edited by:
Rudolf Dolzer
Matthias Herdegen
Bernhard Vogel

FOREIGN INVESTMENT

Its Significance in Relation to the Fight against Poverty, Economic Growth and Legal Culture

Konrad
Adenauer
Stiftung

Original Edition in German by VERLAG HERDER, Freiburg im Breisgau 2006

Editors
Rudolf Dolzer
Matthias Herdegen
Bernhard Vogel

Publisher
Konrad-Adenauer-Stiftung
34/36 Bukit Pasoh Road
Singapore 089848

Translation of originally German papers by Dr. Donna Elliott, LL.M

ISBN-13: 978-981-05-6819-1
ISBN-10: 981-05-6819-3

Cover Design
Media Consulta, Cologne

Layout
TimeEdge Publishing Pte Ltd
10 Anson Road
15-14 International Plaza
Singapore 079903
www.tepub.com

CONTENTS

The NAFTA's Investment Chapter and Mexico

Jose E. Alvarez[1]

Introduction

It makes sense for those who want to know whether investment agreements can successfully achieve their stated economic purposes – to promote economic growth, stabilize investor expectations, and promote foreign investment - to look at the NAFTA's investment obligations in Chapter Eleven for a clue. It is hard to ignore the sheer magnitude of the NAFTA. When it entered into force, in 1994, the NAFTA covered a $6 trillion economy serving a population of 360 million; ten years later, it represented the world's largest free trade area in terms of gross domestic product – a $12.5 trillion economy with a population of 430 million – and the second largest, after the European Union – in terms of total trade volume.[2] Putting to one side the European Union as a special case premised on a much deeper conception of political as well as economic integration and the failed negotiations for a multilateral investment agreement (MIA) in the OECD, the NAFTA's investment provisions are the most economically significant set of international investment obligations existing today.

The NAFTA's Chapter Eleven was, in 1994, and remains today, one of the most investor-friendly pacts ever concluded by any nation. The United States used Mexico's entry into what was formerly the Canada-United States Free Trade Agreement as an opportunity to vastly overhaul the relatively modest investment protections in that prior agreement. The result was a far more strengthened package of investment rights for foreign investors from the three NAFTA parties. Like the contemporaneous U.S. model bilateral investment treaty (BIT) when the NAFTA was negotiated (but unlike most European BITs), Chapter Eleven extended national and MFN guarantees for the *entry* and not only the post-establishment treatment of foreign investors.[3] It extended, in addition, "absolute" guarantees, not based on discrimination: namely, (1) the right to be treated in accordance with international law, on the basis of "fair and equitable treatment" and with "full protection and security" (article 1105), (2) the right to freely transfer capital out of the host country (article 1109)[4], and (3) the right to compensation if expropriated (article 1110). Unlike most other investment treaties then in place, it also included a ban on the most common form of performance requirements, such as those requiring certain levels of exports or the transfer of technology (article 1106(1)). Its compensation provision in cases of direct or indirect expropriation was second to none and included cutting-edge language assuring timely payment in G7 currency, along with reasonable rate of interest (article 1110). Its definition of protected "investment" covered an extensive list of tangible and intangible property interests and specifically included investment contracts. Its list of protected "investors" included those having an equity interest. In addition, Chapter Eleven's investor-state dispute settlement provisions were an extensive upgrading of the already ironclad provisions for dispute settlement contained in the U.S. model BIT at the time, and anticipated, for example, that international arbitrators could appoint experts (article 1133) and even issue interim measures of protection (article 1134), in addition to the usual remedy of damages. Its enhanced investor-state dispute settlement provisions even permitted the consolidation of claims (article 1126).[5]

If, as some suggest, studies of the economic impact of investment agreements need to take into account, among other things, whether the treaty in question includes sufficiently strong investor guarantees that could assuage investor concerns and affect their decision to invest (or to remain once invested), there is no such concern with Chapter Eleven. As I have previously suggested, NAFTA's Chapter Eleven is, especially as compared to most European BITs, a BIT on steroids - at least insofar as the investor is concerned.[6] Looking to the NAFTA for evidence of powerful economic effects on Mexico also makes sense insofar as this treaty involves not one but two wealthy states as parties, one of which has been the top exporter of foreign capital in the world and is in close geographical proximity to the third, much poorer party.[7] On the surface, one could scarcely imagine a better test case for determining whether concluding an investment treaty has a favorable impact on FDI flows to a poorer contracting state. If, on the other hand, no such favorable conclusions can be reached with respect to Mexico more than ten years after such a treaty is concluded, the general case that any investment agreement can be given credit for positive economic results on a developing country partner would be considerably weakened.

Why the Test Case Is Hard

Unfortunately for both advocates of investment agreements and their detractors, the Mexican case, on closer inspection, is not an ideal test study and is even less a good subject for forecasting the economic (or other) effects of the over 2000 BITs around the world today. More than a decade after its conclusion, the NAFTA continues to invoke polarized and contradictory reactions, including from economists, on both sides of the U.S.-Mexico border. Although many of the rosy predictions of the NAFTA's early proponents, as well as the harshest fears of its detractors, have been discredited, and views of both the anticipated benefits and consequential harms have been tempered, few minds have been fundamentally changed about the relative merits of this agreement, or its investment chapter. These conflicting sentiments are also reflected in Mexican public opinion polls which suggest a more or less even split among those who believe that "globalization" has been a positive or a negative for Mexico and strong sentiments against permitting foreign investment in the oil, electricity or gas sectors, despite majority support for the proposition that foreign investment generally is beneficial.[8] In addition majorities of those polled, in both Mexico and the United States respectively, apparently believe that the NAFTA has benefited the other country more than their own, despite majority support in both countries for extending the principle of free trade to the whole American continent.[9] Such conflicted sentiments reflect the difficulties in attributing either harms or benefits to the NAFTA itself.

Disentangling cause and effect, a perennial problem when considering the economic impact of any BIT, is especially difficult in the NAFTA case. Apart from the usual methodological difficulties of any such efforts – lack of information, incommensurable information based on different systems of classification, disagreement over when to begin or end assessing impact – determining the economic impacts of Chapter Eleven is made immeasurably more difficult because it is only one chapter in a much broader trade pact, which included unique side agreements on labor and the environment, along with four other modes of dispute settlement apart from investor-state arbitration. As will be addressed below, it is nearly impossible to disentangle the favorable and unfavorable trade impacts of this agreement, including its impact on Mexico's trade deficit and export performance, from its favorable or unfavorable impact on FDI flows. Because of the difficulty in disentangling the effects of its investment chapter from the possible effects of this rest of this trade pact, the NAFTA's lessons for other investment agreements that are not similarly embedded in comparable free trade arrangements are not at all clear. The NAFTA case may suggest few generalizable conclusions about the benefits or detriments of bilateral investment agreements that are not part of a broader trade package.

A more fundamental difficulty is that Chapter Eleven represents the culmination of a multi- year effort by Mexico to adhere to what others have called the "Washington consensus" on how best to "grow" one's economy. While, as is discussed in the conclusion below, there is some dispute about which reform proposals are essential to this "consensus" and whether Mexican government officials generally fulfilled all of these, there is no question that even before the NAFTA was in place Mexico had been engaged in a number of actions to encourage foreign investment, privatize sectors of the economy formerly run by the state, and remove unnecessary government regulation. Mexico's multi-fold efforts to liberalize its economy, beginning long before the NAFTA was concluded, further complicate assessments of the NAFTA's impact. Mexico's most recent attempt to permit more foreign investment and to privatize started long before 1994: when it, for example, initiated its maquiladora program (to encourage assembly facilities in border towns along the U.S.-Mexico border to produce export goods for the U.S. market) in 1965, carried out extensive economic reforms in the mid-1980s under Miguel de la Madrid, and acceded to the GATT in 1986.[10] Although detractors and proponents of the NAFTA agree on little else, all agree that the real purpose of the NAFTA, especially its Chapter Eleven, was not so much to promote further liberalizing changes in Mexican laws or policies, but to "lock in" changes that had begun to take effect at least by 1988. To the extent the NAFTA agreement itself has produced economic effects within Mexico, presumably these emerge not from dramatic legal changes in Mexican laws and policies required as part of the treaty implementation process but from more subtle effects produced by the *codification* of then existing Mexican policies – that is, from the fact that by entering into this international commitment Mexican government officials were: substantially raising the cost of breaching investor contracts or rights, making it easier to deflect internal protectionist pressures, validating their government's credentials as an open economy, reducing the transactional uncertainties for economic agents at least within the three NAFTA countries, and increasing their country's links to the U.S. (and the global) economy.[11] This complicates empirical assessments of economic impact at least to the extent the focus remains on determining, for example, whether the NAFTA agreement itself increased FDI inflows into Mexico, as opposed to determining whether Mexico's own domestic liberalization policies achieved this goal. Predictably, the fact that many Mexican economic reforms preceded the NAFTA helps to explain debates about when to start assessing its impact. Proponents of the NAFTA like to argue that the treaty's economic effects need to be measured from the start of Mexico's liberalization process, say the late 1980s, when FDI flows indeed increased substantially and the Mexican economy was doing relatively well, or at least from the start of the three year period of the NAFTA's negotiations – during which there was a substantial increase in trade flows between the three NAFTA countries presumably in anticipation of the pact's successful conclusion. Detractors of the treaty, however, are more apt to look at the decrease in FDI flows and disastrous economic results immediately after the treaty came into effect, especially from 1994-1995, when Mexico was in the midst of a serious financial crisis.

The impact and meaning of "extraneous" events that followed Mexico's accession to the NAFTA - such as the Mexican peso crisis of 1994-95, the U.S. high tech boom and later bust, cyclical conditions in other countries, and Mexico's accession to more than ten other free trade agreements - further complicates assessments of the impact of the NAFTA, and divides the treaty's detractors and supporters.[12] Detractors suggest that the NAFTA's failure to address the need to better monitor financial institutions along with attendant "irrational exuberance" over Mexico's economic prospects as the pact was concluded contributed to the peso crisis. Proponents argue instead that the NAFTA had nothing to do with a crisis that was rooted in distinct macroeconomic policy mistakes. Regardless of who is right, the fact remains that for many in Mexico it is hard to forget that the beginning of the NAFTA era coincided with a serious deterioration of the Mexican economy (resulting in a collapse of the Mexican peso from 3.4 to at one point 7.2 per dollar, along with 52 percent inflation over the course of 1995). It also coincided with a Zapatista rebellion in the southern state of Chiapas that was timed to begin precisely when NAFTA took effect, on January 1, 1994, and was intended to focus on the pact's alleged bias in favor of Mexico's more modernized northern states to the neglect of the historically poor and more rural south. Public perceptions in Mexico continue to be affected by these events – as is suggested by the conflicted results in Mexican public opinion polls mentioned earlier with respect to the merits of the NAFTA.[13]

Another reason for differing assessments about the economic effects of the NAFTA on Mexico lies in differing perceptions of what the baseline for such assessments ought to be. For detractors of the NAFTA, the baseline for assessing NAFTA's impact on overall growth is either the relatively high growth rates achieved for the Mexican economy in the best years when it was adhering to an import-substitution model (about 6 percent) or annual potential growth rate as estimated by OECD economists (in excess of 6 percent).[14] As compared to these rates of growth, the annual real Mexican GDP growth rate actually achieved from 1994 to 2003 (about 2.7 percent annually) is anemic and disappointing.[15] For NAFTA proponents, however, the appropriate baseline is neither growth rates achieved in the past under different world economic conditions nor the best possible hypothetical rate in an unreal academic setting but what the Mexican economy would have achieved in the absence of the NAFTA or the liberalization reforms that preceded it. Proponents argue that thanks to the NAFTA, the Mexican economy was able to recover much faster (that is by 1996) from a serious crisis and was able to avoid the usual disastrous recipes usually followed by developing countries in the wake of balance of payments problems (namely trade protection and capital controls). They also suggest that the NAFTA was an economic success from the standpoint of Mexico because the existence of the pact made it more likely that the United States (and the World Bank) would offer the lifesaving financial assistance provided in the wake of the peso crisis, because it forced Mexico to adhere to tried and true formulas for recovery (fiscal constraint, tight money, currency devaluation), and because the pact helped spur an export-led recovery since 1995.[16] Baselines also differ among detractors and proponents on such matters as employment rates or FDI rates of growth.[17]

A final reason for differing assessments of the impact of the NAFTA on Mexico derives from strikingly different perceptions of what are the appropriate "economic" goals or targets that ought to be measured. Traditional economists are apt to focus on annual GDP rates, growth in imports and exports, rates of FDI flows, employment rates, and perhaps the rise or fall of real wages. Those economists who believe that the influx of FDI generally produces "spillover" effects are curious about, in addition, whether there is evidence that incoming FDI flows have generated increased or decreased competition among local producers in Mexico or backward linkages within the Mexican economy, along with a more vibrant or competitive indigenous industrial base.[18] But others, influenced by trends in UN institutions to measure progress with respect to "sustainable development," also want to take into account many other factors, such as whether there is a growing congruence in wage or education skills among all three NAFTA parties, whether the NAFTA is lowering (as predicted) migration flows into the United States, whether the treaty has had any effect on preexisting regional disparities within Mexico in terms of FDI flows or employment, whether it has widened or narrowed gaps between rich and poor even if overall wages are rising, or whether it has had any tangible effects on either the production or enforcement of environmental or labor standards. Others, encouraged by advocates of free trade and investment who have suggested that a liberal economy encourages democratization, respect for human rights and the rule of law, along with less corruption, want to go farther afield to see whether these benefits have indeed emerged in the wake of economic liberalization.

And for those more attuned to legal developments, the additional relevant questions to address are whether the processes set out in Chapter Eleven for resolving investor-state disputes are working, as expected, to decrease frictions between private investors and their host governments, to stabilize mutual expectations to the benefit of regional trade and investment integration, and to produce more harmonious and predictable interpretations of relevant laws, or whether, on the contrary, investor-state dispute settlement under the treaty is generating counterproductive results injurious to these expectations.

As this laundry list of possible evaluative factors suggests, one reason why assessments of the NAFTA differ as much as they do is because evaluators are looking at different things, as well as filling their ledgers of pluses and minuses on the basis of different timeframes.

For these reasons, this chapter merely reproduces some of the salient economic data over the course of eleven years of the NAFTA. I leave to others to determine the extent to which the NAFTA agreement itself (or its investment chapter) can be credited or blamed for these effects, although, as indicated in the conclusion, I draw from the Mexican case study some tentative assessments of the problematic aspects of the liberalizing formula for economic development embodied in the NAFTA.

Trade and Investment Flows

As is stated in the NAFTA's article 102, one of its key goals was to facilitate cross-border trade in goods and services and substantially increase investment opportunities in the territories of all the NAFTA parties. There is little question that there has been a sharp expansion of regional trade and investment flows since the NAFTA has come into effect. From 1993 through 2004, U.S. merchandise exports to Mexico increased by 166 percent while its imports increased by 290 percent. While two-way U.S.-Mexico merchandise trade has grown 227 percent, U.S. trade with non-NAFTA countries increased only 124 percent in the same period. Much of this trade is related to foreign investment since, as discussed below, a considerable degree of Mexican FDI exists principally to import U.S. and Canadian components and export finished products duty-free to the huge U.S. market. Maquiladoras, many of which are located just south of the U.S. border, accounted for about 25 percent of total Mexican imports and more than 40 percent of total Mexican exports in 1993, even before the NAFTA took effect and their share of trade flows grew during the NAFTA – to, for example, about 35 percent of imports and 50 percent of exports in 2002.[19]

At the same time, as Hufbauer and Schott indicate, it is difficult to say how much of the increase in trade flows would have occurred without the NAFTA given long-term trends in trade flows in the region and the world.[20] It is also clear that the Mexican economy's growing integration with the U.S. economy, whether or not this is attributed to the NAFTA, has come with a price: Mexico's trade deficit and overall growth rate is now very much tied to boom and bust cycles within the United States so that, when the U.S. entered into a recession and a slow recovery in 2000, or when U.S. importers of goods turned to more competitive suppliers from East Asia, Mexico felt these effects in far more dramatic fashion than did the much larger U.S. economy.[21] There is considerable truth in the comment that, at least since the NAFTA, when the U.S. economy develops a cough, the Mexican economy develops pneumonia.

The connection between trade and FDI flows is perhaps clearest in, for example, automobiles (which accounted for 22 percent of Mexico's total exports in 2003), where Mexico has attracted significant FDI not only from the United States, but Japan and Germany, thereby increasing its trade in autos five-fold from 1993 to 2003.[22] This is the sector that is most likely to be cited for exhibiting the multiple benefits traditionally associated with incoming FDI, such as the production of backward linkages that permit beneficial specialization for Mexican manufacturers of auto parts, opportunities for emulation of best practices (as in production processes, quality control procedures, research and development, and marketing), greater access to international markets, and greater possibilities to take advantage of economies of scale and other efficiencies.[23] But not everyone attributes the relative success of the Mexican auto industry to the NAFTA. Even free trade proponents acknowledge that many, if not most, of the liberalizing changes that produced this success story were in place before the NAFTA was concluded and that the pact had only indirect effects on the integration of the auto industry.[24] There is also dispute about the nature and quality of the attendant FDI spillovers. Some analysts suggest that some forms of incoming FDI, like that associated with maquiladoras and their tendency to import inputs for their assembly lines, may have produced adverse backward linkages that, at least in the short run, have bankrupted local Mexican suppliers before they had a chance to become more efficient and competitive.[25] For this reason, some contend that "the neoliberal integration strategy has undermined, rather than nurtured, Mexico's endogenous productive capacities" and that "in terms of Mexico's long-term prospects for sustainable industrial development, the patient is not well."[26]

By comparison, agricultural trade and trade in extractive industries has increased more moderately between the three NAFTA countries because, in part, of the NAFTA's long phase out periods on tariff reductions - to the detriment of Mexican farmers (and U.S. and Canadian consumers). Energy trade has also been something of a disappointment but the NAFTA can scarcely be blamed for the fact that Mexico is now a significant net importer of natural gas from the United States and maintains its ban on FDI in the energy sector, dating from a provision in its 1917 Constitution declaring all subsoil minerals the property of the Mexican people and the state.[27] Although intra-regional trade in services is much more difficult to track or to estimate, it appears also to have grown significantly over the life of the NAFTA, growing from an estimated $44 billion in U.S. two-way trade in services with its NAFTA partners in 1993 to $74 billion in 2003, a 70 percent increase. (But note that services trade growth between Mexico and the United States, although up 59 percent over this period, was significantly less than the growth of U.S.-non-NAFTA countries trade in services (which grew an estimated 91 percent over the period).)[28] Although Mexico and the United States fought highly publicized battles during this period over the liberalization of trade in telecon services and cross-border trucking, the most visible manifestation of liberal trade in services for Mexico has been in financial services. While the NAFTA mandated liberalization in this sector only for North America, Mexico choose to open this sector to all. The result was that the foreign share of Mexican banking assets increased from 1 percent in 1994 to 90 percent by 2001.[29]

While Spanish banks have been major investors, Citigroup, the (U.S.) Bank of America, and Scotiabank of Canada have also made high profile investments over the period, and Citigroup's $12.5 billion purchase of Banamex, Mexico's then largest bank, single-handedly increased incoming FDI flows in 2001.[30]

According to UNCTAD's Foreign Investment Reports, Mexico enjoyed an FDI boom over the course of the NAFTA, with its FDI stock growing from $33 billion in 1994 to $166 billion by the end of 2003. The stock of U.S. FDI in Mexico went from $17 billion in 1994 to $61.5 billion by the end of 2003.[31] This was an annual influx of foreign capital of about $13 billion, nearly three times more than the yearly average of $4.5 billion between 1988 and 1993.[32] About half of these FDI flows were in manufacturing[33] and the vast bulk of all Mexican FDI flows were from the United States.[34] Although this is a substantial increase, note that the increase was comparable to the increase in U.S.-two-way FDI with non-NAFTA countries, which increased by 333 percent between 1989 and 2003.[35] Notably, the increase in FDI from the U.S. has not been consistent over the period but took a significant hit during the 1994-95 Mexican peso crisis, while greenfield investment has declined since 2004.[36] About half of the U.S. FDI stock was accumulated after 1998 and represents major investments in financial services (such as the purchase of Banamex) and in manufacturing.[37] Ironically, due to the peso crisis which immediately followed NAFTA's entry into force, the most immediate apparent "consequence" of the NAFTA was a significant decrease in incoming FDI.[38] Indeed, given the uneven and inconsistent nature of FDI flows as well as the heightened expectations generated by the NAFTA, some analysts report disappointment with the net FDI flows over the life of the NAFTA, as compared to the spectacular rise in trade.[39] Nonetheless few doubt that the NAFTA has fulfilled at least one of its principal goals: to seal Mexico's appeal to foreign investors within North

America and beyond. As of the beginning of this year, Mexico was host to a larger stock of foreign FDI than all other developing countries except China and Hong Kong.[40]

Far from sparing Mexico from the ebbs and flows of global FDI flows, the NAFTA appears to have made the Mexican economy all the more sensitive to global trends and cycles. Like most developing countries, Mexican inflows of FDI are now increasingly threatened by the appeal of China to both traders and investors, and like most developing countries, Mexico experienced a decline in FDI flows in 2003. Nonetheless, analysts credit both the NAFTA and Mexico's proximity to the world's largest market for its continuing appeal to foreign investors. It is also clear that Mexico has benefited from a far more substantial increase in U.S. FDI flows than has Canada.[41] At least one analyst has suggested, however, that the NAFTA has had no significant effect on incoming foreign portfolio investment, either in the short run or long term, since such flows remain more dependent on perceived profitability and short term risk than is permanent FDI.[42]

A less positive source of foreign capital for Mexico has been an ever rising level of remittances from the estimated 9.9 million Mexican-born residents now living in the United States. These have grown from $3.5 billion in 1994 to $16.6 billion in 2004, a surge that is greater than the increase in FDI flows over the period and, in 2003, constituted a source of foreign cash that actually surpassed net foreign inflows from FDI.[43] Although some of the increase in remittances is due to the increase in technology and banking services that make such transfers easier, it also reflects one of the disappointments of the NAFTA "success" story that will be further addressed below: namely its failure to reduce migration flows into the United States.

More troubling for Mexico has been the unevenness of the distribution within Mexico of the surge in trade and FDI flows experienced since 1994. This unevenness predated the NAFTA and continues today. In 1994, the

Mexican border states accounted for 82 percent of the maquiladora plants and of maquiladora value-added. By 2004, there was only marginal improvement, with the border states accounting for 79 percent of these plants and of maquiladora value-added.[44] Other studies confirm that most of the incoming FDI has been concentrated in about six of Mexico's states, namely those in the federal district and along its Northern frontier, for a variety of reasons including geographical proximity to the United States and more investor-friendly conditions in those areas (such as higher education rates).[45]

To be sure, analysts do not blame the NAFTA itself for the uneven nature of FDI flows. Most contend that the FDI flows would have been more evenly distributed and would have been greater in absolute terms if the less advantaged Mexican provinces had reduced investor concerns over crime or corruption, stabilized the local legal environment, provided for better infrastructure (such as highways and schools), and increased the supply of energy.[46] Others point out that uneven FDI flows are inevitable since even those changes that most analysts argue continue to be necessary if Mexico is to increase its economic development – such as better roads – are bound to produce uneven regional effects since the relative benefits of better transport, for example, differ from sector to sector (and therefore region to region) – benefiting the export of tobacco, beverages, textiles, autos and electronics, but barely affecting the export of food, chemicals, rubber or metallic products and services.[47]

Economic Growth

While the U.S. and Canadian economies performed well over the NAFTA period, growing by average annual rates of 3.3 and 3.6 percent respectively, Mexican growth, as noted, has lagged behind at an annual rate of about 2.7

percent for most of the NAFTA period.[48] According to the OECD's 2005 economic survey, however, Mexican growth was expected to be a little more than 4 percent over the 2005-2006 period.[49] Assessments of how much of a disappointment this growth rate is, as well as whether the NAFTA can be blamed for it, predictably differ between free traders and their detractors.[50] NAFTA proponents argue that NAFTA, and the primarily export-led growth it helped to produce, can only explain a very small part of a country's growth rate and that countries like Mexico need to engage in structural reforms to correct other rigidities in their economies – such as a lack of access to credit -- if they are to achieve stellar growth rates.[51] They contend that the trade and investment flows generated or encouraged by the NAFTA are, nonetheless, the reason for Mexico's growth after its sharp recession in 1995 and that its annual rate of growth would probably have been even less absent the NAFTA.[52] According to one study, NAFTA generated a welfare gain of 0.1 percent of GDP for the United States, 0.7 percent for Canada, and 1.6 percent for Mexico.[53] Detractors point to the OECD's estimate that Mexico could potentially grow at an annual rate of 6 percent, as well as the fact that the Mexican annual growth rate was 3.7 percent in the financially tumultuous 1980s and 6.7 on average annually under the discredited import-substitution era of the 1970s.[54] They also argue that the kind of growth encouraged by the NAFTA, namely export-led growth primarily with one country, the U.S., is overly dependent on the weaknesses of the U.S. economy and overly affected by the rapid expansion of the relative market share of manufacturing exports to the U.S. from more competitive countries, such as China.[55]

Employment

Most analysts now discredit the predictions of NAFTA advocates that there would be a substantial increase in jobs produced on both sides of the U.S.-Mexico border as a result of the treaty, such as Mexican leaders' original projections that the NAFTA would create one million new jobs each year and dramatically reduce the number of Mexicans relying on subsistence wages. But most are equally skeptical that there is any evidence of the mass "sucking sound" of U.S. jobs south, as predicted by Ross Perot and Pat Choate (who projected up to 5.9 million lost jobs in the U.S. as a result of the pact).[56] While employment levels in the formal sector increased in all three NAFTA countries over the 1993-2004 period, showing a modest net increase from 32.8 million jobs to 40.6 million in Mexico for instance, most economists attribute such gains to macroeconomic policies, the flexibility of a nation's labor force, the level of worker skills, or technological developments, and not the level of increase of trade or investment flows.[57] Not even NAFTA proponents would today suggest that the pact has proven to be a significant driver of employment in Mexico.[58] Determining the number of jobs lost or gained as a result of the NAFTA or even during the period that the treaty has been in effect is all the more complicated by the lack of hard data, particularly about the substantial informal sector in Mexico (estimated to explain almost 40 percent of all Mexican jobs)[59], and by the lack of information in Mexico comparable to that produced by the United States assistance program for U.S. workers dislocated in import-competing industries. Further, even those who have attempted to estimate the number of jobs "lost" in the United States as a result of re-location to Mexico find it hard to determine the number of jobs that were presumably created in the United States as a result of trade and investment liberalization, as through efficiencies attributed to specialization in goods produced or jobs produced because of additional exports.[60]

Some suggest that the sheer level of magnitude of the number of jobs that can be said to have been affected by trade and investment flows suggest that the treaty did not have a significant impact on employment levels, whether in the United States or Mexico. Even though average annual U.S. FDI flows into Mexico rose from $2 billon pre-NAFTA to $5.7 billion over 1993-2003, this level of FDI flows is a 'drop in the bucket' compared to those who regularly are dislocated from jobs on both sides of the border irrespective of FDI flows. It is estimated that from 1994 to 2002, only 1,351 businesses relocated from the U.S. to Mexico, an amount equivalent to about 4 percent of total annual U.S. business relocations.[61] By comparison, normal processes associated with job dislocations within the United States ("churning") are estimated to dislocate some one million workers per year alone.[62]

Aggregate figures are less likely to affect political perceptions within Mexico than localized employment effects by region or sector. For Mexico, the most evident employment effects usually attributed to the NAFTA in the popular press are the rise in jobs with maquiladoras at least through 2000 - which employed 540,000 in 1993 and some 1.34 million in October 2000. But the Mexican press has also stressed the decrease in such jobs thereafter. Employment in maquiladoras, which represented 30 percent of total Mexican manufacturing employment in 1994, fell to 1.06 million by December 2003 (or about 45 percent of manufacturing employment), a drop of 21 percent, thanks to the slowdown in the U.S. economy.[63] For these reasons, the maquiladora industry has been described as the "shock absorber" of the U.S. manufacturing sector.[64] Another clear trend over the same period has been a substantial decline in agricultural employment, particularly in Mexico's rural south, a product of Mexico's reform of its ejido system as well as the ever greater appeal of higher wages associated with manufacturing and urban areas in the north. For good or ill, the NAFTA is associated with a steady and substantial migration north within Mexico, such that the share of agricultural employment in Mexico fell from 26 percent of total employment in 1994 to 18 percent in 2001.[65] The NAFTA is also blamed at least in part for many other structural dislocations within the Mexican economy with occasionally severe (if localized) employment effects. As would be expected in a liberalizing environment, many small and medium-sized Mexican firms went out of business either during the peso crisis or as a result of competition by incoming multinational firms. Between 1993 and 2000, the number of Mexican based manufacturing firms fell by 9.4 percent.[66] The results in worker productivity post-NAFTA have also been disappointing, as is suggested by Hufbauer and Schott, who conclude that the "prediction by NAFTA supporters that free trade would foster strong productivity growth has so far materialized only in export-oriented industries, such as autos."[67]

NAFTA proponents note, however, that despite all of these caveats, the total number of employed Mexican workers increased by more than 8 million and the percentage of the working age population that was employed rose from 84 percent to almost 98 percent between 1993 and 2003. This was an average annual employment growth of 3.3 percent, despite the large downtowns of jobs in 1995 and a smaller downtown in 2001.[68]

Inequality

Those who predicted that NAFTA would produce a convergence of U.S. and Mexican GDP per capital income levels or other types of convergence between the two economies, such as convergence in cross border prices of goods, have been disappointed. By contrast to the experience of the European Union, there is no evidence of price convergence over the period of the NAFTA, presumably because exchange rate volatility was left undisturbed by that agreement.[69] As for convergence of U.S.-Mexico income levels, the results are a draw with one study by the World Bank suggesting that the rate of convergence increased over the 1994-2002 while another study suggesting the opposite.[70] Some contend that Mexican income inequalities sharpened with the beginnings of trade liberalization in the 1980s and have continued over the life of the NAFTA in part because liberalization inordinately rewards those with greater education and skills.[71]

For the average Mexican, the notion that Mexican and U.S. salaries, even when they work for the same companies doing roughly the same work, should be comparable remains ludicrous eleven years after the entry into force of the NAFTA. For example, although Mexican autoworkers earned about 30 percent more than the average Mexican manufacturing worker in 2002, they still earned, thanks in part to lower union levels, $5.12 U.S. dollars per hour as compared to $31.67 for U.S. autoworkers.[72] There is also little evidence that the higher wages offered by foreign investors have diffused into Mexican domestic firms engaged in the same type of work.[73]

The continuing relatively high levels of Mexican agricultural employment as well as the boom and bust aspects of the maquiladora industry help to explain the decline in real wages in Mexico over the 1994-2003 period, a decline of some 5.2 percent (or from 100 pesos per hour worked in 1994 to 94.8 in 2003 (including steep declines to 77.9 pesos per hour by 1997)), despite estimated productivity increases of some 24.7 percent over the same period.[74] Real wages in the maquiladora industry also declined over the same period but have also rebounded considerably after 1997. While in general real wages in Mexico fell by 22 percent in the wake of the peso crisis, they rebounded to reach 95 percent of their pre-crisis level by 2003. While analysts argue that these declines can be attributed to many factors apart from NAFTA (such as institutional factors within Mexico which make wage increases difficult), many in Mexico associate such declines with the onset of the NAFTA and Mexico's integration into the U.S. (and the global) economy. Of course, insofar as real wages have declined, this translates to shrinking incomes and declining consumer demand.[75]

Those looking to greater income equality within Mexico have been disappointed. Although by certain measures the level of inequality within Mexico has slightly decreased – the Gini coefficient declined somewhat from 53.9 in 1994 to 51.4 in 2002[76] and the share of the Mexican population living on less than $2 a day declined from 42.5 percent in 1995 to 26.3 percent in 2000 – many commentators see a greater divergence in incomes in the wake of the NAFTA, not only between middle and upper class Mexican professionals and those still engaged in agricultural jobs, but also at least between the northern frontier states of Nuevo Leon and Sonora and those living in Chiapas and Oaxaca.77 This is borne out by the income statistics: between 1995 and 2000, for example, real per capita income rose 17 percent in the border states compared to 13 percent in other Mexican states and real wage growth has been even higher in regions with higher levels of FDI and higher exposure to foreign trade.[78] It is also suggested by urbanization rates and population growth in the major cities in Mexican border states. Over the 1990-2000 period, Ciudad Juarez and Tijuna, for example, have grown by 52.6 and 62 percent respectively (while the total population of Mexico grew only 20 percent over the same period).[79]

To the extent the NAFTA is associated with maquiladoras, wages in that sector have been a mixed blessing. Maquiladora workers are paid less than Mexicans working in manufacturing as a whole, a fact that in and of itself is not surprising since the average skills needed for maquiladora jobs are lower. NAFTA proponents also argue that the decrease in real wages in this sector over the 1993-2003 period reflect a number of factors not directly connected to the NAFTA: namely, the peso crisis, the decrease in maquiladora employment after the year 2000 in reaction to U.S. economic developments, and a greater tendency for maquiladoras to move further south into Mexico in search of cheaper labor.[80] Such explanations fail to satisfy those who were expecting a substantial and immediate post-NAFTA rise in real wages throughout Mexico - and not merely for those working for electronics firms and auto makers in northern town. Perhaps most politically salient is the fact that for those living in rural Mexico - where about 65 percent of the most extreme poor live - inequality has appeared to worsen or stay the same over the life of the NAFTA, with the richest 10 percent of rural households increasing their share of total income from 27 percent in 1994 to nearly 32 percent by 1998, for example.[81] Zarsky and Gallagher contend that by 2002 the richest 20 percent of Mexicans continued to command 50 percent of its total income, more than in 1984, while the poorest 20 percent continued to receive less than 4 percent, as in 1984.[82] Inequality may also have worsened from a global perspective – if Mexico is compared to other OECD countries - since, for example, as of the year 2000 Mexico ranked last in the OECD on the combined score for reading and literacy among 15 year old students and had fallen to 30th among countries with respect to percentage of its population in the latest generation that had completed upper secondary level education.[83]

For proponents of the NAFTA, these inequalities are not the result of the NAFTA but stem from Mexico's continuing inability to improve the business climate for foreign as well as domestic entrepreneurs by improving its inadequate physical infrastructure (as with respect to lack of highways, water and sewage in rural areas and southern provinces), improving its savings and educate rates, and eradicating corruption.[84] For NAFTA detractors, Mexico's inability to do these things is in part a product of its lack of resources – resources that have not, or at least not yet, emerged from the economic boom that NAFTA was predicted to generate.

Other Labor Conditions

Analysts agree that the most significant factor affecting the Mexican worker in the NAFTA era has been the peso crisis – which contracted the Mexican economy by over 6 percent in a single year (1994). Putting debates on the impact of the NAFTA on that crisis or recovery from it to one side, NAFTA proponents see little evidence of labor-related "races to the bottom." They note that average wages in foreign funded companies in Mexico are 48 percent higher than the national average, and that employment by such firms accounts for about 25 percent of the jobs created in Mexico (at least through 2001).[85] They also note that foreign investors have concentrated their activities not on the lowest skilled sectors but on the semi-skilled and have paid a wage premium for such workers, as with respect to building electronics components.[86] Those less apt to look for the sliver lining, however, note that foreign investors' focus on certain sectors have left other Mexican sectors and areas, such as agriculture, behind, that official unemployment rates (such as 2004's rate of 4 percent) severely understate the degree of Mexican unemployment in less formal sectors and count as employed those who have worked more than one hour over the past week (while those working 35 or more hours a week declined from 77 percent in 2002 to 71 percent in 2004), and the percentage of Mexican children who work stood at about 16 percent in 2004-2005.[87] Detractors also point out that while everyone agrees that the past decade have seen serious dislocations in the structure of Mexican labor markets, boom and bust periods of considerable magnitude, and continuing and perhaps aggravating regional disparities in labor conditions, Mexico continues not to have an explicit government program of unemployment insurance, much less programs comparable to those in the United States to provide worker training or other benefits to those whose jobs disappear as a result of trade or investment effects produced or encouraged by the NAFTA. For these reasons, as well as severe dislocations in the Mexican labor movement, labor advocates argue that Mexico has simply not been ready to provide for the needs of those workers caught up in the "sifting and sorting" of firms encouraged by the NAFTA.[88]

Environmental Degradation

The level of environmental degradation caused directly or indirectly by FDI flows, as well as whether Mexican environmental laws or the level of their enforcement have improved or deteriorated over the life of the NAFTA, remain contentious issues. NAFTA proponents argue that there is no evidence that the considerable environmental problems faced by Mexico today would have been solved or been ameliorated without the NAFTA, no evidence that foreign investors have engaged in much feared regulatory "races to the bottom," and, on the contrary, some evidence, as in electrical production, of a regulatory convergence towards the top (namely towards U.S. standards) in pollution standards by foreign investors.[89] They note as well that the growth in export-led industrialization in Mexico has not been accompanied by a shift towards those sectors known to pollute the most and that post-NAFTA trends suggest a decline in high pollution sectors like printed products and chemicals in favor of low pollution sectors like auto parts and services.[90] There has also been no flood of environmental dispute cases filed under the NAFTA side agreement. Some also point to positive changes in Mexican government capacity, as well as an increase in governmental inspections and a more assertive civil society sector, as evidence that the NAFTA's has had positive "green" effects.[91]

On the other hand, even NAFTA proponents acknowledge that the industrial boom in Mexican border towns has not been accompanied, at least on the Mexican side of the border, by the needed infrastructure development needed to handle the larger amounts of industrial wastes and residues or the greater demand for sewage treatment needed by rapidly rising urban populations. There is as yet no evidence that Mexico has been enjoying the benefits of the hypothetical "environmental Kuznets curve," namely the proposition that as income levels rise public demand for higher environmental standards rise as well. Indeed, commentators suggest that while Mexican income levels would predict better environmental outcomes, the sheer level of environmental degradation within Mexico as well as continued inadequacies in governmental regulatory efforts have "overwhelmed any benefits from trade-led economic growth."[92] This is certainly the case with respect to, for example, sewage treatment: as of 1997 Mexican authorities estimated that only 34 percent of collected wastewater was treated.[93] Despite the NAFTA, Mexico continues to spend less on environmental protection than any other OECD country.[94]

As with respect to labor effects, horror stories of localized environmental degradation, rightly or wrongly portrayed in the press as the product of trade and investment liberalization, have proven to be more politically salient than general statistics. For many Mexicans, particularly those living in Mexican border towns, the publicized violations of Mexican environmental laws by maquiladoras (which in 1997 are believed to be responsible for over 20 percent of all the hazardous waste generated in all of Mexico),[95] the worsening congestion and pollution issues emerging from the boom town conditions in Mexican border towns like Tijana, the many reported incidents of illegal dumping of hazardous wastes, along with the substantial amount of waste of all kinds exported from the United States, are the environmental problems most often attributed to the NAFTA.[96] It is also the case that the level of Mexican governmental resources devoted to environmental concerns remains but a fraction of those available to comparable towns across the U.S. border. For example, in 2002 San Diego city officials had 6.6 times the municipal revenue available to Tijuna city officials.[97] Although these inequalities are in part the result of structural rigidities in the way Mexican taxes are collected and distributed,[98] and not the product of the NAFTA, to environmentalists these predictable problems show that stronger environmental clauses should have been included in the treaty, along with greater inducements to increase the level of Mexican enforcement efforts than those in the NAFTA's environmental side agreement. Whether or not the NAFTA is to blame, few can point to much evidence that Mexico has increased the personnel or other resources devoted to environmental enforcement efforts, at least to a degree commensurate to the levels of growth and urbanization particularly evident in its northern and central regions.[99]

Migration

The hopes of NAFTA proponents that the agreement would stem the flow of unauthorized migrants north have not been satisfied. Indeed, the number of Mexican illegal immigrants in the United States doubled between 1990 and 2000, when these statistics were last collected in the U.S. census, with an annualized increase of 400,000 per year.[100] This is also suggested by population statistics within Mexico over the NAFTA period, which indicate that only 75 percent of those living in Mexican border states in 1995 had been born there (as opposed to 81 percent in the rest of Mexico), and yet the share of the total Mexican population living in these border states has remained relatively constant. This means that while substantial numbers of Mexicans have been moving northward over the life of the NAFTA, many remain in

Mexican border towns, perhaps working in maquiladoras, only for a short time and eventually continue their way across the U.S.-border.[101]

The NAFTA, of course, has no provisions either encouraging or discouraging migration flows among the three NAFTA parties; even its investment chapter does not provide for free movement of labor associated with such investment.[102] Nonetheless, among the many explanations for the apparent increase in Mexican emigration over the past decade, some relate to the NAFTA. While Mexican migration might be caused partly by the consolidation of land holdings in Mexico's southern regions,[103] sociologists contend those Mexicans who initially move north to work for maquiladoras producing U.S. destined goods become acclimated to working for foreign companies that produce U.S. goods and are understandably drawn to the prospect of doing the same thing within the U.S. for much higher wages.[104] It is also not clear when or if such migration flows will slow down. While migration flows may ultimately slow down for a number of reasons – such as increased post-9/11 border patrolling by the U.S., faster Mexican development, or the aging of the Mexican population[105] – for the moment, the economic trends believed to have been encouraged by the NAFTA, are seen, in hindsight, to have only encouraged, at least in the immediate term, cross border migration flows into the United States.

Dispute Settlement

Quite apart from an increase in trade and investment, one of the main goals of the NAFTA was to "create effective procedures" for its implementation, application, and joint administration, as well as to enable the "resolution of disputes."[106] Accordingly, Chapter Eleven provides for investor-state dispute settlement modeled on the then existing U.S. model BIT. As is well known, this method of dispute settlement, unlike the WTO's, turns private investors into the private attorneys general that enforce Chapter Eleven's terms, eliminating both the possibility that governments can screen claims to eliminate those that they prefer not to be heard as well as unfashionable gunboat diplomacy for the settling of investment disputes. But the NAFTA includes at least one political check on the ability of international arbitrators to make law in the course of settling disputes. It includes a provision whereby the three NAFTA parties can, if they all agree, issue interpretations of their agreement that will be binding on arbitrators charged with resolving investor-state investment disputes.[107]

Through January 2005, 39 investor-state disputes have been brought under the NAFTA's investment chapter: 10 against Canada, thirteen against the United States, and 16 against Mexico. The scorecard on these disputes, as of the end of 2004, when eleven of these were still pending, as kept by the principal U.S. government lawyer who has defended the United States in these NAFTA cases (now in private practice), Bart Legum, is six total victories for the respondent states, four partial victories for investors, while the rest concluded without a final award.[108] As Legum indicates, while the total amount of damages asserted in these claims was, through, 2004 $1.2 billion, the total recovery for the "successful" investor claimants was a paltry $23 million, amounting to a little under two cents on the dollar. While the United States has won every case that has proceeded to judgment, Mexico has lost two such cases and has had to pay a total of $18 million on claims that when filed alleged nearly $200 million in damages. Based merely on these numbers, as well as the fact that insofar as we know investors who have brought claims have spent considerable sums in the course of litigation, ranging from $3.5 million to $12 million, it would appear that the NAFTA governments have little to fear from investor-state dispute settlement and that, if anything, it should be the investors who ought to be clamoring for changes in investor-state dispute settlement that would make alternatives to adjudication in the potentially biased courts of their host states easier or at least less costly. Of course, win-lose figures with respect to the relatively few investment disputes that are not quietly settled in the shadow of NAFTA dispute settlement are not a particularly good measure of the long-term benefits to investors of the treaty.

But a decade of NAFTA investor-state disputes suggests that has been the three NAFTA governments, and especially the United States and Canadian governments in particular, who appear to be having second thoughts about the wisdom of investor-state dispute settlement, at least as originally conceived in the NAFTA. Their experience as defendants in NAFTA cases appears to be generating narrower conceptions of investor rights in subsequent U.S. and Canadian investment treaties, cautionary new negotiation instructions by the U.S. Congress about future investment agreements that suggest a return to the Calvo doctrine, and a Commission interpretation by the three NAFTA parties that attempts to narrow one of the core investor protections in Chapter Eleven. Accordingly, these win/lost numbers mislead. Contrary to what the record of mostly governmental victories would suggest, the NAFTA parties appear to be suffering from buyer's remorse. Interestingly, although one would have thought that Mexico, a country that has lost as many cases as Canada, has had to date only one of its investors bring a claim, and has had to pay about nine cents on the dollar for every claim brought (including with respect one of the most controversial judgments yet rendered under the NAFTA, in Metalclad), would be particularly upset about the state of investor-state dispute settlement, Mexican government officials have so far permitted U.S. and Canadian officials to take the lead in suggesting changes and appear relatively sanguine, at least in their public pronouncements, about the results achieved to date under investor-state dispute settlement.

U.S. and Canadian officials clearly have been surprised by some of the types of claims being brought as well as some of the dicta uttered by arbitrators even when ruling either in their favor or in granting investors only very partial victories. Concerns have emerged in the U.S. Congress, among environmental groups, and by some scholars about the prospect that the expropriation and other guarantees in Chapter Eleven could be used to challenge environmental regulations issued by federal, state, or provincial governments.[109] Indeed, about a quarter of all investor-state disputes brought to date have involved environmental concerns.[110] Concerns were prompted by, for example, claims against the regulation of gasoline additives in Ethyl and Methanex or by Metalclad's challenge of a denial of a building permit by a municipality to build a hazardous waste disposal facility by a municipality and the successful challenge to an environmental decree issued by a Mexican provincial governor in the same case. Some alarms were raised concerning the implications of the original Metalclad judgment, prior to being "corrected" by the enforcing court in British Columbia, which also suggested that an illegal expropriation could take place even without a outright seizure of property, provided government action led to a decrease in an investor's expected rate of return. Property law experts in the United States suggested that such a ruling was more protective of investor rights than even the United States Constitution and was therefore at odds with existing U.S. law. They were also critical of the suggestion in that ruling that the motivation behind an "environmental" decree was irrelevant provided that the decree had such adverse effects on the interests of an investor.[111] Such arbitral rulings and dicta prompted changes in subsequent U.S. investment treaties, including in its latest model BIT, a subsequent U.S. BIT with Uruguay, and U.S. free trade agreements with Chile and Singapore respectively. The changes attempt, for example, to align the expropriation rights in post-NAFTA investment agreements with existing U.S. law, while circumscribing the extent to which such clauses protect investors from "regulatory" takings designed to protect "legitimate public welfare objectives, such as public health, safety, and the environment . . . ."[112]

U.S. and Canadian officials have also been taken aback by the innovative interpretations urged by investor plaintiffs, including contentions that "fair and equitable treatment" requires transparent government measures that make it clear, for example, which government entity is in charge of issuing a final building permit and subject to what conditions; or that this guarantee is violated should any of the NAFTA governments violate other international obligations, as under the WTO covered agreements. (The latter argument, should it prove persuasive to investor-state arbitrators would, of course, turn Chapter Eleven's dispute settlement provisions into an alternative and presumably more investor-friendly venue for settling some WTO disputes.)

To correct such "misinterpretations," the three NAFTA parties issued their first Commission interpretation, on July 31, 2001, which expressly delimited the scope of article 1105 and restricted the meaning of fair and equitable treatment to "the customary international law minimum standard of treatment of aliens" and nothing else.[113] This change was also incorporated in subsequent U.S. investment agreements.[114]

As Bart Legum indicates, U.S. and Canadian officials have also become more aware of adverse public reactions, by members of their respective legislatures as well as prominent NGOs like Public Citizen, directed against the "secret" and "unaccountable" tribunals that pass on issues of great public import in the course of deciding investor claims. Accordingly, they have taken steps to release all documents filed in these cases, to permit amicus curia submissions, and even to permit the public to view NAFTA proceedings at the World Bank through closed circuit television.[115] The United States has also modified its post-NAFTA investment agreements with other countries to permit arbitrators to examine preliminary questions (including with respect to the legal sufficiency of the claim). This permits earlier dismissal of patently frivolous claims. Post-NAFTA U.S. investment agreements also seek to better protect the litigating interests of defendant governments by providing that investor claimants need to name their arbitrator at the time they give notice of arbitration and that claimants' notice of arbitration must be accompanied by their statement of claim.[116]

It has been harder for U.S. government negotiators of post-NAFTA investment agreements to respond to two demands made by the U.S. Congress when it renewed the executive branch's authority to negotiate free trade agreements: first, that an appellate body be established to hear appeals from investor-state ad hoc tribunals (and presumably to lessen the risk of off the wall judgments by irresponsible ad hoc arbitrators) and second, that the executive ensure in the future "that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States."[117] U.S. investment treaty negotiators have responded to the concern for additional checks on arbitrators' discretion by (1) including provisions comparable to the NAFTA Commission interpretation mechanism in bilateral treaties (as with respect to Uruguay); (2) providing for an interim review procedure whereby if either disputing party requests, the tribunal is required to transit a copy of its draft award on liability to both disputing parties and to other state parties to the treaty for comments that the tribunal must consider prior to issuance its final award; and (3) providing that if a convention enters force establishing an appellate mechanism for investor-state disputes (as under ICSID), the state parties will strive to have that mechanism apply under their investment agreement.[118] It has not yet proven possible for U.S. negotiators to comply with Congressional demands that an appellate body, presumably modeled on the WTO's, be put in place to stabilize investment law. The other demand made by the U.S. Congress is, of course, far more difficult to achieve since it is inconsistent with including in investment agreements any absolute standards not dependent on discriminatory treatment. Nonetheless, post-NAFTA changes to U.S. and Canadian investment agreements, as well as the NAFTA parties' first Commission interpretation, limiting the scope of the most significant "absolute" guarantee in investment agreements – the right to fair and equitable treatment – respond to these Calvo-type concerns.

Ironically, this apparent demand for a return to the Calvo doctrine, at least in terms of substantive results, is not being made by the one NAFTA party that historically adhered most religiously to that doctrine and indeed championed it for the world when a New International Economic Order (NIEO) was under serious discussion in UN fora, namely Mexico.[119] It is being led instead by the country that has done the most to undermine the Calvo doctrine around the world, including through odious gunboat diplomacy, namely the United States. This fact makes the precedents being set by the United States in the wake of the NAFTA all the more influential. Given the traditional leadership exercised by the United States on foreign investment issues, at least some other industrialized countries, in the wake of the U.S.'s backtracking on investor protections post NAFTA, also appear to be having second thoughts about how best to encourage investor-state dispute settlement. The recent Australia-United States Free Trade Agreement, for example, excludes an investor-state dispute settlement provision altogether. It would be interesting to see whether other countries emulate these changes in their own investment agreements or whether the rates of ratification of BITs slow down as a result of the post-NAFTA example set by the United States.

Conclusion

As noted, determining the "effects" of the NAFTA's investment chapter, positive and negative, on Mexico are problematic for a variety of reasons. What can be said with greater assurance is that the life of the NAFTA has coincided, although it did not necessarily cause, a period of considerable growth in trade and investment flows in Mexico, especially into Mexico's northern states and its central region, along with considerable urbanization and industrialization, particularly in Mexican border towns. Net economic growth in Mexico, however, has lagged behind that of Canada and the United States for much of the NAFTA period and much of the Mexican population, perhaps the majority, has yet to see tangible evidence that the NAFTA has improved their standard of living.

The NAFTA's investment chapter is also associated with some costs, at least in the minds of its critics, which, if polls are an indication, may include the majority of Mexicans. The ebbs and flows of Mexican trade and FDI flows are now very much linked to ups and downs of the U.S. economy, as well as competition from trade and FDI flows from lower cost producers elsewhere (as in China). Despite the increase in FDI flows, and a decline in the percentage of the Mexican population living on less than $2 a day, the gap between rich and poor within Mexican society, as well as its wealthier northern provinces compared to southern regions like Chiapas, remains stark, Mexican real wages have fallen, and the numbers of Mexicans drawn to migrating north and often to the United States, have only risen since the NAFTA came into effect. While there is no sign that Mexican laws on labor or the environment are less strict or well enforced than before the NAFTA and indeed foreign investors themselves appear to pay their workers more than the average Mexican worker and may adhere to higher environmental standards, the influx of FDI has not clearly produced, at least to date, demonstrable environmentally positive spillover effects on other Mexican enterprises. Evidence of other positive spillover effects stemming from foreign investment is scarce or ambiguous.[120] Many Mexican enterprises have suffered dramatic consequences from increased competition – as would be expected in any liberal investment environment. There is no evidence that Mexican government expenditures or enforcement efforts have kept pace with the rates of industrialization or the attendant negative environmental problems associated with economic growth (especially in northern Mexican states).

The NAFTA probably has exceeded expectations with respect to its perceived impact on trade flows. It has probably satisfied expectations with respect to FDI flows, at least in certain sectors tied to exports to the United States market. It has also probably satisfied the expectations of those who sought the pact to stabilize the rights of foreign investors as well as to enable such investors to remove their disputes with their host states from potentially biased national courts. But those who expected this free trade pact to accomplish a variety of social goals – to improve income equality, lower corruption, or improve the enforcement of labor or environmental laws – or to maintain Mexico's economic competitiveness globally remain disappointed.

Perhaps most surprising has been the reaction of the two states that used the prospect of this pact so effectively to change the Mexican landscape into one that is so favorable to liberal trade and investment. Over a decade into the NAFTA era, it is the United States and Canada - countries that have not suffered any dramatic adverse effects stemming from the pact – that are showing the clearest signs of buyers' remorse. These countries' changes to their subsequent investment agreements, prompted by perceived threats in investor-state dispute settlement, now threaten the expansion of Chapter Eleven to the entire Western hemisphere – no less than the fears of those other countries in the region that continue to fear the forces of the global market or those newly led by neo-leftist leaders intent on disassociating themselves with the "imperialist" United States. Thanks to the defensive measures of Canada and the United States, Chapter Eleven might eventually be regarded not as a progressive step towards ever more investor-friendly international obligations but as the high water mark of investor protection, never to be equaled.

It would be easy to end this chapter here: with a mixed ledger of accomplishments and harms and no clear conclusion about who or what is to blame. Yet, this conference has proven invaluable particularly to the extent its case studies apart from this chapter – dealing with recent Chinese, Argentine, and Indian experiences with FDI – evince a comparably "mixed" outcome. As Jurgen Illing notes, Argentina's attempts to privatize and even to tie its economic fate to the U.S. dollar culminated in an extremely severe economic crisis from which it is now recovering – but only after that crisis has engendered the largest number of foreign investment claims ever filed against one country in the history of ICSID and fevered responses by Argentine officials suggesting that they will refuse to comply with any and all awards rendered under Argentina's many BITs.[121] Anjan Roy's description of India's mixed experiences with FDI puts into context that country's highly qualified and measured approach to investment liberalization.[122] Even with respect to China, a country that is widely considered the poster child of FDI "success," the case study by Markus Taube suggests that relatively high rates of incoming FDI there have not (yet) yielded the "win-win" situation touted by free trade advocates, at least as measured by inter-regional equity or a number of social variables.[123]

As Matthias Herdegen points out in his closing remarks, these case studies confirm that incoming FDI, while it may be indispensable to the alleviation of poverty, provides no assurance of it.[124] Herdegen also suggests the traditional answer given by defenders of investment agreements:

namely that these accords do not relieve host governments of the responsibility to take care of their own house, including by providing the necessary public infrastructure (from potable water to public roads), an educated workforce, and a relatively uncorrupt government bureaucracy that is capable of, among other things, enforcing local laws and collecting taxes. According to this view, whether or not investment agreements actually produce an increased level of FDI flows (a question that remains contested),[125] investment agreements do not purport to contain a generalized model for governance or for the promotion of economic development and should not be blamed if governments continue to be run poorly or fail to develop. BITs and agreements like the NAFTA encourage, as the leading U.S. academic on investment agreements argues, only the first (and essential) steps for attracting foreign investors and for building a sound economy through "genuine libealization;" they leave much else for host governments and the multinational enterprises that seek to invest to work out for themselves.[126]

But it would be remiss not to mention a more radical critique of investment agreements and their economic premises based on the results achieved to date in countries such as Mexico. What if the disappointing results in all of these cases studies – and particularly in cases like Argentina and Mexico – is not an accident or the product of government mistakes unrelated to the investment agreements? Growth economists like Dani Rodrik of Harvard University argue that these disappointing results are the predictable consequence of "liberalization" policies that assume that certain institutional arrangements are uniquely suited to "first-order economic principles" such as protection of property rights, market-based competition, a regulatory framework that produces appropriate incentives, and a sound fiscal policy; he contends that the disappointing results achieved to date in some countries result from attempts to impose certain closely circumscribed institutional arrangements – including the privatization of all formerly governmentally run sectors and adherence to strict investment agreements – on all countries without sufficient attention to local context.[127] On this view, the Mexican case study is interesting not because of what it says or doesn't say about the effects of the NAFTA agreement as such but because of what it appears to say about the consequences of following the model de jour for economic development embodied by the "Washington consensus" – a model that includes, as a prominent feature, the conclusion of investment agreements like the NAFTA.

Rodrik argues that countries like Mexico or Argentina that have attempted to follow most rigorously what he identifies as 20 rules of "good behavior for promoting economic growth" embodied in the Washington consensus have not experienced the growth rates the traditional economists predicted; he contends that the states that have done better – such as the Asian tigers, along with some regions of China and, for a time, India – have deviated from these rules to a considerable degree and are the better for it.[128]

Rodrik is not against liberal investment flows or free trade. He does not deny the value of the "first order economic principles" identified above or that investment agreements like NAFTA embody them. His argument is more subtle: namely that igniting economic growth is not the same as sustaining it and that different contexts require different institutional mechanisms, particularly to achieve the more difficult task of achieving sustainable high growth rates over the long term. Rodrik contends that some "unconventional" government actions (e.g., government screening of incoming FDI, export performance requirements, differentiated treatment for foreign versus national investors or that distinguish different sectors or regions) appear in some cases to be consistent with the promotion of sustained economic growth.[129] For students of investment agreements what is interesting is the extent to which Rodrik's lessons of viable economic growth strategies may be inconsistent with some of the provisions of investment agreements, especially the NAFTA's, which as noted, discourages the screening of investment, prohibits export performance requirements, and requires non-discriminatory post-entry treatment of foreign investors – and makes departures from these investment guarantees extremely costly to governments given the rigors of investor-state dispute settlement. If Rodrik is right, one problem with investment agreements like the NAFTA's is that they go beyond establishing the minimal conditions for liberalization or for protecting basic property rights to foreclose some policies that would permit host governments to select among foreign investors in order to encourage particular kinds of backward linkages, to encourage FDI only in certain poor regions, or to impose conditions on FDI entry (e.g., requiring the hiring of a certain percentage of locals, the export of certain percentage of production, the purchasing of local components, or more than 50 percent local ownership).[130] Rodrik's critique of the Washington consensus implies that those investment agreements that embody it, such as the NAFTA (and other investment agreements with strong investor rights), make the mistake of assuming that failures to promote economic growth are invariably the product of *government* failures – particularly over-regulation or the failure to privatize – while ignoring (or in some cases even prohibiting) some forms of pro-active government intervention that address unique *market* failures in distinct settings that impede growth.[131] His argument is, in short, that the advocates of the Washington consensus and of investment agreements like the NAFTA have been overly confident in recommending a uniform and unnecessarily rigid set of institutional reforms for all countries, regardless of political, cultural, or other circumstances, and have failed to recognize that the fundamentals for a solid economy can be achieved via different routes.

Of course, defenders of the NAFTA would argue with Rodrik's fundamental premise – namely that Mexico (or

Argentina prior to its 2001-2002 economic crisis) really did adhere to the Washington consensus – as well as with his more pessimistic conclusions about the lack of demonstrable positive effects as a result of incoming FDI.[132] Mainstream economists continue to maintain that Mexico would have seen far higher rates of growth and positive "spillover effects" if it had followed the Washington consensus more closely and had, for example, privatized all sectors of its economy or been more "flexible" with respect to its labor laws. For these traditionalists, it is the failure to adhere strictly to every one of the rules of the Washington consensus, even those that are in the short term politically unpopular, not the rules themselves, that accounts for the failure to grow an economy. But Rodrik-styled critiques cannot be so easily dismissed – at least not with respect to Latin America, a region that as a whole did turn, over the course of the 1980s, away from an import-substitution model to a model of development much more consistent with investment agreements and yet saw its overall competitive position decline relative to the rest of the world. This is also region that, not surprisingly, has experienced in even more recent years – as in Venezuela, Brazil, Bolivia, Argentina, and Chile – a return of leaders much less publicly committed to liberalization modeled on what Washington wants. Several countries in the region are now contemplating the prospect of nationalizations and other forms of government interventions in the market at odds with the provisions (and certainly the premises) of most investment agreements. In terms of the domestic politics of countries like Argentina, Rodrik-type contentions now have considerable salience.

Even if one disagrees with Rodrik's analysis of the harms of the Washington consensus, his broader contention that development economists, who have since WWII often disagreed with each other and who have advocated diverging economic reforms to a confused Third World, need to be more humble about their current prescriptions, has considerable force. Certainly those advocates of investment agreements who once confidently predicted that such agreements would bring about a permanent turn to U.S.-styled investment liberalization as embodied in the NAFTA – consistent with Francis Fukuyama's thesis that capitalist democracies would usher in the 'end of history'[133] – should surely be a bit less confident today, given the political and economic developments in some of the developing countries that once took such predictions seriously. When the leading foreign policy journal in the United States, Foreign Affairs, believes it is time to ask who in Washington 'lost Latin America,'[134] Rodrik's call for greater introspection requires a fair hearing.

And if economists need to be more humble, international lawyers may need to heed the same call. Some international lawyers' predictions that an ever-rising number of investment agreements around the world would necessarily bring about a "rise to the top" in the protection of foreign investors are less likely to come true – not only as a result of developments in some developing countries but also in the United States.[135] Certainly, the prospect of ever-rising levels of global investor rights encouraged by MFN provisions in investment agreements and the high level of absolute protections achieved under investor-friendly agreements like the NAFTA dims if, as noted, the foremost advocate of such rights, the United States, is itself retreating from the high levels of investor protections accorded in the NAFTA.

It may also be erroneous to presume that the "culture of law" encouraged by investment agreements vis-à-vis foreign investors and the state will necessarily permeate and have a positive impact on the internal legal culture of treaty signatories, producing a harmonious result for both foreign investors and others needing protection of the law.[136] While BIT proponents are entitled to hope that the treaty standards applicable to foreign investors will foster broader government accountability, consistent, transparent, and predictable local regulations for all, a fair and equitable legal environment, and the uniform protection of property rights for all persons, and not only foreign investors,[137] empirical evidence demonstrating such general effects remains to be gathered. As is suggested at least in part by the Chinese experience, it is possible for countries, on the contrary, to try to limit the culture of legal entitlement to the foreign investor. Despite Herdegen's powerful arguments to the contrary, such attempts at two-track economies subject to different entitlements may prove sustainable.

In other cases, the legal rights protected by an investment treaty may fall victim to a local culture that resists real or full compliance with rights of private parties when arrayed against the government – to the detriment of both foreign and local investors. Despite the rigors of investor-state dispute settlement, it is not entirely clear, after all, what would happen if, as in the case of Argentina, a country were to refuse to comply with an arbitral award or to cooperate with ICSID. Investment agreements may ultimately prove as fragile, in terms of enforceability, as many other treaties have been.

There is also the risk, as is suggested by on-going debates in the United States about whether investment treaty rights ought to be permitted to trump local law (or for that matter current Argentine concerns about complying with their BITs), that the legal rights touted by investment agreements will be regarded, at least in some instances, as inconsistent with the democratic values (and laws) generated by a particular polity. There is no guarantee, particularly in proudly democratic countries like the United States, that the "culture of law" protected by treaty will be regarded as fully consistent with the "culture of law" produced by "more democratically accountable" national law-making processes.[138] Democracies may ultimately chaff under investment agreements as much as other governments. For these reasons, it is too soon to conclude that the status quo now secured by investment agreements will prove stable. The NAFTA – as well as the current pro-liberalization stance of the Mexican government – may not bode 'the end of history.'

Endnotes

[1] Many thanks to Tamara Lothian and Kenneth Vandevelde for comments on a prior draft. I also owe a debt of thanks to Gary Clyde Hufbauer and Jeffrey J. Schott, whose recent book, NAFTA Revisited (2005), summarized the results of many studies of the NAFTA's impact. I have relied on Hufbauer's and Schott's invaluable synthesis for many of the statistics cited here. All remaining mistakes are, of course, my own.

[2] Hufbauer and Schott, supra note 1, at 1; M. Ayhan Kose, Guy M. Meredith, and Christopher M. Towe, How Has NAFTA Affected the Mexican Economcy? Review and Evidence, IMF Working Paper (April 2004)(available at http://www.imf.org/external/pubs/ft/wp/2004/wp0459.pdf), at 6.

[3] U.S. BITs are unusual in extending national and MFN guarantees to the entry of foreign investment and not merely its treatment post-entry. For suggestions that the relatively strong investor protections of U.S. BITs may explain their greater success, see Jeswald W. Salacuse and Nicholas P. Sullivan, Do BITS Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, 46 Harv. Int'l L. J. 67 (2005). But note that both Canada and Mexico explicitly excluded decisions by their respective government agencies with respect to the entry of foreign investment from investor-state dispute settlement under annex 1138.2 of the NAFTA.

[4] But this provision was reinterpreted to considerably narrow the potential scope of investor protections under the NAFTA Free Trade Commission Note of Interpretation of July 31, 2001 (indicating that the rights to 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" and that a breach of other international obligations does not establish a breach of article 1105).

[5] Article 1126 was presumably designed to enhance the probability that investment claims would be brought against a defaulting host

state even if the harms suffered by individual investors was disparate or small enough to make such demands for international arbitration unlikely.

[6] José E. Alvarez, Critical Theory and the North American Free Trade Agreement's Chapter Eleven, 28 Inter-American Law Rev. 303 (Winter 1996-97).

[7] Cf. Salacuse and Sullivan, supra note 3, at 108-110 (surveying evidence suggesting that U.S. BITs, including the NAFTA, are more likely than other OECD BITs to exert a strong and positive impact on U.S. and overall FDI flows).

[8] See Centro de Investigación y Docensia Económicas Consejo Mexicano de Asuntos Internacionales, Visions Globales 2004, Opinión Pública y Política Exterior en México, at http://www.consejomexicano. org/download.php?id=965785,185,2).

[9] Centro de Investigación y Docensia Económicas Consejo Mexicano de Asuntos Internacionales, Visions Globales 2004, Opinión Pública y Política Exterior en México y Estados Unidos: Un estudio Comparado, at http://www.consejomexicano.org/download.php?id=878671,186,2).

[10] See, e.g., Hufbauer and Schott, supra note 1, at 1; Sergio Luna Martínez and Eduardo González Nolasco, Libre comercio y convergencia. La macroeconomía del TLCAN, in Enrique R. Casares and Horacio Sobarzo, eds., Diez años del TCLAN en México: una perspectiva analíca (México D.F.: Fondo Cultura Económica, 2004) at 19-60; Kose, Meredith, and Towe, supra note 2, at 9-12. For a summary account of Mexico's historic cycles between nationalization and liberalization throughout the 20th century, see Amy Chua, The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries, 95 Colum. L. Rev. 223 (1995).

[11] See, e.g., Luna Martínez and González Nolasco, supra note 10. See also Salacuse and Sullivan, supra note 3, at 96 (suggesting most BITs involve a "codification" of a country's pre-existing laws and policies).

[12] See, e.g., Kose, Meredith, and Tove, supra note 2, at 11-17.

[13] See supra at text and accompanying notes 8-9.

[14] See generally, OECD Economic Survey: Mexico (September 2005).

[15] See, e.g., id., at 24 ("The recent GDP growth performance of Mexico and its short-term prospects are very good by average

OECD standards but they are not good enough for Mexico. Although slowing down, Mexico's population is growing faster than that of other OECD countries, so that GDP per capita growth is about the same as the OECD average. In recent years, the gap in living standards with other OECD countries has hardly narrowed, despite Mexico's extremely low income level. With potential output growth currently estimated at around 4%, it would take several generations for Mexico to catch up with the average OECD GDP per capita")(footnote omitted).

[16] Hufbauer and Schott, supra note 1, at 11; Kose, Meredith, and Towe, supra note 2, at 10. See also Aaron Tornell, Frank Westermann, and Lorenza Martínez, NAFTA and Mexico's Economic Performance, CESIFO Working Paper No. 1155 (March 2004); World Bank (D. Lederman, W. Maloney, and L. Servén), Lecciones del Tratado de Libre Comercio de América del Norte Parea los Países de América Latina y Del Caribe (June 2003).

[17] See, e.g., Lederman, Maloney and Servén, supra note 16 (contending that global Mexican exports would have been 25 percent less, FDI flows 40 percent less, and income per capital growth 4-5 percent less by the end of 2002 if the NAFTA had not been concluded).

[18] See, e.g., Theodore H.. Moran, Parental Supervision: The New Paradigm for Foreign Direct Investment and Development (2001).

[19] Hufbauer and Schott, supra note, at 104, Figure 2.1. See also Luna Martínez and González Nolasco, supra note 10.

[20] Hufbauer and Schott, supra note 1, at 18-19. See also Russell Hillberry and Christine McDaniel, A Decomposition of North American Trade Growth since NAFTA, USITC Working Paper 2002-12-A (July 2002) (attempting to determine the impact of the NAFTA on U.S.-Mexico trade flows through July 2002); Jorge Martinez-Vazquez and Duanjie Chen, The Impact of NAFTA and Options for Tax Reform in Mexico (September 2001), at 2-4 (noting the potential impact of a number of extraneous factors on trade flows).

[21] See generally, Tornell, Westermann, and Martínez, supra note 16, at 1; see also Luna Martínez and González Nolasco, supra note 10.

[22] Hufbauer and Schott, supra note 1, at 20-24. These authors contend that the increase in intra-NAFTA trade represents the

creation of additional trade opportunities and not merely trade diversion (that is, a shift in trade from non-NAFTA countries because of tariff barriers permitted by the NAFTA). Id., at 23-24.

[23] Hufbauer and Schott, supra note 1, at 20-21, 383; Theodore H. Moran, Foreign Direct Investment and Development (1998) at 51-56; Isabel Studer, El sector automotor, in Beatriz Leycegui and Rafael Fernández de Castro, eds., ¿Socios naturales? Cinco años del Tratado de Libre Comercio del América del Norte (México D.F.: Instituto Tecnológico Autónomo de México: Miguel Ángel Porrúa Grupo Editorial, 2000) at 283-353. But see L.M. Galindo, E. Loria, and E. Dussel (ed.), Condiciones y Efectos de la Inversión Extranjera Directa y del Proceso de Integración Regional en México Durante Los Noventa, (2003)(contending that it is hard to measure empirically the positive spillovers of FDI such as the degree it produces a transfer of technology or learning processes).

[24] See, e.g., Hufbauer and Schott, supra note 1, at 368-369 (noting that many of the benefits produced by policy coordination in the North American auto industry by the Big Three auto makers were in place prior to the NAFTA and were produced by the Mexican Automotive Decree of 1989 which liberalized the Mexican auto industry). But see Studer, supra note 23 (arguing that the NAFTA mitigated the effects of the peso crisis on the auto industry and enabled that sector to recover faster).

[25] See, e.g., Juan Carlos Moreno-Brid, Pablo Ruiz Nápoles, and Juan Carlos Rivas Valdivia, NAFTA and the Mexican Economy: A Look Back On a Ten Year Relations, 30 N.C. J. Int'l L. & Com. Reg. 997 (2005). See also Lyuba Zarsky and Kevin P. Gallagher, NAFTA, Foreign Direct Investment, and Sustainable Industrial Development in Mexico, (January 28, 2004), available at http://ase.tufts.edu/gdae/Pubs/rp/AmerProgFDIJan04.pdf, at 2 (noting that between 1994 and 2002 total annual investment as a percent of Mexican GDP stayed the same as in the 1980s (19 percent) while the share of FDI in total investment more than doubled, indicating the severe contraction in the share of domestic investment since the NAFTA).

[26] Zarsky and Gallagher, supra note 25, at 1.

[27] Many analysts contend that Mexico's failure to liberalize this sector will continue to produce a drag on its economic growth. See, e.g., Hufbauer and Schott, supra note 1, at 58-59.

[28] Hufbauer and Schott, supra note 1, at 25.

[29] These changes are the direct result of legal changes encouraged by the NAFTA. Under the NAFTA, Mexico agreed to increase the levels of controlling investment shares for foreign investors in financial services (from $25 million in 1997 to $150 million by 2003). Mexico want further and lifted these restrictions in 1998 and also eliminated restrictions on foreign investment in its commercial banks. See Hufbauer and Schott, supra note 1, at 203.

[30] Hufbauer and Schott, supra note 1, at 28-29 (noting that among the benefits of such transactions has been a drastic reduction in politically and familial based lending practices, along with a growth in financing for home mortgages).

[31] Hufbauer and Schott, supra note 1, at 30.

[32] See Zarsky and Gallagher, supra note 25.

[33] Id.

[34] Martinez-Vazquez and Chen, supra note 20, at 4 (noting that U.S. FDI accounted for 71 percent of such flows in 1998 while Canada represented only 3 percent).

[35] Hufbauer and Schott, supra note 1, at 35.

[36] See, e.g., OECD Economic Survey, 2005, supra note 14, at 33, Figure 1.11.

[37] Hufbauer and Schott, supra note 1, at 35.

[38] See, e.g., Francisco Venegas-Martínez, El TLCAN y su efecto en la inversion extranjera de cartera, in Casares and Sobarzo, supra note 10, at 170-171.

[39] See, e.g., Galindo, Loria, and Dussel, supra note 23.

[40] Hufbauer and Schott, supra note 1, at 35.

[41] See, e.g., Hufbauer and Schott, supra note 1, at 33 and 35-36.

[42] See, e.g., Venegas-Martínez, supra note 38, t 178.

[43] Hufbauer and Schott, supra note 1, at 37-38.

[44] Hufbauer and Schott, supra note 1, at 103.

[45] See, e.g., Alejandro Ramírez, Inversión Extranjera Directa en México: Determinantes y Pautas de Localización (unpublished Ph.D. dissertation, Universdidad Autónoma de Barcelona, 2002), available at http://www.tdx.cesca.es/TDX-1128102-181158/. For an attempt to indicate the levels of incoming FDI by Mexican region, see Claus von Wobeser, The Legal Regime of Foreign Investment in NAFTA and its Effects on the Capital Flows Towards Mexico, in Leycegui and Fernández de Castro, supra note 23, at 225-80. See also Rafael Tamayo Flores, Integración económica en Norteamérica

y desempeño económico local: ¿Qué ha ocurrido en las regiones mexicananas rezagadas?, in Arturo Borja Tamayo, Para evaluar al TLCAN (México: Tec del Monterrey, Campus Ciudad de México: Miguel Ángel Porrúa Grupo Editorial, 2001), at 311-53 (contrasting the effects on the state of Oaxaca).

46 See generally OECD Economic Survey, 2005, supra note 14. Thus, Hufbauer and Schott contend that while the Mexican provinces of Nuevo Leon and Aguasacalientes are known to suffer less from such concerns, Chihuahua and Jalisco have a considerably worse reputation in the business world. Hufbauer and Schott, supra note 1, at 33-35. They also note that Mexico's reputation in the business community ebbs and flows over time. While in 2003 it was ranked third, behind China and the United States, in the A.T. Kearney FDI Confidence Index, derived from a worldwide survey of business executives, fell to 22 in the 2004 rankings. Id., at 35, note 55 (citing continued lack of Mexican reforms in energy, infrastructure, and telecom as the cause). For a contrary view of the appeal of Jalisco to the foreign investor, see Galindo, Loria, Dussel, supra note 23, at 213-58 (noting the rise and fall of the electronics industry and its causes).

47 Horacio Sobarzo and María Luisa Plá, Ajuste regional, transporte y comercio frente al TLCAN, in Casares and Sobarzo, supra note 10, at 145-168.

48 Hufbauer and Schott, supra note 1, at 61-62.

49 OECD Economic Survey, 2005, supra note 14, at 9 (noting that while this rate would be high for most OECD countries, "in the Mexican case it is barely enough to keep per capita living standards rising at the same rate as the OECD average").

50 See, e.g., Mark Weisbrot, David Rosnick and Dean Baker, NAFTA at Ten: The Recount, Center for Economic and Policy Research (March 2004), available at http://www.cepr.net/publications/nafta_2004-03.htm)(disputing an assessment by the World Bank that suggested that NAFTA increased Mexico's per capita GDP by four to five percent by the end of 2002); Kose, Meredith, Towe, supra note 2, at 26 (discussing economic models that suggest that NAFTA raised the level of the Mexican GDP by 2 to 3.3 percent).

51 See, e.g., Tornell, Westermann, and Martínez, supra note 16.

52 See, e.g., Tornell, Westermann, and Martínez, supra note 16; Lederman, Maloney and Servén, supra note 16; OECD Economic

Survey, 2005, supra note 14, at 18-19.

[53] Hufbauer and Schott, supra note 1, at 69-70 (citing a study by Fox in 2004).

[54] See, e .g., Zarsky and Gallagher, supra note 25, at 2; Galindo, Loria, and Dussel, supra note 23.

[55] See OECD Economic Survey, 2005, supra note 14, at 25, Figure 1.5 (indicating a loss in Mexico's market share of goods exported to the U.S. relative to China), id., at 26 (indicating that one in four Mexican maquiladoras relocated to China in the 2000- 2004 period). For explanations, see, e.g., Zarsky and Gallagher, supra note 25, at 1 (noting that wages in Mexican manufacturing are on average four times greater than in China).

[56] See "The NAFTA-The Showdown," The Economist, Nov. 13, 1993, cited in Hufbauer and Schott, supra note 1, at 8.

[57] See, e.g., Hufbauer and Schott, supra note 1, at 38; Galindo, Loria, and Dussel, supra note 23.

[58] See, e.g., Zarsky and Gallagher, supra note 25; Galindo, Loria, and Dussel, supra note 23.

[59] OECD Economic Survey, 2005, supra note 14, at 20.

[60] See generally, Edward M. Graham and Paul R. Krugman, Foreign Direct Investment in the United States (3rd ed. 1995).

[61] Hufbauer and Schott, supra note 1, at 91.

[62] Id., at 39.

[63] Hufbauer and Schott, supra note 1, at 43-44.

[64] Hufbauer and Schott, supra note 1, at 49 (citing Gruben). See also María Ruth Vargas, Industria maquiladora de exportación ¿Hacia donde va el empleo?, Papeles de Población, No. 37 (July/September 2003), available at http://papelesdepoblacion.uaemex.mx/rev37/pdf/vargas37.pdf (discussing the boom and bust history of the maquiladoras). But Hufbauer and Schott contend that the NAFTA actually eroded some of the advantages that had already been enjoyed by maquiladoras (since for example, after the NAFTA all manufactured goods and not merely those produced by maquiladoras could be trade duty fee), and that boom/bust cycles in that industry were due to a number of factors not tied to the NAFTA, such as a change in Mexican tax law in 2000 that made them subject to Mexican income tax, greater competition from China, the Caribbean and the Central America, and an overvalued peso in 2001-02. Hufbauer and Schott, supra note 1, at 48-49.

[65] Hufbauer and Schott, supra note 1, at 47 (citing the World Bank's World Development Indicators).
[66] Id., at 105.
[67] Id., at 47.
[68] Id., at 98.
[69] Id., at 37.
[70] Id., at 50. These authors conclude that as of 2005 it did not appear that Mexico's GDP has converged toward the U.S. level. Id., at 52. See also OECD Economic Survey, 2005, supra note 14, at 18-19 and Figure 1.1, and 24 (contending that Mexico's growth rate is too low to catch up with the average standards of living in the OECD); id., at 33 (noting that the distribution of income in Mexico is one of the most uneven in the OECD, with a near absence of a middle class, half of its population living in poverty and one in six in extreme poverty).
[71] See, e.g., Andrés Zamudio, El TLCAN y la remuneración al trabajo calificado, in Casares and Sobarzo, supra note 10, at 189-214. See also Ignacio Trigueros, El Tratado de Libre Comercio de América del Norte y la situación macroeconomómica de México, in Leycequi and Fernández de Castro, supra note 22, at 103-32.
[72] Hufbauer and Schott, supra note 1, at 377 (Table 6.4) and 378. See also L. Ortiz, Algunas reflexiones diez años después de la celebración del Tratado de Libre Comercio de América del Norte, 34 Anuario Del Departamento de Derecho de la Universidad Iberoamericana 13 (2004)(discussing the gap in living and income standards between the U.S. and Mexico and arguing for establishment of an economic fund to compensate for those asymmetries).
[73] See Galindo, Loria, and Dussel, supra note 23.
[74] Hufbauer and Schott, supra note 1, table 1.9 at 45 and 46. See also Ortiz, supra note .
[75] See, e.g., Zarsky and Gallagher, supra note 25, at 2 (noting that real wages in Mexican manufacturing outside of maquiladoras declined by 12 percent between 1994 and 2002).
[76] The Gini coefficient measures income equality within a population. A coefficient of zero would indicate that all residents have the same income; 100 would indicate that a single resident receives the total national income. The Gini coefficient in the United

States is approximately 45. Hufbauer and Schott, supra note 1, at 51-52.

[77] See, e.g., Alejandro Dávila Flores, Impatos económicos del TLCAN en la Frontera Norte de México, in Leycequi and Fernándex de Castro, supra note 22, at 177-224; Patrico Aroca, Mariano Bosch, and William F. Maloney, Is NAFTA Polarizing México? Or Existe También el Sur? (January 2003). For a critique of NAFTA's effects (or lack thereof) on the state of Oaxaca, see Tamayo, supra note 45. For a general argument that this reflects the comparative advantages of different regions in Mexico, see Isaac Katz, El impacto regional del Tratado de Libre Comercio de América del norte. Un analysis de la industria manufacturera, in Leycegui and Fernández de Castro, supra note 23, at 133-176. For evidence that income per capita remains sharply distinguishably between the northern border states and a low growth cluster of Chiapas, Veracruz and Oaxaca but does reflect a general trend showing that center states benefit from greater proximity to the US, see Aroca, Bosch, Maloney, supra.

[78] Hufbauer and Schott, supra note 1, at 109 and note 39.

[79] Id., at 110 and 113 (Table 2.16).

[80] Id., at 104 and 100 (Table 2.9).

[81] Id., at 51, note 1.

[82] Zarsky and Gallagher, supra note 25, at 2.

[83] Hufbauer and Schott, supra note 1, at 51, note 4 (noting that South Korea moved from rank 24 to 1 over the same period).

[84] See, e.g., OECD Economic Survey, 2005, supra note 14, at 77 (noting that according to Transparency International Mexico is ranked in the "critical corruption level" and has shown no improvement in the perceived level of corruption since 1995).

[85] Hufbauer and Schott, supra note 1, at 98.

[86] Id.

[87] Id., at 98-101.

[88] For a description of some of the changes in the Mexican labor movement over the course of the NAFTA, see, e.g., Hufbauer and Schott, supra note 1, at 107-109 (describing the decrease in membership in official government sponsored unions and the impact of a Mexican Supreme Court ruling in April 2001 that obligatory union membership was unconstitutional).

[89] Id., at 164. For a generally positive assessment, see also Alejandro Guevara Sanguinés, Reflexiones acerca del TLCAN y su efecto

ambiental en México, in Casares and Sobarzo, supra note 10, at 243-72.

[90] Hufbauer and Schott, supra note 1, at 164.

[91] See, e.g., Guevara Sanguinés, supra note 89. But see Zarsky and Gallagher, supra note 25, at 3 (contending that environmental spending by the Mexican government was halved between 1994 and 1999, total environmental inspections declined by 45 percent since 1993 with maquila inspections decreasing by 37 percent).

[92] Guevara Sanguinés, supra note 89, at 168.

[93] Id., at 170.

[94] Zarsky and Gallagher, supra note 25, at 3.

[95] Guevara Sanguinés, supra note 89, at 171.

[96] See, e.g., Christopher N. Behre, Mexican Environmental Law: Enforcement and Public Participation Since the Signing of the NAFTA's Environmental Cooperation Agreement, 12 J. Transnat'l L. & Pol'y 327 (2003).

[97] Hufbauer and Schott, supra note 1, 169.

[98] Hufbauer and Schott point out that although the number of maquiladoras have increased 30 percent since the launch of the NAFTA and have generated significant additional government revenues, these go into the Mexican federal treasury and do not necessarily return to pay for the roads, schools, electricity, and sewage systems needed by over-stressed the border towns where the maquiladoras are located. Id., at 171.

[99] See, e.g., Behre, supra note 96.

[100] Hufbauer and Schott, supra note 1, at 57; 441-466.

[101] Id., at 109.

[102] The most directly applicable provision, article 1107, merely provides that foreign investors may appoint senior managers of any particular nationality and indicates that the NAFTA state parties can require that a majority of the board of directors of a foreign investor be of a particular nationality or be resident in the territory of a party, so long as this does not impair the ability of an investor to exercise control.

[103] Hufbauer and Schott, supra note 1, at 450.

[104] This may help explain in part the annual turnover rate of 100 percent that characterize maquiladoras. Id., at 454.

[105] Mexican population growth peaked at 3.3 percent in 1970 and was down to less than 2 percent a year by 2004. Id., at 454-455.

[106] Article 102 (1)(e), NAFTA.
[107] See articles 1115-1135, NAFTA. The NAFTA Trade Commission comprises the trade ministers of the three parties. See article 2001, NAFTA. The Commission's "interpretations" of the agreement are "binding" on investor-state tribunals under article 1131(2) of the NAFTA.
[108] Bart Legum, Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions, 19 ICSID Review, Foreign Investment Law Journal 344, at 345 (Fall 2004).
[109] See, e.g., Public Citizen, NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy (September 2001); Vicki Been, Does an International "Regulatory Takings" Doctrine Make Sense?, 11 N.Y.U. Environmental L. J. 49 (2002).
[110] Hufbauer and Schott, supra note 1, at 226.
[111] See, e.g., Been, supra note 109.
[112] See U.S. Uruguay BIT, U.S.-Chile and U.S.-Singapore Free Trade Agreements.
[113] See supra note 4.
[114] See, e.g., US Model BIT 2004, available at www.state.gov/documents/organization/38710pdf.
[115] Legum, supra note 108, at 349-350. Assuring such transparency was also the subject of the first Commission interpretation of July 31, 2001, supra note 4.
[116] Legum, supra note 108, at 353-354.
[117] The U.S. Congress also suggested that "protecting the rights of U.S. investors abroad should not come at the expense of making Federal, State and local laws and regulations unduly vulnerable to challenges by foreign investors" and that the aim of U.S. investment agreements ought to be to "secure investors important rights comparable to those that would be available under United States legal principles and practice." Quoted in David A. Gantz, The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement, 19 Am. Univ. Int'l L. Rev. 679, 705-706 (2004).
[118] Legum, supra note 108, at 355-56.
[119] See, e.g., Hufbauer and Schott, supra note 1, at 201.
[120] For suggestions as to why existing studies attempting to show such effects are difficult to interpret, see, e.g., Moran, supra note 18 (Parental Supervision), at 41-44.

[121] Jurgen Illing chapter.
[122] Anjan Roy chapter.
[123] Markus Taube chapter.
[124] Herdegen conclusion.
[125] See, e.g., Jennifer Tobin and Susan Rose-Ackerman, Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties (January 3, 2005); Mary Hallward-Driemeier, Do Bilateral Investment Treaties Attract Foreign Direct Investment? World Bank, Policy Resarch Working Paper 3121 (August 2003); Salacuse and Sullivan, supra note 3.
[126] Kenneth Vandevelde, Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties, 36 Colum. J. Transnational L. 501 (1998).
[127] Dani Rodrik, Growth Strategies (August 2004), available at http://ksghome.harvard.edu/~drodrik/growthstrat10.pdf. For an argument that developing countries have been forced by economic pressures (as by the IMF) one by one to adhere to economically harmful bilateral investment agreements even though they would, collectively, opt to forego them, see Andrew T. Guzman, Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Agreements, 38 Va. J. Int'l L. 639 (1998).
[128] Rodrik's Table Two lists the original ten elements of the Washington consensus as (1) fiscal discipline; (2) reorientation of public expenditures; (3) tax reform; (4) interest rate liberalization; (5) unified and competitive exchange rates; (6) trade liberalization; (7) openness to DFI; (8) privatization; (9) deregulation; and (10) secure property rights. His "augmented" Washington consensus includes in addition: (11) corporate governance; (12) anti-corruption; (13) flexible labor markets; (14) adherence to WTO disciplines; (15) adherence to international financial codes and standards; (16) "prudent" capital-account opening; (17) non-intermediate exchange rate regimes; (18) independent central banks/inflation targeting; (19) social safety nets; and (20) targeted poverty reduction. Rodrik, supra note 127.
[129] Rodrik, supra note 127.
[130] Compare Moran, supra note 18 (Parental Supervision), at 61-65 (discouraging the use of domestic-content, export-performance, joint-venture, or technology-sharing requirements by developing country FDI host governments).

[131] This critique does not merely target those investment agreements like the NAFTA that prohibit certain government policies that under Rodrik's analysis such not be banned in all contexts – such as export performance requirements. Rodrik might be understood as implying that the negotiation and on-going adherence to investment agreements, including the demands placed on scarce government resources by investor-state dispute settlement, to the extent it consumes government resources and time best spend on developing context-specific policies to sustain economic growth or encourages officials to think that concluding such agreements is in and of itself sufficient to generate growth, might in itself be counter-productive.
[132] See, e.g., Moran, supra note 18 (Parental Supervision), at 42-43.
[133] Francis Fukuyama, The End of History and the Last Man (1992).
[134] See Peter Hakim, Is Washington Losing Latin America?, For. Aff. (Jan./Feb. 2006).
[135] But this does not mean that the web of investment agreements, along with the less formal investment regulation promoted by organizations like the IMF and the World Bank, do not prevent a race to the bottom with respect to protecting fundamental investor rights. No one would suggest that foreign investors today face the risk of uncompensated direct expropriations that they faced thirty years ago. For a discussion of how the IMF engages in investment regulation, see Daniel Kalderimis, IMF Conditionality as Investment Regulation: A Theoretical Analysis, 13 Soc. & Leg. Stud. 104 (2004).
[136] Cf. Herdegen concluding remarks.
[137] Cf. Herdegen concluding remarks.
[138] See, e.g., Public Citizen, supra note 109. See more generally, Jeb Rubenfeld, The Two World Orders, Wilson Quarterly 22 (Autumn 2003)(arguing that a commitment to democratic sovereignty distinguishes U.S. and European attitudes towards international obligations); Kenneth Anderson, Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Governmental Networks, 118 Harv. L. Rev. 1255 (2005) (criticizing various forms of transnational governance on the basis of lack of fidelity to democratic values and democratic forms of accountability).