.com/nathan-gardels/stiglitz-the-fall-of-wall-b-126911.htm/.

[20] Francis Fukuyama, *The fall of America Inc.*, 152 (15) Newsweek, October 13, 2008, at 29.

[21] Dean Baker, *Ending the Myth of 'Market Fundamentalism'*, Dissent 58 (2010).

ment, a disarticulated economy with huge debts, massive migration, youths without hopes for the future, abandoned elderly left on their own, heads of family without fixed wages, and broad crime-ridden gray zones.

This struggle between opposing political tendencies has extended from the national to the international arena. The dividends generated by the large free-market model are not willing to cede an inch of ground; others, however, have raised the need to rethink the terms of the relationship to obtain a more equitable distribution of national wealth. As Stiglitz says, this is the refrain of the free trade doctrine regarding globalization. However, it would be wrong to reduce the problem of globalization to the simple field of economic relations as neo-liberals do. On the contrary, globalization is presented in several interdependent and contradictory dimensions.

II. Globalization as a Process

In view of the new international phenomenon produced by recent changes, William H. Mott has said: "Globalization has become […] the most important, economic, political and cultural phenomenon of our time."[22] It is a fact that, because of its complexity, requires systematic study. Otherwise, it is easy to fall into an analytical chaos. Trying to bring order to the enormous amount of analysis on globalization, in his essay "A Global Society?" Anthony McGrew presents a classification based on the different approaches to globalization.[23] For McGrew, the analysis of globalization can be divided into two main branches: the authors who emphasize a single determining cause for globalization and the authors who emphasize the multi-causal nature of the phenomenon.

Along the monocausal line, McGrew calls attention to three authors, Immanuel Wallerstein, James N. Rosenau and Robert Gilpin. In his book, *Historical Capitalism*,[24] Wallerstein introduced the concept of world system as a social science and emphasized the importance of capitalism, or the economy in the globalization process. In his book *The Study of Global Interdependence*,[25]Rosenau associates globalization with technological progress and especially with the expansion of transnational companies. In his text *The Political Economy of International Relations*,[26] Gilpin, in turn, highlights the political-military aspects

[22] William H. Mott, Globalization: People, Perspective and Progress 1 (Westport Praeger, 2004).

[23] Anthony McGrew, *A Global Society?*, in Stuart Hall et al., Modernity 466-503 (Cambridge, Polity Press, 1995).

[24] Immanuel Wallerstein, Historical Capitalism (London, Verso, 1983).

[25] James N. Rosenau, The Study of Global Interdependence (New York, Nichols Publications, 1980).

[26] Robert Gilpin, The Political Economy of International Relations (New Jersey, Princeton University Press, 1987).

of international integration and his approach focuses on the rise and fall of hegemonic powers in the inter-State system.

In the second classification, the multiple causes current, McGrew identifies two authors, Anthony Giddens and Ronald Robertson. According Giddens in *The Consequences of Modernity*,[27] there are at least four factors involved in globalization: the capitalist economic system, the inter-State system, the military complex and the process of industrialization. In his article *"Mapping the Global Condition"*,[28] Robertson stresses that the most important task of social theory today is to take into account the history of globalization in terms of international policy and economy in a plural sense so as to go beyond the model.

In the same multidimensional classification is important to add the thesis of Joseph Nye. In his book *The Paradox of American Power*, Nye points out that perhaps since the time of the Roman Empire, no other power has looked down on others as the United States today. And yet, the conditions imposed by international politics today think it of utmost importance that the United States does not follow a militaristic, unilateral and one-dimensional line to remain standing as "[…] military power alone cannot produce the outcomes we want on many of the issues that matter to Americans."[29] Globalization is such a special event that no matter how much power a State has, it cannot go forward if its pre-eminence is not backed by consensus from other countries.

One of Nye's theoretical contributions is the difference between what he calls a "hard power" and a "soft power". This difference lies in separating the military and economic factors on one hand, and the many aspects a country as powerful as the United States can draw upon to develop its foreign policy, on the other: diplomacy, culture, education, science, technology, health and ecology. Nye also noted the difference between the imposition and negotiation.

Nye expresses his doubts regarding hard power exercised alone: "Any retreat to a traditional policy focus on unipolarity, hegemony, sovereignty, and unilateralism will fail to produce the right outcomes, and its accompanying arrogance will erode the soft power that is often part of the solution. We must not let the illusion of empire blind us to the increasing importance of our soft power."[30] Nye acknowledges that the United States is forced to build the consensus to adhere to a set of principles and standards for the world to work toward achieving political stability, economic growth and global democracy.

On the multidimensional nature that now exists in international politics and globalization, Nye notes that the power among nations is currently dis-

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[27] Anthony Giddens, The Consequences of Modernity (Stanford, California, Stanford University Press, 1990).

[28] Ronald Robertson, *Mapping the Global Condition: Globalization as the Central Concept*, 7 (2) Theory, Culture and Society 15-30 (1990).

[29] Joseph Nye, The Paradox of the American Power, XV (Oxford, Oxford University Press, 2002).

[30] *Id.* at XVI.

tributed according to a pattern that resembles a complex three-dimensional chess game. At the top is military power. On that point, it can no longer be said that the United States can control the world and act unilaterally to resolve conflicts. In the middle board, there is the economic power which cannot be guided solely by the intervention of a single power. There, the United States ceases to have control. The bottom board is filled with transnational relations beyond the control of governments. A large number of non-State actors, such as banking and financial transactions, trade, NGOs, etc., are also listed. "When you are in a three-dimensional game, you will lose if you focus only on the interstate military broad and fail to notice the other broads and the vertical connections among them."[31]

In my opinion, the most convincing point of view is the multi-causal one, which recognizes the various factors that affect globalization. It is very important to note that globalization is not, as the current neo-Marxist and neo-liberal believe, predominantly economic. On the contrary, there are converging factors. I find this important because globalization has been presented as a one-dimensional phenomenon. Globalization is, in reality, multidimensional. Moreover, globalization tends to reinforce the inequalities that existed before it occupied the center stage. In other words, globalization is not part of an egalitarian basis, but a long history of inequality and asymmetries. To correct this trend, it is necessary to act in the different fields mentioned as multicausal determinants of globalization.

Contrary to the belief that globalization involves series of equal opportunities for all, McGrew and Giddens have shown that globalization is a process that does not produce shared benefits. It moves in a variety of contradictory trends reflected in some of the following pairs: universalism versus particularism, integration versus fragmentation, homogenization versus differentiation, juxtaposition versus syncretism, centralization versus decentralization and equality versus inequality.

Major changes are taking place in first world countries. Globalization is not causing economies to be reorganized in the interest of all in a coordinated and equitable manner. In reality, it is a phenomenon that has further divided the third world from the first world. For example, for the first-World knowledge is a vital competitive factor for the generation of wealth and the development of a new workforce. Some third world countries have understood the conditions of the new process and are adapting to it, but others have lagged behind and it is likely that they will not react until later when the conditions of the economy and science have produced an even bigger gap between the rich and the poor. And so far we have not been able to create a supranational body to balance and adjust this disparity. From our point of view, increasing inequality in the global process would be the greatest security threat of the fu-

[31] *Id.* at 39. Nye recognizes that this metaphor of multiple (though not three-dimensional) chess boards was due to his friend Stanley Hoffmann. See also Joseph Nye, Primacy or World Order 119 (New York, McGraw-Hill, 1978).

ture. Globalization has shown that without and effective governance, it tends to accentuate existing injustices. If we cannot shift this current tendency, it will lead us to more and more dangerous instability and violence.

Some social and economics writers, such as Adam Smith, August Comte and Herbert Spencer, foresaw this problem and suggested a solution: it is better to take the path of economic development instead of the military one if we want to follow the project of modernity and escape barbarism.

Without losing sight of the multi-causal perspective, I would like to turn to the political dimension. In this area, globalized politics refers to the increasing interaction between domestic and foreign policy. It is becoming a global/world politics. The perspective that international politics exclusively pay attention to the relationship between States has been replaced by a global policy that involves a wide variety of stakeholders, such as political parties, transnational corporations, civic organizations, and the media, while training a global public opinion.

Global politics is being strengthened to the extent that, as pointed out by Luigi Bonanate, the rigid barrier between domestic policy and foreign policy is fading:

> […] reality seems to have overtaken the theories, as it has been changed so drastically we may be faced with the need of a true and proper scientific revolution (in the manner in which Kuhn stated it). Revolution which becomes necessary by the fact that "normal science" cannot deal with "anomalies," that is, events or circumstances that cannot be encased in the known and shared principles. But before addressing such a polemic theme, we must ask whose turn is it to try this maneuver. We are facing issues that pertain to political scientists or internationalists? Going from here it can be explicitly deduced, that, on one hand, we could say that the dividing line between two disciplines has ceased to exist (but it is a Salomonic solution, inconsistent if in its awaiting, both disciplines continue to do their routinely job) and, on the other hand, making problems global turns them into "international issues" mainly (or in other words, relative to humans).[32]

There is a constant tug-of-war between internal and external politics. As Bonanate states, reality has moved faster than theory. Consequently, globalization presents itself as a challenge for both internationalists and experts in political science. Another internationalist who has analyzed this challenge is William Mott:

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[32] Luigi Bonanate, *La politica interna del mondo,* XVII (1) Teoria Politica (Italian review*)* 8-9 (2001). Another place where Bonanante also presents this thesis about the link between domestic politics and international politics is in his book: La Politica Internazionale fra Terrorismo e Guerra, Cap. III 40-59 (Bari, Laterza, 2004). As to the rest, concept of "internal politics of the world" first appeared in Jurgen Habermas's essay, L'Inclusione dell'Altro 139,169 (Milano, Feltrinelli, 1998).

> Political globalism appreciates global values and concerns, deflates commitments to narrow perspectives and local interests, and seeks to relieve social stresses in human progress and new knowledge. This multidimensional expansion involves not only the geographical expansion of political ideas into foreign polities but also the expansion of political activity from narrow perspectives to broader ones.[33]

Political globalization has therefore drawn attention to the situation of nation states, overpassing the old political and institutional forms. According to this view, we are facing the process of the dissolution of sovereign States, as Nancy Fraser says. She argues that the old scheme based on the Treaty of Westphalia (1648), which placed national states and the concept of territorial sovereignty as key players in international relations, is being overcome: "Today, by contrast, this 'Westphalian' framing of justice is in dispute […] justice claims are increasingly mapped in geographical scales —as, for example, when claims on behalf of 'the global poor' are pitted against the claims of citizens of bounded polities."[34] For Fraser, the Westphalian framework is no longer sufficient to understand what is happening in the national and international arenas.

The sharp division between domestic and international politics is fading under the new political forms that Fraser calls "intermestic", which means half international and half domestic, practiced by new transterritorial, non-State actors, which may include international social movements, transnational corporations, financial speculators, civic organizations, both public and private supranational and international organizations and international public opinion (and here Habermas's proposal on the public and the public spheres becomes more compelling) moving quietly through all areas of the Earth through the mass media and cyberspace. The weight of these actors is increasingly being felt in global politics. The apparent non-viability of the old regulatory scheme supported by the sovereign nation-state leads Fraser to speak of the imperative of forming a new paradigm which she has called "postwestphalian context" of globalization.

But the alleged dissolution of national institutions is not in any way what is happening on a widespread basis. What we are witnessing is a combined phenomenon of recomposition and decomposition of States. We speak of composition because in some cases some States, are concentrated into supranational political bodies like the European Union. Meanwhile, we refer to decomposition because in other cases some States have been dismembered or disaggregated like the former Yugoslavia.

Still, no one can say that the recomposition and decomposition are constant and widespread. Most nation-states still exist. Therefore, we can argue

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[33] See Mott, *supra* note 22, at 11.

[34] Nancy Fraser, Scales of Justice. Reimagining Political Space in a Globalizing World 2 (New York, Columbia University Press, 2009).

that the unit of measure of international politics is the nation-state. Reinforcing this assessment, McGrew says: "The nation-state and the inter-state system […] are and will continue to remain the dominant 'reality' of modern social life."[35] Wolfram Hanreider argues: "Far from being secondary or obsolete, the nation-state, nationalism, and the idea of the national interest are central elements in contemporary world politics."[36] George Soros, writes: "The basic unit for political and social life remains the nation-state."[37]

Greater interdependence in different dimensions and the concept of national sovereignty are not antagonistic. Taking advantage of global dynamics can be an asset to maintain political and national institutional frameworks. The problem is that the nation-state is affected when governments show a lack of adaptability, especially in the case of poor countries, to the new reality.

Between 1989 and 2008 (the fall of the Berlin Wall to Wall Street debacle), there are two major recognizable trends that have worked against the national States and democracy: 1) the ideas and practices of neoliberalism; and 2) the idea and practice of multiculturalism, which has taken up the banner of cultural claims of ethnic and regional demands.

Economic liberalism despised the national State, considering it a hindrance to the operation of market laws. Multiculturalism despised the nation-state by calling it an element of oppression against ethnic minorities. Benjamin Barber's argument regarding the post-Cold War is that two universalizing tendencies became strong: neoliberalism and multiculturalism. They want to get the various dimensions of globalization to a single expression, respectively, the economic and cultural-anthropological field.[38] Faced with such radicalism, it would seem that the world has no option, but to open itself up to other manifestations of social reality.

Against these simplifications, Barber explains the distinction of spheres (economic, political and social). He defends the legitimacy of politics, whether national or international, as the central point of coordination and planning. The international political and financial institutions created after Second World War, are inadequate for this new phase. Those institutions have not been able to maintain peace (United Nations) or counteract the excesses of financial markets (World Bank, International Monetary Fund). These institutions are acting casuistically —almost always under the pressure of contingencies— to a global situation that requires a different framework.

On the mentality of neoliberalism, Soros said sharply: "The promotion of self-interest to a moral principle has corrupted politics and the failure of politics has become the strongest argument in favor of giving markets an ever

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[35] McGrew, *supra* note 23, at 485.

[36] W. Hanreider, *Dissolving International Politics: Reflections on the Nation-State*, 72 (4) American Political Science Review 1277 (1978). Cited by Anthony McGrew, *supra* note 23, at 494.

[37] George Soros, The Crisis of Global Capitalism 102 (New York, Public Affairs, 1998).

[38] Benjamin Barber, *supra* note 10, at 58-76.

freer reign."[39] From this point of view, we might add in reference to multiculturalism that the promotion of tribal interest to a moral principle has corrupted politics and the failure of politics has become the strongest argument in favor of giving tribalism an even freer reign.

We must defend politics as a form of mediation among the many forces on the global scene, and as a coordinating mechanism to solve the problems we face. Politics is the only instrument that can make a new national and international consensus possible. In the national context, it is obvious that we are ending a period of far-reaching time and we need to open another of equal proportions. Entering a new historical stage can only be achieved after searching for the coincidences that makes it possible to establish the foundations of a democratic agreement for development.

In the international context, political consensus is necessary to stabilize the rules of coexistence that govern the new era that is starting. Given that the inclination to build a universal empire has proven ineffective, it is then better to mold from the roots of their own nation-states, an agreement that will lead to democratic global governance. The situation which led to the collapse of the socialist bloc, the collapse of the twin towers in New York and the meltdown in financial markets cannot go without prolonging a period of far-reaching decline. The fall of the Soviet empire may have started an obscurantist state, as happened with the fall of the Roman Empire. Which took place in the middle ages.

Globalization refers to the human capacity to stay a step ahead of the immediate perspective to envisage a larger project that allows us to avoid the trends of decline. Pippa Norris has rightly observed:

> The impact of global governance upon national identities has raised many hopes and many fears. On the one hand, theorist ranging from August Comte and John Stuart Mill to Karl Marx and Anthony Giddens have expressed optimism that humanity will eventually transcend national boundaries by moving towards a global culture and society. In this perspective, we can expect the globalization of markets, governance, and communications to strengthen a *cosmopolitan* orientation, broadening identities beyond national boundaries to a world community, and increasing awareness of the benefits of transnational collaboration within regional associations and international institutions.[40]

A cosmopolitan outlook is emerging amid conflicting trends that move in a non-cosmopolitan way. In other words, these trends tend to stress the ethnic, inbred identities, an attachment to traditions and customs as denial of change and adaptation to a different reality. Drawing on the Greek roots of the con-

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[39] Soros, *supra* note 37, at XXVI.

[40] Pippa Norris, *Global Governance and Cosmopolitan Citizens*, in Governance in a Globalizing World 156 (Joseph D. Nye & John D. Donahue eds., Cambridge, Massachusetts, Visions of Governance for the 21st Century, Washington, Brooking Institution Press, 2000).

cept *cosmopolis* (that tends to the universal), its opposite would be the *ideopolis* (that which tends to the particular). One is identified with the kingdom of light, the other with the kingdom of darkness.

Without effective political and cultural orientation, it is more likely that globalization will move toward an ideopolis and not to a cosmopolis, which will lead to greater injustice and exploitation. The change will not lead to better conditions, but rather to ones that will be more disastrous than those we already suffer. The roots of the globalization movement are in fact pessimism and distrust: "Rather than carrying people smoothly into a new and better, but comfortable and familiar, world, the most recent waves of globalization have deposited them on the far side of progress with only their wits and hearts to create any new world."[41]

One thing is certain: globalization is an interaction among ideological, religious, economic and cultural paradigms from different geographical areas and social backgrounds that do not have to be consistent with each other. This interaction can be constructive in the sense that it leaves some benefits to our societies. But interaction can also manifest itself in irreconcilable positions which can only be resolved through violent confrontation. In my opinion, two events are already underway: first, a peaceful gathering of ideas and doctrines that fruitful and second, a clash of radicalism that proclaims the necessary annihilation of the opponent as a prelude to the proliferation of a single and exclusive true doctrine.

In one of his writings, Giovanni Sartori recalled that on the maps of ancient Rome when they did not know what was in one region, they wrote *Ic Sunt Leones* (here are the lions).[42] Well, for globalization, we could use this metaphor to indicate that we do not know the land we are heading towards. We do not know what is in store for us while we penetrate a field that no one has explored before.

III. A Theoretical Challenge

To summarize the impact of the three phenomena mentioned above, we could say that the order created after World War II has modified since the fall of the Soviet world. The theoretical interpretations of international relations for that condition are no longer valid.

Globalization has cast doubt on the realist international relations theory. This approach, that has been the dominant one since the end of World War II, is emphatic in national States as fundamental subjects of its analysis. Today, that kind of assumption does not help understand what is happening in

[41] Mott, *supra* note 22, at 303.

[42] Giovanni Sartori, ¿Que es la democracia? 319-330 (México, Tribunal Federal Electoral/ Federal Electoral Institute, 1993).

the world. It is no longer useful to understand the multidimensional interaction between nations and people, in view of the repercussions globalization is having within national States. This does not mean that national States are not important anymore. The problem is that power has acquired a complexity that it did not have in previous ages of national and international politics.

To understand the crisis of realist theory of international relations, we have to know its basis. Justin Rosenberg says:

> What then does it mean to speak of a realist school of [International Relations] theory? In the postwar period the term realism has come to indicate a series of propositions underlying a distinctive approach to the study of international politics. These may be abbreviated as follows:
>
> 1) International politics is to be understood predominantly as the realm of interaction between sovereign authorities—a realm which is separate from that of domestic politics.
>
> 2) The distinctive character of this realm is given by the condition of 'anarchy'—meaning that the competitive pursuit of divergent 'national interests' takes place in the absence of regulation by a superordinate authority.
>
> 3) The result is a set of compulsions generic to relations between states which works, though the complex operation of the balance of power, to determine how states behave internationally. To understand the balance of power is therefore also to explain international politics.[43]

In a few words, the realist theory of international relations is a State-centered approach, a one-dimensional perspective.

According to certain interpretation of Thomas Hobbes's political philosophy, the State of Nature as a condition of anarchy and a lack of authority was resolved by establishing a social contract among men. This social contract produced the political State with which order and peaceful relations were possible internally. Nonetheless, in the international arena, it was not possible to build another social contract. Therefore, anarchy continues in this field. The subjects of politics inside the national boarders are men while the subjects of the politics outside national boarders are States. David Held recognized the importance of Hobbesian thought in the theory of international relations:

> […] in the arena of world politics, Hobbes's way of thinking about power and power relations has often been regarded as the most insightful account of the meaning of the state at the global level [...] It is said that Hobbes drew a comparison between international relations and the state of nature, describing the international system of states as being in a continuous "posture of war."[44]

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[43] Justin Rosenberg, The Empire of Civil Society (A Critic of the Realist Theory of International Relations) 9-10 (London, Verso, 1994).

[44] David Held, Democracy and the Global Order (From the Modern State to Cosmopolitan Governance) 74 (Stanford, California, Stanford University Press, 1995).

In the *Leviathan*, we read:

> […] in all times, Kings, and Persons of Soveraigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continual Spyes upon their neighbours.[45]

The next step in the Hobbes's argument for getting away from anarchy in international relations would be stipulating a contract among States to create an association and subordinate agencies from each State to a central and monarchical authority. The universal empire is created by consent:

> […] the defenders of anarchy point out that the only conceivable alternative to this dispersed form of authority would be its centralization in a world state (or empire); and since this global Leviathan could exist only by overriding the sovereign independence of individual states (and with it the self-determination of nations) it would perforce constitute a kind of global despotism.[46]

Hobbes's political thought has been associated with realistic theory in the sense that as the individuals in the State of Nature, States have to see to their own interests and security without any kind of moral or religious considerations. The first rule of the natural law according to Hobbes is to guarantee our own lives through the means each person has at hand against everyone else. This is the sign of the *realpolitik* that has had a significant influence on the study and practice of the international relations in the decades subsequent to World War II. Politics means defending and attacking when in the midst of an unstable environment in which States must survive at any cost. Neorealism overly stresses conflict and competition for power while minimizing collaboration among the actors of international politics. It does not take internal politics into account. The sharp division between internal and external politics is the principal assumption of this school.

Kenneth Waltz affirms: "Students of international politics will do well to concentrate on, separate theories of internal and external politics until someone figures out a way to unite them."[47] This theory sets forth issues like the domestic conformation of power. Justin Rosenberg says: "In their eyes [of the realist writers], the discipline of [International Relations] is premissed on the recognition of a fundamental *disjuncture* between internal political life, which is carried on under the co-ordinating and pacifying sovereignty of the state,

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[45] Thomas Hobbes, Leviathan, 187-188 (C.B. Macpherson ed., Harmondsworth, Penguin Books, 1968).

[46] Rosenberg, *supra* note 43, at 142.

[47] Kenneth Waltz & Roberto O. Keohane, Neorealism and Its Critics 340 (New York, Columbia University Press, 1986).

and external politics, which is governed by the irresistible logic of anarchy."[48] Realist theorists have concluded that International Relations discipline should not lay down the possible connections between the international system of power and the political internal structure.

Bearing in mind that in the historical sense, the State-centered approach is best expressed in the Westphalian constitution of world (dis)order. In fact, the Westphalia and Osnabruck Peace Treaties (1648), as stated above, establish the legal and political basis of modern statehood. Over the course four centuries, it has formed the normative structure that has ruled power relations among nations. The mainstay of the Westphalia settlement was agreement among Europe's rulers to recognize each other's right to rule their own territories without outside interference. No one could violate the jurisdiction of the other. This translated over time into the concept of sovereign statehood and with it national self-determination, which acquired the status of universal ordering principle of international relations.[49] Each State recognizes the legal and political existence of the other. Meanwhile, each State admits the right of other States to control their own territories and govern their own populations according to like circumstances. This concept gave birth to the modern-State system.

But the historical and theoretical starting point of the international relations and more specifically of the Realist school is Thucydides's classical narrative of the Peloponnesian War (431-404 B.C.). The city-States of ancient Greece gave shape to a distinct system of interrelated and, at the same time, autonomous political entities, each with its own land and population. There was a complex structure of alliances among them, but in any case, this war was because they formed two main blocs forms of the democratic Athens on the one hand, and the oligarchic Sparta, on the other. Athens was dominant the Delian League while Sparta was the leader of the Peloponnesian League. Thucydides is quite clear in explaining the motive of the conflict: "What made war inevitable was the growth of Athenian power and the fear which this caused in Sparta."[50] Therefore, at first glance, we can admit the Realist theory, which holds that there is a clear link between what happened in time of the Hellenic world and what is happening in our time. This means that political entities are, in fact, subjects of international relations and, consequently, we can ignore the internal facts of those entities.

However, Thucydides stresses that the Peloponnesian War was a constant and dynamic phenomenon of exchange between internal and external facts. Both parties tried to take advantage of the internal conflicts (*stasis*) backing the enemy's democratic (Athenian) or oligarchic (Spartan) factions. Moreover, from the beginning of his book, Thucydides points at the origin of the

[48] Rosenberg, *supra* note 43, at 4.

[49] Anthony McGrew, *Globalization and Global Politics*, in The Globalization of World Politics 23 (John Baylis, Steve Smith & Patricia Owens eds., Oxford University Press, 2008).

[50] Thucydides, History of the Peloponnesian War 49 (Penguin Books, 1972).

dispute: "The last act before the war was the expulsion of the nobles by the people. The exiled party joined the barbarians, and proceeded to plunder those in the city by sea and land."[51] The antagonism between democracy and oligarchy as internal political regimes was permanent and fundamental in the Peloponnesian War. It was this which made it difficult for the two power-blocs, representing different social systems, to come together.[52]

With these elements of analysis, we can maintain that Thucydides does not belong to the Realist theory even if the most important authors (Edward Hallett Carr, Hans Morgenthau, Kenneth Waltz)[53] of this school have made of him an icon. To the contrary: if we analyze what Thucydides said about what really happened with the polis in Greece at that time and the Peloponnesian war, we will have a useful tool to better comprehend contemporary international relations. In view of all the historical differences between the ancient world and the contemporary world, this means that there were no rigid sketches between what we name internal and external politics. Thucydides's real is just that.

Religious expressions, political revolutions and social upheavals have had deep repercussions in different cultures, communities and countries throughout history. For instance, in antiquity, there is Judaism, Christianity; in the Middle Ages, Islam; in modern times, the Glorious English Revolution (1688), the American Independence (1776), the French Revolution (1789), the Russian Revolution (1917), and the Cuban Revolution (1959). All of them began in specific places (national politics) and then spread out in many directions. They changed not only domestic politics, but also the foreign balance of power. Moreover, they have left their mark in history.

In the contemporary age of globalization, Thucydides's lesson is more current than ever before. If in the postwar period it was possible to think about two different dimensions of politics (internal and external), we cannot deny that globalization has brought closeness, intertwining national and international politics. This requires and inside-out view.

IV. The Inside-Out Approach: A Case in Point on the Transition to Democracy

Applying an inside-out approach on some specific cases, we can resort to, for instance, the "transition from authoritarian regimes to democracy" in some Latin American States, as well as in Portugal and Spain during the 1970s and 80s. Together, they are known as "the Ibero-American world."

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[51] *Id.* at 49.

[52] A.R. Burn, The Pelican History of Greece 261(Harmondsworth, Penguin Books 1982). Cited by Justin Rosenberg, *supra* note 43, at 82.

[53] See E.H. Carr, The Twenty Years' Crisis (London, MacMillan Press, 1981); H. Morgenthau, Politics Among Nations (New York, McGraw-Hill, 1985) and K. Waltz Man, The State and War (New York, Columbia University Press, 1959).

With the victory of the allies in World War II, the Western world opened up to democracy, but not so in Latin America where autocracies or, more precisely, military dictatorships, were maintained and even increased. The Ibero-American autocracies, with a few rare exceptions, experienced a wave of collapses in the 1960s and 70s due to both internal and external causes. The internal reasons included the weakness of the republics, increased social demands for better economic conditions and greater political participation, and conservatives' demand to preserve order and the concentration of wealth in a few hands. The external factors included the hemispheric security policy imposed by the United States during the Cold War and the consequent counter-attack deployed to curb the example of the Cuban Revolution. Cuba was an inspiration to other countries on the need to fight against imperialism and adopt a socialist regime. The call was to respond to dictatorial and imperialist violence with revolutionary violence, but most of the attempted insurrections failed and brought even more repression. This outlook was confirmed with the rise and fall of the Nicaraguan Revolution (1979).

But a different pattern of political change was brewing in many Ibero-American nations. The old military autocracies under the leadership of Antonio de Oliveira Salazar and Francisco Franco began to disappear in Portugal in 1974 and in Spain between 1973 and 1975, respectively. This was the starting point for their political transformation towards democracy. In many Latin American countries, military dictatorships were then replaced by democratic governments: Brazil, Argentina, Uruguay, Chile, Peru, Bolivia, Ecuador, Paraguay and many Central American nations.

The phenomenon of democratization in Ibero-American countries began because of internal causes, but there were also external factors that favored this process, such as demilitarization, assistance given by the rising political class which came into power with the change of regime, the spread of democratic awareness beyond national borders, the media and its role as a liaison among different sectors of society.

In these cases, a different political framework is apparent because the transition from one regime to another was not through violence, as usually happened in countries. Since ancient times, political change usually presented itself in the form of a revolution if it was a mutation of a system or as a reform if it was a transformation in the system. The real novelty of the Ibero-American transition to democracy is that the change from autocracies to democracies did not take place through revolutionary means, but by reforms.

Once the political change took on a secondary role to give priority to social change (or mode of production to put it in Marxist terms), the political transformation became a central issue in Ibero-America. The political philosophy behind this is reflected in Guillermo O'Donnell's definition of the concept: "[…] we define transition as 'the interval between one political regime and

another' [...]."[54] The transition to democracy in Ibero-American countries meant the collapse of authoritarian regimes and the rise of democracies.

With the abundant literature on this topic and given the multitude of analytical perspectives, there are no coincidences on the peculiarities of dictatorships or democracies. However, it is necessary to highlight some basic features to show the change from one regime to another. We could say that politics has two facets: strength and consensus. Dictatorship stresses the first, while democracy emphasizes the second. Dictatorship highlights the mandate momentum and democracy lays emphasis on consensus. Under a dictatorship, power is highly concentrated and unlimited. In other words, there are no, or very few, institutional barriers to stop abuse; there is no effective control over rulers' conduct; there is little or no tolerance for opposition; civil and political organizations have a low degree of autonomy from the State; representative bodies and electoral mechanisms, if any, are reduced to purely ceremonial functions; education and political participation are discouraged; and negotiation as a tool for political integration is relegated to inconsequential levels.

Conversely, in a democracy, power is more distributed and is subject to institutional oversight. Consequently, there is control over the actions of public servants; dissents are tolerated; civil organizations and political parties are independent of government power; representative bodies and electoral mechanisms work efficiently; education and political participation are encouraged; and agreement as a form of aggregation is central in political activity.

Defining the transition from an autocracy to a democracy also presents certain difficulties. Still, there are indications of a change when authorities began to offer concessions to individual and political rights which had previously been violated and start to remove obstacles to make a change of government possible, and when the existence of social and political actors that had previously been banned is accepted. So far only liberalization has been discussed. While it is necessary for democratization, it is not sufficient since the trend can still be reversed by the political dominance of armed forces, persistent inequalities that follow entrenched and powerful interests and an intolerant culture. However, certain signs of genuine transition include the establishment of a new and fair electoral law, successfully holding free and fair elections, and even completing the constituent assembly's work to produce a new institutional framework. Signs of transition from dictatorship to democracy denote a change from militarism to civilian rules.

Therefore, a transition takes place when the political principle that underpinned the regime, in this case the authoritarian one (deterrence through violence), is declining and is no longer able to contain social and political conflicts. In that sense, the coalition of forces that supported the autocrat and that may include important sectors of society becomes fracture and gradually begins to disintegrate.

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[54] Guillermo O'donnell, Phillip Schmitter & Leonard Witehead, Transiciones desde un Gobierno Autoritario 19 (Buenos Aires, Paidos, 1989).

While the old regime is diluted, the new one is strengthened by the rising political and civil freedoms and equality (another recurring factor). The old political class is replaced by one more capable of elaborating consensus and supported by organized and mobilized social sectors. The flow of power from top to bottom begins to change its route by moving in the opposite direction while horizontal, civil pluralism replaces vertical, State corporatism. This shows that democracy works better in dealing with conflict than dictatorship does. It is true that autocracies are always equal to themselves and immovable, while a feature of democracy is to undergo constant transformation, adapting to new circumstances by forming agreement among the participants.

V. Old and New Populism

The transition to democracy is the most important phenomenon that has been observed in Ibero-American countries in the last four decades. However, not everything has been easy. Some countries have fallen back into authoritarianism, though not in the way of the old military-style dictatorships of Antonio Salazar Oliveira (Portugal), Francisco Franco (Spain), Leonidas Trujillo (Dominican Republic), Anastacio Somoza (Nicaragua), Alfredo Stroessner (Paraguay), or Jorge Rafael Videla (Argentina). Authoritarianism has now taken the form of populism. It is worth wondering whether populism has any equivalent in classical political theory. Explicitly, the answer would be negative as there is no literal reference to this word. However, I believe a certain implicit reference to it can be found in some authors. This has to do with the question of which is the best government, the one of laws or of men? It is clear that the vast majority of political thinkers have preferred the government of laws and not the government of men for the same reason Aristotle noted in his *Politics*: it is better to be governed by laws and not by men for one simple reason, the laws have no passions, which is necessarily found in any human soul. "Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire."[55]

The superiority of the law is tied to the idea of good government, which the Greeks identified with the term *eunomia* (a well-ordered State by law). The opposite is *dysnomia* (the ill-ordered State which contravenes the law). In his essay "*Government of Laws or Government of Men?*,"[56] Norberto Bobbio wrote that in *Nomos Basileus*, Pindar points out that the law is queen of all things, mortal and immortal. In *The Republic*, Cicero argued that by serving the law, men attain their freedom. This happened in the ancient world, but in medieval

[55] Aristóteles, La Política 146 (México, Editora Nacional, 1967).

[56] Norberto Bobbio, *Governo degli uomini o governo delle leggi?* in Il Futuro della Democrazia 173-174 (Torino, Einaudi).

times the idea that the good ruler is one who exercises power within the law remained in force. For example, in the book *De legibus et consuetudinibus angliae*, Henri Bracton pronounced a rule that later served as the basis for a State based on the rule of law (*lex facit regem*): the law makes the king.[57]

The rule of law is understood as a State subject to the law. This is the basis of constitutionalism (*government sub leges*). From this, Max Webber developed the idea of rational-legal authority in the sense that this kind of power bases its legitimacy on the exercise of power under the law. In this sense, Hans Kelsen speaks of the law as a series of rules that create powers whose reason for existence lies in the law of laws; that is, the *Grundnorm*.

There is an entire systematic process about the government of laws, but beside it, its opposite appears: the government of men. In his above-mentioned essay, Norberto Bobbio said he recognizes that in this other part of political history there is a wide and rich phenomenology to develop a typology of the government of men.

To this end, the first thing Bobbio does is to affirm that the government of men is not to be confused with monarchy, which was the preferred regime of political authorities like Bodin, Hobbes, Montesquieu and Hegel. The point of difference lies in the fact that monarchy is also a government under law since the King is not obligated to obey the laws he created himself, but is obliged to respect the natural and divine laws as pointed out by Saint Thomas Aquinas. Hence, Bobbio holds: "The negative mirror-image of the king is the tyrant, whose power is *extra legem* both in the sense of not having any valid authority to rule, and in the sense of ruling illegally. Even among those writers who regard monarchy as the best form of government, tyranny, the archetypal form of government of the rule of men, is always portrayed in negative terms."[58]

From Plato's famous description of the advent of tyranny due to an unbridled (or "wanton" as Machiavelli called it centuries later) democracy, the presence of this corrupt form of government has been closely linked with the deterioration of democracy rather than of the different variants of monarchy. It is no coincidence that with the personalist referral who ran the French Revolution after the government of the convention and terror emerged again into the concept of "Cesarist" in reference to Napoleon Bonaparte. This idea of personal rule was reinforced by the advent of Napoleon III, decades after the French Revolution, who inspired Karl Marx in his work *The Eighteenth Brumaire of Louis Bonaparte.* Marx spoke of "Bonapartism" in reference to Napoleon the Great, countering the caricature of his nephew Napoleon III. In that essay, Marx writes: "Hegel says somewhere that great historic facts and personages recur twice. He forgot to add: once as tragedy and again as farce."[59]

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[57] *Id.*

[58] *Id* at 180.

[59] Carlos Marx, *El dieciocho brumario de Luis Bonaparte* in Carlos Marx & Federico Engels, Obras Escogidas 95 (Editorial Progreso, Moscú, s/f).

We must stress that several authors have described both Caesarism and Bonapartism as popular tyranny.

Alexis de Tocqueville also evidenced the risk of an unbridled democracy converting into despotism in his book *Democracy in America*:

> I seek to trace the novel features under which despotism may appear in the world. The first thing that strikes the observation is an innumerable multitude of men, all equal and alike, incessantly endeavoring to procure the petty and paltry pleasures with which they glut their lives...
>
> Above this race of men stands an immense and tutelary power, which takes upon itself alone to secure their gratifications and to watch over their fate. That power is absolute, minute, regular, provident and mild. It would be like the authority of a parent if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood: it is well content that the people should rejoice, provided they think of nothing but rejoicing.[60]

Immoderate democracy is prone to fall into a paternalism that conceals the cruelest of regimes, despotism. This form of domination takes advantage of citizens' immaturity to establish an authoritarian regime. To prevent a demagogue from exploit the weaknesses of an unbridled democracy, according to Tocqueville, it is necessary to institutionalize the rule of law and separation of powers.

The study of the government of men, as embodied by Cesarism, holds a special place in two important treatises written in the late 19th century. One was written by Treitschke and the other one by Roscher, both of which are coincidentally entitled *Politics*. Treitschke states that Napoleon the Great met the needs of the French, who wanted to be slaves and called the post-revolutionary regime a "democratic despotism."

Roscher stressed the problem of anarchy and the need to impose order through an extraordinary one-person government. For Roscher, the degeneration of popular government leads to tyranny, which rules with the support of those same slaves. This link between licentious democracy and the authoritarian solution was examined by Alexander Hamilton in the first letter of *The Federalist*: "History will teach us […] that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying obsequious court to the people; commencing demagogues, and ending tyrants."[61]

This semblance on the distinction between a government of laws and a government of men leads us to place populism within the realm of the gov-

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[60] Alexis de Tocqueville, La Democracia en América 633 (México, Fondo de Cultura Económica, 1973).

[61] Madison, Jay & Hamilton, The Federalist Papers 18 (Bellevue, Washington, Merrill Press, 1999).

ernment of men. Populism is a true and proper "popular tyranny" that opposes the government of laws in at least two of its classic forms. Recalling that Hubert Languet, which used the pseudonimus Stephanus Junius Brutus, wrote of two different types of tyranny: the tyrant who is the figure of the tyrant usurper without a legitimate title (*ex defectu tituli*), and the legitimate ruler who is in power but exercises said power outside the law *(ex parte execiti*).[62]

Latin America has ample examples of populist governments. In some of them and at least during the initial stages, the government appeared to be more paternalistic (Lázaro Cárdenas in Mexico), while those more recently formed resemble a despotic regime (Hugo Chavez in Venezuela). Similarly, we can say that paternalistic populism has led to the institutionalization of the republic while despotic populism is more likely to destroy the institutionalism of the republic.

For the reasons set forth herein, I believe what Ernesto Laclau said on populism is wrong:

> If populism consists in postulating a radical alternative within the communitarian space, a choice at the crossroads on which the future of a given society hinges, does not populism become synonymous with politics? The answer can only be affirmative. Populism means putting into question the institutional order by constructing an underdog as an historical agent —*i.e.* an agent which is an *other* in relation to the way things stand. But this is the same as politics. We only have politics through the gesture, which embraces the existing state of affairs as a system and presents an alternative to it (or, conversely, when we defend that system against existing potential alternatives). That is the reason why the end of populism coincides with the end of politics.[63]

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[62] Stephanus Junius Brutus, Vindiciae Contra Tyrannos (Il Potere Legittimo del Principe sul Popolo e sel Popolo sul Príncipe) 142-148 (Torino, La Rosa, 1994).

[63] Ernesto Laclau, *Populism: What's in a Name?,* in Francisco Panizza, Populism and the Mirror of Democracy 47-48 (London, Verso, 2005). I must add that I do not agree with Francisco Panizza, who sees populism as a mirror of democracy: "By raising awkward questions about modern forms of democracy, and often representing the ugly face of the people, populism is neither the highest formo of democracy nor its enemy, but a mirror in which democracy can contemplate itself, warts and all, and find out what it is about and what it is lacking." (30) The objection to such assumptions is that democracy and populism are enemies. Each negates the other. One belongs to the range of government of law, the other belongs to the classification of the rule of men. Therefore, democracy does not need populism to recognize its own faults. It has done it throughout its long life through the art of discussion and building consensus and dissent within its own institutions. On the other hand, Panizza himself admits the dangers that populism incarnate, in which the government of men ends up being tyranny with popular support as he himself describes: "Populist leaders share with the broader category of *caudillos* and other types of similarly strong, personalist leaders a style of politics based on the prevalence of personal allegiances and top-down representation over party support and institutional debate. In common with *caudillos*, and in contrast with the political forms of liberal democracy based on strong institutions and checks and balances, populist leaders are a disturbing intrusion into the uneasy articulation of liberalism and democracy, and raise the

It is wrong to argue that populism is an alternative "at the crossroads of which depends the future of a given society." This is tantamount to saying that the only alternative for our societies is tyranny. Similarly, it is nonsense to say that populism is synonymous with politics. Fortunately, politics has many more options than the government of the charismatic leader, among them, the government of laws. It is quite obvious that these laws and institutions can be renovated or modified by pre-established mechanisms stipulated in the constitution without having to fall into despotism.

Believing that populism constitutes the people, as a historical agent is to deny the people themselves the opportunity to choose courses of action that are not focused on personal domain. The alternative of transforming the state of current affairs has a range of possibilities that have nothing to do with populism. These possibilities may opt for the policy of negotiation rather than one of confrontation, which may seem like a populist policy. I would say that the end of populism coincides with the end of anti-politics, understood as confrontation, the destruction or marginalization of the opponent.

If we understand democracy as a peaceful exercise of power, rather than a repressive one, we understand politics better than the crass error in which Laclau has fallen. Contrary to what this author says, I believe populism is the refusal of democracy, a tyrannical government that replaces democracy and denies it. This denial is manifest in both government subversion of institutions and laws, and the removal of power from the base to be deposited at the apex, or in the figure of the charismatic leader who acts in the name of those treated as children or as slaves. The mission of tyranny is not to encourage individuals' improvement, but to turn them into obedient servants.[64]

To this we must add that the term "populism" was put back into circulation by neoliberal technocracy as a way of discrediting their political enemies. However, sociologists and political scientists, who embraced the concept of "populism" in the 1960s, did so for scientific purposes: to define certain patterns of behavior in regimes like those of Getulio Vargas in Brazil, Juan Domingo Perón in Argentina, Raúl Haya de la Torre in Peru, José María Velasco Ibarra in Ecuador, Jacobo Arbenz in Guatemala and Lázaro Cardenas in Mexico.

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spectre of a *tyranny with popular support*." (18) Here Panizza fortunatly agrees with the classical distinction between the government of laws and government of men.

[64] Aristotle in his book *Politics* makes a clear reference to the three things that make tyranny: "the first one the debasement of the subjects, it is well known that someone that has a low and weak soul will never conspire; the second one spread mistrust and suspicion among citizens, because tyranny can only be overthrown by men animated by mutual trust; and so it is the reason for which the tyranny fights the good men that harms its authority, not because they do not want to be seen as governed despotically, but for being unable to betray the others and themselves; the third thing that tyranny looks for is the impossibility of all action, because no one attempts the impossible, and it is clear that it will not undertake the abolition of tyranny, who cannot do it" (371).

In analytical terms, the concept of populism was useful to better understand the Latin American social mobilization of masses in partnership with the State. The principal argument for this was that social groups under a populist leader fail to defer to an independent political alternative and therefore yielded to the designs of the rulers. Thus, authoritarian command was formed with broad popular support. Among the scholars who studied this phenomenon are René Zavaleta, Mario Salazar Valiente, Rui Mauro Marini, Octavio Ianni and Andre Gunder Frank. For them, the term populism, referred especially to social forms that replaced oligarchic systems of government. Some of these populist forms managed to extend themselves despite the departure or fall of their leaders.

The paternalistic populism was not born by chance. Studies on this topic suggests that populism began when, in the late 19th century and the first third of the 20th century, the landed oligarchies in Latin America blocked the lower social strata's access to the political sphere and those oligarchies took possession of power to exercise it as a form of patronage, that is, blurring the line between public resources and private wealth. Positivism and the "*laissez faire, laissez passé*" was the banner of the elites

Apart from neoliberalism and populism in which the first acquires a positive value and the second a negative one under the perspective of modernization, a new form of populism has emerged to draw the attention of politics in Latin America: despotic populism.

In Latin America, the neoliberal model has persisted as in the cases of Mexico (Vicente Fox and Felipe Calderon) and Colombia (Alvaro Uribe and Juan Manuel Santos). However, that which I call "neo-populist" has come into existence as the one headed by Hugo Chávez in Venezuela and his respective followers: Evo Morales in Bolivia, Rafael Correa in Ecuador, Daniel Ortega in Nicaragua and Ollanta Humala in Peru.

According to that which was said by Ludolfo Paramio,[65] populism today presents new foundations for a system that goes against that which already exists in terms of institutional and legal matters. According to the new populism, all republican institutions and laws should be eliminated and replaced by the rule of a single man. This is accompanied by increased polarization, as well as social and political conflict. This in turn establishes an atmosphere of constant tension.

Faced with these characteristics, it should be noted that the new populism differs from classic populism: the new one fights against oligarchic governments while the second one plain and simply goes against democracy.

While populism has been reborn in Latin America, it does not mean that "popular tyranny" is limited to that region of the world. The phenomenon is already a challenge to democracy worldwide. One example is what is hap-

[65] Ludolfo Paramio at the Master Conference to the International CLAD Congress, Buenos Aires, Argentina: El regreso del Estado: entre el populismo y la regulación (Nov. 7th, 2008).

pening in Italy with Silvio Berlusconi, a regime that Giovanni Sartori has described as a true and proper "*sultanato*." In this same range, we can include Jean-Marie Le Pen in France and Pim Fortuyn in Holland. Another case in point is the example of Jörg Haider in Austria. It is interesting and not without significance that unlike what happens in Latin America, a region where left-wing populism has sprung up, in Europe, right-wing populisms are also appearing. Among the issues that have been at the heart of the demands of European populism is that of the immigration of people from all over the world to the European continent and especially to Western Europe.

VI. The Collapse of the Free Market Model

There are many scholars studying national and international politics who assure that populism has been a response to the difficult conditions international financial institutions impose on developing countries. The neoliberal onslaught has not only affected Latin American countries, but also a large number of nations around the world. The neoliberal cycle that took place in the late 1970s gave way to the meltdown on Wall Street in 2008.

Assuming that the concept of globalization became part of the common language of national and international politics when the Berlin Wall fell, if one of the opponents, the Soviet Union, fell apart along with its empire based on authoritarianism and a centrally planned economy left the door open to democracy, a market economy could spread everywhere. A form of government, democracy, and an economic system, capitalism, without restrictions, would unite the world. There are some who believe in the peaceful coexistence of democracy and market economy. This is the case of Giovanni Sartori who in his book "*What is Democracy?*" also establishes that this relationship is evident. However, democracy embracing market economy can be both vital and lethal. It is vital because both are fueled by dynamism, creativity, and constant transformation; it is lethal because while democracy requires equality, market economy is a natural producer of inequalities.

Both democracy and capitalism continue to face serious problems. On the one hand, democracy has seen brutality with events like those that took place in the former Yugoslavia, the massacres in Rwanda and Sudan, separatist tendencies and particularly, the terrorist attacks in Washington D.C. and New York on September 11, 2001. Even then, although democracy managed to defeat enemies as bad as Nazism and Communism in the 20th century, another equally insidious rival has now emerged: populism.

Regarding capitalism, or more specifically the neoliberal model, it seems to me that its fate has been sealed with the financial meltdown in September 2008. Those who thought that globalization was just the universalization of markets through the free market system (*McWorld*) were completely mistaken. Today, the challenge is finding an economic model to go beyond statism (*Wel-*

fare State), and mercantilism (*liberalism*). Neither John Maynard Keynes nor Milton Friedman can be theoretical references any more.

VII. The Old Third Way

We will now proceed to review the recent history of neoliberal economic politics and the alternative option to this strategy, the *Third Way*, to better understand the possibilities open to us in the future from an economic standpoint, which is less undemocratic, or more inclusive.

For starters, the 1980s will admittedly be remembered for the control exercised by conservative parties that even spoke of a true and particular "Restoration", which had an echo and followers in practically the whole western world.

One of the biggest mistakes of conservatism was to practice abstentionism, not only in the economic realm, but also in the political one. The result of this was what Massimo D'Alema has called "weak politics", meaning it allows the "*laissez faire, laissez passé*" principle to be applied in the circulation of goods and in following up on problems.[66] In the neoliberal era, the State certainly did follow the interventions of conservatives, but now it was to favor the concentration of wealth. The neoliberal right wing had a technocratic formation, but lacked a political culture and a precise notion about the State and what it stands for. The conservative strategy left national cohesion hanging.[67]

The social vision of the *Third Way* was not, as the conservatives thought, a collection of people competing among themselves, but a conglomerate that looked to support and gather individual efforts.[68] The project that the left wing supported tried to forge a different relationship between individuals and society. Tony Blair said: "The question today is whether we can achieve a new relationship between individuals and society, in which the individual acknowledges, in certain key matters, that it is only by working together in a community of people that the individual's interest can progress."[69] Under this premise, a mutual correspondence between individual rights and social responsibilities was tried to put into practice.

As to distributive justice, one of the most frequent topics of neoliberals theoreticians has been the refusal to join together individual freedom and social equality.[70] In contrast, writers identified with the *Third Way*, like Bruce Ackerman, refuted that supposition: "We emphatically reject the idea that

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[66] Massimo D'Alema, La Grande Occasione (L'italia verso le Riforme) 159-160 (Milano, Mondadori, 1997).

[67] Jeff Faux, *Lost on the Third Way*, Dissent 75 (Spring, 1999).

[68] Anne Applebaum, *Tony Blair and the New Left*, Foreign Affairs 48 (March-April, 1997).

[69] Tony Blair, New Britain (My vision of a Young Country) 298 (London, Fourth Estate, 1996).

[70] Robert Nozick, Anarchy, State and Utopia Part. II (New York, Basic Books, 1974).

there is an inexorable distance between freedom and equality. The comprehensive partnership (*Stakeholder Society*) promises more of the two."[71]

Neoliberal rejection of social justice was mixed with abhorrence for populism and statism. Nevertheless, social justice and populism are not the same. Neoliberals kill social justice to get rid of statism and populism. Now substance will have to be saved while the complements are taken out.

Labor parties were in power for many years and their example was followed in several countries of the world, including some Latin Americans countries.

VIII. The New Third Way

But with Labor Party's removal from power in the United Kingdom and the defeat of the German Social Democrats, it can be said that the experiment of the *Old Third Way* came to an end. Nevertheless, there is a new economic and social model worth taking as a viable alternative to populism and neoliberalism: the Scandinavian model. This model, which has survived the assault of neoliberalism, could trigger an alternative economic and political line to old markets, old Statist and the politic defeat of the U.K.'s Third Way.

On this, Eric S. Einhorn and John Logue affirm: "the Scandinavian Welfare State, which were written off as road kill on the global economy highway in 1990 or 1995, have now again become a social laboratory for adapting solidaristic and universalistic Welfare State programs to the change International economic dispersement."[72] The OECD ranks Scandinavian per capita incomes at the top level. Income inequality is one-third lower than that in the larger European Union countries and fully 40 percent less than in the United States.[73] Scandinavia encompasses five States: three of which are full European Union members (Denmark, Finland and Sweden) while two belong to the European Economic Area (Iceland and Norway). As Einhorn and Logue suggest, the experience of these states shows that *success is a matter of policy choices*. This is an important consideration when faced with the need to find a new model of development both nationally and internationally.

Nordic countries have been able to find a rapid solution to recover from severe economic problems. They identified the failures Welfare State and corrected them. They implemented a new line of public politics without sacrificing social protection and social cohesion by creating jobs and promoting economic growth. This model, which has drawn attention from around the world, is called "flexicurity," which has been recognized by the International

[71] Bruce Ackerman, The Stakeholder Society 4 (New Hamshire, Yale University Press, 1999).

[72] Eric S. Einhorn & John Logue, *Can Welfare State Be Sustained in a Global Economy? Lessons from Scandinavia*, 125 (1) Political Science Quarterly 2 (Spring 2010).

[73] *Id*. at 25.

Monetary Fund (especially in its 2003 report on Sweden) and by the Organization for Economic Cooperation and Development (OECD). Over the past two years, a spate of news articles appearing in The New York Times, Newsweek, The Economist, and amazingly, Forbes, have described the new Scandinavian model as "flexicurity" in action. "Flexicurity" is the combination of economic flexibility, security and particularly, as Forbes expressed it:

> […] a "Third Way' trade off [that] gives employers the right to hire and fire easily, while the state guarantees a good wage [that is protection against unemployment] and retraining for the fired." The World Economic Forum places Denmark and Sweden as the fourth and fifth most-competitive national economies (just behind Switzerland, the United States and Singapore), and Finland and Norway are only slightly lower (sixth and fourteenth, respectively).[74]

The Scandinavian Third Way has captured the attention of international public opinion because it has been able to face the challenges of globalization, while maintaining social policies and shifting its approach about competitiveness, things that apparently cannot combine among them.

Scandinavian model has proved that policymaking does not need to have a restricted scope to operate within the technocratic *entourage*. Public policy can be the result of consensual policy-making and obtain the legitimacy that other governmental activities do not easily acquire. Consensual decisions take time, but it is a matter of choice in democratic societies:

> […] government commissions have recruited experts from academia, business organizations and labor movement to study problems and propose solutions. Universities and autonomous think tanks have added volumes of data and research on intricate issues such as economic structural change, technology, healthcare performance, and not least, old-age pension alternatives. This does not replace either the periodic national collective bargaining rounds or the political debate, but it does provide a generally accepted database of "facts" in which policymakers and their constituents can frame the debate.[75]

It is clear that democracy and economic efficiency are not enemies as neoliberal dogma proclaims: democracy and efficiency can complement each other.

One of the main features of the "New Third Way" is the importance it gives to research and development:

> Nordic countries […] spend lavishly on research and development. All of them, but especially Sweden and Finland, have taken to the sweeping revolution in information and communications technology and leveraged it to gain global competitiveness. Sweden now spends nearly 4 percent of GDP on R&D,

[74] *Id.* at 4.

[75] *Id.* at 17-18.

> the highest ratio in the world today. On the average, the Nordic nations spend 3 percent of GDP on R&D, compared with around 2 percent in the English-speaking nations. Social policy was part of the restructuring that has produced the currently strong performance.[76]

The experience of Scandinavian nations in recent years has shown that social democracy is still strong. Moreover, social democracy in Scandinavian has regain energy "without sacrificing a strong commitment to economic equality."[77] Nobody in Europe has better assimilated the challenge of globalization than Scandinavia. "A comparison between the relative success of Scandinavian policies and those of Britain, France, Germany, or the United States would be as favorable to the Scandinavian model today as it was in 1970. That would not have been true in 1985 or 1995."[78]

Some components of Scandinavian model are: democratic rule, a strong civil society, technological innovation, and adaptability to globalization, as well as collaboration among entrepreneurs, workers, the government, academia and civil society. Furthermore, the Scandinavian model is characterized by a constellation of social values like solidarity and reciprocal responsibility. These values truly relate to Robert D. Putnam's idea of "social capital." At this level of social confidence and high levels of organization, Scandinavian countries have a striking degree of organizational membership. For instance, in 2003, Union Density (union membership as a percent of employed workers) stood at 70 percent in Denmark, 74 percent in Finland, 53 percent in Norway, and 78 percent in Sweden, higher that of any other European country. In comparison, the United States has a union density of only 12 percent. As a consequence, "the labor movement's strength has been key to modernizing the Scandinavian Welfare State in the labor market and pension policy areas."[79] The organizational strength of Scandinavian unions has made it possible for the workers' movement to think of the common good and not their own narrow interests.

It cannot be denied that certain elements of neoliberalism have been adapted to Scandinavian model as part of a general strategy to upgrade the social-democratic model: "While Danish and Swedish pensions tomorrow will rely less on the state and more on the market, they will do so through collectively bargained, universal DC systems that cover all participants in the labor market. Neoliberal elements have been integrated in Scandinavian Welfare State reform, but not at the cost of cutting health care, increasing poverty, or reducing future pensions."[80]

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[76] *Id*. See also Jeffrey D. Sach, *The Social Welfare State, beyond Ideology: Are Higher Taxes and Strong Social 'Safety Nets' Antagonistic tp a Prousperous Market Economy? The Evidence is Now in*, 17 Scientific American (November, 2006).

[77] *Id.*

[78] *Id*. at 25.

[79] *Id*. at 26.

[80] *Id.* at 28.

In a nutshell,

> The revised Nordic model is now widely known and attractive to a broad political spectrum. It seems to have success fully dealt with issues of pension reform, employment flexibility, labor force growth, and medical cost containment in ways that are compatible with economic security, high employment at high wages, good health outcomes, and broadly shared prosperity. Relatively high levels of taxation do not seem to be a problem in and of themselves, at least when they are perceived as fair and do not lead to serious economic dislocations.[81]

The new Third Way can be a fresh wave of political and economic strategies globally. Taking into account the lack of strong proposals due to the collapse of the neoliberal model and the languishing old Third Way, the experience of the Scandinavian model should be kept in mind.

IX. Cosmopolitanism

Throughout this essay, we have seen that globalization presents a theoretical and practical challenge of great proportions. The Realistic theory of international relations is no longer able to address this phenomenon adequately, nor can the field of international relationships be addressed as a collection of entities mired in anarchy. As a result, we are at a stage in which every member must act according to a calculation of convenience in order to survive. In a strange mixture of Hobbesian and utilitarian political theories, those thinkers who identify themselves with the appointed realism needed to survive in the State of Nature have to carry on in the anarchic situation according to the calculation of maximizing benefits and minimizing losses. The outcome is assessed according to "the national interest."

Neither is the doctrine of multiculturalism well-suited to understand the phenomenon of globalization. The world cannot be characterized as a set of autonomous entities defined by their ethnic features and driven by the desire to establish themselves as small states emerging from the wreckage of national States. Another doctrine present throughout the process of globalization has been neoliberalism, which understands this phenomenon one-dimensionally as the universalization of the markets. Economic liberalism has encouraged the view that the world's financial and commercial integration should not encounter obstacles in its path or any form of regulation either nationally or internationally.

Instead of these failed doctrines, we have a real theoretical proposal: cosmopolitanism. This is based on rationality, and not results like utilitarianism, but is based on the rules derived from practical reasoning, so much so that

[81] *Id.* at 29.

these rules become moral duties for individuals, regardless of racial identity, income level, gender, religion or party affiliation. This set of rules must be respected by the fairness of the intent. Cosmopolitanism coincides with the Kantian theory that the existence of rules must be universal for all human beings.

The Kantian ethics is known as a normative doctrine, which opposite to the consequentialist theory of utilitarianism as the latter feeds realism. Multiculturalism highlights particularism, and not universalism. For multiculturalism, national borders are important limits for the implementation of its project. Borders within the States themselves are even more barriers set by each cultural community. Each ethnic-cultural entity establishes its own patterns of behavior that have nothing to do with other cultures: "[…] different cultures have their own ethics and it is impossible to claim, as cosmopolitans do, access to one single account of morality […] Therefore, we must reject the idea of a single universal morality as a cultural product with no global legitimacy."[82] According to multiculturalists, it is impossible to reach an agreement among cultures as different as those that exist worldwide. There is no code of ethics that can work for all of them universally. This position also tends to be wary of these hypothetically universal values because they are generally proclaimed by Western nations, such as using human rights to justify "humanitarian" military intervention in those countries in which these rights are not respected. From this point of view, each national State or even each ethnical community can freely determine the place of these rights within their legal system, without having to render explanations to the international community.

While globalization is increasingly linked to cosmopolitism there are however, schools of thought that oppose unification from the perspective of particular collective belonging. In doing so, it often leaves room for well-intentioned forces to take over this link and impose their own interests on all societies.

This normative view is that of equal dignity for all men and women. This equality, in turn, requires a fair consideration. This criterion of fairness almost always leads to the demand for global justice, as has lately been claimed in the case of Amartya Sen, who in several works has stressed this need.[83] In this same liberal idea although on a different philosophical matrix, lines of thought related to the legacy of John Rawls have also emphasized the issue of global justice.[84] Issues like those mentioned above, the respect for human

[82] Richard Sharpcott, *International Ethics*, in John Baylis, Steve Smith & Patricia Owens, The Globalization of World Politics, *supra* note 49, at 195.

[83] Amartya Sen, Development as Freedom (New York, Anchor Books, 1999). See also The Idea of Justice (Cambridge Massachusetts, Harvard University Press, 2009).

[84] Thomas Pogge, World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms (Cambridge, Polity Press, 2002).

rights, the formation of a global civil society and setting limits on the uncontrolled powers that have taken advantage of globalization and that Luigi Ferrajoli has called "savage powers"[85] (such as transnational corporations and the corporations that dominate the information and news in the world) have been added to the need for global justice.

Globalization has brought enormous challenges, like the need to establish global citizenship and democracy, not as a romantic idea, but as an imperative need to stop wild powers and place them under well-defined legal and institutional control. At the same time, global citizenship and democracy are presented as the need to lead the momentum that seems to go in many directions without a premeditated path and is determined consensually. There is a generalized perception that no one is in the leading position of globalization even though some authorities may have significant influence on some fields of activities, which means having certain abilities to effectively apply Joseph Nye's formula. But there is no harmony. The main challenge of globalization is to find some form of supranational governance and hence the need to establish a cosmopolite citizenship and democracy that allows participation in the process of decision-making and place cosmopolite politics in a position of control. Although long, it is fitting to mention Andrew Linklater's view on this topic:

> The idea of world citizenship is a concept which international non-governmental organizations have used to promote a stronger sense of responsibility for the global environment and for the human species. Proponents of cosmopolitan democracy have argued that national democracies have little control over global markets, and limited ability to influence decisions taken by transnational corporations, which influence currency values, employment prospects, and so forth. They maintain that democracy may not survive if it remains tied to the nation-sate. They argue for democratizing international organizations such as the World Trade Organization, and for ensuring that transnational corporations are held accountable for decisions that may harm vulnerable persons in different parts of the World.[86]

To this, I would add the need to make world-governing institutions democratic, and not just in terms of the World Trade Organization, but also the International Monetary Fund, the World Bank and the United Nations. These institutions were created after World War II and are still operating according to the structure established back then; that is, with the predominance of the countries victors of that war. However, the physiognomy of the world

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[85] Luigi Ferrajoli, Poderes salvajes. La crisis de la democracia constitucional (Madrid, Trotta, 2011).

[86] Andrew Linklater, *Globalization and the Transformation of Political Community*, in John Baylis, Steven Smith & Patricia Owens, The Globalization of World Politics, *supra* note 49, at 551.

has greatly changed. We cannot continue to use schemes from the mid-20th century to solve affairs that involve all of humanity and the many dimensions of its future.

Due to globalization, the question Immanuel Kant made has been updated: "Do the oceans make a community of nations impossible?"

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HOW MEXICAN PRINCIPALS DEAL WITH TEACHER UNDERPERFORMANCE: A STUDY OF HOW PUBLIC MIDDLE SCHOOL PRINCIPALS IN MEXICO CITY MANAGE UNDERPERFORMING TEACHERS*

Jorge Luis Silva Méndez**

Abstract. *This study, based on thirty-eight interviews of principals from public middle schools in Mexico City, analyzes the criteria and methods used by these school officials to identify underperforming teachers, as well as how they wield discretionary authority. The study also proposes several measures that can be implemented by educational authorities to improve how these cases are handled. These measures include improving both principals' training and the mechanisms used to evaluate teacher performance in the classroom.*

Key Words: *Teacher underperformance, teacher performance, middle schools, Mexico, principals, educational administration, school administration, public schools, Mexico City.*

Resumen. *Con base en 38 entrevistas realizadas con directores de secundarias públicas localizadas en el Distrito Federal, este estudio analiza los criterios y métodos empleados por estos funcionarios para identificar a los docentes de bajo rendimiento, y cómo éstos usan sus facultades discrecionales para lidiar con estos casos. Se proponen varias medidas que pueden ser implementadas por las autoridades educativas para mejorar el tratamiento de estos asuntos. Entre las medidas propuestas destaca el mejorar la preparación del director para ejercer el cargo y los mecanismos usados para evaluar el desempeño del docente en el salón de clases.*

Palabras clave: *Bajo rendimiento, secundarias, México, directores, administración educativa, educación pública, administración escolar.*

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I. Introduction

1. *Teacher Underperformance*

The phenomenon of underperforming teachers, also referred to as incompetent[1] or marginal,[2] has already been studied in other countries. In 1992, Edwin Bridges published a pioneering study which analyzed the perceptions of school administrators from diverse California school districts toward teacher

[1] Edwin Bridges, The Incompetent Teacher, Managerial Responses 24 (The Falmer Press: Washington, D.C., 1992).

[2] Jim Sweeney & Dick Manatt, *Team Approach to Supervising the Marginal Teacher*, 14(7) Educational Leadership 25-27 (1984).

incompetence. After Bridges's study was published, other studies on teacher incompetence were realized both in the U.S. and elsewhere.[3]

These studies provide a number of important lessons. First, most studies to date have focused on the phenomenon of underperforming teachers from a managerial perspective. As pointed out by Torff and Sessions,[4] one approach to evaluate teacher performance involves the consultation of principals who, as school administrators, supervise and evaluate teachers. Several reasons are cited for this reliance on principals to study teacher underperformance: first, principals are in an excellent position to observe how teachers perform; second, principals regularly receive comments regarding teacher performance from students, parents and other supervisors; third, principals are former teachers with teaching experience; and fourth, principals are responsible for hiring and granting tenure to teachers. These studies also explore methods commonly used by principals to detect poor classroom performance; as well as how principles respond in these situations. These and other factors are then used to determine how to resolve cases of teacher underperformance. These studies[5] highlight the fact that when dealing with classroom underperformance, principles have a strong tendency to use informal measures.

Despite these lessons, more research is needed to better understand teacher underperformance. Few studies, for example, have yet examined teacher underperformance in low- or middle-income countries.[6] This study shall hopefully contribute in this respect. Also, the study of teacher underperformance has been limited to underperformance in the classroom. This research

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[3] Sahin, Ali E., *Practices Used by Arizona School Districts Dealing with Incompetent Teachers*, Annual Meeting of the American Education Research Association (California, American Education Research Association, 1998); see also Painter, Suzanne R., *"Principal' Efficacy Beliefs About Teacher Evaluation*, 38(4) Journal of Educational Administration 368-378 (2000). See also Painter, Suzanne R., *Principals' Perceptions of Barriers to Teacher Dismissal*, 14(3) Journal of Personnel Evaluation in Education 253-264 (2000); Wragg, Edward C. et al., Failing Teachers? (New York: Routledge, 2000). Tucker, Pamela D., *Lake Wobegon: Where All Teachers Are Competent (Or, Have We Come to Terms with the Problems of Incompetent Teachers?)*, 11(2) Journal of Personnel in Education 03-126 (1997); Earnshaw, Jill, Lorrie Marchington, Eve Ritchie & Derek Torrington, *Neither Fish Nor Fowl? An Assessment of Teacher Capability Procedures*, 35(2) Industrial Relations Journal 139-152 (2004). Yariv, Eliezer, *Challenging' Teachers: What Difficulties do They Pose for their Principals?*, 32(2) Educational Management Administration Leadership 149-169 (2004); Bruce Torff & David N. Sessions, *Principals' Perceptions of the Causes of Teacher Inefectiveness*, 97(4) Journal of Educational Psychology 530-537 (2005). See also Brian Jacob & Lars Lefgen, Principals as Agents: Subjective Performance Measurment in Education (Harvard University: 2005); Glenn Daley & RosaValdés, *Value Added Analysis and Classroom Observation as Measures of Teacher Performance*, Los Angeles Unified School District, Program Evaluation and Research Brand: 2006, Planning, Assessment and Research Division Publication No. 311.

[4] See Torff & Sessions, *supra* note 3, at 531.

[5] See Bridges, *supra* note 3. See also Earnshaw, *supra* note 3.

[6] Yariv, *supra* note 3.

attempts to go beyond that. In reality, underperformance encompasses a diverse range of behaviors cited by principals from public middle schools in Mexico City, including misconduct, criminal behavior, tardiness and unjustified absences.

2. *Evidence of Teacher Underperformance*

The terms classroom underperformance, misconduct, sexual offenses, tardiness and unjustified absence are used here to cover all types of behavior committed by underperforming teachers.[7] The misconduct includes any wrongful conduct committed by teachers against either school personnel or students (including physical or psychological harm). A sexual offense is a specific type of misconduct that results in significant damage and is usually treated differently. There are three types of sexual offenses: harassment, abuse and rape.

In the following paragraphs, this paper presents evidence supporting the fact that teacher underperformance is a problem in public secondary schools in Mexico, particularly in Mexico City.

Academic studies clearly show that teacher effectiveness has a profound impact on students' academic achievement.[8] In general, teachers are deemed "effective" when sufficient evidence exists to show that his or her students have acquired adequate knowledge and abilities. Standardized exam results are often used to measure teacher effectiveness.[9] Mexican students' average scores, both in reading and math, are among the lowest of any country in the OCDE. The PISA 2009 results, based on 65 countries, ranked Mexico 48th in reading and 51st in math.[10] Another OCDE survey, the Teaching and Learning International Survey of 2009 (TALIS), reports that over 60% of Mexican schools report lack of teacher preparation as a major obstacle to learning, double the OCDE average.[11]

The National Evaluation of Academic Achievement ("ENLACE" for its initials in Spanish), a standardized test recently conducted in Mexico, has

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[7] In general, during the manuscript, I use the terms *underperformance/underperforming/low performance/low performer* to refer, in a general manner, to all these behaviors.

[8] Organization for Economic Co-operation and Development [Hereinafter OECD], *Attracting, Developing and Retaining Effective Teachers, Country Background Report for Mexico, Overview*, at 12 (Paris, 2005).

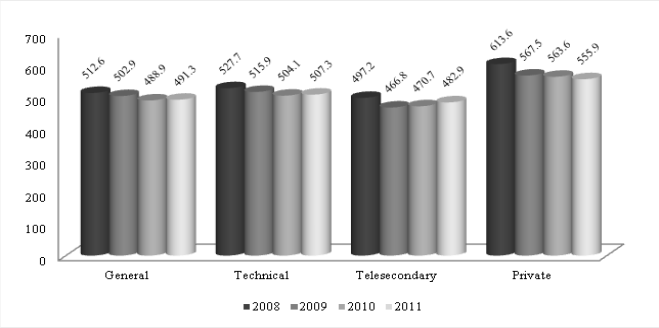
[9] Emiliana Vegas & Ilana Umansky, *Improving Teaching Education Reforms in Latin America*, in Incentives to Improve Teaching, Lessons from Latin America 5 (E. Vegas ed., Washington, D.C., World Bank, 2005).

[10] The Program for International Student Assessment (PISA), a standardized exam given by the OECD to evaluate 15-year-old students' knowledge and abilities. See OECD, *PISA 2009: Science Competencies for Tomorrow's World* (Paris, 2009).

[11] OECD, *Estudio Internacional sobre la Enseñanza y el Aprendizaje (TALIS), Resultados de México* (SEP, 2009).

been especially useful to measure the performance of Mexico City-based middle school students. The ENLACE exam is administered to Mexican third graders and covers language, math and science.[12] The following graph shows the average ENLACE 2008-2011 scores of third-grade students located in Mexico City, according to school modality.[13]

Graph 1. ENLACE Historical Average Score of Third-Year Students in México City Secondary Schools by Modality



Source: ENLACE, http://enlace.sep.gob.mx/.

The ENLACE 2008-2011 results show the low academic level of general middle school students in comparison with students at technical and private middle schools (general, technical and telesecondary are public middle schools). Many factors, subsequently developed, may help explain this disparity, including the academic preparation of teachers and class hours, among others.[14]

Evidence of other reasons for underperformance, such as physical harm, psychological damage, and sexual offenses, is less evident, but exists. Several studies have exposed what has been termed "institutional violence" or offenses committed by school personnel against students.[15] The *Unidad de Atención*

[12] Secretaría de Educación Pública [S.E.P.] [Public Education Ministry], *Evaluación nacional de logro académico de centros escolares*, *Documento de apoyo para los talleres generales de actualización* (México, SEP, 2008).

[13] School modality: general, technical, telesecondary and private.

[14] Evidence from Mexico states that students attending evening school schedules obtain worse scores compared to students attending the morning hours. See Sergio Cárdenas, *Escuelas de doble turno en México*, 16 (50) Revista Mexicana de Investigación Educativa 801-827 (2011). There are also differences in scores caused by family income level, urban or rural location of the school, secondary's model type (indigenous vs. non-indigenous, and secondary vs. telesecondary), time dedicated to the classroom learning process, educational material and several other social and family-related factors. See Claudia Rodríguez & José Vera, *Evaluación de la práctica docente en escuelas urbanas de educación primaria en Sonora*, 12 (35) Revista Mexicana de Investigación Educativa 1129-1151 (2007).

[15] Jorge Silva & Adriana Corona, *Violencia en las escuelas del Distrito Federal. La experiencia de la*

al Maltrato y Abuso Sexual Infantil (UAMASI) [Unit for the Attention of Harm and Sexual Abuse against Children] is an entity responsible for handling complaints of violence in Mexico City schools (public and private). Based on studies realized by Silva and Corona,[16] 3,242 complaints were filed before the UAMASI between 2001 and 2007. In 85.78% of these complaints, at least one of the suspects was a school employee; in only 11.1% of these cases were students considered suspects. Considering only complaints involving school personnel, 48.47% involved physical harm; 33.66% psychological harm; 14.56% sexual offenses (either harassment or abuse); and 3.31% other behaviors. In another study,[17] Silva states that between 1998 and 2008, the *Dirección General de Asuntos Jurídicos* General Office of Legal Affairs of the Ministry of Education ("DGAJ" for its initials in Spanish), analyzed 229 administrative hearings (the procedure used to initiate the dismissal of tenured teachers) that involved sexual offenses (sexual abuse or harassment).

II. Methodology and data

This work will address three main issues:

1) What criteria are used by principals to identify underperforming teachers?
2) How do principals identify teachers and prove underperformance?
3) How do principals use their discretionary authority to deal with cases involving teacher underperformance?

To answer these questions, several interviews were realized with educational officials (principals, supervisors, teacher supervisors and superintendents)[18] who work in middle schools in Mexico City. Although the study focuses on the principal's point of view, interviews with other officers were realized to verify the information provided by them.[19] Interviews with educational officials were conducted in two stages. The first was realized in September 2007, and involved interviews with one principal, three supervisors and one

Unidad para la Atención al Maltrato y Abuso Sexual Infantil, 2001-2007, 15 (46) Revista Mexicana de Investigación Educativa 739-770 (2010a); see also Jorge Silva, *Procedimiento para cesar al personal de la Secretaría de Educación Pública que acosa y/o abusa sexualmente de los alumnos/as: legislación, evidencia y recomendaciones para el cambio*, 11(2) Revista de Estudios de Violencia 1-25 (2010b).

[16] Silva & Corona, *supra* note 15.

[17] Silva, *supra* note 15.

[18] Every general middle school is overseen by a principal. A number of schools located in the same territorial jurisdiction comprise a School District, which is headed by a superintendent.

[19] Norma K. Denzin & Yvonna S. Lincoln, Collecting and Interpreting Qualitative Materials 478 (California: Sage, 2008).

superintendent utilizing a semi-structure protocol.[20] Informal talks were also realized with principals, supervisors and teacher supervisors. The goal of the first stage was to pilot the interview protocols previously designed. The second stage, realized between July and December 2008, involved standardized interviews[21] based on a questionnaire.

Table 1. Information on the Sample of Officers Interviewed

Officer	*Number of officers*	*Average length of the interview (in hours)*	*Average number of years working in general middle schools*	*Average number of years in the position*
Principal	38	01:27:56	29.79	6.30
Supervisor	10	01:15:58	37.00	9.95
Teacher supervisor	5	01:00:49	39.40	6.00
Superintendant	4	01:23:22	41.75	5.38

Principals interviewed in the second stage were selected using a convenience sample technique known as snowball.[22] This technique was implemented in the following way: first, access was secured to supervisors representing every county in Mexico City; second, every supervisor was interviewed and, at the end of the interview, asked to propose two or three principals for further interviews on this topic. The supervisors were told that the principals chosen for the interview must have experience in dealing with underperforming teachers. Because it was not possible to determine the sample size of interviewees a priori, the saturation point criterion was used.[23] This criterion assures that the sample size is determined by the amount of additional information given by the last unit interviewed. Using the aforementioned standard, interviews were realized in the second stage with 38 principals, 10 supervisors, 5 teacher supervisors and 4 superintendents. The teacher supervisors and superintendents were also contacted through the supervisors. Only 5 of the 57 officers interviewed did not permit the interview to be recorded. Table 1 shows information on the sample of officials interviewed in the second stage.[24]

[20] Michael Q. Patton, Qualitative Research and Evaluation Methods 342 (California: Sage, 2002). A semi-structure interview is guided by a list of item, which allows the interviewee some flexibility.

[21] *Id.*

[22] *Id.* The snowball sample was obtained in the following way: the first principal referred a second principal, and then that second principal referred a third one, and so on. The main reason to select this technique was the difficulty in gaining access to the principals.

[23] Yvonna S. Lincoln & Egon G. Guba, Naturalistic inquiry 202 (California: Sage, 1985).

[24] I also conducted interviews with other actors frequently involved in underperformance

A quick look at the characteristics of the principals interviewed for this study shows a bias toward those with experience in handling underperforming teachers. For this reason, the opinions of inexperienced principals, who may hold different views about the issues described herein, are not included in this study. The sample is also biased against parents, students, teachers and other community members, whose views do not appear in these pages. Undeniably, parents, students and community members have a close relationship with school personnel and can provide accurate information regarding how principals handle underperforming teachers. Teachers, for example, have a close relationship with principals, and can provide valuable information on the principal's performance in diverse areas.[25]

The participation of all the interviewees was voluntary and confidential. The education officials never provided any personal or confidential information of school personnel or students under their supervision.

III. Principals' Responses in Cases Involving Underperforming Teachers

As the data will show in the following sections, principals rarely rely on formal measures stipulated under law to address teacher misconduct;[26] instead, they tend to resort to diverse informal mechanisms. As one of the principals interviewed said, "formal measures are only used as a last resource, and when it is no longer possible to reach a viable solution with the teacher." Other studies have also found that principals tend to use informal measures to deal with teachers who perform poorly in the classroom before taking legal action.[27] This section will review the process followed by principals when dealing with teacher underperformance.

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cases: the director of the UAMASI, two judges from the *Tribunal Federal de Conciliación y Arbitraje* (TFCA) [Federal Tribunal of Conciliation and Arbitration], lawyers who work in the DGAJ, union representatives and private lawyers who represent teachers in termination cases. Most of these interviews were performed between September and December 2008. While the union representatives and private lawyers allowed me to record the interviews, none of the public servants gave their authorization.

[25] Since I did not have sufficient resources to interview these actors, I opted for other sources for verification, including testimony provided by supervisors, teacher supervisors, superintendents and, in some cases, information obtained from documents or databases. Note that previous research on this topic has taken into consideration the views of other stakeholders besides teachers and administrators. See Wragg et al., *supra* note 3.

[26] For a complete explanation of the legal framework that regulates the performance of general middle school teachers in Mexico, see Joge Silva, *An Overview of the Rules Governing the Performance of Public Middle School Teachers in Mexico,* 3 (1) Mexican L. Rev. 151-185 (2010).

[27] Bridges, *supra* note 3; Wragg et al., *supra* note 3. Earnshaw, *supra* note 3.

1. *What Criteria Are Used by Principals to Identify Underperforming Teachers?*

In the interviews, each principal was asked about the underperformance cases handled in the school where he or she has worked the longest. After being given a list of underperforming behaviors, each one of them was asked to record the number of cases they had personally handled for each behavior type. Table 2 summarizes their responses.

Table 2. Underperformance Clases Reported by Interviewed Principals (N=38)

*Type of behavior**	*None*	*From 1 to 5 cases*	*From 6 to 10 cases*	*More than 10 cases*	*Number of principals who responded*
Sexual abuse or sexual harassment	24	12	1	1	38
Physical or psychological harm	8	20	8	2	38
Other types of misconduct*	2	4	5	27	38
Underperformance in the classroom**	2	15	13	6	36
Incompliance with administrative duties related to the performance of the teacher in the classroom***	5	3	6	22	36

Notes:

* Other types of misconduct: Violent discussions between the teachers or between teachers and parents, teacher behavior that disrupts the school organization, such as teachers who create conflicts in the organization of the school by manipulating parents or students, or teachers who close the school; disrespectful behavior of the teacher when dealing with the principal or parents, disobedience, misuse of the school funds by the teacher, the teacher attends work under the effects of alcohol or drugs, the teacher does not help take care of students during the school breaks.

** Underperformance in the classroom: failing in teaching the contents, evaluating or supervising the students, the teacher abandons the classroom when teaching.

*** Incompliance with administrative duties related to the performance of the teacher in the classroom: failing in developing the lesson plan or submitting this document to the principal for evaluation.

During the interviews, principals were also asked the following question: "Do you consider teacher absenteeism and/or tardiness a problem at your current school?" In response to this question, principals had to select any of the following options: "not a problem"; "minor problem"; "problem"; "significant problem", "very significant problem". All the principals interviewed stated that teacher tardiness and unjustified absenteeism was (at the very least) a "problem" in their current school.

2. H*ow Do Principals Determine the Identity of Underperforming Teachers?*

During the interviews, principals were asked to rank the methods they used to detect underperforming teachers at their schools. the principal was instructed to assign the number "one" to the method used most frequently; number "two" to the second most-used method; and so forth. Table 3 depicts the number of times each method was rated number one, number two or number three, as well as the number of principals who assigned a number to each method.[28]

Table 3. Methods More Frequently Used by Principals to Detect an Underperforming Teacher (N=34)

Method	*Selected as option 1*	*Selected as option 2*	*Selected as option 3*	*Selected as option 1, 2 or 3*	*# Principals who assigned a number to this method*
Parent complaint	4	11	9	24	34
Student complaint	12	8	4	24	34
Observations of principal or assistant principal	12	2	6	20	33
Observations of hall supervisor	1	5	7	13	31
Low student archievement	6	1	0	7	31
Observations of the group advisor	0	2	5	7	22
Teacher complaint	0	2	2	4	28
Standardized test	0	3	0	3	22
Teacher's indifference in collegial activities	0	1	1	2	25

As shown in Table 3, principals take into account parent and student complaints more than any other resource to identify underperforming teachers (24 out of 34 principals marked these methods as number one, two or three). Parents regularly lodge their complaint with the school principal. Although the complaints can be filed in written or oral form, principals tend to pay more attention to written complaints, since these require a written response. Written complaints can eventually be used as evidence to support the filing of formal measures against a teacher. Parents are also entitled to file complaints

[28] In the evaluation, some principals failed to rank either all or some of the methods listed.

with other outside education officials, including the supervisor, superintendent or the School Complaints Office. A complaint filed before an outside official will eventually be referred to the principal, who is the final authority responsible for resolution. Although filing a complaint before an outside education official can delay resolution, once the complaint reaches the principal, he or she must take immediate steps to resolve the issue. In these cases, the principal must also submit a written report to the educational authorities involved regarding whether or not the problem has been resolved. Principals also stated that student complaints frequently alerted them to teacher underperformance. Because students are afraid of teacher retaliation, their complaints tended to be anonymous. Depending on the situation, principals may or may not decide to notify the parents before pursuing a complaint. Prior research has shown that the observations of the principal as well as of parents and students are the two most common methods used to identify underperforming teachers.[29]

Observations of school personnel also play a critical role in providing principals with valuable information. Principals frequently rely on their own observations and those of assistant principals to detect underperformers (20 out of 33 principals indicated this method as number one, two or three). Principals and assistant principals mainly gather these observations from walking in the hall and, sometimes, visiting classrooms in order to directly supervise teachers' performance. Based on the interviews, principals spent an average of 44.31% of their total time doing administrative tasks, and only 17.5% supervising teacher performance. Since principals spend such a significant amount of time dealing with administrative matters, they rely heavily on support provided by school personnel, in particular hall supervisors,[30] who report irregularities regarding teacher behavior or student discipline directly to the principal.

There are other methods that principals use less frequently to detect underperformers. At the beginning of every school year, the principal assigns to every group of students a teacher who is responsible for advising them on academic and disciplinary matters. Among other duties, this group advisor is responsible for reporting student complaints regarding teacher underperformance directly to the principal (7 out of 22 principals marked this method as number one, two or three). Teachers may complain about colleagues (7 out of 22 principals marked this as number one, two or three). According to the principals interviewed, teachers' complaints are rare but can arise when the claimant is directly affected by the behavior of the underperformer. For instance, when a teacher is unable to maintain student discipline, the noise from his or her classroom may prevent teachers in adjacent classrooms from

[29] Bridges, Sahin, Wragg et al., and Earnshaw et al., *supra* note 3.

[30] Principals consider hall supervisors' observations as a useful way to detect teacher underperformance (13 out of 31 principals marked this method as number one, two or three).

properly realizing their duties. Principals may also consider the low academic achievement of students as a sign of an underperforming teacher (7 out of 22 principals marked this as number one, two or three).

3. *How Do Principals Use Their Discretionary Authority to Deal with Underperforming Teachers?*

Previous studies have focused on the steps used by principals to handle teacher underperformance. Bridges describes these steps as follows: first, tolerance of the teacher's poor performance; second, an attempt to "save" the teacher; third, an effort to convince the poor performer to either resign or retire early; and, finally, a recommendation to dismiss.[31] For his part, Tucker describes the following sequence: remediation, reassignment, encouragement to resign or retire and, finally, dismissal.[32] These two studies were conducted in the United States, where principals have a certain level of authority to recommend teacher dismissal. Although Mexican public school principals do not have the ability to dismiss or recommend teacher dismissal, they rely heavily on informal mechanisms to handle cases involving classroom underperformance.

The following paragraphs describe the measures generally taken by principals to deal with underperforming teachers. Although these measures vary depending on the specific behavior involved, their main components are outlined here.

Once the principal has detected an underperforming teacher, either by means of a complaint or other means, the first step is to gather evidence to corroborate the alleged misbehavior. As one principal said: "Before taking any measure against a teacher, I must first have enough evidence to convince him that the situation is *not* personal." Depending on the case at hand, the evidence can consist of a confession; testimonies of students, parents, teachers, or other school personnel; or expert testimony issued by physicians or psychologists. Public documents, including judicial decisions, time cards, and academic records can also be important pieces of evidence. In some cases, the claimants can present visual or audio records. As a general rule, principals consider teacher confessions, public documents and expert testimony as the strongest evidence.

Even when an investigation confirms accusations leveled against a particular teacher, principals rarely implement formal measures. As stated earlier, they often resort to informal measures (*i.e.*, those note regulated under law), including dialogue, supportive measures, oral or written recommendations,[33]

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[31] Bridges, *supra* note 3.

[32] Tucker, *supra* note 3.

[33] In the TALIS report of 2009, it was found that Mexican teachers who were never evaluated, or had never received a recommendation in their schools, have a higher probability of

oral reprimand,[34] a written request, reconciliation, negotiation, and segregation of the teacher within the school. Besides written recommendations, written requests and other informal measures rarely produce evidence that can be used to prove teacher underperformance in a formal legal proceeding.

The informal measure most used by principals is dialogue. Dialogue is rarely if ever used to intimidate but rather to make teachers aware of the charges against them. If at this stage the teacher recognizes the accusations, the principal normally shows support, including recommendations on how to improve his or her performance. These measures depend, of course, on each specific case. According to the principals interviewed, many underperformance cases are resolved after this dialogue occurs and supportive and motivational measures are implemented. When this does not happen, the next most utilized method employed by principals is written request. The text of the written request invites the teacher to comply with a particular obligation. An example of a written request is: "Because of your delay in submitting the graded exams, we have been unable to report grades to the students. I urge you to submit the graded exams as soon as you can." Although the written request is archived in the teacher's personnel file, it does not affect the labor conditions of the teacher. This said, the written request plays an important role during the resolution process of underperformance cases, especially to indicate the principal's intent to implement formal measures if the underperformance continues.

The intervention of outside education officials occurs only when principals have exhausted all available informal measures. Two outside officials usually intervene in such cases: the superintendent and teacher supervisor. Principals request the intervention of teacher supervisors when an underperforming teacher —despite informal measures— has failed to improve his or her classroom performance. If this occurs, the principal submits a written petition requesting that a teacher supervisor visit the school. During this visit, the principal describes the measures taken to try to resolve the case. After the teacher supervisor observes the teacher's classroom performance, he writes his observations in the school log. The principal then uses these observations to justify the application of additional formal measures, such as a low evaluation score. During this process, the supervisor plays a significant role by providing advice regarding the reconciliation of the case, as well as how formal measures could be implemented.

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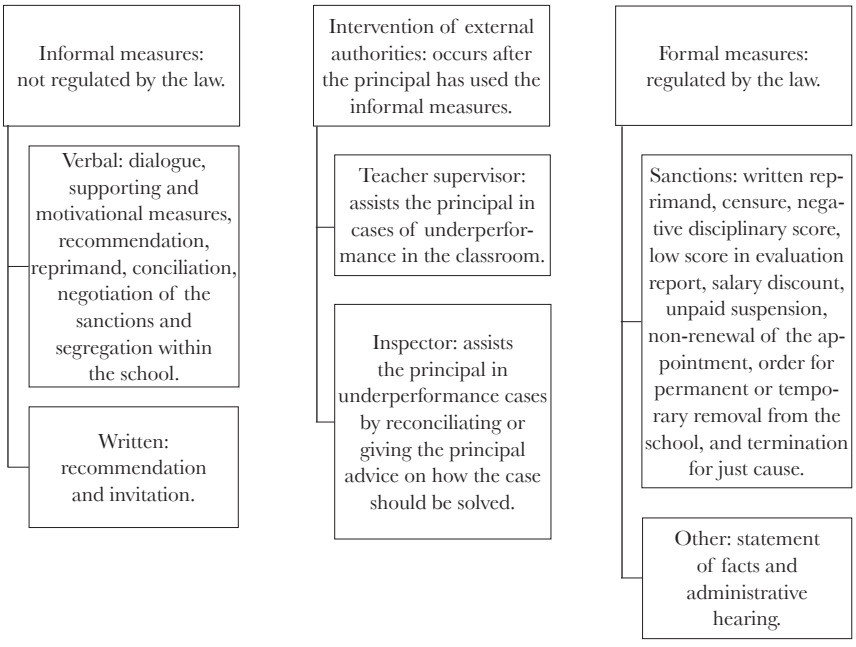
having lower levels of auto-efficacy, even when the relation is indirect. Nevertheless, it also found that the frequency of these evaluations in Mexico is higher compared to the TALIS average (30% of the teachers received at least one evaluation per month, compared to the average of 12%). Most evaluated teachers felt that, in general, these evaluations were fair and useful for their development, satisfaction, job security, and innovation. See OECD, *supra* note 11.

[34] For the purposes of this research, oral reprimands, set forth in section 71 of the General Conditions for the Personnel of the Ministry of Education, are considered to be informal measures.

Measures regulated by law include written reprimands; censure; negative disciplinary points; low evaluation scores; salary discounts; unpaid suspension; non-renewal of teaching contracts; an order for the teacher's permanent or temporary removal; or termination for any just cause. In general, formal measures result in a written record placed in the teacher's personnel file which may be later used to justify further sanctions. There are two formal measures that merit special attention: the statement of facts and the administrative hearing. Principals implement these formal measures to create an evidentiary record that is later submitted to higher educational authorities (either the superintendent or the DGAJ), who make the final decision regarding the formal measures to be applied against the underperformer.[35] In addition to these procedures, the principal may also try to implement informal measures such as negotiation of sanctions or segregation within the school. During the application of informal measures, principals generally try to understand (and are supportive of) the underperformer; during formal measures, however, principals no longer tolerate the underperformance and may in fact try to have the individual removed from the school.

Figure 1 summarizes the measures implemented by principals in cases involving teacher underperformance.

Figure 1. Measures Used by Principals to Deal with Cases Involving Underperforming Teachers



[35] In particular, the DGAJ may decide to start a termination lawsuit before the TFCA.

Implementation of the measures shown in Figure 1 depends on the facts of each specific case. The following section presents and explains several examples that illustrate how the process varies in accordance with different scenarios.

4. *Underperformance Cases Reported by Principals*

The examples and flowcharts presented in this section are based on the experiences of educational officials who participated in the study. The final versions of the flowcharts were approved by the supervisors and superintendents.

In this section, the term *bureaucratic authorities* refers to those entities or individuals from which the principal requests authorization to implement a punitive measure, either on an informal or formal basis, against an underperforming teacher. The role of the bureaucratic authorities is to prevent principals from abusing their discretionary authority when imposing punitive measures against underperformers. The bureaucratic authorities include supervisors, teacher supervisors, superintendents, the DGAJ and the UAMASI.[36] The term *administrative procedures* refers to requirements (*e.g.*, paperwork) submitted by principals to the bureaucratic authorities in order to receive authorization of a punitive measure against underperformers. Finally, the term *authorization standards* (or *standards*) refers to the criteria used by the bureaucratic authorities to authorize punitive measures solicited by principals against underperforming teachers.

A. *Underperformance in the Classroom*

The principal is regularly informed of these teachers either through his or her personal observations of the teacher's performance or the observations of assistant principals; hall supervisors; parents or students; or other teachers' with respect to classroom noise or any other type of misbehavior. In these cases, the principal first attempts to talk to the teacher in a careful and polite manner. At first, the principal seeks to understand the reasons behind the teacher's deficiencies. If during this dialogue, the teacher accepts the fact that he has difficulties in performing his job, the principal often adopts a tolerant attitude, at least for a certain period of time. Despite solid evidence proving their underperformance, some teachers are reluctant to accept responsibility for an underperformance issue. Once informed of the case, the principal

[36] The UAMASI is an entity responsible for investigating complaints involving actions that affect the physical or psychological integrity of students attending schools that offer basic educational services in Mexico, which includes general middle schools.

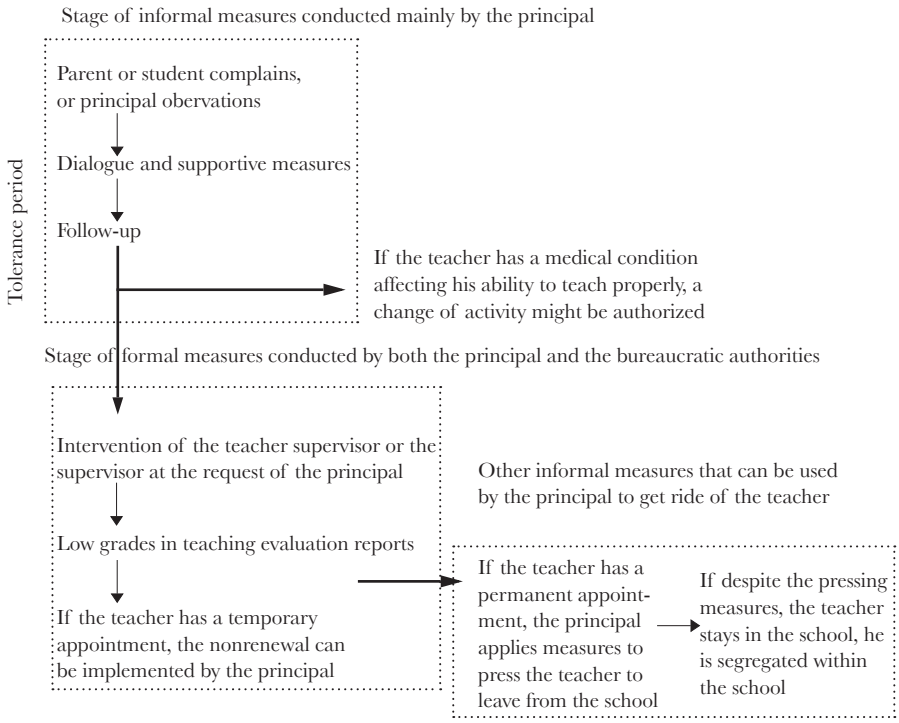
can implement supportive and motivational measures to assist the teacher. Common recommendations include advice regarding teaching techniques; a request that the teacher attend auxiliary classes; information about courses taught at the Teacher Centers; participation in collegial activities; and, in some cases, even a request that the teacher seek psychological treatment. After the dialogue and recommendations, the principal, assistant principal, and other members of school personnel supervise the teacher's performance to verify improvement. This time, is known as the "tolerance period."

If the teacher fails to respond in a satisfactory manner to these informal measures, the principal generally implements one or more written requests. Once a written request has been issued, the principal regards the case as irremediable, and often initiates steps to remove the teacher. After the written request(s), the principal assigns the teacher a low evaluation score, after which he or she may choose to apply even stronger measures (both informal and formal) depending on the circumstances. These measures include failing to renew the teacher's contract (applicable only if the teacher holds a temporary position); segregating the teacher within the school (assigning the teacher solely administrative work); or encouraging the teacher to seek transfer to another school. If during the resolution process, the teacher can prove that he has a physical or psychological condition that affects his teaching ability, the teacher can legally request a change of activities; that is to say, administrative work instead of teaching.

According to principals, many of these cases are resolved through the implementation of informal measures. The bureaucratic procedures to implement formal measures are complex and require a significant amount of time dealing with the authorities. Irrespective of whether convincing evidence exists about classroom underperformance, the formal punitive measures that may be implemented in these cases are often extremely limited, especially if the underperforming teacher has tenure. Since the legal standard used to define classroom underperformance is not set forth under law and, as a result, termination is not a feasible option,[37] principals must often use informal measures in cases involving tenured teachers, including negotiation (in exchange for the principal's decision not to apply sanctions, the teacher voluntarily requests to be transferred to another school); or the segregation of a teacher within the school. As a result of the difficulties involved with removing a teacher either formally or informally, some principals simply opt to tolerate the underperformer. Figure 2 depicts the procedures used by principals to handle cases involving classroom underperformance.

[37] Although the law states that SEP workers must "perform their duties with the required intensity and quality," the meaning of "required intensity and quality" remains undefined in the law and the jurisprudence.

FIGURE 2. PRINCIPALS' RESPONSES IN CASES INVOLVING UNDERPERFORMANCE IN THE CLASSROOM

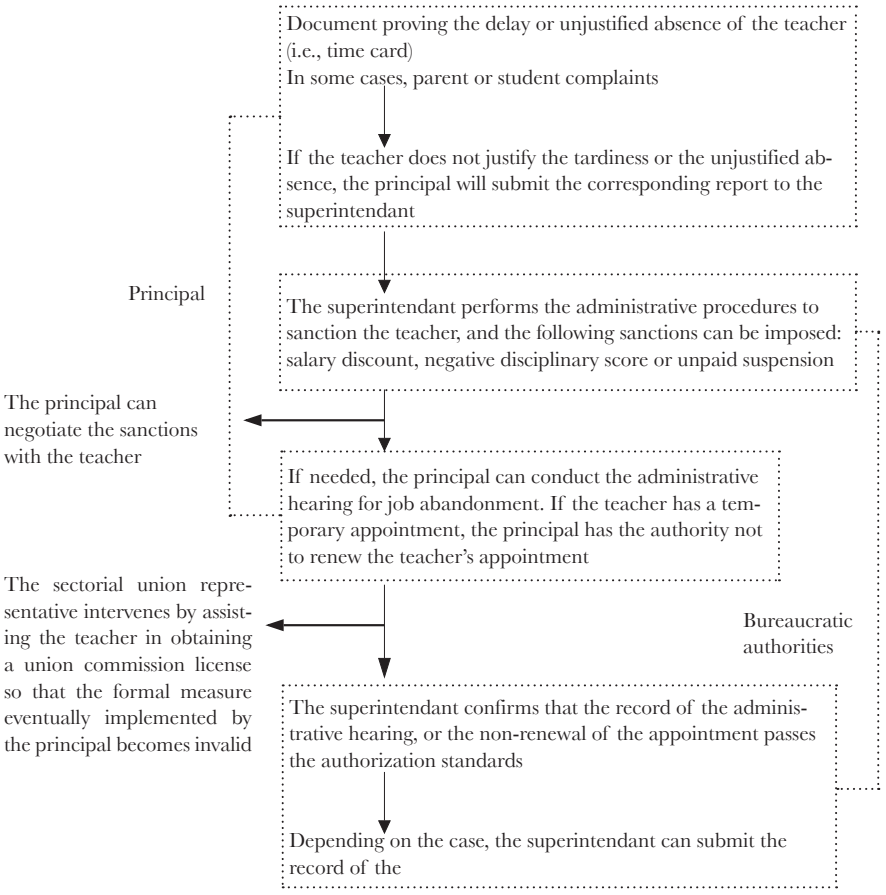


B. *Tardiness or Unjustified Absences*

Bureaucratic procedures to implement formal measures in cases involving tardiness or unjustified absence do not require a great amount of the principal's time and effort. Since evidence supporting these cases may be found in public records (*e.g.*, time cards showing that the teacher was late or absent), the standards established by the bureaucratic authorities can be normally satisfied through formal measures. For this reason, principals use formal measures more often in these types of cases, which include salary discounts, unpaid suspensions, negative disciplinary scores and administrative hearings for job abandonment.[38] Figure 3 below summarizes the procedures generally followed by principals when dealing with cases involving tardiness or unjustified absence.

[38] A jurisprudential criterion provides that job abandonment requires that the teacher fail to attend work in a continuous and unjustified manner for four consecutive days. See Pleno Suprema Corte de Justicia [S.C.J.N.] [Supreme Court of Justice of the Nation], Appendix of 1995, Página 368 (Mex.).

FIGURE 3. PRINCIPALS' RESPONSES IN CASES INVOLVING TARDINESS OR UNJUSTIFIED ABSENCES



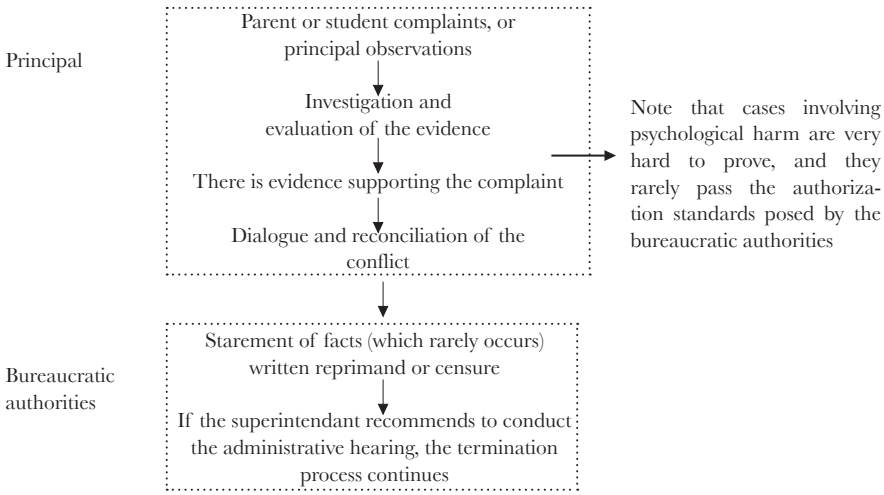
C. *Psychological Harm*

Just as in classroom underperformance, principals normally detect teacher misbehavior through the complaints and observations of parents, students and school personnel. Although principals may lawfully obtain evidence to prove psychological harm, it is difficult using such evidence to justify punitive measures. As one principal said: "Often student witnesses are reluctant to testify […] which often results in the teacher's word against the student's word. In these cases, there is rarely enough evidence to convince the superintendent to order an administrative hearing or transfer."

Because of difficulties with dismissal procedures, many principals resolve these cases through conflict resolution. Depending on circumstances, prin-

cipals may either reprimand or censure teachers in writing. Figure 4 depicts the procedures followed by principals in cases involving psychological harm.

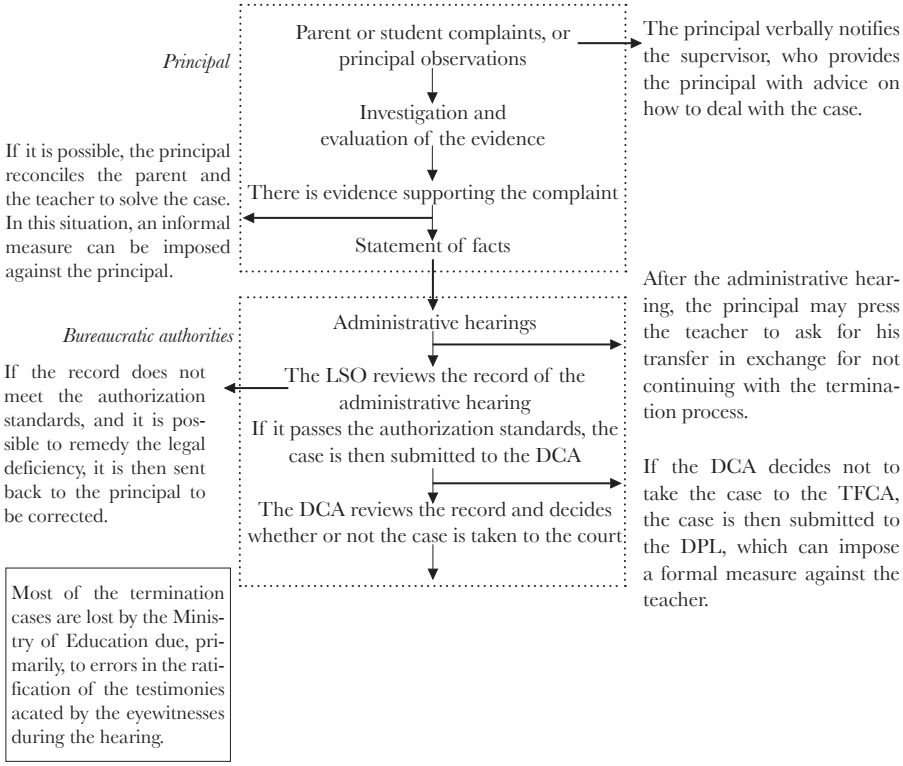
Figure 4. Principals' Responses in Cases Involving Psychological Harm Committed by Tenured Teachers



D. *Physical Harm*

The principal is generally informed of the teacher's misbehavior through the complaints or observations of parents, students and school personnel. In cases where strong evidence exists, such as third-party witness testimony, the principal will immediately draft the statement of facts. Although the case may still be reconciled later, this step prevents the principal from being later accused of neglect of duty. Once the statement of facts has been reviewed by the superintendent, he may order the principal to conduct an administrative hearing. Once the hearing has been conducted, the superintendent may decide to remove the teacher from the school. Another option would be to reconcile the case after the statement of facts has been drafted, at which point the teacher can either accept a transfer or request a transfer in exchange for a promise by the principals and parents to drop all claims against the teacher. Figure 5 portrays the procedures followed by principals in cases involving physical harm.

FIGURE 5. PRINCIPALS' RESPONSES IN CASES INVOLVING PHYSICAL HARM COMMITTED BY TENURED TEACHERS



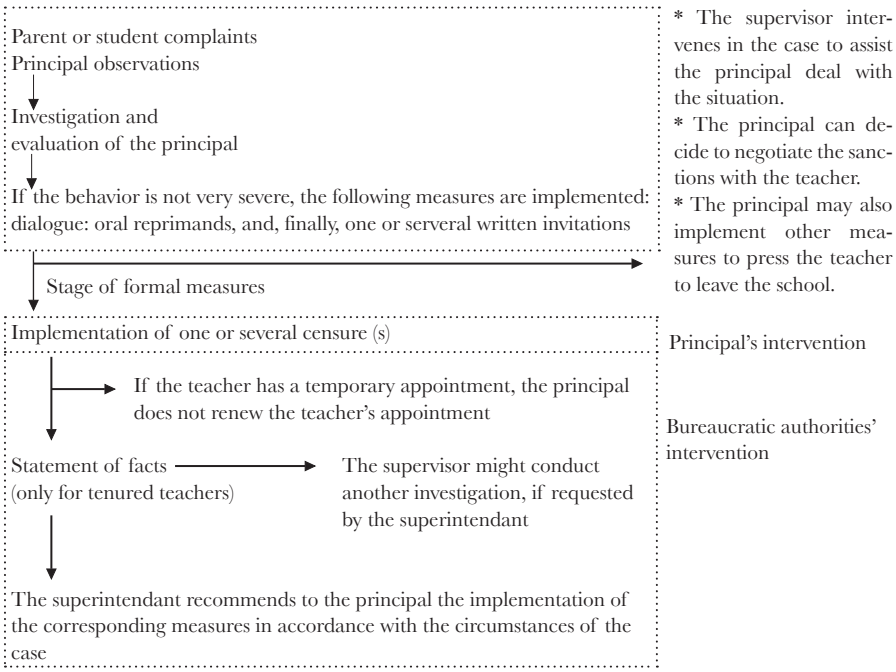
E. *Other Types of Misconduct*

In this case, the resolution process begins with dialogue. During this period, the principal expects the teacher to explain the reasons for the alleged misbehavior. Depending on the teacher's reaction, the principal may decide to issue a verbal warning; by so doing, the teacher is warned that if the alleged misbehavior is not heeded, the principal shall be prepared to implement further measures. If the teacher continues to misbehave, then the principal may adopt stricter measures depending on the circumstances of each particular case, including the type of appointment held by the teacher or the teacher's response after discussion with the principal. In general, the procedures always begin with a written reprimand or censure. Some principals, depending on the number of times the teacher has broken the rules, may issue more than one reprimand or censure.

Following these measures, the next step taken by the principal depends on the teacher's appointment: if the contract is temporary, the principal may simply decide not to renew the contract. If the teacher holds a permanent

position, the principal initiates the termination process by submitting a statement of facts to the superintendent. The statement of facts normally includes a detailed list of the teacher's alleged misbehavior, as well as testimony of both eyewitnesses and the offended party. After evaluating the statement of facts, the superintendent recommends an appropriate disciplinary measure. Principals can also implement other measures to "push" the teacher out of school; for instance, assigning excessive amounts of work or simply segregating the teacher within the school. In these cases, the principal is free to negotiate sanctions with the teacher in order to encourage him to opt for early retirement or voluntary transfer to another school. Figure 6 portrays the procedures mentioned in this paragraph.

FIGURE 6. PRINCIPALS' RESPONSES IN MISCONDUCT CASES



These cases are normally resolved using informal measures in order to avoid the voluminous amount of time and effort necessary to realize the statement of facts and administrative hearing. Since the cost of these procedures can be exorbitant, the principal usually only performs these tasks when the teacher is likely to be removed as a consequence of the formal measures; or, alternatively, when the teacher's behavior can no longer be tolerated. Because these cases seldom pass the standards established by the bureaucratic authorities, the superintendent rarely recommends an administrative hearing after reviewing the statement of facts.

F. *Sexual Abuse and Sexual Harassment*

After the principal is notified of the teacher's misbehavior, she often requests the supervisor to support her in handling the case. At that point, the principal initiates a careful investigation to determine whether or not the teacher has actually committed the offense. If the principal determines that the accusation is justified, he may either opt to reconcile the parties to help them reach agreement; or initiate the termination process by drafting a statement of facts. Most principals opt for the former option.

If the principal decides to reconcile the conflict, the teacher must make a written commitment in exchange for a promise by the principal and parent to not take any further measures or drop any prior complaint. This commitment usually includes the teacher's promise to avoid contact with the student or, at the least, avoid offending the student again. It also obliges the teacher to accept a transfer —if not immediate then as soon as possible— to another school.

If the principal carries out the statement of facts, then she has to wait for instructions from the superintendent. If the superintendent recommends that the principal conduct an administrative hearing, this procedure must be realized as soon as possible. After the administrative hearing, the superintendent can order the teacher's temporary suspension. Aside from the superintendent, outside education authorities (*e.g.*, the UAMASI or police) rarely intervene. The superintendent also plays an essential role, since he has the authority to decide whether the principal must realize an administrative hearing or transfer the teacher to another school.

Figure 7 shows the procedures used by principals to deal with cases involving sexual abuse or sexual harassment.

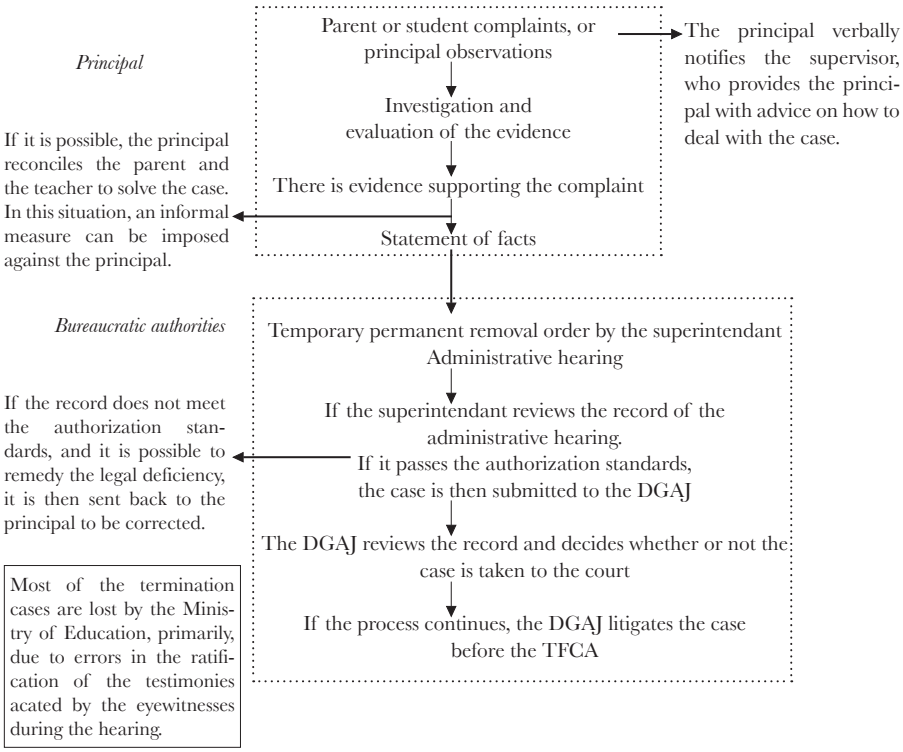
As depicted in Figure 7, the principal always first attempts reconciliation as an informal and cost-effective way to resolve this type of case. Principals generally try to remove these teachers by pressuring them to accept a transfer during the reconciliation period. Principals showed a preference to transfer the teacher to another school instead of implementing formal procedures with a very low chance of success. In fact, the TFCA failed to authorize termination in 63% of the cases in which the SEP made such request between 1979 and 2007.[39]

Principals in Mexico deal with these cases in a completely different way than principals elsewhere. In the U.S., for example, teachers who sexually abuse or harass students are treated to the full extent of the law. To begin with, the police usually intervene at the early stages of the resolution process (*i.e.* once the complaint has been filed). If the allegation is proven, the teacher faces not only termination but also criminal charges.[40]

[39] Source: Statistics Department of the TFCA.

[40] Jeff Horner, *A Student's Right to Protection From Violence and Sexual Abuse in the School Environ-*

FIGURE 7. PRINCIPALS' RESPONSES IN CASES INVOLVING SEXUAL ABUSE OR SEXUAL HARASSMENT COMMITTED BY TENURED TEACHERS



IV. RECOMMENDATIONS

The *Sindicato Nacional de Trabajadores de la Educación* (SNTE) [Mexican National Educational Workers Union] was founded in 1944. In 1946, two years after its founding, the SNTE signed an agreement with the government that established the criteria used on a national basis for decades: the *Reglamento de las Condiciones Generales de Trabajo de la Secretaría de Educación Pública* (RCGT) [General Conditions for the Personnel of the Ministry of Education].[41] The RCGT granted teachers advantageous labor conditions, especially tenured teachers. Taking advantage of both its privileged regulatory framework (*i.e.* RCGT), the union has been able to implement a bureaucratic and legal structure that protects its own interests first. This maze of regulations and rules has

ment, 36(1) SOUTH TEXAS L. REV. 45-57 (1995), and Jason P. Nance & Daniel Philip T.K., *Protecting Students from Abuse: Public School District Liability for Student Sexual Abuse Under State Child Abuse Reporting Laws*, 36(1) JOURNAL OF LAW AND EDUCATION 33-63 (2007).

[41] Secretaría de Gobernación [SEGOB] [Ministry of the Interior], *General Conditions for the Personnel of the Ministry of Education* (México, 1946).

put the interests of the union and its members over the interests of the educational system as a whole. As long as this system continues, it is unrealistic to expect any meaningful structural reform.

After analyzing how public secondary school principals in Mexico City handle underperformance cases, this section points out several recommendations intended to improve the current situation. As the examples in section III clearly show, the most common way that principals deal with teacher underperformance is by engaging in informal mechanisms. The main reason explaining this is their lack of training to handle them in a proper and formal manner. For this reason, the three recommendations below focus on policies designed to help train principals for dealing with underperformance cases.

1. *Improve Principals' Training*

As one principal mentioned, "I learned and practiced all the skills needed to be a principal when I started as a principal." In fact, there are no formal requirements or certification necessary in order to be a principal in Mexico. Once a teacher is appointed as assistant principal, she can remain in this position for several years before being appointed principal. In practice, the position of assistant principal is the best available opportunity for a teacher to learn how to manage a school. Several circumstances, however, might prevent an assistant principal from acquiring these skills. The first is the unwillingness of the principal to delegate authority to his or her assistant. Some principals perceive this delegation as a threat to their authority. Second, a principal might have a poor personal or professional relationship with the assistant principal. In these cases, the principal tends to isolate the assistant principal by assigning only administrative duties; in most cases, the supervisor is eventually asked to remove the assistant principal from the school.

I propose two measures designed to improve principals' training. This training must cover, among other topics, techniques to supervise teacher performance in the classroom; negotiation and conciliation techniques; and the legal framework that governs middle school organizations, including the rules that regulate teacher performance. This training program could be administered by the Teacher Centers[42] and evaluated by an exam given by the *Exámenes Nacionales para la Actualización de los Maestros en Servicio* (ENAMS) [National Exams for the Actualization of the In-Service Teachers].[43] Second, the teacher supervisors and superintendents must help ensure that the principal and assistant principal collaborate in the administration of the school, which also means that the principal agree not to treat the assistant principal as an administrative employee.

[42] Teacher Centers are educational institutions that provide training for in-service teachers.

[43] The ENAMS are annual evaluations applied to teachers who enroll in a course offered by the Teacher Centers.

2. *Improve the Legal Advice Given to Principals in Teacher Underperformance Cases*

Tenured teachers can only be terminated by a legal decision issued by the TFCA. The educational authorities rarely conduct the procedures necessary to terminate underperforming teachers. As many principals have stated in regard to the transfer of underperforming teachers: "We never solve the problem, we just transfer it to another school." In fact, a transfer is an outrageous way to resolve cases involving sexual abuse, sexual harassment, gross misconduct or any other type of egregious misbehavior. In sum, although transfers are far from ideal for dealing with teacher misconduct, educational authorities often have no other choice: formal mechanisms are difficult if not impossible as a result of regulations that overly protect tenured teachers and involve highly complex and time-consuming procedures.

There are two feasible ways to deal with these obstacles. First, superintendants could be made responsible for assisting principals in legal matters. This should be carried out by an individual assigned to assist the superintendant with both a law degree and experience in the practice of administrative law. Second, the DGAJ should be more involved with principals when handling termination suits. The main reason why the SEP generally loses termination suits is because the testimonies appearing in the administrative hearing records are often never properly ratified. These ratification errors are mostly due to limited communication between SEP litigators and the principal who carried out the administrative hearing.[44]

3. *Improve Mechanisms to Evaluate Teacher Performance in the Classroom*

Since there are no legal standards established to measure teacher performance in the classroom, teacher supervisors often lack clear criteria to properly evaluate whether teachers adequately perform their duties. For this reason, an adequate standard must be established based on several factors, including the teachers' ability to impart their subject matter to students. As the OECD[45] pointed out, educational quality must be based upon diverse factors, particularly the following: 1) teacher qualifications, including credentials, experience, degrees, certifications and all other relevant professional development; 2) teacher characteristics and in-classroom practices, such as attitudes, expectations, personal characteristics, strategies, methods and actions employed by teachers both in the classroom and during interaction with

[44] Principals interviewed for this paper state that once the administrative hearing has been realized, they rarely find out about the status of the termination procedure or the reasons why a case is not taken by the DGAJ to the TFCA.

[45] OECD, *Evaluating and Rewarding the Quality of Teachers* at 14 (2009).

students; and 3) teacher effectiveness, as an assessment of the degree to which teachers can contribute to the learning outcomes of students.[46]

Clarifying this legal standard would allow both principals and teacher supervisors to better perform their supervisory duties. This paper suggests that an intelligent education strategy be established that clearly defines standards for adequate classroom performance without the need to amend the RCGT. Although the RCGT can be improved by clarifying the meaning of the terms *quality* and *intensity*, the SNTE will strongly oppose any such change. As a result, an alternative legal strategy must be developed based on a system that assures both quality assurance and professional development. As Danielson claims, though, most evaluation systems fail to do this because "evaluation is either neglected altogether or conducted in a highly negative environment with low levels of trust."[47]

In order to improve teacher performance in the classroom, principals should avoid spending such an enormous amount of time on administrative duties by relying more on administrative personnel to realize administrative tasks. By so doing, they are better able to allocate additional time to the supervision of teacher performance. Pursuant to Marshall,[48] an evaluation system must not only evaluate a very small part of all the teaching process: when this occurs, the lessons that principals evaluate are often atypical, and they present an incomplete picture of instruction. In sum, principals should not spend so much time on administrative tasks; as the proper evaluation of teacher performance requires an investment of considerable time and effort.[49]

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[46] Koedel and Betts have shown that although teacher quality is an important contributor to student achievement, teacher qualifications are only weakly-related to outcome-based measures of teacher quality (such as scores of standardized exams). For this reason, a deeper analysis is needed to help determine which factors best indicate teacher quality in Mexico. See Cory Koedel & Julian Betts, *Re-Examining the Role of Teacher Quality in the Educational Production Function* 49 (2007) (Working paper, University of Missouri).

[47] Charlotte Danielson, *New Trends in Teacher Evaluation,* 58 (5) Evaluating Educator 12-15 (2001).

[48] Marshall, Kim, *It's Time to Rethink Teacher Supervision and Evaluation,* 58 (10) Phi Delta Kappan (2005).

[49] Garcia et al. have demonstrated that principals in a northern state of Mexico spend most of their time on administrative work, making it impossible for them to spend adequate time on issues involving teacher underperformance. See José García, Charles Slater & Gema López, *Director escolar novel de primaria,* 15(47) Revista Mexicana de Investigación Educativa 1051-1073 (2010).

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NOTES

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GROUP LITIGATION REACHES MEXICO: REVISITING MEXICO'S SYSTEM OF COLLECTIVE ACTIONS AS A VEHICLE TO ENSURE EFFICIENT IMPLEMENTATION OF ENVIRONMENTAL JUSTICE

David P. Vincent*

Abstract. *This Note analyzes the decision of the Mexican legislature to allow for a system of group litigation to redress a particular set of environmentally based legal problems. The laws of Mexico, as they currently read, do not comport with the legislative intent of the authors of the legislation to allow for group litigation. This is primarily an effect of the economic incentives imposed by the new system of group litigation on institutional interests and corporate actors in Mexico. The argument advanced by this Note is that either judicial or legislative clarifications must be made to this legislation to effectuate the intent of the acts of the Mexican Congress. This may be achieved through Jurisprudencias, Ejecutorias, expansive judicial interpretation in the coming years, or through additional legislative amendments; all of which could provide additional parameters to ensure the unassailable environmental and constitutional rights of Mexican citizens. However, this Note advances the idea that the most effectual vehicle for implementing such change is through the introduction of additional pecuniary damages with regard to group litigation. In the coming years, the system of group litigation in Mexico is certain to come under heavy criticism and scrutiny from citizens, legal scholars and politicians alike. The arguments proposed herein must be addressed by the Mexican Congress to ensure that the environmental rights of citizens, guaranteed by the Mexican Constitution, are not subordinated to institutional economic interests.*

Key Words: *Political Constitution of the United Mexican States, environment, collective action, comparative law, pecuniary damages, public policy.*

Resumen. *Este trabajo analiza la decisión de la legislatura mexicana para permitir un sistema de demanda colectiva para corregir un conjunto de tecnolo-*

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gías que se basan en problemas legales. En este momento, las leyes de México no se compadecen con la intención de los legisladores. Principalmente esto es un efecto de los incentivos económicos impuestos por la nueva acción colectiva que relacionan a los intereses institucionales y los actores corporativos en México. El argumento de este trabajo es que aclaraciones judiciales o legislativas son necesarias para que la presente legislación cumpla con la intención legislativa de los actos del Congreso mexicano. Se pueden lograr los cambios necesarios a través de jurisprudencias, ejecutorias, la interpretación expansiva de la judicatura en los próximos años, o por modificaciones legislativas, todo lo cual podría permitir parámetros adicionales que garanticen los derechos inexpugnables ambientales y constitucionales de los ciudadanos de México. Sin embargo, este trabajo afirma que el mejor vehículo para la aplicación de dicho cambio es la introducción de la indemnización de daño pecuniario con respecto a los litigios del grupo en México. En los próximos años, el sistema de acciones colectivas en México recibirá fuertes críticas y se encontrará bajo el escrutinio de los ciudadanos, abogados y políticos. Los argumentos propuestos por el autor deben ser resueltos por el Congreso mexicano para garantizar que los derechos ambientales de los ciudadanos, garantizados por la Constitución mexicana, no se subordinan a los intereses económicos institucionales del país.

Palabras clave: *Constitución Política de los Estados Unidos Mexicanos, medio ambiente, acción colectiva, derecho comparado, daños materiales, políticas públicas*.

Table of contents

I. Introduction

Along the trajectory of any juridical evolution, a country is certain to run into the need for amendments and revisions as it realizes that its initial plan for implementation is unlikely to both effectuate the legal end sought and assuage the reservations of those involved and affected. Examples of such transitions include the end of apartheid politics in South Africa, the shift from communism to democratic political systems in Eastern Bloc countries, and the emergence of the "green" movement in the United States in the late 1960s and in Europe after the signing of the Kyoto Protocol.

One such legal development is underway in Mexico. The members of the LXI Legislature of the Mexican Congress[1] passed a series of legislative additions and amendments allowing for the introduction of collective actions into Mexico's legal system.[2] A collective action is a lawsuit in which a group brings

[1] The LXI Legislature of the Congress of Mexico meets from September 1, 2009, to August 31, 2012. Members of the Mexican Senate were elected in the elections of July 2006 while members of the Chamber of Deputies were elected in the elections of July 2009.

[2] Decreto por el que se reforman y adicionan el Código Federal de Procedimientos Civiles, el Código Civil Federal, la Ley Federal de Competencia Económica, la Ley Federal de Protección al Consumidor, la Ley Orgánica del Poder Judicial de la Federación, la Ley General del Equilibrio Ecológico y la Protección al Ambiente y la Ley de Protección y Defensa al Usuario de Servicios Financieros [Decree to amend and add the Federal Code of Civil Procedure, Federal Civil Code, the Federal Economic Competition Law, Federal Consumer Protection Act, Organic Law of the Federal Judicial System, General Ecological Balance and Environ-

a claim collectively and sues a particular class of defendants.[3] This form of collective lawsuit is similar to the American legal mechanism known as "class action." The collective action legislation passed in Mexico entered into force on March 1, 2012.[4] This legislative package approved by the Congress in April 2011 was set forth in a Decree (*hereinafter* "Decree" refers to this August 30, 2011 Decree unless otherwise noted) published in the Federal Official Gazette (*Diario Oficial de la Federación*) on August 30, 2011.[5] The Decree amends a number of laws and acts: the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*); Federal Civil Code (*Código Civil Federal*; *hereinafter* "Mexican Civil Code"); Federal Economic Competition Law (*Ley Federal de Competencia Económica*); Federal Consumer Protection Act (*Ley Federal de Protección al Consumidor*); Organic Law of the Federal Judicial System (*Ley Orgánica del Poder Judicial de la Federación*); General Ecological Balance and Environmental Protection Act (*Ley General de Equilibrio Ecológico y Protección al Ambiente*); and the Law for the Protection of Financial Service Users (*Ley de Protección y Defensa de los Usuarios de los Servicios Financieros*).[6] Although this note focuses strictly on the effect of this legislation on environmental protection, legislative recognition of such actions will also have an impact in numerous additional areas, such as consumer protection, economic competition, urban development and Mexican cultural property.[7]

This Note holds that implementation of collective actions in Mexico provides substantial improvements for citizen and governmental redress of environmental problems. However, the legal structure ratified for implementation lacks the economic incentives needed to completely effectuate the change sought by congressional intent as it opens avenues to institutional actors by which neglecting Mexican law can be the most economically efficient outcome.

Therefore, the argument advanced by this Note is that clarifications must be made to this amendment, through either *Jurisprudencias* or *Ejecutorias*,[8] ex-

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mental Protection Act, and the Law for the Protection of Financial Service Users] [hereinafter Decree], Diario Oficial de la Federación [D.O.], 30 de Agosto de 2011 (Mex.) (This Decree enters into force March 1, 2011, six months from the publication of the Decree); *see also* Cacheaux, Cavazos & Newton, *Constitutional Amendment Pertaining to Collective Lawsuits*, *available at* http://mexicoreport.com/en/2010/04/Constitutional-Amendment-Pertaining-to-Collective-Lawsuits?aid=947 (last visited Oct. 20, 2011).

[3] Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 38 (New Haven: Yale University Press), 1987.

[4] Catherine Dunn, *Mexico's New Class Action Law Opens a Litigation Frontier*, *available at* http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202518442900 (last visited Oct. 13, 2011).

[5] *See* Decree, *supra* note 2.

[6] *Id.*

[7] *Id.*

[8] *See* Jorge A. Vargas, *Mexican Law and Personal Injury Cases: An Increasingly Prominent Area for U.S. Legal Practitioners and Judges*, 8 San Diego Int'l L.J. 475, 500-01 (2007). The federal deci-

pansive judicial interpretation in the coming years or additional legislative amendments, all of which could allow additional parameters to ensure the unassailable environmental and constitutional rights of Mexican citizens. Mexico has made significant progress in addressing environmental law issues over the past forty years. However, additional substantive changes are necessary to ensure that citizens' environmental rights are not subordinated to institutional economic interests. It is the opinion of this Note that the most effectual vehicle for accomplishing such change is through the implementation of additional economic damages with regard to collective actions in Mexico, similar to the notion of punitive damages in American jurisprudence.

Part I introduces the legislative amendments that provide for collective actions, the legal repercussions of the action and the legal argument proposed by this Note. Part II outlines Mexico's legal system with particular attention paid to environmental law and its evolution over the past century. Part III addresses the recent amendment made to Article 17 of the Mexican Constitution (*hereinafter* "Article 17," unless otherwise noted),[9] which allows for class actions through a number of additions and amendments to existing federal law, focusing on a number of significant changes to the nation's legal system. Part IV distinguishes the procedural and substantive aspects of the Mexican collective action system from the American system. Part V analyzes the economic consequences of this amendment. Part VI discusses some of the major complications of this new juridical regime and proposes possible solutions to ensure that the new system of collective actions reflects the legislative intent of the recent constitutional amendment. This part reasons that either a change in judicial interpretation or additional legislative action regarding

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sions known as *Jurisprudencias* are legally binding on lower courts, and *Ejecutorias* or *Tesis* only carry "persuasive" value to lower courts. Accordingly, in compliance with Articles 192 and 193 of the Federal Amparo Act, Mexican courts formally adhere to the substantive content of *Jurisprudencias* and pay an adequate degree of deference to *Ejecutorias* and *Tesis*, when rendering their rulings and decisions.

[9] Global Class Actions Exchange of Stanford University, Mexico Adopts a Class Action Procedure (July 29, 2010), *available at* http://globalclassactions.stanford.edu/content/mexico-adopts-class-action-procedure-july-29-2010 (last visited Nov. 30, 2011); *see also Decreto por el que se reforman y adicionan el Código Federal de Procedimientos Civiles, el Código Civil Federal, la Ley Federal de Competencia Económica, la Ley Federal de Protección al Consumidor, la Ley Orgánica del Poder Judicial de la Federación, la Ley General del Equilibrio Ecológico y la Protección al Ambiente y la Ley de Protección y Defensa al Usuario de Servicios Financieros* [Decree to amend and add the Federal Code of Civil Procedure, Federal Civil Code, Federal Economic Competition Law, Federal Consumer Protection Act, Organic Law of the Federal Judicial System, General Ecological Balance and Environmental Protection Act, and the Law for the Protection of Financial Service Users] [hereinafter July 2010 Decree], Diario Oficial de la Federación [D.O.], 29 de Julio de 2010 (Mex.). This Decree enters into force March 1, 2011; the text of the amendment to Article 17, published to the Official Gazette on July 29, 2010: "El Congreso de la Unión expedirá las leyes que regulen las acciones colectivas. Tales leyes determinarán las materias de aplicación, los procedimientos judiciales y los mecanismos de reparación del daño. Los jueces federales conocerán de forma exclusiva sobre estos procedimientos y mecanismos [...]."

damages for collective actions would help Mexico comport with the intent of the amendment. Finally, Part VII concludes with a summary of the legal arguments proposed.

II. Mexico's Legal System with Respect to Environmental Law

Legislating environmental problems in Mexico has taken place rather gradually, with substantial changes occurring quite recently.[10] Though broad constitutional articles have been used in addressing environmental issues since the enactment of the Political Constitution of the United Mexican States of 1917 (*Constitución Política de los Estados Unidos Mexicanos de 1917*; *hereinafter* "Mexican Constitution of 1917" or "Mexican Constitution"), the first legislation directly concerning environmental issues was promulgated only as recently as 1971.[11] However, from 1971 to the present, Mexico has implemented an about-face with respect to environmental law. Environmental law in Mexico can be divided into three distinct periods: the Emergence of Environmental Law in Mexico, the Mexican Environmentalism Movement and the Era of Free-Market Environmentalism in Mexico.

1. *The Emergence of Environmental Law in Mexico (1917-1971)*

Mexico's environmental legislation is rooted in the Mexican Constitution of 1917. Article 27 of the Mexican Constitution regulates the ownership of lands and waters in Mexico while specifying the obligation of the Mexican government "to preserve or restore the ecological balance" of the land.[12] Additionally, Article 73 empowers Congress to delimit the powers of states and municipalities regarding environmental protection.[13] Since the enactment of the Mexican Constitution, environmental law in Mexico has largely relied on these and similar provisions to effectuate substantive environmental change.[14] However, the effects of these constitutional amendments were not very pervasive until the early 1970s when Mexico, like many other developing economies, followed the impetus of environmental movement of the United States.[15]

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[10] Benjamín Revuelta Vaquero, *Environmental Law in Mexico: A New Paradigm* at 131, *available at* http://info8.juridicas.unam.mx/pdf/mlawrns/cont/5/nte/nte6.pdf (last visited Oct. 13, 2011).

[11] *Id.*

[12] Juan Antonio Herrera Izaguirre et al., *Mexico's Environmental Law in the GMO Era* at 122, *available at* http://info8.juridicas.unam.mx/pdf/mlawrns/cont/1/cmm/cmm7.pdf (last visited Oct. 19, 2011).

[13] *Id.*

[14] *See generally* Benjamín Revuelta Vaquero, *supra* note 10, at 131.

[15] *Id.*

2. *The Mexican Environmentalism Movement (1971-2008)*

The 1970s environmental movement in the United States was born of the fears and anxieties concerning environmental issues brought out by the confluence of several political events[16] and publications —most prominently, Rachel Carson's *Silent Spring*.[17] Similarly, Mexico's environmental legislation also began to evolve in the early 1970s. During the 1970s and 1980s, many Latin America countries experienced waves of social mobilization and popular protests as countries in the region transitioned away from military dictatorships.[18] Although Mexico was largely immune from the political unrest endemic to much of Latin America, this period nonetheless proved to be formative for environmental mobilization in Mexico.[19] Mexico consequently experienced the emergence of an environmental movement that grew in size and strength and gained national visibility by the mid-1980s.[20]

Constitutional reforms in 1971 and 1987 granted the Mexican Congress the authority to legislate on environmental matters.[21] In 1988, the General Ecological Balance and Environmental Protection Act was created[22] and offered a more comprehensive approach to environmental conservation. Unlike previous legislation, this act went beyond preserving the environment as it considers the importance of biological resources.[23]

During a series of environmental reforms implemented in the 1990s, Mexican environmentalists were successful in influencing national environmental policy and achieved a series of significant policy triumphs.[24] In a relatively short period, Mexico's green movement emerged and became an important political actor.[25] At this time, the Mexican Congress passed a constitutional amendment adding a fourth paragraph to Article 4 providing for the right of all persons to an adequate environment for their development and well-being.[26] Although general, this constitutional provision serves as an aspira-

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[16] *See generally* John McCormick, The Global Environmental Movement 1-8 (1995).

[17] Rachel Carson, Silent Spring (1962).

[18] Jordi Díez, *The Rise and Fall of Mexico's Green Movement* at 2, *available at* http://www.cpsa-acsp.ca/papers-2007/Diez.pdf.

[19] *See generally* Jose Roberto Quintos Guevara, *Popular Environmental Education: Progressive Contextualization of Local Practice in a Globalizing World* 81-90 (2002), http://vuir.vu.edu.au/15285/1/Guevara_2002.pdf.

[20] *See* Beatriz Oliver, *Participation in Environmental Popular Education Workshops: An Example from Mexico*, 33 Convergence 44-53 (2000).

[21] Herrera Izaguirre, *supra* note 12, at 125.

[22] *Id.*

[23] *Id.*

[24] Díez, *supra* note 18, at 2.

[25] *Id.*

[26] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended, art. 4, Diario Oficial de la Federación [D.O.], 30 de Agosto de 2011 (Mex.).

tional right. Mexico currently lacks the procedural formalities, statutes and regulations needed to fully implement the spirit of this amendment. Despite this, the amendment does serve a didactic purpose. Additionally, the recent amendment to Article 17, as well as numerous others contemplated or implemented by Mexican legislatures, lends additional credence to the text of Article 4.

Subsequent steps towards attaining environmental rights in Mexico during this period have mainly resulted from the international treaties the country has signed.[27] Two such examples are the 1972 Stockholm Conference on Human Environment and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed and ratified in 2000.[28]

Although contemporaneous with the environmentalism movement in the United States, the environmentalism movement in Mexico did not embrace the notion of "free-market environmentalism" at this time. Free-market environmentalism is a position that argues the free market, property rights, and tort law provide the best tools to preserve the health and sustainability of the environment.[29] This contrasts with the theory of state intervention to protect the environment —the most common modern approach in civil law countries like Mexico.[30] Perhaps the most ubiquitous implementation of free-market environmentalism is the use of "class action" or "collective action" lawsuits. These legal mechanisms have been used across the world to redress environmental issues.[31] However, until the dawn of the 21st century, Mexico resisted any attempt to implement a legal regime that allowed the use of such legal mechanisms.[32]

This period noticeably differed from the previous one in that it was the first time in Mexican legal history in which substantive legislative efforts were made to contend with environmental issues. During this period, the nation followed the lead of the United States and implemented legislative measures reflecting the concerns of the environmentalism movement —clean air, clean water, conservation, etc.[33] The end of this period did not mark a lull in legisla-

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[27] Revuelta Vaquero, *supra* note 10, at 131.

[28] *See generally* Héctor Herrera, *Panel Discussion: Mexican Environmental Legal Framework*, 2 San Diego Justice J. 31, 31-35 (1994).

[29] *See generally* Richard Stroup, *Free-Market Environmentalism*, *available at* http://www.nesgeorgia.org/files/free_market_environmentalism.pdf.

[30] *Id*.

[31] *See generally* Revuelta Vaquero, *supra* note 10, at 131.

[32] Dunn, *supra* note 4.

[33] The Federal Government of Mexico, through the Secretariat of the Environment, Natural Resources and Fishing (*Secretaría de Medio Ambiente*, *Recursos Naturales y Pesca* (SEMARNAP)), has sole jurisdiction over those acts that effect two or more states, acts that include hazardous waste, and procedures for the protection and control of acts that can cause environmental damage or serious emergencies to the environment. The Secretariat's main activities are to make environmental policy and enforce it; assist in urban planning; develop rules and technical standards for the environment; grant (or deny) licenses, authorizations and permits; decide on

tive action concerning environmental matters; rather, the distinction between this period of Mexican environmental legal history and the subsequent one was predicated on the economic implications of environmental legislation.

3. *The Era of Free-Market Environmentalism in Mexico (2008-Present)*

Over the past few years, Mexico has been increasingly reticent to promulgate environmental regulations.[34] Recently, Mexico's deterrence mechanisms with regard to environmental law have begun to focus their impetus on economic incentives rather than legal regulation.[35] This Note refers to this sea change as the beginning of free-market environmentalism in Mexico.

These amendments are emblematic of the change from regulation to free-market environmentalism to preserve the health and sustainability of the environment. They allow for collective actions and provide guidelines for their regulation and procedural implementation, as has been done in other countries in the Americas, such as the United States, Brazil, Uruguay, Argentina and Venezuela.[36] Collective actions seek to aggregate the rights of a group of persons for their defense in group litigation.[37] The various rights of the members of a group are considered collective in the strict sense of individuals in a collective group according to a ruling on the propriety of a collective action, and whether or not there are common circumstances to permit linking all the individuals together for their common protection or defense.[38]

III. Constitutional Amendment Allowing for Group Litigation in Mexico

Early on in the congressional sessions beginning on February 1, 2011, two legislative proposals allowing for implementation of collective actions in Mexico appeared to be leading in the debate, one originating in the Chamber

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environmental impact studies; and grant opinions on and assist the states with their environmental programs. This Secretariat enforces the law, regulations, standards, rulings, programs and limitations issued by it through the National Environment Institute and the Federal Attorney Generalship of Environmental Protection (*Procuraduría Federal de Protección al Ambiente*) (PROFEPA). Penner & Associates, *Environmental Law in Mexico*, *available at* http://www.mexicolaw.com/LawInfo08.htm (last visited Oct. 22, 2011).

[34] *See generally* Revuelta Vaquero, *supra* note 10, at 131; Juan Antonio Herrera Izaguirre, *supra* note 12, at 125.

[35] *See generally* Revuelta Vaquero, *supra* note 10, at 131; Juan Antonio Herrera Izaguirre, *supra* note 12 at 125.

[36] Cacheaux, Cavazos & Newton, *supra* note 2.

[37] *Id.*

[38] *Id.*

of Deputies (*Cámara de Diputados*) and the other in the Senate (*Cámara de Senadores* or *Senado*).[39] The Chamber of Deputies bill was introduced in July 2010 by Representative Javier Corral Jurado of the National Action Party (*Partido Acción Nacional*) —the governing party at the time.[40] This bill would give a number of public officials and entities the requisite standing to file collective actions, including the President, the Attorney General, municipalities, public prosecutors, and civil and consumer associations, as well as any individual in Mexico.[41] This bill proposed no class certification or admissibility rules.[42] Under this bill, a defendant would be given ten days to respond to a complaint, which would be followed by a short evidentiary phase.[43] The judge would then decide the case based on its merits within ninety days.[44] The bill's support waxed and waned through late 2010 in comparison with the contemporaneously proposed Senate bill.

The Senate bill was subsequently introduced by Senator Jesús Murillo Karam of the Institutional Revolutionary Party (*Partido Revolucionario Institucional*), the largest party in the Chamber of Deputies at the time.[45] This bill sought to amend Article 17 of the Mexican Constitution to allow for collective actions. Senator Murillo had been involved in a previous attempt to draft such a law in 2008, when he headed a Senate Task Force charged with drafting such a bill.[46] The Task Force failed to reach consensus on the action; however, Senator Murillo came out of as a "champion," which gave his 2010 proposal significant credibility.[47] Though the Decree bears little resemblance to the original Murillo bill introduced in September 2010, Senator Murillo's amended bill became law in Mexico.[48] Prior to the amendments detailed in the Decree, Article 17 read:

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[39] *See* William J. Crampton & Silvia Kim, *The Federalist Society for Law and Public Policy Studies, Piecing Together the Puzzle of Mexican Class Actions*, *available at* http://www.fed-soc.org/publications/detail/piecing-together-the-puzzle-of-mexican-class-actions (last visited Nov. 13, 2011).

[40] *See* Decree, *supra* note 2.

[41] Crampton & Kim, *supra* note 39.

[42] *Id*.

[43] *Id*.

[44] *Id.*

[45] The bill proposed a bundle of amendments to several pieces of legislation: the Código Federal de Procedimientos Civiles (Federal Civil Procedure Code), el Código Civil Federal (Federal Civil Code), la Ley Federal de Competencia Económica (Federal Competition Law), la Ley Federal de Protección al Consumidor (Federal Consumer Protection Law), la Ley Orgánica del Poder Judicial de la Federación (Federal Judicial Branch Law), la Ley General del Equilibrio Ecológico y la Protección al Ambiente (Environment Protection Law) and Ley de Protección y Defensa al Usuario de Servicios Financieros (Law for the Protection of Financial Service Users).

[46] Crampton & Kim, *supra* note 39.

[47] *Id.*

[48] *See* Decree, *supra* note 2.

> Individuals shall be authorized neither to take the laws in their own hands nor to violently claim a right.
>
> Every person shall be entitled to a fair trial in a court of law. Courts' rulings shall be issued within the legal timetables. Courts shall resolve legal controversies in a speedy, thorough, and impartial way [...].[49]

In late 2010, after intense debate and discussion, Senator Murillo's bill was amended to introduce safeguards intended to protect defendants' rights.[50] After publication in the Official Gazette, the relevant text of the amendment reads: "The Federal Congress shall issue laws governing collective actions. Such laws determine the application materials, judicial proceedings, and mechanisms for damage repair. Federal judges know exclusively about these procedures and mechanisms [...]."[51]

Collective actions are divided into three categories: (1) diffuse actions to protect comprehensive rights that belong to society in general and not to any individual in particular, like the right to a clean environment, (2) collective actions to protect rights that belong to a group of persons linked by a legal relationship, and (3) homogeneous individual rights collective actions to protect a group linked by a contractual relationship.[52] The opt-out procedure presented in the early drafts of Senator Murillo's bill was replaced by a mixed system under which it is possible to opt out of collective actions if they involve diffuse rights and opt in if they involve collective rights or individual homogeneous rights.[53]

Accompanying the above amendments was the introduction of a clear certification phase with familiar criteria, such as commonality, adequate representation, class definition and superiority.[54] These included rules that provide for parties' right to appeal the trial court's certification ruling.[55] In addition, the "loser pays" rule was adopted and attorney's fees were subject to caps that aim at avoiding abuse.[56] In late December 2010, the revised Murillo bill was

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[49] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Article 17, Diario Oficial de la Federación [D.O.], 30 de Agosto de 2011(Mex.): "Ninguna persona podrá hacerse justicia por sí misma, ni ejercer violencia para reclamar su derecho […] Toda persona tiene derecho a que se le administre justicia por tribunales que estarán expeditos para impartirla en los plazos y términos que fijen las leyes, emitiendo sus resoluciones de manera pronta, completa e imparcial. Su servicio será gratuito, quedando, en consecuencia, prohibidas las costas judiciales."

[50] *See* July 2010 Decree, *supra* note 9.

[51] Gregory L. Fowler et al., *Class Actions in Latin America: A Report on Current Laws, Legislative Proposals and Initiatives*, 1:1 Latin Am. F. News l. (International Bar Association), Oct. 2008, at 72.

[52] *Id.*

[53] *See* Decree, *supra* note 2.

[54] Fowler et al., *supra* note 51.

[55] *Id.*

[56] *See* Decree, *supra* note 2; *see also* Fowler et al., *supra* note 51.

approved unanimously in committee and, shortly thereafter, by the Senate's Plenary Assembly.[57] The August 30, 2011 publication of the Decree in the Official Gazette marked the completion of the process and its implementation as of March 1, 2012.[58] This six-month *vacatio legis*[59] allowed the Mexican Congress a prescribed period in which all of the governmental entities involved in the enforcement of the action may address and take the requisite administrative, budgetary and legal measures necessary to put the decree into force.

In Mexico, as in other civil law jurisdictions, the procedures for collective actions do not necessarily resemble the procedures used in common law countries. The following part will juxtapose Mexico's nascent group litigation system with the long-established common law system implemented in the United States.

IV. Comparative Analysis of Procedural and Substantive Aspects of Group Litigation in the United States and Mexico with Specific Regard to Pecuniary Damages

Much like the way class action addresses the legal mechanism of remediation for a group of litigants in the United States, the term "collective action" encompasses group litigation in Mexico. This part will discuss the procedural and substantive aspects of group litigation in these countries, setting aside the possibility of injunctive relief and focusing on the pecuniary damages as set forth in the substantive laws of both the United States and Mexico. The respective differences in the procedural and substantive aspects of group litigation will serve as a point of reference throughout this Note and in regard to the possible solutions proposed in Part VI.

1. *The Procedural Aspects of Group Litigation*

In American federal courts, class actions are governed by Federal Rules of Civil Procedure Rule 23 (*hereinafter* "Rule 23") and 28 U.S.C.A. § 1332(d).[60] Class actions may be brought before a federal court if the claim arises under federal law, or if the claim falls under 28 U.S.C.A. § 1332(d).[61] In Mexico,

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[57] Fowler et al., *supra* note 51.

[58] *See* Decree, *supra* note 2.

[59] *Vacatio legis* is a technical term in civil law referring to the period between the promulgation of a law and the time the law takes legal effect. *See* Jerzy Stelmasiaka, *Environmental Protection as a Political-Legal Problem in Central-Eastern European Countries*, 21 Journal of East and West Studies 59, 61 (1992).

[60] *See* FED. R. CIV. P. 23(a)(3).

[61] *See* 28 U.S.C.A. § 1332(d) (West 2011) [*United States Code Annotated*]; under § 1332(d)(2) the federal district courts have original jurisdiction over any civil action where the amount in controversy exceeds $5,000,000 and (1) any member of a class of plaintiffs is a citizen of a

a legislative package approved by the Congress in early 2011 regulates collective actions.[62] As described in Part III, this enactment took the form of a Decree that outlines the amendments and additions to various sections of the Mexican Civil Code that will serve as the procedural nexus for collective actions.

In the United States, a group must be timely in filing its class action documentation. For federal causes of action, the statute of limitations is dependent on the legal issue in play;[63] however, the typical statute of limitations in American jurisprudence ranges from two to six years.[64] A statute of limitation may be tolled when it is interrupted by operation of law or policy to preclude its expiration against an absent class member during a relevant period.[65] While there can never be certainty that an absent class member's statute of limitations will be extended by a case filed as a class action, federal courts recognize a general policy of honoring such tolling to preclude the statute running against absent class members during pendency of a class action.[66]

Mexico's civil law system provides periods of prescription that specify the time in which all collective actions must be filed. The Mexican Civil Code provides a statute of limitations of three years and six months to initiate any collective action.[67] This period contrasts with the statute of limitations for obligations arising from unlawful acts not included in the Decree, which is codified in Article 1934 of the Mexican Civil Code and prescribes two years starting from the day in which the damage was caused.[68] In the case of harm or injury with continuous or ongoing effects, the term will run as of the last day on which the harm was caused.[69] In environmental legal matters, oftentimes the harm continues over an extended period. In such situations, numerous Mexican jurists predict this forty-two month timeframe will not apply, but rather, the statute of limitations will be tolled.[70]

State different from any defendant; (2) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (3) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

[62] *See* Decree, *supra* note 2.

[63] *See* 18 U.S.C.A. § 3282(a) (West 2011) [*United States Code Annotated*].

[64] *Id.*

[65] *See* Chardon v. Fumero Soto, 462 U.S. 650, 652 (1983).

[66] *See generally* Tosti v. City of Los Angeles, 754 F.2d 1485, 1489 (9th Cir. 1985); *see also Chardon v. Fumero Soto*, 462 U.S. 650, 652 (1983); *see also In re Rhone-Poulenc Rorer Inc,* 51 F3d 1293, 1298 (7th Cir. 1995).

[67] *See* Código Civil Federal de México [C.C.F.] [Federal Civil Code], *as amended* on January 28, 2010, Article 584, Diario Oficial de la Federación [D.O.] 29 de Agosto de 1932 (Mex.)

[68] *Id.* at Article 1934: "Artículo 1934. La acción para exigir la reparación de los daños causados en los términos del presente capítulo, prescribe en dos años contados a partir del día en que se haya causado el daño."

[69] *Id.* at Article 584.

[70] *Id.*

As previously explained, these provisions became effective March 1, 2012.[71] Legal scholars and commentators are still unsure as to how courts will apply the statutory requirements in other unpredictable situations. Mexican academics and jurists have speculated as to what the criteria of the courts will be for the plaintiffs in such a scenario in which one develops a harm or injury outside the statutory limit. However, the answer to this question will only become apparent once federal judges encounter such situations in the coming months and years.

In both the United States and Mexico, the procedure for filing a class action is to file suit with one or several named plaintiffs on behalf of a proposed class.[72] The proposed class must consist of a group of individuals or business entities that have suffered a common injury or injuries.[73] After filing a complaint, the plaintiff must certify the class.[74] The procedure of class certification differs in the United States and Mexico. The following paragraphs will address the procedural requirements for class certification in both the United States and Mexico.

A. *Class Certification in the United States*

Class certification is the determination by a judge that a group of individuals has met both the requirements set forth in Rule 23 and an initial motion to dismiss it on the merits.[75] Such a ruling is necessary to ensure judicial economy and to guarantee that courts are not inundated with meritless lawsuits. Therefore, in the United States, Rule 23 requires that the plaintiff demonstrate adequacy, numerosity, commonality and typicality.[76]

The requirement of adequacy in a class action provides for ensuring that the representative parties adequately protect the interests of the class. Federal courts construe the adequacy requirement quite liberally, and are unlikely to deny certification on such grounds.[77] However, class representative status may properly be denied "where the class representatives have so little knowledge

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[71] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* on August 30, 2011, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[72] Fed. R. Civ. P. 23.

[73] *Id.*

[74] *See generally id.*

[75] Barbara J. Rothstein & Thomas E. Willging, Managing Class Action Litigation: a Pocket Guide for Judges 6 (2005), http://www.fjc.gov/public/pdf.nsf/lookup/ClassGde.pdf/$file/ClassGde.pdf.

[76] Fed. R. Civ. P. 23(a).

[77] *See generally* South Carolina Nat Bank v Stone, 139 F.R.D. 325, 329 (DSC 1991); *see also* McGlothlin v Connors, 142 F.R.D. 626, 634 (W.D. Va 1992); Adair v. Sorenson, 134 F.R.D. 13, 19 (D. Mass. 1991) (Holding that a class representative "need not have knowledge of all the relevant facts to be an adequate representative.").

of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys."[78]

Under Rule 23, "the class must be of sufficient numerosity to make joinder impracticable." The term "impracticable" does not mean impossible.[79] Impracticability itself depends on an examination of the facts and imposes no numerical limitations.[80] Courts have repeatedly stated that whether the numerosity requirement is met depends on the facts of each case.[81] Generally, courts will find the numerosity requirement satisfied when the class comprises forty or more members and will find that it has not been satisfied when the class is composed of twenty-one or fewer.[82] However, these are not rigid parameters, and the ultimate issue is whether the class is too large to make joinder impracticable.[83]

Regarding commonality in a class action, there must be one or more legal or factual claims common to the entire class.[84] Courts have routinely recognized that the commonality requirement is not high,[85] and federal courts throughout the United States have consistently applied a liberal standard for

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[78] *See* Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1077-78 (2d Cir. 1995).

[79] *See* Robidoux v Celani, 987 F2d 931, 935 (2d Cir. 1993); *Smith v. B&O R.R.,* 473 F. Supp. 572, 581 (D. Md. 1979); Doe I v. Guardian Life Insurance Company of America, 145 FRD 466, 471 (N.D. Ill. 1992); Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964).

[80] *See* General Tel. Co. of Northwest, Inc. v. EEOC, 446 U.S. 318, 329 (1980); *see also* Gurmankin v. Costanzo, 626 F.2d 1132, 1135 (3d Cir. 1980) ("We believe that the numerosity requirement must be evaluated in the context of the particular setting […]"); Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 109 (E.D. Pa. 1992) (Huyett, J.) (stating that the number in the class is not, by itself, determinative). Accord, Gordon v Forsyth County Hosp Auth., Inc., 409 F. Supp 708, 717 (MDNC 1976) (There is no specific threshold number of absent class plaintiffs required as a prerequisite to certification).

[81] *See e.g.,* General Tel. Co. v. EEOC, 446 U.S. 318, 330 (1980); Perez-Funez v. District Director, I.N.S., 611 F. Supp. 990, 995 (C.D. Cal. 1984).

[82] *See* Cox v. American Cast Iron Pipe, 784 F.2d 1546, 1553 (11th Cir. 1986); Padron v. Feaver, 180 F.R.D. 448 (S.D. Fla. 1998); Ansari v. New York University, 179 F.R.D. 112, 114 (S.D.N.Y. 1998); Town of New Castle v. Yonkers Contracting Co., 131 F.R.D. 38, 40 (S.D.N.Y. 1990); Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir.), *cert. denied,* 515 U.S. 1122 (1995). *See also* Jordan v Lyng, 659 F. Supp 1403, 1410 (ED Va 1987)(One hundred members or less have been found to meet requirement); Afro American Patrolmens League v. Duck, 503 F.2d 294 (6th Cir. 1974) (Thirty-five members sufficient); Markham v. White, 171 F.R.D. 217, 221 (N.D. Ill. 1997)(class of 35 to 40 plaintiffs sufficient to satisfy numerosity where class members resided in different states).

[83] *See* Strykers Bay Neighborhood Council v. New York, 695 F. Supp. 1531, 1538 (S.D.N.Y. 1988).

[84] Fed. R. Civ. P. 23.

[85] *See* Morris v. Transouth Fin. Corp., 175 F.R.D. 694, 697 (M.D. Ala. 1997). *See also* Shipes v. Trinity Industries, 987 F2d 311, 316 (5th Cir. 1993) (Threshold requirements of commonality and typicality are not high). If a benefit may be achieved through class disposition, the rule

finding commonality in class actions.[86] The commonality test is "qualitative rather than quantitative."[87] Essentially, these cases and their progeny suggest there need be only a single issue common to all members of the class.[88] Just as common issues of law are not required for all class members, common issues of fact are not required among all class members.[89] Class actions may be certified on limited common issues of fact.[90]

Lastly, Rule 23 of the Federal Rules of Civil Procedure provides that a class action may not be maintained unless "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[91] Unlike numerosity and commonality, which focus on the characteristics of the class, typicality and adequacy of representation focus on the characteristics of the plaintiff representative of the class.[92] Typicality refers to the nature of the claim or defense of the class representative and not to the specific facts from which it arose or to the relief sought. Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.[93] As the Supreme Court has explained, "The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiffs' claims."[94] The typicality analysis asks, "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct."[95]

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requires only that the resolution of common questions affect all or most of the class members; Jenkins v Raymark Indus., 782 F.2d 468 (5th Cir. 1986).

[86] Morris v. Transouth Fin. Corp., 175 F.R.D. 694, 697 (M.D. Ala. 1997). *See also* Shipes v. Trinity Industries, 987 F2d 311, 316 (5th Cir. 1993) (Threshold requirements of commonality and typicality are not high). If a benefit may be achieved through class disposition, the rule requires only that the resolution of common questions affect all or most of the class members. Jenkins v Raymark Indus., 782 F.2d 468 (5th Cir. 1986).

[87] *See* In re American Medical Systems, Inc., 75 F 3d 1069 (6th Cir. 1996). *See also* Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982) (The commonality test of Rule 23(a)(2) is met when there is "at least on issue whose resolution will affect all or a significant number of the putative class members.").

[88] *Id.*

[89] Haywood v Barnes, 109 F.R.D. 568, 577 (E.D.N.C. 1986).

[90] Central Wesleyan College v W.R. Grace, 6 F.3d 177, 184 (4th Cir. 1993).

[91] Fed. R. Civ. P. 23(a)(3).

[92] Hassine v. Jeffes, 846 F.2d 169, 176 n.4 (3rd Cir.1988); *see also* Herbert B. Newberg, Newberg on Class Actions, Prerequisites for Maintaining a Class Action, §3:13, at 316-17 (4th ed. 2002).

[93] Herbert B. Newberg, *supra* note 92, § 3.15 at 335.

[94] General Telephone Co. of the Northwest v. Equal Employment Opportunity Commission, 446 U.S. 318, 330 (1980).

[95] Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (quoting Schwartz v. Harp, 108 F.R.D. 279, 282 (C.D. Cal. 1985)).

Having met the abovementioned four criteria gives a group seeking redress in the United States legal standing. Mexico, as a civil law country, differs somewhat in the system its legislature has passed for class certification. The required elements of class certification in Mexico will be addressed in the following subsection.

B. *Class Certification in Mexico*

Like the United States, class certification in Mexico ensures an efficacious judicial system with respect to collective actions. The Decree published to the Official Gazette in August 2011 required that, as of March 1, 2012, plaintiffs hoping to file collective actions under the authority of the amendment made to Article 17 fulfill a number of requirements: adequate representation, commonality, superiority and legal standing.

The Decree amends Article 586 of the Mexican Civil Code of Procedure defining adequate representation (*representación adecuada*).[96] Although the final decision is in the hands of the federal judge hearing the case, some of the factors for which adequate representation is determined are to: "I. Act with diligence, skill and good faith in defending the interest of the public at trial; II. Not be in [a] conflict of interest with his or her clients about relevant activities; [...] V. Not [have] been charged with incompetence, bad faith or negligence in prior collective actions [...]."[97]

At this time, Mexico has yet to rule on collective action litigation.[98] Therefore, it is uncertain how Mexican federal judges will apply these standards. However, the guidelines set forth in the amendment to Article 586 seem to set rigid guidelines that ensure that group litigants are provided with diligent representatives as must be the case to ensure the effective organization for legal redress to affected citizens.

The Decree amends Article 588 of the Mexican Civil Code of Procedure to illustrate the requirement of commonality.[99] As in American jurisprudence, commonality in Mexico is statutorily defined as the presence of one or more common legal or factual claims.[100] It will be interesting to see how Mexican judges interpret this commonality requirement in the months and years to

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[96] Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended* on December 30, 2008, Article 586, Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.).

[97] *Id.*

[98] These amendments became legally effective March 1, 2012; *see* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* on August 30, 2011, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

[99] *See* Código Federal de Procedimientos Civiles, *as amended* on December 30, 2008, Article 588, Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.).

[100] *Id.*

come. The Decree also mandates that a collective action may only be certified if it demonstrates superiority, or that the group litigation mechanism is deemed the most efficient method to address the legal issue.[101]

Lastly, in order to file a collective action in Mexico, one must have legal standing (*legitimación activa*). In the United States, standing is subsumed by meeting the Rule 23 requirements of adequacy, numerosity, commonality and typicality.[102] In comparison, the Mexican Decree has settled the requirements for legal standing under a collective actions claim, issuing legal standing to a group of Mexican regulatory agencies: The Federal Bureau of Environmental Protection (*Procuraduría Federal de Protección al Ambiente*), the Federal Consumer Protection Bureau (*Procuraduría Federal del Consumidor*), the National Commission for the Protection and Defense of Financial Service Users (*Comisión Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros*) and the Federal Antitrust Commission (*Comisión Federal de Competencia*).[103] Additionally, a common representative of a community comprised of at least 30 members can be granted standing for collective action.[104] Civil non-profit associations legally incorporated at least one year prior to the date when the action has been filed also enjoy legal standing, having as their statutory purpose the promotion or defense of rights and interests in the area in question —consumer protection, financial services or environmental compliance.[105] Lastly, the Attorney General of the Republic has the benefit of legal standing in collective actions.[106]

2. *The Substantive Aspects of Group Litigation*

As with procedural law, substantive law in the United States and Mexico demonstrate marked differences. This section will address the differences in substantive law in the two countries, focusing on laws regarding pecuniary damages issued in group litigation.

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[101] *See* Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended* on December 30, 2008, Articles 588-89, Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.). Although this provision has yet to be challenged, Mexican jurists believe that in the coming months and years this provision will be enforced liberally. *See also* Robert Kossick, *The Rule of Law and Development in Mexico*, 21 Ariz. J. Int'l & Comp. L. 715, 725-30 (2004) (noting Mexico's recent neoliberal development agenda and judicial reforms).

[102] *See* Fed. R. Civ. P. 23(b) (2); *see also* Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970); Krawez v. Stans, D.C., 306 F. Supp. 1230 (1969); Planned Parenthood Federation, Inc. v. Schweiker, 559 F. Supp. 658, 662 (D.D.C. 1983).

[103] *See* Código Federal de Procedimientos Civiles [C.F.P.C.], *as amended* on December 30, 2008, Article 585 (I), Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.).

[104] *Id.*

[105] *Id.*

[106] *Id.*

In the United States, damages issued in class actions fall primarily into one of two general categories: compensatory damages and punitive damages. Compensatory damages refer to the pecuniary damages the defendant pays to the injured plaintiff to cover the actual costs of the plaintiff's injury. If the defendant is found liable for the plaintiff's injuries, the judge or jury will calculate the amount of actual damages to be awarded.[107] These calculations are strictly based on evidence of the plaintiff's costs.[108] Punitive damages, however, are subject to much more scrutiny where judge-made substantive law is created to define the rights and obligations of the parties involved. Unlike the damages system in the United States, punitive damages are not part of Mexican jurisprudence. In Mexico, damages issued in collective actions are limited to compensatory damages, in which a judge or jury objectively determines what a successful plaintiff loses in terms of opportunity, and nothing more.[109] Unlike American jurisprudence, Mexico has a number of numerous substantive laws, rather than simply legal opinions, regarding collective actions.

It is important to note that the United States, under the aegis of the Rules of Decision Act,[110] allows the filing of class actions in both state and federal courts. First enacted in 1789, the Rules of Decision Act discourages forum shopping and avoids the unfair administration of laws in cases heard by federal courts because of the diverse citizenship of the involved parties. The landmark decision in *Erie Railroad Co. v. Tompkins*[111] interpreted the Rules of Decision Act to include not only state statutes, but also controlling judicial decisions or state Common Law as constituting the laws of the state.[112] *Erie* overruled *Swift v. Tyson*,[113] which construed the Rules of Decision Act as not requiring federal courts to apply state common law in diversity cases.[114] Class actions under the authority of a particular state give state legislatures the prerogative to pass their own local class action procedures.[115] Legislation passed in such a manner creates significantly different procedural and substantive legal implications from state to state. To simplify the analysis below, this Note will focus specifically on federal class actions. In contrast with class action procedure in the United States, Mexico currently only allows for collective actions to be filed in federal courts. This subsection will compare the legislation and limitations regarding pecuniary damages in group litigation.

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[107] *Id.* at Articles 581, 604-05.

[108] *Id.*

[109] *Id.*

[110] 28 U.S.C.A. § 1652 (1948).

[111] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

[112] *See id.*

[113] Swift v. Tyson, 41 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842).

[114] *See id.*

[115] *See generally* Crampton & Kim, *supra* note 39.

A. *Substantive Aspects Regarding the Issuance of Pecuniary Damages in the Context of Group Litigation in the United States*

As a result of *Erie*, federal courts in diversity jurisdiction must apply the substantive law of the state in which it sits. This was incongruous with the past procedure sanctioned previously by *Swift v. Tyson*, which allowed federal judges in cases based on diversity jurisdiction to ignore the common law local decisions of state courts in the state in which the court was located. Of course, application of the *Erie* doctrine was a difficult decision for the Court, since overruling *Swift* meant a large number of decisions by the Court and all lower federal courts were no longer valid. However, the Court did not declare the Rules of Decision Act itself unconstitutional.[116] Instead, it reinterpreted the Act so federal district courts hearing cases in diversity jurisdiction had to apply the whole of the law, both statutory and judge-made, of the states in which they sat.[117] This Note does not seek to analyze the numerous different substantive laws applicable to each state, but will focus on the substantive laws regarding damages issued in federal class action proceedings.

Over the last twenty years of Supreme Court jurisprudence, there have been numerous influential decisions devoted to punitive damages, the larger and more subjective of the possible damage awards, within the context of class actions.[118] The interests of the Court in this area have been driven by effort on the part of defendants to limit both the scope of liability for compensatory awards and the instances and amounts applicable to punitive damages awards.[119]

In 1993, the Supreme Court heard *TXO Prod. Corp. v. Alliance Res. Corp*. Here, the defendant argued that the punitive damages award violated the Due Process Clause.[120] In this argument, the defendant failed; however, the decision of the case set an outline for an award of punitive damages in that "vagueness, lack of guideline and the lack of any requirement of a reasonable relationship between the actual injury and the punitive damage award, in essence, would cause the Court or should cause the Court to set it aside on Constitutional grounds."[121] The Court in *TXO Prod. Corp.* added additional clarity to the delegation of punitive damages, stating such damages awards "are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages awards must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it."

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[116] *See* Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

[117] *Id.*

[118] Francis E. McGovern, *Punitive Damages and Class Actions*, 70 Louisiana L.R. 435, 436 (2010).

[119] *Id.*

[120] TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 451 (1993).

[121] *Id.* at 451.

In 1996, the United States Supreme Court addressed punitive damages in *BMW of North America, Inc. v. Gore*,[122] holding that punitive damages must be reasonable as determined by the degree of reprehensibility of the conduct that caused the plaintiff's injury, the ratio of punitive damages to compensatory damages, and any comparable criminal or civil penalties applicable to the conduct.[123] Subsequently, in 2003, the case of *State Farm Auto. Ins. v. Campbell*[124] resolved the issue that punitive damages may *only* be based on the acts of the defendants that harmed the plaintiffs.[125] More recently, in *Philip Morris USA v. Williams*,[126] the Supreme Court ruled that punitive damage awards cannot be imposed for the direct harm the misconduct caused others, but may consider harm to others as a function of determining how reprehensible it was.[127] Misconduct that is more reprehensible justifies a larger punitive damage award, just as a repeat offender in criminal law may be punished with a tougher sentence.[128]

This subsection has identified the current substantive law behind pecuniary damages in the context of American class actions. The following subsection will introduce the specifics underlying the issuance of such damages in Mexican collective actions.

B. *Substantive Aspects Regarding the Issuance of Pecuniary Damages in the Context of Group Litigation in Mexico*

Impelled by the promulgation of the amendment to Article 17, Article 603 *et seq.* of the Decree amending the Federal Code of Civil Procedure addresses the substantive law behind the pecuniary and injunctive judgments (*sentencias*) of collective actions in Mexico. In diffuse actions, the judge may order the defendant to repair the damage caused to the community.[129] This compensation may include performing one or more actions or refrain from doing.[130] If this is not possible, the judge shall order substitute performance (*cumplimiento sustituto*) according to the infringement of the rights or interests of the com-

[122] BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

[123] *Id.* at 575-82.

[124] State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

[125] *Id.* at 416-20.

[126] Philip Morris USA v. Williams, 549 U.S. 346 (2007).

[127] *Id.* at 358-61.

[128] *See generally* McMahon v. Bunn-O-Matic, 150 F.3d 651, 654 (7th Cir. 1998); Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994); Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996) (Posner, J.).

[129] Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended* on December 30, 2008, Article 604, Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.).

[130] *Id.*

munity.[131] In the case of collective actions and homogeneous individual rights collective actions, the judge may order the defendant to repair the damage, consisting of the realization of one or more actions or refraining from doing such actions, and to cover damages individually to group members as provided in this article.[132] Only if this option is not possible will the judge defer to the issuance of pecuniary damages.[133] In such a case, whether a diffuse action, collective action or homogeneous individual rights collective action, the reparation to the plaintiff community is the same —compensatory damages.[134]

Under Mexican jurisprudence, the vast majority of these compensatory damages issued are likely to come under the guise of "damages and losses" (*daños y perjuicios*). Articles 2104 through 2110 of the Mexican Civil Code fall under Title Four of the Code, entitled "Effects of Obligations," which govern such damages and losses. Chapter One of this article deals with the consequences of non-compliance.[135] Article 2104 of the Mexican Civil Code states "Whoever is obligated to perform an act and fails to do so or performs such act without conforming to what was agreed, will be responsible for the loss of profit (*lucrum cessans*)." Article 2107 of said Code further establishes, "[t]he type of responsibility referred in this Title, will imply the return of the goods or the price, or the repair of the damages and the indemnification of the prejudices."[136] Articles 2108 and 2109 define "compensatory damages" and "loss of future earnings," respectively, as follows: "compensatory damage is the loss or decrease of assets suffered as a result of the failure to comply with an obligation" and "lost profits are the deprivation of lawful gains that would have resulted had there been compliance with an obligation."[137] Moreover, Article 2110 states that "Damages and losses shall be an immediate and direct consequence resulting from the breach of the obligation, either caused or that had to be necessarily caused."[138]

Although the Mexican application of damages relies only on the abovementioned provisions, the system is likely to change as the practice of issuing damages for sanctions begins in 2012. In the forthcoming part, this Note will examine the implications and make judges and legislators cognizant of the effects of Mexico's practice of issuing damages in the absence of any juridical or legislative action. This will provide a practical guide for those on the

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[131] *Id.*

[132] *Id.* at Article 605.

[133] *Id.*

[134] *Id.* at Articles 604-05.

[135] *See* Código Civil Federal de México [C.C.] [Federal Civil Code], *as amended* on January 28, 2010, Articles 2104-09, Diario Oficial de la Federación [D.O.], 29 de Agosto de 1932 (Mex.).

[136] *Id.* at Article 2107.

[137] *Id.* at Articles 2108-09.

[138] *Id.* at Article 2110.

frontlines of these cases to ensure that justice is accomplished with respect to the consumer and the environment in the formative stages of collective actions in Mexico.

V. Implications of the Amendment to Article 17 of the Mexican Legal System

With the provisions described in Part III, the Federal Congress in Mexico pieced together a collective action model intended to protect the interests of numerous stakeholders. However, to this point, it is largely academic to speculate as to the implications the amendment will have on corporate and individual action. Prior to the amendment of Article 17, the legal mechanism of group litigation was foreign to Mexico's civil law system. Nevertheless, inferences regarding the applicability of Mexico's existing statutory provisions are the best available resources to speak to the consequences of Mexico's actions regarding collection actions. Part V uses this information to draw conclusions primarily on the economic implications of the aforementioned legislative amendment to Article 17. However, it does bear noting that given the newness of the Decree, many of the opinions and projections addressed within this section are projections that are more speculative than authoritative assertions.

As addressed in Part III, the amendment to Article 17 published to the Official Gazette on August 30, 2011, provides for a system that limits damages a successful plaintiff may recover for the costs of remediating the harm or injury incurred. Under the legislation passed by the Mexican Congress, plaintiffs in a collective action may seek no additional pecuniary damages.[139] This is a stark contrast to the legal structure for collective actions provided by many common law countries. For example, in the United States, it is permissible for a plaintiff to seek additional pecuniary damages in such an action.[140] The most emblematic of these damages is the award of punitive damages.

Punitive damages are damages intended to reform or deter the defendant and others from engaging in conduct similar to that which formed the basis of the lawsuit.[141] Oftentimes, this is the impetus behind punitive damages, with punitive damages often being awarded when compensatory damages

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[139] *See generally* Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended* on December 30, 2008, Articles 581, 604-605, Diario Oficial de la Federación [D.O.], 24 de Febrero de 1943 (Mex.).

[140] *See* John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages* 139, 139-150 (1986).

[141] *See generally* McMahon v. Bunn-O-Matic, 150 F.3d 651, 654 (7th Cir. 1998); Liebeck v. McDonald's Restaurants, Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994).

are deemed an inadequate remedy.[142] Since they are usually paid in excess of the plaintiff's provable injuries, punitive damages are awarded only in special cases, usually under tort law, in cases in which the defendant's conduct was egregiously insidious.[143] However, the court may also impose them to prevent under-compensation of plaintiffs, to allow redress for undetectable torts and to take some strain away from the criminal justice system.[144] Although the purpose of punitive damages is not to compensate the plaintiff, the plaintiff will in fact receive all or some portion of the punitive damage award. The lack of the option to pursue punitive damages within the Mexican legal system raises the possibility that the Mexican system may provide too little of an economic incentive to affect corporate behavior.

Consider a *maquiladora*[145] that produces LCD televisions. In Mexico, many *maquiladoras* lack proper waste management facilities and the ability to clean up disposal sites, which is why some of the hazardous waste is disposed of illegally.[146] These *maquiladoras* may dump their waste into rivers or landfills where the hazardous toxins will seep into nearby aquifers and contaminate the local water supply. This is but one hypothetical scenario that would both affect a given population and particular environment. Under Mexico's newly enacted legislation, the affected population may file a collective action seeking pecuniary damages for the harm or injury incurred as a result of the environmental tort. Suppose the *maquiladora* saved more in its illegal disposal of the waste than the damages sought by the plaintiffs in their collective action. In such case, the *maquiladora* has no incentive to cease its illegal behavior without the imposition of some sort of additional damages award. Thus, the *maquiladora* will avoid economic inefficiency by continuing to dispose of materials illegally.

The intent of the legislative actions taken by the Mexican Congress does not comport well with this possibility. In proposing his bill that eventually became law, Senator Murillo wrote a piece of legislation to better protect citizens and consumers from violations of their constitutional rights. This includes, among other rights, the right of all persons to an adequate envi-

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[142] *See generally* McMahon v. Bunn-O-Matic, 150 F.3d 651, 654 (7th Cir. 1998); Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994); Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996).

[143] *Id.*

[144] *See* Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996).

[145] Black's Law Dictionary (9th ed. 2009), maquiladora, *n.* (1976) "A Mexican corporation, esp. one that holds a permit to operate under a special customs regime that temporarily allows the corporation to import duty-free into Mexico various raw materials, equipment, machinery, replacement parts, and other items needed for the assembly or manufacture of finished goods for export."

[146] Mary E. Kelly, Free Trade: The Politics of Toxic Waste 48; Clapp, Jennifer, Piles of Poisons: Despite NAFTA's Green Promises, Hazardous Waste Problems are Deepening in Mexico 25 (2002).

ronment for their health and development guaranteed by Article 4 of the Mexican Constitution.[147] Senator Murillo believed Mexican citizens were in a state of "*anomia*,"[148] essentially *lacuna legis* or *lacuna lex*; in which there is a gap in the law that is not addressed.[149] The fact that the legislation passed by the LXI Legislature of the Mexican Congress aims at providing better protection for citizens and consumers from violations of their constitutional rights, yet allows for the possibility of blatant disregard of these rights under the guise of institutional economic interests, signifies that this legislation is incomplete.

The Mexican legal system and the recent constitutional amendment to Article 17 require either a nuanced judicial approach or additional legislative modification to ensure the protection of citizens' constitutional rights —especially the reckless disregard of these rights by institutional actors seeking only increased profits. These changes need not necessarily embody the philosophy of American jurisprudence, but can build upon the economic incentives used to modify institutional behavior in the changes that Mexico will make in the coming years. The potential of these aims will be the focus of the discussion in Part VI.

VI. Possible Solutions to the Complications Posed by the Current Juridical System

In 1979, Professor Arthur R. Miller published an article contrasting the myths and realities of group litigation in the United States. To some, Professor Miller wrote, the legal mechanisms allowing for group litigation seemed a "Frankenstein monster," while to others it appeared as a "knight in shining armor."[150] Professor Miller's comments illustrate the diverse views individuals have regarding group litigation. Numerous legal scholars have spoken about the complexities inherent to the system of group litigation.[151] These problems are not endemic to the United States. It is understandable that many within the legal community may fear that the actions taken by Mexico, although beneficial, are too complex to be addressed by the Mexican legal system and

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[147] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* on August 30, 2011, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[148] Iniciativa para el Desarollo Ambiental Sustenable, the "Class Action" and its Relationship with the Environmental Damage 3, http://www.iniciativasustentable.com.mx/documents/01_documents_ideas_eng.pdf (last visited Nov. 12, 2011).

[149] *Id.*

[150] *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'*, 92 Harv. L. Rev. 664, 665 (1979).

[151] *See*, *e.g.*, Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 Duke J. Comp. & Int'l L. 405 (2001); James E. Starrs, *Continuing Complexities in the Consumer Class Action*, 49 J. Urb. L. 349 (1971-1972); Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 Ariz. L. Rev. 533 (1997).

are unlikely to address the inefficiencies and insufficiencies present within the Mexican legal system for the protection of collective environmental rights. In the United States, class actions are complex, lengthy procedures. These decisions therefore pose a tremendous burden on the American court system. Accordingly, significant expertise is required both by the judges and by the litigators involved in order to present or defend a successful class action suit. At the time of this publication, Mexico is quite unfamiliar with the system of group litigation and this system could easily take a period of five years for Mexican courts to become accustomed with this nascent area of law. This means that Mexican group litigation in the coming years is likely to be both scarce and tentative.

Collective actions are essentially the incarnation of the American class action. This is a new, foreign area within Mexican law. Therefore, the Mexican federal government and federal judiciary are likely to be initially ignorant of the niceties involved in such litigation. Currently, Mexican judges and jurists have no sources to consult and therefore could be reticent in handling cases and rendering the first decisions in the coming years. It is also likely that the first decisions will be incomplete or imperfect because of this lack of experience. Therefore, many of these decisions will be challenged through the *recurso de amparo*, a Mexican legal mechanism established to protect the constitutional rights of individuals and companies against violations from public authorities.[152] This Note argues that to ensure an efficient system of group litigation in Mexico, three requisite factors must be present: quality judges abreast of the nascent system of collective actions, lawyers trained in collective action procedure and litigation, and outstanding scientific experts.

1. *The Role of the Mexican Judiciary in Collective Action Litigation*

A. *The Role of the Federal Council of the Judiciary in Collective Action Litigation*

Only weeks after assuming the Presidency in 1994, President Ernesto Zedillo Ponce de Leon made "one of the most surprising changes in the legislative history of Mexico."[153] President Zedillo submitted a legislative bill to the Senate amending twenty-seven articles of the Mexican Constitution, which profoundly altered the structure and function of Mexico's federal judicial system.[154] This legislative package transformed the composition, structure, and function of the Mexican judiciary.[155]

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[152] Jorge A. Vargas, *Mexican Law on the Web the Ultimate Research Guide*, 32 Int'l J. Legal Info. 34, 38 (2004).

[153] Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 Am. U. J. Int'l L. & Pol'y 295 (1996).

[154] *Id.* at 295-296.

[155] *See generally id.* at 296.

> The amendments reduced the number of Supreme Court Justices from twenty-six to eleven, and established stricter qualifications for nominations. In addition to changing the manner in which the Justices are appointed, their tenure was limited to fifteen years. With the intention of creating a truly constitutional court, President Zedillo modified the original jurisdiction of this highest tribunal. [The legislation] also created a new judicial organ, the Council of the Federal Judiciary [...], inspired by similar modern judicial structures operating in Europe and Latin America.[156]

In accordance with the guidelines and directives subsequently formulated by the Plenary of the Council of the Federal Judiciary, this branch of the government has been overseen and regulated by the Institute of the Judiciary (*Instituto de la Judicatura*).[157]

Pursuant to Organic Law of the Federal Judicial Power (*Ley Orgánica del Poder Judicial de la Federción*),[158] the Council of the Federal Judiciary (*Consejo de la Judicatura Federal*; *hereinafter* "the Council," unless otherwise noted) is to have the following five commissions: 1) Administration, 2) Judicial career, 3) Discipline, 4) Creation of new organs and 5) Description.[159] In his initiative proposing for the creation of the Council, President Zedillo stated:

> In order to elevate in the future, the professional quality of those who will have to impart justice, this reform aspires to raise to a constitutional rank the judicial career, so in the future the appointment, description and removal of judges and magistrates will be subject to general, objective and impartial criteria to be determined by the laws on this matter.[160]

To accomplish this goal, the Institute of the Judiciary, an auxiliary organ of the Council, is in charge of the "research, development, training and updating of the members of the Federal Judicial Power, and of those who aspire to belong to it."[161] The Institute may employ support programs from regional offices (*extensiones regionales*) with the possibility of assistance from Mexican

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[156] *Id.*

[157] *Id.*

[158] *See* Ley Orgánica del Poder Judicial de la Federación [L.O.P.J.F.] [Federal Judicial Branch Law], Diario Oficial de la Federación [D.O.], 26 de Mayo de 1995, at 2 (illustrating the text of the Act). This Mexican statute was inspired by the United States 1789 Judiciary Act.

[159] *Id.* at Article 77.

[160] Iniciativa Presidencial de Reformas al Poder Judicial y de la Administración de Justicia Constitucional, Presidencia de la Republica, Palacio Nacional, México, Dec. 5, 1995, at 18; *see also* Vargas, *supra* note 153, at 327.

[161] See Ley Orgánica del Poder Judicial de la Federación [L.O.P.J.F.] [Federal Judicial Branch Law], Article 92, Diario Oficial de la Federación [D.O.], 26 de Mayo de 1995; the functions and powers of this Institute are controlled by "the norms to be determined by the Federal Council of the Judiciary in the respective regulations." *See also* Jorge A. Vargas, *supra* note 153, at 327.

universities; these programs serve to benefit federal judges in their constitutional mandate to timely resolve the matters of which is the subject of this Note.[162]

The Institute of the Judiciary has the support of an Academic Committee (*Comité Académico*),[163] with the ability to implement "programs and courses" designed:

> 1) To develop a practical knowledge regarding the procedures and matters under the jurisdiction of the Council of the Federal Judiciary; 2) To perfect certain technical skills; 3) To strengthen and specialize in matters dealing with the applicable law, doctrine and jurisprudence (*jurisprudencia*); 4) To perfect techniques on legal analysis, interpretation and argumentation; 5) To teach administrative techniques relating to the jurisdictional function; 6) To develop legal vocations in favor of a judicial career, and the ethical values associated with it; and, 7) To promote academic exchanges with institutes of higher education.[164]

Given the importance, originality, and complexity of these new collective actions, it may be prudent for the Mexican Congress to require the Federal Council of the Judiciary to administer a course and require members of the federal judiciary interested in participating in these actions to attend. This could help mitigate some of the potential problems that may occur in the presence of an inexperienced judiciary.

B. *The Role of Federal Judges in Collective Action Litigation*

As the idea of group litigation is novel to Mexico, federal judges must be prudent in the issuance of decisions during the initial years of implementation of collective actions. Since Mexico does not adhere to the principle of *stare decisis*,[165] the significance of case law in Mexico is secondary compared to the importance given to the legal principle, rule, or norm found in the appli-

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[162] Ley Orgánica del Poder Judicial de la Federación [L.O.P.J.F.] [Federal Judicial Branch Law], Article 92, Diario Oficial de la Federación [D.O.], 26 de Mayo de 1995.

[163] Jorge A. Vargas, *supra* note 153, at 327.

[164] Ley Orgánica del Poder Judicial de la Federación [L.O.P.J.F.] [Federal Judicial Branch Law], Article 95, Diario Oficial de la Federación [D.O.], 26 de Mayo de 1995.

[165] *See* Jorge A. Vargas, *Legislative Enactments – Mexican Law with Professor Jorge A. Vargas*, http://www.mexlaw.com/best_websites/2_legislative.html, according to Black's Dictionary, the simplest notion of *stare decisis* is "to abide by, or adhere to, decided cases." As a doctrine, "when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same." *See also* Norne v. Moody, Tex. Civ. App., 146 S.W.2d 505, 509-10 (1940). As a policy of courts, it is when courts have to "stand by precedent, and not to disturb settled point." Neff v. George, 364 Ill. 306, 4 N.E.2d 388, 390-91 (1936).

cable provision of a given statute or code.[166] As a result, great significance will be placed on the applicability of legal principles employed in the litigation of collective actions.

As illustrated in the preceding part, the economic implications of the these forthcoming amendments and additions create situations in which it may be economically efficient to violate the law and pay compensatory damages to replace what the plaintiffs were objectively determined by a judge or jury to have lost, and nothing more. American jurisprudence implements punitive damages to punish a defendant for his or her conduct as a deterrent to the future commission of such acts. Such damages are likely to eliminate the economic incentive to intentionally violate one's legal obligations. In Mexico, remunerations analogous to punitive damages are likely to be implemented only in cases of egregiously insidious behaviors.[167] Under Mexican jurisprudence, the vast majority of damages issued in any sort of reparation are likely to come under the guise of "damages and lost profits" (*daños y perjuicios*).[168]

Additionally, to ensure the constitutionally guaranteed environmental rights of citizens are not subordinated to institutional economic interests, Mexican judges could begin to interpret Articles 2104 *et seq.* of the Mexican Civil Code expansively and incorporate additional damages to dissuade institutional actors from breaking environmental laws under the aegis of an economic efficiency argument. As mentioned in Part IV, Articles 2104 through 2109 of the Mexican Civil Code deal with the consequences of non-compliance.[169] In the coming years, Mexican judges should interpret these statutory provisions expansively to ensure that institutional actors are not incentivized to break the law. Specifically, Article 2109[170] should be read broadly to penalize any party receiving economic gains from a failure to meet a legal duty. The Mexican judiciary should be cognizant of the effects that its initial decisions will have on large institutional actors. The issuance of Article 2109 damages in such a way is likely to eliminate the economic incentive to intentionally violate one's legal obligations. Such an expansive interpretation could mimic

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[166] *See* Jorge A. Vargas, *supra* note 165.

[167] *See* Jorge A. Vargas, *Moral Damages Under the Civil Law of Mexico*, 35 U. Miami Inter-Am. L. Rev. 183, 187-88 (2004) (analyzing Mexico's recently introduced change in the Civil Code protecting the subjective notion of "moral damages" in civil liability cases).

[168] Antonio Ojeda Avilés & Lance A. Compa, *Globalización, Class Actions y Derecho de Trabajo* (2002), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1380&context=articles (last visited Oct. 13, 2011).

[169] *See* Código Civil Federal de México [C.C.F.] [Federal Civil Code], *as amended* on January 28, 2010, Articles 2104-09, Diario Oficial de la Federación [D.O.], 29 de Agosto de 1932 (Mex.).

[170] *Id.* at Articles 2108-09; Articles 2108 and 2109 define "damages" and "losses", respectively, as follows: "damage is the loss or decrease of assets suffered as a result of the failure to comply with an obligation" and "losses are the deprivation of lawful gains that would have resulted had there been compliance with an obligation."

the principles reflected in the United States Supreme Court's ruling in *BMW of North America, Inc. v. Gore*,[171] which held that additional pecuniary damages must be reasonable and determined by the degree of reprehensibility of the conduct that caused the plaintiff's injury.[172] This is the most administratively feasible option for members of the Mexican judicial system to eliminate the presence of such "efficient breaches" of citizens' constitutional rights in the coming years.

To guarantee the intent of the amendments and additions of the Decree are fulfilled, that individual constitutional rights are not alienated or subordinated to institutional economic interests, Mexico must implement a system of damages similar to the American system that punishes activities antithetical to the constitutional environmental rights of its citizens. This change need not be the issuance of "punitive damages" or the result of legislative action if Mexican judges begin to interpret Articles 2104 *et seq.* of the Civil Code more expansively and incorporate additional damages. If such a system may not be executed through the expansive reading of the relevant portions of the Mexican Civil Code, then it is the prerogative of the federal government to pass legislation that allows for the implementation of an equivalent arrangement. The inability to accomplish these juridical changes will fail to realize the intent of both the Decree, to fulfill the *lacuna legis* or *lacuna lex* of the citizens of Mexico, and the didactic purpose of the recent amendment of Article 4, the right of all persons to an adequate environment for their development and well-being, by placing institutional interests above the constitutional rights of the Mexican public.

2. *The Role of Mexican Lawyers in Collective Action Litigation*

As mentioned in Part IV, the Decree amends Article 586 of the Mexican Civil Code of Procedure to define adequate representation for group litigation in Mexico. The above analysis mentioned that Mexico has yet to rule on this aspect of collective action litigation.[173] The standards set forth in the amendment to Article 586 would seem to set rigid guidelines that ensure that group litigants are provided with diligent representatives as must be the case

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[171] *See generally* BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

[172] *Id.* at 575-82 (commenting on the feasibility of additional pecuniary damages; although this case focused specifically on punitive damages, numerous federal class actions decided thereafter have cited *BMW of North America, Inc. v. Gore* and held that additional pecuniary damages must be reasonable and determined by the degree of reprehensibility of the conduct that caused the plaintiff's injury). *See* Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998 (9th Cir. Cal. 2004); Abner v. Kan. City S. R.R. Co., 513 F.3d 154 (5th Cir. La. 2008).

[173] These amendments become legally effective March 1, 2012; *see* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended on* August 30, 2011, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

to ensure an effective organization for legal redress to affected citizens. However, because an ineffective representative is as deleterious as anything is to a plaintiff or defendant, federal judges must be sure that this article is strictly enforced. Like the United States, Mexico respects the principles of *res judicata* and allows only one attempt to resolve any collective action. Accordingly, it is paramount that Mexican lawyers approach collective actions, or any action, diligently to prevent the possibility of preclusion.

3. *The Role of Scientific Experts in Collective Action Litigation*

Numerous studies have documented the significant role that science plays as a tool in group litigation to substantiate claims and corroborate the validity of pecuniary damages.[174] Scientific data and expert testimony are often included to buttress a claim and the admissibility of such evidence is often a consequence of the extant evidentiary rules and their application.[175] In the United States as well as in many other countries, expert witnesses are at once detested and treasured.[176] "Experts are seen as mercenaries, prostitutes, or hired guns, witnesses devoid of principle who sell their opinions to the highest bidder."[177] However, this scorn is mitigated by the imperative function such scientific testimony plays in both its evidentiary role and the calculus of settlement.[178]

In Mexico, the pervasiveness of expert witnesses is not as widespread as it is within the United States. Simple demand-side economics would suggest that the paucity of legal decisions requiring experts in Mexico would suggest that the country might not have the quantity or be prepared to supply the qualified experts for such legal expertise. Mexico will need to deal with this inefficiency in the coming years – either by contracting with foreign experts or catalyzing the development of such experts in response to the need posed by collective actions.

Addressing the lack of expert witnesses, as well as addressing and training quality judges and lawyers in order to comply with the recent requirements of collective actions in Mexico is essential to the development of an efficient system of group litigation in Mexico.

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[174] *See generally* Suman Kakar & Sanjeev Sirpal, *The* In-Terrorem *Value of Science: Bisphenol-A Litigation and an Empirical Assessment of Science as a Collective Litigation Tool*, 2 Beijing Law Review 55, 55-62 (2011); P. Lee, *The Daubert Case and Expert Opinion*, Translating Evidence into Practice 1997 Conference Summary —Session B: Scientific Evidence and the Courts, *available at* http://www.ahcpr.gov/clinic/trip1997/trip2.htm.

[175] *See* Kakar & Sirpal, *supra* note 174.

[176] L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. Rich. L. Rev. 1389, 1389-90 (1995).

[177] *Id.*

[178] *See* Kakar & Sirpal, *supra* note 174, at 55-62; P. Lee, *supra* note 174.

VII. Conclusion

It does not suffice to recognize simply the constitutional right to a healthy environment; it is necessary to admit functional procedural legitimation to ensure these rights are provided, regardless of the desires of powerful institutional economic interests. This Note has discussed the insufficiency and inefficacy of the Mexican legal system, on its face value, for the protection of collective environmental rights. This Note has emphasized the need for the Mexican judiciary to allow for a more expansive reading of Articles 2104 *et seq.* of the Mexican Civil Code, or for the Mexican Congress to add additional parameters to implement and strengthen its vision to effectively protect the unassailable constitutional rights of its citizens.

Mexico has made significant progress in addressing environmental law issues through free-market environmentalism. However, the Mexican Congress must make substantive amendments to the nation's legal system to ensure that the environmental rights of citizens, guaranteed by the Mexican Constitution, are not subordinated to institutional economic interests. This Note advances the idea that the primary, most effectual vehicle for implementing such change is through the introduction of additional pecuniary damages with regard to collective actions in Mexico.

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MEXICO'S ATTEMPT TO EXTEND ITS CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES SERVES AS A MODEL FOR THE INTERNATIONAL COMMUNITY

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Abstract. *In June 2000, the United States and Mexico signed a treaty for the delimitation of the continental shelf in the western Gulf of Mexico beyond 200 nautical miles. When the treaty was signed, both countries realized that the interpretation and implementation of the treaty depended on the scientific and legal certainty of determinations regarding how far their respective submarine continental shelves extended. On 13 December 2007, Mexico submitted information to the Commission on the Limits of the Continental Shelf regarding the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured in relation to the Western Polygon in the Gulf of Mexico. Mexico sought an extension of its continental shelf in the Western Polygon based on international law, UNCLOS, and bilateral treaties with the United States, in accordance with Mexico's domestic legislation. Peaceful delimitation of maritime borders is essential to maintaining world order. Mexico is a country of peace, and has attempted to use international law as a tool to represent its interests. Mexico has meticulously adhered to a series of international precedents and treaties to support its claim. Moreover, Mexico has gathered significant scientific evidence to verify its sovereign authority over its maritime areas. In the author's opinion, the United States should recognize these claims and show the world that the U.S. stands for fairness, equity and the rule of law.*

Key Words: *Law of the sea, maritime delimitation, extending the continental shelf, Mexico, Gulf of Mexico, sovereignty, maritime borders.*

Resumen. *En junio de 2000, los Estados Unidos y México firmaron un tratado para la delimitación de la plataforma continental en el oeste del Golfo de México más allá de 200 millas náuticas. Cuando se firmó el tratado, ambos países dieron cuenta de que el contenido jurídico y, sobre todo, la even-*

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tual interpretación y la aplicación del tratado dependerán fundamentalmente de determinar con certeza científica y jurídica si sus respectivas plataformas continentales submarinas se extienden más allá de 200 millas náuticas. El 13 de diciembre de 2007, México presentó a la Comisión de Límites de la Plataforma Continental, datos sobre los límites de la plataforma continental más allá de 200 millas marinas contadas desde las líneas de base desde las cuales se mide la anchura del mar territorial en lo que respecta al polígono occidental en el Golfo de México. México buscó la extensión de su plataforma continental en el Polígono Occidental con base en el derecho internacional, la Convención y los tratados bilaterales con los Estados Unidos, y de acuerdo con la legislación interna de México. La delimitación pacífica de las fronteras marítimas es esencial para mantener el orden mundial. México es un país de paz, y ha tratado de utilizar el derecho internacional como una herramienta para que represente sus intereses. México meticulosamente se ha adherido a una serie de precedentes y los tratados internacionales para apoyar su reclamación. Por otra parte, México ha acumulado una enorme cantidad de evidencia científica que compruebe su autoridad soberana sobre sus zonas marítimas. Estados Unidos debe reconocer y reforzar estas afirmaciones al mundo, que el país es sinónimo de justicia, la equidad y el imperio de la ley.

Palabras clave: *Derecho marítimo, delimitación marítima, extensión de la plataforma continental, México, Golfo de México, soberanía, bordes marítimos*.

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I. Introduction

Peaceful delimitation of maritime borders is essential to maintaining world order. On 13 December 2007, Mexico submitted to the Commission on the Limits of the Continental Shelf (hereinafter CLCS), in accordance with Article 76, paragraph 8, of the United Nations Convention on the Law of the Sea 1982 (hereinafter UNCLOS), information on the limits of the continental shelf beyond 200 nautical miles (nm) from the baselines from which the breadth of the territorial sea is measured in relation to the Western Polygon in the Gulf of Mexico.[1] In this document, Mexico identified two polygons located in the western and eastern parts of the Gulf of Mexico over which it could extend its national jurisdiction over the continental shelf beyond 200 nm.[2] This submission by Mexico concerns only the Western Polygon.[3]

The Western Polygon is located in the center of the western part of the Gulf of Mexico Basin with water depths ranging from 3000 to 3700 m. On its western edge, this basin is bounded by the Tamaulipas continental slope; on the south-east, by the Campeche Escarpment off the Yucatan Peninsula.[4] The Western Polygon is delineated at 200 nm by the outer limits of the exclusive economic zones of Mexico and the United States.[5] Mexico seeks the extension of its continental shelf in the Western Polygon based on International law, UNCLOS, and bilateral treaties with the United States, in accordance with Mexico's domestic legislation.

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[1] Executive Summary of the United Mexican States Submission on the Limits of the Continental Shelf through the Secretary-General of the United Nations December 2007 (Mar. 31, 2009), http://www.un.org/Depts/los/clcs_new/submissions_files/mex07/part_i_executive_summary.pdf [hereinafter Executive Summary].

[2] *Id.* at 3.

[3] *Id.*

[4] Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by Mexico in Respect of the Western Polygon in the Gulf of Mexico on 13 December 2007 (Mar. 31, 2009), http://www.un.org/depts/los/clcs_new/submissions_files/mex07/mex_rec.pdf, 4 [hereinafter Recommendations of the CLCS].

[5] Executive Summary, *supra* note 2, at 3.

II. Evolution of Mexico's Domestic Law Regarding Maritime Borders

Articles 27, 42, and 48 of the Political Constitution of 1917 of the United Mexican States define the components that make up Mexico's national territory.[6] Listed below are relevant provisions of these Articles:[7]

> *Article 27*. Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property.
>
> The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth […].
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> In the Nation is vested the direct ownership of all natural resources of the continental shelf and the submarine shelf of the islands; of all minerals or substances, which in veins, ledges, masses or ore pockets, form deposits of a nature distinct from the components of the earth itself, such as the minerals from which industrial metals and metalloids are extracted; deposits of precious stones, rock-salt and the deposits of salt formed by sea water; products derived from the decomposition of rocks, when subterranean works are required for their extraction; mineral or organic deposits of materials susceptible of utilization as fertilizers; solid mineral fuels; petroleum and all solid, liquid, and gaseous hydrocarbons; and the space above the national territory to the extent and within the terms fixed by international law.
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> In those cases to which the two preceding paragraphs refer, ownership by the Nation is inalienable and imprescriptible, and the exploitation, use, or appropriation of the resources concerned, by private persons or by companies organized according to Mexican laws, may not be undertaken except through concessions granted by the Federal Executive, in accordance with rules and conditions established by law. The legal rules relating to the elaboration or exploitation of the minerals and substances referred to in the fourth paragraph shall govern the execution and proofs of what is carried out or should be carried out after they go into effect, independently of when the concessions were granted, and noncompliance will be grounds for cancellation thereof. The Federal Government has the power to establish national reserves and to abolish them. The declarations pertaining thereto shall be made by the Executive in those cases and conditions prescribed by law. In the case of petroleum, and solid, liquid, or gaseous hydrocarbons no concessions or contracts will be granted nor may those that have been granted continue, and the Nation shall carry out

[6] Jorge A. Vargas, Mexico and the Law of the Sea: Contributions and Compromises 4 (Martinus Nijhoff Publishers, 2011).

[7] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.] 5 de Febrero de 1917 (Mex.).

the exploitation of these products, in accordance with the provisions indicated in the respective regulatory law.

Given its sweeping characterization of public and private property, Article 27 is recognized as a major provision under Mexican law. In part, the Article states that the national territory belongs to Mexico as a nation and is under the control of the federal government for the benefit of society and the equitable distribution of public wealth.[8] These principles are applied not only to the land, but also to the territorial seas and therefore ultimately to the outer continental shelf.

Article 42. The national territory comprises:

I. The integral parts of the Federation;

II. The islands' including the reefs and keys in adjacent seas;

III. The Guadalupe and Revillagigedo islands situated in the Pacific Ocean;

IV. The continental shelf and submarine shelf of the islands' keys, and reefs;

V. The waters of the territorial seas to the extent and under terms fixed by international law and domestic maritime law;

VI. The air space situated above national territory to the extent of and pursuant to rules stipulated by International Law.

Article 48. The islands, keys, and reefs of the adjacent seas which belong to the national territory, the continental shelf, the submarine shelf of the islands, keys, and reefs, the inland marine waters, and the space above the national territory shall depend directly on the Federal government, with the exception of those islands over which the States have up to the present exercised jurisdiction.

Under these Articles, it would appear that Mexican law includes absolute control over the outer continental shelf (hereinafter OCS). This interpretation, however, runs counter to customary international law and the 1982 Law of the Sea Convention.[9] Mexico does not have ownership rights of the OCS; rather, Mexico simply has the right to explore and exploit resources located in the OCS.[10] Nevertheless, Mexican law has an advanced legal system regulating its maritime zones. The mere fact that Mexico has chosen to include this legal regime in its Constitution, demonstrates the importance of maritime law to the Mexican people. Moreover, Article 27, 42, and 48 mirror many of the most important principles set forth in UNCLOS.

Ratification of UNCLOS

On 10 December 1982, the United Nations Convention on the Law of the Sea was signed by over 150 nations at Montego Bay, Jamaica. The treaty is comprised of 320 articles and 9 annexes that govern all aspects of ocean

[8] Vargas, *supra* note 6, at 14.

[9] *Id.* at 38.

[10] *Id.* at 39.

space.[11] "Endowed with a long coastline bordering the Gulf of California, the Pacific Ocean, the Gulf of Mexico and the Caribbean Sea, with abundant living resources and a vast continental shelf rich in deposits of hydrocarbons and natural gas, as well as numerous islands, it was only logical for Mexico to take a salient part in the formulation of the 1982 United Nations Convention on the Law of the Sea."[12] Mexico was the second country to ratify the 1982 United Nations Convention on the Law of the Sea.[13]

The ratification process in Mexico begins with Article 133. Article 133 of the Mexican Constitution states,

> *Article 133*. This Constitution, the laws of the Congress of the Union that emanate therefrom, and *all treaties that have been made and shall be made in accordance therewith* by the President of the Republic, with the approval of the Senate, *shall be the supreme law of the whole Union*. The judges of each State shall conform to said Constitution, laws, and treaties, in spite of any contradictory provisions that may appear i1n the constitutions or laws of the States (emphasis added).

Accordingly, once the Mexican Senate ratified UNCLOS its provisions became the supreme law of the land in Mexico.

Mexico realized that certain rules in UNCLOS would produce a new legal regime more favorable towards developing countries, notably in the exclusive economic zone, providing the country with modern and effective legal tools to protect its marine resources.[14] Therefore, in order to further strengthen the provisions of UNCLOS and to synchronize domestic law with existing international law, the Mexican government enacted the Federal Oceans Act of 1986 (FOA). The FOA is a public order statute derived from Article 27 of the Mexican Constitution.[15] The FOA was designed to codify, update, and systemize Mexico's numerous statutes regulating the marine environment, and to bring domestic law in compliance with UNCLOS.[16]

The FOA is categorized as a regulatory statute and consists of 65 articles. Article 3 of the FOA identifies six "Mexican marine zones:" 1) the Territorial Sea, 2) the Internal Marine Waters, 3) the Contiguous Zone, 4) the Exclusive Economic Zone, 5) the Continental Shelf and Insular Shelves, 6) any other zone permitted by international law.[17] Additionally, Article 8 of the FOA states

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[11] United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), reprinted in 21 I.L.M. 1261 (1982), to enter into force Nov. 16, 1994 [hereinafter UNCLOS].

[12] Vargas, *supra* note 6, at 49.

[13] *Id.* at 53.

[14] *Id.* at 44, 50.

[15] *Id.* at 44.

[16] *Id.* at 61.

[17] Ley Federal del Mar [L.F.M] [Federal Oceans Act], Diario Oficial de la Federación [D.O.], 8 de enero de 1986 (Mex.), translated in 25 I.L.M. 889, 900 (1986) [hereinafter FOA].

that, "The Federal Executive Power may negotiate with neighboring States for the delimitation of the dividing lines between Mexican marine zones and the corresponding adjacent zones under national marine jurisdiction of other states, in those cases where there is an overlap between said zones, in accordance with international law."[18] With the enactment of FOA, Mexico became the first country to fully adjust its domestic law with the international law framework presented in UNCLOS.[19]

III. Defining the Continental Shelf

1. *Scientific Definitions of the Continental Shelf (Establishing the Outer Edge of the Continental Margin)*

"The definition of the outer boundary of the continental shelf constitutes one of the most difficult technical problems associated with the law of the sea."[20] There are four steps to determining the maximum scientific limits to the continental shelf. First and foremost, the continental shelf must be found to be the natural prolongation of the land mass of the coastal State, unbroken from the shoreline to the outer edge of the continental margin.[21]

The second step in the process is identifying the foot of the slope. Since the foot of the slope is the reference baseline from which the breadth of the outer limit will be measured, determining the status of the foot of the slope off a coastal State is crucial to establishing the limits of the continental shelf.[22] Although there is some debate as to the proper method of identifying the foot of the slope; it is generally determined as the point of maximum change in the gradient at its base.[23]

The third step in the process is to establish the edge of the continental margin by applying either the Irish or Hedberg formula. The Irish formula entails drawing a line connecting points not more than 60M apart, where at each point the thickness of sediments is a least 1% of the shortest distance from such point to the foot of the slope.[24] For example, when applying the Irish formula at a distance of 100M from the foot of the slope, there must be a 1M thickness of sediment. The Hedberg formula is easier to ascertain than the Irish formula. It entails drawing a line connecting points not more than 60M apart, where the points are not more than 60M from the foot of

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[18] *Id.* Article 8.

[19] Vargas, *supra* note 6, at 60.

[20] *Id.* at 66.

[21] Center for Oceans Law and Policy, Legal and Scientific Aspects of Continental Shelf Limits 24 (Martinus Nijhoff Publishers, 2003).

[22] *Id.* at 91.

[23] *Id.* at 25.

[24] *Id.* at 26.

the slope.[25] A state may choose to use one formula or apply both formulas, in a manner that maximizes its entitlement.[26]

The fourth and final step in the process of determining the outer limits of the continental shelf involves the application of maximum constraint lines. The maximum constraint lines are defined by paragraph 5, of Article 76 of the UNCLOS which states that, "the fixed points comprising the line of the outer limits of the continental shelf on the seabed […] either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured" or shall not exceed 100 nautical miles from the 2,500 meter isobath, which is a line connecting the depth of 2,500 meters."[27]

Ultimately, these four steps are combined to determine the maximum scientific outer limits of the continental shelf.

2. *UNCLOS and the Codification of the Continental Shelf*

The United States declared sovereignty over its Continental shelf on 28 September 1948, when President Harry S. Truman issued Presidential Proclamation number 2667 declaring that:[28]

> […] I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.
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> Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected

The Truman Proclamation set off the equivalent of a "land rush" over the continental shelves of maritime nations. In order to bring some order and stability to these and other maritime claims, many nations began working on the creation of a multilateral treaty governing maritime zones. This effort culminated in the creation of UNCLOS. Paragraphs 1 and 2 of Article 76 of UNCLOS define the portion of the continental shelf that may be claimed by a coastal state:[29]

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[25] *Id.* at 27.

[26] *Id.*

[27] UNCLOS, *supra* note 11, Article 76, para. 5.

[28] Proclamation No. 2667, 10 Fed. Reg. 12303 (Sept. 28, 1948).

[29] UNCLOS, *supra* note 11, Article 76, paras. 1-2.

> *Article 76*
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> *Definition of the continental shelf*
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> 1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

The composition of the continental shelf is highly technical. Nevertheless, the nature of the continental shelf and its constituent parts are generally defined in paragraph 3 of Article 76 of UNCLOS.[30]

"3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."

Lastly, the outer limits of the continental shelf are prescribed by paragraphs 4 through 7 of Article 76 of UNCLOS.[31] These paragraphs codify the establishment of the foot of the slope, the Irish and Hedberg formulas, and the demarcation of the 350Nautical Miles and 2500M isobath constraints.

> 4. (a) […], the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles […], by either: (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; *[Irish Formula]* or (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope. *[Hedberg Formula]* (b) In the absence of evidence to the contrary, the *foot of the continental slope* shall be determined as the point of maximum change in the gradient at its base.
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> 5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall *not exceed 350 nautical miles* from the baselines from which the breadth of the territorial sea is measured or shall *not exceed 100 nautical miles from the 2,500 meter isobath*, which is a line connecting the depth of 2,500 metres.

3. *FOA on the Continental Shelf*

With respect to other important UNCLOS principles, the FOA generally adheres to the definition of the continental shelf stipulated therein.

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[30] *Id.* Article 76, para. 3.

[31] *Id.* Article 76, paras. 4-7.

FOA Article 62. The continental shelf and the Mexican insular shelves comprise the bed and the subsoil of the submarine areas that extend beyond the territorial sea, and throughout the natural prolongation of the national territory out to the outer boundary of the continental margin, or up to a distance of 200 nautical miles measured from the baselines from which the territorial sea is measured, in those cases when the outer boundary of the continental shelf does not reach that distance, in accordance with what is prescribed by international law. The preceding definition also applies to the shelves of islands, cays and reefs that are part of the national territory.[32]	*UNCLOS Article 76*. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[33]

4. *Application of the Science, UNCLOS and FOA. Mexico's Determination of the Limits of Mexico's Continental Shelf*

Mexico collected and compiled geophysical data to determine sediment thickness in the Western Polygon located beyond 200 Nautical Miles to establish the position of the outermost fixed points at which the thickness of sedimentary rocks is a least 1% of the shortest distance from such point to the foot of the continental slope. On this basis, Mexico's continental shelf reaches the 350 Nautical Miles constraint line,[34] thereby justifying a continental shelf claim in the Western Polygon up to the 350 Nautical Miles constraint line in accordance with UNCLOS, FOA, and Customary International Law. As a result of conflicting claims made by the United States, however, Mexico must eventually negotiate the delimitation of this area with its northern neighbor.

IV. Delimitation of the Continental Shelf between Mexico and the United States

1. *General Principles of Maritime Delimitation under International Law and UNCLOS Jurisprudence*

It is generally accepted that maritime delimitation jurisprudence began with the *North Sea Cases* and has continued to evolve through a series of cases brought before the International Court of Justice.

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[32] FOA, *supra* note 17, Article 62.

[33] UNCLOS, *supra* note 11, Article 76, para.1.

[34] Executive Summary, *supra* note 1, at 9-10.

In the *North Sea Cases*, the ICJ gave the following guidance for the delimitation of the continental shelf:[35]

> (C) the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the continental shelf […] are as follows:
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> (1) delimitation is to be effected by agreement in accordance with equitable principles and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other
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> (2) if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them;
>
> (D) in the course of the negotiations, the factors to be taken into account are to include:
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> (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
>
> (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved
>
> (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its Coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

These principles serve as the basis of International Common Law regarding maritime delimitation. Notably, many of the principles in the *North Sea Cases* have been codified in UNCLOS. For example, Article 83 of UNCLOS outlines the procedures for delimiting the continental shelf between two states.[36]

> *Article 83. Delimitation of the continental shelf between States with opposite or adjacent coasts*
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> 1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

[35] The North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 para. 101 (Feb. 20).

[36] UNCLOS, *supra* note 11, Article 83.

The *Gulf of Maine Case*[37] offers a modern analysis of maritime delimitation. In *Gulf of Maine*, the ICJ began its opinion with a historical analysis of the boundary dispute between the parties. Next, the ICJ examined Article 15 of UNCLOS for guidance in determining how to fix the maritime boundary. The Court determined that "special circumstances" prevented the Court from using equidistance lines to establish the boundary. The Court reasoned that in single maritime boundary cases the most important criteria for delimitating the boundary line is the geography of the disputed area. After drawing a provisional line based on geography, the Court would then consider additional adjustment factors in order to achieve the most equitable solution. The Court stated that economic matters can be considered as special circumstances if the results of an equidistant line are shown to be "radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the countries concerned."[38]

In the most recent maritime delimitation case decided by the ICJ, Romania v. Ukraine,[39] the Court reinforced the legal principles established in the *Gulf of Maine*. In *Romania v. Ukraine*, the ICJ was asked to draw a single maritime boundary between the continental shelves and the 200-mile Exclusive Economic Zones (EEZ) of Romania and the Ukraine. Romania and Ukraine are parties to the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Therefore, the Court used both UNCLOS and relevant recent decisions to render its opinion.

At the center of the dispute was what impact the Ukrainian island, known as Serpent's Island, would have on the delimitation of the maritime boundary between Romania and Ukraine. Romania argued that Serpent's Island was a rock and therefore incapable of generating a territorial sea (see UNCLOS Article 121(3)). Alternatively, Romania argued that even if Serpent's Island met the definition of an island under UNCLOS, it should not affect the maritime boundary in excess of a small territorial sea. To the contrary, Ukraine argued that Serpent's Island was an island under UNCLOS and as such should generate its own continental shelf (CS) and exclusive economic zone (EEZ). On the first point, the ICJ agreed with Ukraine that Serpent's Island was an island under UNCLOS. However, the Court concluded that this entitled Serpent's Island only to a territorial sea, and should not further affect the maritime boundary delimitation. Using language from *Libya v. Malta*, the Court stated that:[40]

> To count Serpents' Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of

[37] Gulf of Maine Case (Can. v. U.S.), 1984 I.C.J. Rep. 1246 (Oct. 12).

[38] *Id.* para. 237.

[39] Romania v. Ukraine (Rom. v. Ukr.), 2009 I.C.J. Rep. 132 (Sept. 16).

[40] Libya v. Malta (Libya v. Malta), 1985 I.C.J. Rep. 13 (June 3).

> maritime delimitation authorizes. The Court is thus of the view that Serpents' Island cannot be taken to form part of Ukraine's coastal configuration (cf. the islet of Filfla in the case concerning Continental Shelf).[41]

For this reason, the Court considers it inappropriate to select any base points on Serpents' Island for the construction of a provisional equidistance line between the coasts of Romania and Ukraine.[42]

After dispensing with the status of Serpent's Island, the Court continued with its delimitation analysis. Using the reasoning and language adopted from the *Gulf of Maine*, the Court stated that in order to consider economic matters as special circumstances, the results must be shown to be "radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the countries concerned."[43] However, in this case the Court found that no such radical inequality or catastrophic repercussion would result in the drawing of an equidistant line.

Lastly, as in *Libya v. Malta*, the Court considered whether relevant security considerations generated any special circumstances. The Court found that there were no special circumstances related to security. Ultimately, unlike *Libya v. Malta* and the *Gulf of Maine*, the Court found that no relevant circumstances existed to justify a departure from the equidistant line.

Taken together, recent cases decided by the ICJ suggest that —barring special circumstances (including economic matters)— an equidistant line should be used to delimitate maritime boundaries. In this case, Mexico would be justified in arguing that an equidistant line should not be used because special circumstances exist that allow economic matters to be considered in the delimitation of the Western Polygon.

The ICJ has repeatedly stated that economic matters can be considered as special circumstances if the results of an equidistant line are shown to be "radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the countries concerned."[44] Such may be the case if Mexico is denied full access to its continental shelf. Mexico is a relatively poor country with a per capita GDP of $13,900.[45] To the contrary, the United States is one of the wealthiest countries in the world with a per capita GDP of $47,200.[46] Additionally, Mexico has proven oil reserves of 10.42 billion bbl and proven natural gas reserves of 338.8 billion cubic meters.[47] Compared to the U.S., which has proven oil reserves of 20.68

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[41] *Id.* para. 13.

[42] Romania v. Ukraine (Rom. v. Ukr.), 2009 I.C.J. Rep. 132 (Sept. 16).

[43] Gulf of Maine Case (Can. v. U.S.), 1984 I.C.J. Rep. 1246, para. 198 (Oct. 12).

[44] *Id.* para. 237.

[45] CIA World Factbook estimated for 2010, https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html (last visited Nov. 11, 2011).

[46] *Id.*

[47] *Id.*

billion bbl and proven natural gas reserves of 7.716 trillion cubic meters. There is great potential for oil and gas development in the Western Polygon. If the United States receives access to this area, an already rich country's energy companies become even richer. However, if Mexico receives full access to its continental shelf, thousands of Mexican citizens could be lifted out of poverty. Moreover, since the Mexican economy relies so heavily on energy exports, the loss of any portion of its continental shelf in the Western Polygon could be catastrophic to the future of the Mexican economy and thus to the livelihood of the Mexican people.

2. *Mexico's Negotiations and Delimitations with Neighboring States*

Mexico has a long history of negotiating agreements delimitating its maritime borders with neighboring states. Mexico's agreements with the United States, Cuba, and Honduras serve as a model for future negotiations and demonstrate its commitment to international law.

The negotiations between Mexico and the United States on the outer boundary of Mexico's exclusive economic zone began in April 1976.[48] Throughout the negotiations, both parties used highly technical scientific evidence and generally accepted concepts of international law in order to develop an agreement that was fair and equitable to both sides. These negotiations culminated in a formal treaty signed on May 4, 1978.

On July 26, 1976, Mexico and Cuba completed an agreement effected by an Exchange of Notes that divided the 200NM exclusive economic zones and the continental shelves of both countries.[49] The delimitation was conducted using the principle of equidistance.[50]

Mexico considers the Caribbean Sea to be its "Third Frontier."[51] Mexico shares a maritime border with Honduras in this resource rich area. Mexico began negotiating with Honduras in July, 2003.[52] The Treaty on Maritime Delimitations between Mexico and Honduras was finally signed on April 18, 2005.[53] This agreement included a provision acknowledging the possibility of transborder oil deposits, and declared that if such deposits exist, then the Parties shall exchange information about the deposits and may eventually enter into a formal agreement allowing for the efficient and equitable exploitation of these deposits.[54]

In each of these maritime delimitation agreements regarding Mexico's outer boundary of the exclusive economic zone, Mexico has acted in good

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[48] Vargas, *supra* note 6, at 227.

[49] *Id.* at 236.

[50] *Id.*

[51] *Id.* at 237.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 239.

faith based on the principle of equidistance (while considering special circumstances), thereby complying with international law and relevant provisions of the UNCLOS.[55]

V. Commission's Recommendations Regarding the Limits of the Continental Shelf with respect to Mexico's Submission (Adopted 31 March 2009)

1. *The Jurisdiction of CLCS*

The CLCS was established to promote the rights of coastal states and protect the rights of land locked states. Any encroachment made by coastal states upon internationally-recognized seabed areas translates —necessarily— into a loss to land-locked states. The CLCS's main function is to make an independent evaluation of submissions made by coastal states with respect of the outer limits of the continental shelf.[56] The commission must make recommendations to coastal states on matters related to the establishment of the outer limits of the continental shelf beyond 200 NM.[57]

The CLCS is comprised of an elected group of twenty-one specialists in the fields of geology, geophysics, and hydrography, chosen by the signatories to UNCLOS from among their nationals having due regard for the need to ensure equitable geographical representation.[58] Paragraphs 8 through 10 of Article 76 of UNCLOS establish the CLCS, and provide procedures for the submission of information on the determination of the outer limits of the continental shelf beyond 200 M.

The last sentence of paragraph 8, of Article 76, of UNCLOS has caused significant controversy in the international legal community.

> 8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. *The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.*[59]

As noted, the CLCS is a body comprised of technical —not legal— experts. Yet according to UNCLOS, the recommendations of the CLCS "shall

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[55] *Id.* at 243.

[56] Maritime Delimitation 22 (Martinus Nijhoff Publishers, 2006).

[57] *Id.*

[58] *Id.* at 24.

[59] UNCLOS, *supra* note 11, Article 76, para. 8.

be final and binding."[60] Critics point out that this language seems to infer that the CLCS has quasi-judicial authority, even though CLCS' members have no legal training. While proponents believe that the establishment of continental shelf limits is a fundamentally technical decision, CLCS is comprised of scientists, not lawyers. At this time, these arguments have still not been resolved, and will surely become a key issue before the ICJ in the near future.

Even if CLCS recommendations are binding on UNCLOS signatories, it is probably not binding on countries that have not recognized the treaty. Moreover, according to paragraph 10 of Article 76 of UNCLOS, even parties to the treaty are not bound by CLCS recommendations if the continental shelf between adjacent States overlaps.[61]

Ultimately, parties who are not signatories to UNCLOS may still have legitimate claims, regardless of the CLCS recommendations. Such is the case with the United States. Although the U.S. generally adheres to UNCLOS and recognizes much of the precedents established in International Common Law, it is not a signatory to UNCLOS and, as such, is technically not bound by the recommendations of the CLCS. Although CLSC recommendations bind UNCLOS signatories, and may in fact bind non-signatory nations under international common law, the U.S. may claim not to be bound by the CLCS recommendations.

2. *CLCS Application of UNCLOS and International Law to Mexico's Submission*

In accordance with Article 76 of UNCLOS, the CLCS concluded that the outer edge of the continental margin, as established by the 1% sediment thickness formula lies beyond 200 NM, and therefore the test of appurtenance was satisfied by Mexico. In addition, the proposed outer limits of Mexico's extended continental shelf beyond 200 NM consists of 1% sediment thickness at points up to 350 NM and does not exceed the constraints of 100 NM from the 2500 M isobath depth, and that the construction of the outer limits contains no straight line segments exceeding 60 M in length:[62] This would amount to a wholesale acceptance of Mexico's arguments for extending its continental shelf up to 350 NM into the Western Polygon. Since this would extend Mexico's continental shelf well into territory claimed by the United States, however, Mexico and the U.S. would need to enter a bilateral agreement based on international law that delimits their respective claims. If agreement between the two parties cannot be reached, however, the matter would be referred to the International Court of Justice.

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[60] *Id.*

[61] *Id.* Article 76, para. 10.

[62] Recommendations of the CLCS, *supra* note 4.

VI. Conclusion

Why the U.S. Should Recognize Mexico's Claims as Adopted by the Commission on the Limits of the Continental Shelf

Mexico's share of the giant oil deposits in the Gulf of Mexico is the third largest reserve in the world.[63] In June 2000, the United States and Mexico signed a treaty for the delimitation of the continental shelf in the western Gulf of Mexico beyond 200 nautical miles.[64] As a result of the Gulf of Mexico's geographical configuration, two small areas (known as the Western Polygon and the Eastern Polygon) exist in a central part of the Gulf where the EEZs of Mexico and the United States are not contiguous.[65] The total area of the Western polygon is approximately 5,092 square nautical miles.[66] The treaty boundary splits the Western Polygon continental shelf allocating 62% of the total area to Mexico and the remaining 38% to the United States.[67] The mineral resources in the Western Polygon are considered to be part of a transboundary reservoir.[68] Under International law, Mexico and the United States both share rights to this reservoir. Mexico is becoming increasingly concerned that the United States will begin exploiting not only the oil from the American side, but also the Mexican side, since this deposit is a single deposit shared by both countries.[69] When the treaty was signed in 2000, both Mexico and the United States realized that the legal content and, especially, the eventual interpretation and implementation of the treaty were going to depend critically on determining with scientific and legal certainty whether their respective submarine continental shelves extend beyond 200 nautical miles.[70]

Ultimately, the United States is under no affirmative obligation to recognize either the CLCS's recommendations or Mexico's claims. Notwithstanding the fact that Mexico has diligently adhered to international law in making their claim and is UNCLOS signatory (an agreement that has been accepted by a vast number of coastal states) the U.S. would be entitled to dispute Mexico's continental shelf extension. This said, it would nonetheless in the best interests of the United States to adhere to international law and recognize Mexico's claims.

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[63] Vargas, *supra* note 6, at 95.

[64] U.S. Treaty Doc. No. 106-39 (2000).

[65] Vargas, *supra* note 6, at 98.

[66] *Id.* at 100.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 99.

The peaceful delimitation of maritime borders is essential to maintaining world order. Mexico is a country of peace, and has attempted to use international law as a tool to represent its interests. If Mexico was forced to use armed force to represent its interests against the United States, it would of course lose. Instead, Mexico has meticulously adhered to a series of international precedents and treaties to support its claim. Moreover, Mexico has gathered a tremendous amount of scientific evidence that verifies its sovereign authority over its maritime areas. The United States should recognize these claims and reinforce to the world that the U.S. stands for fairness, equity and the rule of law.

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