

A MEXICAN OUTLOOK ON NAFTA, TPP AND THEIR RENEGOTIATION: INVESTMENT ARBITRATION'S TRANSPARENCY AND INTERNATIONAL SUPERVISION AT PERIL?

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ABSTRACT

In the advent of the renegotiation (and possible termination) of the North American Free Trade Agreement, this article tries to shed light on the stakes raised by the states' objectives for the negotiation from a Mexican perspective by analyzing the trade and foreign direct investment strategy pursued by Mexico since the mid-1980s, including recent developments such as the Trans-Pacific Partnership (TPP) and the Comprehensive and Progressive Agreement for TPP. The article forewarns that, from a Mexican outlook, the greatest risk of a bad outcome in the renegotiation would be a departure from the current pro economic liberalization and openness to international supervision that the Mexican state has had since the mid-1980s. Taking this as a

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backdrop, the article then tries to map Mexico's conduct towards the international investment system of dispute settlement (ISDS) through a two-variable approach: the struggle to cope both with full economic liberalization, on the one hand, and with international supervision, on the other hand. Accordingly, Mexico's apparent Manichean attitude towards ISDS, as seen in the international non-arbitrability of the upstream hydrocarbons' sector and secrecy in ISDS, can be explained because of what Mexico's President Enrique Peña (2012–2018) described as the *two Mexicos*: the globalized (*opened*) and the lagging (*closed*).

Keywords: Mexico; International Investment Arbitration; NAFTA; TPP; Trump.

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I. INTRODUCTION

Amid a global sluggish trade and foreign direct investment (FDI) growth,¹ the forces of globalization seem to fade away,

¹ See IMF, *Subdued Demand: Symptoms and Remedies*, World Economic Outlook, 82–83 (Oct. 2016) (underscoring the stagnant trade growth since 2012); see also WORLD BANK,

whilst the winds of change seem to signal a return to an inward looking and protectionist stance towards free trade and economic liberalization. Calls for a return to a pre-globalization era have pervaded recent domestic elections and may unravel the trade and FDI agreements struck at both the multilateral and bilateral levels, wreaking havoc in the current international legal economic order. In a way, the world is witnessing a clash between the winners and losers of globalization, or in other words, between the ideals and realities of different generations. Unfortunately, much of the debate has not been focused on information about economic liberalization's costs and benefits, but rather it has fallen on sectarian fault lines that may put in jeopardy the international status quo.²

It is in this highly, politically driven global environment that on January 20th, 2017, Donald J. Trump's inauguration as the 45th President of the United States took place. President Trump began his term outlaying protectionist policies, in accordance to the promises made in the presidential campaign trail. In the international economic legal arena, second to none is more important than his current stance on America's trade deficit and his vision of a zero-sum game in international trade, which has led the incoming President to reverse his predecessor's legal policies by exiting the Trans-Pacific Partnership Agreement (TPP);³ threatening to use tariffs to reverse its trade deficit with certain nations, particularly in its illegal border tax form with Mexico;⁴ and most recently, to begin a bumpy renegotiation

GLOBAL ECONOMIC PROSPECTS: WEAK INVESTMENT IN UNCERTAIN TIMES xviii (2017), <https://openknowledge.worldbank.org/bitstream/handle/10986/25823/9781464810169.pdf> (highlighting a lack of investment growth in emerging markets and developing economies since 2010).

² See generally Samuel Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22 (1993) (arguing that conflicts in the post-Cold War era will be dominated by cultural and religious identities, such as human immigration among different "civilizations").

³ See Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 25, 2017) (to be codified in the C.F.R.).

⁴ See Jeffrey Schott & Cathleen Cimino-Isaacs, *Updating the North American Free Trade Agreement*, in A PATH FORWARD FOR NAFTA 69, 87 (C. Fred Bergsten & Monica de Bolle eds., Peterson Inst. for Int'l Econ. 2017), <https://piie.com/system/files/documents/pieb17-2.pdf> (arguing that the proposed border tax on imports from Mexico would violate the United States' obligations under both the North American Free Trade Agreement and the World Trade Organization regimes).

process for the North American Free Trade Agreement (NAFTA), which has been coupled with threats to leave the negotiation table and exit the treaty if the document doesn't benefit the United States, such as failing to reach a trilateral consensus that focuses on reducing America's trade deficit.⁵

From a Mexican outlook, the Trump Presidency's threat to repeal NAFTA may not only unravel the supply chains at both sides of the border and wreak havoc in the Mexican economy—at least in the short and medium terms—it could also *trump* the economic liberalization and opening to international supervision and scrutiny that the Mexican state has tried to follow since the mid-1980s, and which was greatly enhanced and crystallized in NAFTA. In a nutshell, considering Mexico's bumpy road from a *closed* country that denied the international legal economic order and did not accept international arbitration to an *opened*, more transparent and globalized one, President Trump's continued anti-Mexican rhetoric could have the unintended consequence of tilting Mexico's current free-trade and pro-FDI stance to the other spectrum again. Conversely, being a NAFTA party has made Mexico more aligned with the American and Canadian positions in the international economic legal system, including advocating for transparency and stakeholder participation in the international investment system of dispute settlement (ISDS).⁶ To understand the danger of losing the *opened*, globalized positions of Mexico to the *closed*, statist ones, the duality in the Manichean attitude towards international economic law that the

⁵ See OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION 3–4 (July 17, 2017) [*hereinafter* OFFICE OF THE U.S. TRADE REP., SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION] (stating that by modernizing the treaty's standards and making it fairer, a more efficient market system will be promoted, thereby reducing the U.S. trade imbalances and ensuring the U.S. economy has greater market access and prosperity); see also Antonio Ortiz-Mena, *Toward a Positive NAFTA Renegotiation: A Mexican Perspective*, in A PATH FORWARD FOR NAFTA, *supra* note 4, at 24 (discussing President Trump's position on NAFTA, as the administration has promised to renegotiate the deal and would withdraw from the renegotiation process if the terms of a new deal become unsatisfactory).

⁶ See OFFICE OF THE U.S. TRADE REP., Press Release, *NAFTA Free Trade Commission Joint Statement: "A Decade of Achievement"* (July 16, 2004), https://ustr.gov/archive/Document_Library/Press_Releases/2004/July/NAFTA_Free_Trade_Commission_Joint_Statement_-_A_Decade_of_Achievement.html (recognizing how Mexico has followed Canada and the U.S. in supporting open hearings for investor-state disputes).

“two Mexicos” have had in the state’s policies has to be understood.

In this regard, on November 27, 2014, Mexican President Enrique Peña (2012–2018) addressed the nation after the disappearance, in still unknown circumstances, of 43 students from the rural college of education in Ayotzinapa, Guerrero.⁷ In his discourse, the President depicted a comprehensive set of policies intended to strengthen the rule of law, as well as to help overcome the poverty of the Mexican southern, low-developed states of Chiapas, Guerrero and Oaxaca:

Today there are two Mexicos: [On the one hand,] one inserted in the global economy, with rising rates of income, development and welfare; and on the other hand, there is a poorer Mexico, with ancient remnants that have not been solved for generations.⁸

That depiction appears as a contradiction: within the same economy there are two very different levels of development. Although the same economic national policy has been pursued—economic liberalization and free trade since the mid-1980’s—two different outcomes have occurred because of many factors, including geographical, historical and structural.⁹ Life after NAFTA, under this purview, has helped the globalized Mexico, but its effects have not been equally spread in the southern, poorer Mexico.¹⁰

⁷ Speech by the President of Mexico Enrique Peña Nieto, WFMZ, <http://www.wfmz.com/espanol/noticias/discurso-delpresidente-de-mexico-enrique-pea-nieto-19113372> (last updated May 27, 2016) (translated from Spanish).

⁸ *Id.*

⁹ See generally EDUARDO BOLIO ET AL., MCKINSEY & CO., A TALE OF TWO MEXICOS: GROWTH AND PROSPERITY IN A TWO-SPEED ECONOMY 1–2 (2014), <http://www.mckinsey.com/global-themes/americas/a-tale-of-two-mexicos> (discussing the divergence of Mexican companies’ productivity with larger companies generally reaping the benefits of economic liberalization); see also *The Two Mexicos*, THE ECONOMIST, (Sept. 19, 2015), <http://www.economist.com/news/leaders/21665027-its-combination-modernity-and-poverty-mexico-provides-lessons-all-emerging> (noting the gap between the globalized minority and the poverty stricken majority in Mexico).

¹⁰ See José Álvarez, *The NAFTA’s Investment Chapter and Mexico*, in FOREIGN INVESTMENT: ITS SIGNIFICANCE IN RELATION TO THE FIGHT AGAINST POVERTY, ECONOMIC GROWTH AND LEGAL CULTURE 241, 274 (Rudolf Dozler et al. eds., Donna Elliott trans., 2006) (analyzing the disparity in wealth across Mexico) [*hereinafter* Álvarez, *NAFTA’s Investment Chapter*]; see also Rafael Tamayo-Flores, *Mexico in the Context of the North*

This apparent contradiction in the Mexican economy also seems to exist in the state's attitude towards FDI and free trade: sometimes more open to economic liberalization—even to unilateral actions—yet others more reticent to liberalizing certain sectors. Likewise, it can be fathomed out of its stance towards ISDS: at times keen to international supervision, but at others closed, secretive and non-transparent. This apparent bipolar conduct can be seen in Mexico's most recent commitments in the TPP, particularly regarding the hydrocarbons sector, one which historically has epitomized the *closeness* in the Mexican economy—although it was liberalized and opened to FDI, the second-guessing by international arbitration was “closed” to international supervision through procedural hurdles.¹¹ Likewise, it is reflected in Mexico's non-accession to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention),¹² and the non-adherence to the International Convention on the Settlement of Investment Disputes between States and Nationals of Other

American Integration: Major Regional Trends and Performance of Backward Regions, 33 J. LATIN AM. STUD. 377, 379 (2001) (critiquing the various research explaining the difference in economic performance between the northern and southern regions of Mexico).

¹¹ See generally Donald Robertson, *Impact of Trans-Pacific Partnership on the Energy Sector*, LEXOLOGY (Nov. 2, 2015), <https://www.lexology.com/library/detail.aspx?g=c9f4a693-a1e1-49d7-abd9-ca505c4609b5> (discussing how the TPP will create new opportunities in the oil and gas sector as Mexico for the first time has permitted foreign participation in its energy industry as a result of the TPP); see also Adrián Magallanes Pérez & Rodrigo Barradas Muñoz, *Mexico*, in THE INTERNATIONAL ARBITRATION REVIEW 304–12 (James Carter ed., 8th ed. 2017) (reviewing the law governing arbitration in Mexico and recent trends).

¹² See *Status: United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration* (New York, 2014), UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html (listing States that have signed or ratified the Convention) (last visited Feb. 18, 2018); United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, *as adopted* by G.A. Res. 69/116, U.N. Doc. A/68/496 (Dec. 10, 2014). The issue of transparency purports to balance the public interest with the private investor's in ISDS by opening the proceedings to other stakeholders, thereby bolstering the legitimacy of the system. See generally Esmé Shirlow, *Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration*, 31 ICSID REV.—FOREIGN INV. L.J. 622, 651 (2016) (arguing a push towards a transparent system will only be achieved by engagement and participation of appropriate stakeholders). For a broader analysis of transparency in general international law, see Anne Peters, *The Transparency Turn of International Law*, 1 CHINESE J. GLOBAL GOVERNANCE 3, 15 (2015) (praising “an emerging transparency norm within international law”).

States (ICSID Convention) that occurred for decades.¹³

This paper analyzes Mexico's attitude towards ISDS against this backdrop. In sum, the article tries to map out Mexico's conduct on ISDS through a two-variable approach: the struggle to cope with full economic liberalization and international supervision. Mexico's liberalization policy, which began in the mid-1980's, and was implemented by neoliberal and technocratic governments, transcended different administrations. After a full departure from the import-substitution industrialization model (ISI), and thus of the state-controlled economy, the country set its path towards an internationally-supervised open economy. Under this account, the move from ISI until today can be understood as a continuing process that departed from an absence of international supervision and aversion to international arbitration, as well as a state-controlled economy that tried to forestall FDI, towards a more liberalized and internationally, supervised economy whose foreign policy now includes incorporating ISDS into its Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) with investment chapters. However, the struggle to cope with the goals of opening both the economy to FDI and its legal system to ISDS have met domestic backlashes that could be well regarded as part of the old, averted view on FDI and foreign competition that pervaded during the ISI years, on the one hand, and of the authoritarianism and secrecy in the state's proceedings, on the other. Accordingly, Mexico's apparent Manichean attitude towards ISDS can be explained on account of what President Peña described as the *two Mexicos*: the globalized (*opened*) and the lagging (*closed*).

In the first part of the paper, the two variables will be introduced through a brief historical account of the road taken from ISI to NAFTA's renegotiation; the reasons the Mexican government espoused for joining TPP; and the current renegotiation of NAFTA that, at the moment this article was written, is still ongoing, as well as the objectives advanced by the three countries. The second section will map out Mexico's stance towards ISDS by depicting two situations where the confrontation

¹³ International Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [*hereinafter* ICSID Convention].

between the *opened* and the *closed Mexicos* meet: the ISDS in the hydrocarbons sector and the secrecy in ISDS proceedings. Finally, a conclusion will be offered, conjecturing on Mexico's political economy in joining TPP and certain of its sector-based liberalizations; underscoring the need during the NAFTA renegotiation for the government of the United States to be more assertive in defending and promoting more transparency in ISDS proceedings for the sake of its investors in Mexico and the latter's country abidance to the already settled NAFTA transparency bar; but stressing out that, despite everything, the recent move of Mexico to advocate for open and transparent proceedings in *Telefónica*¹⁴ may signal a strengthening of the *opened* Mexico over the *closed* one.

II. FROM ISI TO NAFTA'S RENEGOTIATION (AND BACK AGAIN?)

A. *ISI*

For most of Mexico's history during the twentieth century, its policy towards foreign investment was adamantly opposed to that of capital-exporting states, conflicting mainly in the role that the domestic and international legal realms should have in the treatment of aliens. This aversion to international supervision in dictating the substance and forum of how to treat aliens was crystallized in the Calvo doctrine that, since the nineteenth century, Mexico adhered to.¹⁵ The doctrine encompasses two principles. Firstly, it advocates for equality of treatment between foreigners and nationals of the host state; *mutatis mutandis*, its "purpose . . . is to bring foreigners down to the level of nationals"

¹⁴ See *Telefonica S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/12/4, Procedural Order No. 1 (July 8, 2013) (advocating for a general transparency in the publicity of written communications submitted by the parties to the arbitral tribunal and orders related to procedure, but subject to the exception of not releasing protected information).

¹⁵ See Jorge A. Vargas, *Rights and Obligations of Americans in Mexico under Immigration Law and Other Areas of Mexican Law*, 42 U. RICH. L. REV. 839, 859 (2008) (reviewing the general disposition of Mexico on rights and privileges entitled to foreigners); see also Gonzalo Biggs, *The Latin American Treatment of International Arbitration and Foreign Investments and the Chile-U.S. Free Trade Agreement*, 19 ICSID REV.—FOREIGN INV. L.J. 61, 66 (2004) (arguing that Mexico was the first country in Latin America to systematically apply the Calvo Doctrine).

by advocating against an international minimum standard of treatment.¹⁶ Secondly, it requires foreigners to submit to the host country's laws, thereby countervailing the intervention of their home state in the process.¹⁷

As occurred throughout Latin America,¹⁸ the doctrine was so intertwined in Mexico's political imaginary that it was enshrined in Article 27 of the 1917 Mexican Constitution.¹⁹ Although strongly advocated for in the discourse, its importance has been overstated. In this regard, Mexican legal scholar Leonel Pereznieto argues that even though the Calvo clause may have served the political goal of safeguarding Mexican sovereignty *vis-à-vis* foreign states and its nationals, in reality it was illusory, since it was never actually applied in Mexico—at least not formally during the twentieth century—and even when damages had been inflicted upon foreigners, no domestic judicial proceedings were exhausted, but rather Mixed Claims Commissions were created.²⁰ Be that as it may, the point is that Mexico's aversion to international protection of foreign investment was deeply entrenched in the state's policies, even against Mixed Claims Commissions, which Latin American countries viewed as “one-sided”, given their composition and high number of instances in which Latin American states were on the respondent side.²¹

The Latin American rejection of international arbitration was

¹⁶ Stephen Zamora, *Allocating Legislative Competence in the Americas: The Early Experience Under NAFTA and the Challenge of Hemispheric Integration*, 19 HOUS. J. INT'L L. 615, 622 (1997) [*hereinafter* Zamora, *Early Experience Under NAFTA*].

¹⁷ *Id.*; see Manuel Garcia-Mora, *The Calvo Clause in Latin American Constitutions and International Law*, 33 MARQ. L. REV. 205, 219 (1950); see also Amos Hershey, *The Calvo and Drago Doctrines*, 1 AM. J. INT'L L. 26, 32 (1907).

¹⁸ See generally Jorge Castañeda, *Pan Americanism and Regionalism: A Mexican View*, 10 INT'L ORG. 373, 380–81 (1956) (illustrating the general disposition of Latin American states on the Calvo and Drago doctrines as per the status of foreigners).

¹⁹ Constitución Política de los Estados Unidos Mexicanos [CP], art. 27, Diario Oficial de la Federación [DOF] 05-02-1917, última reformas DOF 15-09-2017 (Mex.).

²⁰ Leonel Pereznieto Castro, “Dos Mitos en el Derecho Internacional Privado Mexicano: ‘La Cláusula Calvo’ y ‘La Zona Prohibida’ o ‘Zona Restringida’,” 2 REVISTA MEXICANA DE DERECHO INTERNACIONAL PRIVADO [Mexican Journal of Private International Law], abril de 1997, 137–43.

²¹ Rodrigo Polanco, *The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine*, 20 ICSID REV.—FOREIGN INV. L.J. 172, 178 (2015) [*hereinafter* Polanco, *The No of Tokyo Revisited*].

evident in their late adoption of the 1958 New York Convention,²² in general, and in the “No of Tokyo”, in particular—whereby Latin American states (alongside the Philippines and Iraq) rejected the creation of the International Centre for Settlement of Investment Disputes (ICSID) during a World Bank meeting on September 9, 1964.²³ Mainly, Mexico and other Latin-American countries were reticent to adhere to the ICSID Convention because of their aversion towards arbitral proceedings and forms of dispute resolution other than judicial proceedings,²⁴ as well as on account of the Calvo doctrine, given that the latter requires that an investor-state dispute has to be pursued under the domestic law of the host state and before its tribunals, which runs counter to ICSID’s countervailing of the diplomatic espousal procedure.²⁵

Mexico’s negative attitude towards international supervision of foreign investment during those decades was exemplary, as attested in the strong support of then Mexican President Luis Echeverría (1970–1976) to the Charter of Economic Rights and Duties of States, adopted by the United Nations General Assembly on 1974.²⁶ Overall, Mexico was adamantly opposed to the traditional rules of state responsibility, which it deemed as imperialistic, and that protected foreign investment.²⁷

This position against international supervision was coupled with a closed economic policy that empowered the state and its

²² Biggs, *supra* note 15, at 68 (“As it can be seen, the acceptance of international arbitration and foreign investments in Latin America is part of a long process of gradual change. This process began with the accession of Latin American countries, albeit much delayed, to the New York Convention of 1958.”).

²³ See generally Polanco, *The No of Tokyo Revisited*, *supra* note 21, at 182 (contrasting the Latin American position of the 1960s with recent concerns of developed countries against ISDS).

²⁴ See Paul Szasz, *The Investment Disputes Convention and Latin America*, 11 VA. J. INT’L L. 256, 262–63 (1971).

²⁵ Sonia Rodríguez Jiménez, “México y el Mecanismo Complementario del Sistema Arbitral del Centro Internacional de Arreglo de Diferencias en Materia de Inversiones (CIADI),” 34 JURÍDICA 107, 108–09 (2004) (Mex.).

²⁶ G.A. Res A/3281 (XXIX), Charter of Economic Rights and Duties of States (Dec. 12, 1974); see Biggs, *supra* note 15, at 68; see also Ewell Murphy, *Access and Protection for Foreign Investment in Mexico under Mexico’s New Foreign Investment Law and the North American Free Trade Agreement*, 10 ICSID REV.—FOREIGN INV. L.J. 54, 55 (1995).

²⁷ This was the position of two former Mexican diplomats that were Secretaries of Foreign Affairs and members of the International Law Commission—Luis Padilla and Jorge Castañeda—and a position that reflected the views of the time. See Jorge Castañeda, *The Underdeveloped Nations and the Development of International Law*, 15 INT’L ORG. 38, 39–40 (1961).

role in the economy. In other words, since Mexico's economy was closed, its legal system remained "closed" as well, *i.e.* the interaction between the domestic and international legal systems was limited.²⁸

As occurred throughout the region, beginning in the 1940s, the Mexican state pursued the ISI economic model, wherein the rise of the developmental state and industrialization were central to increase living standards.²⁹ ISI was targeted to counteract "the deterioration of [the] terms of trade and reduce dependence on major trading partners," which was chiefly done through protectionist measures, state investment and limited FDI from the United States.³⁰ Through ISI, coupled with other orthodox macroeconomic policies, Mexico's "stabilization development" economic model achieved sustained growth to the point that it has never been able to reproduce such high numbers with an average growth rate of 6.2% of Mexico's GDP,³¹ but sowed the seeds of further problems that concretized in the so-called "lost decade" of the 1980s:³²

²⁸ 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, 791–95 (1997) (noting that Mexico is a good example of integration efforts in Latin America as it moved away from the closed legal system since the mid-1980s).

²⁹ See David. A. Sonnenfeld, *Mexico's "Green Revolution," 1940–1980: Towards an Environmental History*, 16 ENVTL. HIST. REV. 28, 31–32 (1992) (generalizing the Mexican economy from the 1940s using the ISI model).

³⁰ See Maria Correa, *Foreign Direct Investment and Development in the Pacific Alliance*, in INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA: PROBLEMS AND PROSPECTS 435, 448 (Attila Tanzi et al. eds., 2016) ("[Although] Mexico reserved the oil, banking, insurance and transport sectors to national capital, . . . at the same time it stimulated investment in the manufacturing sector and granted FDI concessions to attract companies that in turn guaranteed funding, the use of technology, marketing and management techniques."); see also Jeff Frieden, *Third World Indebted Industrialization: International Finance and State Capitalism in Mexico, Brazil, Algeria, and South Korea*, 35 INT'L ORG. 407, 415–16, 421 (1981) (suggesting that the Mexican government functioned as the intermediary between international financial markets and the local productive investment because the state needed those funds to further its political legitimacy goals).

³¹ Héctor Guillén Romo, "México: De la Sustitución de Importaciones al Nuevo Modelo Económico", 63: 4 COMERCIO EXTERIOR [Foreign Trade] 34, 36 (2013) (Mex.).

³² See, e.g., Carlos Bazdresch & Santiago Levy, *Populism and Economic Policy in Mexico, 1970–82*, in THE MACROECONOMICS OF POPULISM IN LATIN AMERICA 223, 235 (Rudiger Dornbusch & Sebastian Edwards eds., 1991) ("In sum, stabilizing development brought about sustained growth, but a gamut of structural problems lurked behind the screen of price and exchange rate stability: agricultural stagnation, inward-biased industrialization, regional disparities and urban bias, and insufficient attention to income distribution and poverty. The strategy generated growth, but at increasingly higher costs.

[D]uring [the 1980s] growth stopped due to the demand constraints imposed by the [1982] debt crisis and external credit rationing, capital accumulation collapsed, and with it productivity growth fell in the industrial sectors and, through growing informality in the labor market, also in the trade and services sectors, bringing with it a collapse of aggregate labor productivity and [total factor productivity growth].³³

The “exhaustion” of the stabilization development model came during the 1970s with a major increase in public accumulation of capital, debt and spending, coupled with capital flights, macroeconomic imbalances, inflation and external factors,³⁴ all of which led Mexico to change ISI for a neoliberal economic policy in the mid-1980s—a decade with a financial crisis whose effects led to the tipping point of Mexico’s economic *closeness*,³⁵ and which direct effects were capital outflows in

As the period came to an end, trade and exchange rate policy were turning more incompatible, real wage increases in excess of productivity growth threatened price stability, while restrictive government expenditures generated social problems.”); *see also* Enrique Cárdenas, *Comment*, in *THE MACROECONOMICS OF POPULISM IN LATIN AMERICA*, at 259, 260 (“[S]tabilizing development’ was possible because the government was well disciplined in its finances and because there were no external shocks that disturbed the economy during that period.”); Edward Buffie & Allen Sangines Krause, *Mexico: 1958–86: From Stabilizing Development to the Debt Crisis*, in *DEVELOPING COUNTRY DEBT AND THE WORLD ECONOMY* 141 (Jeffrey Sachs ed., 1989) (analyzing the macroeconomic policy, mainly fiscal policy, of Mexico that led to its debt crisis).

³³ JAIME ROS, *DEVELOPMENT MACROECONOMICS IN LATIN AMERICA AND MEXICO: ESSAYS ON MONETARY, EXCHANGE RATE, AND FISCAL POLICIES* 52 (2015).

³⁴ E.V.K. Fitzgerald, *The State and Capital Accumulation of Mexico*, 10 *J. LATIN AM. STUD.* 263, 281–82 (1978); *see* Bazdresch & Levy, *supra* note 32, at 223 (contrasting the macroeconomic policies of the “stabilizing development” period of the mid-1950s and 1960s, which were the overall economic policies pursued with ISI and were characterized by an orthodox management of macroeconomic policy—tight controls of public finance, foreign exchange and interest rates—with the “populist macroeconomic policies” of the period 1970–1982 that led to the Mexican peso crisis through aggressive use of public expenditures); *see also* Peter Ward, *Social Welfare Policy and Political Opening in Mexico*, 25 *J. LATIN AM. STUD.* 613, 623–24 (1993) (distinguishing a lack of real concern for the poor in social welfare expenditure during the stabilizing development period with the populist interventionist government of President Echeverría from 1970–1976, which invested heavily in inefficient social welfare agencies).

³⁵ *See generally* Ronn Pineo, *The Free Market Experiment in Latin America: Assessing Past Policies and the Search for a Pathway Forward*, COUNCIL ON HEMISPHERIC AFFAIRS (Mar. 29, 2013), <http://www.coha.org/the-free-market-experiment-in-latin-america-assessing-past-policies-and-the-search-for-a-pathway-forward-the-first-of-a-three-part-series/> (highlighting Latin America’s general substitution of the ISI model in favor of neoliberalism starting in the early 1980s).

1982–1983.³⁶ The crisis occurred because of “an increase in two types of capital outflows: (1) funds needed to service the increasingly burdensome number of foreign loans, and (2) funds sought by Mexican businesses and individuals as a hedge against the falling peso (i.e. capital flight).”³⁷ As a counteract to the outflows, the state reached a peak in its intromission in the economic life of the country with the expropriation of the banking institutions and with the introduction of foreign exchange controls on September 1, 1982.³⁸ Although the Mexican economy was not as open then as it is today, “[t]he imposition of exchange controls represented a radical departure from Mexico’s long-held policies of free convertibility for the peso and lack of direct controls over capital movements.”³⁹

The Presidency of José López Portillo (1976–1982) became the turning point for the ISI model. Although his administration sought a liberal trade agenda in the beginning, thereby negotiating a bilateral trade agreement with the United States and even a protocol to adhere to the General Agreement on Tariffs and Trade (GATT), these deals were buried and the trade strategy was reversed to an inward looking one after petroleum prices skyrocketed in 1979, paving the way for a development strategy that deepened ISI through petroleum exports and foreign debt to finance rapid (but inefficient) growth, which ideally would have helped Mexico to assert its autonomy in the international economic realm by not having to conform to the rules already in

³⁶ See Stephen Zamora, *Mexico and the Global Financial Market: Capital Flight as a Factor in National Economic Policy Making*, 18 CAL. W. INT’L L.J. 35 (1987) (analyzing the Mexican debt crisis created by capital flights in the 1980s as a result of the increased integration in the global financial market and the participation of developing countries within it).

³⁷ *Id.* at 37.

³⁸ Stephen Zamora, *Peso-Dollar Economics and the Imposition of Foreign Exchange Controls in Mexico*, 32 AM. J. COMP. L. 99, 152 (1984) [*hereinafter* Zamora, *Peso-Dollar Economics*] (“The imposition of exchange controls complements the *papel rector* of the Mexican government: that is, the increasing trend towards the intervention of the Mexican federal government in the economy at all levels.”); see Decreto que Establece la Nacionalización de la Banca Privada [Presidential Decree that Nationalizes Private Banking], Diario Oficial de la Federación [DOF] 01-09-1982 (Mex.); see also Decreto que Establece el Control Generalizado de Cambios [Presidential Decree that Introduces Foreign Exchange Generalized Controls], Diario Oficial de la Federación [DOF] 01-09-1982 (Mex.).

³⁹ Zamora, *Peso-Dollar Economics*, *supra* note 38, at 100.

place in the international economy.⁴⁰ However, the 1982–1983 financial crises became an effective reality-check on the unsustainability of the ISI model.

After this high peak in the authoritarian power of the president, concretized by the said actions of President José López Portillo (1976–1982), the new incumbent President Miguel de la Madrid (1982–1988) changed the economic course of the country by departing from ISI and embracing free trade and orthodox macroeconomic policies.⁴¹

The new neoliberal economic model pursued by Mexico included a shift of power in the domestic politics and the rise of a new political elite: from nationalist politicians associated with the center-wing PRI ruling political party—unions, grassroots organizations and political institutions—to “*technobureaucrats*” that embraced free trade economics and international integration, had close relationships with the private sector, and coupled technical expertise learned abroad in planning and finance with political wit and a close relationship with the incumbent president.⁴² As the only recipe for Mexico’s economic problems, liberalization, privatization of state-owned companies,

⁴⁰ See David Mares, *Explaining Choice of Development Strategies: Suggestions from Mexico, 1970–1982*, 39 INT’L ORG. 667, 687–97 (1985) (discussing in depth the economic development of Mexico during the 1970s and early 1980s).

⁴¹ See Stephan Haggard & Sylvia Maxfield, *The Political Economy of Financial Internationalization in the Developing World*, 50 INT’L ORG. 35, 61 (1996) (arguing that the 1982 financial crisis strengthened internationalist forces in both the government and the economy; however, these were not unleashed until the change of administration, and thus the policy changes occurred as a reaction against the failure of the López Portillo (1976–1982) and Echeverría (1970–1976) administrations); cf. Robert Kaufman, *Democratic and Authoritarian Responses to the Debt Issue: Argentina, Brazil, Mexico*, 39 INT’L ORG. 473, 474–75 (1985) (arguing that the success of President De La Madrid’s austerity program to tackle the crisis occurred due to the political apparatus prevalent in Mexico at that time: an authoritarian, presidential system where one official party controlled the country through encompassing different interests and voters—mainly the peasants and labor sectors—which quelled populist electoral pressures against the implemented policies).

⁴² Miguel Centeno & Sylvia Maxfield, *The Marriage of Finance and Order: Changes in the Mexican Political Elite*, 24 J. LATIN AM. STUD. 57, 62, 83–84 (1992); see also Alan Knight, *Populism and Neo-Populism in Latin America, Especially Mexico*, 30 J. LATIN AM. STUD. 223, 243–47 (1998) (arguing that the populist style of government in Mexico did not end with ISI governments, but rather that this trait persisted even with President Salinas’ (1988–1994) neoliberal administration, which can be deemed as “neo-populistic” in the distribution of patronage through public works and social programs it implemented, as well as in the President’s personal style).

deregulation and easing of restrictions imposed upon foreign investment were implemented by President de la Madrid's administration (1982–1988), and were greatly spurred and enhanced in that of his successor: President Carlos Salinas (1988–1994).⁴³ After many domestic legislative and policy changes,⁴⁴ the government also paved the way for a rapid liberalization of the financial sector, and eventually to an improvement in the government's fiscal health and public finances.⁴⁵ Through a unilateral liberalization policy, Mexico opened its economy, paving the way for a future opening in the international arena.⁴⁶ Likewise, it engaged into a legal and

⁴³ See Jorge Camil, *Mexico's 1989 Foreign Investment Regulations: The Cornerstone of a New Economic Model*, 12 HOUS. J. INT'L L. 1, 12–13 (1989).

⁴⁴ For instance, quantitatively speaking, the Mexican Constitution was reformed at a very high pace in the period immediately before and after NAFTA: Whereas in the administrations of presidents Echeverría (1970–1976) and López Portillo (1976–1982) there was a rate of 2.33 decrees passed per year that reformed the Constitution (with a rate of over 6.16 constitutional amendments per year), in the administrations of presidents De La Madrid (1982–1988) and Salinas (1988–1994) the rate increased, consisting of 10 decrees per year (comprising, in turn, a rate of over 10 amendments per year), and during President Zedillo's administration (1994–2000) a rate of 3 decrees per year ensued (comprising a rate of 12.8 amendments per year). Imer Flores, *Reconstituting Constitutions—Institutions and Culture: The Mexican Constitution and NAFTA: Human Rights Vis-A-Vis Commerce*, 17 FLA. J. INT'L L. 693, 698–99 (2005); see also Mauro Rivera, *Understanding Constitutional Amendments in Mexico: Perpetuum Mobile Constitution*, 9 MEX. L. REV. 3, 7 (2017) (contrasting the high rate of constitutional amendments from the year 1980 until 2016—137 times in just 36 years—*vis-à-vis* the period from 1917, the enactment of the Constitution, until 1979—it was amended through only 90 decrees in a period ranging over 62 years).

⁴⁵ Susan Minushkin, *Banqueros and Bolseros: Structural Change and Financial Market Liberalization in Mexico*, 34 J. LATIN AM. STUD. 915, 943 (2002).

⁴⁶ Sergio Gómez et al., *Mexican Unilateral Trade Liberalization in the Middle of a Global Crisis*, 28 OXFORD REV. ECON. POL'Y 324, 325–28 (2012) (“Between 1982 and 2007, two periods of economic liberalization can be identified. The first one was unilateral and part of the structural reforms implemented after the 1982 macroeconomic crisis. The second was based on the development of a network of free trade agreements”); see also Manuel Pastor & Carol Wise, *The Origins and Sustainability of Mexico's Free Trade Policy*, 48 INT'L ORG. 459, 459–60 (1994) [*hereinafter* Pastor & Wise, *Mexico's Free Trade Policy*] (arguing that 4 domestic variables explain better Mexico's economic liberalization than just debt shocks and financial crises in the 1980s or intra-industry trade between Mexico and the United States: institutional exclusion of ministries that were protectionists of national industries for those that advocated orthodox macroeconomic policies and were insulated from popular pressures; asymmetric information between policy makers and the public, given that the government kept secret NAFTA's negotiation and potential socioeconomic effects, and only made privy to them big businesses that benefitted from the treaty; linkage between trade liberalization and macroeconomic stabilization, bringing down inflation and creating the perception that free trade was necessary for

institutional overhaul both before, during and after different international agreements were struck,⁴⁷ including the codification in 1993 of the United Nations Commission on International Trade Law's Model Law in its Commerce Code, which recognized private arbitration—until then not regulated in the country.⁴⁸

Mexico's first signal of leaving the protectionism aside in the international level was its accession to the GATT in 1986,⁴⁹ and less than a decade later, NAFTA.⁵⁰

macroeconomic stability; and a change in the ideological preferences of the political elite and businesses—from the traditional corporatism to a neoliberal anti-statist ideology).

⁴⁷ The implementation of the new economic policies and trade agreements signed, specially NAFTA, has changed dramatically the legal and institutional framework in the country. See Fix-Fierro & López-Ayllón, *supra* note 28, at 793 (“Between December 1982 and April 1996, out of a total of 198 existing federal laws, 99 were newly enacted, 57 were amended (in some cases extensively), and only 42, mostly obsolete laws, remained unchanged. In other words, nearly eighty percent of the Mexican national legislation was newly enacted or modified during the last fifteen years. The change in the laws related to the economic, financial, trade, and services sectors was practically complete.”).

⁴⁸ Claudia Frutos-Peterson & Antonio Riva, *Mexico, in* RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRAL AWARDS IN LATIN AMERICA 173 (Omar García-Bolívar et al. eds., 2015). Although, more than twenty years have passed since the recognition of arbitration in the domestic legal system, Mexican courts are still wary in enforcing them. See *id.* at 174, 191 (looking positively to Mexico's legislative reforms, yet analyzing gingerly certain judgments by the national courts on the matter: “On the one hand, Mexican courts support arbitration and, as a general matter, favor enforcement of arbitral awards. On the other hand, Mexican courts continue to overzealously guard the limits for arbitration—sometimes perhaps overstepping their boundary.”).

⁴⁹ Richard English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339, 340 (1988). Although Mexico joined GATT in 1986, there is a failed precedent of the willingness of the country to join the treaty in 1979: After negotiations within the GATT, the draft of a Protocol of Accession of Mexico was published and a public debate ensued in Mexico, leading then President López Portillo in 1980 to publicly suspend the accession, given that it was not in the country's “best interests”. See Dale Story, *Trade Politics in the Third World: A Case Study of the Mexican GATT Decision*, 36 INT'L ORG. 767, 790–91 (1982) (arguing that although Mexican President López Portillo initially wanted to accede GATT, after the public debate he changed his mind because of two factors: Firstly, the leftist, nationalistic Mexican foreign policy that advocated for independence *vis-à-vis* the United States and for bilateral trade negotiations—given that its petroleum-based political leverage supposedly increased more in a bilateral approach than in a multilateral setting—and secondly, the political costs he would receive from domestic detractors: economic intellectuals, protectionist businesses, and key government officials).

⁵⁰ As a skillful move by Mexican President Carlos Salinas to quell nationalistic cries against economic integration with the United States, right before signing NAFTA, Mexico entered into negotiations of FTAs with Chile, the Central American countries, Colombia and Venezuela, arguing that NAFTA was only one in several treaties Mexico was adhering to in order to open its economy. Accordingly, one year prior to the signing of NAFTA,

B. NAFTA and Subsequent FTAs and BITs

NAFTA crystallized the economic liberalization strategy of Mexico and represented a departure from the country's continuous challenge to the traditional rules of international law that govern foreign investment, even paving the way for international supervision through, among others, Chapter XI's ISDS procedure.⁵¹ Whereas for the United States and Canada—both capital exporting, developed states—the political economy reason for joining NAFTA was the protection of their investors from the host states' politics,⁵² for Mexico, NAFTA appeared as something more than merely economic; something political and even transformational, as it permitted locking-in its new economic model into an international instrument,⁵³ thereby preventing subsequent administrations—until then very powerful and without real checks-and-balances from Congress and the Judiciary—from dismantling the liberalization agenda pursued by Presidents de la Madrid (1982–1988) and Salinas (1988–1994).⁵⁴ All in all, NAFTA was a compromise for the three

Mexico signed its FTA with Chile in September 1991—which was superseded by a much more comprehensive one, NAFTA-style, in 1999. Roberto Echandi, *Regional Trade Integration in the Americas During the 1990s: Reflections of Some Trends and Their Implications for the Multilateral Trade System*, 4 J. INT'L ECON. L. 367, 400–01 (2001); see also Patricia Gray, "Acuerdo Chile-México: ¿Una Forma de Integración Viable?", 45: 2 COMERCIO EXTERIOR [Foreign Trade] 122, 126 (1995) (Mex.) (arguing that the Mexico-Chile FTA was the first of its type in the Latin American region and permitted Mexico, from a political standpoint, to balance NAFTA).

⁵¹ See Gloria Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 327 (1994).

⁵² Sergio Puig, *Is Investment Arbitration Good or Bad for Developing Countries? The Mexican Experience in the North American Free Trade Agreement Context*, 4 L. & PRAC. INT'L CTS. & TRIBUNALS 61, 87 (2005) [hereinafter Puig, *Mexican Experience in the NAFTA Context*].

⁵³ Sergio Puig, *NAFTA, Authority and Political Behavior: The Case of Mexico*, 5 SANTA CLARA J. INT'L L. 363, 365 (2007) [hereinafter Puig, *Case of Mexico*]; see also Kenneth Vandeveld, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 523 (1998) (arguing that one of BIT's principal contributions is turning the foreign investor's favorable treatment into an international obligation).

⁵⁴ See Tanya Kapoor, *Cycling to Economic Freedom?: An Analysis of Privatization, Nationalization, and Expropriation in Argentina, Mexico, and the United Kingdom*, 24 MICH. ST. INT'L L. REV. 1, 16–18, 32 (2015) (arguing that after the privatizations of the Salinas's administration, no renationalization process ensued because of legislative entrenchment of the Executive Branch's power to expropriate and nationalize private property through both domestic federal legislation and NAFTA).

member states.⁵⁵ Evaluated under this light, Mexico's political objective of locking-in its macroeconomic policy was a success, given that no Mexican administration has denounced the treaty or tried to back off from the economic path pursued.⁵⁶ And on the contrary, Mexico has thereafter considered NAFTA-style provisions in its international agreements, thereby disseminating its normative contents through the FTAs and BITs it has entered into with other countries.⁵⁷ Accordingly, Mexico's incorporation of NAFTA-style norms into its foreign policy agenda can be seen as a success for NAFTA's locking-in political objective.

Similarly, Sergio Puig contends that NAFTA's Chapter XI has two political economy legitimations: "first, in the economic sense as a means to foster development and economic growth through FDI and, second, in the political realm as a manner to strengthen domestic institutions."⁵⁸ Therefore, even despite the divergent studies' results on the impact of NAFTA on Mexico's economy,⁵⁹

⁵⁵ See Sergio Puig & Meg Kinnear, *NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic Approach in Investment Arbitration*, 25 ICSID REV.—FOREIGN INV. L.J. 225, 230, 257 (2010) (highlighting the negotiations for the dispute resolution clause that ultimately resulted in Articles 1121 (1)(b) and (2)(b)—the "no-U-turn" model that sidesteps prior exhaustion of local remedies while at the same time "permit[ting] simultaneous or subsequent uses of domestic and international fora."); see also Sergio Puig, *Investor-State Tribunals and Constitutional Courts: The Mexican Sweeteners Saga*, 5 MEX. L. REV. 199, 215 (2013) ("the history of the NAFTA negotiations suggests that the waiver model is a compromise between the three Parties to the treaty").

⁵⁶ See Juan Moreno-Brid et al., *NAFTA and the Mexican Economy: A Look Back on a Ten-Year Relationship*, 30 N.C. J. INT'L L. & COM. REG. 997, 1018 (2004–2005); see also Pastor & Wise, *Mexico's Free Trade Policy*, *supra* note 46, at 484 ("[L]inkage of macroeconomic stabilization with trade liberalization and the embodiment of both in the NAFTA initiative help to explain why the coalition of free trade supporters includes small and medium-sized businesses [not directly benefitted from trade liberalization] . . . In short, macroeconomic objectives have led many economic and political actors to set aside microeconomic concerns.").

⁵⁷ See Echandi, *supra* note 50, at 374 ("While the features of the NAFTA model can be attributed to a great extent, to the United States, the dissemination of such a model throughout Latin America has to be attributed, to a great extent, to Mexico.").

⁵⁸ Puig, *Mexican Experience in the NAFTA Context*, *supra* note 52, at 90; cf. Juan Hugues & Jimena Moreno, *Mitos y Realidades del Arbitraje Inversionista-Estado en el Tratado de Libre Comercio de América del Norte: La Experiencia Mexicana*, 31 ICSID REV.—FOREIGN INV. L.J. 147 (2016) (arguing that Chapter XI has been positive for Mexico given that the jurisprudence created by arbitral tribunals has given more legal certainty to NAFTA state parties, on the one hand, and that the Mexican state's litigation has been successful in several occasions, on the other).

⁵⁹ It is very difficult to assess the economic impact of NAFTA, particularly Chapter XI. See, e.g., Álvarez, *NAFTA's Investment Chapter*, *supra* note 10, at 249 ("[O]ne reason why assessment of the NAFTA differ as much as they do is because evaluators are looking

the positive effect of Chapter XI “for Mexico relies on the availability of a process to combat political power deviations, which process produces information about State behavior and exposes violators.”⁶⁰ Consequently, under this purview, it was not unexpected that Mexico was going to become a respondent in a high number of ISDS cases in the first years after NAFTA entered into force, given its developing country status,⁶¹ on the one hand,

at different things, as well as filling their ledgers of pluses and minuses on the basis of different timeframes”); *see also* Moreno-Brid, *supra* note 56, at 1000 (“[C]ontradictory assessments [on NAFTA’s economic benefits] may be due in part, however, to the differences in the expectations it raised.”); *cf.* John Weiss, *Trade Reform and Manufacturing Performance in Mexico: From Import Substitution to Dramatic Export Growth*, 31 J. LATIN AM. STUD. 151 (1999) (concluding that evidence is ambiguous on the impact of trade liberalization on Mexico’s manufacturing performance); *but see* ROS, *supra* note 33, at 171–72 (concluding that given the “high level of sophistication [and diversity] of its export basket . . . the pattern of integration into the world economy has not been a drag on Mexico’s growth.”); *cf.* Manuel Pastor & Carol Wise, *State Policy, Distribution and Neoliberal Reform in Mexico*, 29 J. LATIN AM. STUD. 329, 362–65 (1997) (arguing that one factor that explains Mexico’s poor economic performance is the gap between macroeconomic stabilization, which has been the Mexican neoliberal policy-makers’ only priority, and microeconomic adjustment, left by policy-makers to be regulated by the market, which should be bridged through effective public policies that enhance wage gains, improve income distribution and sustainable growth); *see also* Stephen Zamora, *A Proposed North American Regional Development Fund: The Next Phase of North American Integration Under NAFTA*, 40 LOY. U. CHI. L.J. 93 (2008–2009) (analyzing the negative side effects of NAFTA’s economic integration in Mexico; the lack of a regional development agenda to tackle poverty and boost development in Mexico; and suggesting the creation of a North American Development Fund to tackle Mexico’s poor infrastructure, in a similar manner to what the European Union has done on the matter).

⁶⁰ Puig, *Mexican Experience in the NAFTA Context*, *supra* note 52, at 67; *see also* Puig & Kinneer, *supra* note 55, at 259 (“Perhaps the most notable legacy of Chapter Eleven has been initiatives to entrench greater public access to information and to proceedings.”); *see also* Alejandro Faya Rodríguez, *Un Análisis Económico y Jurídico, in A QUINCE AÑOS DEL TLCAN* 28 (Universidad Iberoamericana, 2008), http://works.bepress.com/alejandro_faya_rodriguez/1/ (characterizing as positive the awareness raising effect that Chapter 11 has had on domestic authorities’ actions and policies).

⁶¹ Guillermo Aguilar, *The Mexican View on the Operation of NAFTA for the Resolution of Canada-U.S.-Mexico Disputes*, 26 CAN.-U.S. L.J. 219, 222 (2000); *see also* José Álvarez, *Critical Theory and the North American Free Trade Agreement’s Chapter Eleven*, 28 U. MIAMI INTER-AM. L. REV. 303, 304–10 (1996–1997) (arguing that NAFTA’s investment chapter is a one-side ratchet for the American investors, and therefore ISDS is likely to be used by them against Mexico and not by Mexican investors); *but see* Hugues & Moreno, *supra* note 58, at 162 (concluding that contrary to the expectations at the sign of NAFTA, Canada has been the most sued state—considering notices of intent and concluded litigations—with 32 claims, then the United States with 21, and lastly Mexico with 19 claims); *see also* Guillermo Aguilar & William Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 370 (2003) (suggesting that the role reversal of the US and Canada—from historically bringing claims on behalf of their investors as developed, capital exporting countries to become respondents under NAFTA

and it helped make the Mexican state more accountable because of the transparency of the proceedings, eventually strengthening the Mexican institutions and fostering a healthy investment climate, on the other.⁶² According to this account, NAFTA's ISDS ability to check and keep the Executive aligned with its international obligations and prevent discretionary maneuvers seems like a further constraint to the Executive's power to act,⁶³ thereby imposing it costs when its actions depart from its international commitments.

Even in the realm of finance, the ability of NAFTA to become a backdrop check on the Executive concretized in Mexico's unilateral liberalization of restrictions of FDI in the financial sector, eventually leading in 1998 to the complete removal of restrictions and to the subsequent ownership of more than half of the financial and banking industries by foreign capital very rapidly. This unilateral action by Mexico was undertaken as a response to the 1994–1995 peso crisis, and the subsequent, costly, opaque federal bailout in 1997–1998.⁶⁴ The liberalization helped quell the public outrage against corruption by eliminating the secretive and inefficient “partnership” between domestic bankers and the government,⁶⁵ making the banking industry more efficient and consumer-friendly, thereby benefitting the Mexican public at large: the foreign ownership of banking in Mexico—when compared to all previous years—helped increase the supply

Chapter 11's arbitral proceedings—has nothing to do with Mexico, but rather it happened because investors from those same countries started attacking the other's government).

⁶² See Sergio López-Ayllón & Alejandro Posadas, *Inversión y Derecho Internacional de la Inversión Extranjera: Reflexión sobre Algunas Disciplinas Adoptadas por México*, 6 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 301 (2006).

⁶³ Zamora, *Early Experience Under NAFTA*, *supra* note 16, at 635–38 (highlighting the legislative power allocation change of NAFTA in Mexico: from an authoritative Executive without checks—either from the outside or from the other Branches—to one that can be second-guessed by international panels).

⁶⁴ See, e.g., Karen Sigmond, *Banking Regulation in Mexico: Lessons from Financial Crisis*, 4 MEX. L. REV. 3, 31 (2011) (contrasting the transparency and accountability in the American bailout of banks and financial institutions in the Obama administration with the opacity and corruption in the secretive bailout process of the 1995 Mexican crisis by then President Zedillo's administration).

⁶⁵ Stephen Haber & Aldo Musacchio, *These Are the Good Old Days: Foreign Entry and the Mexican Banking System* 3, 78 (NAT'L BUREAU ECON. RESEARCH, Working Paper No. 18713, 2013), <http://www.nber.org/papers/w18713.pdf>; Minushkin, *supra* note 45, at 938, 944 (“It is unlikely that the government will form a new coalition with a largely foreign-owned financial sector.”).

of credit, furthered the stability of the system, and did not raise the credit cost.⁶⁶

Although not a direct consequence of the treaty, post-NAFTA Mexico also departed from the 70-year authoritarian, single political party model to one where three main parties contend in free elections. This change concretized in President Fox's (2000–2006) winning election from a political party other than the (until then) unbeatable PRI centered-wing party—the PAN right-wing political party—in the year 2000, which also coincided with a divided Congress among the three major political parties.⁶⁷ Consequently, economic liberalization preceded the political openness in the system.⁶⁸ This new panorama of checks and balances in Mexico's nascent democracy seems a positive outcome of post-NAFTA Mexico.

NAFTA not only became a bedrock for the *open* Mexico's liberalization agenda, it also was a landmark international agreement that can count many positive outcomes, such as giving rise to a competitive regional production platform through which automobiles and other products are jointly manufactured (Canada and Mexico account for 75% of the American value added that returns to the United States from abroad),⁶⁹ or stimulating agricultural exports for all its parties.⁷⁰ In addition to the

⁶⁶ Haber & Musacchio, *supra* note 65.

⁶⁷ See Stephen Zamora & José Cossío, *Mexican Constitutionalism After Presidencialismo*, 4 INT'L J. CONST. L. 411 (2006) (analyzing the distribution of authority after the demise of the Executive authoritarianism through the political reforms of the 1990s and the subsequent arrival of democracy and highlighting the struggles that the disempowered Federal Executive has *vis-à-vis* an empowered Supreme Court, local governments and a divided Congress).

⁶⁸ *Contra* Helen Milner & Keiko Kubota, *Why the Move to Free Trade? Democracy and Trade Policy in the Developing Countries*, 59 INT'L ORG. 143 (2005) (suggesting that a political regime change towards more democracy in a developing country should be followed by trade liberalization); but *cf.* Samuel Huntington, *Liberalization and Democratization: How the World can Modernize*, HARVARD INT'L REV. (Feb. 2017), <http://hir.harvard.edu/article/?a=14510> (contending that authoritarian governments can more easily promote economic liberalization than democratic ones, such as occurred with the reforms of Mexican President Salinas during the 1990s).

⁶⁹ Robert Koopman et al., *Give Credit Where Credit is Due: Tracing Value Added in Global Production Chains* 25 (Nat'l Bureau Econ. Research, Working Paper No. 16426, 2010), https://www.bea.gov/about/pdf/NBER%20working%20paper_1.pdf.

⁷⁰ Cullen Hendrix, *Agriculture in the NAFTA Renegotiation*, in A PATH FORWARD FOR NAFTA, *supra* note 4, at 101, 104.

economic upshots,⁷¹ NAFTA can be hailed for recognizing in an international trade instrument the importance of environmental protection for the first time, which by most measures today is far better than what it used to be pre-NAFTA, particularly in Mexico;⁷² and for fostering integration of both businesses and authorities on issues as complicated as the security ones.⁷³

NAFTA has served as Mexico's model investment treaty, and therefore the majority of its BITs and FTAs with an investment chapter contain similar provisions on ISDS as those of NAFTA's Chapter XI.⁷⁴ Mexico's proactive agenda in securing market access for national producers while at the same time attracting FDI has been pursued consistently since NAFTA, and has led to the signing of 12 FTAs with 46 countries and 32 BITs with 33 countries.⁷⁵ Overall, Mexico's statistics show that it attracts much more FDI than what its national companies invest abroad,⁷⁶

⁷¹ See, e.g., GARY HUFBAUER ET AL., *NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES* 469 (2005) (describing positively that "[i]n economic terms, NAFTA has more than delivered what it promised"); see also Bruce Fisher, *NAFTA: Testing Ricardo's Theory of Comparative Advantage by Empirical Evidence Pre- and Post-NAFTA*, 15 *CHI.-KENT J. INT'L & COMP. L.* 1, 34 (2012) ("NAFTA's success lies in reducing trade barriers given the vast expansion of trade in all NAFTA nations during 1993–2012"); cf. Christopher Wilson, *A Regional Manufacturing Platform*, in *GROWING TOGETHER: ECONOMIC TIES BETWEEN THE UNITED STATES AND MEXICO* 1 (Wilson Ctr., 2016), https://www.wilsoncenter.org/sites/default/files/growing_together_a_regional_manufacturing_platform.pdf [hereinafter Wilson, *Manufacturing*] ("Since the 1990s, trade between the United States and Mexico has grown tremendously, with bilateral goods and services trade in 2015 reaching a total six times greater than before the North American Free Trade Agreement (NAFTA) was implemented in 1993. In 2015, bilateral trade reached \$584 billion dollars, meaning that the United States and Mexico trade more than a million dollars' worth of goods and services every minute. The United States is Mexico's top export market, and Mexico is the second largest foreign buyer of U.S. goods, second only to Canada. The bilateral trade relationship is enormous in size, and the U.S. and Mexican economies each depend significantly upon one another.").

⁷² Daniel Esty & James Salzman, *Rethinking NAFTA: Deepening the Commitment to Sustainable Development*, in *A PATH FORWARD FOR NAFTA*, *supra* note 4, at 125, 137.

⁷³ John Hamre, *NAFTA as a National Security Priority*, in *A PATH FORWARD FOR NAFTA*, *supra* note 4, at 140–41.

⁷⁴ Claus Von Wobeser, *Mexico*, in *LATIN AMERICAN INVESTMENT PROTECTIONS: COMPARATIVE PERSPECTIVES ON LAWS, TREATIES, AND DISPUTES FOR INVESTORS, STATES AND COUNSEL* 361, 406 (Jonathan C. Hamilton et al. eds., 2012).

⁷⁵ Luis Videgaray, "La Diplomacia Económica de México", 11: 3 *COMERCIO EXTERIOR [FOREIGN TRADE]* 46, 49 (2017) (Mex.).

⁷⁶ See OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, *U.S.-Mexico Trade Facts*, <https://ustr.gov/countries-regions/americas/mexico> (last visited Apr. 18, 2018) (highlighting that U.S. FDI in Mexico was \$87.6 billion in 2016, whereas Mexico's FDI in the U.S. was \$16.8 billion in the same year); see also Gonzalo Gutierrez, *Why is Mexico an Attractive Investment Destination?*, in *PROFESSIONAL REPORT*, Summer 2015,

which has led the country to litigate as respondent twenty seven times in ISDS and has been the home state of the claimants only twice (of the cases that have been made public).⁷⁷

At the domestic level, post-NAFTA unilateral liberalizations have also ensued. Since the beginning of the current administration of President Peña (2012–2018), the federal government embarked in negotiating with the main political parties a set of so-called “structural reforms” that involved a plethora of constitutional amendments, enactment of new legislation, creation of regulation and institutions. These 11 reforms were enacted to increase productivity, safeguard civil rights and democratic institutions, all of which changed the structure of sectors that needed a revamp: energy, antitrust, telecommunications, tax, finance, labor, education, *amparo* (judicial review), a single National Procedural Criminal Code, electoral institutions, access to governmental information, and transparency.⁷⁸ These reforms were coupled with a liberalization of sectors that until then were closed to FDI, such as hydrocarbons—from upstream to downstream—and power;⁷⁹ and a complete elimination of all restrictions and limitations to FDI participation in financial institutions, thrifts and insurance companies,⁸⁰ as well as on radio and television broadcasting and mobile telephony.⁸¹

at 36–37, <http://www.sior.com/docs/default-source/Profreport/why-is-mexico-an-attractive-investment-destination.pdf?sfvrsn=0> (depicting Mexico’s FDI climate friendliness as positive, particularly as regards to U.S. FDI).

⁷⁷ UNCTAD, *Investment Policy Hub: Investment Dispute Settlement Navigator*, <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry> (last visited Apr. 18, 2018).

⁷⁸ PRESIDENCIA DE LA REPÚBLICA [Office of the Mexican President], *Reforms in Action: The Reforms*, <http://reformas.gob.mx/las-reformas> (last visited Jan. 11, 2018).

⁷⁹ Decreto por el que se Expide la Ley de Hidrocarburos y se Reforman Diversas Disposiciones de la Ley de Inversión Extranjera; Ley Minera, y Ley de Asociaciones Público Privadas [Legislative Decree Whereby the Hydrocarbons Act is Enacted, and the Foreign Investment, Mining and Public-Private Partnership Acts Are Amended], *Diario Oficial de la Federación* [DOF] 11-08-2014 (Mex.) [*hereinafter* Decreto por el que se Expide la Ley de Hidrocarburos].

⁸⁰ Decreto por el que se Reforman, Adicionan y Derogan Diversas Disposiciones en Materia Financiera y se Expide la Ley para Regular las Agrupaciones Financieras [Legislative Decree Whereby the Act that Regulates Financial Groups is Enacted, and Different Legislative Provisions on Finance Are Amended], *Diario Oficial de la Federación* [DOF] 10-01-2014 (Mex.).

⁸¹ Decreto por el que se Expiden la Ley Federal de Telecomunicaciones y Radiodifusión, y la Ley del Sistema Público de Radiodifusión del Estado Mexicano; y se Reforman, Adicionan y Derogan Diversas Disposiciones en Materia de Telecomunicaciones

Overall, today, the Mexican legal system is mostly opened to FDI; however, few areas still remain where legal strategies must be used to circumvent prohibitions on FDI—such as those pertaining to acquisition of property in the restricted zone: 100 km along the borders and 50km on coastline⁸²—or limitations to FDI participation—such as firearms’ production and commercialization.⁸³

Alvaro Santos sums up the trade liberalization strategy undertaken by Mexico:

[A] country that made trade liberalization its most important economic development strategy. . . [which] dates back to Mexico’s entry into GATT in 1986, and was consolidated and expanded by the [NAFTA] in 1994. Since then successive governments have further pursued free-trade agreements.⁸⁴

According to Santos’ analysis, the development of the free trade agenda in Mexico is reflected in its legal capacity, which only seeks to gain market access, in contrast to a developmental legal capacity, where countries use their litigation skills and capacities to increase policy space through defending their domestic industrial policies in the international area.⁸⁵ For Mexico, its international legal commitments constrain its policy space, since they reflect its development strategy, “and thus there is no need [for Mexico] to look for more space through rule or doctrinal flexibilities.”⁸⁶ Accordingly, in the World Trade

y Radiodifusión [Legislative Decree Whereby the Telecommunications and Radio Act and the Public Radio System of the Mexican State Act are Enacted, and Different Legislative Provisions on Telecommunications and Radio are Amended], *Diario Oficial de la Federación* [DOF] 14-07-2014 (Mex.).

⁸² Juan Herrera et al., “Ley de la Inversión Extranjera: ¿Instrumento para el Desarrollo Económico?,” 140 *Boletín Mexicano de Derecho Comparado* [BMDC] 687, 697. The sectors that are excluded from FDI participation are only those included in articles 5 and 6 of the Foreign Investment Law. *Ley de Inversión Extranjera* [LIE] [Foreign Investment Act Law], *Diario Oficial de la Federación* [DOF] 27-12-1993, última reforma 26-06-2017 (Mex.) [*hereinafter* *Ley de Inversión Extranjera*].

⁸³ *Ley de Inversión Extranjera*, *supra* note 82, at arts. 7–9.

⁸⁴ Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico*, 52 *VA. J. INT’L L.* 551, 597 (2012).

⁸⁵ *Id.* at 594.

⁸⁶ *Id.* at 607.

Organization (WTO) context, Mexico's strategy has been "largely concerned about ensuring market access for its exports in other countries and about fending off unfair competition caused by foreign imports at home."⁸⁷ Reflecting on the institutional legal capacity and strategies of Mexico while litigating cases before the WTO—which is the same in-house legal unit at the Department of Economy that litigates ISDS disputes—Santos concludes that due to the lack of coordination of the International Trade Legal Counsel with other Departments and private sector, the relative few continuity in the personnel, and the use of outside legal counsel for its cases, there seems to be:

[No] overarching, explicit economic policies that the Mexican government is interested in advancing [through WTO litigation]. Instead, Mexico adheres to the agendas that are assumed to be embedded within its international trade agreements. The Office of the [Trade] Legal Counsel takes the cases as they come; each case is a separate problem with no relation between each other or to a deliberate agenda. . . Rather, they seek primarily to provide immediate relief.⁸⁸

This legal capacity in the WTO realm is the same as in NAFTA's dispute settlement mechanisms.⁸⁹ As will be depicted below, given that the legal capacity of the Mexican International Trade Legal Counsel has been defensive, its litigation strategy and stance on transparency issues before ISDS tribunals has been

⁸⁷ *Id.* at 608.

⁸⁸ *Id.* at 609–12; *but see* Francisco González, *Mexico Before ICSID: Rebel Without a Cause?*, 1–2, <http://www.gdca.com.mx/PDF/Arbitraje/Mexico%20and%20ICSID%20Rebel%20Without%20a%20Cause.pdf> [*hereinafter* González, *Mexico before ICSID*] ("Mexico done away with xenophobic whims and embraced foreign investment. As to investment arbitration, the approach has been intelligent. Essentially, it has harnessed a team of qualified experts, sought top external counsel, secured insurance and resisted the temptation to resort to populist rhetoric or chicanery"); *cf.* Rodrigo Polanco, *Systems of Legal Defence Used by Latin American Countries in Investment Disputes*, 17 *J. WORLD INV. & TRADE* 562, 580–81 (2016) (arguing that since the first ISDS case to which Mexico was a party in 1997—*Metalclad*—the legal defense of the country has relied on this in-house legal unit at the Department of Economy, which has been assisted by external counsel from international law firms since 2004 from time to time, but never from a domestic one, and that is consistent with the strategy used by the majority of the Latin American states with the highest amount of ISDS cases).

⁸⁹ Santos, *supra* note 84, at 623.

adamant, as it has tried to maintain the status quo and neither increase the power of foreign investors in ISDS nor decrease it—through more transparency and third-party intervention, for instance. However, once Mexico and other state parties to international economic treaties have adopted new rules, it has adhered strictly to them—through the Free Trade Commission’s (FTC) interpretations in NAFTA, for example.

C. TPP

The TPP was the result of a national economic policy that transcended two different Mexican federal government administrations: Although Mexico joined the TPP’s negotiation rounds in 2012 during the last year of President Felipe Calderón’s administration (2006–2012)—from the right-wing PAN political party—the deal was ultimately signed by current President Enrique Peña (2012–2018)—from the center-wing PRI party. Not only did President Peña’s government retained former President Calderón’s Trade Representative, Francisco de Rosenzweig, but it further supported the TPP’s conclusion by identifying it as one of the national economic policy lines of actions in the National Development Plan (NDP) that his six-year government follows: “Actively promote the TPP as a fundamental strategy to incorporate the Mexican economy in the dynamics of the major international markets.”⁹⁰

Mexico’s participation in the TPP has to be understood in the context of its international trade policy: support for free market and repudiation of protectionist measures as the best policy to safeguard Mexican economic interests’ abroad, as well as an active Mexican foreign policy and international participation to promote them.⁹¹ These strategies are reflected in the NDP, which is Mexico’s main national economic policy instrument,⁹² and

⁹⁰ Decreto por el que se Aprueba el Plan Nacional de Desarrollo 2013–2018 [National Development Plan 2013–2018] [NDP], line of action 4, strategy 5.3.2, Diario Oficial de la Federación [DOF] 20-05-2013 (Mex.) (translated from Spanish) [*hereinafter* Decreto por el que se Aprueba el Plan Nacional de Desarrollo 2013–2018].

⁹¹ Ulises Granados, *México y el Acuerdo de Asociación Transpacífico (TPP): Oportunidades y Retos*, 6 *MÉXICO Y LA CUENCA DEL PACÍFICO* [Mexico and the Pacific Rim] 55, 64 (2014).

⁹² Decreto por el que se Aprueba el Plan Nacional de Desarrollo 2013–2018, *supra* note 90.

guides all the federal departments' and agencies' actions during the current Presidential term.⁹³ NDP's objective 5.3 enshrines Mexico's liberalization international trade policy: "Reaffirm the country's commitment to free trade, mobility of capital, and productive integration."⁹⁴ This objective, in turn, is further defined through the two strategies (with their own lines of action) that implement it: "Promote and deepen the trade liberalization policy to encourage the participation of Mexico in the global economy," and "[p]romote the regional integration of Mexico, establishing strategic economic agreements and deepening the existing ones."⁹⁵ This liberalization policy also encompasses investment. For instance, one line of action requires the negotiation and update of Mexican BITs, since they are "a tool to increase capital flows and protect Mexican investments abroad."⁹⁶

Accordingly, the fact that both Mexico's commitment with a neoliberal economic agenda that promotes active BIT and FTA programs and the TPP's promotion are portrayed in the NDP clearly exemplify Mexico's development and economic policy's alignment with free trade and economic liberalization, on the one hand, and with the rules contained in the TPP, on the other. For the current administration, being part of the TPP was part of its development agenda.

According to the Mexican Trade Representative (the Under-Secretary of International Commerce within the Department of Economy) that negotiated TPP, Francisco de Rosenzweig, the

⁹³ Ley de Planeación [Planning Law] [LP], art. 6, 8, 9, and 21, Diario Oficial de la Federación [DOF] 05-01-1983, última reforma 28-11-2016 (Mex.); The NDP is created and implemented by the President with the participation of civil society and the Congress. *Id.* at arts. 4, 5; The NDP guides all the Federal Executive's actions during the sexennial term in which it is created, including all administrative regulations and Executive orders issued, and bills presented by the Executive before Congress. *Id.* at art. 10; Although only applicable to a determined presidential term, the NDP must consider a longer-term vision on the national economic policy—up to 20 years. *Id.* at art. 21 Bis.; All actions undertaken by the federal departments and agencies must be evaluated in accordance with (and have relation to) the NDP, and the results must be presented during each President's state of the union address and cabinet official's reports to Congress. *Id.* at arts. 7–9; As the instrument that delineates Mexico's objectives, strategies and priorities, the NDP guides all actions, even those to be performed in coordination with state governments. *Id.* at arts. 20, 28.

⁹⁴ Decreto por el que se Aprueba el Plan Nacional de Desarrollo 2013–2018, *supra* note 90, at objective 5.3 (translated from Spanish).

⁹⁵ *Id.* at objective 5.3., strategies 5.3.1 and 5.3.2 (translated from Spanish).

⁹⁶ *Id.* at objective 5.3., strategy 5.3.1, line of action 5 (translated from Spanish).

impetus for strengthening and diversifying its trade agenda led Mexico to seek to join the TPP negotiations during the 19th Asia-Pacific Economic Cooperation (APEC) Economic Leader's Meeting on November 13, 2011.⁹⁷ Therefore, TPP must not be seen negatively, but rather positively, as it could have further integrated Mexican production and supply chains with the United States, while at the same time diversifying the Mexican market; however, there were defensive arguments that called for Mexico's participation as well, on account of the integration that Mexican production has had with the North American region and the new competition that it would have faced in the United States by Asian competitors.⁹⁸

Given this context, it was no surprise that the conclusion and signing of the TPP was celebrated by the current President Peña's administration. According to the Mexican Secretary of Economy (the Mexican cabinet-member in charge of commerce), Ildefonso Guajardo, the TPP allows Mexico to retain its NAFTA trade privileges, while not losing ground to Asian countries in the American market (which would allegedly have happened had Mexico not participated in TPP); to participate in the definition of the new international trade norms; and to gain access to six new markets.⁹⁹ The ultimate goal was for Mexico to enjoy the benefits that could accrue from TPP, so that the country may become "the most successful value-added logistics platform, which has the best connection to the four cardinal axes of international trade."¹⁰⁰ The Mexican President also emphasized TPP's strengthening of the supply chain with the United States and Canada, the consolidation of the already existent trade relationship with Chile

⁹⁷ Francisco de Rosenzweig, *Mexico en el TPP: Una Ventana Hacia el Futuro*, ICTSD (Aug. 12, 2012), http://www.ictsd.org/bridges-news/puentes/news/m%C3%A9xico-en-el-tpp-una-ventana-hacia-el-futuro#_ednref.

⁹⁸ *Id.*

⁹⁹ NOTIMEX, *Acuerdo Transpacífico Consolida Ventajas para México, Afirma Guajardo* (Nov. 4, 2015), <http://www.radioformula.com.mx/notas.asp?Idn=545331&idFC=2015>.

¹⁰⁰ Roberto Morales, *El TPP Blindará la Reforma Energética* [interview with Ildefonso Guajardo, Mexican Secretary of Economy], *EL ECONOMISTA* (Oct. 27, 2015), <https://www.economista.com.mx/empresas/El-TPP-blindara-la-reforma-energetica-20151027-0117.html> (translated from Spanish).

and Peru—with whom Mexico formed the *Pacific Alliance*¹⁰¹—and the possibility of accessing the Asian-Pacific markets,¹⁰² wherein Mexico only has one FTA signed—with Japan.¹⁰³ Under this discourse, the TPP was to bring more investment and well-paid jobs to Mexico, along with preferential access to the world's most important economies, in order to raise living standards and reduce poverty.¹⁰⁴ It was forecasted that the agreement could bring USD \$150 billion growth in exports to Mexico in the immediate five years after its signature, and most importantly, provide a platform to diversify Mexico's exporting base away from the United States.¹⁰⁵ Even before finalizing TPP, Mexico's trade

¹⁰¹ See PAC. ALLIANCE, <https://alianzapacifico.net/en/que-es-la-alianza/#la-alianza-del-pacifico-y-sus-objetivos> (last visited Apr. 18, 2018) (The Pacific Alliance was officially formed on April 28, 2011 and includes Chile, Colombia, Mexico and Peru. It has been a successful alliance with goals towards driving “further growth, development and competitiveness of the economies of its members” with focus on becoming “a platform of political articulation, economic and commercial integration and projection to the world, with emphasis on the Asia-Pacific region.”); *but cf.* Correa, *supra* note 30, at 467 (taking a critical view on the Pacific Alliance's role to further the economic development of the region through integrating and complementing their production, and rather being pessimistic: “the Pacific Alliance will increase trade among its members because of the export demand by FDI, and not as a result of scale economies taking advantage of an integrated market whose consequences could be increased productivity, technological development and dissemination of knowledge”); *see also* Perla Buenrostro & Lorena Rivera, *Together, Separate or the Free Way? What are the Real Options for Trade Integration in Latin America?*, 3 *LATIN AM. J. INT'L TRADE L.* 74, 95 (2015) (Julie Salisbury trans.) (Mex.) (highlighting the low integration of the Pacific Alliance member's production linkages).

¹⁰² Mauricio Rubí, *TPP, Mercado de US\$150,000 Millones para México: EPN*, *EL ECONOMISTA* (Oct. 7, 2015), <https://www.economista.com.mx/empresas/TPP-mercado-de-US150000-millones-para-Mexico-EPN-20151007-0126.html>.

¹⁰³ PROMÉXICO, *Tratados de Comercio*, <http://www.promexico.gob.mx/es/mx/tratados-comerciales>.

¹⁰⁴ *See* *EL ECONOMISTA*, *Con TPP, México se Fortalece: Peña Nieto* (Oct. 5, 2015, 12:22), <https://www.economista.com.mx/empresas/Con-TPP-Mexico-se-fortalece-Pena-Nieto-20151005-0174.html> (“Enrique Peña Nieto, president of Mexico, welcomed the conclusion of negotiations of the Trans-Pacific Partnership Agreement. . . and said that the agreement will benefit the country in investment opportunities and well-paid employment.”) (translated from Spanish); OFFICE OF THE U.S. TRADE REP., *Trans-Pacific Partnership Ministers' Statement* (Oct. 2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/trans-pacific-partnership-ministers>.

¹⁰⁵ Rubí, *supra* note 102; *Acuerdo Transpacífico abre oferta exportable para México de 150 mil mdd*, NOTIMEX (Nov. 16, 2015, 10:48 AM), <http://ntrzacatecas.com/2015/11/16/acuerdo-transpacifico-abre-oferta-exportable-para-mexico-de-150-mil-mdd/>. This same goal has been espoused as the main drive for other FTAs pursued by Mexico. *See, e.g.*, Matthias Busse & Georg Koopmann, *The EU-Mexico Free Trade Agreement: Incentive, Context and Effects*, 3 *J. WORLD INV. & TRADE* 121–23 (2002) (arguing that the main driving force for Mexico to join the 2000 European Union-Mexico FTA was to diversify its trade balance with the United States, and the main benefit

with the Pacific Rim countries was enormous: On 2015, almost three quarters (72 percent) of the Mexican foreign trade was done with TPP countries; and since 1999, more than half of Mexico's FDI has come from those nations.¹⁰⁶

Although the TPP was very rapidly signed and presented to the Mexican Senate for its ratification, Mexico was invited to participate in the TPP negotiation process in the latest stages: on June 2012.¹⁰⁷ This casts a shadow of doubt on whether Mexico's participation was actually based on the benefits of accessing six new markets and acquiring rule making power by joining TPP, and conversely would suggest that Mexico entered on a give or take buy-in where the United States imposed its regulation on the more general issues,¹⁰⁸ only leaving as relevant to Mexico those

that it accrues out of that FTA is to increase the FDI from that region because it can become a hub between North America and Europe); cf. Anna Turinov, *Free Trade Agreements in the World Trade Organization: The Experience of East Asia and the Japan-Mexico Economic Partnership Agreement*, 25 UCLA PAC. BASIN L.J. 336, 355 (2008) (arguing that the main driving force for Japan's entry into the Japan-Mexico FTA was the loss of trade and investment in North America, particularly on account of the restrictive rules of origin from NAFTA, as well as the advantages gained by the European Union through its FTA with Mexico).

¹⁰⁶ SECRETARÍA DE ECONOMÍA [Mexican Department of Economy], *Concluyen las Negociaciones del TPP*, (Oct. 15, 2015), www.economia.gob.mx/eventos-noticias/informacion-relevante/11354-boletin15-092.

¹⁰⁷ SECRETARÍA DE ECONOMÍA [Mexican Department of Economy], *El Gobierno de la República Presenta el TPP en la Cámara de Senadores para su Discusión y Eventual Aprobación*, (Apr. 27, 2016), <https://www.gob.mx/tratado-de-asociacion-transpacifico/articulos/el-gobierno-de-la-republica-presenta-el-tpp-en-la-camara-de-senadores-para-su-discusion-y-eventual-aprobacion-29808?idiom=es>; SECRETARÍA DE ECONOMÍA [Mexican Department of Economy], *México Suscribe el Tratado de Asociación Transpacífico (TPP)*, (Feb. 3, 2016), <https://www.gob.mx/se/prensa/mexico-suscribe-el-tratado-de-asociacion-transpacifico-tpp>.

¹⁰⁸ See Richard Stewart, *State Regulatory Capacity and Administrative Law and Governance Under Globalization* 8 (N.Y. Univ. MegaReg Series, IILJ Working Paper 1, 2016), http://iilj.org/wp-content/uploads/2016/08/Stewart-State-Regulatory-Capacity-and-Administrative-Law-and-Governance-under-Globalization-IILJ-WP-2016_1-MegaReg.pdf ("In TPP, the US seeks to help strengthen Japan as a partner by stimulating liberalization of its economy and enlisting a variety of the smaller developing and developed countries in the region as a regional counter to China, and by establishing a template for an inclusive Asia-Pacific Free Trade Agreement. TPP enables the US to use access to US and Japanese markets as an incentive for the other TPP parties to adopt its favored regulatory and other measures as part of a single package this is the same "single undertaking" strategy that the US and EU used in the multilateral context in the Uruguay Round Agreements."); see also Eyal Benvenisti, *Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law* 13 (N.Y. Univ. MegaReg Series, IILJ Working Paper 2, 2016), http://iilj.org/wp-content/uploads/2016/08/Benvenisti_IILJ_2016_2-MegaReg.pdf ("[E]mphasis on

pertaining to particular sector-by-sector issues.¹⁰⁹ It also strengthens the justification that TPP was necessary for Mexico to retain its NAFTA privileges, primarily, and to strengthen the ones with Chile, Peru and Japan, secondarily. Additionally, the fact that Mexico has tried to join the Transatlantic Trade and Investment Partnership between the European Union and the United States (TTIP)—justifying its incorporation in the negotiations with the need to harmonize the North-American region’s trade agenda—gives further weight to the primacy of the American market in Mexico’s trade policy;¹¹⁰ particularly because being absent from the TTIP would have had adverse consequences for Mexico’s trade relationship and FDI captation from the United States. For instance, it could make the European FDI currently invested in Mexico—and meant to be introduced into the American market—be repatriated.¹¹¹

Seen in this light, Benvenisti’s account of President Obama’s administration parallel negotiations of TPP and TTIP as a “divide and conquer” technique pursued by the United States would characterize one side of the coin, and the other one would be illustrated by the strategies (which we could call “tag along”) pursued by countries like Mexico that have to reach out to those venues where the United States is participating, lest it may lose

convergence [through regulatory harmonization] will generate a process of emulation among the regulatory bodies in the member states, and hence pressure to conform to a standard set by the more sophisticated or the first mover, who is likely to be of the more powerful state party”); cf. José Álvarez, *Is the Trans-Pacific Partnership Investment Chapter the New “Gold Standard”?* 18–19 (N.Y. Univ. MegaReg Series, IILJ Working Paper 3, 2016), http://iilj.org/wp-content/uploads/2016/08/Alvarez_IILJ_2016_3-MegaReg.pdf [*hereinafter* Álvarez, *Gold Standard*] (“The TPP replicates many of the provisions of the latest generation of US (and to some extent Canadian) investment protection treaties. Its contents reflect that of the 2004 and 2012 US Model BIT texts and treaties concluded under their influence, including the investment chapters of recent US FTAs.”).

¹⁰⁹ For instance, the Mexican Secretary of Economy, Ildefonso Guajardo, has said that one of Mexico’s outputs was to increase from 30% to 45% the regional content requirement for automobiles, one of Mexico’s main exports. Morales, *supra* note 100.

¹¹⁰ Ivette Saldaña, *México Busca Participar en el Acuerdo Comercial EU-Europa*, EL FINANCIERO (Mar. 13, 2013), <http://www.elfinanciero.com.mx/economia/mexico-busca-participar-en-el-acuerdo-comercial-eu-europa.html> (last visited Jan. 11, 2018).

¹¹¹ Osvaldo Rosales & Sebastián Herrerros, *Acuerdos Comerciales Megarregionales: ¿Qué Está en Juego para Latinoamérica?*, ICTSD (Mar. 13, 2014), <http://www.ictsd.org/bridges-news/puentes/news/acuerdos-comerciales-megarregionales-%C2%BFqu%C3%A9-est%C3%A1-en-juego-para-am%C3%A9rica>.

its NAFTA secured place, thereby waiving possible bargaining power in the negotiations to buy-in its participation.¹¹² Another possible explanation for the United States' approach to negotiate TPP unilaterally and without a consensus with Canada and Mexico is that the United States has not seen (not even in the Obama administration) a need for more integration in the region—contrary to the Mexican discourse—and thus of a common stance on trade agenda issues beyond its commitments in NAFTA.¹¹³ Contrary to Mexico's public position of having an integrated North American trade agenda for the mega-regionals, the United States has pursued a unilateral one, in detriment of a deeper integration agenda for the North-American region.¹¹⁴

Be that as it may, the concrete tariff reduction commitments that Mexico undertook must be analyzed by sub-sectors, to determine whether its strategy was on the defensive or offensive side in this regard. For instance, in the sugar sector, with TPP Mexico could have potentially lost share of the American market it currently has because Australia gained market-access in terms of allotment in the United States for its sugar producers, which could reduce American imports of Mexican sugar—the highest of all countries.¹¹⁵ In the meat sector, Mexico's commitments to

¹¹² See Benvenisti, *supra* note 108.

¹¹³ Stephen Zamora, *Rethinking North America: Why NAFTA's Laissez Faire Approach to Integration is Flawed, and What to Do About It*, 56 VILL. L. REV. 631 (2011–2012) [*hereinafter* Zamora, *Rethinking North America*] (concluding that political leaders in the three countries have an aversion to trilateral cooperation, integration and establishment of supranational agencies).

¹¹⁴ *But see* Michael Kergin et al., *Why North America Needs to Pivot North America*, HUFF. POST: THE WORLD POST (Jan. 29, 2016), http://www.huffingtonpost.com/michael-kergin/pivot-north-america_b_9129348.html?utm_hp_ref=world (noting the call by former Ambassadors of Mexico and Canada to the United States, and of the United States to Mexico, for a strengthening of ties in all foreign policy agendas in the region in the midst of the little publicity and fanfare of the 2016 North American meeting of foreign ministers in Quebec); *see also* Anthony Wayne & Sergio Alcocer, *The United States and Mexico: Building and Designing Things*, WILSON CTR. (Feb. 25, 2016), <https://www.wilsoncenter.org/article/the-united-states-and-mexico-building-and-designing-things-together> (highlighting the recent regulatory initiatives undertaken by Mexico and the United States to facilitate trade in goods in the border and travel in both land and airports security checkpoints in the midst of the 2016 High Level Economic Dialogue in Mexico City); *see generally* ROBERT PASTOR, *THE NORTH AMERICAN IDEA: A VISION OF A CONTINENTAL FUTURE* 169 (2011) (advocating for deeper integration at every level: not only economic, but also conceptual).

¹¹⁵ Cullen Hendrix & Barbara Kotschwar, *Agriculture, in* 1 ASSESSING THE TRANS-PACIFIC PARTNERSHIP: MARKET ACCESS AND SECTORAL ISSUES 41, 51 (Peterson Inst. for

eliminate tariffs on beef, sheep and goat meat, as well as on livestock imports, were undertaken without many curdles because the sector is highly competitive worldwide, and thus there has been no political backlash.¹¹⁶ In the automobile sector, Mexico has been very adamant to losing the ground obtained with NAFTA, and hence was very protective with its domestic industry by calling for similar tariffs and rules of origin requirements contained in NAFTA.¹¹⁷ And in the dairy sector, although Mexico's liberalization of its current high tariffs could benefit TPP dairy-exporters such as New Zealand or Australia, this could benefit Mexico as well by diversifying the products it imports, and therefore help lower the trade imbalance it has with the United States in this sector.¹¹⁸

Presidents and Finance Ministers of TPP state parties hailed the signing of the treaty in New Zealand on February 2016. It would have not only become the biggest free trade area in the world but would have also changed the rules of the game by incorporating "tradeoffs between regulatory discretion and the benefits anticipated for trade in goods and global value chains."¹¹⁹ However, as questioned by Professor Álvarez: could it (ever) become the new gold standard?¹²⁰

Int'l Econs. ed., 2016), <https://piie.com/system/files/documents/piieb16-1.pdf> ("As of now, it is unclear whether the increased allotment for Australia will be offset by reduced imports from Mexico or reduced domestic production caps under the US Overall Allotment Quantity, which establishes production limits for US producers.").

¹¹⁶ *Id.* at 45–49 ("Mexico agreed to eliminate its tariffs of 20–25 percent on beef and 10 percent on sheep and goat meat over the next 8–10 years and lift its 10–15 percent tariff on livestock imports immediately upon ratification. While this sounds generous, these reductions reflect the highly competitive nature of Mexican beef exports, which totaled nearly \$1 billion in 2015 and are the only animal protein for which Mexico enjoys a trade surplus with the United States, its largest trading partner.").

¹¹⁷ Sarah Oliver, *Auto Sector Liberalization*, in 1 *ASSESSING THE TRANS-PACIFIC PARTNERSHIP: MARKET ACCESS AND SECTORAL ISSUES*, *supra* note 115, at 60, 65 ("While the TPP does contribute to the liberalization of the auto sector in many TPP member countries, particularly Vietnam and Malaysia, for large auto and auto parts producers (particularly the United States, Mexico, and Canada) much of the agreement is focused on protecting the domestic industry through regional content requirements and long tariff expiration periods.").

¹¹⁸ Hendrix & Kotschwar, *supra* note 115, at 53.

¹¹⁹ Álvarez, *Gold Standard*, *supra* note 108, at 42.

¹²⁰ *Id.*

In the face of the mega-regionals and *minilateral* trade strategies between small group of states,¹²¹ concerns on the negative effects that these regimes may create were raised: whether they will affect the international liberalization agenda undertaken in the WTO,¹²² or even become a substitute for the dispute settlement mechanism of the WTO;¹²³ their effects *vis-à-vis* other regional agreements,¹²⁴ as well as to the pursuit for more universality, inclusiveness and due process in the multilateral trade agendas;¹²⁵ and even the retainer of ISDS, and not the creation of a more institutionalized body like the TTIP European suggestion.¹²⁶

¹²¹ See CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT 16–19 (2014) (contrasting the minilateral dealing of trade matters between a small group of states with the multilateralism of the WTO).

¹²² Gary Hufbauer & Cathleen Cimino-Isaacs, *How will TPP and TTIP Change the WTO System?*, 18 J. INT'L ECON. L. 679 (2015) (arguing that the WTO has been overshadowed by the TPP and the TTIP in trade issues).

¹²³ See Jennifer Hillman, *Dispute Settlement Mechanism*, in 2 ASSESSING THE TRANS-PACIFIC PARTNERSHIP: INNOVATIONS IN TRADING RULES 101, 102 (Jeffrey Schott & Cathleen Cimino-Isaacs eds., Peterson Inst. for Int'l Econ. 2016), <https://piie.com/system/files/documents/piieb16-4.pdf> (“The TPP’s Chapter 28 dispute settlement mechanism differs in two key ways from the WTO’s dispute settlement system. First, it does not contain any appeals mechanism. Second, it does not include the equivalent of the WTO’s Dispute Settlement Body to ride herd over compliance with dispute settlement rulings. The absence of these two mechanisms may make the process faster and less bureaucratic. However, it may also discourage some countries from using the TPP system if their dispute can be resolved at the WTO, where the availability of the appeals process may give them comfort that an erroneous panel decision can be corrected and where they have the support of all WTO members, not just the disputing parties, in urging compliance with adverse rulings.”).

¹²⁴ For instance, in the Americas, it is not entirely certain whether having the TPP will incite other countries to follow its rules or rather depart even more than the current state of sub-regionals in the region. See Antoni Estevadeordal & Ernesto Talvi, *Towards a New Trans-American Partnership*, BROOKINGS INST. (Apr. 25, 2016), <http://www.brookings.edu/research/opinions/2016/04/12-new-trans-american-partnership-estevadeordal-talvi> (advocating for a common FTA in the Americas that would build on the current sub-regional FTAs already in existence and create a single framework for the rules of origin that can harmonize the region’s current disparate ones).

¹²⁵ BRUMMER, *supra* note 121, at 20.

¹²⁶ See Joost Pauwelyn, *Why the US Should Support the EU Proposal for an “Investment Court System,”* LINKEDIN (Nov. 16, 2015), <https://www.linkedin.com/pulse/why-us-should-support-eu-proposal-investment-court-system-pauwelyn?trk=prof-post>; see also Stephan Schill, *The European Commission’s Proposal of an “Investment Court System” for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, 20 ASIL INSIGHTS (Apr. 22, 2016), <https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>; but see Álvarez, *Gold Standard*, *supra* note 108,

As one of the United States' trade agenda goals, it was not unforeseen that the TPP ended up resembling one of its FTAs—the United States-Korea—however, it is significant that key provisions from the European Union-Singapore FTA and the European Union-Canada Comprehensive Economic and Trade Agreement (CETA) were also incorporated, thereby addressing certain concerns in areas that had raised criticisms, like transparency, third party intervention and tobacco litigation.¹²⁷ The TPP investment chapter copies 81% of its text from the United States-Colombia FTA and has a 58% of similarity with NAFTA.¹²⁸ Perhaps the most innovative provision is Article 9.17 on corporate social responsibility, which has no precedent on American practice, but rather is inspired on Canadian FTAs and BITs.¹²⁹ Nevertheless, considering the extensiveness of the investment protection clauses, host state flexibility provisions that give policy space, and a more calibrated ISDS mechanism, the TPP's provisions could be considered the golden standard, as they go beyond the current agreements applicable to TPP parties.¹³⁰

at 38–39 (remaining skeptical that a turn to investor-state judges and courts could counteract many of the perceived deficiencies and criticism of the system); see also Gary Hufbauer, *Investor-State Dispute Settlement*, in 1 ASSESSING THE TRANS-PACIFIC PARTNERSHIP: MARKET ACCESS AND SECTORAL ISSUES, *supra* note 115, at 109, 118 (2016) [*hereinafter* Hufbauer, *ISDS*] (“TPP Chapter 9 makes no provision for appellate review. One reason is that the United States is so happy with its win-loss record in ISDS cases (13-0) that it did not want to risk the possibility of adverse appellate decisions.”); *but cf.* Robert Howse, *International Investment Law and Arbitration: A Conceptual Framework v*, (N.Y. UNIV. MEGAREG SERIES, IILJ Working Paper 1, 2017), https://www.iilj.org/wp-content/uploads/2017/04/Howse_IILJ_2017_1-MegaReg.pdf (concluding that a multilateral investment court is preferable to ISDS when considering the rationales behind the investment regime).

¹²⁷ See Hufbauer, *ISDS*, *supra* note 126, at 110 (analyzing the ample similitudes between TPP and the United States-Korea FTA, as well as the subtle ones with the European Union-Singapore FTA and CETA); *but see* Daniel Ikenson et al., *Should Free Traders Support the Trans-Pacific Partnership? An Assessment of America's Largest Preferential Trade Agreement 37–38*, (CATO INST., Working Paper 39, 2016), https://object.cato.org/sites/cato.org/files/pubs/pdf/working-paper-39_3.pdf (arguing that the exclusion of the tobacco sector from ISDS is a bad precedent because it could lead to further discrimination against other industries in subsequent FTAs and BITs).

¹²⁸ Wolfgang Alschner & Dmitry Skougarevskiy, *The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe*, 17 J. WORLD INV. & TRADE 339, 348 (2016).

¹²⁹ *Id.* at 352.

¹³⁰ *Id.* at 359.

Unfortunately, on January 23, 2017, President Trump withdrew the United States' participation in TPP, thereby eliminating the possibility of watching the birth of the treaty in the manner it was foreseen by his predecessor's administration, and effectively putting a hold on the mega-regionals proposed by the Obama administration.¹³¹ Nevertheless, with the intention of making the TPP possible, the other eleven TPP parties embarked in negotiations towards entering into a Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that is based on the TPP text, and therefore a treaty that can nudge the United States into adhering to it in the future, while at the same time suspending certain of its provisions to make it more appealing to the signatory states.

CPTPP was agreed by the eleven countries in a TPP Ministerial Statement on the sidelines of the 25th APEC Economic Leader's Meeting on November 10, 2017.¹³² It incorporates TPP's text generally and suspends only 20 provisions, and leaves another four to be finalized by the date of signature; none of which affect the tariff reductions already committed to by the countries in TPP.¹³³

Although at the time of writing this piece the CPTPP has not been signed yet, Mexico's participation seems to confirm the goals behind its participation in TPP: not lose NAFTA's benefits—by joining a treaty the United States designed and could later in the future join—and at the same time diversifying its trade basket with markets with which it lacks an FTA or BIT.

In sum, *necessity* led Mexico to participate in TPP, which was facilitated by its policy on free trade and economic liberalization through BITs and FTAs. Contrary to the American rhetoric,

¹³¹ See Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, *supra* note 3.

¹³² *Trans-Pacific Partnership Ministerial Statement*, AUSTRALIAN GOV'T, DEP'T OF FOREIGN AFFAIRS & TRADE, (Nov. 11, 2017), <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/news/Pages/trans-pacific-partnership-ministerial-statement.aspx>; *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)*, N.Z. MINISTRY OF FOREIGN AFFAIRS AND TRADE, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/>.

¹³³ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership: Annex II—List of Suspended Provisions*, N.Z. MINISTRY OF FOREIGN AFFAIRS AND TRADE, https://www.mfat.govt.nz/assets/FTAs-in-negotiations/TPP/ANNEX-II_List-of-suspended-Provisions.pdf.

however, for Mexico, retaining its NAFTA privileges appears to be the goal, which was sweetened in the official discourse with calls for a consensual North-American agenda for the Obama administration's mega-regionals. Even though President Trump repudiated TPP, Mexico has still advocated for its continued existence through CPTPP, thereby betting on a return of the United States to the treaty, and justifying its participation on the need to diversify its trade basket.¹³⁴

D. Trumping NAFTA?

Mexico is going through one of the worst diplomatic crises in its contemporary history with its northern neighbor, probably the worst since the military incursions of President Woodrow Wilson during the Mexican Revolution in 1914 and 1916.¹³⁵ Despite the good neighborliness that both countries have maintained for decades, President Trump seems to have targeted Mexico as the source of many of the problems that afflict the American society.¹³⁶ From the first moments of the presidential campaign, the then candidate for the Republican nomination, Donald J. Trump, depicted Mexican migrants in the United States as criminals, rapists and drug traffickers, thereby proposing to build a wall in the southern border that Mexico would pay to reduce crime and undocumented immigration, and criticized the trade imbalance between the countries as a one sided-deal that's taking jobs out of the United States.¹³⁷ This aversion was canalized, among other targets, towards NAFTA, concretizing in the renegotiation process started by the United States, and which, at the time this article was written, was still ongoing into bumpy negotiation rounds in the three countries that will continue into the year 2018. Perhaps the best example of the complicated road

¹³⁴ Cf. Zachary Torrey, *TPP 2.0: The Deal Without the US*, THE DIPLOMAT (Feb. 3, 2018), <https://thediplomat.com/2018/02/tpp-2-0-the-deal-without-the-us/> (noting that CPTPP remains attractive to the United States and could be rejoined by the country).

¹³⁵ Cf. John Eisenhower, *Intervention! The United States and the Mexican Revolution, 1913-1917*, FOREIGN AFFAIRS (1994), <https://www.foreignaffairs.com/reviews/capsule-review/1994-07-01/intervention-united-states-and-mexican-revolution-1913-1917>.

¹³⁶ Enrique Krauze, *Trump Threatens a Good Neighbor*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/17/opinion/trump-threatens-a-good-neighbor.html>.

¹³⁷ *Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>.

that NAFTA will follow arose two days after the first round of negotiations began in Washington DC, when President Trump rammed against the treaty in his Twitter account: “We are in the NAFTA (worst trade deal ever made) renegotiation process with Mexico & Canada. Both being very difficult, may have to terminate?”¹³⁸

An exit from NAFTA would certainly become a huge blow to the Mexican economy and could entail great costs to its northern neighbors, including the risk of losing 4.9 million jobs in the United States that directly depend on trade with Mexico;¹³⁹ the unraveling of complex cross-border value chains between the three countries, which would directly affect the deepening of manufacturing integration between Mexico and the United States and diminish the productivity and competitiveness of both countries and the North-American region as a whole;¹⁴⁰ or even the halting of regulatory cooperation between authorities of the three countries, including issues not directly contemplated in NAFTA, such as security.¹⁴¹ Simply put, it could become a turning point for Mexico’s trans-sexennial policy of economic liberalization and opening to international scrutiny because NAFTA crystallized the economic reforms adopted by Presidents De la Madrid (1982–1988) and Salinas (1988–1994), and thereafter has become the internationally binding promise of Mexico to foreign investors that its economic model will not be reversed because it is embodied in an international treaty. In other words, the trade policy followed by the current United States’ administration is directly opposed to the development model based on liberalism and free trade that Mexico has followed since it left the ISI model, which could nudge Mexico to seek to apart itself from its American counterpart and the rules the United States has promoted through NAFTA, and thereby affect

¹³⁸ Donald Trump (@realDonaldTrump), TWITTER, (Aug. 27, 2017, 06:51 AM), <https://twitter.com/realdonaldtrump/status/901804388649500672?lang=en>.

¹³⁹ Christopher Wilson, *How Trade with Mexico Impacts Employment in the United States*, in GROWING TOGETHER: ECONOMIC TIES BETWEEN THE UNITED STATES AND MEXICO 1 (Wilson Ctr., 2016), https://www.wilsoncenter.org/sites/default/files/growing_together_how_trade_with_mexico_impacts_employment_in_the_united_states_2.pdf.

¹⁴⁰ Wilson, *Manufacturing*, *supra* note 71.

¹⁴¹ Hamre, *supra* note 73, at 141.

the implementation of Mexico's recently-enacted liberalizing, structural reforms, as well as unraveling the economic and regulatory integration achieved between them.

The renegotiation is still ongoing, and although threats for its termination have arisen, the three countries' objectives do not seem to be too divergent, except for a few of them. In this regard, on July 17th, 2017, the Trump Administration advanced its negotiation objectives, among which it presented the most polemic one: "[i]mprove the U.S. trade balance and reduce the trade deficit with the NAFTA countries."¹⁴² This has spurred alarms and debate among the three countries and most certainly will keep on troubling negotiators. On the one hand, for Canadians, weighing NAFTA's benefits on trade deficits would make the treaty seem a bad deal since the United States has had surplus in their bilateral relationship.¹⁴³ On the other hand, for Mexicans, a better approach towards reducing the trade deficit between the United States and Mexico could be to use the NAFTA renegotiation towards strengthening the latter's economy, thereby boosting its imports from the United States.¹⁴⁴ In sum, a better way to modernize NAFTA and achieve a *win-win-win* outcome is if the Trump Presidency replaces its "America First" agenda in favor of one that benefits the region as a whole, in order to increase competitiveness in the three countries.¹⁴⁵

Regarding ISDS and dispute settlement mechanisms, the Trump Administration advanced as a negotiation objective the elimination of Chapter 19's dispute settlement mechanism¹⁴⁶—a judicial review of whether a country implemented its own laws correctly, particularly on antidumping and countervailing duties—which can be forecasted to become a very heated topic because it is in both Mexico's and Canada's best interest to retain

¹⁴² See OFFICE OF THE U.S. TRADE REP., SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION, *supra* note 5, at 4.

¹⁴³ Wendy Dobson et al., *NAFTA Modernization: A Canadian Perspective*, in A PATH FORWARD FOR NAFTA, *supra* note 4, at 36, 38.

¹⁴⁴ Fred Bergsten, *The US Agenda: Trade Balances and the NAFTA Renegotiation*, in A PATH FORWARD FOR NAFTA, *supra* note 4, at 13, 22.

¹⁴⁵ Fred Bergsten & Monica de Bolle, *Overview*, in A PATH FORWARD FOR NAFTA, *supra* note 4, at 4.

¹⁴⁶ OFFICE OF THE U.S. TRADE REP., SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION, *supra* note 5, at 14.

the mechanism, as a favorable resolution through that mechanism grants them the possibility of accessing a retroactive refund of wrongly imposed antidumping and countervailing duties that is not available under the other existing international mechanism—the one under the aegis of the WTO.¹⁴⁷ Conversely, for the environment and labor provisions, the United States proposed subjecting them to the same dispute settlement mechanism that applies to other obligations of the agreement, although it did not specify which mechanism.¹⁴⁸ Finally, it advanced a cryptic position as per ISDS:

Secure for U.S. investors in the NAFTA countries important rights consistent with U.S. legal principles and practice, while ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors.¹⁴⁹

This was coupled with a general provision in favor of transparency for the different dispute settlement procedures in the treaty:

Establish a dispute settlement process that is transparent by:

- Requiring that parties' submissions be made publicly available;
- Requiring that hearings be open to the public;
- Requiring that final determinations by a panel be made publicly available; and
- Ensuring that non-governmental entities have the right to request making written submissions to a panel.¹⁵⁰

¹⁴⁷ Gary Hufbauer & Euijin Jung, *NAFTA Renegotiation: US Offensive and Defensive Interests vis-à-vis Canada*, in *A PATH FORWARD FOR NAFTA*, *supra* note 4, at 50, 54 [*hereinafter* Hufbauer & Jung, *US Interests vis-à-vis Canada*].

¹⁴⁸ See OFFICE OF THE U.S. TRADE REP., SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION, *supra* note 5, at 12–13. *But see* Ikenson et al., *supra* note 127, at 61 (criticizing this enforceability of the labor and environmental provisions in the TPP context because it could lead to disguised protectionism).

¹⁴⁹ OFFICE OF THE U.S. TRADE REP., SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION, *supra* note 5, at 9.

¹⁵⁰ *Id.* at 17.

This unclear position will unfold in the following months and rounds of negotiations, although some have spoken about a proposal drafted by American trade negotiators that would make ISDS voluntary by including an opt-in clause for each country to decide whether to join it or not.¹⁵¹ If true, this would run counter to the American continued policy of defending foreign capital since the Jay Treaty up to the Obama administration's support of ISDS,¹⁵² and would potentially subject investors to host state's politics, thereby running counter to the political economy that both the United States and Canada had for devising NAFTA's Chapter XI.¹⁵³ Conversely, for Mexico, as previously explained, NAFTA permitted locking-in the new economic model of economic liberalization and free trade it adopted since the mid-1980s into an international instrument, thereby preventing subsequent administrations from derailing the liberalization agenda.¹⁵⁴ Consequently, for Mexico, the opt-in model would not be critical to its participation in the treaty; its sole interest relies in keeping NAFTA *alive*, as Mexico's political objective of locking-in its macroeconomic policy can be evaluated as a success if it maintains its status as a NAFTA party and the continued policy of abiding and fostering its implementation, no matter the Mexican political party in power.¹⁵⁵ *Mutatis mutandis*, Mexico's main goal in the renegotiation of NAFTA remains the same as it was when it negotiated NAFTA in the 1990s: reaching an agreement that supports the free flow of trade and investment with stable and clear rules that generate certainty for investors and traders.¹⁵⁶

Additionally, Mexico may benefit from the new NAFTA because it could boost the recent "structural reforms" that Mexico

¹⁵¹ See, e.g., Simon Lester, *ISDS in the New Nafta*, INT'L ECON. L. & POL'Y BLOG, (Aug. 20, 2017, 4:35 AM), <http://worldtradelaw.typepad.com/ielpblog/2017/08/isds-in-the-new-nafta.html>.

¹⁵² José Álvarez, *Alexander Hamilton's Defense of Foreign Capital*, N.Y. UNIV. MEGAREG FORUM 8 (Jan. 11, 2017), http://www.iilj.org/wp-content/uploads/2017/01/Alvarez_IILJ-MegaRegForumPaper_2017-1.pdf.

¹⁵³ Puig, *Mexican Experience in the NAFTA Context*, *supra* note 52, at 87.

¹⁵⁴ Puig, *Case of Mexico*, *supra* note 53, at 365; see also Álvarez, *NAFTA's Investment Chapter*, *supra* note 10, at 274.

¹⁵⁵ See Moreno-Brid, *supra* note 56, at 1018; see also Pastor & Wise, *Mexico's Free Trade Policy*, *supra* note 46, at 484.

¹⁵⁶ Ortiz-Mena, *supra* note 5, at 27.

undertook under the current Peña administration (2012–2018), such as education, labor, telecommunications, and finance, but most importantly for the energy one.¹⁵⁷ This was stated in the objectives advanced by the Mexican Government, which went even further and included novel issues such as cross-border data flow and digital commerce, which could boost the Mexican economy.¹⁵⁸ In other words, the Mexican Government wants to do with the new NAFTA the same thing it did with TPP and the 1990s NAFTA: capture its recent domestic structural reforms in an international treaty so that other administrations cannot change them, thus improving the country's trans-sexennial credibility with foreign investors.

Be that as it may, it is important to also consider the American government's pro-transparency position on NAFTA's dispute settlement mechanisms, which were elaborated more thoroughly in the TPP, and which in turn took inspiration for many of its provisions on transparency and third-party intervention from CETA.¹⁵⁹ The provisions of CETA on this matter will surely come to the fore in the renegotiation rounds because the Canadian government announced as one of its objectives to make NAFTA more "progressive" in CETA terms "by reforming the [ISDS] process, to ensure that governments have an unassailable right to regulate in the public interest."¹⁶⁰

The new-NAFTA could benefit from CETA's provisions on ISDS, such as the creation of an appellate body, which

¹⁵⁷ Luz María de la Mora, *The NAFTA Negotiations: A Mexican Perspective*, WILSON CTR. 7 (Sept. 2017), https://www.wilsoncenter.org/sites/default/files/the_nafta_negotiations_a_mexican_perspective.pdf.

¹⁵⁸ SECRETARÍA DE ECONOMÍA [Mexican Department of Economy], *Prioridades de México en las Negociaciones para la Modernización del Tratado de Libre Comercio de América del Norte* (Aug. 2, 2017), <https://www.gob.mx/se/articulos/prioridades-de-mexico-en-las-negociaciones-para-la-modernizacion-del-tratado-de-libre-comercio-de-america-del-norte?idiom=es> [*hereinafter* SECRETARÍA DE ECONOMÍA, *Prioridades de México*].

¹⁵⁹ Cf. Hufbauer, *ISDS*, *supra* note 126, at 110 (analyzing the ample similitudes between TPP and the United States-Korea FTA, as well as the subtle ones with the European Union-Singapore FTA and CETA).

¹⁶⁰ *Address by Foreign Affairs Minister on the Modernization of the North American Free Trade Agreement (NAFTA)*, GLOBAL AFFAIRS CANADA (Aug. 14, 2017), https://www.canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html.

purportedly would address criticisms to ISDS that include the panelists' lack of independence and inconsistency in panels' decisions.¹⁶¹ Likewise, it's probable that both the United States and Canada will seek to augment NAFTA's rules on State-Owned Enterprises, thereby embracing TPP's Chapter 17 on the matter in the new NAFTA.¹⁶² Overall, it is not too far-fetched to foresee the NAFTA's renegotiation text as similarly written to the TPP, considering the latter was the first time that the three countries attempted to renegotiate NAFTA.¹⁶³ Nevertheless, considering the difference in tradeoffs between plurilateral and bilateral agreements, it's probable that the TPP will only be considered as a template for the NAFTA renegotiation; neither a floor nor a ceiling.¹⁶⁴

For its part, as one of its negotiation objectives, Mexico advanced the modernization of all dispute-settlement mechanisms in the treaty to make them more agile, transparent and effective, with the participation of third parties.¹⁶⁵ Similarly to the American proposal, Mexico even suggested a strengthening of the compliance of international labor obligations, anti-corruption and cooperation in environmental topics.¹⁶⁶ Although it advocates for pro-transparency in the *discourse*, and therefore could be considered that Mexico's objective in this regard aligns with those of Canada and the United States, in *reality* Mexico's position towards transparency and accountability in ISDS has leaned towards the other spectrum: secrecy and non-arbitrability for certain sectors.

¹⁶¹ Dobson et al., *supra* note 143, at 43; *see generally* Schott & Cimino-Isaacs, *supra* note 4, at 76 (arguing in favor of considering provisions from modern United States' FTAs, CETA and TPP to update NAFTA's Chapter XI; particularly those that purport to better safeguard the government's right to regulate in the public interest, others that try to preclude bias from panel selection, and those that narrow the scope of frivolous cases).

¹⁶² Hufbauer & Jung, *US Interests vis-à-vis Canada*, *supra* note 147, at 50, 65.

¹⁶³ Bergsten & de Bolle, *supra* note 145, at 9.

¹⁶⁴ Ortiz-Mena, *supra* note 5, at 30. There are also policy reasons for this approach, particularly the fact that TPP is more liberalizing than the status quo, and that both the investment and dispute settlement chapters would lean more towards expanding economic freedoms and free trade than to protectionism, and that the trade liberalizing nature of TPP is magnified by its openness to accession by new members. All those reasons would support the use of TPP's template over other existing treaties. Ikenson et al., *supra* note 127, at 76.

¹⁶⁵ SECRETARÍA DE ECONOMÍA, *Prioridades de México*, *supra* note 158.

¹⁶⁶ *Id.*

III. ON-GOING LIBERALIZATION PROJECT?

Transformations from the *closed* to the *opened* Mexico can be observed from the change of ISI to economic liberalization and international supervision openness. According to this account, Mexico would have departed from ISI towards a liberalization agenda that pervades different presidential terms. This seems to be suggested, at least as contained in the *discourse* of the law in the books, by the NDP's of all Mexican presidents since Salinas (1988–1994), which indicate a departure from ISI and an encouragement of trade liberalization and increase of FDI through BITs and FTAs since the mid-1980s.¹⁶⁷ This discourse is straightforwardly summarized by current President Peña NDP's preamble: between 1985 and 1994 Mexico changed its economic policy from ISI to a privatization and de-regulation of the economy, as well as trade liberalization, which began with Mexico's accession to GATT and was strengthened with NAFTA; the departure from ISI to the new model can be explained *inter alia* on account of the global economic conditions that made the internal market-oriented model obsolete.¹⁶⁸

Although persuasive in the *discourse*, the state-ownership and external supervision aversion of the *closed* Mexico has been particularly difficult to eradicate in two areas in *reality*: the second-guessing of international arbitrators in the upstream hydrocarbons sector, and the lack of transparency and use of domestic nullification procedures in the ISDS proceedings.

¹⁶⁷ See Decreto por el que se Aprueba el Plan Nacional de Desarrollo 1989–1994 [National Development Plan 1989–1994], Diario Oficial de la Federación [DOF] 31-05-1989 (Mex.); Decreto por el que se Aprueba el Plan Nacional de Desarrollo 1995–2000 [National Development Plan 1995–2000], Diario Oficial de la Federación [DOF] 31-05-1995 (Mex.); Decreto por el que se Aprueba el Plan Nacional de Desarrollo 2001–2006 [National Development Plan 2001–2006], Diario Oficial de la Federación [DOF] 30-05-2001 (Mex.); Decreto por el que se Aprueba el Plan Nacional de Desarrollo 2007–2012 [National Development Plan 2007–2012], Diario Oficial de la Federación [DOF] 31-05-2007 (Mex.); Decreto por el que se Aprueba el Plan Nacional de Desarrollo 2013–2018, *supra* note 90.

¹⁶⁸ Decreto por el que se aprueba el Plan Nacional de Desarrollo 2013–2018, *supra* note 90.

A. *Upstream Hydrocarbons Sector International Non-Arbitrability*

The Mexican oil industry has had a complicated relationship with FDI. Since the enactment of the current 1917 Mexican Constitution, hydrocarbon resources were deemed as national property,¹⁶⁹ and on March 1938, foreign and private investment in the sector were terminated when then President Lázaro Cárdenas (1934–1940) expropriated the oil industry.¹⁷⁰ In that same year, Mexico saw the creation of the state-owned company *Petróleos Mexicanos* (Pemex).¹⁷¹ Thereafter oil became the bedrock of Mexican nationalism and the bulwark of the *closed* Mexico; as a result, Pemex retained a monopoly over Mexico's oil and natural gas sectors for over 75 years.¹⁷² Nevertheless, in 2013, Mexico put an end to Pemex's monopoly in the hydrocarbons' sector by liberalizing it to attract greater FDI. Mexico opened the energy sector to private enterprises to counteract the decline in the hydrocarbon's production and boost investment and growth in the energy industry to meet the rising energy demand.¹⁷³

President Peña's energy reform required constitutional and legislative amendments, which were ensured through a unified

¹⁶⁹ Constitución Política de los Estados Unidos Mexicanos, *supra* note 19.

¹⁷⁰ Decreto que Expropia a Favor del Patrimonio de la Nación, los Bienes Muebles e Inmuebles Pertenecientes a las Compañías Petroleras que se Negaron a Acatar el Laudo de 18 de diciembre de 1937 del Grupo Número 7 de la Junta Federal de Conciliación y Arbitraje [Petroleum Industry Nationalization Presidential Decree], art. 1, Diario Oficial de la Federación [DOF] 19-03-1938 (Mex.).

¹⁷¹ Decreto que Crea la Institución "Petróleos Mexicanos" [Decree Whereby Pemex is Created], art. 1, Diario Oficial de la Federación [DOF] 20-07-1938 (Mex.).

¹⁷² Richard H.K. Vietor & Haviland Sheldahl-Thomason, *Mexico's Energy Reform*, 717-027 HARV. BUS. SCHOOL 1, (Jan. 23, 2017).

¹⁷³ Alex Wood, *A Look at the Future of the Mexican Petroleum Industry After Energy Reform*, WILSON CENTER, (Oct. 2016), https://www.wilsoncenter.org/sites/default/files/a_look_at_the_mexican_petroleum_industry_after_energy_reform.pdf; see also Enoc García, *The Renewed Constitutional Regulation of National Hydrocarbons*, 33 REVISTA MEXICANA DE DERECHO CONSTITUCIONAL [Mexican Journal of Constitutional Law] 53, 56–62 (2015) (arguing that the main driving force behind the Energy Reform was to reverse the declining rate of production of hydrocarbons, as can be fathomed out of the NDP 2013–2018, objective 4.6, strategy 4.6.1, which preceded the energy reform and allegedly guided its design and implementation).

Congress on his agenda.¹⁷⁴ The reform was enacted during one of the most active legislative periods in the Congress's history,¹⁷⁵ one that oversaw several constitutional amendments in other sectors, such as finance and education, and which encompass the so called "structural reforms" referred to above.¹⁷⁶ The energy reform's constitutional amendment does not privatize Mexico's hydrocarbons sector: it only opens all of its components to private investment—upstream, midstream and downstream.¹⁷⁷ However, Pemex retained its status as a state-owned company at the center of the industry, particularly in the upstream sector, where it holds the great majority of existing hydrocarbon fields in production, as well as trained human resources, and a long-standing network of service providers.¹⁷⁸

Until the 2013 energy reform, the only form of private participation in the upstream hydrocarbons' sector was through "incentive contracts" with Pemex—wherein all oil and gas products belonged to Pemex—which were created after legislation

¹⁷⁴ Gustavo López, *La Política de la Reforma Energética*, FORBES (Oct. 10, 2013), www.forbes.com.mx/la-politica-de-la-reforma-energetica/.

¹⁷⁵ See, e.g., Rivera, *supra* note 44, at 7 (arguing that between 2012 and 2015, the rate of constitutional amendments was the highest it has ever been with 6.6 amendment decrees per year); see also Carlos Elizondo, *A New Constitution in 2013? The Economic Chapter*, 31 REVISTA MEXICANA DE DERECHO CONSTITUCIONAL [Mexican Journal of Constitutional Law] 29, 37 (2014) (arguing that the constitutional amendments enacted during President Peña's administration are the ones that have changed the most the economic chapter of the Mexican Constitution, i.e. the relationship between the state and private property).

¹⁷⁶ See PRESIDENCIA DE LA REPÚBLICA, *supra* note 78.

¹⁷⁷ Elisabeth Eljuri & Daniel Johnston, *Mexico's Energy Sector Reform*, 7 J. WORLD ENERGY L. & BUS. 168 (2014); see also Elisabeth Eljuri & Carlos Garibaldi, *Latin America: Despite Volatility and Mood Swings, a Surge in Licensing and Acquisition Activity*, 5 J. WORLD ENERGY L. & BUS. 148, 159–60 (2012) (concluding that, as of 2012, any change in the oil and gas sector required constitutional change, particularly for the participation of Exploration and Production companies other than Pemex). The 2013 energy reform preserves the two-sided minerals regime that existed in the country: on the one hand, the hydrocarbons' legal framework that does not grant property of the minerals to the contractor, thereby requiring a set of legal contingencies for the contractor to meet in order to be paid with the monetary or production compensation that he is entitled, and on the other hand, the concession-granting legal framework that exists for all other minerals, wherein the concessionary has property rights to the minerals. George Baker, *Mexico's Upstream Business Model*, 8 MEX. L. REV. 121, 131–35 (2015).

¹⁷⁸ Eduardo Gonzalez-Canales, *Mexican Energy Law: Industry Renaissance or Chronicle of a Death Foretold*, 8 J. WORLD ENERGY L. & BUS. 45, 53–54 (2015).

was amended by Congress on 2008.¹⁷⁹ Prior to that legislative reform, the sector was modified only twice: in 1995 when the midstream sector was opened to private capital, and a year later when the downstream sector (petrochemical industry) was opened as well.¹⁸⁰ In both instances FDI was excluded from participating in the sectors, and was liberalized along with the upstream sector until the 2013 energy reform.¹⁸¹

In the upstream business, the first bid of oil and gas exploration and production areas took place on July 15th, 2015.¹⁸² Although it was a huge success in terms of transparency of the bidding process,¹⁸³ the exclusion from international arbitration of the administrative rescission and acts of authority legal figures has been raised as a key industry concern.¹⁸⁴ Although subsequent bidding processes have ensued, this worry has not been addressed entirely.

Mexican Secretary of Economy, Ildefonso Guajardo, has declared that Mexico's 2013 energy reform is "captured" in the TPP, thereby protecting it from possible repeal by subsequent administrations, lest the latter want to internalize the cost of defecting from an international treaty.¹⁸⁵ The Secretary went even further and compared TPP's energy liberalization lock-in with NAFTA:

In NAFTA, oil was not liberalized. But they [NAFTA negotiators] put a paragraph saying that if Mexico unilaterally opens its energy sector, the

¹⁷⁹ Alejandro López-Velarde, *The New Foreign Participation Rules in Each Sector of the Mexican Oil and Gas Industry: Are the Modifications Enough for Foreign Capitals?*, 3 J. WORLD ENERGY L. & BUS. 71, 82–83 (2010).

¹⁸⁰ Cf. *id.* at 90–91.

¹⁸¹ See Decreto por el que se Expide la Ley de Hidrocarburos, *supra* note 79.

¹⁸² Clare R. Seelke, et. al., CONG. RESEARCH SERV., R43313, *Mexico's Oil and Gas Sector: Background, Reform Efforts, and Implications for the United States* 7 (2015).

¹⁸³ See, e.g., Daniel Johnston, *Changing Fiscal Landscape 2008–2017*, 10 J. WORLD ENERGY L. & BUS. 415, 431–32 (2017) (praising the transparent and efficient process of the first round of contracts that was awarded after the 2013 reform, as well as its outcome: the number of licenses to be awarded and financial commitments surpassed expectations from the industry and government); but see Michael Ventocilla, *Unlocking Mexico's Shale Gas Reserves: Folly or Fortune?*, 9 J. WORLD ENERGY L. & BUS. 74, 80 (2016) (highlighting that, unfortunately, the reform coincided with the plummeting of oil prices that began in 2014, which has affected its implementation).

¹⁸⁴ See, e.g., Elisabeth Eljuri & Daniel Johnston, *Mexico's Very First Round*, 8 J. WORLD ENERGY L. & BUS. 391, 392 (2015).

¹⁸⁵ Morales, *supra* note 100.

liberalization would become automatically captured in the treaty. So what we did in the TPP was nothing other than expand and amplify that [lock-in] clause... but at the same time I protect myself [as a country] from what I'm obliged to do [by reflecting the national legislation on the matter in the TPP and its reservations], so that the latter [domestic legislation] may not become an origin of disputes with my commercial partners.¹⁸⁶

During the 1990s NAFTA negotiations, since the Mexican Constitution foresaw no possibility of participation of FDI in the oil industry, Mexico excluded that sector from NAFTA's protection in Annex III and 602.3 of the treaty, thereby continuing the monopoly of its state-owned companies without any change—Pemex, for the oil and gas industry, and *Comisión Federal de Electricidad*, for the power sector.¹⁸⁷ However, in the annexed note 40 of the treaty, Mexico agreed that whenever it permitted an activity to be open to FDI, Chapter XI would apply to it.¹⁸⁸ Consequently, with the ratchet clause, today an investor that has a contract with the government in the oil sector is protected by NAFTA.¹⁸⁹

¹⁸⁶ *Id.*

¹⁸⁷ See Gary Hufbauer & Euijin Jung, *NAFTA and Energy*, in *A PATH FORWARD FOR NAFTA*, *supra* note 4, at 91, 94 (2017) [*hereinafter* Hufbauer & Jung, *NAFTA and Energy*]; see generally Murphy, *supra* note 26, at 77 (contending that if measured by the number of reservations to NAFTA, the difficulty of Mexico to adhere to NAFTA's obligations was evidently far greater than that of the United States and Canada).

¹⁸⁸ See Hufbauer & Jung, *NAFTA and Energy*, *supra* note 187, at 95.

¹⁸⁹ There is a debate on the extent in which Mexico's reservations still apply. Compare Emilio Arteaga, *The Energy Overhaul's Effects on Mexico's NAFTA Reservations Concerning Investments in the Oil Sector*, 4 *LATIN AM. J. INT'L TRADE L.* 27, 56 (2016) (Mex.) (arguing that some of Mexico's reservations are still valid, particularly for the midstream and upstream hydrocarbons sectors: "In sum, Mexico's NAFTA reservations in its schedule to Annex III related to the oil sector are still producing legal effects. Therefore, Mexico may continue to accord less favorable treatment to foreign investors than that accorded to PEMEX in the acquisition and establishment of investments in upstream and midstream activities listed in its schedule to Annex III. Mexico may also continue to impose the three prohibited performance requirements . . . but only to the upstream and midstream activities that were previously reserved to the State. Finally, Mexico's right to restrict foreign investment is limited to the actual level of inconformity established in the Hydrocarbon Act, FIA [Foreign Investment Act], and its domestic legal framework. Hence, Mexico cannot increase or restore the non-conformity level pursuant article 1108(1)(c) NAFTA."), with Bradley Condon, *Mexican Energy Reform and NAFTA Chapter 11: Articles 20 and 21 of the Hydrocarbons Law and Access to Investment Arbitration*, 9 *J. WORLD*

Although the recent 2013 energy reform has liberalized the oil and gas markets in Mexico, thereby seeming to open the door to possible ISDS litigations in the future, the country's TPP Annex 9-L reservations tried to prevent this outcome by not consenting to ISDS in the administrative contracts granted in the upstream hydrocarbons sector—which is the only way FDI can invest in the business of petroleum exploration and production—and therefore the use of national law as the governing law for arbitration in the event of non-compliance was safeguarded.¹⁹⁰ Consequently, allegations of breaches of those governmental contracts with the oil industry would not apply international legal standards, but rather domestic tribunals would resolve the disputes according to Mexican federal law.¹⁹¹ This is in accordance with domestic legislation on hydrocarbons, which even goes one step further by deeming the unilateral administrative terminations of hydrocarbons' exploration and production contracts as non-arbitral.¹⁹² And it's also consistent with similar legislation on commercial arbitration: on 2009, amendments to the Public Sector Procurement, Leasing and Services Act opened the possibility of submitting legal disputes where the Federal Government was a party to commercial arbitration; however, thereafter the administrative rescission (or early termination of governmental contracts) was excluded from

ENERGY L. & BUS. 203, 218 (2016) (arguing that the effects of the reservations are limited: "Mexican NAFTA reservations exclude some Mexican regulation from the scope of application of specific obligations in Chapter 11, such as those regarding performance requirements, most favoured-nation treatment and national treatment. However, Mexico's legislative restrictions on foreign investors' right to pursue investor-state arbitration are not covered by its NAFTA reservations. Those restrictions are inconsistent with NAFTA Chapter 11 and Mexico cannot invoke its domestic laws to justify a violation of its international obligations. Moreover, Mexico's reservations do not prevent the application of the key obligations regarding fair and equitable treatment in Article 1105 and expropriation in Article 1110.").

¹⁹⁰ See OFFICE OF THE U.S. TRADE REP., *Text of the Trans-Pacific Partnership*, Chapter 9, Annex 9-L, section C, <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf>.

¹⁹¹ See generally Paloma Gómez et al., *Resolution of Disputes in the Mexican Hydrocarbons Sector Following Energy Reform*, 44 INT'L L. NEWS 10 (2015).

¹⁹² Ley de Hidrocarburos [Hydrocarbons Act], arts. 20–21, Diario Oficial de la Federación [DOF] 11-08-2014, última reforma 15-11-2016 (Mex.); see also Elisabeth Eljuri & Clovis Trevino, *Energy Investment Disputes in Latin America: The Pursuit of Stability*, 33 BERKELEY J. INT'L L. 306, 332 (2015).

arbitration.¹⁹³ Nevertheless, this TPP reservation does not prevent the investor from subsequently recurring to ISDS because of a mistreatment in the domestic proceedings, or directly (if it's an American or Canadian investor) through NAFTA.¹⁹⁴

Recently, CPTPP member states agreed to suspend the provisions of TPP's Annex 9-L, which includes Mexico's limitations to its consent to ISDS.¹⁹⁵ This means that if CPTPP enters into force, any national investor from a CPTPP member state could sue Mexico through an ISDS proceeding for violations to that treaty's investment provisions in the hydrocarbons sector, thereby effectively precluding Mexico's reservation in TPP from entering into force—at least until the United States decides to adhere to TPP and the other states parties agree to apply fully the suspended provisions of TPP. Therefore, a Canadian national could sue Mexico either based on NAFTA or on CPTPP. This outcome seems like a win for the *open* Mexico, albeit a transitory one until TPP would enter fully into force with the original 12 countries and the limitations to Mexico's consent to ISDS kick-in (again).

In the NAFTA renegotiation context, one of the most

¹⁹³ Von Wobeser, *supra* note 74, at 363 (arguing that even before that time Pemex—along with *Comisión Federal de Electricidad*—already had the possibility of subjecting its disputes to commercial arbitration).

¹⁹⁴ See Condon, *supra* note 189, at 212 (concluding that Articles 20 and 21 of the Mexican Hydrocarbons Act, which deems as non-arbitral the administrative rescission of contracts, would not be able to exclude the ISDS procedure of NAFTA's Chapter XI). Article 9.5, §3 of TPP limits the use of the most-favored-nation treatment, so that it cannot be interpreted as encompassing dispute settlement provisions from other treaties. Accordingly, investors from TPP state parties other than the United States and Canada cannot claim the protection of NAFTA's Chapter XI to investments in the oil sector in Mexico. This coexistence between TPP (if it ever enters into force in its terms or through the CPTPP) and other FTAs and BITs such as NAFTA may create, in the long run, conflicts of norms and interpretations between them. See Nahila Cortes, *The TPP as a Template to Liberalize Investments: Normative Glory or Chaos?*, KLUWER ARB. BLOG, (June 18, 2016), <http://kluwerarbitrationblog.com/2016/06/18/tpp-template-liberalize-investments-normative-glory-chaos/>; cf. David Gantz, *The Spaghetti Bowl Revisited: Coexistence of Regional Trade Agreements such as NAFTA with the Trans-Pacific Partnership*, 48 GEO. J. INT'L L. 557, 569 (2017) (suggesting that most investors would prefer the earlier treaty in lieu of TPP because, generally speaking, preceding treaties are more investor-friendly than TPP); see generally, Jarrod Hepburn, *Applicable Law in TPP Investment Disputes*, 17 MELB. J. INT'L L. 1, 14–15 (2016) (analyzing the conflicts of norms' interpretations that can result in an ISDS litigation where TPP and earlier FTAs and BITs can be deemed as the applicable law).

¹⁹⁵ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership: Annex II—List of Suspended Provisions*, *supra* note 133.

important sectors that could benefit from more cooperation and integration deriving from new norms in the NAFTA renegotiation is the Mexican energy industry. Canada and Mexico are already the first and second largest trading partners of the United States in energy products; with Canada, the United States is a net importer, whereas with Mexico it is a net exporter.¹⁹⁶ The new NAFTA could further integrate the North American energy grid, on the one hand, and lock-in Mexico's energy reform, on the other hand; but to do so, Mexico should revise how to fully adhere to NAFTA's current investment obligations for the energy sector:¹⁹⁷

The new NAFTA should revise "carve-out" clauses for Mexico, to promote private investment in the Mexican energy sector and foster cross-border integration. The new NAFTA should create a strong presumption in favor of cross-border electrical transmission lines and fossil fuel pipelines. It should set forth norms for state-owned enterprises, drawing on Chapter 17 in the Trans-Pacific Partnership agreement. It should mandate cooperation between the relevant federal, state, and provincial regulatory authorities.¹⁹⁸

Whether the new NAFTA will contain a non-arbitrability clause precluding ISDS in the hydrocarbons sector, such as occurred in TPP, is still unknown. Nevertheless, NAFTA negotiators should tread gingerly on this issue, considering the historical importance of this sector in the Mexican economy and history, and the possibility of a winding down of the energy reform due to a politicization of the issue, a resurgence of nationalism or anti-American sentiment in the 2018 Mexican presidential

¹⁹⁶ Hufbauer & Jung, *NAFTA and Energy*, *supra* note 187, at 91.

¹⁹⁷ See Schott & Cimino-Isaacs, *supra* note 4, at 82–83. Mexico and the United States are already parties to the Agreement concerning transboundary hydrocarbon reservoirs in the Gulf of Mexico signed on February 20, 2012. However, its scope is limited, as it only covers offshore activities in the Gulf of Mexico, excluding the Pacific Ocean and onshore activities, and its provisions do not safeguard investor's rights as NAFTA does. José Luis Herrera Vaca, *The New Legal Framework for Oil and Gas Activities Near the Maritime Boundaries Between Mexico and the U.S.: Comments on the Agreement Between the United Mexican States and the United States of America Concerning Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico*, 5 J. WORLD ENERGY L. & BUS. 235, 238 (2012).

¹⁹⁸ Hufbauer & Jung, *NAFTA and Energy*, *supra* note 187, at 96.

election.¹⁹⁹

In sum, as occurred during the 1990s negotiation of NAFTA, the animus of Mexico's 2013 unilateral economic liberalization in the oil sector was high on the part of the *open* Mexico, which afterwards locked-in its commitments through an international instrument like the TPP. But the pulling force of the *closed* Mexico made those agreements extremely limited, particularly as they pertained to the second-guessing by international tribunals. Nevertheless, as the open avenue for NAFTA ISDS litigation and the CPTPP suspension of TPP's Annex 9-L both attest, there is so much that a state can do to insulate itself from prior pro-investor commitments.

B. Secrecy in ISDS

1. Transparency in ISDS

The United States and Canada appear to be keen on the transparency and access to investment arbitration information issues, but Mexico has been wary in addressing them: After the *Metalclad* award, Mexico vehemently opposed to the transparency and publicity of the proceedings and documentation, but eventually gave in to pressures from public interest groups and joined the United States and Canada in issuing the interpretative note of the FTC that addressed this issue.²⁰⁰ Afterwards, when calls arose for the participation of third parties in the arbitral proceedings, and the United States and Canada seemed willing to concede it, Mexico argued that its civil law tradition ran contrary to the *amicus curiae* legal institution, thereby resisting more openness in the procedures, but ultimately the Arbitral Tribunals in *UPS* and *Methanex* permitted *amicus* briefs in those cases.²⁰¹

Mexico has not been an advocate of transparency, not even in international conventions. In this regard, although it joined Canada and the United States in the FTC's interpretations referred to above, Mexico has not signed the Mauritius Convention, although Canada and the United States have done

¹⁹⁹ *Cf. id.* at 91.

²⁰⁰ Puig, *Mexican Experience in the NAFTA Context*, *supra* note 52, at 102.

²⁰¹ *Id.* at 103.

so.²⁰²

Nevertheless, in the recent *Telefónica* arbitration under the Mexico-Spain 2005 BIT, Mexico's conduct may shine a new more open light on transparency. Whereas the investor sought for confidentiality in the proceedings, Mexico asked the Tribunal for full transparency "à-la-NAFTA . . . that is, to open and make public all minutes briefs, exhibits, and documents entering the record."²⁰³ Mexico defended the transparency of the proceedings by relying on, among other things, its prior practice in transparency as a NAFTA state party, and thus sought the application of the FTC's Note of Interpretation to the case at bar.²⁰⁴ However, the Tribunal decided that NAFTA rules could not be applied by analogy because Spain was not a party to NAFTA, and therefore the Tribunal could not decide any issues according to that treaty; and given that neither the ICSID Convention, the Spain-Mexico BIT nor the Arbitration Rules addressed the issue of the confidentiality of the proceedings, the Tribunal held that it had ample discretion to resolve the matter, and thus accorded confidentiality as a general rule, but with caveats and exceptions.²⁰⁵

Although the decision may be criticized for failing to uphold transparency,²⁰⁶ Mexico's reaction is startling, given that it tried to uphold a principle against which it has strongly opposed: full transparency in the proceedings. Mexico's departure from its opposition to transparency in ISDS proceedings may be interpreted as a positive signal that the country cannot only be held accountable, but that it complies exceptionally with its international legal obligations, particularly to those in NAFTA. However, this move may not mean that Mexico has suddenly embraced the transparency flag, as it has not adhered to the

²⁰² See *Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration*, *supra* note 12.

²⁰³ Santiago Montt & Carlos Portales, *Telefonica v. United Mexican States*, 15 J. WORLD INV. & TRADE 737, 737–38 (2014).

²⁰⁴ *Telefonica v. United Mexican States*, *supra* note 14.

²⁰⁵ Montt & Portales, *supra* note 203, at 739.

²⁰⁶ See *Telefonica v. United Mexican States*, *supra* note 14, Dissenting Opinion; see also Montt & Portales, *supra* note 203, at 745 ("by deciding under the inspiration of commercial arbitration's rules and principles, the *Telefónica* tribunal 'transformed' a complex *public nature* dispute between an investor and a regulatory state, into a *confidential one*." (emphasis in the original)).

Mauritius Convention, but rather that maybe it did so because it favored its litigation strategy in that particular case. And given that, as Álvaro Santos espouses, Mexico's legal capacity requires it to seek the implementation of the already defined set of international legal obligations under NAFTA, it advocated for transparency under the NAFTA FTC's interpretation flag.²⁰⁷

2. Non-adherence to ICSID(?)

Canada's accession to ICSID in 2013 made Mexico the only NAFTA state not party to that Convention.²⁰⁸ Given the number of BITs with ISDS that Mexico has signed, there have been calls for Mexico to join ICSID. For instance, Bernardo Sepúlveda, former Mexican Judge of the International Court of Justice, highlights that Mexico has already opened itself to international arbitration through many international treaties that provide ISDS, and given the alleged benefits that being an ICSID member would give the country and Mexican investors abroad over those of retaining the status quo—keeping the Additional Facilities litigation—there are both legal and political reasons why Mexico should join ICSID.²⁰⁹ Among these, Sepúlveda underscores the recognition and enforcement of the awards, which, under the Additional Facilities Rules, can be subject to judicial review by national courts, whereas under ICSID they cannot.²¹⁰ Given the

²⁰⁷ Cf. Santos, *supra* note 84, at 609–13, 623 (depicting Mexico's legal capacity in the WTO realm).

²⁰⁸ ICSID, *Database of ICSID Member States*, <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>, (last visited Feb. 4, 2018) (noting that Mexico is not a contracting state to ICSID).

²⁰⁹ Bernardo Sepúlveda, *Mexico and the Settlement of Investment Disputes: ICSID as the Recommended Option*, 5 PEPP. DISP. RESOL. L.J. 407 (2005) [*hereinafter* Sepúlveda, *ICSID as the Recommended Option*]; but cf. Bernardo Sepúlveda, *International Law and National Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 HOUS. J. INT'L L. 565, 582–83 (1997) [*hereinafter* Sepúlveda, *Claims of Mexican Jurisdiction*] (arguing against ISDS in NAFTA's Chapter 11 because investors would have recourse to arbitration against Mexican authorities that its citizens don't have and because investors would enjoy a preferential treatment in the legal system to be applied, thereby isolating them from the applicability of Mexican jurisdiction).

²¹⁰ Sepúlveda, *ICSID as the Recommended Option*, *supra* note 209, at 409–10 (highlighting as other benefits that Mexico would have by joining ICSID the possibility of appointing four arbitrators in ICSID's roster; representation in the Board of Directors, and therefore in the determination of the rules pertaining to arbitration; and more insulation from power politics through the prohibition of "contracting state[s] from extending diplomatic protection to one of its investors or filing an international claim if the dispute is subject to arbitration pursuant to the ICSID Convention").

risk that submitting an investment dispute to national courts would entail—such as lack of knowledge of the arbitration rules, ICSID precedents and international law—the greatest benefit that Mexico would accrue from joining ICSID is “to ground the award interpretation, revision and annulment motions, as well as award recognition and enforcement, in a single statute, all wrapped up in a single package [ICSID].”²¹¹

Under this line of reasoning, the possibility of accessing domestic remedies for investor-state disputes through the Additional Facilities Rules is regrettable, “since one of the virtues (and purposes) of these types of procedures is to prevent the use (and abuse) of domestic remedies that delay or obstruct the arbitration procedure.”²¹² Therefore, there appears to be a contradiction between granting investors the possibility of using the ICSID rules in BITs, while at the same time not being a state party to it,²¹³ thereby making the investor’s recourse to ICSID theoretical, and obliging them to take the second best solution: ICSID’s Additional Facility.²¹⁴ In the words of Mexican arbitrator Francisco González:

²¹¹ *Id.* at 410.

²¹² Francisco González de Cossío, *The Mexican Experience with Investment Arbitration: A Comment*, 3 J. WORLD INV. & TRADE 473, 478 (2002) [*hereinafter* González, *Mexican Experience with Investment Arbitration*]; see generally Sergio Puig, *Recasting ICSID’s Legitimacy Debate: Towards a Goal-Based Empirical Agenda*, 36 FORDHAM INT’L L.J. 465, 491 (2013) [*hereinafter* Sergio Puig, *Recasting ICSID’s Legitimacy*] (“ICSID has defended its existence by relying on three goal-based claims, all of which find background in the organization’s mandate and constitutive instrument: first, as an institution specialized in international methods for investment dispute settlement; second, as a system to achieve legalization towards an increased “depoliticization” of investment disputes; and, third as a multilateral organization that facilitates economic policy stabilization and the removal of impediments to the free international flow of private investment that are posed by non-commercial risks”).

²¹³ See Sonia Rodríguez Jiménez, *La Incoherencia Jurídica y el Impacto Social del Capítulo XI del TLCAN en México*, FORO DE ARBITRAJE EN MATERIA DE INVERSIÓN, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas 1–2 (2013) [*hereinafter* Rodríguez, *La Incoherencia Jurídica*]; see also Gabriel Cavazos & Carlos Romero, *Why Should Mexico Join the ICSID Convention?*, 4 LATIN AM. J. INT’L TRADE L. 1, 3 (2015) (Mex.) (suggesting that the strongest public policy consideration that supports Mexico’s accession to the ICSID Convention is the eradication of that incoherence, which would enhance Mexico’s international reputation as an investor-friendly country through a coherent, comprehensive policy towards the protection of foreign investment).

²¹⁴ González, *Mexico before ICSID*, *supra* note 88, at 372.

It is time to correct the contradiction. Mexico has a choice: to be identified as a law-abiding State, supportive of the global Rule of Law [through its adherence to ICSID], or to be signaled-out as the black sheep of the international herd [by maintaining the status quo: ICSID's Additional Facility Rules].²¹⁵

Although there is no official posture by the Mexican government as to why it did not accede to ICSID,²¹⁶ it is not too far-fetched to hypothesize that the Mexican state has seen the nullification process granted by the New York Convention and ICSID's Additional Facility Rules as a litigation resource. ICSID does not permit an appeal of the award because the ad hoc committees do not analyze the correctness of the award, but rather only deal with the very limited number of situations provided in article 52(1) of the ICSID Convention for the annulment of an award: improper constitution of the tribunal; manifest exceedance of powers by the tribunal; corruption from a member of the tribunal; "serious departure from a fundamental rule of procedure"; or lack of reasoning in the award.²¹⁷ In contrast, the *lex arbitri* annulment provisions of the seat of the arbitration depends on the country concerned.

Under this reasoning, the fact that all the nullification proceedings started by Mexico have arisen out of arbitrations where the arbitral rules were ICSID's Additional Facility Rules

²¹⁵ *Id.* at 376; but see Jan Paulsson, *The Power of States to Make Meaningful Promises to Foreigners*, 1 J. INT'L DISP. SETTLEMENT 341, 346 (2010) (suggesting that Mexico's legal defense in NAFTA ISDS proceedings has been competent, its losses moderate, and it has paid the awards, all of which has enhanced its reputation as an investor-friendly country with the current status quo).

²¹⁶ See González, *Mexico before ICSID*, *supra* note 88, at 372 (quoting one response by the Mexican government on the matter and disregarding it for not explaining the underlying reason); Francisco González, *México ante el Arbitraje CIADI: ¿Prudente o Rebelde?*, in *ARBITRAJE EN MATERIA DE INVERSIONES* 63, 69–72 (Sonia Rodríguez & Herfried Woss eds., 2010) (attaching the petition for information on the matter presented to the Mexican Trade Representative's Office).

²¹⁷ ICSID Convention, *supra* note 13, art. 52(1); see generally Gabriel Bottini, *Present and Future of ICSID Annulment: The Path to an Appellate Body?*, 31 ICSID REV.—FOREIGN INV. L.J. 712, 717 (2016) (noting that "Articles 52 and 53 of the ICSID Convention exclude appeals against ICSID awards, limit the annulment grounds to those listed in the former provision and, indeed, prevent ad hoc committees from substituting their own view on the merits for that of the tribunal.").

would support this conclusion.²¹⁸ Consequently, contrary to the apparent contradiction and criticism of Mexico's non-adhesion to ICSID by Mexican arbitrator González, Mexico acted as a strategic litigator by keeping the recourse to domestic courts as a political venue to further its interests and not completely insulate them. This would be a more persuasive reason as for why Mexico did not accede to ICSID than others, such as Mexico's negative past experience with international arbitration;²¹⁹ lack of interest in the topic's incorporation into the country's political agenda;²²⁰ aversion to international supervision, as embodied in the Calvo clause;²²¹ or positioning international law as a corrective device of domestic law.²²² All of them can be discarded because they fail to explain why Mexico chose to grant ISDS through ICSID's Additional Facilities and not fully embracing ICSID, and conversely only suggest arguments that run contrary to the ISDS as such, and of which Mexico is already a part to.

A comprehensive study undertaken by students of the Graduate Institute of International and Development Studies in Geneva concluded that:

All [Mexican international investment agreements] provide for arbitration as [a] mechanism for

²¹⁸ See UNCTAD, *Investment Policy Hub: Investment Dispute Settlement Navigator*, <http://investmentpolicyhub.unctad.org/ISDS/AdvancedSearch> (last visited Apr. 18, 2018) (finding that out of the 5 nullification proceedings in which Mexico has participated as a respondent, 2 were started by the investor and 3 by Mexico; that the 3 nullification proceedings started by Mexico all arose out of arbitrations under ICSID's Additional Facility Rules; and that Mexico has litigated 19 times under ICSID's Additional Facility Rules).

²¹⁹ See, e.g., Sepúlveda, *Claims of Mexican Jurisdiction*, *supra* note 209, at 576 (concluding that the Mexican experience with arbitration has not been positive in terms of winning the merits of the case, and thus it has been reluctant to accept the jurisdiction of an international tribunal).

²²⁰ See Cavazos & Romero, *supra* note 213, at 2 (noting that, at the time of the article, the execution and ratification of the ICSID Convention was not a relevant subject in the Mexican government's and Congress' agendas).

²²¹ See Rodríguez, *La Incoherencia Jurídica*, *supra* note 213, at 5 (dismissing the Calvo clause and constitutionally prohibited zones where foreigners cannot possess land as factors that explain Mexico's reticence to sign ICSID); see also Murphy, *supra* note 26, at 95 (alleging that although legally the Calvo clause still survives in Mexican law, in practice it is not applied).

²²² See González, *Mexican Experience with Investment Arbitration*, *supra* note 212, at 478–81 (dismissing all of them and advocating for Mexico's accession to ICSID); see also Francisco González de Cossío, *The International Centre for the Settlement of Investment Disputes: The Mexican Experience*, 19 J. INT'L ARB. 227, 239–41 (2002).

resolving investor-States disputes and all contain a reference to the ICSID Convention. Thus, the ratification of the ICSID Convention would not entail any need of modification of existing [international investment agreements] and will automatically give right to investors to submit a claim under its provisions 30 days after the deposit of the instruments of ratification.²²³

Accordingly, Mexico's non-adherence to ICSID seemed puzzling, considering that it would allegedly send a good signal to investors: that it is willing to offer them a forum that it has been considering in the BITs and FTAs with an investment chapter that it has signed ever since it joined NAFTA. However, analyzed against the backdrop of the "No of Tokyo" and its use of nullification procedures, it might well be that the latter explanation fits better: Mexico still wanted to retain the possibility of acceding to more "politicized" forums—such as the domestic courts—to nullify the procedure, if suitable for its litigation strategy.

In the eve of the NAFTA renegotiation, on January 11th, 2017, the Mexican Secretary of Economy signed the ICSID Convention in Washington DC with the intention of strengthening Mexico's position as an investor-friendly country.²²⁴ Although the treaty is yet to be ratified by the Mexican Senate, this signal of the *open* Mexico is astounding, as the country that once said "no" to ICSID begins the road to its accession.²²⁵ At the moment of writing this article there has been no formal, complete explanation on why the sudden move from the Mexican government occurred, although it's clear the connection it has with the renegotiation of NAFTA's dispute settlement mechanisms—and the possibility of its

²²³ Larisa Babiy et al., *Should Mexico Join ICSID*, 1, 20 (The Graduate Institute, Centre for Trade and Economic Integration, Working Paper, 2012), http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI-2012-06.pdf.

²²⁴ SECRETARÍA DE ECONOMÍA [Mexican Department of Economy], *México Firma el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados Nacionales y de Otros Estados* (Jan. 11, 2018), <https://www.gob.mx/se/prensa/mexico-firma-el-convenio-sobre-arreglo-de-diferencias-relativas-a-inversiones-entre-estados-nacionales-y-de-otros-estados>.

²²⁵ See ICSID, *supra* note 208 (noting that Mexico was the most recent signatory state to ICSID).

termination—due to the fact that the other only public event scheduled in the Secretary’s trip to Washington DC was a meeting with the United States Trade Representative, Robert Lighthizer, to discuss issues involved with the Sixth Round of NAFTA Negotiations to be held in Montreal, Canada, later in the month.²²⁶

Accordingly, one could conjecture that perhaps Mexico is expecting the possibility of a termination of NAFTA, and thus began entrenching its commitment to protect foreign investors’ interests in Mexico through international treaties other than BITs and FTAs, thereby acting strategically to “diversify” the instruments that lock-in the disciplines it must adhere to become an investor-friendly country. Or perhaps it’s the continuation of the “golden straightjacket” that deepens Mexico’s commitment with free trade economics, liberalization policies and pro-investor choices.²²⁷ Or maybe it’s just the natural step for a country that has already foreseen the ICSID venue in its FTAs and BITs, and thus a win of the *open* Mexico over the *closed* one.

IV. CONCLUSION

As an outcome of the 2017 Group of 20 Summit held in Berlin, Germany, the leaders of the world’s most important economies recognized (albeit discretely) that there have been winners and losers of free trade and FDI—of economic globalization and liberalization of markets—and consequently, that there’s a need to cooperate and share successful experiences to widen globalization’s beneficiaries:

We recognise that the benefits of international trade and investment have not been shared widely enough. We need to better enable our people to seize the opportunities and benefits of economic globalisation. We agree to exchange experiences on

²²⁶ SECRETARÍA DE ECONOMÍA [Mexican Department of Economy], *El Secretario de Economía Realiza Gira de Trabajo a la Ciudad de Washington, D.C.*, <https://www.gob.mx/se/prensa/el-secretario-de-economia-realiza-gira-de-trabajo-a-la-ciudad-de-washington-d-c-143080> (last visited Jan. 30, 2018).

²²⁷ See generally Thomas Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (1999) (depicting the set of neoliberal economic policies associated with the Washington Consensus as limits to the states’ behavior, particularly as constraints to their political whip).

the mitigation of the adjustment costs of trade and investment liberalisation and technological change, and on appropriate domestic policies, as well as to enhance international cooperation towards inclusive and sustainable global growth.²²⁸

In order to do so, more debate about these topics must ensue. Not only do states need to exchange experiences on adjusting to labor and economic market disruptions created by economic liberalization, but they should also try to understand the asymmetry of information among all stakeholders, and try to tackle it down by making it more readily available and easier to comprehend. In sum, countries that want their citizenry to defend free trade and economic liberalization should invest in increasing their countrymen's *trade literacy*. And the first step begins by debating and disseminating information about the benefits and negative consequences of these policies, including those unintended ones, lest they may widen the gap between those supporting international integration and those against it.

In the NAFTA renegotiation context, it is necessary to recognize that NAFTA translated into segmented benefits for different sectors of the population in the three countries, and that in Mexico this led to the "*two Mexicos*": one that benefitted from globalization (the Northern states) and one that didn't (Southern states); one integrated into North American value chains, and the other, left behind from the benefits that liberalization has generated. But that gap can be mitigated with domestic legislative and public policies, such as the recently enacted Federal Act on Special Economic Zones that was specially tailored to address this issue in Mexico;²²⁹ or by creating labor safety nets

²²⁸ G20 ARGENTINA 2018, *G20 Germany 2017 Leaders' Declaration: Shaping an interconnected world* 3, (July 7–8, 2017), <https://www.g20.org/es/g20/historia-presidencias>.

²²⁹ See Ley Federal de Zonas Económicas Especiales [Special Economic Zones Act], Diario Oficial de la Federación [DOF] 01-06-2016 (Mex.). This bill recognized that the benefits of NAFTA have not been reaped equally by the southern, poorer Mexican states, and therefore applied a non-orthodox economic policy approach advocated for critics of hyper-globalization. See Iniciativa de Decreto por el que se Expide la Ley Federal de Zonas Económicas Especiales y se Adiciona el Artículo 9 de la Ley General de Bienes Nacionales [Special Economic Zones Act Presidential Bill], 29 de septiembre de 2015, Gaceta Parlamentaria, Número 4372-VIII, Año XVIII, Anexo VIII, 14 (recognizing that NAFTA's benefits were not spread evenly and to all regions of the country, particularly to the Southern states); see generally, Dani Rodrik, THE GLOBALIZATION PARADOX: DEMOCRACY

with sectoral relocation programs that mitigate disruptions in the labor market caused directly by trade agreements—such as the American Trade Adjustment Assistance Program created since the 1970s—and which the Mexican government advanced as a regional concern and negotiation objective for the new NAFTA.²³⁰

While it is undoubted that NAFTA resulted in segmented benefits for different sectors of the US population, it is also true that it is not the source of all the ills of the American economy. For instance, a recent study by the Wilson Center concluded that the decline of the manufacturing sector in the United States is mainly caused by labor automation and technological advancement, and not only because of NAFTA.²³¹ Another study by the Peterson Institute of International Economics points to the conclusion that, even adding the temporary costs that the loss of manufacturing jobs in the United States have generated because of both technological innovation and economic liberalization, these are less than the permanent benefits that technology and economic liberalization provide to the American economy;²³² and another one from the Pew Research Center concluded that since 2014 more Mexicans have returned to Mexico than emigrated without documents to the United States,²³³ thereby running contrary to many of the recent rhetoric revolving around the United States-Mexico relationship. The only way that more integration in the North American region can ensue is through increasing trade literacy among the stakeholders, so that they may know the benefits and negative consequences of deepening the regional integration created by NAFTA.

A recent study by the Wilson Center on public perception

AND THE FUTURE OF THE WORLD ECONOMY (2011) (advocating for non-orthodox trade policies).

²³⁰ See generally SECRETARÍA DE ECONOMÍA, *Prioridades de México*, *supra* note 158 (noting the regional improvements that Mexico is working to enforce).

²³¹ Christopher Wilson, *Trump to Announce Plans for Renegotiation of NAFTA: Five Ways to Improve the Agreement*, WILSON CTR. (Jan. 23, 2017), <https://www.wilsoncenter.org/article/trump-to-announce-plans-for-renegotiation-nafta-five-ways-to-improve-the-agreement>.

²³² Gary Hufbauer & Zhiyao Lu, *The Payoff to America from Globalization: A Fresh Look with a Focus on Costs to Workers*, PETERSON INST. INT'L ECON. 21 (May 2017), <https://piie.com/system/files/documents/pb17-16.pdf>.

²³³ Ana Gonzalez-Barrera, *More Mexicans Leaving Than Coming to the U.S.*, PEW RESEARCH CTR., (Nov. 19, 2015), <http://www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s/>.

toward Mexico and the United States by each states' citizens shows that, even though the overall view that Americans have toward Mexico has improved in the past few years, since President Trump took office there has been a sharp decline in Mexican perceptions toward the United States and the (until now held) perception that that country was seen as the preferred model for Mexico's development ever since the 1990s, *i.e.* since NAFTA was struck.²³⁴ These negative perceptions could solidify and put in risk all that has been done in the United States-Mexico relationship, so both governments should internalize this and include the public in the cooperative projects they may engage to further the relationship, including the renegotiation of NAFTA.²³⁵ But in order to do so, one should start by looking into the positions these states have had in the past towards economic liberalization and international supervision, lest they may nudge their neighbors into paths they may regret in the future.

In the Mexican case, contrary to other countries in the Latin American region, it has undertaken a national agenda to liberalize the economy as an on-going trans-sexennial neoliberal economic project that pervades all legislative, policy and national actions.²³⁶ This has led Mexico to apart itself from other countries

²³⁴ See generally Christopher Wilson et al., *A Critical Juncture: Public Opinion in U.S.-Mexico Relations*, WILSON CTR. (Nov. 2017), https://www.wilsoncenter.org/sites/default/files/us_mx_public_opinion.pdf (comparing the charts and data, it is shown that 64% of Americans have a favorable view of Mexico, while the percentage of Mexicans that trust the US has decreased dramatically between 2016 and 2017, as well as the percentage of Mexicans who believe that the United States is the best model for future development).

²³⁵ *Id.* at 4.

²³⁶ See Rodrigo Polanco, *Two Worlds Apart: The Changing Features of International Investment Agreements in Latin America*, in INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA, *supra* note 30, at 68, 97 (“[T]here is no single Latin American approach to the ISDS regime . . . In response to the criticisms against the investor-State arbitration, some countries—Bolivia, Ecuador and Venezuela—have decided to partially abandon the system. Other countries—like Chile, Colombia, Mexico and Peru—have taken an ‘intra-system’ and ‘normative’ strategy, actively participating in the negotiation and renegotiation of new investment treaties that give more control to the Contracting Parties, with the aim to limit expansive or unclear interpretations.”); see also Katia Fach & Catharine Titi, *International Investment Law and ISDS: Mapping Contemporary Latin America*, 17 J. WORLD INV. & TRADE 515, 517 (2016) (underscoring the absence of a single regional approach to ISDS in Latin America); but see Catharine Titi, *Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas*, 30 ARB. INT’L 357, 386 (2014) (“At this stage, the overall Latin American approach does not amount to a rejection of investment arbitration, nor should it necessarily be perceived as particularly hostile to it.”); see also Maria Luque, *Inter-State Investment Dispute Settlement in Latin*

in the region by disregarding altogether ISI-era legal and policy positions. For instance, contrary to other Latin American countries that used prior litigation requirements to bypass the Calvo doctrine, Mexico departed altogether from those strategies and embraced ISDS fully in NAFTA and its BITs and FTAs with an investment chapter.²³⁷

Although at the beginning it started with unilateral liberalizations, they have been afterwards crystallized in the international economic treaties it has joined, in order to lock-in its commitments and prevent departures from future administrations.²³⁸ Contrary to the United States and Canada that appear to have a “buyer’s remorse” from NAFTA’s strong investor friendly provisions, Mexico has been optimistic about being part of NAFTA and its results.²³⁹ In light of this free trade development agenda, Mexico’s adherence to TPP seemed natural. However, when taking a closer look, it can be fathomed that the country was acting more on the defensive side: to not lose ground in the North American market. Furthermore, although without the United States’ participation, Mexico has still embraced TPP’s rules (albeit partially) through participating in CPTPP, and even in the face of an anti-Mexican rhetoric, it has engaged into the bumpy renegotiation of NAFTA with the Trump Administration.

Likewise, when analyzing Mexico’s liberalization commitments in the oil sector and its stance towards transparency and further empowering the investor through a more expeditious process of enforcing their awards by joining ICSID, the position of the state seems contradictory with its

America: Is There Space for Transparency?, 17 J. WORLD INV. & TRADE 634, 636 (2016) (analyzing the practice of Latin American states, including Mexico, of reinforcing inter-state dispute settlement in investment treaties with Brazil).

²³⁷ See Facundo Pérez, *Local Litigation Requirements in International Investment Agreements: Their Characteristics and Potential in Times of Reform in Latin America*, 17 J. WORLD INV. & TRADE 536, 539 (2016) (highlighting the fact that Latin America is the region where most BITs with provisions and arbitral decisions that discuss the topic of prior litigation requirements are found).

²³⁸ See Puig, *Case of Mexico*, *supra* note 53, at 387–88 (noting that “evidence suggests that NAFTA works as a constraint of political behavior and as a guide for governmental decisions”).

²³⁹ See generally Álvarez, *NAFTA’s Investment Chapter*, *supra* note 10, at 269–73 (equating the subsequent practice of the United States and Canada of limiting investors’ rights in BITs and through their participation in NAFTA FTC’s interpretations with the Calvo doctrine and other policies pursued by Mexico before the 1980s).

liberalization policy. Nevertheless, given its historical struggle to fight off international supervision, on the one hand, and economic liberalization in the oil sector, on the other, Mexico's apparent Manichean attitude does not seem so contradictory. Conversely, it is just the position of a state that has given 180 degrees turn from absence of supervision and accountability for the Executive to an open, internationally supervised economy. As espoused by Sergio Puig, through the use of ISDS, Mexico's secretive, discretionary government has become more open to international scrutiny.²⁴⁰ Under this light, the step that it undertook in *Telefónica* to call for opening the procedures is positive. However, by applying Santos's depiction of Mexico's legal capacity analyzed above to the ISDS context, it may also be that given its trade liberalization development agenda, this strategy was natural for Mexico: once it has adhered to a certain legal commitment—the transparency status quo of the FTC's interpretation—it will try vehemently to stick to it.

For Mexico, being party to NAFTA has had positive effects. Among those, being a more transparent respondent state before ISDS proceedings can be underscored. Although laudable in the *discourse*, it has been a bumpy road wherein Mexico has ceded to the American and Canadian positions on this issue in *reality*. Accordingly, this is one among many areas where the compliance pull of the United States and Canada can exert beneficial effects on their southern counterparty. Unfortunately, if the Trump administration decides to exit NAFTA or lower the stringency of NAFTA's transparency standards—through an opt-in clause for ISDS's abidingness, for example—it's not too farfetched to foresee that one negative unintended consequence could be Mexico's departure from these transparency standards in other ISDS proceedings—contrary to the position it held in the *Telefonica* litigation. Although Mexico's recent signing of the ICSID Convention seems an indirect positive unintended consequence in NAFTA's renegotiation context, it's still too early to determine

²⁴⁰ Puig, *Case of Mexico*, *supra* note 53, at 387 (arguing that the legalization effect of international law, whereby states are subjected to international scrutiny, helps explain NAFTA's enabling of political reform in Mexico as a constraint on its political behavior); see Puig, *Recasting ICSID's Legitimacy*, *supra* note 212, at 475 (noting that the ICSID could be regarded as the "poster-child" of international legalization).

whether the decision was taken because of its American counterparty's position on ISDS or as a preventive tactic in case NAFTA is terminated. Consequently, in the present highly, politically-driven international context, more information on states' attitudes towards international supervision and transparency should inform their positions, lest they may nudge their treaty associates into positions they may regret in the future.

Writing back in the 1990s, late professor Stephen Zamora was wary of the use of NAFTA as a tool for the "Americanization" of the Mexican law through imposition, stressing different traits in Mexican society, legal system and culture that could disrupt the stability of the country and the bilateral relations; however, at the same time he acknowledged that the "Americanization" process had begun by Mexico's own initiative through looking out to the United States governance laws and regulations.²⁴¹ Under this light, it is positive that a more open Mexico adopted "American" traits such as an openness towards accountability and transparency in its dealings with investors. However, it's clear that the liberalization changes have come top-down. Although it pervades the agenda of the Mexican state, involving the Congress and Executive branches, this liberalization still needs to become a democratic and transparent one that pertains not only to the Mexican elites in government and business, *i.e.* to the technocratic governments and select private interest, but rather one that all Mexicans can understand;²⁴² one that the other

²⁴¹ Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 L. & POL'Y INT'L BUS. 391, 410 (1992–1993); see also Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401 (1995) (identifying areas of the legal practice that have begun to harmonize the domestic legal systems of the three NAFTA state parties); see Sergio López-Ayllón, *The Impact of International Trade Agreements in the Legal Systems of the American Continent*, 19 HOUS. J. INT'L L. 761, 767 (1997) (highlighting certain common law institutions that were incorporated into the Mexican domestic system by virtue of NAFTA); Stephen Morris, *Reforming the Nation: Mexican Nationalism in Context*, 31 J. LATIN AM. STUD. 363, 379 (1999) (arguing that the economic integration brought by NAFTA changed the traditional anti-American discourse of Mexicans and the ruling elite for one that views pro-economic integration policies with the United States as promoting prosperity); but see Zamora, *Rethinking North America*, *supra* note 113, at 653 (recognizing the limited promotion of trans-governmental networks between the governments, scholars, civil society and businesses in both countries).

²⁴² See Adolfo Aguilar, *Authoritarianism and North American Free Trade: The Debate in Mexico*, in *THE POLITICAL ECONOMY OF NORTH AMERICA FREE TRADE* 205, 207 (Ricardo

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lagging Mexico can take pride for and benefits, but that does not involve the trump of the *closed* one over the current, more *opened* Mexico.

Grinspun & Maxwell Cameron eds., 1993) (noting that the NAFTA negotiations were secretly undertaken, and thus no real public debate arose for its signature or ratification); *see also* Pastor & Wise, *Mexico's Free Trade Policy*, *supra* note 46, at 486 (noting that “the political origins of Mexico’s commercial opening have been distinctly undemocratic, as many of free trade’s opponents have been excluded through the generation of asymmetric information and the reliance on highly insulated policymaking practices within the state bureaucracy”).