THE RULE OF LAW: MEXICO'S APPROACH TO EXPROPRIATION DISPUTES IN THE FACE OF INVESTMENT GLOBALIZATION

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A new constitutional design is emerging in Mexico to address investment and expropriation disputes. Assurance of the rule of law, understood as independent legal process to resolve disputes, is a key element. Although the rule of law assumed growing importance as Mexico's historical expropriations progressed, questions persisted as to its effective application. Mexico's opening to global competition for investment in the 1990s demanded a greater basis for trust in such application. Mexico accordingly provided by treaty to defer investment and expropriation disputes with treaty country investors to binding international arbitration. To address rule of law concerns more broadly, Mexico reformed its Constitution in 1994 to increase its federal judiciary's independence. More recently, federal judicial review has benefited from the Mexican Constitution's increased rigidity consequent to the fading of single party rule. Recent cases, including the resolution of the Metalclad *international arbitration, the Supreme Court's declaration of the constitutional position of treaties relative to legislation, and the Court's resolution of a constitutional dispute between Congress and the President with implications for private investment in the electricity sector, delineate the emerging design and associated, innovative judicial doctrine.*

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I. EMERGING CONSTITUTIONAL DESIGN

A challenge inherent to a country's participation in the global competition for investment is to provide investors a basis to trust in the continuing

respect for the legal framework prevailing when an investment is made. In Mexico, a "new constitutional design . . . to confront the challenges and opportunities of globalization"[1] is emerging with respect to the management of investment and expropriation disputes. The design's key element to assure the necessary trust is the rule of law. In the present context, the rule of law means an independent legal process to resolve disputes.[2]

To provide context for the emerging constitutional design, this Article reviews Mexico's principal historical expropriations. It uses them as a case study to illustrate problems in the development of Mexico's legal system and in its application of the rule of law. The case study in particular illustrates the challenges to assurance of the federal judiciary's independence in politically charged investment and expropriation matters. With the benefit of Mexico's

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1. "[E]l nuevo diseño constitucional que requiere el país para enfrentar los retos y oportunidades de la globalización." Sergio López-Ayllón, *La Jerarquía de los Tratados Internacionales (Amparo en Revisión 1475/98, Sindicato Nacional de Controladores de Tránsito Aéreo)*, in CUESTIONES CONSTITUCIONALES: REVISTA MEXICANA DE DERECHO CONSTITUCIONAL, July–Dec. 2000, at 208 (commenting on the Mexican Supreme Court ruling discussed *infra* in Part IV.C.3–4.) (author's translation). A 1997 dissent by four of Mexico's eleven Supreme Court justices, asserting that the Constitution should be read to mandate a pre-expropriation valuation hearing, echoed the theme of new constitutional design by arguing for an updated interpretation of the Constitution's expropriation provisions in light of land redistribution's completion and globalization's challenges, with:

> reconocimiento de que este país no está segregado ni ensimismado en sus propias murallas, sino que tiene que reconocer este fenómeno de la globalización, fenómeno en el cual es importante que el Tribunal Supremo de este país—la Suprema Corte—facilite el acceso a los capitales, quitando trabas a los riesgos que significan el ataque a la propiedad privada. [recognition that this country is not segregated or fortified within its own walls, but rather that one must recognize this phenomenon of globalization, as to which it is important that the highest court of this country—the Supreme Court—facilitate access of capital, removing supports for the risks that mark the attack on private property.]

"Inmuebles Pridi, S.A.," 5 S.J.F. 378, 382 (9a época 1997) (minority vote of Justices Góngora Pimental, Gudiño Pelayo, Silva Meza and Aguirre Anguiano) (author's translation); *see also* "Ramón Maldonado," 6 S.J.F. 435, 438 (9a época 1997); "María Benítez Puga de Beltrán," 6 S.J.F. 443, 446 (9a época 1997). *Cf. infra* Part II.A.3.; Héctor Fix-Fierro, *Judicial Reform and the Supreme Court of Mexico: The Trajectory of Three Years*, 6 U.S.-MEX. L.J. 1, 20 (1998). The new design's emergence and the plea for updated constitutional interpretation complement the International Court of Justice's notation some time ago of a general, continuing need for the evolution of relevant law created by growing cross border investment. Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), 1970 I.C.J. 3, 46–47 (Feb. 5), *available at* http://www.icj-cij.org/icjwww/idecisions/isummaries/ibtsummary700205.htm.

2. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002) considers various rule of law definitions. Peerenboom employs a definition derived from a "thin theory" of the rule of law, so labeled to distinguish it from more far-reaching definitions with greater ideological content. The thin theory includes meaningful restraints on state actors, procedural rules for lawmaking, transparency of legal norms, equal application of the law, and the like. *Id.* at 65. This Article's specific definition of the rule of law as an independent legal process to resolve disputes facilitates focus on investors' expropriation concerns, and is a plausible element of a "thin theory" definition of the rule of law. It also conforms to a distinction drawn in Mexican scholarship between the rule of law and a state of law. *See infra* note 42.

history in respect to expropriation, this Article addresses developments that offer increased assurance of the rule of law's application to investment and expropriation disputes: judicial reform, constitutional rigidity, and opening to international law. The Article concludes by offering some predictions into the future.

The rule of law, albeit defined more broadly than for purposes of this Article, is widely valued as facilitating investment and hence growth.[3] For instance, Max Weber reasoned that rules predictable in application are essential to the contractual bargaining that he considered capitalism's foundation.[4] Empirical research[5] and life experience[6] further argue for the rule of law's importance to investment and growth.

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3. For example, as to China, Peerenboom concludes that the rule of law (in his "thin theory" concept) is necessary for sustained economic development. PEERENBOOM, *supra* note 2, at 496. Although China and Mexico are both large, geopolitically significant developing countries that have experienced extended one-party rule, their cultures, economies, histories, neighbors, and political systems differ. The expropriations to be sketched here show Mexico's emerging constitutional design as flowing from a legal system with nineteenth century roots and a continuous evolution to the present, a history which China does not share.

4. David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 740. The concept of the rule of law as independent legal process for dispute resolution fits within Trubek's theory:

> But it is not enough for the state to provide a coercive framework for economic activity. Given the need for predictability, the state itself must act in a calculable way. State coercion must be "legal," that is, based on general *rules* uniformly applied. For this reason the legal system of a pure market system must be autonomous from the state.

David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 27 (1972); *see* PEERENBOOM, *supra* note 2, at 148–53 (reviewing critiques of Weber and law and development theory's ebb and flow); DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE (Inst. of Econ. Affairs, Occasional Paper No. 106, 1999) (economic historian's framework to reflect on the role of institutional structures in determining long-term growth).

5. *See, e.g.*, PEERENBOOM, *supra* note 2, at 458–62 (reviewing regression analyses to demonstrate the rule of law's importance to a developing country's economic growth); ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMISING BENEFITS, MINIMISING COSTS (2002), *at* http://www.oecd.org/pdf/M00035000/M00035346.pdf; Richard Roll & John Talbott, *Why Many Developing Countries Just Aren't*, ECON. FREEDOM PROJECT REPS. (The Heritage Foundation Economic Freedom Project Report No. 0201, 2001), *available at* http://www.heritage.org/Research/TradeandForeignAid/EFP0201.cfm. Roll and Talbott performed regressions on summary index data relative to over one hundred countries for 1995–1999, compiled by the World Bank, the Central Intelligence Agency, and two think tanks representing an ideological range, Heritage Foundation and Freedom House. *Id.* at 11–26. They conclude that 80 percent of gross national income per capita can be explained by such determinants as property rights, political rights, press freedom and government expenditures on the positive side, and black market activity, regulation, inflation, and trade barriers on the negative side. *Id.* at 26–27.

6. William Easterly, a World Bank development economist, identifies the rule of law's importance based on his career. WILLIAM EASTERLY, THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS (2001). He reviews—and finds inadequate—some fifty years of economic theorizing as to the determinants of developing country growth. Such theories began with a focus on capital accumulation, moved to an analysis of the

The sketches to come will show that from Mexico's 1821 independence through its 1910–1917 Revolution, independent legal process had limited relevance to expropriation. From the Revolution through the 1982 bank expropriation, judicial review figured prominently in expropriations, but the independence of its application was subject to question. Beginning in 1988 with the Salinas presidency, Mexico embraced globalization,[7] and opened itself to global competition for investment capital.[8] It has worked since then to apply the rule of law to investment disputes.

Legislation in 1992 contemplated a way at least partially to address the concerns of the rule of law's application to investment disputes.[9] Pursuant to the legislation, Mexico would make treaties to allow expropriation disputes with foreign investors from a treaty country to be deferred to binding

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negativity of dependency on foreign economic actors and the consequent desirability of import substitution policies, and then returned to favor capital accumulation, augmented to include human capital accumulation by education. Easterly concludes in favor of the overriding importance of law and institutions. *Id.* at 279.

7. Mexico's prior embrace of globalization was during the pre-Revolution Díaz regime, which relied on foreign investment, but placed little emphasis on institutions to facilitate the rule of law. The post-Revolutionary nationalism evolved into import substitution policies and emphasis on the State as the direct provider of goods and services. Both policies were meant to overcome "dependency" on foreign investment and control. These policies stretched through President Salinas's 1988 assumption of office. *See* VAN R. WHITING, JR., THE POLITICAL ECONOMY OF FOREIGN INVESTMENT IN MEXICO: NATIONALISM, LIBERALISM AND CONSTRAINTS ON CHOICE 11 (1992); MANUEL R. MILLOR, MEXICO'S OIL: CATALYST FOR A NEW RELATIONSHIP WITH THE U.S.? 1–14 (1982). In this text, Millor surveys development models, including structural-functionalism (development as a linear progression from traditionalism to modernity), the diffusion model (orderly diffusion of first world concepts), corporatism (competition of State and social groups), and dependency theory (consequences of developing world dependency on developed world). *See also* Manuel R. Millor Mauri, *La Falacia del "Progreso" y la Paz*, *in* CONGRESO INTERNACIONAL SOBRE LA PAZ 377, 377–85 (1987) (arguing against the dependency of "financial colonialism," perpetrated by a development focus limited to economic growth). At least through the Salinas Administration's commencement, reinforcement of the Mexican State, dominated by its executive, received priority over assurance of the rule of law. *Cf.* RAYMOND VERNON, THE DILEMMA OF MEXICO'S DEVELOPMENT: THE ROLES OF THE PRIVATE AND PUBLIC SECTORS 11–12 (1963).

8. With the North American Free Trade Agreement (NAFTA), effective in 1994, annual foreign direct investment in Mexico increased dramatically. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, INTERNATIONAL DIRECT INVESTMENT STATISTICS YEARBOOK: 1980–2000, at 13 tbl. 2 (2002) (showing annual direct investment from abroad in Mexico jumping from the U.S.$3–8 billion range during the 1989–1993 pre-NAFTA period to the U.S.$9–13 billion range thereafter; showing annual direct investment from abroad in all Organization for Economic Cooperation and Development (OECD) countries jumping from U.S.$175 billion in 1989 to U.S.$1 trillion in 2000, an indicium of investment markets' globalization). *See also* Martin A. Andresen & Álvaro S. Pereira, Structural Change and Foreign Direct Investment, at 16 & 24 fig.5 (unpublished manuscript), *at* http://www.econ.ubc.ca/pereira/links/Structural%20Change%20and%20FDI.pdf.

9. *See infra* text accompanying note 454.

international arbitration outside Mexico's judicial system.[10] The independence of international arbitration offered an opportunity to remove any question as to the rule of law's independent application, but only as to foreign investors from treaty countries. The North American Free Trade Agreement (NAFTA)'s Chapter 11 is the leading example of the implementation of the dispute resolution scheme contemplated by the 1992 legislation.[11]

To address concerns as to the rule of law's application more broadly, a 1994 amendment to Mexico's Constitution modified the Mexican Supreme Court's role and composition.[12] The reform increased the Supreme Court's independence from the President, changed the system of governance of Mexico's federal judiciary, and provided broader constitutional review than previously available in Mexico. Since then, a Supreme Court judicial decision on the status of treaties in Mexican constitutional law[13] and Mexico's further acceptance of treaty obligations[14] continues Mexico's progressive opening to international law, which has been underway for the last thirty years. The evolution of a judicial doctrine based on these developments creates an additional foundation for increased expectations for the rule of law's application within Mexico's judicial system.

It is premature to understand all the consequences of these developments of judicial reform and opening to international law, or to claim that more than a part of their promise is yet realized. For example, Metalclad Corporation, although it obtained payment of U.S.$16 million from Mexico as the outcome of its NAFTA Chapter 11 arbitration proceeding asserting uncompensated expropriation,[15] nonetheless failed in its effort to develop a Mexican business. Moreover, it chose international arbitration over the Mexican courts as the preferred forum to pursue its claims. For Metalclad, the rule of law's application by Mexican courts was not a viable option to resolve its claims. Such limitations notwithstanding, this Article offers Mexico's judicial reforms and international opening as significant strides by Mexico in establishing the legal infrastructure to support its encounter with global competition for investment capital.

10. Mexico's federal judicial power resides in the Supreme Court and lower federal courts. MEX. CONST. art. 94. Mexico's thirty-one states are to establish their own courts along similar lines. MEX. CONST. art. 116 (III). For outline of federal jurisdiction, *see infra* Part III.B.1–3.

11. For discussion and further examples, *see infra* Part IV.B.

12. *See infra* text accompanying note 337.

13. *See infra* text accompanying note 490.

14. *See infra* Parts IV.A. and IV.C.4.

15. *See infra* Part II.I.

A. Historical Evolution Towards the Rule of Law

Although Mexico generally has been respectful of private property and enterprise,[16] it has an extensive history of expropriation to accomplish development aims.[17] From an early date, law was used to accomplish the expropriations. With time, the rule of law, in the sense of using an independent legal process to resolve disputes,[18] grew to be more central to the expropriations.

In the 1700s, the Spanish Crown expelled the Jesuits from Spain and Mexico[19] and seized their property without concern as to possible judicial review of the reasons or terms of the expropriation. In the 1800s ecclesiastical[20] and

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16. *See, e.g.*, Raymond Vernon, *Introduction* to PUBLIC POLICY AND PRIVATE ENTERPRISE IN MEXICO 1, 8–9 (Raymond Vernon ed., 1964); Kenneth L. Karst, *Latin-American Land Reform: The Uses of Confiscation*, 63 MICH. L. REV. 327, 370–71 (1964). Karst observed:

> One important reason why Mexico's post-reform economy eventually prospered was that potential investors were convinced that the land reform did not imply a governmental dedication to continual leveling. The fact that investments in urban land and most industrial investments were left untouched was important not only in leaving a reservoir of capital to be invested, but also in giving security to investors of the future.

Id.

17. On Latin American expropriations of U.S. investments, see William D. Rogers, *United States Investments in Latin America: A Critical Appraisal*, 11 VA. J. INT. L. 246 (1971); WENDELL C. GORDON, THE EXPROPRIATION OF FOREIGN-OWNED PROPERTY IN MEXICO (1941) (reviewing takings of ecclesiastical property, agricultural expropriations, oil, and railroads). A variety of Mexican takings are not addressed in this Article. *See, e.g.*, Friedrich E. Schuler, *From Multinationalization to Expropriation: The German I.G. Farben Concern and the Creation of a Mexican Chemical Industry: 1936–1943*, 25 JAHRBUCH FUR GESCHICHTE VO STAAT 303, 303–20 (1988) (chemicals); Luis Alfonso Ramírez, *Corrupción, Empresariado y Desarrollo Regional en México: El Caso Yucateco in* VICIOS PÚBLICOS, VIRTUDES PRIVADAS: LA CORRUPCIÓN EN MÉXICO 145, 151–55 (Claudio Lomnitz ed., 2000) (hemp); GAMI Investments, Inc. v. United Mexican States, April 9, 2002, Notice of Arbitration, http://www.state.gov/documents/organization/11848.pdf (contestation of sugar expropriation under NAFTA); Victor Fuentes, *Revisa Corte expropiación de ingenios* (Feb. 8, 2003) (contestation of sugar expropriation in Mexican courts, reported in the Mexico City daily newspaper *Reforma*), *available at* http://www.reforma.com; Cronología de la telefonía en México (telecommunications), *at* http://www.cft.gob.mx/html/la_era/into_tel2/hist1.html.

18. Because expropriation is bad business for investors, disputes as to compensation and the expropriation's legitimacy follow. *See* PAUL E. SIGMUND, MULTINATIONALS IN LATIN AMERICA: THE POLITICS OF NATIONALIZATION 36–39 (1980) (listing some forty Latin American nationalizations of American enterprises from 1900 to 1977, with identification of the amount claimed, the year, and the settlement amount as drawn from U.S. government and financial press sources).

19. Carlos III expelled the Jesuits from Spain and its American colonies in 1767 and confiscated their property in 1769. FERNANDO R. SANDOVAL PARDO, HISTORIA CRÍTICA DEL ESTADO MEXICANO: ANÁLISIS ESTRUCTURAL Y SUPERESTRUCTURAL DE LOS ESTADOS AZTECA, NOVOHISPANO E INDEPENDIENTE (1325–1911), at 186 (2001). England's King Henry VIII acted similarly in the 1500s. His schism with Catholicism involved the distribution of confiscated church property to England's landed families so as to coopt support for reunification. *See, e.g.*, HILAIRE BELLOC, CHARACTERS OF THE REFORMATION 26–28 (1958).

20. *See infra* text accompanying notes 95–113.

communal agricultural[21] property was taken by statutory and constitutional enactment at a time when Mexico's system of judicial review was not yet consolidated.[22]

In the late nineteenth and early twentieth centuries, toward the end of Mexico's first century of independence, the Díaz regime, heavily dependent on foreign investment, structured its acquisition of private investment as market purchase. Although the Díaz regime acquired control of the principal national railroads in transactions on international securities markets,[23] it did so in the face of the railroads' inability to thrive within the economic parameters of its regulatory framework.[24] Although the Spanish monarchy and independent Mexico constituted different political and legal systems, the Crown and the Díaz regime shared little interest in justifying expropriatory action before an impartial tribunal.[25] Neither paid much attention to the rule of law.

From the 1910–1917 Revolution, Mexico's government placed judicial review at the center of legitimizing its approach to expropriation.[26] Under President Cárdenas (1934–1940), expropriatory activity intensified. During his administration, the oil industry[27] and the remaining private interest in the major railroads[28] were expropriated, and implementation of the revolutionary agenda of agricultural land redistribution reached a high point.[29] Through this period, however, Mexico was subject to the charge of failing to provide adequate independence for the process of judicial review. Notably as to oil, Mexico's government was charged with having procured Supreme Court decisions as a function of its changing balance between the competing values

21. *See infra* text accompanying notes 128–129.
22. *See infra* text accompanying notes 367–368.
23. *See infra* notes 153–154.
24. *See infra* note 151.
25. Throughout the Díaz regime (1876–1910), Mexico's Supreme Court, under the liberal, federal 1857 Constitution avoided conflict with Díaz by declining to assess the legality of investiture of state and federal executive authorities under a doctrine of *incompetencia de origin*, which deemed such assessment a political question not suitable for adjudication. INSTITUTO DE INVESTIGACIONES JURIDICAS, CONSTITUCION FEDERAL DE LOS ESTADOS UNIDOS MEXICANOS, SANCIONADA Y JURADA POR EL CONGRESO GENERAL CONSTITUYENTE, EL DIA 5 DE FEBRERO DE 1857, *available at* http://www.juridicas.unam.mx/infjur/leg/conshist/pdf/1857.pdf; ANTONIO CARILLO FLORES, *La Suprema Corte en la doctrina, la jurisprudencia y la legislación mexicanas entre 1869 y 1917*, *in* LA SUPREMA CORTE EN LA CONSTITUCIÓN, LA SUPREMA CORTE Y LOS DERECHOS HUMANOS 121–42 (1981). Whereas the Crown of the 1700s answered to no court, the Díaz regime and its Supreme Court reciprocally minimized possibilities of conflict.
26. *See infra* Part II.E.
27. *See infra* note 201.
28. *See infra* note 158.
29. *See infra* text accompanying note 134.

of implementing the constitutional proclamation of oil as the "property of the Nation" and maintaining U.S. support for the government's survival.[30]

In the 1960s, the electricity sector was fully nationalized,[31] and the mining sector was "Mexicanized"—that is, brought under majority Mexican ownership.[32] These takings were consensual in that the investors collaborated in the transfer of their property. However, they did so in the face of government regulation that had the effect of coercing cooperation by limiting the returns of continued ownership. Moreover, as to the electricity nationalization, investors' sale of the electricity companies to the State occurred during the pendency of proceedings to amend the Constitution to make electricity a state monopoly. In 1982, the banks were nationalized.[33] Following the nationalization, the expropriated Mexican bank owners turned to the federal courts. The federal courts declined to grant relief, and constitutional amendment promptly followed to obviate further claims.

These historical takings demonstrate growing recognition over time of the rule of law's importance. As to such takings, however, the rule of law was never implemented convincingly. Government to government negotiation,[34] unilateral government action,[35] creeping expropriation,[36] and negotiation

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30. *See infra* notes 169, 181, 185, and 216.
31. *See infra* text accompanying notes 235–236.
32. *See infra* text accompanying notes 240–249.
33. *See infra* text accompanying note 258.
34. Resolution of expropriated U.S. landowner claims was reached through this method. *See infra* text accompanying notes 141–149.
35. This occurred in the context of bank expropriation. *See infra* Part II.H.
36. Creeping expropriation has been understood as a deliberate policy:

> La historia de las relaciones entre las empresas extranjeras y el Estado después de la expropiación del petróleo en 1938, muestra claramente que los intereses extranjeros nunca han sido forzados, a punta de pistola, por así decirlo, a aceptar las reglas de juego que el Estado mexicano considera como convenientes desde el punto de vista de los objetivos a largo plazo del país. Pero, en última instancia, el Estado siempre ha estado en posición de imponer informalmente su voluntad sobre los rebeldes que escogen el uso de caminos legales que les han sido dejados abiertos de manera conveniente, si es que no se avienen a la aceptación de las nuevas políticas. A menos que la cuestión fuese considerada de importancia vital, el Estado ni siquiera se preocuparía por utilizar mecanismos de persuasión, debido a que se encontraba convencido de que, a largo plazo, podría conseguir sus objetivos sin necesidad de provocar fricciones innecesarias. [The history of relations between foreign enterprises and the State after the 1938 oil expropriation shows clearly that the foreign interests have never been forced, at gunpoint, so to say, to accept the rules of the game that the Mexican State considers convenient from the perspective of the country's long-term objectives. However, ultimately, the State has always been in the position of informally imposing its will on the rebels that choose the use of legal pathways left open, if the new policies are not adopted. Unless the question was considered of vital importance, the State did not even bother to use mechanisms of persuasion, because it was convinced, in the long-term, of being able to reach its objectives without provoking unnecessary frictions.]

under the threat of taking[37] predominated as the mechanisms to resolve expropriation issues. In the various expropriations, the Supreme Court's independence was subject to question (notably as to oil in the 1920s and 1930s), the constitutional system was structured so that no judicial recourse existed (as in the case of land expropriations and the 1982 constitutional amendment to obviate bank expropriation challenges), or the government acted so as to accomplish a creeping expropriation that by its gradualism or political posture precluded effective judicial recourse (in the case of railroads, electricity, and sulfur extraction). Consideration of the historical takings and of how the rule of law fared with respect to them provides a foundation to appreciate the contemporary developments favorable to the rule of law's application to investment and expropriation matters.

B. Recent Developments

Mexico appears to be moving beyond its history of resolving expropriation disputes by political means. It is establishing mechanisms to resolve expropriation and other investment disputes by independent legal process. Judicial reform and opening to international law are intended to establish that such disputes are firmly subject to the rule of law.[38] The Mexican Supreme Court's 2002 decision resolving a dispute between Congress and the President with implications for private participation in the electricity sector,[39] and the *Metalclad* expropriation dispute, which Mexico resolved in 2001 by paying a sum approximating the arbitral award,[40] illustrate these developments' promise. These decisions addressed politically charged investment matters: respectively whether President Fox could provide for the national electricity monopoly's purchase of more electricity from private producers, and the consequences to Mexico of state and municipal obstruction of a foreign investor's pursuit of a federally approved hazardous waste landfill. The respect accorded these

MIGUEL S. WIONCZEK, EL NACIONALISMO MEXICANO Y LA INVERSIÓN EXTRANJERA 248 (1967) (author's translation). An admirer of Mexico's graduated approach to expropriating or displacing private investment, especially foreign investment, commended it as an alternative assertion of State control ultimately more effective than Fidel Castro's radical expropriation on assuming power. ERIC N. BAKLANOFF, EXPROPRIATION OF U.S. INVESTMENTS IN CUBA, MEXICO, AND CHILE, 130–31 (1975).

37. For example, electricity and sulfur. *See infra* text accompanying notes 221 and 240.

38. *See infra* Part VI.

39. *See infra* text accompanying note 530. President Vicente Fox's acceptance of this adverse Supreme Court ruling is a current political milestone. *See infra* text accompanying note 532.

40. *See infra* text accompanying note 279.

proceedings' application of the rule of law gives investors in Mexico a greater basis for trust.[41]

Although this Article focuses on the rule of law as it pertains to expropriation and investment disputes, fundamental steps towards a state of law require mention because they offer the federal judiciary a firmer constitutional foundation upon which to apply the rule of law.[42] Mexico's written Constitution omitted much of Mexican constitutional practice for most of its history as an independent country.[43] The Partido Revolucionario Institucional's dominance of national political life endured from President Cárdenas's 1934 election through President Zedillo's term ending in 2000. Through this period, a President served only one term, but during that term enjoyed broad

41. The pending proposals of President Fox and the legislative opposition each accept the Supreme Court's decision and acknowledge it as a starting point for debate as to reform. As to *Metalclad*, Mexico's acquiescence to the finding of an expropriation, by payment of a sum approximating the arbitral award, confirms Mexico's commitment to NAFTA's Chapter 11 arbitration.

42. The movement away from political resolution of expropriation disputes coincides with progress in achieving both the rule of law and a state of law. In Mexican discourse, these two concepts are distinct, but related. Progress toward one reinforces the other. For example, Juan Alberto Carbajal, *La Independencia Judicial y la Suprema Corte de Justicia de la Nación*, *in* ESTUDIOS SOBRE LA JUSTICIA 75, 76 (2001), observes that the rule of law is necessary for a state of law. The rule of law definition employed here is the application of an independent legal process to dispute resolution, namely, a strong, independent judiciary or autonomous arbitration. A state of law can be understood as a State in which the dominant political voices of the legislative and executive powers respect the institutions of constitutional governance: "El estado de Derecho es el estado que se somete él mismo al imperio de la ley y que no puede transgredirla ni concucarla por ninguna causa y menos por la razón de Estado, en nombre del cual se han cometido toda clase de crímenes." [The state of Law is the state that submits itself to the rule of the law and that cannot transgress it or breach it for any cause and especially for reasons of State, in the name of which all classes of crimes have been committed.] Juan María Alponte, *El Estado de Derecho y el Desarrollo*, MÉXICO EN EL MUNDO DEL SIGLO XXI, Sept. 2000, at 34 (arguing that such a state of law is a prerequisite to economic development and more broadly to realization of human potential) (author's translation). Mexico's steps favoring independent legal process to resolve expropriation and investment disputes evidence progress in respect to the rule of law. Simultaneously, its executive and legislative powers appear to be paying increased respect to the written Constitution, and particularly its provisions for the judicial power to resolve disputes between governmental entities, and to confirm the constitutional conformity of the law and its implementation. Progress on these fronts is important to a legal system that aspires both to follow the rule of law and to be a state of law. For a discussion of the Constitution's newfound rigidity and its implications, see *infra* Part III.B.4.

43. *See, e.g.*, PABLO GONZÁLEZ CASANOVA, LA DEMOCRACIA EN MÉXICO (1965); VERNON, *supra* note 7. Traditionally "metaconstitutional" bargains—understandings not apparent in the Constitution's text—governed Mexico. *See* Jorge I. Domínguez, *Introduction* to MEXICO'S POLITICAL ECONOMY: CHALLENGES AT HOME AND ABROAD 9–21 (Jorge I. Domínguez ed., 1982). These bargains included: (1) participants supporting the system even if they would lose in the short run; (2) all sectors cooperating to manage growth, for example, business and government cooperating in labor peace; (3) Mexico conducting independent policy in reliance on U.S. restraint; (4) elites and masses sharing faith in social development; (5) the dominant party embracing ideologies of all kinds. *Id.* at 10–17.

power, plus the de facto ability to designate his successor.[44] Relative to the politically charged expropriations, the one-party dominance limited the significance of independent judicial review.

President Fox's 2000 election as modern Mexico's first President outside the long dominant party presents the promise of an alternation of power among political parties, with consequent respect for the written Constitution's institutional checks and balances, including respect for the judicial power's role as the third branch of government.[45] President Fox's election coincides with emergence from the sustained, one-party domination of the federal government's three branches and of Mexico's thirty-one states and federal district. These events improve prospects for the rule of law's application in many ways. Most notably, a meaningful opposition in the federal legislature, plus heterogeneous control of state governments, renders constitutional amendment less available to support the prevailing political concern of the moment.[46] Likewise, a meaningful opposition in the Senate legitimizes Senate ratification of presidential Supreme Court nominations.[47]

Crony capitalism mixes the bounds of the public and private sectors, and has little use for the rule of law. It can result in a form of despotic kleptocracy in which the origins of the rulers' personal fortunes are difficult to distinguish from the national treasury. Also, corporate and government funds may be directed to maintain power without public surveillance. Charges of crony capitalism and related corruption have been raised throughout Mexico's history,[48] ranging from the pre-Revolutionary corruption of the Díaz regime,[49]

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44. *See, e.g.*, JORGE G. CASTAÑEDA, LA HERENCIA: ARQUEOLOGÍA DE LA SUCESIÓN PRESIDENCIAL EN MÉXICO (1999); JORGE G. CASTAÑEDA, PERPETUATING POWER: HOW MEXICAN PRESIDENTS WERE CHOSEN (Padraic Arthur Smithies trans., New Press 2001).

45. President Ernesto Zedillo's 1994 reform, see Part *infra* III.A., six years prior to the dominant party's loss of the Presidency, provided the federal judiciary a new measure of independence. Nonetheless, in 1998, prior to President Fox's election, there were constraints on the Supreme Court's effectiveness absent "a fully functioning oppositional party system and real alternation of political power." Sara Schatz, *A Neo-Weberian Approach to Constitutional Courts in the Transition From Authoritarian Rule: The Mexican Case (1994–1997)*, INT'L J. SOC. L., June 1988, at 217, 238.

46. *See infra* Part III.B.4.

47. *See infra* text accompanying note 340.

48. *See* CARLOS ELIZONDO, LA SILLA EMBRUJADA: HISTORIA DE LA CORRUPCIÓN EN MÉXICO (1987); VICIOS PÚBLICOS, *supra* note 17. Other OECD members with entrenched political elites have faced similar claims. *See, e.g.*, A.C. KOTCHIAN, LOCKHEED SALES MISSION: 70 DAYS IN TOKYO (1976) (reporting by former Lockheed Aircraft Corporation president of events leading to former Japanese prime minister's arrest in connection with aircraft procurement bribery); ANTONIO DI PIETRO, AS RECOUNTED TO GIOVANNI VALENTINI, INTERVISTA SU TANGENTOPOLI (2001) (Italy).

49. JACINTO BARRERA BASSOLS, EL CASO VILLAVICENCIO: VIOLENCIA Y PODER EN EL PORFIRIATO (Mexico 1997) (recounting forced labor, bank scandal cover-up, and repression through police violence, through a biography of a police inspector famously involved in the prison death of President Díaz's accused attempted assassin).

to the enrichment of various associates of the Salinas presidency,[50] and more recently to the misappropriation of Pemex funds in connection with Mexico's last presidential election.[51] Crony capitalism is neither the market-based capitalism that Weber contemplated, nor is it the capitalism of global competition for investment capital. Crony capitalism corrodes constitutional governance,[52] and Mexico's movement toward a rule of law both benefits from and reinforces the decline of this kind of capitalism. A broad tranche of private investment, including funds subject to U.S. securities law, is not prepared to take the risk of loss associated with the exposure of the chicanery and the possibility of direct or indirect expropriation arising from changed political circumstances. As global capital markets deepen and rely on investors operating through disclosure and fiduciary mechanisms such as mutual, pension, and insurance funds, the relative importance of the investor pool that shares such concerns will continue to grow.

President Fox's election represents more than just a shift in political preference. Years of reform to insure fair governance of elections and equitable rules for the conduct and financing of political campaigns preceded it. Mexico's 2000 election of a President outside its long dominant party represents a maturation of Mexican political life that comforts investors. However, the optimism for the rule of law's application to resolve expropriation disputes goes well beyond the political event of a specific presidential election. This Article presents the evolving consequences of constitutional reform relative to the judiciary and the ongoing opening to international law as fundamental reasons to be optimistic about the rule of law's application.

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50. *See* JOSÉ LUIS TRUEBA LARA, RAÚL SALINAS DE GORTARI: EL ABUSO DEL PODER (1996); MARÍA BERNAL, RAÚL SALINAS Y YO: DESVENTURAS DE UNA PASIÓN (2000) (containing a first-hand account of the *historia de amor* between María Bernal and President Salinas's brother Raúl, interrupted by a murder charge against Raúl in connection with the assassination of José Francisco Ruíz Massieu); MARIO RUÍZ MASSIEU, TESTIMONIOS A TIEMPO (1998) (containing the former Mexican chief prosecutor's account, written from U.S. detention during the pendency of Mexican extradition proceedings, of events and cover-up charges against him, during the transition from President Carlos Salinas to President Zedillo, following the assassination of the prosecutor's brother José Francisco Ruíz Massieu, a then ruling party leader).

51. Press Release, Instituto Federal Electoral, Sanciona el IFE al PRI con Mil Millones de Pesos por Irregularidades en sus Ingressos del año 2000 (Mar. 14, 2003) (reporting a Federal Electoral Institute assessment of a one billion peso fine against Partido Revolucionario Institucional for acceptance of 500 million peso funding from PEMEX union during the 2000 presidential campaign), http://www.ife.org.mx; *see* Richard Boudreaux, *Fox Targets Graft in Mexico Oil Monopoly*, L.A. TIMES, Sept. 28, 2002, at A1 (reporting allegations of diversion of state oil monopoly funds to the then ruling party's campaign to retain the presidency).

52. For example, the Ministry of Communications' ability to revoke a radio or television broadcast concession was identified as a tool to maintain ruling party control. Ernesto Villanueva, *La Reforma Legal Pendiente de Cara al Nuevo Régimen en México*, *in* NUEVAS TENDENCIAS DEL DERECHO DE LA COMUNICACIÓN: VISIONES DESDE ESPAÑA Y MÉXICO 167, 177 (Guillermo Escobar & Ernesto Villanueva eds., 2000).

C. Inventory of Topics Addressed

This part provides a narrative overview of this Article's detailed table of contents. Following this Part I, five further parts comprise this Article: (II) review of Mexico's historical expropriations and of how the rule of law figured in them; (III) exposition of Mexico's system of federal judicial review and its consequences for the rule of law's application to investment and expropriation disputes; (IV) Mexico's opening to international law and its implications; (V) discussion of two recent developments offered as milestones to assess progress in the rule of law's application; and (VI) observations as to prospects for the rule of law's further application in Mexico.

Part II begins with a brief outline of Mexican constitutional law on expropriation. Sketches of the legal aspects of the principal expropriations follow. They provide context for appreciating the progressive, increased relevance of the rule of law over time and the continuing evolution as to its application. Notwithstanding the rule of law's growing relevance with time, the historical expropriations leave questions as to its effective application. The last of the sketches concerns the *Metalclad* arbitration resolved in 2001 by Mexico's payment of a sum approximating the arbitral award rendered for expropriation. *Metalclad* is the first of the expropriations in which the rule of law's application is beyond question. Mexico achieved this result by consenting to defer the *Metalclad* dispute to international arbitration.

Part III lays out the role of the Mexican federal judiciary and the 1994 reforms with respect to the rule of law's application. It sets forth developments that support increased expectations in regard to the rule of law's application, including the Supreme Court's reform to increase its independence and to allow it greater power to invalidate unconstitutional government action, reform of federal judicial governance to increase judicial independence, and the de facto increased difficulty of amending Mexico's Constitution. Part III also outlines the position of judicial review in Mexican constitutional law through the established writ of *amparo* and the more recent provisions for constitutional review of law with general effect. The reformed judicial system has yet to address a politically charged expropriation definitively,[53] but the Supreme Court's 2002 decision discussed in Part V offers an opportunity to examine the rule of law's application to a dispute arising from the closely related question of the extent to which private investment is allowed in Mexico's electricity sector.

Part IV considers Mexico's opening to international law by treaty, legislation, and judicial articulation of new doctrine. It presents the evolution of

53. Litigation as to the 2001 sugar expropriation is progressing through the federal courts. *Cf.* sources cited *supra* note 17.

Mexican doctrine as to the relation of Mexican and international law, including the present conciliation through NAFTA of the historically sharp differences between such doctrine and the U.S. view of international law. It outlines opportunities for Mexico's continued opening to international law through further judicial elaboration of a modified dualist doctrine relative to the relation of Mexican and international law. The new, emerging constitutional design for addressing investment and expropriation disputes is more open to international law. Part IV therefore considers the question of how international human rights law and its concepts of property rights might relate to Mexican constitutional law relative to expropriation, especially the Constitution's Article 27 limitation on compensation to value assessed for tax purposes.

The developments discussed in Parts III and IV create an improved foundation for the rule of law's application to investment and expropriation disputes in Mexico. Part V presents two contemporary takings concerns as milestones to assess the developments. The first is a cautionary example; it relates to a 1999 incident concerning foreign investment in Mexico's toll roads. It exemplifies the continued potential for frustration of investment expectations outside the framework of judicial or arbitral application of the rule of law. The second, a 2002 Supreme Court decision that resolves a constitutional dispute between Congress and the President with implications for private investment in the electricity sector, appears more positive. The decision can be read as illustrating the Court's ability, invigorated by the 1994 reforms and the last decade's political developments, to resolve politically charged disputes between Mexican governmental authorities by application of the rule of law. However, the decision also exemplifies how the new framework for the rule of law may offer space to voices contrary to private investment, and it can be interpreted alternatively as a rearguard action of the *ancien régime*.

Part VI offers an assessment as to further prospects for realization of the recent developments' promise, with particular reference to the perspectives of investors and of Mexico's federal judiciary.

II. EXPROPRIATIONS

A. Expropriation Law

Mexico's 1917 Constitution and its 1936 Law of Expropriation[54] establish Mexican expropriation law. Mexico adopted its 1917 Constitution—much

54. "Ley de expropiación," D.O., 25 de noviembre de 1936, *available at* http:/www.cddhcu.gob.mx/leyinfo/pdf/35.pdf; THE MEXICAN EXPROPRIATION LAW AND CASES IN WHICH IT HAS BEEN APPLIED: ENGLISH AND SPANISH TEXT 61 (1938) (English translation).

amended since, but still in force—in conjunction with its Revolution.[55] The 1917 Constitution maintained much of Mexico's prior 1857 Constitution,[56] but added provisions for a then groundbreaking social agenda, including land redistribution and national appropriation of natural resources ownership. The Constitution at its 1917 adoption: (1) confirmed the ecclesiastical property expropriation,[57] (2) proclaimed a program of agricultural land redistribution,[58] and (3) declared the State's ownership of subsoil resources including oil.[59] As the sketches of historical expropriations that follow show, the Revolutionary constitutional agenda of property redistribution, particularly agricultural property, ecclesiastical property, and subsoil resources, is today largely achieved.

The 1917 Constitution and the 1936 Law of Expropriation establish the substantive law that underlies expropriation disputes. The 1917 Constitution's provisions define property rights with an emphasis on their social value. They reserve certain kinds of property rights and activity to the State, but provide for concession to private activity, as well as for expropriation. The 1936 Law of Expropriation adds detail as to procedure and broadly defines the purposes for which expropriation could be undertaken.[60] This part outlines the substantive law. Its application to the historical expropriations reviewed here reflects Mexican political concerns of social justice and development. However, the concern as to the rule of law's application is largely independent of the substance of this blackletter law. That is, the effectiveness of the rule of law's application as a technique to implement

55. For background on Mexican constitutional history, see MÉXICO Y SUS CONSTITUCIONES (Patricia Galeana ed., 1998). JOSÉ LUIS SOBERANES FERNÁNDEZ, CÁMARA DE DIPUTADOS DEL H. CONGRESO DE LA UNIÓN, LVIII LEGISLATURA, LA CONSTITUCIÓN DEL PUEBLO MEXICANO (2001), presents the Mexican Constitution with an annotation of its amendments. The Chamber of Deputies' web site offers a fuller version on the Internet. Reformas a la Constitución, http://www.cddhcu.gob.mx/leyinfo/refcns. As of 1983, Ramón Sánchez Medal counted 87 amendments, 14 in the 1977–1983 period, modifying 83 of the Constitution's 136 articles with a total of 300 texts. RAMÓN SÁNCHEZ MEDAL, EL FRAUDE A LA CONSTITUCIÓN: Y EL ÚNICO AMPARO EN MÉXICO CONTRA UNA REFORMA DEMOLITORIA DE LA CONSTITUCIÓN 41 (1988); FELIPE TENA RAMÍREZ, DERECHO CONSTITUCIONAL MEXICANO 64 (1996) (obtaining a similar count).

56. For the 1857 Constitution, see *supra* note 25.

57. MEX. CONST. art. 27(II), *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/27.pdf.

58. MEX. CONST. art. 27.

59. *Id.* The "Nation" holds "direct dominion" of mineral resources, as well as of "petroleum and all the solid, liquid or gaseous hydrocarbons." *Id.* (author's translation). As to petroleum, hydrocarbons, and mineral and water resources, Article 27 provides:

> . . . the dominion of the Nation is unalienable and not waivable, and the exploitation, use or enjoyment of the resources in question, by particular parties or by companies constituted in conformity with Mexican laws, cannot be realized except through concessions granted by the Federal Executive, in accordance with the rules and conditions that laws establish.

Id. (author's translation).

60. *See infra* text accompanying note 82.

constitutional and revolutionary policies of property redistribution has been independent of the substance of the policies. The judiciary's constitutional position, Mexico's posture relative to international law, and their evolution as discussed in Parts III and IV, determine to a greater degree the concerns as to the rule of law's application. As the judiciary achieves greater independence and as Mexico becomes more open to international law, the rule of law becomes a more effective tool to assure Mexico's successful participation in the global competition for investment capital, while at the same time maintaining Mexico's constitutional principles.

1. Property and Private Economic Activity

The 1917 Constitution defined real property rights as originating in the State.[61] The Constitution honors private economic activity, but emphasizes that its value derives from its contribution to the collectivity.[62] For example, by 1983 amendment, the Constitution provides: "The law will nourish and protect economic activity that particular parties realize and will provide conditions so that the private sector involvement contributes to national economic development, in the terms that this Constitution establishes."[63]

The 1917 Constitution adopted the Calvo doctrine,[64] prohibiting foreigners' recourse to their home governments particularly with regard to real

61. "The ownership of the lands and waters within the limits of the national territory, corresponds originally to the Nation, which has held and holds the right to transmit the dominion of them to particular parties, constituting private property." MEX. CONST. art. 27 (author's translation).

62. One root of emphasis on property rights as deriving from collective welfare flows from the colonial era:

> Latin America . . . is heir to a Spanish tradition that vests property rights primarily in the royal patrimony within the framework of a hierarchical and organic concept of society. In contrast, the American contractualist political tradition, drawn from John Locke's *Second Treatise of Civil Government*, emphasizes the rights of the individual against the state, in particular the "natural right" of property.

SIGMUND, *supra* note 18, at 24 (citation omitted).

63. MEX. CONST. art. 25, final paragraph, *amended by* D.O., 3 de febrero de 1983, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/25.pdf (author's translation).

64. The doctrine is named after Carlos Calvo (1824–1906),

> an Argentine diplomat who wrote a treatise on international law, which went through five editions in Spanish and French between 1868 and 1896. The Calvo Doctrine, drawn from his work, is the first of many Latin American contributions to the development of international law embodying the point of view of the less developed (in Calvo's terms, weaker) nations. It asserts that foreigners are to be treated on a plane of absolute equality with the nationals of a given country. Foreigners should not lay any claim to diplomatic protection or intervention by their home countries since this would only provide a pretext for frequent violations of the territorial sovereignty and judicial independence of the less powerful nations.

SIGMUND, *supra* note 18, at 20–21; CARLOS CALVO, 1 LE DROIT INTERNATIONAL THEORIQUE ET PRATIQUE 349 (4th ed. 1887) ("Dans leurs démêlés avec les États américains, les nations européennes

property ownership.[65] In recent years, Mexico has softened but not eliminated its insistence that foreigners accept its courts and law for resolution of disputes.[66]

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sont toujours intervenues contre les faibles et ne sont jamais attaquées aux forts et aux puissants." [In their disputes with American States, the European nations have always intervened against the weak ones and have never attacked the strong and the powerful.]) (author's translation). Calvo attributed European interventionism to remnants of European monarchical and colonial tendencies unprepared to recognize the "independent and free nations" of the Americas as equals. *Id.* at 349–50. Calvo affirmed that the legislative and judicial independence inherent to any sovereign State implied such a State's right to subject foreigners within its territory to its law and courts with no foreign interference. *Id.* at 266. Calvo articulated his views in the context of European interventionism in the Americas, particularly France's intervention in Argentina and Uruguay from 1838 through 1850, *id.* at 324–36, and France's support of Maximilien's establishment as Mexico's emperor from 1864 through 1867, *id.* at 337–48. The widespread adoption of Calvo's views in Latin America, including Mexico, reacted to both U.S. and European interventionism. As fears of military invasion receded, concern shifted to the exercise of private economic force. WIONCZEK, *supra* note 36, at 8, expressed this concern:

> A pesar de que este volumen se ocupa solamente de dos casos concretos de enclaves económicos extranjeros en México: el de la industria eléctrica y el de la minería de azufre, su contenido sirve de ilustración de la naturaleza de la estrategia económico-política de las grandes empresas extranjeras que operan en un país subdesarrollado. Tal estrategia está basada en una filosofía muy particular que cree que la aplicación de las sanciones de todo tipo contra una "sociedad rebelde" forzosamente tiene que surtir efectos deseables para los que las aplican no sólo porque tienen más fuerza que el adversario sino porque la inmanente justicia del desarrollo capitalista está de su lado. [Although this volume concerns only two specific cases of foreign economic enclaves in Mexico, the electric industry and sulfur mining, its content serves to illustrate the nature of the economic-political strategy of large foreign enterprises that operate in an underdeveloped country. Such strategy is based on a very particular philosophy that believes that application of sanctions of every type against a "rebel society" must necessarily produce desirable effects for those who apply it not only because they have more force than the adversary but also because the immanent justice of capitalist development is on their side.]

Id. (author's translation).

65. Constitution Article 27 limits acquisition of "lands and waters" to Mexican companies and citizens. An exception exists for foreigners who accept a Calvo clause and agree that its breach means forfeiture of the property at issue. MEX. CONST. art. 27(I). The United States rejected this position even following its 1936 adoption of the "good neighbor policy" by which it abandoned its unilateral interpretation of the Monroe doctrine that it could intervene in Latin America. *See* MERRILL RIPPY, OIL AND THE MEXICAN REVOLUTION 87–88 (1972), first published as EL PETROLÉO Y LA REVOLUCIÓN MEXICANA (1954); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 (1987) (stating the U.S. view that a State whose national has suffered an inappropriately compensated expropriation has a claim against the expropriating State).

66. For example, in connection with Mexico's adherence to NAFTA, CFE, the state electricity monopoly, was allowed to "agree to the application of foreign law, the jurisdiction of foreign tribunals in commercial matters and conclude arbitral agreements when the best compliance with its purpose merits." "Ley del Servicio Público de Energía," art. 45, *amended by* D.O., 23 de diciembre de 1992 and D.O., 22 de diciembre de 1993, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/99.pdf (author's translation); LUIS MALPICA DE LAMADRID, LA INFLUENCIA DEL DERECHO INTERNACIONAL EN EL DERECHO MEXICANO: LA APERTURA DEL MODELO DE DESARROLLO DE MÉXICO 342–44 (2002). CFE may do so notwithstanding that those who seek authorization to generate electricity for sale to CFE must establish themselves as subject to Mexican jurisdiction, that is, they must be "physical or legal persons constituted in conformity with Mexican laws and with domicile in the national territory." MEX. CONST. art. 36(III)(a) (author's translation). A similar

2. Property and State Responsibility

More broadly, regulation of development is a State responsibility to be exercised to attain goals beyond simple economic growth. By another 1983 addition to the Constitution, the State is to regulate:

> national development to guarantee that it be complete, that it fortifies the sovereignty of the Nation and its democratic regime and that, through promotion of economic growth and employment and a more just distribution of income and wealth, permits full exercise of the liberty and the dignity of the individuals, groups and social classes, whose security this Constitution protects . . . .[67]

At its 1917 adoption, the Constitution reserved specific "strategic areas" of economic activity "in an exclusive manner" to the State.[68] The State is to maintain "ownership and control" of entities established in the strategic areas reserved to the State.[69] As subsequently amended, these areas include: "petroleum and other hydrocarbons, basic petrochemicals, . . . electricity, and the activities which laws issued by Congress expressly identify."[70]

The Constitution contemplates the grant of concessions to private parties in regard to strategic areas and property reserved to the State.[71] Although the colonial *encomiendas* could be considered concessions,[72] concessions in the modern sense began to appear in Mexican law in the 1800s, first with respect to railroad development and operation, and subsequently with respect to water rights, oil, and other natural resources.[73] A proviso relevant to concessions is

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acceptance occured in respect to PEMEX, the state oil company. MALPICA DE LAMADRID, *supra*, at 342–44 (discussing the NAFTA-related amendment). Mexico's treaty commitments to arbitrate expropriation disputes with treaty country investors illustrate further softening. *See infra* text accompanying notes 432–463.

67. MEX. CONST. art. 25 (author's translation).

68. *Id.*

69. *Id.*

70. MEX. CONST. art. 28, ¶ 4 (author's translation). Electricity was added in 1960. D.O., 29 de diciembre de 1960, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/27.pdf. Banking was added just after the 1982 Mexican bank expropriation and subtracted in 1990 in anticipation of bank privatization. D.O., 17 de noviembre de 1982 (adding) and D.O., 27 de junio de 1990 (subtracting), *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/28.pdf. Satellites and railroads were removed in 1995. D.O., 2 de marzo de 1995, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/28.pdf; *see also* MALPICA DE LAMADRID, *supra* note 66, at 467–70 (reviewing rules on railroad and satellite concessions).

71. MEX. CONST. art. 28. Mexicans "in equality of circumstances" are constitutionally to be preferred to foreigners in respect to concessions. *Id.* art. 32.

72. *See infra* text accompanying note 89.

73. RIPPY, *supra* note 65; Miguel S. Wionczek, *Electric Power: The Uneasy Partnership*, *in* PUBLIC POLICY AND PRIVATE ENTERPRISE IN MEXICO, *supra* note 16, at 19, 22–23. The railroad concessions granted from 1837 to 1873 were perpetual and exclusive. RIPPY, *supra* note 65, at 50. An 1899 law limited railroad franchise grants to ninety nine years. *Id.* at 51. The 1910 law on exploitation of

that the "management of federal economic resources" be subject to public bidding;[74] however, public bidding may be waived if it would not assure "the best conditions available with respect to price, quality, financing, opportunity and further pertinent circumstances."[75]

3. Expropriation of Property

The Constitution provides that there is to be no taking of:

> properties, possessions or rights, except through judicial proceeding before tribunals previously established, which satisfies the essential formalities of the procedure and in conformity with the laws adopted prior to the fact. . . .[76]

Constitution Article 27 provides that expropriation may be undertaken only for "cause of public utility" and with compensation. In addition to the right to expropriate for compensation, Article 27 gives the "Nation" rights to impose upon private property as "the public interest dictates," without compensation, provided of course that such imposition does not rise to the level of expropriation.[77] Article 27 contemplates that federal and state laws determine the cases in which the taking of private property is "of public utility."

Article 27 itself specifies that compensation is to be determined with reference to the property's assessment for taxation, subject to modification by expert testimony as to the incremental effect on value of any improvement or degradation occurring subsequent to the assessment determination. This valuation criteria is confiscatory as to property subject to taxation based on assessment at less than full market value. For example, at least through recent years real property has in practice been recorded in the relevant registries at only 10 percent of its commercial value.[78] Article 27 quickly moves

federal waters contemplated a government right to buy out granted concessions. *Id.* at 50 (citing *Ley sobre Aprovechamiento de Aguas de Jurisdicción Federal de 1910*). It also required that existing water entitlements be exchanged for concessions under the new law. *Id.* A 1901 law provided for federal grant of concessions to oil resources on federal lands for ten-year terms, subject to the grantee taking affirmative action to appropriate the oil. *Id.* at 22–23.

74. MEX. CONST. art. 134 (author's translation).

75. *Id.* In such instances, "the laws will establish the bases, proceedings, rules, requirements and further elements to establish the economy, effectiveness, efficiency, impartiality and honorability that assure the best conditions for the State." *Id.*

76. MEX. CONST. art. 14 (author's translation).

77. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S 302 (2002), reaches a similar result under U.S. law. It allows the imposition of a regulatory burden on property without compensation, with the assessment of when "justice and fairness" demand compensation being dependent on the circumstances. *Id.* at 336.

78. Francisco Xavier Manzanero Escutia, *Expropiación, Nacionalización y Requisa Civil o Administrativa*, *in* 1 PROPUESTAS DE REFORMAS CONSTITUCIONALES 135, 140 (2000). If the InterAmerican Court for Human Rights should ever address this provision of Mexico's Constitution

expropriation disputes beyond the question of whether expropriation may occur by providing that the public administration may, one month following an expropriation proceeding's commencement, obtain a judicial order to allow it to consummate the expropriation definitively by taking possession of the property.[79] The issue of compensation may then linger for some time. In 1997, the Mexican Supreme Court ruled that compensation is required within a reasonable period, but that such period includes not only time to establish the appropriate amount of compensation, but also time for the State to amass the revenues necessary to pay the compensation.[80] The Court made clear that the State's need to expropriate to satisfy urgent social needs should not be delayed by the unavailability of funds to pay compensation.[81]

The 1936 Law of Expropriation elaborates substantively on the 1917 Constitution's Article 27 text by broadly defining "causes of public utility."[82] The definition includes, but extends well beyond, such items as creation of rights of way, municipal facilities, and the like. Elements of the definition establishing broad justification for expropriation are: "establishment, exploitation or conservation of a public utility";[83] "defense, conservation, development or use of natural elements susceptible of exploitation";[84] "equitable distribution of wealth taken or monopolized with exclusive advantage of one or various persons and with prejudice of the collectivity in general or a class in

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and find it contrary to the American Convention on Human Rights, Mexican courts may be faced with attempting to reconcile Mexico's treaty commitments with its Constitution's supremacy. *Cf. infra* notes 487 and 516, and Part IV's discussion of monism and dualism. Mexico's treaty undertakings to arbitrate investment disputes with treaty country investors, including NAFTA Chapter 11, avoid the issue by establishing fair market value as the criterion for compensation, and making declared tax value only one element "as appropriate," of establishing fair market value. *Cf. infra* notes 294 and 485–487.

79. MEX. CONST. art. 27(VI).

80. 6 S.J.F. 10 (9a época 1997), Tesis: P. CXIX/97.

81. *Id.*; *see* dissenting opinion at note 1 (arguing unsuccessfully for requiring a pre-expropriation valuation hearing).

82. "Ley de expropiación," D.O. 25 de noviembre de 1936, art. 1. As to procedure, expropriation is accomplished by Federal Executive decree published in the *Diario Oficial* and personally notified to those affected. *Id.* art. 4. A second *Diario Oficial* publication overcomes any inability to make personal notification. *Id.* Administrative appeal of the determination to expropriate is allowed during fifteen working days following notification. *Id.* art. 5. Compensation is equal to the property's tax-declared value, adjusted only for changes in value occurring subsequent to the tax declaration. *Id.* art. 10 (conforming to MEX. CONST. art. 27(VI), ¶ 2). The value assessed for tax purposes is deemed tacitly accepted by the uncontested payment of the relevant taxes. *Id.* art. 10. An expedited judicial procedure, without appeal but subject to the constitutional right to *amparo*, is available to contest compensation. *Id.* arts. 11–17; *see* text accompany notes 358–388. The expropriating authority establishes the form and term not to exceed ten years for compensation. D.O., 25 de noviembre de 1936, art. 20. The State compensates for expropriated property that it receives; otherwise, the property's recipient is responsible. *Id.* art. 19. *Cf. supra* note 1.

83. D.O. 25 de noviembre de 1936, art. 1, item I.

84. *Id.*, art. 1, item VII.

particular";[85] and "creation, development or preservation of an enterprise for the benefit of the collectivity."[86]

B. Evolution and Pattern

The history of government takings sketched here presents an evolution and a pattern relative to law.

The evolution is the growing significance attributed to the *rule of law* in connection with accomplishing takings. Although the *use of law* and the legal system was important to the consummation of each taking described here, the degree of openness to international law and the presence or absence of some notion of judicial process to confirm the validity of the taking varied with time.[87] In general, as to the earlier takings, there was little openness to international law, and either no independent judicial process or one with merely formal importance attributed to it. In the later takings, first the Mexican Supreme Court and later international arbitration are placed at center stage. The chronology of the takings demonstrates an evolution relative to the executive branch of government's control of the taking process. Considering the takings from oldest to most recent, they display growing acceptance, first purely formal and ultimately substantive, of the notion of subjecting executive action to independent review.

There is an element of creeping expropriation to the takings. The pattern of the takings is a recharacterization of the nature of the ownership right prior to formal taking. The change is either a formal change in the nature of the ownership right or subjection to new economic regulation that is arguably confiscatory in effect. In either situation, the change devalues the ownership right. In some instances the threat of formal expropriation or of further regulatory change precipitates the property devaluation. Only after this initial devaluation does property change hands. Although the formal ownership change may occur in an "amicable" transaction, the transaction's "amicability" may be conditioned by the expropriated party's inability to resist the expropriation. Alternatively, the formal ownership change may be futilely contested, with the ultimate result being the expropriation's confirmation by some combination of executive, legislative, and judicial determinations.[88]

85. *Id.*, art. 1, item VIII.

86. *Id.*, art. 1, item IX.

87. PEERENBOOM, *supra* note 2, at 8 (distinguishing "rule by law" from "rule of law").

88. Each of the takings to be sketched here fits this pattern, except the 1982 bank expropriation and *Metalclad*. Although the 1940s legislative modification of the concession concept applicable to banking might be argued as recharacterizing the nature of Mexican bank ownership, see *infra* note 259, the 1982 bank expropriation occurred as one abrupt step in the face of a currency crisis deemed to constitute a public emergency. As to Metalclad's hazardous waste landfill

The re-posturing of property rights discussed here happens apart from any judicial or arbitral action. That it occurs as a pattern evidences attention to law as a device to legitimize the taking; however, it is a recourse to law that evades the rule of law. No independent tribunal is available to resolve disputes in respect to the taking. The taking is either accomplished with sufficient gradualism that recourse to a tribunal does not occur, or the political environment leads to resolution of takings without access to such recourse. At most it is a use of law consistent with a state of law: The recharacterization occurs in conformity with the constitutional mechanisms of governance. While the suppression of investment value by rate regulation in the electricity and railroad sectors might well be so characterized, takings such as the oil and bank expropriations reflect a constitutional change rather than the application of an existing constitutional regime. As such, they evidence neither the rule of law nor a state of law.

C. Real Property

Mexico's land ownership issues have deep roots. The Spanish Crown's grants of feudal rights to land and over the land's occupants, known as *encomiendas*, to Cortés and other conquistadores[89] corresponded to disruption of the relationships of dominance and subjugation established among mesoamerica's indigenous cultures.[90] The *encomienda* rewarded the conquistador, created an administrative unit to govern the indigenous population and to convert it to Christianity, and established a tax base to extract wealth for the Crown.[91] Concentrated land ownership prevailed in one form or another even through the conflicts of the 1800s between conservative and liberal forces.[92]

Mexico's liberal reformers of the mid-1800s articulated a vision of broadly distributed land ownership, free of temporal ecclesiastical influence. Today, their vision is realized; in their lifetimes it was not. Indeed, in the short run their efforts not only failed, but resulted in more concentrated land ownership.

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project, expropriation was not openly a goal. Only the subsequent arbitration determined that expropriation occurred. Local government requirements devalued the project by obstructing and thereby indirectly expropriating it. The government did not, however, formally take title. *See infra* text accompanying notes 276–284.

89. NATHAN WHETTEN, RURAL MEXICO 81–85, 91–92 (1948).

90. *See generally* SANDOVAL PARDO, *supra* note 19, at 3–124; ALAN KNIGHT, MEXICO: FROM THE BEGINNING TO THE SPANISH CONQUEST (2002). During the period of Spanish conquest, central Mexico's population, estimated at 25 million prior to Cortés's 1521 defeat of the Aztecs, declined by 1605 to slightly over 1 million. SANDOVAL PARDO, *supra* note 19, at 162; ALAN KNIGHT, MEXICO: THE COLONIAL ERA 20–21 (2002) [hereinafter KNIGHT, COLONIAL ERA].

91. WHETTEN, *supra* note 89, at 81.

92. GUILLERMO F. MARGADANT, INTRODUCCIÓN A LA HISTORIA DEL DERECHO MEXICANO 83–86 (1998); *see also* KNIGHT, COLONIAL ERA, *supra* note 90.

Although during the colonial era, subsistence farming communities commonly litigated land title and achieved some measure of success,[93] the rule of law had little significance to land reform efforts of the 1800s, largely because independent Mexico's procedure for judicial review of government action, the writ of *amparo*, had yet to be consolidated.[94] In these matters, the executive relied on constitutional adoption and freshly obtained legislation, unconstrained by courts. Even as to the successful post-Revolution efforts to redistribute land, the rule of law remained secondary to redistribution.

1. Ecclesiastical Property

Following Mexico's 1821 independence from Spain, the Church and the extensive ecclesiastical landholdings divided Mexican society. Liberals were anticlerical, while conservatives remained nostalgic for a tradition of Church and monarchy. Neither had scruples about extracting funds from the Church to finance their civil wars.[95]

Liberal thought maintained that religion should be concerned with spiritual, not temporal matters;[96] land's removal from the cycle of purchase, sale, and inheritance hindered economic development;[97] and the extent of ecclesiastical landholdings impeded realization of a Jeffersonian democratic ideal of many small, self-sufficient farming landholders.[98] Much ecclesiastical land was dedicated to subsistence farming, with little incentive for either its owners or its occupants to improve its productivity. Once land came to be held by an ecclesiastical corporation—perhaps by bequest, perhaps as a dowry to enter a convent[99]—it was removed from inheritance and property transfer taxes, both of which were significant revenue sources.

The ecclesiastical corporations were monasteries and convents, religious orders, dioceses and parishes, and various charities including hospitals and schools. They paid no tax and disclaimed subjection to civil control. As of the mid-1800s, "perhaps a fifth or a quarter" of Mexico's national wealth was in ecclesiastical hands.[100] In some places, the ecclesiastical wealth was

93. KNIGHT, COLONIAL ERA, *supra* note 90, at 60–61.

94. *See infra* notes 367 and 368.

95. Liberals were inclined to tax and take ecclesiastical property, while conservatives were more inclined to force loans. Robert Knowlton, *Una Comparación: La Expropiación de los Bienes de la Iglesia en México y Colombia*, SIGLO XIX, July–Dec. 1990, at 149; JAN BAZANT, ALIENATION OF CHURCH WEALTH IN MEXICO: SOCIAL AND ECONOMIC ASPECTS OF THE LIBERAL REVOLUTION 1856–1875, at 25 (Michael P. Costeloe trans. & ed., 1971).

96. *See* BAZANT, *supra* note 95; Knowlton, *supra* note 95, at 151.

97. Knowlton, *supra* note 95, at 151.

98. *Id.*

99. *See* WHETTEN, *supra* note 89, at 94–96.

100. BAZANT, *supra* note 95, at 13.

even more extensive. For example, based on review of notarial registries, the Church in 1852 "owned approximately one-half of all the real estate" in Puebla.[101]

The ecclesiastical property was taken in two legal steps, the first of which devalued the property right.[102] First, ecclesiastical corporations were constrained to transfer land to individuals, with priority first to its occupants and then to any individual who denounced continued ecclesiastical ownership, in exchange for a mortgage on the land. Then, the remaining ecclesiastical property, mortgages included, was nationalized.

The first step was accomplished by an 1856 law that forced ecclesiastical property's conversion to individual ownership, structured to penalize the ecclesiastical interest.[103] The law's purpose was to convert the ecclesiastical corporation from an owner that received rent from the land's tenant, to a mortgagor that received principal and interest payments from the former tenant, newly vested with ownership. However, the ecclesiastical corporation–seller was deemed to sell in exchange for a mortgage calculated based on considering the rent as reflecting a 6 percent annual return.[104] This mechanism appears to have allowed acquisition at two-thirds of the land's value.[105] The tenant had the right to acquire the property on these terms by paying the State a 6 percent tax.[106] If a tenant failed to claim the property within three months, anyone who denounced its ecclesiastical ownership could do so.[107] This device incentivized the pious and those intimidated by Church hostility, to take ownership. However, the transfer tax, mortgage interest, upkeep, and taxes were still likely to exceed the prior rent.[108]

As the second step, the 1857 Constitution declared that the Church could no longer own property unless it was used directly for Church activities and the

101. *Id.* at 46; *see also* MARGADANT, *supra* note 92, at 129–30 (reviewing additional estimates confirming ecclestiastical wealth).

102. MALPICA DE LAMADRID, *supra* note 66, at 97–104.

103. "Decreto que Dispone la Desamortización de Fincas Rústicas y Urbanas que Administren como Propietarios las Corporaciones Civiles o Eclesíasticas de la República de 25 de julio de 1856," *in* MARCO ANTONIO DÍAZ DE LEÓN, LAS ACCIONES DE CONTROVERSIA DE LÍMITES Y DE RESTITUCIÓN EN EL NUEVO DERECHO PROCESAL AGRARIO 89–93 (2000); Knowlton, *supra* note 95, at 150, 152–53. Real estate directly related to the ecclesiastical corporation's core activity, such as a hospital or church sanctuary, was not converted. "Decreto que Dispone la Desamortización," art. 8, *in* DÍAZ DE LEÓN, *supra*, at 90; Knowlton, *supra* note 95, at 152–53.

104. "Decreto que Dispone la Desamortización," art. 1, *in* DÍAZ DE LEÓN, *supra* note 103, at 89.

105. Knowlton, *supra* note 95, at 152–53.

106. "Decreto que Dispone la Desamortización," art. 7, *in* DÍAZ DE LEÓN, *supra* note 103, at 90.

107. "Decreto que Dispone la Desamortización," art. 10, *in* DÍAZ DE LEÓN, *supra* note 103, at 90; BAZANT, *supra* note 95, at 63.

108. Knowlton, *supra* note 95, at 161–63.

State approved the continued Church ownership.[109] Benito Juárez, the liberals' leader, believed the Church was using its wealth to support the conservatives in the civil war.[110] Consistent with this view, an 1859 law nationalized church property without compensation.[111] The property taken included ecclesiastical mortgages received through the 1856 law.[112] The 1859 law also confirmed governmental assessment of particular structures' dedication to use as churches.[113]

The liberals' expropriations failed to empower subsistence farmers. Much of the land was purchased in bulk by investors other than the occupants. The intimidating economic terms for subsistence farmers, the Church's threatened damnation, and the liberals' limited hold on power frustrated broad distribution of ecclesiastical property.[114] Subsequently, under the Díaz regime, the Church amassed wealth again.[115]

The 1917 Constitution renewed the prohibition on the Church owning property not directly related to its mission,[116] denied the Church legal personality,[117] and affirmed government power to determine whether any specific property might remain in Church hands.[118] In 1935 President Cárdenas moved to complete expropriation of Church property.[119]

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109. MEX. CONST. art. 27 (1857), *available at* http://www.juridicas.unam.mx/infjur/leg/conshist/pdf/1857.pdf.

110. Knowlton, *supra* note 95, at 153; "Ley de la Nacionalización de Bienes Eclesíasticos de 12 de julio de 1859," recitals *in* LEYES FUNDAMENTALES DE MÉXICO 1808–1999, at 638–41 (Felipe Tena Ramírez ed., 1999).

111. "Ley de la Nacionalización de Bienes Eclesíasticos de 12 de julio de 1859" art. 11, *in* LEYES FUNDAMENTALES, *supra* note 110; *see* BAZANT, *supra* note 95, at 167; JOSEFINA ZORAIDA VÁZQUEZ & LORENZO MEYER, THE UNITED STATES AND MEXICO 64 (1985).

112. BAZANT, *supra* note 95, at 167.

113. *Id.*

114. ZORAIDA VÁZQUEZ & MEYER, *supra* note 111, at 66.

115. BAZANT, *supra* note 95, at 163.

116. MEX. CONST. art. 27(II), provided that "religious associations known as churches, whatever their creed," cannot "acquire, possess or administer real property or capitals imposed on them." Any such property was to be part of "the dominion of the Nation." February 5, 1917 text, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/27.pdf (author's translation).

117. *Id.* art. 130, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/130.pdf.

118. *Id.* art. 27(II), *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/27.pdf.

119. D.O., 31 de agosto de 1935. A brief on the Church's behalf laments the rule of law's absence:

> Nationalization is to be effected in a manner almost identical to that which was used under the Agrarian Reform for taking their properties from the owners of landed estates. The first part of the procedure consist in the establishment of provisional possession of the goods to be nationalized by virtue of a denouncement or by reason of the direct knowledge of the authorities of the finance department. This provisional possession takes from the owner his property without any form of trial and authorizes an administrative authority to turn over immediately to a public service the property even before it has been nationalized. If the interested party does not oppose this, the case is closed and the property is nationalized without further procedure. If the interested party does oppose,

The relationship between Church and State in Mexico was always multifaceted, and with time both evolved.[120] Constitutional amendments in 1992[121] and a new federal law[122] confirmed achievement of the original liberal agenda of diminishing the Church's temporal wealth to allow more effective religious freedom. The Constitution's Article 130 declaration that churches had no legal personality was amended to provide that "churches and religious groupings" have legal personality once duly registered as religious associations.[123] The Article 27 amendment[124] provided that duly constituted religious associations and other public benefit institutions may own, possess, and administer property, but only when "indispensable" to the organization's purpose.[125]

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the case is transferred to the Minster of Finance, who after a hearing decides whether or not permanent possession is to be approved and a decree issued nationalizing the property. In case of an affirmative decision orders are issued to the office of Public Registry to make the corresponding notations in his records and to record the property in the name of the nation. The owner has no recourse other than that of lamenting his ill fortune because the Supreme Court has decided to wash its hands of this kind of case, holding that action by the Government is final action no matter whose interest may be affected.

Anyone who reads this law will naturally ask himself: Are we really living in a country that has legal institutions? Has the right of property or possession of property any protection under the laws and authorities? Does religious liberty exist?

Eduardo Pallares, *Brief in Protest by "Eduardo Pallares, an Attorney of Mexico," in* MEXICO: TEXT OF DECREE ON NATIONALIZATION OF PROPERTY: APPEAL OF THE BISHOPS OF MEXICO: DECREE OF THE MEXICAN GOVERNMENT ON THE NATIONALIZATION OF CHURCH PROPERTY, PUBLISHED IN D.O., AUGUST 31, 1935 (National Catholic Welfare Conference, Washington, D.C. 1935).

120. Alicia Olivera de Bonfil, *La Iglesia en México, 1926–1970, in* CONTEMPORARY MEXICO: PAPERS OF THE IV INTERNATIONAL CONGRESS OF MEXICAN HISTORY 295 (James W. Wilkie et al. eds., 1976) (anthropologist/historian reviewing Catholic and lay movements from the Díaz regime, through the Revolution and 1926–29 *Cristero* revolt, to the Vatican II era).

121. MEX. CONST. art. 130, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/130.pdf.

122. "Ley de Asociaciones Religiosas y Culto Público," D.O., 15 de julio de 1992, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/24.pdf. For legislative debates, see HONORABLE CÁMARA DE DIPUTADOS, INSTITUTO DE INVESTIGACIONES LEGISLATIVAS, CRÓNICA: LEY DE ASOCIACIONES RELIGIOSAS Y CULTO PÚBLICO (1992).

123. D.O., 28 de enero de 1992, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/130.pdf. *Cf.* "Ley de Asociaciones Religiosas," D.O., 15 de julio de 1992, art 6. The Ley de Asociaciones Religiosas maintains separation of State and church, *id.* art. 1, but provides for individuals' free choice of religion. *Id.* art. 2. Religious associations must abstain from profit-seeking and preponderantly economic activities. *Id.* art. 8. Ownership of radio, television, and telecommunications remains prohibited. *Id.* However, religious associations may engage in educational and health-related activities and use in exclusive form, for religious purposes, State property as allowed by relevant regulations. *Id.* art. 9(V)–(VI).

124. MEX. CONST. art. 27(II), (III); D.O., 28 de enero de 1992.

125. The State determines whether property proposed for a religious association is indispensable for the association's purpose, D.O., 15 de julio de 1992, art. 16 and therefore allowed to be acquired, by a procedure that deems forty-five days without response to be approval. *Id.* art. 17.

2. Communal Agricultural Land

Agricultural land ownership in Mexico will be considered in three periods: the pre-revolutionary period in which liberal aspirations of citizen farmers were abused to concentrate land ownership,[126] the 1917–1992 period of implementing the revolutionary constitutional agenda of land reform and paternalistic protection of *campesinos*, and the post-1992 period of the completion of active land redistribution, and deference to *campesino* autonomy.[127]

The 1856 law that provided for ecclesiastical property transfer to individual holders also addressed communal use lands held by villagers.[128] In line with the liberal philosophy of individual empowerment, communal lands were henceforth to be held by individuals.[129] This transfer, nominally implemented to achieve liberal ideals, started a path that by the Díaz regime's end had consolidated landholdings in *haciendas*, large agricultural estates.[130] The 1917 Constitution proclaimed a land reform agenda[131] focused on creation and promotion of *ejidos*, collectives to own and administer land to be worked by resident members in individual parcels temporarily assigned.[132]

Mexico's post-Revolution land redistribution was accomplished administratively, with exclusion of judicial recourse.[133] Its approach was to expropriate

126. JESÚS SILVA HERZOG, BREVE HISTORIA DE LA REVOLUCIÓN MEXICANA: LOS ANTECEDENTES Y LA ETAPA MADERISTA 7 (1960) (observing that the Mexican Revolution's fundamental cause was "la existencia de enormes haciendas en poder de unas cuantas personas de mentalidad semejante a la de los señores feudales de la Europa de los siglos XIV y XV" [the existence of enormous haciendas in control of some persons of mentality similar to that of European feudal lords of the fourteenth and fifteenth centuries]) (author's translation).

127. As to the latter periods' demarcation, see Sergio García Ramírez, *Raíz y Horizonte de los Derechos "Sociales" en la Constitución Mexicana*, *in* ESTUDIOS JURÍDICOS 15, 43–54 (Universidad Nacional Autónoma de México, 2000).

128. "Decreto que Dispone la Desamortización," art. 1 *in* DÍAZ DE LEÓN, *supra* note 103, at 89, provided for transfer of land owned by "*corporaciones civiles ó eclesiásticas*" to its occupants.

129. *See* WHETTEN, *supra* note 89, at 85–86.

130. Land ownership concentration further increased during the Díaz regime. "Whenever the right of possession was beclouded, those on the land were ejected and title was passed to a small coterie of new owners." *Id.* at 49. "By 1910, over 80 percent of Mexico's rural families were landless, and the prevailing agricultural system of Mexico was that of the giant hacienda." *Id.* at 49 (citing Secretaría de Economía, *Estadísticas Sociales del Porfiriato*, at 217 tbl.85); *see also* DÍAZ DE LEÓN, *supra* note 103, at 104–07; WHETTEN, *supra* note 89, at 86–88; VERNON, *supra* note 7, at 36–37.

131. MEX. CONST. art. 27(XVII) provided for federal and state legislatures to fix "the maximum extension of rural property," and to divide it (author's translation).

132. Kenneth L. Karst, *Latin American Legal Institutions: Problems for Comparative Study*, 5 LATIN AM. STUD. 456 (1966).

133. *E.g.*, MEX. CONST. art. 27 (VII), ¶ 4, original text of February 5, 1917, and art. 27(VI), ¶ 3, *amended by* D.O. 10 de enero de 1934, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/27.pdf. Article 27(XIV), as amended in 1934, provided that those expropriated "no tendrán ningún derecho ni recurso legal ordinario, ni podrán promover el juicio de amparo" [will have no right of ordinary legal recourse, nor will they be able to initiate the writ of *amparo*], and

parcels exceeding the maximum size acceptable for individual ownership, to compensate the expropriated individual, and to attribute the expropriated land to an *ejido* for assignment within the *ejido* collective to individuals. Expropriations continued from 1917 through 1992 with peaks in the Cárdenas (1934–1940) and Díaz Ordaz (1964–1970) presidencies.[134] Mexico awarded ownership of land to its occupants on a theory of restitution, of granting land to its rightful occupants.[135] In theory the current taking was compensated, albeit on a deferred basis.[136] Either by deferring compensation, or by assessing a low value for the land taken, agricultural land redistribution had a substantial confiscatory aspect.[137]

One achievement argued for the 1917–1992 period of intensive land redistribution was creation of a sense of dignity in subsistence farming communities.[138] Nonetheless, subsistence farmers progressed slowly.[139] The

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were limited to petitioning the federal government for compensation (author's translation). *Cf.* note 1. The 1992 reform established agrarian tribunals as specialized administrative courts, not part of the constitutionally established federal judicial power. *See* Marcos Nazar Sevilla, *Los Tribunales Agrarios como Parte del Poder Judicial de la Federación*, *in* 1 PROPUESTAS DE REFORMAS CONSTITUCIONALES 275–305 (Barra Mexicana, Colegio de Abogados, A.C. ed., 2000).

134. JOSÉ LUIS ZARAGOZA & RUTH MACÍAS, EL DESARROLLO AGRARIO DE MÉXICO Y SU MARCO JURÍDICO (1980), *reprinted in* Ann Varley, *¿Propiedad de la Revolucion? Los Ejidos en el Crecimiento de la Ciudad de México*, REVISTA INTERAMERICANA DE PLANIFICACIÓN, July–Dec. 1989, at 134.

135. Karst, *supra* note 132, at 459; Karst, *supra* note 16, at 330–38.

136. Karst, *supra* note 16, at 338–42. MEX. CONST. art. 27(XVII), (d) and (e), respectively, contemplated payment in annual installments with interest not to exceed 3 percent, and by bonds.

137. "One way or another, every land reform in Latin America has been confiscatory." Karst, *supra* note 16, at 369; *see* SIGMUND, *supra* note 18, at 344 n.7 (observing "that 'the myth of compensation' serves a positive social and economic function") (citing Karst, *supra* note 16, at 369–71). EDMUNDO FLORES, LAND REFORM AND THE ALLIANCE FOR PROGRESS 9 (Policy Memorandum No. 7, 1963), argues for confiscatory land reform on the basis that a capital levy on a few landlords to distribute land widely creates a beneficial new income distribution.

138. Karst, *supra* note 16, at 360 (noting that achievement of this goal was "real progress in the highly intangible area of social attitudes. The beneficiaries of the land reforms now regard themselves as men, as citizens.") (citing Richard N. Patch, *Bolivia: U.S. Assistance in a Revolutionary Setting*, *in* SOCIAL CHANGE IN LATIN AMERICA TODAY: ITS IMPLICATIONS FOR UNITED STATES POLICY 108, 137–51 (1960)); *id.* at 150–51 ("[S]ince the 1952 revolution [in Bolivia] a good many farmers have taken to buying livestock—oxen, sheep, cows—which they regard as a permanent investment. The building up of this substantial investment in livestock is a new and satisfying experience for most farmer *colonos*."); Flores, *supra* note 137, at 7 ("Land reform gave Mexico a government with a new concern for the people and the nation. It did something more. It gave to many of the common people something they had never had: the idea of progress and personal ambition for a better future for their children."); Kenneth L. Karst, *Review of Peter Nehemkis, Latin America: Myth and Reality*, 13 KAN. L. REV. 609, 612 (1965) (land redistribution caused perception of farmer to change from *indio* to *campesino*).

139. JESÚS-AGUSTÍN VELASCO-S., IMPACTS OF MEXICAN OIL POLICY ON ECONOMIC AND POLITICAL DEVELOPMENT 42 (1983) (reporting in 1983 the estimate that in rural areas "90 percent

ejidos suffered from insecurity of land title, in the multiple senses of whether land was reserved to the *ejido*, what lands were allocated to individual *ejido* members, and the prohibitions on sale, rental, or mortgage of *ejido* land.[140] *Ejido* members accordingly had restricted access to credit and limited ability and incentive to invest in their land.

Expropriation of U.S. investor–owned land was an incidental part of the land redistribution.[141] Under Mexican law, U.S. investors had the same limited recourse as Mexican land owners. The Mexican Constitution's Calvo clause notwithstanding,[142] U.S. land owners sought U.S. support. To resolve the claims, Mexico and the United States undertook several rounds of procedures that followed in the footsteps of Mexico-United States claims commissions established in 1839 and 1868 to settle claims arising from conflict within Mexico.[143] The 1923 Bucareli diplomatic conference between Mexico and the United States led to agreements for two claims commissions, one to resolve Revolution-related claims and the other to resolve all others, including those of compensation for agricultural land expropriation.[144] Only in 1941 was the commissions' work completed by agreement as to Mexico's definitive payment of claims.[145]

These agreements have been argued to be a triumph of Mexican sovereignty in that they resolved the disputes on a government-to-government basis, on Mexican terms, and without accepting the U.S. proposal that Mexico and the United States agree to a binding arbitration between them to establish the amount due.[146] The U.S. landowners' only viable option was to pursue their claims through the U.S. government, and Mexico then resolved the claims with the U.S. government, not the individual landowners. Throughout, Mexico maintained control not only of whether there would be a resolution, but also of its terms. Mexico maintained the terms as simply the payment of a sum of money from one government to another to settle a claim. Like expropriated Mexican landowners, expropriated foreign landowners had no effective recourse to Mexican courts. The U.S. landowners

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of the population . . . do not receive adequate nutrition"); *see also* Guillermo F. Margadant, *Mexico and the United States: The Need for Frankness*, 18 TEX. INT'L L.J. 455, 465–66 (1983).

140. Kenneth L. Karst & Norris C. Clement, *Legal Institutions and Development: Lessons From the Mexican Ejido*, 16 UCLA L. REV. 281, 281 (1969).

141. As of 1910, Mexico's territory was one-seventh foreign owned. VERNON, *supra* note 7, at 50.

142. *See* RIPPY, *supra* note 65.

143. *Id.* at 68–70.

144. *Id.* at 89–90.

145. *Id.* at 113–15; CATHERINE E. JAYNE, OIL, WAR, AND ANGLO-AMERICAN RELATIONS: AMERICAN AND BRITISH REACTIONS TO MEXICO'S EXPROPRIATION OF FOREIGN OIL PROPERTIES, 1937–1941, at 153–55 (2001).

146. *See* RIPPY, *supra* note 65, at 115.

did not have the ability to achieve resolution of their claims through the rule of law in the sense of independent legal process considered here.

Constitutional and legislative reform in 1992 altered Mexico's approach to agricultural land.[147] From the reforms and the success in distributing land ownership, land redistribution from large to small holders appears largely over.[148] The 1992 reform allows *ejidos* to dissolve themselves by distributing land to members, as well as to transfer land to corporations with *ejido* ownership.[149]

D. Railroads

Mexico acquired majority ownership of its principal railroads in 1908, followed by expropriation of the remaining, minority interest in 1937. Neither event generated much controversy,[150] despite the magnitude of the foreign investors' ultimate loss. Limited industry revenues under government rate regulation facilitated the government's 1908 acquisition. The subsequent defaults on the substantial railroad debt, caused by the Revolution and the depression, limited the basis for the minority equity holders and the bondholders to protest the 1937 expropriation. The low return available in the sector, plus the government's astuteness in structuring its acquisition of control, contributed to the limited controversy, including the absence of significant judicial proceedings, raised by the expropriation.

The pre-Revolution Díaz regime brought railroads to most of Mexico during the 1880s and 1890s by granting American and English investors long-term concessions for specific routes, subject to rate regulation.[151] The

147. MEX. CONST. art. 27 (amended 1992); "Ley Agraria," D.O., 26 de febrero de 1992 (amended 1993), *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/13.pdf.

148. MÁXIMO N. GÁMIZ PARRAL, CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS: COMENTADA 42 (3d ed. 2000).

149. D.O., 26 de febrero de 1992; MARGADANT, *supra* note 92, at 284.

150. Combatants' use and targeting of railroads during the Revolution, John H. McNeely, *The Railways of Mexico: A Study in Nationalization*, 2 SW. STUD. 3, 36 (1964), followed by the labor strife associated with building a union and the union's incorporation into the long-dominant Partido Revolucionario Institucional, was publicly dramatic. *Id.* at 32–37.

151. *Id.* at 5. Concessions were granted within a statutory framework as follows:

> [Mexico's] first General Railroad Law was adopted June 1, 1880. It provided that the terms of grants should not exceed ninety-nine years; that upon expiration or forfeiture, title to all fixed property would revert to the nation (with fair indemnification in case of forfeiture); that maximum rates would be fixed, subject to revision every five years; that rebates should not be allowed; that the mails should be carried free; and finally, that corporations could be organized abroad to operate railroads in Mexico, but they would be considered as Mexican and under Mexican law alone.

Id. at 11. Later,

> Congress adopted a new General Railroad Law . . . proclaimed by decree on April 29, 1899. The Department of Communications and Public Works was to enforce the legislation,

principal railroads that resulted were financially weak. The Díaz government, concerned with foreign monopolization and the railroads' incapacity to finance further railroad development, determined to buy control.[152]

In 1906, the Díaz government purchased control of one of two major railroads connecting Mexico's heartland with the United States.[153] In 1908, it combined that railroad with the other one in a sophisticated leveraged buy-out transaction that gave the government majority control of the new railroad.[154] The government left the foreign investors a hair less than a 50

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but it was to receive advice on the fixing of rates from a Tariff Commission created on January 1, 1900. The Commission consisted of five members named by the Department: a president, two representatives of the railroads, one from the associated chambers of commerce, and one from the agricultural societies.

Id. at 16.

152. J.Y. Limantour, INFORME DEL SECRETARIO DE HACIENDA Y CRÉDITO PÚBLICO A LAS CÁMARAS FEDERALES, SOBRE EL USO DE LAS FACULTADES CONFERIDAS AL EJECUTIVO DEL LA UNIÓN POR LA LEY DE 26 DE DICIEMBRE DE 1906 PARA LA CONSOLIDACION DEL LOS FERROCARRILES NACIONAL DE MÉXICO Y CENTRAL MEXICANO 2, 19 (1908) [hereinafter INFORME].

153. In 1903, it bought controlling stock of Ferrocarril Interoceánico, owner of an unfinished Veracruz-Acapulco line. *Id.* at 20–21; McNeely, *supra* note 150, at 17. The then privately owned Mexican National Railroad, which the Mexican government had outbid, "started negotiations which led to the government's exchanging" the stock for Mexican National Railroad stock. McNeely, *supra* note 150, at 17. By additional market purchases, Mexico acquired a 47.25 percent ownership interest in the Mexican National, a controlling interest. *Id.*

154. In 1906, the Mexican Central debt and equity holders agreed to allow the Mexican government to take a controlling interest. McNeely, *supra* note 150, at 17–18. The Secretaría de Hacienda signed an agreement with both railroads' U.S., English and German lenders in 1908. *See* INFORME, *supra* note 152, at 95. Its consummation was subject to adherence to the reorganization by sufficient equity and debt holders. *Id.* at 96. Prior to the agreement, the Compañía del Ferrocarril Nacional de México [Mexican National] was a Colorado corporation in which Mexico had purchased the controlling shareholding. The Compañía Limitada del Ferrocarril Central Mexicano [Mexican Central] was a Massachussetts company subject to foreclosure for its inability to pay bonds over U.S.$100 million due in 1910 and 1911. McNeely, *supra* note 150, at 18. The Colorado corporation was paying a 2 percent dividend on preferred stock, but lacked revenue to maintain and expand its network. *Id.* at 15–16. The agreement contemplated the two railroads' combination into a new Mexican company, Ferrocarriles Nacionales de México. INFORME, *supra* note 152, at 95. Mexico acquired Mexican Central control by paying a premium to its controlling shareholders not in cash, but rather by promise of the supplemental allotment of the new company's bonds. McNeely, *supra* note 150, at 31–32. Apart from the control premium, all Mexican Central shareholders exchanged their shares for shares of the new company, and issuance of the new company's bonds rolled over Mexican Central's debt. *Id.*

Other than a few classes of outstanding debt with favorable terms, bonds freshly issued by the new company replaced the two railroads' debt. *Id.* at 34–35. The agreement contemplated that the government maintain its prior equity interest without further cash disbursement, and that it obtain control of the new company in exchange for partial guarantee of its debt. *Id.* at 18. Two classes of bonds were issued. A first class of up to U.S.$225 million at 4.5 percent interest for fifty years received a first priority mortgage on the railroad assets. *Id.* at 96. A second class of up to U.S.$160 million at 4 percent interest for seventy years (with repayment of principal to commence after thirty years, that is, starting July 1, 1937), *id.* at 26–27, received a second lien, *id.* at 99, but with government guarantee of principal and interest. *Id.* at 114. To the extent of any government

percent equity interest in the newly enlarged, government-controlled railroad.[155] The government's outlay in the 1908 transaction was limited to its guarantee of a fraction of the bonds issued to roll over the existing railroad debt.[156] Following the Mexican Revolution and its interruption of normal rail operations, the railroad debt was subject to repeated renegotiation and default.[157] As the Revolution, the depression, labor strife, and development of competitive transportation ensued, the foreign equity interest's value shrank. The great preponderance of the railroad debt was secured only by railroad assets. As these assets deteriorated, the strength of the lenders' claims for repayment diminished, and the lenders became ever more undersecured.

In 1937 President Cárdenas completed nationalization by expropriating all the assets of Ferrocarriles Nacionales de México, the national railroad.[158] The decree's preamble reasons that the holders of the nongovernmental minority ownership interest had nothing to lose by virtue of the expropriation, and hence no entitlement to compensation. It argues that the equity value of the company had declined to zero for two reasons. First, the assets were fully pledged to creditors, yet their claims exceeded the value of the assets; in other words, the creditors were undersecured.[159] Second, the company's operating history had demonstrated an inability to generate profit, and hence

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payments on the guarantee, the government was credited with a loan to the company at 4 percent interest, payable after preferred dividends. *Id.*

The refinancing stretched short-term obligations to long-term obligations, thereby reducing debt service impact on cash flow. *Id.* at 18. About half of the two classes was to roll over and stretch existing debt obligations, with the balance for expansion, new rolling stock, and other capital improvements. *Id.* at 26. The new company issued total bonds of about U.S.$230 million "quickly subscribed and readily accepted on the markets of the world," McNeely, *supra* note 150, at 19, which included about U.S.$40 million of new debt. *Id.* at 19 (calculated based on INFORME, *supra* note 152, at 44–45). Revolution deprived the company of the need and opportunity to issue all the bonds contemplated for improvements.

155. The government held sole ownership of the company's common shares, which constituted just over half the company's capital. The government held an antidilution right to ensure continued control notwithstanding subsequent capital increases. Its interest derived from its controlling interest in the Mexican National, "topped up" by additional common shares to recognize its guarantee of the second tranche of the new company's bonds. INFORME, *supra* note 152, at 21–22, 32–33.

156. *See supra* note 154.

157. McNeely, *supra* note 150, at 33–34. As Mexico emerged from the Revolution, desirous of U.S. recognition of its government, it agreed by the June 1922 De la Huerta-Lamont agreement to pay the principal due on the railroad bonds, but the October 1925 Enmienda Pani restored to the National Railways the railroad debt and the assets seized in 1915 during the Revolution. *Id.*

158. *See* "Decree of President Cárdenas of June 23, 1937," first operative paragraph, D.O., 24 de junio de 1937. *See* JAYNE, *supra* note 145, at 34; McNeely, *supra* note 150, at 35, 37. In the following fifteen years, the government acquired the lesser railroads which remained in private hands. McNeely, *supra* note 150, at 36–39.

159. "Decree of President Cárdenas of June 23, 1937," recital 4, D.O. 24 de junio de 1937.

failed as a capitalist enterprise.[160] As to the lenders, they likewise lost nothing by the expropriation because the assets expropriated remained subject to their security interests.[161] A 1946 agreement relative to payment of the railroad debt acknowledged obligation to pay the principal of about U.S.$233 million, but forgave virtually all of the unpaid interest accrued from 1914 to 1945, about U.S.$360 million.[162]

E. Oil

American and English oil companies developed and dominated Mexico's oil industry from its pre-revolutionary beginning, through the Revolution, and until its 1938 nationalization.[163] The oil companies contested the 1917 Constitution's Article 27 declaration of subsurface hydrocarbon resources as property of the Nation,[164] the government's subsequent efforts to give meaning to Article 27, and the ultimate 1938 expropriation.[165] From 1917 to the 1938 expropriation, Mexico made efforts to force the oil companies to accept new government concessions consistent with the Constitution's declaration.

The oil companies and the Mexican government both attached significance to the federal courts as the venue to resolve ownership disputes. The United States' leverage on Mexico's domestic political situation led the government on occasion to retreat from aggressive application of Article 27's

160. *Id.* recital 2.

161. *Id.* recital 5.

162. RIPPY, *supra* note 65, at 133; ZORAIDA VÁZQUEZ & MEYER, *supra* note 111, at 157. "[P]ayments were to be completed in 1954." McNeely, *supra* note 150, at 37.

163. RIPPY, *supra* note 65, at 135–82.

164. The 1917 Constitution's provisions were anticipated by efforts to tax the oil companies starting in 1910, that is, at the Revolution's beginning. *Id.* at 31. Throughout the Revolution, the oil companies continued to invest and remained highly profitable. *Id.* at 153–55; WHITING, JR., *supra* note 7, at 31; WIONCZEK, *supra* note 36, at 185. Although efforts from 1917 to President Cárdenas's election achieved little to alter the foreign ownership, they corresponded to a decline in investment and production from 1921 through 1933 as Venezuela presented a more attractive political environment and U.S. domestic oil production surged. RIPPY, *supra* note 65, at 162.

165. There are numerous Mexican histories of the oil expropriation. *E.g.*, JESÚS SILVA HERZOG, HISTORIA DE LA EXPROPIACION DE LAS EMPRESAS PETROLERAS (4th ed. 1973); JOSÉ DOMINGO LAVÍN, PETROLEO: PASADO, PRESENTE Y FUTURO DE UNA INDUSTRIA MEXICANA 150–64 (1976) (discussing oil company connections with government functionaries, practice of allocating assets and liabilities into separate corporate shells, and Mexican court litigation over royalties in the 1920s and early 1930s); LORENZO MEYER, MÉXICO Y LOS ESTADOS UNIDOS EN EL CONFLICTO PETROLERO (1917–1942) (1972); LORENZO MEYER, MEXICO AND THE UNITED STATES IN THE OIL CONTROVERSY, 1917–1942 (Muriel Vasconcellos trans., 1977); JOSÉ LÓPEZ PORTILLO Y WEBER, EL PETRÓLEO DE MÉXICO (1975) (career public servant's account of the Mexican oil sector's history, enriched by personal anecdotes of cultural conflicts and first-hand oil field experience).

declaration of ownership. On two occasions (the 1922 *Texas Oil Company*[166] and 1927 *Mexican Petroleum Company*[167] decisions), the Supreme Court's rulings supportive of oil company positions appear to have served as a face-saving way for the President, under threat of U.S. intervention, to retreat from aggressive action to implement the constitutional proclamation of national ownership. The President's apparent role in procuring the decisions detracted from the Court's legitimacy as an independent forum for review of presidential action.[168]

When the President expropriated the oil industry in 1938, the industry attacked the Mexican legal system as lacking autonomy;[169] it claimed that Mexico's lack of impartiality and independence made Mexico an unsafe place to invest.[170] Mexico argued that its conduct was justified;[171] however, the direct attack on the integrity of Mexico's highest court created concern for investment dependent on the rule of law.

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166. *See infra* text accompanying note 173.

167. *See infra* text accompanying note 180.

168. Schatz references the executive's undercutting of judicial efforts to hold the executive accountable as a general problem in Latin America, Schatz, *supra* note 45, at 233 (citing EDGARDO BUSCAGLIA, JR. ET AL., JUDICIAL REFORM IN LATIN AMERICA: A FRAMEWORK FOR NATIONAL DEVELOPMENT 13 (1995)). *Cf.* CARLA HUERTA OCHOA, MECANISMOS CONSTITUCIONALES PARA EL CONTROL DEL PODER POLÍTICO 181 (1998) (making the same point as to Mexico two years prior to President Fox's 2000 election).

169. An example of such an attack follows:

> From a narrative of the events preceding the seizure of the oil properties, it is evident that whatever crisis may have existed on March 18, 1938, or appeared to be impending, was wholly the result of successive steps which were designed to precipitate a crisis and thus to give some semblance of an occasion for the seizure.

ROSCOE B. GAITHER, EXPROPRIATION IN MEXICO: THE FACTS AND THE LAW 26–27 (1940) (arguing that President Cárdenas, the oil union and their party, the nascent Partido Revolucionario Institucional, orchestrated the events, including judicial decisions, that accomplished the expropriations).

170. For example, in 1940 the Standard Oil Company (N.J.), following the oil expropriation, attacked Mexico's Supreme Court:

> The decision of the Mexican Supreme Court of December 2, 1939 affirming the legality under Mexican law of the confiscation effected by the Expropriation Decree of March 18, 1938, involves so flagrant a violation of the Mexican Constitution and distortion of Mexican law that it constitutes a denial of justice in international law.

STANDARD OIL CO. (N.J.), DENIALS OF JUSTICE: A MEMORANDUM ON THE DECISION OF THE MEXICAN SUPREME COURT OF DECEMBER 2, 1939, at 1 (1940).

171. Mexico responded with GOVERNMENT OF MEXICO, THE TRUE FACTS ABOUT THE EXPROPRIATION OF THE OIL COMPANIES' PROPERTIES IN MEXICO 5 (1940), quoting Woodrow Wilson:

> The system by which Mexico has been financially assisted has in the past generally bound her hand and foot and left her in effect without a free government. It has almost in every instance deprived her people of the part they were entitled to play in the determination of their own destiny and development.

For further argument of the Mexican perspective, see MANUEL GONZÁLEZ RAMÍREZ, EL PETRÓLEO MEXICANO: LA EXPROPIACIÓN PETROLERA ANTE EL DERECHO INTERNACIONAL (1941).

Shortly after the expropriation, the Supreme Court delivered a further ruling, *Huasteca Petroleum*,[172] for compensation. This ruling, together with those of the 1920s, suggests that throughout this period the Supreme Court followed the President's political line as to significant political questions. Such distortion of judicial process to affirm exercises of government power inhibits confidence in the rule of law. Whether or not Mexican law justified the governmental conduct challenged by the oil companies, the perception that the Supreme Court's own integrity was at issue damaged investor confidence.

1. 1922 Supreme Court Ruling—*Texas Oil Co.*

Some read pre-revolutionary subsurface rights legislation as providing vested property rights to all the oil present.[173] Others argued that it provided property rights only to materials actually appropriated by extraction.[174] The adoption of the 1917 Constitution raised the question whether it had retroactive effect and thus expropriated property rights previously existing under Mexican law.[175]

President Carranza attempted by decrees, particularly one of February 19, 1918, to confirm the Nation's ownership of oil by requiring the oil companies to trade existing ownership rights for new concessions that explicitly recognized the new Constitution's applicability.[176] Eighty actions seeking

172. "Huasteca Petroleum Company," 56 S.J.F. 1305 (5a época 1938) (2d chamber, unanimous 5 vote decision).

173. An example of this view follows:

> The Mexican Constitution of 1857, which was in force until May 1, 1917, contained no specific reference to petroleum. However, in the Mining Code of November 22, 1884, the surface owner was declared to be the owner of petroleum subsoil rights, and in the Mineral Law of June 4, 1892, the owner was declared to have the right freely to exploit the petroleum subsoil. The Mineral Law of November 25, 1909, again declared the surface owner to be the owner of the subsoil rights to the oil.

GAITHER, *supra* note 169, at 2–3.

174. RIPPY, *supra* note 65, at 15–28. For example, when the oil industry was expropriated in 1938, the government and the oil union argued that the 1870 Civil Code implied that, notwithstanding the text of the 1884 Mining Code and the 1892 Mineral Law, ownership of subsurface substances was not obtained until their appropriation. *Id.* at 18–19. GONZÁLEZ RAMÍREZ, *supra* note 171, at 150–74, reviews: (1) applicable Spanish law establishing rights to subsurface property as forms of concession in the interests of "public utility," and securing the collective benefits of exploitation, with reversionary rights in the Crown, (2) Mexican 1884, 1892, and 1909 mining laws that opened oil exploitation to private initiative within the framework of Mexican civil law, and (3) the 1884 Federal District civil code provisions making appropriation and possession part of the definition of property, all to delimit the oil companies' pre-1917 "acquired rights."

175. Essentially all oil extraction prior to the 1938 expropriation depended on pre-1917 rights. MEYER, *supra* note 165, at 57.

176. *See* RIPPY, *supra* note 65, at 43–48; ZORAIDA VÁZQUEZ & MEYER, *supra* note 111, at 123–24.

relief from the decree were filed in Mexican courts by 1919.[177] Faced with oil company and U.S. protests, Carranza suspended the decrees on the pretext that the Mexican Congress would act. It did not.[178]

The next President, Alvaro Obregón, desired U.S. recognition to consolidate his government.[179] The Supreme Court ruled on the oil companies' pending protests in a way that appeased the oil companies and therefore facilitated U.S. recognition, assertedly at Obregón's behest.[180] The Supreme Court's 1921 ruling on The Texas Company of México's petition against President Carranza's 1918 decrees declared that Constitution Article 27 had no retroactive application to oil ownership by virtue of the Constitution Article 14 prohibition on retroactivity.[181] The court found that a "positive act" relative to the oil would suffice to establish pre-1917 ownership and hence prevent any vesting of ownership in the Nation under Article 27. In the instant case the positive act was the sale of land at a premium reflecting its value for oil exploration and exploitation rather than for agricultural use.[182]

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177. *See* RIPPY, *supra* note 65, at 46.

178. *Id.* at 45–46.

179. *Id.* at 56.

180. Meyer implies the Mexican government's orchestration:

> La decisión de la Suprema Corte del 30 agosto de 1921 no debió sorprender mucho a los norteamericanos, ya que en el memorándum del 9 de ese año, que Pani entregó a Summerlin, se decía que si el Ejecutivo y el Legislativo estaban a favor del principio de la no retroactividad de las leyes, "¿qué otra cosa puede hacer la Suprema Corte de la Nación que sumarse en tales propósitos de equidad, a los otros dos poderes?". Pani insinuó que quizás no transcurriría mucho tiempo sin que se confirmara su aseveración, y dado el tradicional control del Poder Ejecutivo sobre el Judicial, ello equivalía casi a una seguridad. Así sucedió. [The Supreme Court's August 30, 1921 decision must not have surprised the North Americans much, given that in the memorandum of the ninth of this year, that [Mexican finance minister Alberto J.] Pani delivered to [U.S. Chargé d'Affaires ad interim George T.] Summerlin, it said that if the Executive and the Legislature were in favor of the principle of nonretroactivity of laws, "What could the Supreme Court of the Nation do other than to add itself to such proposals of equity, to the other two powers?" Pani insinuated that likely there would not pass much time without confirmation of its happening, and given the traditional control of the Executive Power over the Judicial Power, this amounted almost to a certainty. So it was.]

MEYER, *supra* note 165, at 173 (author's translation).

181. *"The Texas Company of México, S.A.,"* 9 S.J.F. 432, 443 (1921) (Supreme Court granted *amparo* to the Texas Company of México, S.A. against award of the concession to Rafael Cortina for oil exploration and exploitation of land under a pre-1917 concession that the Texas Company of México, S.A. had purchased in 1917); ZORAIDA VÁZQUEZ & MEYER, *supra* note 111, at 128–29; *see also* RIPPY, *supra* note 65, at 80–82 (citing GONZÁLEZ RAMÍREZ, *supra* note 171, at 132).

182. *Texas Company*, 9 S.J.F., at 442. *See* ZORAIDA VÁZQUEZ & MEYER, *supra* note 111, at 128–29. To establish precedent, four identical holdings in different cases shortly followed. MEYER, *supra* note 165, at 174–75. The five holdings to establish *jurisprudencia*, *see* text accompanying note 377, were: (1) *Texas Company*; (2) *"International Petroleum Company,"* 10 S.J.F. 886 (May 8, 1922) (includes dissenting opinion of Justice Sabido taking stronger view of positive acts required to vest property right); (3) *"International Petroleum Company,"* 10 S.J.F. 886 (May 10, 1922, indexed but not

2. 1927 Supreme Court Ruling—*Mexican Petroleum Co.*

President Calles appears to have procured the Supreme Court's 1927 *Mexican Petroleum* decision. In 1926, he left open the possibility of a Supreme Court decision to resolve controversy over 1925 legislation[183] to implement Constitution Article 27.[184] In 1927 he assured U.S. Ambassador Morrow that the decision was forthcoming.[185] The decision retreated from the 1925 legislation to again require that pre-1917 private property rights be exchanged for government concessions affirming the Constitution's Article 27 declarations of the Nation's ownership.[186] Although the new concessions confirmed pre-1917 rights, they did so with new restrictions as to duration and size.[187] The principal oil companies refused to comply, cut production, and refrained from new drilling. The United States threatened intervention and suggested resolution of the matter by a court ruling as to the legislation's lack of retroactive effect.[188] Subsequently, the Supreme Court decided that the 1925

published); (4) "*Tamiahua Petroleum Company*," 10 S.J.F. 1189 (May 12, 1922, not published); and (5) "*Tamiahua Petroleum Company*," 10 S.J.F. 1190 (May 12, 1922, not published).

183. On December 31, 1925, "the first legislation concerning hydrocarbons based on the Constitution of 1917 [Ley de Petróleo] took effect. In April 1926, regulatory legislation [D.O., 8 de abril de 1926] was promulgated." ZORAIDA VÁZQUEZ & MEYER, *supra* note 111, at 135; *see also* RIPPY, *supra* note 65, at 57.

184. MEYER, *supra* note 165, at 116.

185. A Mexican historian recounts events as follows:

> [C]omo respuesta a una pregunta de Calles, el embajador sugirió que se utilizara un fallo favorable a las compañías dado tiempo atrás por el juez de Tuxpan, Veracruz . . . y que la Suprema Corte, siguiendo el precedente sentado en el caso de la Texas en 1922, lo ratificara. El Presidente aseguró al representante norteamericano que si por ese medio podía encontrarse solución al conflicto, en dos meses lograría que el fallo fuera pronunciado. En realidad, no fue necesario esperar tanto: a través del propio Morones, Calles pidió a la Suprema Corte que actuara en la forma convenida con Morrow, y el día 17 ésta dio a conocer una sentencia en el sentido aconsejado por el Ejecutivo. [As response to Calles's question, the ambassador suggested that one use a decision favorable to the companies given some time before by the judge of Tuxpan, Veracruz . . . and that the Supreme Court, following the 1922 Texas case precedent, would ratify it. The President assured the North American representative that if by this means there could be found a solution to the conflict, in two months he would achieve that the decision be issued. In reality, it was not necessary to wait so long: through Morones [President Calles's Secretary of Industry, Commerce and Labor] himself, Calles asked the Supreme Court to act in the form agreed with Morrow, and on the seventeenth it issued a decision as counseled by the Executive.]

Id. at 270–71 (citations omitted) (author's translation). Former President Calles, in retirement, denied agreement with ambassador Morrow. GONZÁLEZ RAMÍREZ, *supra* note 171, at 139.

186. *See supra* note 183.

187. RIPPY, *supra* note 65, at 57–58.

188. *Id.* at 59–61. U.S. Ambassador Morrow had "suggested that it would be expedient to modify the oil legislation by persuading the Mexican courts to rule that it was not retroactive." ZORAIDA VÁZQUEZ & MEYER, *supra* note 111, at 137–38.

legislation was invalid, and affirmed the pre-1917 concessions as vested rights not subject to subsequent reduction.[189]

3. Expropriation

President Cárdenas was elected in 1934 on a platform declaring "nationalization of the subsoil will be made effective."[190] However, his 1938 nationalization of U.S. and British oil company assets was not a straightforward implementation of the constitutional proclamation that oil belonged to the Nation. Rather, it culminated in a battle between the oil companies and the nascent oil workers' union for control of the industry.[191]

In 1936 the new, national oil industry union demanded money, benefits, job security, and a determinative voice in management.[192] A ten-day general strike to press the demands began May 28, 1937.[193] In June 1937, the union brought the matter before the Federal Board of Conciliation and Arbitration, which designated experts,[194] each associated with the government,[195] who produced a voluminous report.[196] On March 1, 1938 the Supreme Court upheld[197]

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189. 21 S.J.F. 1338–47 (1927) (nine of eleven justices granted *amparo* to Mexican Petroleum Company of California against the revocation of the drilling permits after the company's refusal to seek confirmation of its concessions); RIPPY, *supra* note 65, at 61.

190. RIPPY, *supra* note 65, at 176.

191. *Id.* at 196.

192. GAITHER, *supra* note 169, at 9; JAYNE, *supra* note 145, at 26. RIPPY, *supra* note 65, at 183–188 (reviewing the union's demands).

193. GAITHER, *supra* note 169, at 13; JAYNE, *supra* note 145, at 29.

194. RIPPY, *supra* note 65, at 188–89; JAYNE, *supra* note 145, at 30–31.

195. Efraín Buenrostro, Hacienda undersecretary; Mariano Moctezuma, Economía undersecretary; and Jesús Silva Herzog. MEYER, *supra* note 165, at 158.

196. RIPPY, *supra* note 65, at 189–90.

197. "Cía de Petróleo, 'El Aguila,' S.A. y coags. (amparo directo en materia de trabajo)," 55(II) S.J.F. 2007–2126 (1938) (4th chamber, unanimous 4 vote decision, one recusal). The oil companies involved were:

> Compañía Mexicana de Petróleo "El Aguila", Naviera San Cristóbal, S.A., Naviera San Ricardo, S.A., Huasteca Petroleum Co., Sinclair Pierce Oil Co., Mexican Sinclair Petroleum Corporation, Stanford y Cía. Sucesores, S. en C., Penn Mex Fuel Co., Richmond Petroleum Co. of México, S.A., Compañía Petrolera "Clarita", S.A., Compañía Petrolera "Cacalilao", S.A., California Standard Oil Co. of México, Sabalo Transportation Co., S.A., Compañía de Gas y Combustible "Imperio", Consolidated Oil Companies of México, S.A. y Compañía Petrolera "El Aguila", S.A.

Id. at 2125. The award's enforcement was further delayed,

> because an appeal was still pending before the First District Court of Administrative Matters against the resolution of the full Labor Board and this suit did not arrive before the Supreme Court until March 12, 1938, when it too was rejected.

RIPPY, *supra* note 65, at 206 (citation omitted). The Standard Oil Company (N.J.) complained that prior to the Court's decision, the tenure of the Court's judges was reduced from life to a six-year term coincident with the President's. D.O., 15 de diciembre de 1934, transitory arts. 2 & 3, 1934 amendment to MEX. CONST. art. 94, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/

the Labor Board's subsequent December 1937 decision which was unfavorable to the companies.[198] Later, in March 1938, a district court upheld the Labor Board's imposition of damages,[199] and the expropriation decree then issued in the face of the companies' continued refusal to comply with Labor Board decisions.[200]

The expropriation decree was brief.[201] It recited the crisis created by the oil companies' failure to comply with the Labor Board award, even after the Supreme Court's confirmation of its validity.[202] The decree declared that the oil companies' property was "expropriated for cause of *utilidad pública*."[203] Compensation was to be paid from proceeds of oil sales in conformity with Constitution Article 27 and the Law of Expropriation's Articles 10 and 20, within a term not to exceed ten years.[204] The Supreme Court subsequently in 1939 refused to enjoin the expropriation,[205] except in respect to the taking of records, accounts payable, cash, and securities.[206]

The Roosevelt administration responded in conformity with its good neighbor policy and its desire for Mexico's alliance regarding World War II. U.S. actions were limited to interrupting its purchases of Mexican silver

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pdfsrcs/94.pdf; RIPPY, *supra* note 65, at 182. The Standard Oil Company (N.J.) further complained that prior to the Court's decision the Attorney General formally visited the Supreme Court for an *ex parte* communication. STANDARD OIL CO. (N.J.), *supra* note 170, at 2.

198. Junta Especial número Siete de la Comisión Federal de Conciliación y Arbitraje. *See* Cía de Petróleo, "El Aguila," S.A. 55 S.J.F. 2007; GAITHER, *supra* note 169, at 19; RIPPY, *supra* note 65, at 190–91; JAYNE, *supra* note 145, at 32.

199. GAITHER, *supra* note 169, at 22, 25; RIPPY, *supra* note 65, at 196.

200. RIPPY, *supra* note 65, at 208–09. Immediately after the decree,

> the army started seizing everything possible, such as derricks and refineries as well as personal property. News of the expropriation was met with such resounding approval that the Mexicans helped the government cover the cost of the compensation . . . by donating cash, jewelry, and other personal items and purchasing bonds the government issued.

JAYNE, *supra* note 145, at 37 (citations omitted).

201. "Decree of Lázaro Cárdenas, President of the Republic, of Mar. 18, 1938," D.O., 19 de marzo de 1938.

202. *Id.* first recital.

203. *Id.* art. 1.

204. *Id.* art. 3.

205. "La Cía. Mexicana de Petróleo 'El Aguila', S.A.," 52 S.J.F. 3021 (5a época 1939), decision of the Supreme Court's Second Chamber. STANDARD OIL CO. (N.J.), *supra* note 170, at 51, provides an English translation of the decision. Considerable litigation preceded the Supreme Court's definitive ruling. *Id.* For example, "Mexican Petroleum Company," 57 S.J.F. 818 (5a época 1938), rejected an oil company claim that the government's creation of the Consejo Aministrativo del Petróleo to administer the expropriated properties created an impermissible monopoly.

206. "La Cía. Mexicana de Petróleo 'El Aguila', S.A.," 52 S.J.F. at 3181; STANDARD OIL CO., *supra* note 170, at 165–67. The oil company later complained that "the Petroleum Administration, so we are informed, is industriously copying all the records and books and has not returned the cash or the accounts receivable." STANDARD OIL CO., *supra* note 170, at 6.

mine output[207] and to diplomatic protest.[208] The United States demanded prompt, just, and adequate compensation to the former owners in a March 26, 1938 diplomatic note.[209] The U.S. and British oil companies organized a Mexican oil boycott,[210] in the face of which Germany, Italy, and Japan became purchasers of the Mexican output,[211] until they were replaced by Allied purchases of oil during World War II.

In April 1940, one U.S. oil company settled without payment for its claims to oil reserves.[212] On November 19, 1941, the Mexican and U.S. governments announced an agreement to resolve the remaining claims.[213] After each country's appraisers agreed on the amounts due,[214] Mexico and the United States agreed a total to be paid in installments.[215]

4. 1938 Supreme Court Ruling—*Huasteca Petroleum Co.*

Less than two months following the expropriation, the Mexican Supreme Court decided *Huasteca Petroleum Company*,[216] an *amparo* action pending since 1918.[217] The case involved a challenge to the government's right to tax pre-1917 concessions. Together with a companion case,[218] the decision reduced the legal foundation under Mexican law for oil company compensation by diminishing the extent to which the oil companies' rights were vested. The decision differed from the Court's previous rulings contemplating pre-1917 rights as vested rights, by establishing a higher standard of positive act for purposes of establishing the vesting of property rights. To vest a property

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207. JAYNE, *supra* note 145, at 44–47.
208. RIPPY, *supra* note 65, at 128–29 and 223.
209. JAYNE, *supra* note 145, at 47. *Cf. infra* note 475 and accompanying text.
210. RIPPY, *supra* note 65, at 243.
211. *Id.* at 253; JAYNE, *supra* note 145, at 33, 86.
212. JAYNE, *supra* note 145, at 105, 116.
213. RIPPY, *supra* note 65, at 305.
214. "When . . . Mexico City's and Washington's respective experts, went to Mexico to examine the properties in question, they concluded that the companies had grossly overestimated the amount of money they had invested in the Mexican oil industry." JAYNE, *supra* note 145, at 116; *see also* RIPPY, *supra* note 65, at 299–312.
215. Payments totalling U.S.$27,981,955.20 were to be completed in 1947. RIPPY, *supra* note 65, at 312–13. The final payments were in fact made in 1963. VELASCO-S., *supra* note 139, at 57. The total paid was approximately U.S.$165 million, the larger sum reflecting interest, prior payments by Sinclair (the oil company that first settled) and payments to the British oil company. *Id.*; SILVA HERZOG, *supra* note 165, at 201–05.
216. "Huasteca Petroleum Company," 56 S.J.F. 1305 (5a época 1938) (2d chamber, unanimous 5 vote decision); RIPPY, *supra* note 65, at 225.
217. *Huasteca*, 56 S.J.F. at 1306.
218. "Tuxpan Petroleum Company," 57(II) S.J.F. 2521, 2521 (1938) (unpublished decision) (the decision was not published because it upheld the same thesis based on a legal foundation identical to that of *Huasteca*).

right to subsurface oil, the *Huasteca* ruling required actual "work" to extract the oil.[219] Mexico relied on these rulings to negotiate compensation with the United States.[220]

F. Electricity

As for railroads, the electricity sector from its inception was subject to government rate regulation and other political and economic pressures to hold rates low. As governmental pressure to maintain low rates increased in the 1930s, the foreign investors turned unsuccessfully to Mexican courts. The

219. *Huasteca*, 56 S.J.F. at 1308–09:

> Finalmente, debe agregarse, para resolver en su totalidad las cuestiones fundamentales propuestas en la demanda, que atento al texto expreso del artículo 27 constitucional, no puede sostenerse, jurídicamente que el petróleo existente en el subsuelo sea de propiedad particular, ni tampoco puede invocarse que la disposición contenida en ese estatuto es ilegalmente retroactiva, pues como lo ha resulto este Alto Tribunal en la ejecutoria que puede consultarse en la página 723 del Tomo XXVIII del Semanario Judicial de la Federación, los derechos eventuales del subsuelo constituían verdaderos derechos, antes de la promulgación de la Constitución de mil novecientos diecisiete, pero quedaron sin efecto jurídico al entrar en vigor esta Constitución, lo que, sin embargo, no entraña una aplicación retroactiva del artículo 27 constitucional aun cuando con ello vulneren derechos adquiridos, debiendo entenderse portales, aquellos que se incorporaron al patrimonio por medio del trabajo. [Finally, there must be added, to resolve in their totality the fundamental questions raised in the complaint, that attentive to the express text of Constitution Article 27, it cannot be juridically maintained that the petroleum existing in the subsoil is of individual ownership, nor can it be claimed that the provision contained in the statute is illegally retroactive, because as this High Tribunal has already resolved in the decision that can be consulted at page 723 of Volume 28 of the Semanario Judicial de la Federación, the eventual rights of the subsoil would constitute true rights before the promulgation of the 1917 Constitution, however they remain without legal effect on the entry into force of this Constitution, which, undoubtedly, does not comport a retroactive application of Constitution Article 27 even when it weakens acquired rights, they having to be understood as established as those that are incorporated to property by means of work.]

Id. (author's translation). *Cf.* cases cited *supra* notes 181, 182, and 189; GAITHER, *supra* note 169, at 35–41; RIPPY, *supra* note 65, at 61–67.

220. A Mexican author observed:

> Mexico pointed out that property rights were not established by international law but by municipal law, and Mexican law concerning the property in the subsoil had assigned it to the nation by Article 27 of the constitution which was declared retroactive by the Mexican Supreme Court on May 10, 1938.

RIPPY, *supra* note 65, at 287 (citations omitted). The Standard Oil Company (N.J.) charged:

> Yet on May 10, 1938, in a palpable desire to fortify the "expropriation" of the preceding March, the Mexican Supreme court dug out of its archives an obsolete 1918 petition of the Huasteca Company for amparo against a Carranza decree, and without giving reasons—in violation of Article 195 of the Amparo Law, with requires the Court to respect its own decisions and to vary established jurisprudence only upon adducing reasons for setting it aside—proceeded to depart from the Texas Company decisions and to deny for the first time the vested or acquired rights of the pre-1917 owner or lessee.

STANDARD OIL CO., *supra* note 170, at 4.

government's continued rate suppression impeded further private investment. The government increased its involvement, by building, owning and operating the bulk of new generating capacity in the decades preceding the sector's 1960 nationalization, but allowing electricity distribution through the foreign companies. Like the railroad nationalization, the electricity sector's ultimate nationalization was nominally amicable, even if accomplished at a substantial discount to book value and presented at its 1960 culmination as a triumph equivalent to land redistribution and the oil expropriation.[221]

From its beginning in the 1890s through the end of World War II, foreign investors owned substantially all of Mexico's electricity sector.[222] On the eve of the Depression, foreign ownership of Mexico's electricity industry became further concentrated.[223] Starting in 1932, the government pressured the private companies to lower rates,[224] obtained a constitutional amendment making electricity a matter of federal legislative jurisdiction,[225] and then by 1936 adoption of a statute, the Código Nacional Eléctrico, broadened federal regulation from its base in the grant of water resource concessions for hydroelectric power plants to all phases of power generation and distribution, including thermoelectric plants previously under state and municipal concessions.[226]

In the 1930s Mexico did not change the sector's ownership. Instead, it suppressed rates and continued to do so until completion of the sector's nationalization in 1960 and 1961.[227] Consequently, as electricity demand grew,

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221. JAYNE, *supra* note 145, at 92.

222. Specifically:

> Between 1902 and 1906, five major British, Canadian, and United States companies entered the Mexican electric power industry . . . By . . . 1910, the foreign companies controlled the most profitable concessions for hydroelectric power generation, having either received these concessions directly from the Díaz government or bought them from their domestic owners.

Wionczek, *supra* note 73, at 22. Through the sector's first decades, hydroelectric power plants constituted its base. About two-thirds of Mexico's present generating capacity derives from oil and natural gas, and about a fourth remains hydroelectric. CFE Home Page, *at* http://www.cfe.gob.mx.

223. "During 1928 and 1929 . . . American & Foreign Power became the owner of all major generation and transmission facilities in Mexico outside the Mexico City area." Wionczek, *supra* note 73, at 46.

224. *Id.* at 53–54. The largest company, Mexican Light & Power, "successfully delayed any rate-lowering action for almost two years by arguing in the courts that the legislation passed under Calles was unconstitutional. (This company's rates in the capital and central Mexico were revised downward in July 1934, eighteen months after some smaller companies accepted the government's suggestions.)" *Id.* at 53.

225. MEX. CONST. art. 73, *amended by* D.O., 18 de enero de 1934, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/73.pdf; Wionczek, *supra* note 73, at 53–54.

226. D.O., 30 de abril de 1936; Wionczek, *supra* note 73, at 41.

227. From 1939 to 1958, rate increases were constrained such that the private company returns in the electricity sector averaged only 1.5 percent. BAKLANOFF, *supra* note 36, at 46 (citing the Bank of Mexico); *see also* DAVID FARQUHAR CAVERS & JAMES R. NELSON, ELECTRIC POWER REGULATION IN LATIN AMERICA 32–36 (1959).

private investors were unprepared to invest new capital to increase the sector's capacity and to further electrify the countryside. A new government agency, the Comisión Federal de Electricidad (CFE) was created in 1937,[228] when electricity service reached 38 percent of the population, and was concentrated in urban areas.[229] CFE was intended to create new generation capacity through direct government investment.[230] However, from 1936 to 1945, no new power plants were built.[231] CFE placed its first generating capacity into service in 1944–1945, and thereafter was Mexico's principal source of new generating capacity. Over time the private electricity companies came to purchase almost half their electricity from CFE.[232]

In 1960, Mexico acquired the two principal privately owned electric power companies, first the holdings of the United States-based American & Foreign Power Company and then the Belgian-held Mexican Light & Power Company. Although the companies cooperated, they did so against the

228. Comisión Federal de Electricidad: Historia, *at* http://www.cfe.gob.mx/www2/queescfe/notaqueescfe.asp?seccion=queescfe&seccion_id=2270&seccion_nombre=Historia.

229. CAVERS & NELSON, *supra* note 227, at 57. For coverage statistics, see *supra* note 228. Ninety-five percent of Mexico's population now has access to electricity. *Investment Opportunities in the Electric Sector*, *at* http://www.energia.gob.mx/ingles/index_elec.html.

230. *Id.* CFE today is "a public decentralized entity with legal personality and its own patrimony" administered predominantly by presidential appointees, but with union representation on its board. "Ley del Servicio Público de Energía Eléctrica," art. 8, D.O., 22 de diciembre de 1975, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/99.pdf (author's translation). *See* "Estatuto Orgánico de la Comisión Federal de Electricidad," art. 8., D.O., 9 de noviembre de 2000. CFE's governing board is comprised of the Secretaries of Budget and Public Credit; Social Development; Commerce and Industrial Development; Agriculture and Water Resources; and Energy, Mines and Para-State Industry, together with the Director-General of PEMEX and three CFE union representatives. "Ley del Servicio Público de Energía Eléctrica," art. 10. Mexico's President designates CFE's Director General. *Id.* art. 14.

231. Wionczek, *supra* note 73, at 59–60.

232. Stated more completely:

> In 1945, the two large private companies had controlled 60 per cent of the total installed capacity; the CFE had accounted for 5 per cent; and the rest of the industry 35 per cent. By 1960, the CFE controlled some 40 per cent of the total capacity; the two foreign companies together around 33 per cent; and the small public and private service plants about 27 percent.

Id. at 75–76. Consistent with the fact that only CFE was creating new generating capacity:

> From the inauguration of the first major CFE generating plant in 1944 until 1959, the energy purchases of the two foreign companies from the commission averaged 75 percent of the commission's annual output. Although this percentage declines somewhat in the late fifties, the relative importance of the CFE-generated energy in the total volume of business transacted by the two private utilities was increasing sharply all the time. Whereas in 1950 their energy purchases from the commission were equal to some 15 per cent of their sales to end-users, ten years later, on the eve of nationalization, they were equal to nearly 50 per cent.

Id. at 76–77.

backdrop of the President's January 11, 1960 proposal,[233] prior to consummation of the transfers, of constitutional amendment to make electricity an exclusive State activity. The amendment became effective at year end after consummation of the transfers.[234] Mexico then granted itself a substantial rate increase in order to attract World Bank financing of additional electrification.[235] The combination of long-standing suppression of allowable rates, plus the pending threat of expropriation, contributed to the acquisitions' consummation at a price less than one-fifth the book value of the assets acquired.[236]

Mexico's electricity sector remains substantially in CFE's hands. The current Ley del Servicio Público de Energía Eléctrica [Law of the Public Service of Electric Energy][237] repeats the essence of the 1960 Constitution Article 27 amendment reserving the "public service of electricity" to the State.[238] As discussed later in Part V.B., a 1992 statutory amendment provided a limited opening to private power generation by excepting self-generation, cogeneration, and independent power from the definition of "public service."[239]

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233. D.O., 29 de diciembre de 1960, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/27.pdf.

234. *Id.*

235. BAKLANOFF, *supra* note 36, at 47.

236. *Id.* The initial cash to consummate these transactions came from a March 1960, Prudential Insurance Company of America loan to the government, "the first long-term credit, since the Porfirian era, granted by a private foreign financial institution to the Mexican government without any conditions attached to its use." Wionczek, *supra* note 73, at 92. The first of the two principal acquisitions, involving American & Foreign Power Company assets, occurred in conjunction with the company's decision to exit the electricity sector throughout Latin America, because of expropriation vulnerability. *Id.* at 94–95; William J. Hausman & John L. Neufeld, *The Rise and Fall of the American & Foreign Power Company: A Lesson from the Past?*, 10 ELECTRICITY J. 46, 46–53 (1997) (detailing the company's progression from the initial 1920s massive influx of capital via U.S. securities markets through the lingering stagnation thereafter). The government agreed to a U.S.$70 million price, "substantially the same as the value which previously had been approved by the authorities as a basis for rate-making." Wionczek, *supra* note 73, at 91. The government assumed outstanding debt of U.S.$34 million, and paid the seller U.S.$5 million with the balance due over fifteen years at 6.5 percent interest tax free. *Id.* at 91–92. The seller agreed to re-invest the proceeds in Mexico. *Id.* at 92. Later in 1960, the government bought 90 percent of the Mexican Light & Power Company by consensual purchase of stock from a Belgian holding company and individual investors. It paid U.S.$52 million, a modest premium over the stock's preceding market price, and assumed debt of U.S.$78 million. *Id.* In 1961 it purchased the lesser, remaining private companies. *Id.* at 91.

237. D.O., 22 de diciembre de 1975, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/99.pdf.

238. *Id.* art. 2.

239. *See infra* notes 530–533 and accompanying text. The 1992 reform contemplated an autonomous commission within the Secretariat of Energy to regulate the activities newly "liberalized" by virtue of the exclusion from the definition of public service. "Decreto que reforma, adiciona y deroga diversas disposiciones de la Ley del Servicio Público de Energía Eléctrica," third transitory provision, D.O., 23 de diciembre de 1992, *available at* http://www.cre.gob.mx/marco/elec/lspee.pdf.

G. Sulfur Extraction

The "Mexicanization" of the dominant company involved in sulfur extraction did not result in a definitive expropriation. In this regard it differs from the rail and electricity sector pattern. However, it conforms to the pattern in that the government's acquisition of ownership occurred in the face of significant regulatory pressure. The government's push for Mexicanization occurred at a time when the owners dedicated the company's production to an exploding export market, even as the Mexican oil industry's critical need for sulfur was apparent. The dispute over Mexicanization was resolved by direct negotiation between the foreign investor and the government, without judicial recourse.

The 1884 Mining Code modified the previously prevailing principle that the State held subsoil ownership.[240] The Mining Code granted subsoil ownership to the owner of the land surface. The 1917 Constitution's Article 27, however, rendered this law unconstitutional. The 1926 mining law, amended in 1930 and 1934, confirmed the constitutional declaration and provided for the grant of government concessions to exploit mineral resources.[241]

Mexican commercial sulfur production began in 1954.[242] By 1966, the Pan American Sulphur Company, initially created with the backing of "the Little Mothers Club"—a Dallas breakfast club of oil executives[243]—controlled four-fifths of Mexico's sulfur production and export.[244] As Mexico's oil and chemical industries developed, concern arose as to the export of so much of this nonrenewable resource.

A 1961 mining law grandfathered existing concessions,[245] but gave the State priority in further mineral resource exploitation. To the extent the resource was not exploited by the State, the law contemplated concessions

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A 1993 decree, D.O., 4 de octubre de 1993, followed by a 1995 law, D.O., 31 de octubre de 1995, *amended by* D.O., 23 de enero de 1998, created the contemplated regulator, the Comisión Reguladora de Energía (CRE). Five full-time commissioners, named for staggered, renewable five-year terms by Mexico's President, comprise the CRE. *Id.* art. 4–6. The CRE has jurisdiction over electricity, natural gas, and pipelines. *Id.* art. 2. It is intended to safeguard the performance of public services and to promote healthy competition. *Id.* Within its subject matter, it fixes tariffs, issues permits, and establishes the terms of acquisition of CFE's purchase of privately generated power. *Id.* art. 3. It has eminent domain power to establish pipelines. *Id.* art. 10.

240. WIONCZEK, *supra* note 36, at 190–91.

241. *Id.* at 192–93. Tax legislation of the period imposed taxes on mining production, exports and profits. *Id.* at 193.

242. *Id.* at 171.

243. *Id.* at 203.

244. *Id.* at 171.

245. "Ley Reglamentaria del Artículo 27 Constitucional en Materia de Explotación y Aprovechamiento de Recursos Minerales," D.O., 7 de febrero de 1961; WIONCZEK, *supra* note 36, at 245–46.

to private parties of more limited size and duration than preexisting concessions.[246] Shortly thereafter, a Secretaría de Hacienda y Crédito Público decree offered a 50 percent reduction on mineral production and export taxes to companies that complied with "Mexicanization" conditions—namely, conversion to 51 percent Mexican ownership.[247] To receive the benefits, companies had to commit to Mexicanizing, present a plan to Mexicanize, and accomplish it within five years.[248] All mining companies in Mexico so committed, except those mining sulfur.[249]

The Secretaría de Industria y Comercio ordered the cessation of Pan American Sulphur Company exports effective April 21, 1965.[250] Mexico thereby expressed its concern that the sulfur be available to its domestic oil industry.[251] The company's export quota was restored promptly on the basis of the company's affirmation of substantial reserves within its concession, sufficient to establish that its 1965 export quota was not excessive.[252]

In October 1966, the Mexican government and a group of private investors offered to buy 66 percent of Pan American Sulphur Company's Mexican sulfur activities.[253] The transaction closed in June 1967, with the Mexican government owning 43 percent, Mexican private investors 23 percent, and the Pan American Sulphur Company 34 percent.[254] Although the parent company's stock on the New York Stock Exchange declined by almost a third upon the offer's announcement, it slightly exceeded the prior value shortly before closing.[255] While this suggests the purchase price was not confiscatory, a factor inducing the company's acceptance was that the 1961 Mining Law would result in expiration of its grandfathered concessions without renewal on the same favorable terms.[256]

246. WIONCZEK, *supra* note 36, at 246.
247. *Id.* at 246–47.
248. *Id.*
249. *Id.* at 247–48.
250. *Id.* at 266.
251. *Id.* at 266–68.
252. *Id.* at 272. Louisiana's Senator Long had accused Mexico of expropriation. He advocated cessation of Mexican foreign aid pursuant to the Hickenlooper Amendment and reduction of its U.S. sugar import quota. *Id.* at 269–70; 111 Cong. Rec. 10,580 (1965).
253. The offer was for U.S.$63 million, net, in cash or cash equivalent. WIONCZEK, *supra* note 36, at 288.
254. The Mexican government and private purchasers paid approximately U.S.$69.5 million. *Id.* at 290.
255. *Id.* at 289.
256. *Id.* at 303–04.

H. Banks

President López Portillo, faced with a financial crisis,[257] nationalized Mexico's banks by a September 1, 1982 decree.[258] The banks previously had operated in Mexico pursuant to concessions.[259] However, the decree expropriated for "*causas de utilidad pública*" [reasons of public utility] the assets used for banking activity pursuant to the concessions.[260] The decree effectively terminated the concessions. Its preamble recited the desirability of such termination in view of the government's ability to provide banking services with better attention to the social goals of channeling credit to smaller borrowers and promoting consumer credit.[261]

257. President Echevarría in 1970–1976 focused on "redistribution with growth" without regard to balancing the budget. Notwithstanding revenues from new oil discoveries, unsustainable spending under President López Portillo's administration led to the 1982 crash. EASTERLY, *supra* note 6, at 223–26. "Nine of the largest U.S. money-center banks had an exposure in Mexican loans equal to 44.4 percent of their capital." JOHN A. ADAMS, JR., MEXICAN BANKING AND INVESTMENT IN TRANSITION 21 (1997). Exchange controls accompanied the nationalization decree. *Id.* at 20.

258. D.O., 1 de septiembre de 1982 at 3–5; *see* CARLOS ELIZONDO, THE MAKING OF A NEW ALLIANCE: THE PRIVATIZATION OF THE BANKS IN MEXICO (1993); CARLOS TELLO, LA NACIONALIZACIÓN DE LA BANCA EN MÉXICO (1984); Ewell E. Murphy, Jr., *Expropriation and Aftermath: The Prospects for Foreign Enterprise in the Mexico of Miguel de la Madrid*, 18 TEX. INT'L L.J. 431 (1983) (arguing that the expropriation's motivation was ultimately to expand state capitalism to circumscribe the power of the private Mexican business interests that had controlled the banks).

259. "Ley General de Instituciones de Crédito y Organizaciones Auxiliares," art. 2, D.O., 31 de mayo de 1941, initially required a concession to engage in banking, but provided no public administration discretion in granting it. A 1942 amendment, D.O., 13 de enero de 1942, made the concession grant discretionary based on the need for banking services and the public administration's appreciation of the applicant's integrity and technical capacity. A 1946 amendment, D.O., 15 de marzo de 1946, further specified the nontransferability of concessions. "Ley General de Organizaciones y Actividades Auxiliares del Crédito," D.O., 14 de enero de 1985, *amended by* D.O., 4 de junio de 2001, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/139.pdf, replaced the 1941 law. *See* FINANCIERA NACIONAL AZUCARERA, S.A., INSTITUCIÓN NACIONAL DE CRÉDITO, LEY GENERAL DE INSTITUCIONES DE CRÉDITO Y ORGANIZACIONES AUXILIARES: JURISPRUDENCIA, REGLAMENTOS, CRITERIOS ADMINISTRATIVOS, EXPOSICIONES DE MOTIVOS DE REFORMAS (Mexico 1980) (presenting the 1941 banking law as amended and restated, annotated with regulatory and judicial materials, plus preambles to the law's various amendments). Carlos Tello in its *Prologo* at IX–XII observes that the 1941 law's amendments progressively emphasized achievement of development aims as the banking concessions' purpose.

260. D.O., 1 de septiembre de 1982, art. 1 (author's translation). The 1941 law's Article 100, in force at the 1982 expropriation, contemplated revocation of banking concessions followed by liquidation of the bank. Contemplated reasons for revocation included insolvency, failure to comply with accounting and regulatory requirements and the like, but not a general currency crisis.

261. *Id.* preamble; *see* TELLO, *supra* note 258, at 133–34.

The fifty-eight banks nationalized were Mexican owned.[262] Nineteen sued, but lost by early 1983.[263] Within three months following the decree, the Constitution's Article 28 amendment established that the State would provide the public service of banking exclusively through its institutions and that concessions would not be granted to private parties.[264] The amendment obviated further judicial challenges to the decree, exemplifying how the Constitution's flexibility at the time could obviate the rule of law's application.[265] The banks' lawyer labeled the federal courts' response to the banking nationalization "deplorable," because they accepted the constitutional amendment's preemption of claims under other constitutional provisions protective of due process and vested rights, and because they accepted the Constitution's facile amendment.[266]

The expropriation decree provided for compensation within a period not to exceed ten years.[267] Negotiations as to compensation began almost immediately[268] and the money paid was more than double the government's initial proposal.[269] The bank nationalization achieved neither of the goals of channeling credit to smaller borrowers nor of promoting consumer credit.[270]

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262. Manlio Tirado, *La expropriación de la banca privada*, PLURAL, Oct. 1982, at 43–47; RUSSELL N. WHITE, STATE, CLASS, AND THE NATIONALIZATION OF THE MEXICAN BANKS 84–88, 157–62 (1992) (describing leading Mexican bank groups). The two remaining banks operating in Mexico were U.S.-owned Citibank-México and labor union-owned Banco Obrero. ADAMS, *supra* note 257, at 11 n.10. Banco Obrero, founded as a union bank 1977, was liquidated in 1997. FRANCISCO JAVIER VEGA RODRÍGUEZ ET AL., LA SINGULAR HISTORIA DEL RESCATE BANCARIO MEXICANO DE 1994 A 1999 Y EL RELEVANTE PAPEL DEL FOBAPROA: UN ANÁLISIS DEL PAPEL DEL "PRESTAMISTA DE ÚLTIMA INSTANCIA" 521–22 (1999) (describing Banco Obrero's operation as focused on matters of "*dudosa licitud*" [questionable licitness]) (author's translation). Foreign bank representative offices were not affected.

263. *See Sentencia del Tribunal Colegiado en Materia Administrativa del Primer Circuito*, Jan. 31, 1983, *in* SÁNCHEZ MEDAL, *supra* note 55, at 105–13. On November 22, 1983, the Supreme Court, voting thirteen to two, found no jurisdiction to consider *amparo* in respect to the banks' claims. *See id.* at 167–73; Sylvia Maxfield, *The International Political Economy of Bank Nationalization: Mexico in Comparative Perspective*, 27 LATIN AM. RES. REV. 75, 89 (1992).

264. D.O., 17 de noviembre de 1982.

265. *See* TENA RAMÍREZ, *supra* note 55, at 636–43 (identifying the expropriation decree as creating an additional monopoly in violation of the then effective text of Article 28, and labeling the constitutional amendment as part of "*la patética y constante infracción de la ley fundamental*" [the pathetic and constant violation of the fundamental law]); SÁNCHEZ MEDAL, *supra* note 55, at 42–43.

266. SÁNCHEZ MEDAL, *supra* note 55, at 179; Rafael Estrada Sámano, *Administration of Justice in Mexico: What Does the Future Hold?*, 3 U.S.-MEX. L.J. 35, 41 (1995).

267. D.O., 1 de septiembre de 1982, art. 2.

268. Maxfield, *supra* note 263, at 91–92.

269. *Id.* Carlos Tello, a nationalization advocate, headed the Central Bank from just after the decree's proclamation through the Portillo administration's remaining three months. *Id.* at 80, 86; TELLO, *supra* note 258, at 19. He advanced the government's initial compensation proposal. Maxfield, *supra* note 263, at 91–92.

270. Maxfield, *supra* note 263, at 95–96, 98.

After a 1990 constitutional amendment, the commercial banks were reprivatized by auction in 1991–1992.[271]

The owners of Mexico's banks appear to have fared well relative to owners of other investments expropriated, or even simply regulated. The original owners achieved relatively favorable compensation subsequent to the 1982 compensation, and in connection with events following the 1991–1992 reprivatization, the new owners benefited from a massive bailout. Following the reprivatization, the banks incurred U.S.$55 billion in bad loans, alleged in many instances knowingly to have been made without the prospect of repayment.[272] The government subsidized the removal of these bad loans from the banks' balance sheets[273] as part of recovery efforts from the December 1994 economic crash.[274] What benefited the bank owners most in regards to compensation, reprivatization, and the subsequent bailout was not litigation; rather, it was their status as the politically connected Mexican business class.[275] The rule of law's judicial application had little relevance to addressing the bank owners' concerns.

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271. D.O., 27 de junio de 1990, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/28.pdf. "The privatization of the 18 remaining banks began in June 1991. . . . Total foreign investment in a Mexican financial group or bank was limited to 30 percent of equity capital. . . . The process took 13 months, [and] raised $12.4 billion (37.8 trillion pesos) for the government . . ." ADAMS, *supra* note 257, at 23–24 (citations omitted); *see also* Maxfield, *supra* note 263, at 99. Even prior to the reprivatization, parts of the banks engaged in businesses ancillary to commercial banking were privatized, *id.* at 95–96, and the so-called nonbank financial sector boomed. "Between 1982 and 1988, nonbank financial institutions' assets rose from 9.1 percent to 32.1 percent of total financial system assets." John H. Welch & William C. Gruben, *A Brief Modern History of the Mexican Financial System*, FIN. INDUS. STUD., Oct. 1993, at 6.

272. *See, e.g.*, EASTERLY, *supra* note 6, at 225; DOLORES PADIERNA, LA HISTORIA OCULTA DEL FOBAPROA (2000) (critique of FOBAPROA's activity by opposition member (Partido Revolucionario Democrático) of Congress); Mario Delgado Carrillo, *El Impacto Presupuestal del Rescate Financiero*, *in* DEL FOBOPROA AL IPAB: TESTIMONIOS, ANÁLISIS Y PROPUESTAS 107–22 (2000) (discussing the magnitude of the bank bailout and the burden on the national budget); Adolfo Aguilar Zinser, *La Negociación del FOBAPROA*, *in* FOBAPROA E IPAB: EL ACUERDO QUE NO DEBIÓ SER 75 (Rogelio Carvajal Dávila ed., 1999) (told from the perspective of an opposition member, later advisor to President Fox).

273. A bank-funded deposit insurance program, Fondo Bancario de Protección al Ahorro (FOBAPROA), removed the banks' bad loans from their balance sheets by purchasing the loans. In 1995 and 1996 FOBAPROA assumed responsibility for bad loans of about U.S.$55 billion. To assure FOBAPROA's solvency, the State guaranteed its debt in excess of the deposit insurance scheme's coverage ability. "Ley de Protección al Ahorro Bancario," D.O., 19 de enero de 1999, *as amended*, D.O. 1 de junio 2001, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/62.pdf (creating the Instituto de Protección al Ahorro Bancario (IPAB) as the rescue vehicle).

274. "Growth in 1995 fell to –8 percent per capita." Adams, *supra* note 257, at 21.

275. The expropriations reviewed here do not establish directly discriminatory treatment of foreign and Mexican investors. Rather, the distinction appears to be between politically connected and politically marginal investors. Politically marginal owners include the Church after backing the losing conservatives in the civil wars of the 1800s, large agricultural land owners faced with the Revolutionary tide of land redistribution, and the foreign oil industry. Like the bank expro-

I. *Metalclad*

Metalclad[276] exemplifies the rule of law's application through international arbitration. In *Metalclad*, the Mexican government agreed, by its ratification of the NAFTA's Chapter 11,[277] to be subject to a dispute resolution process the outcome of which it does not control. Mexico ultimately accepted the outcome that it compensate the complaining investor on the fair market value terms established by NAFTA Chapter 11.[278] The *Metalclad* dispute with Mexico stands out among the NAFTA Chapter 11 arbitration procedures brought against the three NAFTA countries,[279] because it yielded a

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priation, the Yucatan hemp industry expropriation at the beginning of the 1960s compensated the Mexican owners well. Ramírez, *supra* note 17, at 154–55 (discussing generous compensation to twining plant owners, the local political establishment).

276. International Centre for Settlement of Investment Disputes (Additional Facility) Case No. ARB(AF)/97/1 between Metalclad Corporation, Claimant, and The United Mexican States, Respondent, Award before the Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement, Aug. 30, 2000, 40 I.L.M. 36 (2001), 16 ICSID REV.-FOREIGN INVESTMENT L.J. 165, *available at* http://www.worldbank.org/icsid/cases/mm-award-e.pdf; United States v. Metalclad Corp., [2001] 89 B.C.L.R. 3d 359 (B.C. Sup. Ct.), *available at* http://www.worldbank.org/icsid/cases/metalclad_reasons_for_judgment.pdf (ruling on appeal of aribitral award); United States v. Metalclad Corp., [2001] 95 B.C.L.R. 3d 169 (B.C. Sup. Ct.) (further ruling on appeal), *available at* http://www.courts.gov.bc.ca/jdb-text/sc/01/15/2001bcsc1529.htm.

277. NAFTA, Dec. 17, 1992, art. 1136, 32 I.L.M. 605, 646, *available at* http://www.nafta-sec-alena.org/DefaultSitehome/index_e.aspx.

278. *See infra* text accompanying note 485.

279. Although NAFTA's Chapter 11 arbitration proceedings are not necessarily made public, for compilations, see http://www.naftaclaims.com and http://www.worldbank.org/icsid/cases/cases.htm. Listed proceedings involving Mexico include: Waste Mgmt, Inc. v. United Mexican States, ICSID Case no. ARB(AF)/00/3, June 26, 2002 (Mexican municipality concession for the provision of waste management services; arbitral decisions address conditions to commence arbitration), *available at* http://www.state.gov/documents/organization/12244.pdf, http://www.worldbank.org/icsid/cases/waste_united_eng.PDF; Azinian v. United Mexican States, ICSID Case no. ARB(AF)/97/2, November 1, 1999 (holding that U.S. individual investors have no claim against Mexican municipality regarding waste management concession), *available at* http://www.worldbank.org/icsid/cases/robert_award.pdf; Award of November 1, 1999, 14 ICSID REV.-FOREIGN INVESTMENT L.J. 538 (1999); 39 I.L.M. 537 (2000); Feldman Karpa v. United Mexican States (ICSID Case no. ARB(AF)/99/1, December 16, 2002), *available at* http://www.state.gov/s/l/c3751.htm (finding Chapter 11 equal treatment applicable to U.S. citizen residing in Mexico in interim award, finding no expropriation of grey market cigarette export business in subsequent award, but in 2-1 decision awarding damages for Mexican tax authorities' unequal treatment of a U.S. investor); GAMI *Investments, Inc. v. United Mexican States*, Apr. 9, 2002, Notice of Arbitration, Mexican company Grupo Azucarero México, S.A. de C.V. whose sugar mills were expropriated, D.O., 3 de septiembre de 2001, protests improper expropriation and unequal treatment arising from Mexico's regulation and restructuring of the sugar industry; selects UNCITRAL rules); Calmark Commercial Dev., Inc. v. United Mexican States (involving dispute over Cabo San Lucas real estate development and actions taken by different parts of a dissolving Mexican law firm), *available at* http://www.international-economic-law.org/Mexicans/Calmark_Redacted_NOI.pdf, Notice of intent to commence arbitration, Jan. 11, 2002; Adams v. United Mexican States (presenting claims of individual U.S. buyers of real estate interests in Ensenada area resort under development, frustrated by resolution of clouded title issues, selects UNCITRAL

final arbitral award, judicial decisions on appeal, and final payment. The *Metalclad* arbitrators and the reviewing court each addressed Chapter 11's meaning. Although they expressed divergent views, they agreed that Metalclad Corporation suffered an expropriation not permitted under NAFTA. *Metalclad* is the one example to date of a Chapter 11 arbitration finding such an expropriation by Mexico.[280] *Metalclad* demonstrates an international procedure for reviewing the compliance of the Mexican legal system's operation with Mexico's treaty commitments, finding a deficiency, condemning Mexico to pay damages, and closing with payment.

Metalclad, a Delaware corporation publicly traded in the United States, sought to develop a hazardous waste landfill in Guadalcazar, a municipality in Mexico's San Luis Potosí state.[281] In 1993 Metalclad, through wholly owned subsidiaries, bought a Mexican company, which owned the landfill site and held a federal permit for the landfill. Municipal and state government actions relative to construction permitting and environmental matters frustrated the effort.

Metalclad initiated a NAFTA Chapter 11 arbitration in 1996,[282] seeking U.S.$90 million.[283] After the Arbitral Tribunal awarded Metalclad U.S.$16,685,000, plus accruing interest, Mexico appealed to a British Columbia trial court. Subsequent to the trial court decision, Mexico settled the *Metalclad* matter in October 2001 by paying Metalclad U.S.$16,002,000.[284]

1. NAFTA Chapter 11

NAFTA Chapter 11's section A provides legal standards governing a host country's treatment of investors from other NAFTA countries. Its section B allows such investors to commence binding international arbitration against a host country in the event of a dispute over the host country's

rules), Notice of arbitration Feb. 16, 2001, *available at* http://www.international-economic-law.org/Mexicans/Adams%20et%20al%20and%20Mexico%20%20-%20Notice%20of%20Arbitration.PDF.

280. Feldman Karpa v. United Mexican States (ICSID Case no. ARB(AF)/99/1, Dec. 16, 2002), *available at* http://www.state.gov/s/l/c3751.htm, likewise condemned Mexico to pay damages, but for unequal treatment, not expropriation.

281. The statement of facts is drawn from the arbitral award. *See supra* note 276; *Metalclad*, 40 I.L.M. 41.

282. *See* http://www.sice.oas.org/trade/nafta/naftatce.asp; *Metalclad*, 40 I.L.M. 38.

283. Metalclad Corporation, 2001 Form 10-K, filed with SEC, Mar. 29, 2002, *available at* http://www.sec.gov/Archives/edgar/data/13547/000001354702000005/form10k123101.txt.

284. Metalclad also "transferred its remaining Mexican assets to the Mexican government, with the exception of approximately 227 acres of land." *Id.*

respect of such standards. NAFTA Chapter 11 arbitrations may bind a State to compensate a disgruntled foreign investor.[285]

NAFTA Chapter 11 awards are made by case-specific arbitral panels, and the awards are binding only in the specific cases.[286] The three treaty countries, comprising a Commission,[287] maintain an authoritative power of NAFTA interpretation.[288] The Commission is to decide by consensus, unless it otherwise agrees.[289] Chapter 11 establishes no permanent institution to resolve disputes, nor does it create a lawmaking body independent of the unanimous agreement of the NAFTA countries.[290] Unlike the decisions of the courts of supranational systems such as those of the American and European Conventions on Human Rights and the European Union,[291] the arbitral award obligates the State to which it is addressed only to satisfy the prevailing plaintiff. There is no direct effect on the State's law. Whereas the supranational systems' courts authoritatively interpret their governing law, Chapter 11 produces arbitral, not judicial decisions.

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285. The award may impose monetary damages and interest. NAFTA, art. 1135(1)(a). If the award imposes restitution of property, it must allow the payment of monetary damages and interest in lieu of restitution. *Id.* art. 1135 (1)(b). The arbitrators may order interim protective measures, but may not order attachment or enjoin the measure challenged. *Id.* art. 1134. A final award may not order punitive damages. *Id.* art. 1135(3).

286. *Id.* art. 1136(1).

287. *Id.* art. 2001.

288. *Id.* art. 1131(2), 1132(2). NAFTA interpretation by the "Commission," comprised of representatives of the three NAFTA contracting countries, binds the arbitrators. *Id.* art. 1131(2).

289. *Id.* art. 2001(4).

290. NAFTA does not contemplate judicial and legislative institutions like those of supranational systems, such as the American Convention on Human Rights, the European Convention on Human Rights, or the European Union. The Inter-American Court for Human Rights is the supranational judicial body which has functioned pursuant to the American Convention on Human Rights since 1979. *See* HÉCTOR FIX-ZAMUDIO, MÉXICO Y LA CORTE INTERAMERICANA DE DERECHOS HUMANOS (1999) (discussing the Inter-American Court for Human Rights, with particular reference to Mexico); Mauro Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 427–30 (1980) (discussing the institutions of the European Convention on Human Rights); PAOLO MENGOZZI, EUROPEAN COMMUNITY LAW: FROM THE TREATY OF ROME TO THE TREATY OF AMSTERDAM (Patrick Del Duca trans., 2d ed. 1999) (discussing European Community institutions).

291. Judicially, the supranational systems may function pursuant to a question referral mechanism similar to that of a constitutional court. An example is the question referral jurisdiction of the European Court of Justice. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, art. 234, Nov. 10, 1997. O.J. (C 340) 3 (1997). An alternative is recourse to a supranational court after exhaustion of national remedies and passage of a commission with screening and settlement functions. The latter model is followed by the European Court of Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 19, 219 U.N.T.S. 222, 234, *available at* http://www.echr.coe.int/Convention/webConvenENG.pdf, and the InterAmerican Court for Human Rights. Articles 46, 47, American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), *available at* http://heiwww.unige.ch/humanrts/oasinstr/zoas3con.htm.

NAFTA Article 1110 prohibits "direct or indirect" nationalization or expropriation of an investor of another contracting country, or measures "tantamount to nationalization or expropriation." The exception is an expropriation for a public purpose, on a nondiscriminatory basis, in accordance with due process and with compensation of fair market value.[292] Compensation is to be "paid without delay," "freely transferable," and subject to "interest at a commercially reasonable rate . . . from the date of expropriation until the date of actual payment."[293] The criteria for establishing fair market value include: "going concern value, asset value including declared tax value of tangible property, and other criteria as appropriate, to determine fair market value."[294]

The parties to a Chapter 11 arbitration are the investor and the State. The concept of "investor" includes persons or entities of a NAFTA country who directly or indirectly own or control an entity organized under the law of the host NAFTA country, which expropriates such entity's assets.[295] The investor must make the claim within three years from when "the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."[296]

The investor may institute the arbitration under United Nation Commission on International Trade Law[297] or International Convention for the Settlement of Investment Disputes (ICSID) rules.[298] NAFTA Article 1121

292. These provisions echo those of a 1921 U.S.-proposed draft treaty of amity and commerce with Mexico. RIPPY, *supra* note 65, at 76. In addition to prohibiting expropriation except within the defined parameters, NAFTA Chapter 11 establishes rules for general treatment of another contracting country's investors. Article 1102 mandates "national treatment" of such investors, which means that the foreign investors receive "treatment no less favorable" than that accorded the host country's own investors and investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." NAFTA, art. 1102. Article 1103 increases the standard of treatment to "most-favored-nation" treatment. That is, the host country must offer an investor of a contracting party the best treatment that it offers in like circumstances to an investor of any country. *Id.* art. 1103. In general, Article 1105 provides that each contracting country is to "accord to investments of investors of another [contracting country] treatment in accordance with international law, including fair and equitable treatment and full protection and security." *Id.* art. 1105(1).

293. *Id.* art. 1110.

294. *Id.* art. 1110. As to this provision's compatibility with Mexico's Constitution, *compare supra* note 78 *with infra*, text accompanying notes 485 & 487.

295. NAFTA, art. 1117.

296. *Id.* art. 1116(2).

297. Defined as the United Nations Commission on International Trade Law arbitration rules approved by the United Nations General Assembly December 15, 1976, *available at* http://www.uncitral.org/en-index.htm.

298. NAFTA, art. 1120. If both the investor's country and the host country are ICSID Convention parties, the investor may invoke the ICSID convention. If only one of the two relevant countries is party to the ICSID Convention, the investor may invoke the ICSID Additional Facility Rules. Because the United States is party to ICSID, and even though Mexico

requires the investor to surrender the right to initiate or continue national court proceedings and to agree to be bound by the arbitration.[299] Unless the parties otherwise agree, each party names one of the three arbitrators, and the third is to be named by agreement.[300] A party may enforce an award pursuant to the provisions for the enforcement of arbitral awards under any one of three leading international conventions, the ICSID, New York, or Inter-American Conventions.[301]

2. Arbitral Award

Metalclad claimed that it suffered inequitable treatment[302] and an impermissible expropriation[303] in breach of NAFTA Chapter 11. The arbitration was conducted under the ICSID Additional Facility. The arbitrators were a former U.S. Attorney General, a leading Mexican practitioner and a British international law professor.[304] The Arbitral Tribunal met throughout the arbitration proceedings in Washington, D.C., but with the parties' approval set the place of arbitration as Vancouver, British Columbia, Canada.[305] The choice of the place of arbitration is significant. Had they chosen a different Canadian province, the award would have been deemed issued in that province rather than British Columbia,[306] and the law relevant to an appeal would have been the law of that place rather than British Columbia.[307]

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is not, U.S. investors may invoke the Additional Facility Rules to contest treatment of investments in Mexico. NAFTA, art. 1120. On ICSID and Mexico, see *infra* Part IV.B.

299. By virtue of a reservation by Mexico, an investor may not make a claim under Chapter 11 section A "both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal." NAFTA, art. 1120, annex 1120.1.

300. *Id.* art. 1123. Absent agreement, the ICSID Secretary-General appoints the third arbitrator. *Id.* art. 1124. There is a mechanism to consolidate multiple investor claims. *Id.* art. 1126.

301. *Id.* art. 1136(6). Independent of such enforcement rights, the country of an investor seeking to enforce an award may have the Commission establish an Article 2008 panel to determine whether a NAFTA country is breaching NAFTA by resisting compliance with an award and to make recommendations as to compliance. *Id.* art. 1136(5).

302. *Id.* art. 1105.

303. *Id.* art. 1110.

304. Respectively, Benjamin R. Civiletti, José Luis Siqueiros, and Elihu Lauterpacht.

305. For an arbitration such as *Metalclad*, NAFTA Article 1130 provides that the place of arbitration be selected under ICSID Additional Facility Rules, provided that the arbitration be held "in the territory of a [contracting country] that is a party to the New York Convention." *Id.* art. 1130. Canada is such a party, and also a neutral location. ICSID, Schedule C Arbitration (Additional Facility) Rules, art. 21, *available at* http://www.worldbank.org/icsid/facility/facility.htm.

306. *Id.* art. 21(3).

307. The choice of forum for the arbitration establishes the law that governs the award's validity. *See id.* art. 3 (clarifying that arbitrations under such rules do not benefit from the ICSID Convention exemption from subjection to the arbitration forum's law). The rule's comment provides:

> This is an explicit reminder that the provisions of the Convention are not applicable to Additional Facility proceedings. With respect to arbitration proceedings this means, e.g.,

The Arbitral Tribunal based its decision on the Chapter 11 provision that it decide in accordance with NAFTA and applicable rules of international law.[308] NAFTA itself provides for its interpretation in light of its stated objectives, which include transparency and substantial increase in investment opportunities, and in accordance with applicable rules of international law.[309] The Arbitral Tribunal reasoned that as to transparency, NAFTA imposes on the contracting countries an affirmative obligation to ensure that "its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement" are made public so that "interested persons" can "become acquainted with them."[310]

The Arbitral Tribunal found that by failing to clearly articulate rules concerning municipal construction permit applicability and procedures for grant, and by allowing the subsequent litigation as to the construction permit to halt the previously approved project,

> Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.[311]

Metalclad therefore succeeded on its Article 1105 claim that Mexico breached its obligation to provide "fair and equitable treatment."

The Arbitral Tribunal found also that an indirect expropriation without compensation had occurred by virtue of two actions: first, the Mexican government's failure to resolve the municipality's effort to block the project with its building permit denial, which the Tribunal deemed inappropriate both as a matter of Mexican law and by virtue of not being founded in transparent procedures; and second, the creation of an ecological reserve by the state governor's decree.[312] Hence, Metalclad's claim was founded also on Mexico's

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> that awards, unlike awards rendered pursuant to the Convention, are not insulated from national law and that their recognition and enforcement will be governed by the law of the forum, including applicable international conventions.

Id.

308. Metalclad Corp. v. United Mexican States, 16 ICSID REV.-FOREIGN INVESTMENT L.J. ¶ 70 (2001) (citing NAFTA article 1131(1)). As a source of international law, the Arbitral Tribunal considered the Vienna Convention on the Law of Treaties, which provides that a state party to a treaty may not invoke its internal law as justification for its failure to perform the treaty. Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339.

309. NAFTA, art. 102(2).

310. *Metalclad*, *supra* note 308, at ¶ 71 (citing NAFTA Article 1802.1).

311. *Id.* ¶ 99.

312. After Metalclad commenced the arbitration proceedings, "[o]n September 23, 1997, three days before the expiry of his term, the [state] Governor issued an Ecological Decree declaring a Natural Area for the protection of rare cactus. The Natural Area encompasses the area of the landfill." *Id.* ¶ 59.

breach of its NAFTA Article 1110 obligations not to expropriate without a public purpose, a nondiscriminatory basis, due process or compensation.

3. Judicial Appeal

NAFTA Article 1136(3) delays enforcement of a final award until judicial appeals are complete. Mexico appealed the award to a British Columbia trial court as the court of the forum of arbitration.[313] In his decision on Mexico's appeal,[314] the court's Justice Tysoe found that the Arbitral Tribunal's foundation of the award on breach of the NAFTA transparency obligation exceeded the terms of reference to arbitration and he accordingly refused to enforce the award insofar as it was based on such a breach. The Arbitral Tribunal had offered a third foundation for its award, namely that the state governor's decree constituted an expropriation without compensation. Justice Tysoe upheld the Arbitration Tribunal's award on that ground.[315]

British Columbia's International Commercial Arbitration Act allows a reviewing court to set aside an award if it is not "contemplated by or not falling within the terms of the submission to arbitration."[316] Justice Tysoe found that the Arbitral Tribunal, by considering the Mexican legal framework's transparency, addressed issues outside the Chapter 11 provisions that provided the substantive and procedural basis for the arbitration. He accordingly set aside those portions of the award that relied on findings of breach of transparency obligations.[317]

Justice Tysoe's reasoning for setting aside such portions of the award was founded on a close reading of the NAFTA provisions in which the three NAFTA countries consented to binding arbitration of claims by investors from other countries. He noted:

> Section B of Chapter 11 establishes a separate arbitration procedure. It allows investors of a NAFTA Party (who are not themselves a party

313. The British Columbia Supreme Court, the province's trial court with jurisdiction over large matters, received the petitions for review of the arbitral award. Appeals of the Supreme Court's decisions are to the British Columbia Court of Appeal. *See* http://www.courts.gov.bc.ca.

314. *See* United Mexican States v. Metalclad Corp., [2001] 89 B.C.L.R. 3d 359 (B.C. Sup. Ct.) Subsequent to the Supreme Court's May 2, 2001 order, Justice Tysoe postponed entry of a definitive order. United Mexican States v. Metalclad Corp., [2001] 95 B.C.L.R. 3d 169 (B.C. Sup. Ct.). He rejected appeals from both parties, but amended his May 2, 2001 order to adjourn the Supreme Court proceedings for eighteen months to allow the arbitral panel to determine whether Metalclad was entitled to interest from an earlier date. *Id.* at 178.

315. He adjusted its amount to reflect the running of interest only from the later date of the Ecological Decree. *Metalclad*, 95 B.C.L.R. 3d at 174.

316. International Commercial Act, R.S.B.C., ch. 233, § 34 (1996) (B.C., Can.), *available at* http://www.qp.gov.bc.ca/statreg/stat/I/96233_01.htm#section34.

317. *Metalclad*, 89 B.C.L.R. 3d at 396.

> to the NAFTA) to make claims against other NAFTA Parties by way of arbitration. However, the right to submit a claim to arbitration is limited to alleged breaches of an obligation under Section A of Chapter 11 and two articles contained in Chapter 15. It does not enable investors to arbitrate claims in respect of alleged breaches of other provisions of the NAFTA. If an investor of a Party feels aggrieved by the actions of another Party in relation to its obligations under the NAFTA other than the obligations imposed by Section A of Chapter 11 and the two articles of Chapter 15, the investor would have to prevail upon its country to espouse arbitration on its behalf against the other Party.[318]

With this language, Justice Tysoe substituted for the Arbitral Tribunal's view his own view of the meaning of the Chapter 11 consent by the contracting countries to binding arbitration with investors of other countries.[319] Justice Tysoe read NAFTA to contemplate the three contracting countries' consent to investor arbitration against a State only within the narrow grounds established by express reference in Chapter 11. In his view, NAFTA left broader complaints, such as lack of transparency as to local government requirements, for resolution through country to country negotiation.

The Arbitral Tribunal held a broader view of the import of the contracting countries' consent to binding arbitration of disputes with investors. Justice Tysoe's narrow reading of the scope of consent allowed him to take issue with the Arbitral Tribunal's application of NAFTA. First, he noted that the arbitral panel relied on the NAFTA section 1802 obligation of a contracting country to publish its law, even though section 1802 is not part of Chapter 11. Second, he took issue with the arbitral panel's finding, on the basis of reading NAFTA's preamble, that transparency as to a contracting country's legal requirements was one of NAFTA's purposes. Justice Tysoe found that the Arbitral Tribunal "misstated the applicable law to include transparency obligations and it then made its decision on the basis of the concept of transparency."[320]

Shortly following Justice Tysoe's ruling, the three NAFTA countries exercised their power under NAFTA to issue an interpretation of Chapter 11 that affirmed Justice Tysoe's view that the Chapter 11 consent by the three contracting countries to binding arbitration is only to violations claimed of the specific provisions of Article 11 section A and that those provisions

318. *Id.* at 376–77. NAFTA Articles 1116 and 1117 limit claims to those under Chapter 11 section A and two articles of Chapter 15 that relate to the behavior of state enteprises and monopolies.

319. Justice Tysoe thereby made British Columbia a problematic choice of venue for arbitral plaintiffs. Todd Weiler, *NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back*, 36 INT'L LAW. 345, 350 (2002).

320. *Metalclad*, 89 B.C.L.R. 3d at 380.

should not be read to incorporate other NAFTA provisions.[321] The contracting countries' interpretation of Chapter 11 as having a narrow scope does not alter the independence of the procedure for its application. As mentioned, the parties settled on substantially the same monetary terms as the Arbitral Tribunal's award following Justice Tysoe's ruling. Although Justice Tysoe and the Arbitral Tribunal differed on the proper application of Chapter 11's section A and the NAFTA contracting countries have made Justice Tysoe's view applicable to any future Chapter 11 arbitrations, *Metalclad* stands as the resolution of an investment dispute through the rule of law's application. There was no question as to the Arbitral Tribunal's or the British Columbia court's independence. There is no doubt as to the procedure's availability to future, similarly situated investors in Mexico.

The three contracting countries' interpretation of Chapter 11's meaning is a political correction of the NAFTA Chapter 11 process. The interpretation modifies Chapter 11's substance by narrowing the grounds to sustain an expropriation claim and hence entitlement to compensation. The narrowed basis for sustaining an expropriation claim underlines the importance of also assuring the rule of law's application through Mexico's judicial system.

III. MEXICO'S FEDERAL JUDICIARY

Mexico's federal judiciary addresses expropriation disputes by virtue of its jurisdiction over disputes arising under federal law.[322] In addition to the

321. The three NAFTA countries, on July 31, 2001, intepreted NAFTA article 1105: Minimum Standard of Treatment in Accordance with International Law

(1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

(2) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

(3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

NAFTA FREE TRADE COMMISSION, NOTES OF INTERPRETATION OF CERTAIN CHAPTER 11 PROVISIONS (2001), *available at* http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp; *see also* Mark Ballard, *Foreign Firms Get New Appeal Right*, NAT'L L.J., Mar. 19, 2001, at A5; *Trade Ministers Agree to Clarify NAFTA Investor Provisions*, 2 LATIN ADVISORY 1 (Sept. 2001). NAFTA Articles 1131(2) and 1132(2) bind Chapter 11 Arbitral Tribunals to follow such intepretations. Todd Weiler, *NAFTA Article 1105 and the Free Trade Commission: Just Sour Grapes, or Something More Serious?*, 29 INT'L BUS. LAW. 491–500 (2001) (arguing that the "most favored nation" rule of NAFTA's articles 102(1) and 1103, which require that each NAFTA country accord the other NAFTA countries the most favored treatment offered any country, will limit the interpretation's import).

322. Federal courts have jurisdiction over civil and criminal matters concerning "fulfillment and application of federal laws or international treaties." MEX. CONST. art. 104 (author's translation). At the

Constitution itself, federal law includes the 1936 Law of Expropriation, the Commercial Code[323] and other federal statutes that govern most topics of investment and financial interest.[324] It also includes treaties.[325] Such disputes have come to the federal courts principally as *amparo* actions, the pleas to a federal judge for protection from improper government action discussed in Part III.B.[326] Mexico's Supreme Court, as well as the balance of the federal judiciary, is known for sustaining individual rights through amparo rulings.[327] But, at least prior to the 1994 constitutional reform, it was also known for following the President's line as to policy on politically charged matters,[328] such as the oil[329] and bank[330] expropriations.

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plaintiff's option, a state court may also hear such disputes, "[w]hen such controversies affect only individual interests . . . " *Id.*

323. The Commercial Code is federal law. D.O., 15 de septiembre de 1889, *as amended* through June 5, 2000, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/3.pdf.

324. For example, on federal laws relative to secured lending and bankruptcy, see Patrick Del Duca & Rodrigo Zamora Etcharren, *Mexico's Secured Lending Reforms*, 33 UCC L.J. 225 (2000).

325. *See supra* note 322.

326. *Amparo* jurisdiction is exclusively federal. *See infra* text accompanying note 358.

327. Carl E. Schwarz, *Judges Under the Shadow: Judicial Independence in the United States and Mexico*, 3 CAL. W. INT'L L.J. 260, 260 (1973) [hereinafter Schwarz, *Judges Under the Shadow*]; Carl E. Schwarz, *Rights and Remedies in the Federal District Courts of Mexico and the United States*, 4 HASTINGS CONST. L.Q. 67, 67 (1977); Joel G. Verner, *The Independence of Supreme Courts in Latin America: A Review of the Literature*, 16 J. LATIN AM. STUD. 463, 484–86 (1984). One study of the over 3700 *amparo* cases heard by the Supreme Court from 1917 to 1960 found that more than a third were decided against the government. GONZÁLEZ CASANOVA, *supra* note 43, at 19–21. *But see* Keith S. Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L.J. 785, 815–16 (1974) (observing the limitations of those statistics, for example, "Mexican presidents are automatically included as parties in all constitutional amparo actions. That the president was named as a party is simply a formality rather than an indication that the amparo involved a matter important to the government."); Keith S. Rosenn & David A. Katz, Book Review, 68 CAL. L. REV. 565 (1980) (reviewing JOHN HENRY MERRYMAN & DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS, CASES AND MATERIALS (1978)) (outlining methodological issues associated with comparative, quantitative analysis of judicial performance).

328. For example,

> Que la Suprema Corte de Justicia constituye un poder . . . parece no presentar lugar a dudas, lo cual no impide por supuesto que en las grandes líneas siga la política del Ejecutivo, y sirva de hecho para darle mayor estabilidad. [That the Supreme Court constitutes a power . . . appears not to be subject to doubt, which does not impede of course that in broad lines it follows the policy of the Executive, and serves in fact to give it greater stability.]

GONZÁLEZ CASANOVA, *supra* note 43, at 21 (author's translation); *see also* Verner, *supra* note 327, at 484–85; Margadant, *supra* note 139, at 459 (arguing that "Mexico's federal judiciary likes to 'drop those potatoes' that seem politically 'too hot to handle,'" and referencing the Supreme Court President's public comment pre-judging the bank nationalization *amparo* action). Schwarz notes the federal courts' lack of response to *amparo* petitions by university students in connection with actions of the federal riot police and the army during the 1968 and 1969 Mexico City demonstrations. Schwarz, *Judges Under the Shadow*, *supra* note 327, at 324. The federal judiciary has on occasion frustrated government policy initiatives, for example the Supreme Court's 1961 protection of Química Industrial de Monterrey S.A. from the Ministry of Foreign Relations' requirement that it demonstrate majority Mexican control of its board of directors as a condition of increasing its capital. *See* KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK 148 (1975); WHITING, JR., *supra* note 7, at 76.

A. Independence

One source of doubt as to Mexican courts' application of the rule of law has been the dependence of judicial careers on patronage.[331] Prior to 1994 reform, the President appointed the Supreme Court, and the Supreme Court appointed, assigned, and if necessary removed, the other federal judges.[332] Although the President's nomination of Supreme Court judges was subject to legislative concurrence, the Partido Revolucionario Institucional's majority status made such approval a formality. Starting in the Cárdenas presidency, the President had the opportunity to name a new Supreme Court upon election.[333] Moreover, Supreme Court judges frequently served only brief terms, followed by further designation to political posts.[334] Hence, both the Supreme Court and the balance of the federal judiciary were perceived as subject to partisan political influence. The presidential control may have been indirect, but it was perceived.[335]

To address the concern, President Zedillo launched constitutional reforms as he took office in 1994 that significantly altered the Supreme Court's position and the federal judiciary's governance.[336] The reforms reconstituted the Supreme Court, provided greater weight for Senate approval of nominations

329. *See supra* text accompanying note 163.

330. *See supra* text accompanying note 257.

331. YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002). As to state courts, see *infra* note 395.

332. MEX. CONST. art. 97, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/97.pdf.

333. *See supra* note 197.

334. Note, *Liberalismo contra Democracia: Recent Judicial Reform in Mexico*, 108 HARV. L. REV. 1919, 1929 (1995).

335. Mariano Azuela Güitrón, a pre-1995 Supreme Court justice reappointed in 1995 and now the Supreme Court's President, told the Mexican newspaper *Processo* in 1995:

> I have in my personal experience never received any pressures. I have always acted with absolute independence. [However], I have in some manner the sensation that there was always a latent worry, the fear that in [legal] themes of certain importance (declaring the unconstitutionality of a law, for example), one assumes a contrary attitude, that this could make the executive angry. And in a system in which the Executive [sic] does not want anyone to touch it or to limit it, the easiest thing to do is to reform the Constitution, to eliminate life-terms for ministers [the judges], and to throw out onto the street all the previous ministers. Of course, were there an independent Senate and Chamber of Deputies, this could not occur. Yet, what is certain is that one knows that not only can it happen but it can easily happen. I attribute this to the fact that there have been some decisions made influenced by this fear, even though I have no proof to say that is [sic] was a designation of the Executive. Rather, more likely, that the majority saw some pronouncement or another as a very grave risk.

Schatz, *supra* note 45, at 233 (Schatz's translation) (citation omitted).

336. This reform is part of a process of the crumbling of "a case-by-case approach to law by authoritarian political elites [which] is the result when legal decisions are made and supreme court rulings are enforced on the basis of arbitrary extralegal factors." *Id.* at 220.

to the Court, and changed the system of nomination, assignment, and removal of the federal judiciary below the Supreme Court.[337] The Court's previous twenty-one judges were removed from office,[338] and the Court was reconstituted with just eleven judges, only a few of whom were selected from the prior Court.

The Court's judges now serve single fifteen-year terms, with lifetime retirement benefits.[339] Subsequent to the reform, the President now nominates members of the Supreme Court, subject to a two-thirds Senate approval.[340] Among the new requirements intended to curb partisan influence, a nominee may not have served as a cabinet minister, administrative agency head, legislator, or governor within a year preceding nomination.[341]

The Federal Judicial Council,[342] chaired by the Supreme Court's President and comprised of representatives from the three branches of government, now names and promotes federal judges below the Supreme Court through competitive examination.[343] It is responsible for appointment, assignment, and removal of all federal judges other than those of the Supreme Court, subject to Supreme Court review only as to its compliance with relevant legislation. The Council appoints judges for initial six-year terms, after which

337. D.O., 31 de diciembre de 1994; "Ley Reglementaria de las Fracciones I y II del Artículo 105 de la Constitución Política de los Estados Unidos Mexicanos," D.O., 11 de mayo de 1995. *See* Fix-Fierro, *supra* note 1; Jorge A. Vargas, *The Rebirth of the Supreme Court of Mexico: An Appraisal of President Zedillo's Judicial Reform of 1995*, 11 AM. U.J. INT'L L. & POL'Y 295 (1996); Note, *supra* note 334, at 1928–36.

338. Second transitory article, of the amending decree.

339. MEX. CONST. art. 94.

340. The Senate approval applies during the Congress's limited twice-yearly sessions. Outside such sessions, the Permanent Commission, comprised of members of both houses, has the approval power. *Id.* art. 76 (VIII); *id.* art. 89 (XVIII); *id.* art. 96. Previously only a simple majority of the Senate was required to approve a judicial nomination. *See* MEX. CONST. art. 94.

341. *Id.* art. 95.

342. The post–World War II French and Italian Constitutions, and subsequently various Latin American and other European countries, adopted this method of judicial governance. *See* ALEJANDRO ÁLVAREZ CÁRDENAS, EL PROCEDIMIENTO DISCIPLINARIO DEL CONSEJO DE LA JUDICATURA FEDERAL 1–2 (2001); HÉCTOR FIX-ZAMUDIO & JOSÉ RAMÓN COSSIO DÍAZ, EL PODER JUDICIAL EN EL ORDENAMIENTO MEXICANO 54–71 (1996); Vargas, *supra* note 337, at 333. The Mexican states of Sinaloa and Coahuila adopted a form of Judicial Council to govern their state judiciaries in 1988. ÁLVAREZ CÁRDENAS, *supra*, at 36; Héctor Fix-Zamudio & Héctor Fix-Fierro, *El Consejo de la Judicatura*, *in* 3 CUADERNOS PARA LA REFORMA DE LA JUSTICIA (Instituto de Investigaciones Juridicas de la Universidad Nacional Autonoma de México, 1996), *available at* http://www.juridicas.unam.mx/publica/justicia/cuad3/conjud3.htm#uno. Mexico's version most closely resembles the 1978 Spanish Constitution's. *Id.*

343. The Supreme Court President, three judges chosen by the Supreme Court from district and circuit judges, two Senate designees, and one presidential designee comprise it. MEX. CONST. art. 100, *amended by* D.O., 31 de diciembre de 1994 and D.O., 11 de junio de 1999, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/pdfsrcs/100.pdf. Mario Melgar Adalid, *Prólogo* to ÁLVAREZ CÁRDENAS, *supra* note 342, at XI n.1 (listing Mexican scholarly writings on the Council); *see also* http://www.cjf.gob.mx/inicio.asp (council web site).

they can only be removed for cause.[344] The Council also administers the federal judiciary's budget.[345] Whereas formerly the almost exclusive path to becoming a federal district judge with subsequent possibilities of promotion was to begin as secretary to a Supreme Court justice, entry to the federal judiciary is now through a competitive examination conducted by the Council.[346]

Concerns continue to be voiced that the judiciary's independence as a whole remains to be consolidated.[347] The consolidation of a human rights ombudsman system outside the judicial system reflects ongoing concern about federal judicial independence.[348] The independence of many of the state judicial systems remains subject to particular question.[349] Nonetheless, the 1994 reforms are significant steps to addressing questions as to the judicial application of the rule of law.

B. Judicial Review

Constitutional review of laws exists pursuant to Mexico's Constitution in three kinds of federal jurisdiction:

(1) *amparo* jurisdiction,
(2) "constitutional" controversies (relating to respect of the spheres of authority within Mexico's federal framework), and
(3) "abstract review of constitutionality."[350]

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344. MEX. CONST. art. 97, *available at* http://www.cddhcu.gob.mx/leyinfo/1/97.htm, interpreted by Tesis P. XLIX/97, in ANEXO AL INFORME ANUAL, 130–31 (1997) and Tesis P. LII/97 in ANEXO AL INFORME ANUAL, 133–34 (1997).

345. ÁLVAREZ CÁRDENAS, *supra* note 342, at 18–19.

346. *Id.* at 21–22.

347. For example:

> During his mission [May 13–23, 2001], the Special Rapporteur observed that the process, begun in 1994, towards the establishment of a culture of judicial independence has been slow. Impunity and corruption appear to have continued unabated. Whatever the changes and reforms, they are not seen in reality. Public suspicion, distrust and want of confidence in the institutions of the administration in general and the administration of justice in particular are still apparent.

Report of the Special Rapporteur on the Independence of Judges and Lawyers, Dat'Param Cumaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 2001/39: Report on the Mission to Mexico, U.N. ESCOR, 58th Sess., U.N. Doc. E/CN.4/2002/72/add.1, at 4 (2002). PODER JUDICIAL DE LA FEDERACIÓN, RESPUESTA AL INFORME DEL RELATOR DE LA ONU PARA LA INDEPENDENCIA DE JUECES Y ABOGADOS 211 (2002), undertakes to refute each of the Special Rapporteur's allegations. *See also* Manuel González Oropeza, *The Administration of Justice and the Rule of Law in Mexico*, *in* REBUILDING THE STATE: MEXICO AFTER SALINAS 59 (Mónica Serrano & Víctor Balmer Thomas eds., 1996); Estrada Sámano, *supra* note 266.

348. MEX. CONST. art. 102; "Ley de la Comisión Nacional de Derechos Humanos," D.O., 29 de junio de 1992, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/47.pdf. *See* DEZALAY & GARTH, *supra* note 331, at 229–35. Criticisms related to violations of human rights and suppression of political dissent remain. *See, e.g.*, HUMAN RIGHTS WATCH, WORLD REPORT 2002: EVENTS OF 2001, 158–63 (2002).

349. *See infra* note 395.

350. HUERTA OCHOA, *supra* note 168, at 155–77.

Each has relevance for investment and expropriation and is discussed in the parts that follow. An *amparo* action is the vehicle by which an expropriated party may raise a judicial challenge. The 1994 reform expanded the Supreme Court's jurisdiction over constitutional controversies and created its jurisdiction for abstract constitutional review. Although an investor is not among the governmental entities and political actors with standing to initiate either a constitutional controversy or an abstract constitutional review,[351] such proceedings may have significant consequences for investors. For example, the Supreme Court's decision with implications for private participation in the electricity sector, to be discussed in Part V,[352] arose as a "constitutional controversy." Likewise, Mexico's ratification of an expansion of NAFTA would be subject to "abstract review of constitutionality."[353]

The historical posture of judicial review in Mexico has limited its development of strong constitutional doctrine.[354] The discussion of the writ of *amparo* that follows identifies limitations deriving from *amparo*'s historical place in Mexican constitutional law. The 1994 reforms and recent political heterogeneity in control of governmental institutions offer Mexico's federal judiciary an improved foundation to stand as a third branch of government. Following the discussion of *amparo*, constitutional controversies, and abstract constitutional review, the newly increased rigidity of Mexico's Constitution is discussed as a basis for the Supreme Court to use its expanded jurisdiction, as well as its existing *amparo* jurisdiction, to greater effect.[355] The Supreme Court's decision concerning private participation in the electricity sector, to be discussed in Part V,[356] illustrates the implications for investors that may follow from an invigorated Supreme Court.

1. Writ of *Amparo*

The writ of *amparo* is a central part of Mexico's judicial system[357] and offers federal judicial protection from improper action under color of governmental

351. *See infra* text accompanying notes 400 & 405.
352. *See infra* text accompanying note 530.
353. *See infra* text accompanying note 406.
354. *Cf. infra* note 392.
355. *See infra* text accompanying note 404.
356. *See infra* text accompanying note 530.
357. The Supreme Court's immediate past president wrote some years ago in a textbook: Que la justicia federal mexicana tiene muchas deficiencias, puede ser verdad. Que también aquí los caprichos de los caciques, de los políticos, del Estado y de los gobernantes, pueden torcer la cara de la justicia, es algo que de ser cierto no podrá lamentarse bastante. Que el cúmulo de trabajo y la falta de preparación de los juzgadores produce muchas veces sentencias aberrantes, esto puede suceder. Pero, la institución del juicio de amparo funciona y protege a los mexicanos

authority to the plaintiffs who seek it.[358] *Amparo* jurisdiction is exclusively federal.[359] It extends to controversies raised by laws or acts of "the authority that violated individual guarantees" and by laws or acts of state and federal authorities that invade their respective spheres.[360] Standing to seek a writ of *amparo* is limited to those prejudiced by the law, treaty, regulation, or other act.[361] Parties to the action include the party harmed, the responsible authority,[362] and potentially third parties, such as the other litigants in the event of *amparo* against a judicial decision, the victim in the case of a tort action or a criminal prosecution, the beneficiaries of an act against which *amparo* is sought, and the federal prosecutor.[363] *Amparo* actions are to be brought within fifteen days of when the plaintiff knows or should have known of the injury protested.[364]

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de los actos arbitrarios de las autoridades, cuando éstas burlan garantías individuales. [That Mexican federal justice has many deficiencies, may be true. That likewise here the caprices of the caciques [bosses], of the politicians, of the State and of the governors, can strain the application of justice, is something that certainly cannot be lamented enough. That cumulation of work and the lack of preparation of the judges often produces aberrant decisions, this can happen. However, the institution of the writ of amparo works and protects Mexicans from the arbitrary acts of the authorities, when these play with individual guarantees.]

GENARO DAVID GÓNGORA PIMENTEL, INTRODUCCIÓN AL ESTUDIO DEL JUICIO DE AMPARO: EL ARTÍCULO 103 DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS 6 (1987) (author's translation).

358. *See* RICHARD D. BAKER, JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT (1971); JUVENTINO V. CASTRO, HACIA EL AMPARO EVOLUCIONADO 42, 172–73 (1971) (proposing that state as well as federal judges entertain *amparo* actions and that *amparo* rulings of the Supreme Court based on unconstitutionality have *erga omnes* effect, for reasons of justice and efficiency); KARST & ROSENN, *supra* note 328, at 127–59; EDUARDO FERRER MAC-GREGOR, LA ACCIÓN CONSTITUCIONAL DE AMPARO EN MÉXICO Y ESPAÑA: ESTUDIO DE DERECHO COMPARADO (2000); Héctor Fix-Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. W. INT'L L.J. 306 (1979) (focusing on citation of English language materials); Héctor Fix-Zamudio, *Los Tribunales Federales como Controladores de la Constitución*, *in* TEMAS Y PROBLEMAS DE LA ADMINISTRACIÓN DE JUSTICIA EN MÉXICO: ANTOLOGÍA (1982); Héctor Fix-Zamudio, *The Writ of Amparo in Latin America*, 13 LAW. AM. 361 (1981) (detailing influence of Mexican concept of *amparo* in other Latin American countries); Verner, *supra* note 327.

359. MEX. CONST. art. 103; "Ley de Amparo, reglamentaria de los artículos 103 y 107 de la constitución política de los Estados Unidos Mexicanos," art. 1, D.O., 10 de enero de 1936.

360. *Id.*

361. *Id.*, art. 4.

362. In the 1920s the Supreme Court established a restrictive definition of what constituted a public authority, perhaps in part to restrict its case load. Fix-Fierro, *supra* note 1, at 14. Notwithstanding the concerns as to control of its docket, the Supreme Court, subsequent to its 1995 reconstitution, formulated a broader definition, namely, "a public authority is any official of a public agency who can legally adopt unilateral actions that create, modify, or extinguish the rights of citizens." *Id.* citing Tesis P XXVII/97, *in* ANEXO AL INFORME ANUAL 112–13 (1997).

363. "Ley de Amparo, reglamentaria de los artículos 103 y 107 de la constitución política de los Estados Unidos Mexicanos," art. 5, D.O., 10 de enero de 1936. However, federal prosecutors are not parties to *amparo* actions for civil and commercial matters affecting only individual interests, other than family law matters.

364. This statute of limitations is extended to 30 days in cases challenging a law, and is extended indefinitely in cases regarding danger of loss of life, attacks to personal liberty, deportation, loss of

Amparo decisions are to address only the particular individuals or moral persons, private or official, who are the plaintiffs.[365] All federal courts are obligated to address constitutional issues in their decisions of *amparo* proceedings.[366]

The 1841 Yucatán Constitution first instituted the writ of *amparo*,[367] and the 1847 Acta de Reformas applied it nationally.[368] Although the writ of *amparo*'s roots have been traced by some to legal institutions of the medieval kingdoms that preceded Spain's unification,[369] its adoption in Mexico appears to derive from appreciation for U.S. constitutional review of laws obtained through the Spanish edition of Alexis de Tocqueville's *Democracy in America*.[370] In de Tocqueville's time and even as of the 1917 adoption of Mexico's Constitution, the United States was the only country that undertook judicial invalidation, with general effect, of an unconstitutional law. In his work, de Tocqueville affirmatively states the importance of the judicial review of the constitutionality of laws.[371] He does not, however, address the U.S. system's attribution of general effect to a judicial declaration of a law's unconstitutionality.[372]

The feature of the U.S. system for constitutional review of laws implemented in Mexico through the writ of *amparo* is any federal court's ability to protect individual rights. The feature not implemented in Mexico was a court's ability in a specific action to invalidate a law with general effect.[373] Mexico's

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land, cruel and unusual punishment, or forced conscription into military service. *Id.* art. 21. In civil matters, a defendant can force a victorious plaintiff seeking to execute a judgment either to await resolution of an *amparo* action or to post a bond collectible by the appealing defendant in the event of a successful *amparo* action. *Id.* art. 107(X).

365. *Id.* art. 76.

366. *Id.* art. 79.

367. BAKER, *supra* note 358, at 12–13; TENA RAMÍREZ, *supra* note 55, at 496. Latin American countries that have adopted some form of Mexico's writ of *amparo* include Argentina, Bolivia, Brazil, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, and Venezuela. CASTRO, *supra* note 358, at 19–21.

368. BAKER, *supra* note 358, at 22. For a summary history of Mexico's constitutions with emphasis on their construction of the branches of government and centralism/federalism issues, see EMILIO O. RABASA, HISTORIA DE LAS CONSTITUCIONES MEXICANAS (2000).

369. *See, e.g.*, Héctor Fix-Zamudio, *Introducción* to FRANCISCO FERNÁNDEZ SEGADO, LA JURISDICCIÓN CONSTITUCIONAL EN BOLIVIA: LA LEY NÚMERO 1836, DEL 10 DE ABRIL DE 1998, DEL TRIBUNAL CONSTITUCIONAL 1–7 (2002); TENA RAMÍREZ, *supra* note 55, at 498.

370. BAKER, *supra* note 358, at 15; TENA RAMÍREZ, *supra* note 55, at 495–96; Fix-Zamudio, *supra* note 369, at 2 (noting the 1836 publication of the Spanish edition of DEMOCRACY IN AMERICA).

371. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (George Lawrence, trans., J.P. Mayer & Max Lerner eds., 1835, 1840) (1966), at 89–93 (Chapter 6: Judicial Power in the United States and its Effect on Political Society). *See infra* note 417.

372. DE TOCQUEVILLE, *supra* note 371, at 89–93 (Chapter 6: Judicial Power in the United States and Its Effect on Political Society), 125–41 (Chapter 8: The Federal Constitution). In neither of the cited chapters does de Tocqueville state the general effect of a judicial declaration of the unconstitutionality of a law.

373. *See supra* note 25 and *infra* note 417.

Constitution prohibits Mexican federal courts from making determinations of the constitutionality of laws with general effect when exercising their general federal jurisdiction.[374] The judicial inability to invalidate a law as unconstitutional with general effect conforms to traditional English and French notions of legislative supremacy as a binding expression of popular will.[375]

Although individual *amparo* rulings do not have the same stare decisis effect as U.S. judicial decisions as to the constitutionality of laws, Mexico's legal system does include a concept of precedent.[376] The Ley de Amparo establishes the precedential effect of federal court rulings generally, including *amparo* rulings, by defining the concept of *jurisprudencia* for the Supreme Court and the circuit courts.[377] The establishment of *jurisprudencia* is centralized in the Supreme Court for the whole country and within the circuit courts for their circuits. A holding affirmed by the instant court five times without interruption binds lower state and federal courts as *jurisprudencia*.[378] At least eight members of the Supreme Court, or four members of the relevant chamber must approve a decision for it to count for purposes of establishing *jurisprudencia*. The Court's decisions resolving contradictions between the

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374. MEX. CONST. art. 107.

375. Otero, author of the 1847 national adoption of *amparo*, expressed an understanding of U.S. judicial review of the constitutionality of laws that reflects an English or French notion of legislative supremacy rather than the U.S. constitutional notion of checks and balances between branches of government:

> No he vacilado en proponer al Congreso que se eleve a grande altura al Poder Judicial de la Federación, dándole el derecho de proteger a todos los habitantes de la República en el goce que les aseguren la Constitución y las leyes constitucionales . . . ya de los Estados o de la Unión. En Norteamérica este poder salvador provino de la Constitución y ha producido los mejores efectos. Allí el juez tiene que sujetar sus fallos antes que todo a la Constitución; y de aquí resulta que cuando la encuentra en pugna con una ley secundaria, aplica aquélla y no ésta, de modo que sin hacerse superior a la ley, ni ponerse en oposición contra el Poder Legislativo, ni derogar sus disposiciones, en cada caso particular en que ella debía herir, la hace impotente. [I did not hesitate to propose to the Congress that it raise to great height the Judicial Power of the Federation, giving it the right to protect all the residents of the Republic in enjoyment of that which the Constitution and laws of both the States and the Union assure them. In North America [the U.S.] this saving power comes from the Constitution and has produced the best effects. There the judge has to subject above all his decisions to the Constitution, and hence when he has in hand a secondary law, he applies the Constitution and not the law, so that without making himself above the law, nor placing himself in opposition to the legislature, nor changing its provisions, in each case it which it might harm, he renders it impotent.]

TENA RAMÍREZ, *supra* note 55, at 500 (quoting Otero) (author's translation).

376. For a historical review of the limited role of stare decisis in Mexico's legal system, *see* Héctor Fix-Zamudio, *Some Aspects of Constitutional Interpretation in Mexico's Legal System*, 11 COMP. JURID. REV. 105, 134–36 (1974).

377. MEX. CONST. art. 94.

378. *Id.* art. 192. Holdings that count to establish *jurisprudencia* are published in the SEMANARIO JUDICIAL DE LA FEDERACIÓN (S.J.F.). *Id.* art. 195. They are also available through the Supreme Court's web site, http://www.scjn.gob.mx/default.asp.

Court's chambers and among the circuit courts may also count towards *jurisprudencia*.[379] Circuit courts establish *jurisprudencia* by five uninterrupted decisions, adopted unanimously.[380] *Jurisprudencia* can be ignored or undone by the same majorities and mechanisms that established it.[381] The full Supreme Court or the corresponding chamber on request of a Supreme Court chamber, circuit courts, and their judges, may also undo it.[382] Parties to cases with contradictory holdings may also invoke such review.[383]

In some civil law systems, the highest civil court, for example, the French Court of Cassation, can "break" lower court judgments appealed to it, but its rulings are not binding beyond the specific case even if they are persuasive.[384] Mexico goes further, by mechanisms to make Supreme Court rulings as to which *jurisprudencia* is established binding on all courts as a matter of law. This gives such rulings general effect in the sense of binding any court faced with the issue. Specifically, as to any laws declared unconstitutional by binding Supreme Court *jurisprudencia*, any court hearing an *amparo* proceeding must on its own motion recognize the applicability of the Supreme Court's *jurisprudencia* of unconstitutionality.[385]

Although Mexico's constitutions have taken inspiration from parts of the U.S. Constitution, the Mexican notion of judicial autonomy diverges substantially from the U.S. notion.[386] The lack of a power in *amparo* actions to invalidate laws with general effect evidences a divergent notion of the judicial role with respect to checks and balances among branches of gov-

379. MEX. CONST. art. 195.
380. *Id.* art. 193.
381. *Id.* art. 194.
382. *Id.* art. 197.
383. *Id.* art. 197.
384. NOUVEAU CODE DE PROCEDURE CIVILE, art. 5, 625, 633 & 638, *available at* http://www.legifrance.gouv.fr.
385. *Id.* art. 76 bis (I).
386. de Tocqueville commented on Mexico's early 1800s expression of another concept borrowed from the U.S. Constitution, federalism:

> The Constitution of the United States is like one of those beautiful creations of human diligence which give their inventors glory and riches but remain sterile in other hands.
>
> Contemporary Mexico has shown that.
>
> The Mexicans, wishing to establish a federal system, took the federal Constitution of their Anglo-American neighbors as a model and copied it almost completely [See the Mexican Constitution of 1824]. But when they borrowed the letter of the law, they could not at the same time transfer the spirit that gave it life. As a result, one sees them constantly entangled in the mechanism of their double government. The sovereignty of the states and that of the union, going beyond the spheres assigned to them by the constitution, trespass continually on each other's territory. In fact, at present Mexico is constantly shifting from anarchy to military despotism and back from military despotism to anarchy.

DE TOCQUEVILLE, *supra* note 371, at 150.

ernment.[387] The restriction of *amparo* rulings' effect to the specific *amparo* plaintiffs limits the scope of conflict between the judicial power on the one hand and the executive and legislative powers on the other. In the context of Mexico's prevailing political systems during its approximately 150 year experience of *amparo* actions, the minimization of such conflict may have afforded more, rather than less, space for the judicial protection of constitutional rights.[388]

Mexico's 1917 Constitution embraced the writ of *amparo* as a key element in the delivery of justice.[389] With this embrace, and by proclaiming every person's right to the administration of justice by impartial tribunals,[390] it affirmed a vision of the rule of law centered on vindication of individual rights on a case-by-case basis. *Amparo* suits have constituted and remain the bulk of the Supreme Court's activity.[391] However, the Supreme Court has not used them to develop "a strong and independent constitutional doctrine."[392] Reasons for this include Mexico's longstanding one-party rule that made the Constitution easy to modify,[393] the limited precedential value of individual *amparo* rulings, and the Supreme Court's chronically heavy docket, exacerbated by its early determination to subject court rulings generally to *amparo* review and its lack of an effective procedure to control its docket.[394] A particular source of this burden is the pre-Revolution expansion of the notion of acts

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387. *Cf. supra* note 25.

388. BAKER, *supra* note 358, at 26. In considering Mariano Otero's role in the early drafting of the *amparo* provision, Baker observes:

> Of greater significance in the long run was Otero's creation of a precise juridical formulation within which *amparo* was capable of functioning and adapting to a political environment that has been, on the whole, unfavorable to the evolution of judicial power. It is probably true that he neither anticipated nor intended that *amparo* play any considerable part in general constitutional defense. That it has come to do so to a limited degree must be attributed partly to the apparent political innocuousness that Otero gave it, which permitted it to survive and take root.

Id. In the same sense, see also Kenneth L. Karst, *Law in Developing Countries*, 60 LAW. LIBR. J. 13, 19 (1960).

389. MEX. CONST. art. 107.

390. "Every person has the right that justice be administered to him by tribunals that will be established to impart it in the times and terms that laws establish, issuing its resolutions in prompt, complete and impartial manner." *Id.* (author's translation).

391. Fix-Fierro, *supra* note 1, at 18–19. Other principal Supreme Court activities include resolving conflicts between circuit court opinions, incidental petitions regarding noncompliance with *amparo* judgments, and federalism issues involving state and municipal governments. *Id.*

392. *Id.* at 3–4. "[T]he Supreme Court carefully avoided any major involvement in politically sensitive issues and cultivated a discrete image to escape public opinion . . . in light of the increasing levels of social and political pluralism prevailing in Mexico, the Court's avoidance of its role in government is dysfunctional." *Id.* at 2–3 (citation omitted).

393. *See infra* text accompanying note 408.

394. Fix-Fierro, *supra* note 1, at 16–17 (noting the burden arising from the absence of a certiori mechanism for the Supreme Court to control its docket).

subject to *amparo* challenge to include state court rulings.[395] Accordingly, the focus of *amparo* decisions has been on the protection of individuals in specific instances rather than the articulation of strong constitutional doctrine.[396]

In 1999, the Supreme Court's President established a commission to study the prospect of a new and restated law of *amparo*.[397] Among the proposals advanced is the notion of giving *amparo* declarations of the unconstitutionality of laws general effect, perhaps after three affirmations of unconstitutionality by the Supreme Court, rather than the five affirmations necessary to establish

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395. By way of historical background:

> Originally, the amparo suit didn't apply to judicial decisions, per Article 8 of the Amparo Law of 1869. However, Article 14 of the 1857 Constitution provided persons could be judged or sentenced only under laws enacted prior to the case and exactly applicable to it (not ex *post facto*). This allowed the Court to consider that a constitutional right was violated whenever an ordinary law was incorrectly applied by a court. The Court adopted this policy for complex reasons including mistrust of the state courts. This resulted in the concentration of all ordinary judicial matters before the Court, giving way to what Emilio Rabasa termed [in 1906] the impossible task of the Supreme Court in his classic study on Article 14 of the 1857 Constitution.

Id. at 5 n.23; *see also* Antonio Carillo Flores, *La Suprema Corte Mexicana: de 1824 al caso de Miguel Vega y la acusación contra los magistrados en 1869. Nacimiento y degeneración del juicio de amparo*, *in* CARRILLO FLORES, *supra* note 25, at 105–21 (Supreme Court decision to grant *amparo* to a state judge of first instance to protect the judge from personal liability imposed by the state court of second instance hearing an appeal, established precedent of federal reconsideration of state judgments); Fix-Zamudio, *supra* note 376, at 137 (referencing the judicial determination of the unconstitutionality of 1869 legislation to make *amparo* unavailable to challenge judicial decisions). Following the Revolution, the right to seek *amparo* against state court rulings supported federal efforts to curb centrifugal, even successionist tendencies, in some states. Further, grounds for federal skepticism as to some states' courts independence persist. *See* José Ovalle Favela, *El Poder Judicial en las entidades federativas*, *in* TEMAS Y PROBLEMAS DE LA ADMINISTRACIÓN DE JUSTICIA EN MÉXICO: ANTOLOGÍA 237, 259–60 (José Ovalle Favela ed., 1982) (observing that the state constitutions and laws on state judiciaries evidence lack of judicial independence from executive and higher judicial influence, unconstrained executive discretion in naming and removing judges, lack of court system financial autonomy, lack of a judicial career path, and lack of an appropriate judicial disciplinary system). *See also* FIX-ZAMUDIO & COSSIO DÍAZ, *supra* note 342, at 301–542 (describing Mexico's state courts by review of state constitutions and statutes). Concha Cantú and Caballero Júarez review the administration of justice in the courts of each Mexican state on the basis of analyses of state legislation and budgetary information, and surveys of judges and other court personnel. HUGO ALEJANDRO CONCHA CANTÚ & JOSÉ ANTONIO CABALLERO JUÁREZ, DIAGNÓSTICO SOBRE LA ADMINISTRACIÓN DE JUSTICIA EN LAS ENTIDADES FEDERATIVAS: UN ESTUDIO INSTITUCIONAL SOBRE LA JUSTICIA LOCAL EN MÉXICO (2001). They avoid quantitative assessment or ranking of performance or status and focus instead on identifying policy initiatives helpful to improving the courts' performance. They conclude that the 1990s was a period of improvement in state court administration of justice generally, much remains to be done, and significant differences among the states' administration of justice exist. For example, they observe: "Todavía existen al menos una docena de estados en los que la independencia del Poder Judicial se percibe de manera incipiente." [There still exist at least a dozen states in which the Judicial Power's independence is perceived incipiently.] *Id.* at 310 (author's translation).

396. TENA RAMÍREZ, *supra* note 55, at 524–27; Fix-Fierro, *supra* note 1, at 5 n.23.

397. Héctor Fix-Zamudio, *Hacia una nueva ley de amparo*, *in* ESTUDIOS EN HOMENAJE A DON MANUEL GUTIÉRREZ DE VELASCO 287, 290 (2000).

jurisprudencia.[398] Others have suggested that *amparo* rulings simply be given general effect.[399]

2. Constitutional Disputes

The 1994 reform amplified the Supreme Court's existing "constitutional" jurisdiction to resolve federalism disputes.[400] The Supreme Court has original jurisdiction over federalism disputes. The 1994 reform broadened this jurisdiction beyond disputes between the federal government and a state, or between states. It now includes disputes between branches and levels of government, including disputes between a state, and a municipality, and between the executive and Congress.[401] The new heterogeneity in political control of levels and branches of government gives relevance to the Supreme Court's role as the arbiter of disputes concerning constitutional attribution of powers.

3. Abstract Constitutional Review

The 1994 reform added to the Supreme Court's jurisdiction a procedure for control of the constitutionality of laws at the time of their enactment.

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398. *Id.* at 335. IGNACIO BURGOA ORIHUELA, ¿UNA NUEVA LEY DE AMPARO O LA RENOVACIÓN DE LA VIGENTE? 10, 99–100 (2001) (suggesting that the Ley de Amparo be modified, but not replaced; that only Mexican jurists specialized in Mexican constitutional law are competent to elaborate reforms; and that reform should include mechanisms to ensure that *amparo* decisions based on constitutional grounds are followed by all authorities).

399. *El Control de la constitucionalidad de las leyes y los efectos de las sentencias de amparo; un estudio jurisprudencial*, *in* JUAN ALBERTO CARBAJAL, ESTUDIOS SOBRE LA JUSTICIA 37, 44 (2001) (proposing to associate *amparo* reform with giving the Supreme Court control of its docket, perhaps by a mechanism of certiorari reminiscent of that of the U.S. Supreme Court); Juan Alberto Carbajal, *La Suprema Corte de Justicia: 70 años de Constitución*, *in* ESTUDIOS SOBRE LA JUSTICIA, *supra*, at 95, 98–99; DIEGO VALADÉS, CONSTITUCIÓN Y DEMOCRACIA 11–12 (2000) (speaking of "la presencia anacrónica de la denominada 'fórmula Otero', que impide los efectos generales de la declaración de inconstitucionalidad de las leyes" [the anachronistic presence of the so-called "Otero formula" which prevents the general effects of the declaration of unconstitutionality of laws]) (author's translation).

400. This change was accomplished by amending Constitution Article 105.

401. MEX. CONST. art. 105(I). *See* JOSÉ DE JESÚS GUDIÑO PELAYO, CONTROVERSIA SOBRE CONTROVERSIA: DISCUSIÓN EN TORNO AL ALCANCE DE LA COMPETENCIA DE LA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN EN CONTROVERSIAS CONSTITUCIONALES (2000).

> El despertar de la Suprema Corte para administrar justicia en las controversias constitucionales apenas tiene seis años de impulso, por lo que preocupa al ministro Gudiño en cada uno de sus votos particulares es que en tratándose de las controversias constitucionales suceda lo mismo que el amparo en negocios judiciales, cuyos efectos han reducido a la nada a la justicia local. [The Supreme Court's awakening to administer justice in constitutional controversies has barely six years of impulse, for which what concerns Justice Gudiño in each of his individual votes is that in addressing the constitutional controversies there not happen the same which occurred with amparo in judicial matters, the effects of which reduced local [state court] justice to nothing.]

Manuel González Oropeza, *Prólogo* to GUDIÑO PELAYO, *supra*, at xxvix (author's translation).

Because specific plaintiffs who have suffered harm are not required to initiate such cases, they are known as "abstract actions of constitutionality." The Mexican system now approximates the limited French concept of constitutional review of laws[402] in that Constitution Article 105 provides a mechanism for a sufficient minority of disgruntled legislators or the Procurador General to challenge laws before the Supreme Court at the time of their adoption, but not thereafter. Such persons must file their challenge with the Supreme Court within thirty days of the law's publication.[403] The procedural standard for a declaration of unconstitutionality is high: The decision must be made by the full Supreme Court, voting by an eight out of eleven majority. A decision declaring a law unconstitutional has general effect, rather than an effect limited to the parties, as is the case for an *amparo* decision.[404] The parties who can initiate such actions include 33 percent of either house of Congress, and the Procurador General.[405] The constitutionality of treaties can be challenged only by 33 percent of the Senate or the Procurador General.[406] As to state laws, 33 percent of a state legislature may at the time of their adoption challenge a law's compliance with the federal Constitution before the national Supreme Court.[407]

4. Newly Rigid Constitution

Mexico's Constitution may be amended by a two-thirds vote of those present in Congress at the vote, accompanied by approval of a majority of the thirty-one state legislatures.[408] From the Revolution until the 2000 election of Mexico's current President, the Partido Revolucionario Institucional's dominance of both the federal and state governments rendered the amendment procedure a formality. Accordingly amendments were frequent.[409]

402. On France's quasi-legislative Conseil Constitutionnel, see *infra* note 418.
403. MEX. CONST. art. 105(II), cl. 2.
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.* art. 135.
409. In 1988, the lawyer and law professor who represented the bank owners expropriated in 1982 wrote:

> Solo hasta que se ponga fin a tan desenfrenada carrera de enmiendas dejará la Constitución de ser el movible parapeto de la omnímoda voluntad del Presidente de la República, para recuperar su auténtico carácter de valladar infranqueable de dicha voluntad y hacer así posible la existencia de un Estado de Derecho. [Only when an end has been put to the unchecked stream of amendments will the Constitution cease to be the moveable parapet of the all-purpose will of the President of the Republic, so as to recover its authentic character of barrier unbreachable by said will and thus to make possible the existence of a State of Law.]

The absence of one-party dominance renders constitutional amendment more difficult. Consensus among distinct political parties is now required. The Constitution's newfound rigidity reinforces judicial review in general. For example, the 1982 bank expropriation scenario in which an expropriatory decree was followed almost immediately by a constitutional amendment ratifying the decree, is unlikely to be repeated.

The increased rigidity of Mexico's Constitution, combined with the Constitution's amendment providing the Supreme Court with expanded powers of constitutional review have changed Mexico's model of judicial review. They offer the Supreme Court a stronger platform from which to articulate constitutional doctrine. In the old model, the ruling party had the last word as to the content of the Constitution. Either the ruling party directly, as the oil companies claimed, or indirectly, perhaps by the designation of justices to the court and the provision of subsequent career opportunities, influenced the Court's ruling on controversial issues. Alternatively, the ruling party arranged to modify the Constitution, as was done in the 1982 bank expropriation.

This model in a perverse sense approximates what has been labeled the "Commonwealth model,"[410] a model intermediate between "a fully constitutionalized bill of rights and full legislative supremacy."[411] It leaves the legislative power with the last word as to the definition of constitutional guarantees. However, Mexico did not spring from a tradition of parliamentary supremacy such as prevailed in England and France.[412] Unlike the Commonwealth model pioneers Canada, New Zealand, and the United Kingdom,[413] Mexico had a written Constitution that contemplated judicial review of the constitutionality of

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SÁNCHEZ MEDAL, *supra* note 55, at 9 (author's translation).

410. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 719 (2001). The Commonwealth model represents an attempt to avoid the "mighty problem" of the legitimacy of judicial review, although the initial results of its application are mixed. *See id.* at 724–39.

411. *Id.*

412. Mariano Otero, voting in 1847 to restore federalism in Mexico, observed:

> Declarar como lo hicieron las Bases Orgánicas, que toda la Constitución puede reformarse cualquier día, si es cosa sin peligro hablándose de una Constitución tan sólida como la de Inglaterra, sería proclamar entre nosotros que el país debe permanecer eternamente inconstituido, que la mudanza de los primeros principios de la sociedad debe ser la materia de discusión y el trabajo constante de los mexicanos; y con este supuesto la paz es imposible. [To declare as did the Bases Orgánicas, that the entire Constitution can be modified any day, although it may be a thing without danger speaking of a Constitution as solid as England's, would be for us to proclaim that the country must remain eternally unconstituted, that the modification of the first principles of the society must among Mexicans be a constant matter of discussion and work, and with such premise peace is impossible.]

SÁNCHEZ MEDAL, *supra* note 55, at 34 (author's translation).

413. Gardbaum, *supra* note 410, at 719.

government action. The mechanism for such review was the writ of *amparo*. The Constitution's written text did not contemplate facile constitutional amendment.[414] The political fact of one-party rule was the key to the ready political ability to override undesired judicial declarations as to constitutionality.[415]

Mexico's present model for the constitutional review of laws is a hybrid. Models for judicial review of constitutionality prevailing in the rest of the world include:[416]

(1) the U.S. system of generalized constitutional review,[417]
(2) the French system of temporally truncated, super legislative review,[418] and
(3) the Kelsenian constitutional court system,[419] implemented in

414. "La supremacía de la Constitución presupone dos condiciones: el poder constituyente es distinto de los poderes constituidos, la Constitución es rígida y escrita." [The Constitution's supremacy assumes two conditions: the constitutive power is distinct from the constituted powers, the Constitution is rigid and written.] TENA RAMÍREZ, *supra* note 55, at 12 (author's translation). Tena Ramírez laments the lack of respect of the Constitution's supremacy in Mexico's history by virtue of its frequent and easy amendment. *Cf. supra* note 265.

415. For a discussion of the marginal role of judicial elaboration of constitutional doctrine as a consequence of the historical flexibility of Mexico's constitutions (which continued until recently), see Fix-Zamudio, *supra* note 376, at 108, 131–34.

416. Gardbaum, *supra* note 410; FIX-ZAMUDIO & COSSIO DÍAZ, *supra* note 342, at 16–23. Stephen Gardbaum labels these models as within the "American model" because they share the features of being: "(1) fundamental rights enjoying the status of supreme law, (2) entrenched against amendment or repeal by ordinary legislative majority, and (3) enforced by courts granted the power of judicial review." Gardbaum, *supra* note 410, at 723.

417. In the U.S. system, any judge in litigation arising at any time may determine with general effect the constitutionality of a law or government action. In this sense, the U.S. model of constitutional review is decentralized and generalized. The generality of effect depends on the position of the court, for example Supreme Court rulings bind courts generally, while a federal court's ruling, although perhaps persuasive elsewhere, would bind courts beneath it only within its territory. The generality of the effect is limited in that all within the ambit of the ruling may not spontaneously comply. For example, application of the Supreme Court's *Brown v. Board of Education*, 347 U.S. 483 (1954), ruling policies of "separate but equal" schools unconstitutional, was contested at length, often hotly. Precedent is binding, but not immutable. Courts may distinguish or overrule precedent as a function of different or changed circumstances. *See e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 854–55 (1992).

418. In the French system of superlegislative review, constitutional review of a law is not possible after the law's definitive adoption. A Conseil Constitutionnel, a quasi-legislative body whose review is invoked by a sufficient minority of the legislature or other political leaders, may invalidate a law only within a short window of its adoption. FR. CONST. title VII, *available at* http://www.assemblee-nat.fr/english/8ab.asp. In this model the review is centralized and temporally truncated. Cappelletti discusses the French acceptance in limited spheres of broader judicial review, that is, within the administrative court system the Conseil d'Etat's application of *principes généraux de droit*, including as derived from the 1789 Declaration of the Rights of Man, to review the executive's use of its constitutionally granted, broad regulatory power, and as to European Community law, the Court of Cassation's acceptance of European Community law as binding on all French courts and hence as a basis for their "disapplication" of conflicting domestic law. Cappelletti, *supra* note 290, at 414–16, 418–21.

419. In the constitutional court system, the determination of the constitutionality of a law or government action may occur in litigation arising at any time, but the actual determination is centralized in one court. Ordinary judges suspend pending proceedings to refer the constitutional question to the con-

Austria,[420] Germany,[421] Italy,[422] and Spain,[423] much of Latin America[424] (notably Bolivia,[425] and Nicaragua[426]), and most of the Central European countries,[427] among others.

The Mexican system, with the expansion of constitutional review provided by the 1994 reform, is a hybrid of the U.S. and French systems. In Mexico, the possibility of judicial review of constitutionality through an *amparo*

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stitutional court, whose answer is binding on the referring and other judges. The constitutional court, in recognition of its combined judicial and legislative function, typically is composed of a mix of members with judicial and legislative origins. In this model, the review is centralized and generalized. For an introduction to Austrian jurist Hans Kelsen, see Bojan Bugaric, *Courts as Policy-Makers: Lessons From Transition*, 42 HARV. INT'L L.J. 247, 256–57 (2001). For Kelsen's own exposition of the theory and practice of constitutional review by a constitutional court, see Hans Kelsen, *La garantie juridictionelle de la Constitution (La Justice constitutionnelle)*, 45 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ÉTRANGER 197 (1928). For contemporary review of constitutional courts with emphasis on Spain's *Tribunal Constitucional*, see Francisco Fernández Segado, *El Tribunal Constitucional. Un estudio orgánico*, REVISTA DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD COMPLUTENSE 375 (1989).

420. The 1920 Austrian Constitution established a Constitutional Court on the basis of Kelsen's theories. Kelsen was a member of the Court. Austria's present Constitution provides for a Constitutional Court at articles 89 and 137–48. AUS. CONST. art. 89, 137–48, *available at* http://www.oefre.unibe.ch/law/icl/au00000_.html.

421. CONSTITUTIONAL COURTS IN COMPARISON: THE U.S. SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT (Ralph Rogowski & Thomas Gawron eds., 2002).

422. IT. CONST., tit. VI, *available at* http://www.camera.it/index.asp?content=/deputati/funzionamento/costituzione_parte2_titul06.asp.

423. SPAIN CONST. tit. IX, *available at* http://alcazaba.unex.es/constitucion/tituloIX.html.

424. By way of overview:

> En América Latina existen órganos ad hoc que realizan dicha función de manera exclusiva, siguiendo el modelo europeo de control constitucional, denominados cortes or tribunales constitucionales (Bolivia, Guatemala, Chile, Colombia, Ecuador y Perú). En otros casos se han creado salas constitucionales dependientes de las propias cortes supremas (El Salvador, Costa Rica, Nicaragua, Paraguay y Venezuela). Incluso, en algunos países donde no existen estos tribunales o salas constititucionales, el máximo órgano jurisdiccional ordinario realiza funciones de control constitucional, aunque no de manera exclusiva (Argentina, Brasil y México). [In Latin America ad hoc bodies exist that realize said function in an exclusive fashion, following the European model of constitutional review (Bolivia, Guatemala, Chile, Colombia, Ecuador and Peru). In other cases constitutional chambers dependent on the supreme courts have been created (El Salvador, Costa Rica, Nicaragua, Paraguay and Venezuela). In some countries where these tribunals or constitutional chambers do not exist, the highest ordinary jurisdictional body accomplishes functions of constitutional control, although not in an exclusive fashion (Argentina, Brazil and Mexico).]

Presentacíon, *in* DERECHO PROCESAL CONSTITUCIONAL: COLEGIO DE SECRETARIOS DE LA SUPREMA CORTE DE JUSTICIA DE LA NACIÓN at xix–xx (Eduardo Ferrer Mac-Gregor ed. 2001) (author's translation) (containing essays on constitutional review of laws in Argentina, Brazil, Chile, Ecuador, Guatemala, Mexico, Peru, Uruguay, and Venezuela).

425. FERNÁNDEZ SEGADO, *supra* note 369.

426. NICARAGUA CONST. art. 164, *available at* http://www.georgetown.edu/pdba/Constitutions/Nica/nica87.html.

427. Herman Schwartz, *Eastern Europe's Constitutional Courts*, J. DEMOCRACY, Oct. 1998, at 100, 103–10; Bugaric, *supra* note 419.

action reflects the U.S. model, and the Constitution's Article 105 abstract review of constitutionality reflects the French system. The Mexican system's hybrid nature continues to reflect an unwillingness to grant Mexican courts full powers of constitutional review akin to those of either the U.S. system of decentralized, generalized review or the constitutional court system of centralized, generalized review.

Prior to the 1994 amendment of Constitution Article 105, Mexico had no judicial review of constitutionality of laws on the *Marbury v. Madison*[428] model. In other words, there was no Mexican tradition of judicial declaration with general effect of the unconstitutionality and hence invalidity of a law. The "mighty problem" of the legitimacy of judicial review of the constitutionality of laws[429] did not historically pose itself in Mexico in terms of justifying a court's general substitution of its views for the legislature's.[430] Rather, through the writ of *amparo*, Mexican judicial review of the constitutionality of laws focused on the protection of individual plaintiffs from inappropriate state action. The Supreme Court's powers to establish *jurisprudencia*, its limited ability to reach out for certain kinds of cases,[431] and its "constitutional" and "abstract review" jurisdictions, taken together, reflect a model of constitutional review with a limited element of general effect, but certainly hobbled relative to the U.S. and constitutional court models. Nevertheless, even if hobbled, Mexico's federal courts have the potential to function as a check on the legislative and executive branches of government. The Constitution's de facto increased rigidity offers the Supreme Court and the other federal courts an opportunity to use their considerable power to address even politically charged matters in an independent fashion.

428. 5 U.S. (1 Cranch) 137 (1803).

429. Cappelletti, *supra* note 290.

430. *Cf. supra* note 388.

431. Part of the 1994 reform allows the Supreme Court to reach out for certain cases. The Supreme Court, on its own motion or on the basis of a reasoned petition of the corresponding circuit court, or of the Procurador General, may hear *amparo* actions that "by their interest and transcendence so merit." MEX. CONST. art. 107(V), (VIII), *amended by* D.O., 31 de diciembre de 1994; *id.* art. 108(VIII) (author's translation). A similar ability for the Supreme Court to reach out to address contradictory positions of circuit courts is contemplated. *Id.* art. 107(XIII). The parties in the relevant proceedings, the circuit court involved, the Procurador General or Supreme Court judges can denounce the contradiction to the relevant Supreme Court chamber. If Supreme Court chambers conflict, the same parties may denounce the contradiction to the full court. These proceedings are neither appeals nor declarations of unconstitutionality with general effect. They have only "the effect of establishing *jurisprudencia*," *id.* art. 107(XIII), and do not affect the position of the parties in the underlying cases. *Id.* art. 107(XIII).

IV. CONSOLIDATION OF THE RULE OF LAW: INTERNATIONAL OPENING

A. Treaties

During the 1990s, Mexico's adherence to NAFTA, its increased opening to international commercial dispute resolution, and a Supreme Court decision elaborating the relationship between Mexican and international law[432] worked to lessen Mexico's previous closure to international law with respect to investment. The combination of the monist theory of Mexican constitutional supremacy[433] and the associated rejection through the Calvo doctrine of recourse to home state support[434] isolated the Mexican legal system from formal consideration of outside influences for a substantial period of its modern history. This exclusion of reference to outside legal norms is comprehensible in the context of Mexico's breaking free of Spanish colonialism, losing the northern territories that are now Texas and the U.S. Southwest,[435] repelling U.S.[436] and European[437] invasion, and asserting sovereignty over key economic sectors dominated by foreign investment.[438] With time and the maturation

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432. *See infra* text accompanying note 490.

433. *See infra* text accompanying notes 464 & 494.

434. *See supra* note 64.

435. SANDOVAL PARDO, *supra* note 19, at 443–621; Patricia Galeana, *Presentación: Una Frontera Conflictiva*, *in* NUESTRA FRONTERA NORTE 7 (Patricia Galeana ed., 1999); Ángela Moyano Palrissa, *El Tratado de Guadalupe Hidalgo y la Frontera Norte de México*, *in* NUESTRA FRONTERA NORTE, *supra*, at 15.

436. For example, U.S. troops occupied Mexico City 1847–1848, Galeana, *supra* note 435, at 8, and President Wilson ordered the navy to occupy Veracruz in April 1914 and General John Pershing to hunt Pancho Villa's rebel forces in northern Mexico in Spring 1916. JAYNE, *supra* note 145, at 13–14; MEYER, *supra* note 165, at 65–72.

437. SANDOVAL PARDO, *supra* note 19, at 646–63.

438. Lowenthal takes note of Latin American dependency on U.S. private commercial interests and their ability to influence U.S. policy to intervene in their support. Abraham F. Lowenthal, *Latin America: A Not-So-Special Relationship*, 32 FOREIGN POL'Y 107, 120 (1978). "Whatever the official rhetoric of cooperation, Latin Americans learn that private interests in the United States can use public instruments to achieve their will." *Id.* His observation echoes a State Department official's in 1937:

> It was in large part the influence of pressure groups bent upon selfish gain and immediate material profit that led more than once to our interference in the internal affairs of our Central and South American sister republics, finally resulting in armed invervention and the sowing of fears and deep-seated resentment. . . . It was not dislike of North American people but fear of North American guns which lay at the root of much South American bitterness.

RIPPY, *supra* note 65, at 86 (quoting Francis B. Sayre, *Our New Pan American Policy*, *in* INTERNATIONAL INSTITUTIONS AND WORLD PEACE 182 (S.D. Myres, Jr. ed., 1937)).

of Mexico's identity, the sensitivities to legal consideration of outside influences are changing.[439]

The first steps to the international opening of Mexico's legal system were its acceptance of the principal international conventions addressing enforcement of international arbitration awards. Mexico accepted the New York Convention on Recognition and Enforcement of Arbitral Awards in 1971[440] and the Inter-American Convention on International Commercial Arbitration in 1978.[441] A further, related step was to revise its law relative to domestic arbitration. In 1989 Mexico rewrote its commercial arbitration law to render arbitration practical in Mexico, both as to domestic and international matters.[442]

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439. The then President of Mexico's Supreme Court recently wrote:

> [E]n el ámbito constitucional continuamos con un monismo con predominio del derecho interno aun cuando recientemente se han dado muestras de que ésto puede cambiar, sin llegar a poder precisar el punto exacto de este cambio. [In the constitutional framework, we continue with a monism with predominance of internal law even though recently there have been signs that this can change, without being able to specify the exact point of this change.]

Genaro David Góngora Pimentel, *Prólogo* to MALPICA DE LAMADRID, *supra* note 66, at 7, 12 (author's translation).

440. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (New York Convention); D.O., 22 de junio de 1971.

441. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 104 Stat. 449, Pan-Am. T.S. 42 (Panama Convention); D.O., 27 de abril de 1978.

442. Mexico updated its 1890 Commercial Code as to arbitration in 1989, D.O., 4 de enero de 1989, with a further amendment in 1993 to incorporate partially the UNCITRAL commercial arbitration model law, D.O., 22 de julio de 1993. GONZALO URIBARRI CARPINTERO, EL ARBITRAJE EN MÉXICO (1999); Margarita Treviño Balli & David S. Coale, *Recent Reforms to Mexican Arbitration Law: Is Constitutionality Achievable?*, 30 TEX. INT'L L.J.535 (1995). Mexico's Commercial Code Book 5, Title 4, is "On Commercial Arbitration," CÓD. COM. art. 1415–1463, *available at* http://www.cddhcu.gob.mx/leyinfo/txt/3.txt. As a federal law, the Commercial Code applies throughout Mexico. Title 4's rules apply to Mexican arbitrations, including international arbitrations held in Mexico, except as otherwise provided by treaty. *Id.* art. 1415. The parties may establish freely the place, *id.* art. 1436, and language, *id.* art. 1438, of arbitration. Written arbitration agreements, *id.* art. 1423, and consequent awards, domestic or otherwise, are enforceable in Mexico, subject to exceptions for party incapacity, lack of due notice, exceeding arbitration terms, improper arbitrator conduct, subject matter barred for arbitration under Mexican law, or that the award contradicted Mexican public order. *Id.* art. 1457.

The Constitution's Articles 14, 16 and 17 declare rights to judicial administration of justice. Some suggest a constitutional amendment to obviate the possibility of court decisions refusing to enforce arbitral awards as contrary to such rights. URIBARRI CARPINTERO, *supra*, at 41. Others argue that agreements to arbitrate are consistent with the right, but not the obligation, to obtain judicial administration of justice. *Id.* at 41–42; Treviño Balli & Coale, *supra*, at 550–51.

Whether arbitrations are subject to *amparo* actions depends on whether arbitrator action is viewed as a public authority's action. The Supreme Court decided early on that arbitration is a private act not subject to *amparo*. Treviño Balli & Coale, *supra*, at 554 (citing 2 S.J.F. 1131 (5a época 1918); 3 S.J.F. 879 (5a época 1918); 6 S.J.F. 922 (5a época 1920); 26 S.J.F. (5a época 1930)).

Mexico's adherence to trade agreements is another dimension of its international opening. In 1985 Mexico adhered to the General Agreement on Trade and Tariffs (GATT).[443] Subsequently, to facilitate commercial trade, Mexico adhered to the Vienna Convention on the International Sale of Goods, effective 1989.[444] In 1993, Mexico ratified NAFTA,[445] followed by additional bilateral agreements to arbitrate investment disputes discussed in Part IV.B. Following NAFTA, Mexico made a free trade agreement with the European Community,[446] among others.[447]

Mexico's increased profile in the international community is also associated with its 1994 membership in the Organization for Economic Cooperation and Development[448] and its 1998 acceptance of Inter-American Court for Human Rights jurisdiction following its 1980 ratification of the American Convention on Human Rights (American Convention).[449]

Mexico has 224 federal laws,[450] 1018 bilateral treaties and 551 multilateral treaties to which it is a party.[451] The modest ratio of Mexican federal laws to Mexican treaties—notwithstanding a tendency towards codification and hence comprehensiveness of individual federal laws—suggests the significance of the contribution that treaties make to Mexican law.[452]

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443. D.O., 26 de noviembre de 1986.

444. D.O., 17 de marzo de 1988.

445. D.O., 20 de diciembre de 1993.

446. Decision No. 2/2000 of the EC-Mexico Joint Council of Mar. 23, 2000, 2000 O.J. (L 157), *available at* http://www.europa.eu.int/comm/trade/bilateral/mex.htm, in implementation of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Members States and the United Mexican States, 2000 O.J. (L276).

447. For an overview of Mexico's trade and investment treaties, see James R. Holbein et al., *The Mexico-European Community and Member States Economic Partnership, Political Coordination, and Cooperation Agreement*, 35 INT'L LAW. 927, 927–47 (2001). *See also infra* text accompanying note 454.

448. Mexico deposited its instruments of ratification of the OECD Convention on May 18, 1994, http://www.oecd.org/EN/document/0,,EN-document-589-17-no-6-9464-589,00.html. *See* D.O., 14 de abril de 1994 (ratification); D.O., 5 de julio de 1994 (promulgation).

449. Mexico ratified the convention in 1980, D.O., 9 de enero de 1981, and pursuant to the convention's Article 62, accepted the Court's jurisdiction in 1998 over "all matters relating to the interpretation and application" of the convention, D.O., 8 de diciembre de 1998. *See infra* text accompanying note 507.

450. Excluding those of the Federal District. *See* Legislacion Federal de Mexico, http://www.cddhcu.gob.mx/leyinfo.

451. *See* Tratados celebrados por Mexico, http://tratados.sre.gob.mx/Default.htm.

452. López-Ayllón, *supra* note 1, at 199. In recent years Mexican federal courts appear to be addressing international law issues more often as well, suggesting that the treaties have increasing significance. *Id.*

B. International Arbitration With Treaty Country Investors

Following its 1989 reforms to make both domestic and international commercial arbitration of disputes feasible between private parties,[453] Mexico further opened itself to international dispute settlement by adopting a 1992 law that contemplates Mexico's entry into treaties providing "international mechanisms for the solution of controversies" between Mexico or Mexicans on the one hand and foreign governments or individuals on the other, on condition that Mexican interests benefit from reciprocal rights.[454] Such mechanisms include binding private arbitration of investor expropriation claims against Mexico.[455] The political reasoning at the time of the 1992 law's adoption was that foreigners' recourse to such arbitral mechanisms avoided the Calvo clause prohibition on recourse to home governments because the arbitral mechanisms were international, reciprocal, and accepted by Mexico.[456]

Mexico has not ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), the multilateral convention providing for arbitration of expropriation disputes between foreign investors and host countries.[457] For the reasons to be discussed, Mexico's lack of ratification of the ICSID Convention is superceded by its ratification of alternative treaties with all of its principal foreign investment sources, with the exception of Japan. Although the ICSID Convention became effective in 1966 upon ratification by the required twenty countries, the first Latin American country to ratify it

453. *See supra* note 442.

454. "Ley sobre la celebración de tratados," D.O., 2 de enero de 1992, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/216.pdf. Additionally, such treaties must assure the parties of the guarantees of hearing, the exercise of due process defense rights, and the impartiality of the decisionmaking bodies. *Id.* arts. 8(II), (III). The law provides that Mexico will not recognize any such decisions that challenge the "security of the state, public order or any other essential interest of the Nation." *Id.* art. 9 (author's translation). Bilateral investment treaties commonly include this dispute resolution mechanism. Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 672 (1990).

455. They also include the Inter-American Court of Justice's resolution of claims by foreign private parties and governments brought before the Court. *See infra* text accompanying note 507.

456. LUIS MIGUEL DÍAZ & GUADALUPE MORONES LARA, INVERSIÓN EXTRANJERA: DERECHO MEXICANO Y DERECHO INTERNACIONAL 59 (2001).

457. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, *at* http://www.worldbank.org/icsid/basicdoc/9.htm. A list of contracting states is available at http://www.worldbank.org/icsid/constate/c-states-en.htm. Latin American countries as to which the convention is in force as of July 31, 2002 include Argentina, Chile, Colombia, Costa Rica, El Salvador, Honduras, Nicaragua, Panama, Paraguay, Peru, and Venezuela. The Dominican Republic signed the convention in 2000, but has yet to ratify it.

was Paraguay in 1983, and others followed in the 1980s and 1990s. The ICSID Convention's slow acceptance in Latin America, and even Mexico's continued nominal lack of adherence, evidence the Calvo doctrine's sustained appeal.

Notwithstanding the fact that Mexico did not ratify the ICSID Convention, it moved aggressively to open itself to the kind of arbitration that the ICSID Convention contemplates. Mexico ratified NAFTA in 1993, including its Chapter 11, in reliance on the 1992 statute mentioned above. Through NAFTA Chapter 11, Mexico makes arbitration available to investors associated with the other NAFTA countries under the ICSID Additional Facility Rules.[458]

Subsequent to ratifying NAFTA, Mexico entered into a series of treaties with all of its principal sources of direct foreign investment,[459] except Japan, which provide for binding arbitration of expropriation disputes between Mexico and investors of the treaty countries.[460] Mexico's continued lack of adherence to the ICSID Convention thus has mostly symbolic significance.

Mexico's treaty making and updating of its legislation over the last thirty years have opened it to new voices relative to the resolution of commercial and expropriation disputes. The reforms to make international commercial arbitration practical were a preliminary step.[461] The resulting arbitral decisions offer an objective view, outside the Mexican judiciary, of the equitable resolution of such disputes, but not a direct check on the State. Mexico's adherence to the arbitral process of NAFTA Chapter 11 and subsequent treaties with similar arbitration mechanisms is its most novel

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458. ICSID Additional Facility Rules, http://www.worldbank.org/icsid/facility/1.htm. The Additional Facility Rules were created to administer arbitrations pursuant to ad hoc agreements between States and investors to arbitrate expropriation disputes. ICSID's primary responsibility is the administration of arbitrations under the ICSID Convention.

459. Mexico's Instituto Nacional de Estadística, Geografía e Informática shows the United States as responsible for half to three-quarters of Mexico's direct foreign investment, with European Union members, Canada, and Japan responsible for the preponderance of the balance. Estadísticas Económicas, Inversión Extranjera Directa Anual Según Principales Países de Origen, 1999 y 2000, http://www.inegi.gob.mx/difusion/espanol/fietab.html. In the same vein, see ORG. FOR ECON. COOPERATION & DEV., INTERNATIONAL DIRECT INVESTMENT STATISTICS YEARBOOK 261 tbl.3 (2001).

460. Mexico made free trade agreements that cover Bolivia, Chile, Colombia, Costa Rica, El Salvador, the European Free Trade Association (Norway, Switzerland, Iceland and Liechtenstein), the European Union, Guatemala, Honduras, Israel, Nicaragua, and Venezuela. MIGUEL DÍAZ & MORONES LARA, *supra* note 456, at 60–63. The treaties can be found at http://www.sre.gob.mx and http://tratados.sre.gob.mx. Most of Mexico's Latin American free trade agreements contemplate mechanisms similar to those of NAFTA Chapter 11. As to European Union member states, plus Argentina, South Korea, Switzerland, and Uruguay, Mexico is party to bilateral investment treaties that allow investors from such countries on similar terms to initiate binding arbitration to resolve expropriation disputes. MIGUEL DÍAZ & MORONES LARA, *supra* note 456, at 88–135.

461. *See supra* note 442.

legal opening in respect to investment matters, because the outcomes bind Mexico directly.[462] Mexico has accepted the *Metalclad* award rendered under this mechanism.[463] The impact on expropriation and investment disputes of Mexico's adherence to the American Convention and its acceptance of Inter-American Court for Human Rights jurisdiction to decide disputes in respect to the American Convention remains to be seen. The parts that follow lay out the doctrinal framework within which the American Convention may affect expropriation and investment disputes.

C. Monism and Dualism

The relation of international and domestic law can be classified as either monist or dualist.[464] In a monist conception, there is but one legal system. In that legal system, either national or international law dominates. In a dualist conception, there are two legal systems, national and international, which have distinct spheres of application. The doctrine that prevails has implications for the extent to which international law has effect, and the manner in which the effect occurs. Mexico's constitutional law doctrine as to the relation of international and domestic law began as dualist, switched to a strict monist prevalence of national law, and now appears to be evolving in the direction of a modified dualism. This doctrinal evolution leaves open the possibility of further enhancement of international law's position in the Mexican legal system, and hence an additional basis for investors, Mexican and foreign, to claim rights pursuant to international law such as the American Convention.[465]

1. Pre-1934 Dualism

The 1917 Constitution's initial text accepted international law only insofar as Mexico assumed international law obligations by treaty. It placed no restriction on the State's ability to modify the Constitution's provisions

462. On NAFTA's Chapter 19 mechanism for country to country trade dispute resolution, see LAS PRÁCTICAS DESLEALES DE COMERCIO EN EL PROCESO DE INTEGRACIÓN COMERCIAL EN EL CONTINENTE AMERICANO: LA EXPERIENCIA DE AMÉRICA DEL NORTE Y CHILE (Sergio López-Ayllón & Gustavo Vega Cánovas eds., 2001); FINDING MIDDLE GROUND: REFORMING THE ANTIDUMPING LAWS IN NORTH AMERICA (Michael Hart ed., 1997) (publishing selected articles in English).

463. *See supra* Part II.I.

464. Malpica de Lamadrid discusses the origins of the monist/dualist classification in the late nineteenth and early twentieth century writings of European international law scholars. MALPICA DE LAMADRID, *supra* note 66, at 69–74.

Huerta Ochoa uses an alternative monist/dualist terminology. In this usage parliamentary supremacy is monist and distinguished from the dualism of a legislative body limited by an authority not democratically constituted, namely a king. HUERTA OCHOA, *supra* note 168, at 100.

465. *See infra* text accompanying note 506.

by treaty ratification.[466] Mexican doctrine considered the text dualist because treaty obligations were not mandated to conform to the Constitution, and any subsequent laws could override the treaty.[467] The two bodies of law were conceived as of equal authority, but concerned with different spheres of application. During this time, Mexico embraced treaties on the same terms as its Constitution and federal laws. For this period, national and international law could be thus considered dual systems, although national law determined when the national or international system governed.

2. 1934–1999 Monism

With a 1934 constitutional amendment,[468] Mexico confirmed its constitution as its supreme law[469] and clarified that treaty obligations conflicting with its Constitution were void. As amended, Constitution Article 133 provides that treaties are Mexican law only insofar as they conform to the Constitution.[470] As amended in 1934 and still in force, the Constitution expressly forbids the conclusion of "conventions or treaties in virtue of which the guarantees and rights established by this Constitution for man and citizen are altered."[471] Another constitutional amendment would be required in order for such a treaty to be considered binding in Mexican courts.[472] The 1934 amendment articulates a monist approach to the theory of Mexican law's supremacy, that is, Mexican law precludes consideration of international law except as agreed by Mexico by treaty in conformity with Mexico's Constitution.[473]

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466. MEX. CONST. art. 133, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/art133.

467. Góngora Pimentel, *supra*, note 439, at 11; TENA RAMÍREZ, *supra* note 55, at 40–43 (citing Supreme Court Justice Ignacio L. Vallarta's 1897 opinion under the 1857 Constitution's identical text).

468. D.O., 18 de enero de 1934, *available at* http://www.cddhcu.gob.mx/leyinfo/refcns/art133/ref01.htm. MALPICA DE LAMADRID, *supra* note 66, at 104–106, reviews the limited legislative history associated with the amendment.

469. As amended in 1934, Article 133 provides:

> This Constitution, the laws of the Congress of the Union that emanate from it and all the treaties that be in agreement with the same, concluded and that may be concluded by the President of the Republic, with approval of the Senate, will be the Supreme Law of all the Union. The judges of each State shall comply with said Constitution, laws and treaties, notwithstanding the contrary provisions that may be in the Constitutions or laws of the States.

MEX. CONST. art. 133 (author's translation).

470. *Id.*

471. *Id.* art. 15.

472. *See* Raymundo E. Enríquez, *Expropriation Under Mexican Law and Its Insertion Into a Global Context Under NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 385, 388–89 (2000). The procedure for making a treaty is for the President to negotiate it, and then for the Senate to ratify it by a simple majority. MEX. CONST. art. 76(I), 89(X). *Cf. supra* note 408 and *infra* note 495.

473. TENA RAMÍREZ, *supra* note 55, at 40–43.

In the nearly seventy years of one-party dominance following the 1934 amendment, the ability readily to amend the Constitution limited the practical relevance of the amendment's subordination of treaties to the Constitution. However, Mexico strongly asserted the monist doctrine that the amendment expressed. Although the mechanisms of Mexico's historical takings varied,[474] common to all was their foundation in Mexican law. That is, although Mexico also argued that they were consistent with international law, it asserted that Mexican law alone justified its conduct. A September 1, 1938 diplomatic note by Mexico's Secretary of Foreign Relations to the U.S. Secretary of State in an exchange relative to Mexico's land redistribution policies makes a strong statement of this monist doctrine: "Mexico has maintained that the so-called rights of man, among others, the right to property, with its modalities, are not principles of international law, but that their validity is derived from municipal law."[475]

The United States disagreed in the 1930s with particular crispness. It recognized that Mexico could expropriate property in the public interest, but only in compliance with the standard of adequate, effective, and prompt compensation.[476] U.S. Secretary of State Cordell Hull articulated this standard in diplomatic notes to Mexico, first in 1938 with respect to expropriations of agricultural land, and again in 1940 with respect to the oil expropriation.[477]

The practice of Mexico and the United States in settling their historical expropriation disputes demonstrates no formal retreat from their respective

474. The takings were ultimately accomplished in reliance on Mexican constitutional principles that property rights are founded on their benefit to the collective good and originate in the State. However, the specific taking mechanisms varied. They included outright government purchase, combined in the instance of the railroads with debt refinancing through international public capital markets. In the case of ecclesiastical property, the government dictated who was entitled to own property and provided a mechanism for its transfer in conformity with the dictate. Similarly, the constitutional provision for the Nation's ownership of oil resources simply declared the ownership as vested in the State, although the actual expropriation occurred in the context of a labor dispute that was argued to create a national emergency by imperiling the sector's viability. Other sectors have come into public hands on theories of expropriation for public utility, including the need to provide public service. Property rights based on government grants of concession, including those related to sulfur extraction and banking were terminated based on notions that the government retained the power to modify the terms of the concession or that the concession as initially granted was limited.

475. RIPPY, *supra* note 65, at 107.

476. SIGMUND, *supra* note 18, at 8.

477. *Id.* at 63 (citing 5 U.S. DEPT. OF STATE, FOREIGN RELATIONS OF THE UNITED STATES (1938)); Tali Levy, Note, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" Standard*, 31 STAN. J. INT'L L. 423, 426–28 (1995). The 1987 revision of the Restatement of the Foreign Relations Law of the United States replaced the formulation of "prompt, adequate, and effective" with the term "just," inspired by the U.S. Constitution's Fifth Amendment prohibition on taking without "just compensation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987), discussed by Levy, *supra*, at 437. Comments c and d to section 712 suggest that "just" differs little from the old standard.

positions. The disputes were resolved by agreement between the governments on terms that allowed each side to claim vindication of its position.[478] In neither case did Mexico retreat from its view that its own law governed the determination of compensation. The United States conversely argued that its acceptance of compensation implied no prejudice to the U.S. view of international law.

In the 1960s and 1970s the United Nations addressed the question in a fashion that either papered over the fundamental disagreement, or simply articulated it.[479] A 1962 General Assembly resolution, adopted with the support of the United States, contemplated that expropriation should occur with payment of "*appropriate* compensation . . . in accordance with international law," without defining the term "appropriate" or otherwise specifying the substance of the relevant international law.[480] Subsequent United Nations General Assembly resolutions did not receive the support of major capital exporting countries, including the United States.[481] These resolutions include the 1974 Charter of Economic Rights and Duties of States, which provided:

> "Each State has the right . . . [t]o nationalize, expropriate, or transfer ownership of foreign property, in which case appropriate compensation

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478. Levy, *supra* note 477, at 429.

479. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 REPORTERS' NOTES. In seeking a middle ground, arguments were made for "recognizing that often the world community's various needs conflict and require weighing." Kenneth L. Karst, *Land Reform in International Law*, *in* ESSAYS ON EXPROPRIATIONS 41, 70 (Richard S. Miller & Roland J. Stanger eds., 1967). The thought was that the "justice of many partially confiscatory takings" be recognized, *id.* at 58, and that the compensation requirement be assessed through some weighing of factors that incorporated the expropriating country's developmental needs, *id.* at 60; *see* SIGMUND, *supra* note 18, at 7–8 (developing countries do not provide expropriated property owners immediate, full market value, convertible currency compensation). The weighing of development needs received limited recognition "in exceptional circumstances," particularly with reference to agricultural land reform. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. d. *See also id.* § 3. To a limited degree, a 1961 draft international convention embodied these views. *See* Article 10, Draft Convention on the International Responsibility of States for Injuries to Aliens, *in* Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interest of Aliens*, 55 AM. J INT'L L. 545, 553 (1961).

480. Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962), discussed by Levy, *supra* note 477, at 434. As background:

> [F]ollowing an intense struggle between an American effort to secure endorsement of the principle of "prompt, adequate, and effective" compensation for nationalized property and a Soviet attempt to secure support for "the inalienable right of peoples and nations to the unobstructed execution of nationalization and expropriation," the General Assembly adopted Resolution 1803 on Permanent Sovereignty over Natural Resources, which called for "appropriate compensation in accordance with the rules in force in the state taking such measures . . . and in accordance with international law." . . . In accepting the expression "appropriate compensation," the United States representative stated that his delegation "was confident" that it "would be interpreted as meaning under international law, prompt, adequate, and effective compensation."

SIGMUND, *supra* note 18, at 6 (footnote omitted).

481. Levy, *supra* note 477, at 436.

> should be paid by the State adopting such measures, taking into account its relevant law and regulations and all circumstances the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals . . . ."[482]

NAFTA Chapter 11 is the current conciliation of Mexico's and the United States' divergent positions. Together with Mexico's treaty commitments to other countries constituting its leading sources of foreign investment, it is Mexico's practical response to investment globalization's rule-of-law demands. NAFTA Chapter 11 and the investment dispute arbitration provisions of Mexico's other treaties allow advocates of Mexico's monist doctrine to maintain that Mexico's agreement to such arbitration is a sovereign contractual act that in no way diminishes its Constitution's predominance. Mexico might also argue that its agreement to Chapter 11 arbitrations follows its practice of resolving compensation disputes with the United States through direct agreement, as with the agricultural land[483] and oil expropriations.[484]

NAFTA Chapter 11 reflects elements of both Mexico's and the United States' positions. For example, Chapter 11 mandates prompt compensation of fair market value of property expropriated;[485] however, it allows consideration of the "declared tax value of tangible property," as appropriate along with other criteria, to determine fair market value.[486] Relying on fair market value allows the United States to claim that the standard is "just" and "adequate and effective." The reference to declared tax value as a criterion to be used to assess fair market value when "appropriate" allows Mexico to note reference to its Constitution's Article 27 criterion, even though such reference does not assure the criterion's application.[487]

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482. Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 52, U.N. Doc. A/9631 (1974), *reprinted in* 14 I.L.M. 251 (1975); *see also* SIGMUND, *supra* note 18, at 5 (commenting that the May 1, 1974 General Assembly declaration on the principles of the New International Economic Order, "included the claim that 'the full permanent sovereignty of every state over its natural resources and all economic activities' involved 'the right to nationalization or transfer of ownership to its nationals . . . ', [but] . . . omitted any reference to a duty to compensate.") (quoting Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (s-VI), U.N. GAOR, 6th Special Sess., Supp No. 1, at 4, U.N. doc. A/9559 (1974), *reprinted in* 13 I.L.M. 715 (1974)).

483. *See supra* text accompanying note 141.

484. *See supra* text accompanying note 214.

485. NAFTA, art. 1110(2), (3). *Cf. supra* note 294.

486. NAFTA, art. 1110(2).

487. Article 21 of the 1937 Ley de Expropiación was amended, D.O., Dec. 22, 1993, in conjunction with Mexico's adherence to NAFTA, to provide that its application is "without prejudice to what is provided by the international treaties to which Mexico is party, and, in its case, the arbitral agreements that are concluded." This amendment mitigates potential statutory conflicts with NAFTA Chapter 11 and the other international investment arbitration treaties. A constitutional

Mexico's agreement to allow arbitrators to assess whether and what damages are due, and such agreement in advance of an actual dispute arising with an investor of another NAFTA country, is a significant innovation,[488] which *Metalclad* illustrates. It provides a basis for investor belief that the rule of law will prevail in the resolution of expropriation disputes. Although the disparate views of the *Metalclad* Arbitral Tribunal and of the reviewing court[489] illustrate the ambiguity of Chapter 11's definition of what constitutes a taking and its required compensation, perhaps what matters most to foreign investors prospectively is that Mexico has agreed to be bound by NAFTA Chapter 11 and other treaties formalizing an agreed, independent procedure to resolve investor expropriation disputes with treaty country investors.

3. Post-1999 Dualism

The Constitution does not address expressly whether a federal law adopted subsequent to the Senate's ratification of a treaty prevails over the treaty. In 1999, the postreform Supreme Court interpreted the Constitution to provide that legislation cannot modify treaty obligations.[490] This holding

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issue remains however, because the Mexican Constitution's Article 27 provides for valuation at the value accepted for tax purposes, *see supra* note 78; whereas, Chapter 11 contemplates only considering such value as appropriate to ascertaining its valuation criteria of fair market value. This discrepancy could be raised in an abstract action of constitutionality at the time of a treaty's ratification. It theoretically could also be raised by Mexico to resist an action before a Mexican court to enforce an arbitral award against it pursuant to one of the investment arbitration treaties. The discrepancy does not, however, diminish Mexico's liability under international law. Accordingly, a non-Mexican court presented with an effort to enforce such an arbitral award against Mexico should disregard it. In all cases, Mexico's voluntary payment of an arbitral award obviates the point.

488. *See* Salacuse, *supra* note 454, at 672–73 (commenting on Latin American countries' reluctance to agree to bilateral investment treaties that include compulsory arbitration provisions); Levy, *supra* note 477, at 447.

489. *See supra* Part II.I.

490. "Sindicato Nacional de Controladores de Tránsito Aéreo," 10 S.J.F. 46 (9a época 1999) (full court unanimous decision, with one justice absent, determined to qualify for establishing *jurisprudencia*). *See* MALPICA DE LAMADRID, *supra* note 66, at 627–29; commentaries of Manuel Becerra Ramírez, Jorgé Carpizo, Edgar Corzo, & Sergio López-Ayllón, *in* CUESTIONES CONSTITUCIONALES, *supra* note 1. The Supreme Court granted *amparo* to the air controllers' union by finding that the "Ley Federal del Trabajo al Servicio del Estado," art. 68, D.O. 28 de diciembre de 1963, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/111.pdf, was unconstitutional because it contradicted the Mexican Constitution's Article 123(B)(X) right to organize. The union sought *amparo* against a 1997 Tribunal Federal de Conciliación y Arbitraje decision that denied it recognition. For the Supreme Court, Article 123(B)(X)'s literal text was insufficient to establish the proscription on multiple unions as unconstitutional. The Supreme Court looked to the International Labor Organization's 1948 Convention 87 on Freedom of Association and Protection of the Right to Organise, which Mexico had ratified in 1950, available at http://ilolex.ilo.ch:1567/english/convdispl.htm. *See* D.O., 1 de abril de 1950 (ratification); D.O., 16 de octubre de 1950 (promulgation). The Court determined that Article 68's implicit limitation to recognition of only one union contradicted the broad freedom

rejects a 1992 Supreme Court decision,[491] made prior to the Court's 1995 reconstitution. In its 1999 decision, the Supreme Court declared that international treaties are, in the hierarchy of law, a step below the Constitution but above federal and local law.[492] This decision moves Mexico toward a modified dualist approach to international law, which increases its opening to international law. The pre-reform Supreme Court's 1992 decision on the point had affirmed Mexico's monist approach to the supremacy of its domestic law, which limited the import of international law,[493] and considered treaties on the same plain as ordinary legislation, and hence susceptible to modification by ordinary legislation.

Some Mexican scholars label the 1999 decision as maintaining a monist doctrine.[494] They base this label on the decision's use of the Constitution as a metric against which to assess the validity of Mexico's treaty obligations. It is, however, dualism, because to the extent that a treaty conforms with the Constitution Article 15 imperative to "the guarantees and rights established

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to organize guaranteed by the Convention. It determined under Constitution Article 133 that the Convention, as a treaty ratified by Mexico, trumped the conflicting federal statute.

491. Tesis P. C/92, "Manuel García Martínez," 60 LA GACETA DEL S.J.F. 27 (1992). In the 1992 decision, the Court determined that treaties and federal laws have the same rank pursuant to Constitution Article 133. Accordingly, "an international treaty cannot be a criterion for determining the constitutionality of a law nor vice versa." *Id.* (author's translation). Hence, the Court determined that the Law on Chambers of Commerce and Industry could not be considered unconstitutional because it conflicted with a treaty. *See* Genaro David Góngora Pimentel, *Eficacia Jurídica de los Tratados Internacionales*, *in* EL DERECHO QUE TENEMOS: LA JUSTICIA QUE ESPERAMOS 137, 143–44 (Genaro David Góngora Pimentel ed., 2000).

492. The Court interpreted Constitution Article 133 in this sense on the basis that the treaty obligations assumed by the Mexican State bind all Mexican authorities relative to the international community. The Court found that the Constitution's delegation of the treaty negotiation power to the President, as Chief of State, and the power of the Senate, as a representative of the will of the states, supported the obligation of all governmental authorities to respect the treaty. The Court noted that Article 133's grant of treaty-making power to the President and the Senate makes no distinction between federal and state subject matters. Thus, the treaty-making process binds all Mexican governmental entities, even though other provisions of the Constitution may allocate certain subject matters to the jurisdiction of the states. In particular, Article 124 reserves to the states any power not specifically granted to the federal authorities. For the Court, however, the reservation of the treaty power to federal authorities means that treaties take precedence over state law.

493. *See supra* note 491.

494. Manuel Becerra Ramírez, *Tratados Internacionales, se ubican jerárquicamente por encima de las leyes y en un segundo plano respecto de la Constitución Federal (Amparo en Revisión 1475/98)*, *in* CUESTIONES CONSTITUCIONALES, *supra* note 1, declares that the decision "establece un sistema de recepción monista internacional" [establishes a system of monist international reception], but acknowledges that with the decisión, "el Estado mexicano da pasos a un sistema de recepción del derecho internacional más amplio a favor del derecho internacional." [the Mexican State takes steps towards a broader system of reception of international law favoring of international law.] *Id.* at 176 (author's translation). *Cf. supra* note 423 (then President of Mexico's Supreme Court describing Mexico's predominant doctrine as monist).

by this Constitution for man and the citizen," the reasoning of the 1999 decision allows a treaty to define its subject matter outside the purview of domestic law. In addition, unlike the pre-1934 dualism, the present orientation maintains the 1934 amendment proviso that treaties may not derogate from "the guarantees and rights" that the Constitution establishes "for man and citizen." In this sense the 1999 decision contemplates a modified dualism, quite different from the pre-1934 dualism.

The Supreme Court's 1999 decision provides a firm constitutional foundation in Mexico for NAFTA and other international investment dispute arbitration treaties. NAFTA Chapter 11, together with other treaties' arbitration provisions adopted pursuant to the 1992 statute, appears to be beyond easy constitutional challenge in the Mexican courts. To adhere to NAFTA, Mexico followed its constitutional process for treaty ratification.[495] At the time, Mexico's Constitution did not yet provide the present Constitution Article 105 mechanism for abstract constitutional review. However, by virtue of the passage of time, and the procedural impossibility of retroactive application, the Article 105 procedure for abstract constitutional review has no application to Mexico's ratification of NAFTA and other investment dispute treaties made prior to the adoption of Article 105 in its present form.[496] Although *amparo* actions can be used to challenge treaties,[497]

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495. Senate ratification occurred on November 22, 1993, D.O., 8 de diciembre de 1993. President Salinas officially promulgated NAFTA's text Dec. 14, 1993, D.O., 20 de diciembre de 1993, in anticipation of NAFTA's January 1, 1994 effective date.

Although the United States' adoption of NAFTA did not follow the treaty ratification process requiring two-thirds Senate approval, the Eleventh Circuit found that what constitutes a treaty requiring Senate ratification is a nonjusticiable political question and accordingly declined to declare NAFTA unconstitutional. *See* Made in the U.S.A. Foundation v. United States, 242 F.3d 1300, 1311 (11th Cir. 2001); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995). Ackerman and Golove observe that the U.S. Senate's ability to refuse to ratify a treaty by one-third plus one vote of the Senators led to its rejection of the post–World War I Treaty of Versailles. Relative to post–World War II institutions and trade agreements, the President's ability to conclude executive agreements without subjection to the veto of one-third plus one vote of the Senate was perceived as a crucial step in avoiding a repeat of U.S. isolationism post–World War I. *Id.* at 803. The slim majority vote of the two houses of Congress that approved NAFTA, pursuant to legislatively delegated "fast-track" authority to the President to negotiate a trade agreement, illustrates the importance of fast-track procedures for adoption of international agreements. *Id.*

496. Theoretically, abstract constitutional review could be instituted by the appropriate minority of the Senate or other qualified actors at the time of ratification of further treaties. MEX. CONST. art. 105.

497. Appeals from lower court determinations of a treaty's constitutionality are to the Supreme Court sitting as a whole. *Id.* art. 105(II)(a). For a Supreme Court declaration that a treaty contrary to the Constitution is without effect, see 96 S.J.F. 1639 (5a época 1948) (unanimous) (cited by Góngora Pimentel, *supra* note 491, at 139). For a Supreme Court determination that *amparo* is available against application of a treaty contrary to the Constitution, see 97 S.J.F. 61 (5a época 1965) (unanimous).

Mexico's payment of final arbitral awards would deprive courts of the opportunity to rule on potential constitutional issues, such as whether the Constitution's Article 27 compensation standard can be altered by treaty, or whether Mexico's adherence to the American Convention creates any conflict with Mexico's Constitution.[498]

4. Supranational Implications

Supranational systems raise the issue of the theory on which the national systems participating in them accept the supranational law.[499] Under a monist theory with international law priority, the national system simply accepts the supranational law's priority. The Netherlands Constitution, for instance, expressly does this with respect to European Community law.[500] Under a dualist theory, the national system maintains a separate sphere of application of national law. A compromise view is that the national system admits the supranational law only insofar as it does not challenge the fundamental principles of the national system.[501] Relative to European Community law, the Italian Constitutional Court[502] and then the German Constitutional Court[503] adopted this latter solution. These constitutional courts in assessing the relation between European Community law and domestic law protected their fundamental constitutional values by declaring that their domestic legal orders made space for the application of the European Community law only insofar as it was compatible with their constitutional values. This is substantially the position in Mexico by virtue of the Supreme Court's 1999

498. *See supra* notes 78, 487, & 507.

499. Antonio La Pergola & Patrick Del Duca, *Community Law, International Law, and the Italian Constitution*, 79 AM. J. INT'L L. 598 (1985).

500. The Netherlands Constitution provides:

> Article 91(3). Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Chambers of the States General only if at least two-thirds of the votes cast are in favor.
>
> Article 92. Legislative, executive, and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 (3).
>
> Article 93. Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.

NETH. CONST. art. 91(3)–93, *translated at* http://www.oefre.unibe.ch/law/icl/nl00000_.html.

501. La Pergola & Del Duca, *supra* note 499, at 605.

502. *Corte costituzionale*, Decision no. 170 of June 8, 1984, *S.p.a. Granital v. Amministrazione delle Finanze dello Stato*, 1984(I) GIURISPRUDENZA COSTITUZIONALE 1098.

503. In re Wünsche Handelsgesellschaft (Solange II), BVerfGE 73, 339 (1986), *translated in* [1987] 3 C.M.L.R. 225; Brunner v. European Union Treaty, BVerfGE 89, 155 (1993), *translated in* 33 I.L.M. 388 (1994).

decision and its interpretation of Constitution Articles 133 and 15.[504] A caveat to this conclusion is that the Supreme Court's one holding in this sense does not constitute *jurisprudencia*, with its more binding status.[505]

Whereas NAFTA Chapter 11 and the related trade and investment treaties adopted pursuant to the 1992 law contemplate resolution of investment disputes only by arbitration,[506] the American Convention contemplates judicial resolution of disputes. Mexico's adherence to this Convention, its acceptance of the Inter-American Court for Human Rights' jurisdiction to apply the Convention, and the 1999 Supreme Court decision, with its opening to a limited dualist doctrine of international law's applicability in Mexico, create a possibility for further application of international law to expropriation disputes in Mexico.

The American Convention contemplates the right of protection of property and limits expropriation to reasons of "public utility or social interest"[507] and provides a right to judicial protection of such rights.[508] The Inter-American Court for Human Rights applies the American Convention's provisions, with the power to

> rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.[509]

A disgruntled investor might consider recourse to the Inter-American Court for Human Rights, notwithstanding the hurdles to reaching it. Access to the Court is limited to cases brought by the Commission or States that are parties to the Convention.[510] The Commission screens cases for merit, and brings to the Court only those for which national remedies are exhausted and no resolution reached.[511] An investor can press its claim directly before

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504. *See supra* Part IV.C.3.

505. *See supra* text accompanying note 377.

506. A Supreme Court minority has suggested that NAFTA modifies Mexican internal law as to expropriation. In the dissent to *Inmuebles Pridi*, the minority argues that NAFTA implies a right to a valuation hearing for NAFTA country investors prior to expropriation and hence that the Mexican Constitution's equal treatment guarantees mandate the same for Mexicans. "Immuebles Pridi, S.A.," 5 S.J.F. 378, 388–89 (9a época 1997) (dissenting opinion). *See supra* note 1.

507. American Convention on Human Rights, Nov. 22, 1969, art. 1(2), 1144 U.N.T.S. 123 (entered into force July 18, 1978) *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, *supra* note 291, *available at* http://www.corteidh.or.cr/docs_basicos/Convencion.html.

508. *Id.* art. 25.

509. *Id.* art. 63.

510. *Id.* art. 61.

511. *Id.* art. 46(1).

the Inter-American Court, but only in conjunction with the Commission's prosecution of the case.[512] Mexico has not yet been the source of an investment claim before the Inter-American Court. However, a Peruvian investor has obtained a ruling against Peru for violation of property rights,[513] implying that the American Convention may have relevance to expropriation disputes in Mexico. Moreover, the combination of Mexico's law on the conclusion of treaties[514] and the 1999 Supreme Court decision on the position of treaties in the Mexican legal system,[515] suggests that Mexican courts should consider as binding the principles of law enunciated in decisions of the Inter-American Court for Human Rights.[516] Although the Inter-American Court for Human Rights has not said expressly that the American Convention requires all national judges to adhere to the Court's jurisprudence, it has affirmed that each state party to the Inter-American Convention must "adopt all measures necessary so that provisions contained in the Convention have full force and effect within its domestic legal system."[517] While NAFTA Chapter 11 and other analogous treaty provisions for binding arbitration do not provide for any effect of the arbitration beyond the resolution of the

512. INTER-AMERICAN COURT FOR HUMAN RIGHTS, RULES OF PROCEDURE, art. 23(1), *available at* http://www.corteidh.or.cr/info_general/reglamento.html#MRC00000000000000114. Previously, the party whose rights were violated could appear only in the damages phase of the proceedings. Sergio García Ramírez & Mauricio Ivan del Toro Huerta, *México y la Corte Interamericana de Derechos Humanos*, *in* LA JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS 1, 37 (2001).

513. Baruch Ivcher Bronstein v. Peru, Judgment Inter-Am. C.H.R., series C, no. 74 (2001), *available at* http://www.corteidh.or.cr/seriecing/serie_c_74_ing.doc (condemning Peru for the taking of a television network, on grounds of breach of American Convention on Human Rights Article 21 property rights, and Article 25 judicial protection rights); Baruch Ivcher Bronstein v. Peru, Interpretation of the Judgment on the Merits, Inter-Am. C.H.R. series C, no. 84 (2001), *available at* http://www.corteidh.or.cr/seriecing/1serie_c_84_ing.doc (interpreting the initial judgment with respect to a determination of damages).

514. "Ley sobre la celebración de tratados," D.O., 2 de enero de 1992, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/216.pdf.

515. "Sindicato Nacional de Controladores de Tránsito Aéreo," 10 S.J.F. 46 (9a época 1999).

516. Becerra Ramírez, *supra* note 494, at 175–76.

517. Garrido and Baigorria Case, Inter-Am. C.H.R. series C, no. 39 (1998), *available at* http://www.corteidh.or.cr/seriecing/serie_c_39_ing.doc; García Ramírez & del Toro Huerta, *supra* note 512, at 26. *See also* Castillo Petruzzi et al. Case, Inter-Am. C.H.R. series C, no. 52, (1999), *available at* http://www.corteidh.or.cr/seriecing/serie_c_52_ing.doc. The Court stated:

> The general duty under Article 2 of the American Convention implies the adoption of measures of two kinds: on the one hand, elimination of any norms and practices that in any way violate the guarantees provided under the Convention; on the other hand, the promulgation of norms and the development of practices conducive to effective observance of those guarantees.

Id. at ¶ 207.

instant dispute, the decisions of the Inter-American Court for Human Rights authoritatively interpret the American Convention.[518]

In Mexico's monist view of the prevalence of domestic law as maintained from 1934 through the Supreme Court's 1999 decision on the relation of treaties and ordinary law, a court seeking to establish the constitutional appropriateness of applying international law confronts two questions: (1) whether the provision is incorporated into domestic law, and (2) whether it is constitutional. A dualist view of the relation between domestic and international law would require a court only to determine that domestic law leaves the subject matter to the sphere of international law. With acceptance of the modified dualist doctrine, a Mexican court hearing an *amparo* action involving a challenge to expropriation would find it easier to apply a principle articulated by the Inter-American Court than under the monist doctrine with prevalence of domestic over international law. If affirmed in Mexico, the qualified dualist approach would offer greater flexibility to a court conducting constitutional review of matters associated with these agreements, whether in the context of Article 105's constitutional abstract review at the time of legislative adoption, or in the context of an *amparo* action.[519]

Further, the dualist doctrine might have implications with respect to Mexican state and federal judicial roles, and to the applicability of Mexican procedural law. In European Community law, the European Court of Justice

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518. Pursuant to Article 62 of the American Convention on Human Rights, Mexico has recognized as binding "the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention." American Convention on Human Rights, *supra* note 507, art. 62(1). *Cf. supra* note 449. Article 62(3) defines the "jurisdiction of the Court" as comprising the cases submitted to it. *Id.* art. 62(3). Mexico's recognition of the Court's jurisdiction goes beyond the obligation pursuant to Article 68(1) to comply with a judgment of the Court to which Mexico is a party. Because the 1999 Supreme Court decision places treaties above other nonconstitutional domestic law and because the American Convention recognizes the InterAmerican Court as the Convention's authoritative interpreter, Mexican judges may determine to follow the InterAmerican Court's interpretation of the Convention. The Commission established by the Supreme Court to analyze proposals for a new *amparo* law proposed in 2000 to amend the law to recognize expressly the binding character on Mexican judges of the American Convention on Human Rights and other international human rights agreements. *See* García Ramírez & del Toro Huerta, *supra* note 512, at 18.

519. As context for the significance of the distinction between adoption of a monist view with precedence of international law versus a dualist view, consider the following observation:

> The monist view of the supremacy of international law and the dualist view both allow the supremacy of international law to be established. However, which of the two theories one adopts will influence the response given to two issues: (1) whether other constitutional values may override the applicability of international law, and (2) whether determination of the superiority of international law over national law is reserved to constitutional courts.

La Pergola & Del Duca, *supra* note 499, at 601. The first of these two issues is germaine to Mexico. In the absence of Mexico's adoption of the centralized aspect of the Constitutional Court model of constitutional review, the second issue is inapplicable.

considers all member state judges obliged to apply European Community law, even if their powers under domestic constitutional law would not enable them to do so.[520] An analogous application of the dualist doctrine in Mexico would be to require Mexican judges, federal and state, to consider relevant declarations of law by the Inter-American Court as binding.

V. SPACE FOR CONTRARIAN VOICES

A. Expropriatory Pressure at the Rule of Law's Edge: Toll Roads

Despite the grounds for increased optimism relative to the rule of law in Mexico, actions of creeping expropriation remain a potential challenge. An incident in respect to the Mexican toll road financings near the end of President Zedillo's term provides an example.[521]

In the early 1990s, Mexico's intercity highway network was substantially upgraded by toll road construction.[522] The government granted concessions to private parties for specific sections, which then financed construction in reliance on the stream of revenues to be generated by tolls. The financing was mostly from Mexican banks, but in at least three instances, bonds were sold on international capital markets.[523] Following the 1994 currency devaluation and consequent inflation, the indexation of the tolls to inflation caused the tolls to rise.[524] The effect of higher tolls and the economic downturn reduced toll road revenues below debt service obligations.[525] In 1997, in part to restore the health of the Mexican banks that had lent funds for the toll roads and in part to be able to reset the tolls at levels that would encourage the roads' use, the government revoked the concessions financed by Mexican bank loans, and paid the loans by issuing the Mexican banks

520. *See e.g.*, Case C-213/89, The Queen v. Secretary of State for Transport ex parte Factortame Ltd., 1990 E.C.R. I-2433, [1990] C.M.L.R. 1 (1990); MENGOZZI, *supra* note 290, at 212–15. In 1980, Kenneth Karst anticipated that the European Convention on Human Rights and the Treaty of Rome, "operating together seem likely to achieve an underground importation from 'Europe' (as many Britons call the rest of Europe) of both a substantive body of law and a system of judicial review." Kenneth L. Karst, *Judicial Review and the Channel Tunnel*, 53 S. CAL. L. REV. 447, 456 (1980). This has since occurred. *See, e.g.*, Gardbaum, *supra* note 410, at 713 n.20; MENGOZZI, *supra* note 290 at 212–15.

521. John E. Rogers, *Rate Protection in Mexican Toll Road Finance*, 35 INT'L LAW 947 (2001).

522. *Id.*

523. *Id.*

524. *Id.*

525. *Id.*

government bonds.[526] Thereafter, the government assumed responsibility for the roads.[527]

The concessions for the toll roads financed internationally remained in place. In 1999 the Ministry of Communications and Transportation opposed the increase of tolls on the Mexico City–Toluca road. The terms of the concession allowed the rates to be raised in line with an inflation index, but the ministry expressed the view that its further authorization was required.[528] The concessionaire and operator resisted following the bondholders' direction to apply the increase, which they were contractually obligated to do, out of fear that the concession would be revoked if the increase were applied.[529] Although legal actions were available to force the issue, the ministry appears to have succeeded, at least in the short run, in exercising its leverage to impede resetting the toll rates.

B. The Rule of Law at Least Temporarily Frustrating Private Sector Electricity

A 2002 Supreme Court decision[530] declared invalid President Fox's decree[531] to allow self-generators and cogenerators to sell CFE additional power. President Fox immediately announced his respect for the decision, even though it frustrated his effort through the decree to obtain more electricity.[532] It is

526. D.O., 27 de agosto de 1997, at 35.

527. *Cf. Deal Analysis: Rutas del Pacífico: Slip Road?*, PROJECT FIN. MAG. Apr. 2002, at 14 (describing a Chilean toll road to be financed by bonds on the basis of a variable term concession, the length of which is determined by the time required for the bond holders to earn a fixed return).

528. Rogers, *supra* note 521, at 948–49.

529. *Id.*

530. "Sentencia y votos concurrentes y de minoría, relativos a la Controversia Constitucional 22/2001, promovida por el Congreso de la Unión en contra del Presidente Constitucional de los Estados Unidos Mexicanos, del Secretario de Energía, de la Comisión Reguladora de Energía y del Secretario de Gobernación," [Judgment and concurring and minority voices, relative to constitutional controversy 22/2001, brought by the Congress of the Union against the Constitutional President of the United Mexican States, the Secretary of Energy, the Energy Regulatory Commission, and the Secretary of Interior], D.O., 3 de junio de 2002, *available at* http://www.gobernacion.gob.mx/dof/dof_03-06-2002.pdf (author's translation); Transcript of Ordinary Public Session of the Full Supreme Court (Apr. 23, 2002), http://www.energia.org.mx/bajar/doc/sesion23.doc (presenting a verbatim transcript of the full court's public deliberation of the case); Transcript of the Ordinary Public Session of the Full Supreme Court (Apr. 25, 2002), http://www.energia.org.mx/bajar/doc/sesion25.doc (same).

531. "Decreto por el que se reforman y adicionan diversas disposiciones del Reglamento de la Ley del Servicio Público de Energía Eléctricia," D.O., 24 de mayo de 2001, *available at* http://www.cre.gob.mx/diario_oficial/avisos2001/010-240501.pdf.

532. Carlos Avilés & Juan Arvizu, *Revoca Corte Decreto en Materia Eléctrica*, EL UNIVERSAL Apr. 26, 2002, at 9 ("El gobierno federal, a través de la Secretaría de Energía, informó que acatará la resolución, y consideró que el fallo es una muestra clara de los cambios que ocurren en el país y del contrapeso entre los tres poderes." [The federal government, through the Ministry of Energy,

difficult to identify another Supreme Court decision that contradicts presidential will as to a significant matter, followed by prompt presidential declaration of respect for the ruling.

The decree was intended to provide CFE authority to purchase additional electricity from private power plants otherwise allowed in Mexico pursuant to the 1992 reforms as self-generation and cogeneration projects. The essence of the decree was to allow CFE to purchase electricity generated by such plants in excess of the needs of the hosts of such facilities without competitive bidding.

The Supreme Court's electric power ruling suggests that, perhaps for the first time in Mexico's history, the Supreme Court has autonomy to rule against the President on a major political matter. A skeptic might diminish the ruling's significance by observing that all of the Court's judges were appointed under the Partido Revolucionario Institucional regime, that CFE's union, an important constituency of the Partido Revolucionario Institucional, benefits from CFE's monopoly status, and that the Partido Revolucionario Institucional resists weakening it. Such a skeptic might argue that the Court could have decided the case without reaching the constitutional definition of the permissibility of private participation in the electricity sector.[533] More generous readings of the ruling are that it creates space for voices in opposition to the President, a space suppressed during the period of one-party domination of national political life, and that it seeks to attribute meaning to the written Constitution. In this more generous perspective, investors might take comfort in the Court's independence and in its attention to the Constitution.

Congress, which challenged the decree's validity, argued that it invaded Congress's sphere of legislative authority over energy matters, and in particular its sole competence to determine whether CFE could purchase electricity without public bidding.[534] The Supreme Court's eleven justices produced four

communicated that it will comply with the resolution, and considered that the decision is a clear sign of the changes occurring in the country and of the counterbalance among the three powers of government.]), *available at* http://www.el-universal.com.mx/pls/impreso/web_histo_primera.despliega?var=12326&var_sub_actual=-&var_fecha=26-ABR-02 (author's translation).

533. If the case had been resolved based on either the grounds advanced by Congress or by the judge who prepared the proposal for the Court's decision, there would be no basis for concern that the Constitution's Article 27 provision for state monopoly of "the public service of electricity" contradicted the 1992 reforms that allowed private power by statutorily defining the term "public service of electricity" to exclude it. MEX. CONST. art. 27.

534. Congress challenged the constitutionality of President Fox's decree through an abstract review of constitutionality initiated on July 4, 2001. It argued that the President's promulgation of the decree invaded its sphere of legislative authority, specifically in respect to electricity as provided by Constitution Articles 73(X) and 134, and pursuant to the general division of powers established by Constitution Article 49. Congress asserted that the President's Constitution Article 89(I) regulatory authority did not provide an adequate basis for the decree. "Sentencia y votos concurrentes y de minoría, relativos a la Controversia Constitucional 22/2001, promovida por el

distinct opinions.[535] The majority of eight out of the eleven required to invalidate the decree as unconstitutional produced three of the opinions.

Five of the eleven Supreme Court justices voted to invalidate the decree based on a broad, literal reading of the constitutional reservation of the "public service of electricity" to the State.[536] Of those five, four also found other grounds for invalidity. Three of their colleagues concurred with the finding of invalidity, and noted that their five colleagues' reading of the constitutional restriction might be valid, but was not appropriate to decide the instant case. The remaining three judges believed the decree was constitutional. The Court's divisions, reflected in its multiple opinions, leave questions as to whether any further pruning of CFE's present monopoly is constitutional. The Court's decision clouds prospects for further expansion of electricity sector private investment.

The 1992 reforms allowing independent power, self-generation, and cogeneration, among others, were based on a statutory definition of the

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Congreso de la Union en contra del presidenta Constitutional de los Estados Unidos Mexicanos, del Secretario de Energia, de la Comisión Reguladora de Energía y del Secretario de Governación," D.O., 3 de junio de 2002.

535. *Id.*

536. The four justices, reasoning broadly, asserted that the Constitution required them to examine its compatibility with the substantive norms at issue, as well as the bounds of the respective spheres of competence of the President and the Congress. The four justices offered two grounds for their opinion. First, they concluded that only Congress could adopt legislation to exempt electricity purchases from public bidding. The President's decree, in their view, was invalid because it exempted electricity purchases from public bidding, an exemption that only Congress could provide. *Id.* Second, they asserted that the Constitution's conception of "public service of electricity" prohibited any provision for private generation of electricity for ultimate public consumption, other than as incidental to electricity generation for private consumption. In their view, the only acceptable way to change this prohibition was by constitutional amendment. One justice of the eight voting for the decree's invalidity joined the opinion of the four only as to the reasoning based on the meaning of the Constitution's conception of "public service of electricity." *Id.* (author's translation).

Three justices joined the conclusion of the five justices opining that, based on the Constitution's conception of "public service of electricity," that the decree was invalid. However, they did not believe that it was appropriate to base their decision on the Constitution's conception of "public service of electricity." Instead, they voted to invalidate the President's decree solely based on a determination that it infringed Congress's prerogatives by intruding into a sphere in which Congress had sole legislative authority. They believed that the decree was unconstitutional because it failed to provide competitive bidding, as required for public procurement by Constitution Article 134, and that article's exception by legislative action had not been satisfied. Nonetheless, these three judges expressly noted that the Constitution may well prohibit legislative definition of the concept of "public service of electricity."

The three justices who were in the minority and believed the decree to be valid reasoned that the Constitution and the Law on Public Service of Electricity allowed the President to issue the decree. They took specific issue with the plurality's definition of public service of electricity. These three justices opined that Mexican constitutional law leaves the definition to Congress.

constitutional term "public service of electricity" excluding such activities.[537] An implication of the reasoning of the Court's five members who were part of the majority of eight necessary to determine the decree's unconstitutionality is that the 1992 legislative definition of the term "public service of electricity" to exclude independent power would likewise fail to pass constitutional muster.[538]

Because Constitution Article 105 requires actions for constitutional review with general effect to be brought within ninety days of the challenged measure's publication, no direct challenge of the 1992 reforms can be brought under Article 105. However, to the extent that an *amparo* plaintiff can show direct and newly realized harm, such a plaintiff could raise the unconstitutionality of the 1992 reforms in an *amparo* action. A CFE rate payer who brought an *amparo* action would face a difficult factual challenge to establish the necessary direct and newly realized harm, and a favorable decision would relate only to that rate payer's specific injury. Nonetheless, significant European Community jurisprudence relative to the relationship of national and European Community law sprang from litigation by an electric utility

537. "Ley del Servicio Público de Energía Eléctrica," *as amended* 1992, D.O., 23 de diciembre de 1992, arts. 3 & 36, *available at* http://www.cddhcu.gob.mx/leyinfo/pdf/99.pdf. See implementing regulation, D.O., 31 de mayo de 1993, *available at* http://www.cre.gob.mx/marco/elec/rlspee.pdf, *as amended* by "Decreto que reforma el Reglamento de la Ley del Servicio Público de Energía Eléctrica," D.O., 25 de julio de 1997, *available at* http://www.cre.gob.mx/marco/elec/rlspee-25jul97.pdf. The activities that the 1992 reform opened to private activity are subject to CRE permits. "Ley del Servicio Público de Energía Eléctrica," art. 36, together with "Ley de la Comisión Reguladora de Energía," D.O., 31 de octubre de 1995, *amended by* D.O., 23 de enero de 1998. *Cf.* note 239. CFE's preeminent position as the national electric monopoly is largely maintained. In particular, electricity produced through independent generation is to be sold only to CFE. D.O. 23 diciembre de 1992, art. 36(III). The Secretary of Energy is to determine whether needed CFE capacity is to be provided by CFE itself or solicited from private parties, *id.* art. 36bis. so as to employ the "production of electric energy that results of least cost for the CFE and that offers, further, optimum stability, quality and security of public service." *Id.* art. 36bis (author's translation).

538. Further independent power is most clearly at variance with the Supreme Court plurality's reasoning. The approximately 4100 MW of power provided by Mexico's seven independent power projects operating as of 2002 is a significant fraction of Mexico's total installed capacity of about 38,500 MW. For comparison, as of 2002, there were 103 self-supply projects and twenty-seven cogeneration projects operating, corresponding to 2907 and 1125 MW of capacity, respectively. *Latin America: Mexico*, PLATTS INT'L PRIVATE POWER Q., First Quarter 2002 at 398, 406; COMISION REGULADORA DE ENERGIA, ELECTRICIDAD: MATERIA REGULADOR, *available at* http://www.cre.gob.mx/estadisticas2/Materia_Regulada/Electricidad/Perm._Gen_Priv._por_Tipo/poertipo.htm. As the CFE bid solicitation process for long-term power purchase contracts has become more competitive, developers have achieved lower fuel prices by making take-or-pay commitments to natural gas fuel suppliers. John Schuster & Bob Marcum, *Emerging Fuel Supply Issues in Mexican IPP Project Financing*, J. STRUCTURED & PROJECT FIN., Summer 2002, at 40, 42–44. Any prospect that a power purchase contract may be unenforceable is daunting to investors in the face of such commitments.

rate payer from an analogous fact pattern.[539] More tangibly, any current legislative reform of the Ley del Servicio Público de Energía Eléctrica potentially is subject to so-called abstract constitutional review in connection with its adoption.[540]

The reasoning of the Court's plurality led President Fox to include constitutional amendments as part of his August 2002 proposal of electricity sector reform by legislation and constitutional amendment.[541] Constitutional amendment would resolve the cloud created by the recent Supreme Court ruling. President Fox proposed to create an open, competitive electricity market to supply consumers using more than 2500 MWh/year. About five-hundred companies meet this threshold, creating the prospect of a U.S.$2 billion annual free market. Adoption of Fox's proposal will require its acceptance by the opposition Partido Revolucionario Institucional, which holds a majority of the Congress. The procedural requirement for constitutional amendment increases the need for consensus among political parties relative to the proposal.

The Supreme Court's electric power decision suggests a paradoxical relationship between private investment and Mexican federal courts' increased independence. As the legal system's reliability increases, Mexico becomes more attractive to private investment that relies on the rule of law, and the increased stake of such private investors should influence Mexico's

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539. *Cf.* Costa v. ENEL, 19 Rac. Uff. 131, 1964 Giur. Cost. 129 (1964) (Italian constitutional court's declaration of the supremacy of Italian constitutional law over European Community law); Flaminio Costa v. ENEL, [1964] E.C.R. 592 (European Court of Justice declaration of the supremacy of European Community Law); Patrick Del Duca & Duccio Mortillaro, *The Maturation of Italy's Response to European Community Law: Electric and Telecommunication Sector Institutional Innovations*, 23 FORDHAM INT'L L.J. 536, 542–50 (2000) (discussing the conciliation of Italian constitutional court and European Court of Justice views on supremacy).

540. *See supra* text accompanying note 402.

541. 35 GACETA PARLAMENTARIA 18–81 (Aug. 21, 2002), *available at* http://www.cfe.gob.mx/www2/queescfe/notaqueescfe.asp?seccion=queescfe&seccion_id=2587&seccion_nombre=Iniciativa%20de%20reforma%20eléctrica. Fox's proposal is to revise the current language of Article 27, paragraph 6. The state monopoly on the public service of electricity would remain, but Article 27, paragraph 6 would be amended expressly to allow self-generation, and to allow the Congress to establish a threshold for the size of the consumer as to which independent generators could freely compete to supply. The constitutional amendment would provide for the State's guarantee of nondiscriminatory access to the national grid and distribution networks. The Fox proposal also would change the Article 28, paragraph 4, reference to "electricity" as a strategic sector reserved to the State to a reference to the "public service of electricity," thereby more clearly leaving space for private activity in the electricity sector. The proposal would revise the Ley del Servicio Público de Energía Eléctrica to conform to the constitutional amendments. As of September 2003, legislative and constitutional reform has not occurred.

For discussion of electricity sector reform in other Latin American countries, see Hugh Rudnick & Juan-Pablo Montero, *Second Generation Electricity Reforms in Latin America and the California Paradigm*, 2 J. INDUSTRY, COMPETITION & TRADE 159 (June 2002).

legal system in favor of stability and predictability.[542] Although these two drivers of development reinforce each other, they also conflict. A historic and still vibrant aspect of Mexico's legal system is a concern for social justice, especially in regard to freedom from inequitable distribution of wealth and control of resources, whether by foreigners or Mexicans. This concern has often manifested itself in expropriation and expansion of state capitalism. As Mexico's legal system becomes less susceptible to overt partisan direction, the voices that raise challenges to private investment may find more space for expression through the legal system, even if the overriding contemporary political orientation favors further private investment.

VI. PROSPECTS

Mexico has taken intelligent and credible policy steps to establish a new constitutional design for the handling of investment and expropriation disputes. The essence of the design is to remove doubt as to the rule of law's application to such disputes.[543] The basic policy steps that Mexico has taken are its network of investment arbitration treaties and the constitutional reform of its federal judiciary. What prompted the accomplishment of these steps is a combination of decisions by Mexico's leaders, the internal dynamics of Mexico's development (including by virtue of its historical expropriations), and economic globalization.[544]

542. Max Weber identified this dynamic as part of his analysis of the relationships between legalism and capitalism: "Legalism supported the development of capitalism by providing a stable and predictable atmosphere; capitalism encouraged legalism because the bourgeoisie was aware of its own need for this type of governmental structure." Trubek, *supra* note 4 (citation omitted).

543. There are skeptics as to whether Mexico's initiatives to promote the rule of law's application to expropriation and investment disputes will prevail. *See, e.g.*, DEZALAY & GARTH, *supra* note 331, at 250 (expressing skepticism as to Latin America generally: "[T]he new ambition of the cosmopolitan elite—the rule of law—is . . . bound to be a limited success at best" because "the best of intentions cannot ignore the local structures and the power relationships they sustain."). GONZÁLEZ CASANOVA, *supra* note 43, at 4–5, defines development as an "increase and redistribution of production," and notes that to achieve it requires addressing the structure of "power"—that is "the local structures and the power relationships they sustain" referenced by Dezalay and Garth. Since González Casanova published his work in 1965, Mexico's "local structures" have evolved considerably in ways favorable to the rule of law, including by the fading of one-party rule and the new constitutional position of the federal judiciary.

544. The combination can be viewed within the neoclassical model of structure and change outlined in DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 20–32 (1981). In this view, as globalization changed Mexico's relative economic position, its leaders, in an attempt to maintain power, initiated reform efforts that included steps towards a new constitutional design to handle investment and expropriation disputes. North offers a theory of ideology's contribution to economic structure and change pursuant to which ideological evolution explains secular change. *Id.* at 33–58. Of course, ideology may be argued to be both a cause and an effect of secular change. In either perspective, Mexico's emerging constitutional framework for the rule of law can be considered as having an ideological dimension tied to growing notions of

The phenomenon of economic globalization originated outside Mexico. Mexico's leaders catalyzed Mexico's opening to it through their policy initiatives. Exposure to economic globalization reinforced attention to the rule of law's importance because of its perceived significance to where investors direct their capital. However, Mexico's independence, liberal and conservative turmoil, revolution, and continuing "institutional revolution" under its long dominant ruling party, notwithstanding their many frustrations, appear to have created an internal dynamic of evolutionary economic, political, and cultural change, ultimately favorable to the rule of law.

Presidents Salinas and Zedillo led the commencement of the policy steps towards the rule of law's application to expropriation and investment disputes. President Salinas opened Mexico's economy through NAFTA. As preparation for NAFTA, his administration embraced the deference of expropriation disputes with treaty country investors to international arbitration. President Zedillo led the 1994 Supreme Court reform as part of his strategy to separate the long dominant ruling party from the apparatus of the State. Salinas's and Zedillo's steps to apply the rule of law in connection with opening Mexico to global competition flow from Mexico's political evolution.[545] Their international liberalism responded to failures of nationalism and statism.[546] The success of their rule of law initiatives in regard to the federal judiciary turns on the rigidity of Mexico's Constitution, which was achieved with the fading of their party's dominance. The evolution towards attributing greater prominence to the rule of law in the historical expropriations (land, railroads, oil, electricity, mining, banks) prepared the way for these initiatives. In the first decades after the Revolution, Mexico's presidents understood the rule of law's importance to global competition for capital, and accordingly placed it at center stage in the resolution of expropriation disputes. As Mexico opened and integrated with the global economy, the one-party manipulation of the legal system, both by influencing judicial decisions and by altering the Constitution, appeared increasingly ill-suited to investor requirements, and out of step with Mexico's aspirations for transparent and democratic governance. The political maturation associated with the move away from

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political pluralism and constitutional governance. Insofar as Mexico's leaders further articulate the rule of law's value, they reinforce both the ideological evolution that supports the rule of law and the rule of law itself. As noted *infra* in Part VI.B., the increasing independence of the federal judiciary reinforces the significance of its affirmations of the rule of law's value.

545. *Cf.* Martin Shapiro, *Comparative Law and Comparative Politics*, 53 S. CAL. L. REV. 537 (1980) (commenting on the inseparability of politics and constitutional law, particularly relative to the design of the European Community as a state of law and the rule of law's role in assuring it as such).

546. *Cf.* WHITING, JR., *supra* note 7, at 8 ("[J]ust as nationalism was a response to dependency, international liberalism emerged in Mexico as a response to the failures of nationalism and statism.").

one-party government opens space for Mexico's judicial power to be respected as an independent and co-equal branch of government.

By virtue of these steps, investors from most countries that are sources of investment in Mexico can count on independent arbitration to resolve their investment disputes. NAFTA Chapter 11, which as to arbitration against Mexico benefits U.S. and Canadian investors, is a leading example of such a treaty commitment. More broadly, any investor, Mexican or foreign, may benefit from the increased independence of Mexico's federal judiciary and its opening to international law.

The steps that have led to these results are intelligent in several ways. The deference of disputes with treaty country investors to arbitration immediately removes any doubt as to the decisionmaking body's neutrality. Aspersions of bias leveled at national courts are manifestly unsustainable against an arbitral tribunal selected either cooperatively by Mexico and the disgruntled investor, or at least by a neutral process agreed to by treaty. Likewise, the proper criteria for expropriation and compensation are set by treaty, agreed by Mexico and the investor's home country. This agreement obviates political contention as to the application of the Calvo doctrine or the relation of Mexican and international law, which were both historically associated with Mexican judicial resolution of expropriation disputes. The treaty agreement to arbitration also recognizes the need for time both to implement the fundamental judicial reform undertaken by the 1994 constitutional amendment and for investors to become comfortable with the reform's consolidation.

The steps that have led to these results are credible because of developments inherent to Mexico itself. These developments include political evolution, judicial reform, the opening to international law, and the clear contribution of private investment to Mexico's development. Collectively these developments create an environment for the recognition of the rule of law's importance and for its further elaboration.[547]

Mexico's two greatest steps towards the rule of law's application to expropriation disputes were its 1992 law on treaties, which contemplated Mexico's making treaties to defer expropriation disputes to international arbitration, and its 1994 constitutional amendment for judicial reform. Each of these dramatic steps forward required the expenditure of a kind of presidential political capital that in the new era of multiparty politics no longer exists. The Constitution's newfound rigidity derives from the new multiparty

547. These developments go well beyond the lament of twenty years ago, based upon an analysis of the then fresh bank expropriation as an exercise of naked political power to consolidate state capitalism and a step towards "an Algeria on the Rio Grande," that "the moral of the tragedy of contemporary Mexico is that a society cannot sustain middle-class institutions unless it first sustains a middle class." Murphy, Jr., *supra* note 258, at 451, 453.

quality of Mexican political life. It gives new significance to the federal judiciary and especially to the Supreme Court as interpreters of the Constitution. At the same time, it limits the opportunity for dramatic initiatives by the legislative and executive branches of government in respect to expropriation and the rule of law. The continued implementation of Mexico's judicial reform will by its nature proceed slowly. It will consist of the federal judiciary's progressive renewal under its new governance structure and in its further enunciation of constitutional doctrine.

Investors and the federal judiciary are the two kinds of actors accordingly positioned to exert the greatest influence on how future expropriation and investment disputes in Mexico unfold. The diminished importance of country to country (Mexico versus United States) contention and of Mexican presidential influence is a striking predicate to this observation and confirms the achievements made through Mexico's policy initiatives regarding expropriation disputes. Investors and the federal judiciary are by their nature both likely to be conservative in their next steps, but in different ways. Investors are likely to remain timid about trusting Mexico's federal judiciary to resolve investment and expropriation disputes for some time to come. Federal judges have the opportunity to further consolidate the rule of law's application by the additional enunciation of doctrine relative to the application of treaties to which Mexico has adhered, particularly the American Convention on Human Rights.

A. Investor Perspective

Relative to the historical takings, contemporary investors in Mexico are in a much improved position to confront expropriation disputes by virtue of the developments mentioned. Caution, however, remains warranted. A common path to implement investment is to engage legal counsel to secure necessary governmental approvals and simultaneously to seek alliance with a locally connected partner. Metalclad Corporation seems to have attempted just this path.[548] Although Metalclad achieved a measure of vindication through its Chapter 11 arbitration under NAFTA, its Mexican business initiative nonetheless failed, contributing to the company's bankruptcy. Moreover, to obtain the relief that it ultimately received, Metalclad abandoned the Mexican judicial system—the Chapter 11 arbitration process occurred without Mexican judicial input. Metalclad's choice in favor of NAFTA Chapter 11 arbitration reflects its view that such arbitration held a greater likelihood for recognition of its claims. Metalclad's choice likely

548. *See supra*, Part II.I.

reflected its assessment of procedural and substantive elements. It is probable that Metalclad quite simply distrusted Mexican courts and believed that arbitration offered a quicker and more reliably independent path to resolve its claims. Moreover, Chapter 11 arbitration avoided any Constitution Article 27 claim by Mexico that fair value for compensation was limited necessarily to the value accepted by Metalclad for tax purposes.[549]

The legal dimension of managing Mexico's encounter with globalization of opportunities for investment capital has thus far relied extensively on mechanisms that avoid Mexican courts. The extent to which investors prefer commercial arbitration and arbitration of expropriation disputes pursuant to NAFTA Chapter 11 and Mexico's analogous treaties over Mexican court proceedings is an indicium of the degree of confidence in the Mexican judicial system. The popularity of such mechanisms correlates with distrust of the federal judiciary's performance. Private arbitration of commercial disputes, outside of Mexico and particularly in respect to larger matters, will likely continue to be many investors' preference for some time to come. The reforms of Mexican arbitration law[550] and Mexico's system of investment dispute arbitration treaties, including Chapter 11, accommodate this preference. Although commercial arbitration is available to all Mexican and foreign investors, the treaties for expropriation disputes are accessible only to treaty country investors. Moreover, Chapter 11 provides a narrow basis for claims, in that it is limited specifically to claims of expropriation and unequal treatment. This excludes broader claims, such as the claim of insufficiently transparent legal frameworks which was rejected in the judicial appeal of the Metalclad arbitral award,[551] and further rejected for the future by determination of the three NAFTA countries.[552]

In the same vein of preference for avoidance of judicial dispute resolution, larger investors, particularly those invested in infrastructure, will continue to attempt to involve in their projects multilateral institutions such as the World Bank and the Inter-American Development Bank for the added leverage that such institutions provide in the event of confrontation with Mexican governmental authorities. Likewise, national export credit agencies such as the U.S. Export Import Bank and their financing[553] will remain attractive for similar reasons in addition to favorable financing terms. Political risk coverage through involvement of government entities such as

549. *See supra* note 487.
550. *See supra* note 442.
551. *See supra* note 314.
552. *See supra* note 321.
553. *E.g.*, Cliston Brown, *Power Plant Fuels Mexican Energy Revolution*, CORP. LEGAL TIMES Sept. 2001, at 10.

the U.S. government's Overseas Private Investment Corporation (OPIC),[554] and from the private sector, may provide additional comfort. Directly involving local government as a partner on a model akin to that for municipal bond finance in the United States may also serve to mitigate investors' expropriation risk.[555]

B. Judicial Perspective

A prerequisite to any judgment that Mexico has fully met the legal challenge of investment market globalization is that its legal system be considered an acceptable venue for investment dispute resolution. In this regard, much remains to be accomplished. Long-standing constitutional issues of structural significance remain unaddressed, including the lack of a mechanism to regulate surcharging the Supreme Court's docket and the limited precedential value of *amparo* decisions. Moreover, the reforms in the governance of Mexico's federal courts are recent, and most federal judges were named under the old regime. The preference of the investment community for extrajudicial dispute resolution reflects these and related concerns, including a residual distrust based on the question of the federal judiciary's independence with respect to such historical expropriation disputes as those concerning oil and banking.

Nonetheless, the federal judiciary's increased independence works to limit the arbitrary exercise of governmental discretion. With time, investors will increasingly appreciate and respond to its performance in this regard. At the same time, however, judicial independence creates space for voices opposed to private sector investment. Mexico's executive branch,

554. OPIC has not provided political risk insurance coverage directly in Mexico, but in recent years has extended credit to U.S. small business in connection with Mexican investment. Press Release, In Historic Breakthrough, OPIC to Support Private Investment in Mexico (Jan. 18, 2001), *available at* http://www.opic.gov. As of June 9, 2003, Mexico and the United States made an agreement, which if ratified as a treaty by Mexico's Senate, would enable OPIC to offer a full range of financing and political risk insurance services by allowing OPIC to step into the shoes of its U.S. client to pursue expropriation claims against Mexico by a process modeled on the Chapter 11 arbitration mechanism in NAFTA. Press Release, U.S. and Mexico Sign Bilateral Agreement Paving Way for Full OPIC Activity (June 9, 2003), *available at* http://www.opic.gov.

555. Mexico's Constitution allows local government borrowing. MEX. CONST. art. 117(VIII). Mexican local government financial capabilities vary, but some infrastructure investors have attempted investments through contractual arrangements with them for the provision of services and infrastructure, backed by arrangements to pledge local government receipts of federal revenues. Carlos Ramos Miranda, *Project Finance and Federal Guarantees Provided for Infrastructure Projects in Mexico*, 35 INT'L LAW. 950 (2001). On efforts to improve local government administration, see Steven Barracca, *Reforming Mexico's Municipal Reform: The Politics of Devolution in Chihuahua and Yucatán*, 1 J. L. BORDER STUD. 31 (2001). One of the missions of the North American Development Bank, a Mexico-U.S. publicly capitalized development bank, is to pursue such financing opportunities. NADB, General Overview, http://www.nadb.org/english/general/general_frame.htm.

more specifically the President and the President's cabinet, and in some instances also the legislature, may invite private investment in the infrastructure and natural resource sectors that have been the focus of past expropriation. However, voices remain to express the concerns that prompted past expropriations. For example, the Supreme Court's decision, particularly the reasoning of its plurality, invalidating President Fox's 2001 decree with respect to CFE's purchase of "excess power" from existing self-supply and cogeneration projects, places further independent power in Mexico under a cloud unless the Constitution is amended to define clearly that independent power is outside the State's constitutional electricity monopoly. Nonetheless, insofar as the judicial reforms achieve greater judicial independence, they offer the Mexican judiciary greater opportunity to assure the implementation of the rights articulated by the Constitution, and hence serve directly to protect investor expectations. The novelty of dissenting judicial voices is that the legal system now appears to have matured to the point that its decisions may frustrate, rather than merely confirm, the policies of those who hold political power in Mexico.

In view of the fading of one-party rule and the Constitution's consequent increased rigidity, Mexico's federal judiciary appears to be the pivotal actor in the near future with respect to achieving increased confidence in the rule of law's application to investment disputes. The area in which it may provide rapid further progress is doctrine. The Supreme Court's 1999 declaration that treaties are superior to federal legislation reversed its 1992 ruling on the point. The 1999 ruling is an opening to a modified dualist doctrine to govern the relation of international and domestic law. The lower federal courts and state courts will follow any further Supreme Court affirmation of this doctrine. Moreover, in reliance on the 1999 ruling, any Mexican court could address expropriation issues with attention to the American Convention. Such an approach would focus attention on the confiscatory element of expropriation inherent in the Constitution's Article 27 establishment of compensation based on tax value when value assessed for tax purposes is less than market value.[556] A possible outcome of the dualist doctrine's affirmation, and its application in respect to the American Convention and the Article 27 valuation criterion would be to overcome the Article 27 limitation to tax value.

The political environment, statutes, treaties, and judicially enunciated doctrine offer Mexican federal judges an opportunity to contribute to the rule of law's further affirmation as an element of progress towards Mexico's

556. *See supra* notes 78 & 487.

constitutionally proclaimed goal of development.[557] Notwithstanding the ambiguity associated with the number of opinions that the Supreme Court produced to resolve the dispute between the President and Congress in respect to electricity,[558] its 2002 decision of the dispute casts the Supreme Court in a new position as an independent arbiter of such jurisdictional disputes. Bold federal judicial statements of law relevant to investment and expropriation like this one have the prospect of furthering the rule of law in Mexico. Regardless of any substantive ruling on the permissibility of investment or expropriation, the independent judicial resolution of disputes—as opposed to their resolution by political opportunism—will tend to facilitate further investment by affirming the stability and predictability of the legal system. It is a good time to be a Mexican federal judge, especially a passionate one. Roberto Mangabeira Unger famously identified legal academics lacking critical initiative as like a priesthood that loses its faith but keeps its job, thus standing in tedious embarrassment before a cold altar.[559] A Mexican federal judge today has a serviceable altar to affirm the rule of law and the opportunity to fire it up.[560]

557. See *supra* note 67.

558. See *supra* text accompanying note 535.

559. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 675 (1983).

560. As an example of judicial passion, see Justice Góngora Pimentel's account of *amparo*'s purpose to his students, *supra* note 357, together with the balance of the introduction to his textbook.

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