

# Law and Business Review of the Americas

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Volume 1 | Number 2

Article 12

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1995

## Mexico

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### Recommended Citation

Chris Olive, *Mexico*, 1 LAW & BUS. REV. AM. 122 (1995)

<https://scholar.smu.edu/lbra/vol1/iss2/12>

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# Member States Developments

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## Mexico

### I. Introduction

As 1994 drew to a close, trade statistics revealed that the North American Free Trade Agreement had dramatic and positive effects upon the Mexican economy. Mexico's trade with the United States was up 17.5 percent and, with Canada up 33.3 percent in the first seven months of 1994, according to Guillermo Aguilar Alvarez, Legal Advisor to the Section on Commercial Negotiations of the Ministry of Trade and Industrial Development (SECOFI).<sup>1</sup> Speaking at the American Bar Association Section of International Law and Practice Fall Meeting, Aguilar said Mexican exports to the United States in the first seven months of 1994 were up 20.5 percent over the same period in 1993, while U.S. shipments to Mexico increased by 10.8 percent.<sup>2</sup> U.S. Department of Commerce Secretary Ronald H. Brown likewise reiterated that the North American Free Trade Agreement was "working," citing trade statistics for the first nine months of 1994 showing that U.S. exports to Mexico were at \$37.5 billion, up 21.7 percent over the same period in 1993, while imports from Mexico were up 22.8 percent at \$35.7 billion.<sup>3</sup> In addition, foreign investment in Mexico dramatically increased under the NAFTA, underscored by \$8 billion in investments during January-June of 1994, a 31 percent rise over the same period in 1993.<sup>4</sup>

Aside from the successful trade developments occurring between Mexico and the other NAFTA signatories, Mexico seemed poised to become an export platform to Central and South America, most notably because the nation had recently concluded Free Trade Treaties with Chile, Costa Rica and Bolivia, was negotiating such a treaty with Ecuador, and was prepared to formally implement the G-3 Accord previously signed with Columbia and Venezuela in June 1994.<sup>5</sup> In sum, commentators from Mexico's legal community made it clear at the ABA meeting that Mexico's modern trade and investment institutions, along with modern tax frameworks and other laws, made it an attractive and appropriate platform to do business within Mexico, the NAFTA area and Latin America.<sup>6</sup> Thus, as a member of the NAFTA, the General Agreement on Tariffs and Trade (GATT), and of the several intra-American Free Trade Agreements, Mexico had been expected to be the guiding light for the rest of Latin America to break free from a "long tradition of minimizing imports and protecting-at-any-cost local industry against more efficient foreign competition."<sup>7</sup>

1. 11 Int'l Trade Rep. (BNA) No. 46, p. 1797 (Nov. 23, 1994).

2. Int'l Trade Rep., *supra* note 1, at 1797.

3. *Id.* at 1795.

4. *Id.* at 1797.

5. *Id.* at 1798.

6. *Id.*

7. *Mexico: Special Report—Mexico—U.S. Helps Strengthen the Safety Net*, Reuter Textline, Lloyd's List, Feb. 7, 1995.

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## II. The Mexican Financial Crisis

### A. DECEMBER 1994

Immediately prior to the mid-December Summit of the Americas in Miami, where the groundwork was prepared to create a Free Trade Agreement of the Americas (FTAA), Jaime Serra Puche, Mexico's then-existing Secretary of Finance, asserted that the Mexican government had to maintain greater fiscal discipline and stricter federal budget control if the nation was to meet its objectives of economic growth and price inflation set by the new administration of President Ernesto Zedillo.<sup>8</sup> Hence, in order to facilitate these goals and to prevent a run on its currency in foreign-exchange markets, the Zedillo Administration proceeded to devalue the peso, which had previously been fixed at 3.5 to the dollar on December 20, 1994.<sup>9</sup> However, the value of the peso plummeted much further than the devaluation; Mexico's equity markets fell dramatically, and foreign speculative investors began making a near-panic exodus of its markets. By December-22, 1994, Mexico abandoned its defense of the peso and allowed the currency to float, but the peso continued weakening to 5.40 per dollar at the beginning of 1995.<sup>10</sup>

### B. JANUARY 1995

Thus, on January 3, 1995, President Zedillo announced an economic emergency plan, entitled *The Agreement of Unity to Overcome the Economic Emergency*, which was signed between the Mexican government, the Bank of Mexico and the labor and business sectors, in order to re-establish investors' confidence and prevent an inflationary spiral caused by the devaluation of the peso.<sup>11</sup> In this announcement, Zedillo also officially con-

8. 11 Int'l Trade Rep. (BNA) No. 50, p. 1952 (Dec. 21, 1994). Serra asserted that the new government would work to achieve several economic objectives, including: (i) 4 percent growth in the nation's gross domestic product in 1995; (ii) price inflation, expected to reach 6.9 percent in 1994, of no more than 4 percent in 1995; (iii) non-petroleum export growth of 15.5 percent of gross domestic product in 1995, up from an expected 14.1 percent in 1994; (iv) continued import growth to 21.9 percent of gross domestic product, up from 20.8 percent in 1994; and (v) a 7 percent rise in the dollar value of exports and 6.7 percent rise in imports in 1995. *Id.* at 1952-53; see also Roberto Galvan Gonzales, *Bank of Mexico Reorganization-Central Bank Spin-Off*, Business Mexico, June 1994 (analyzing the duties of the newly autonomous Bank of Mexico and its strategies for implementing Mexico's stabilization program).

9. See *Quick Fix: Clinton Arranges Aid to Mexico Via Executive Order*, Wall St. J., Feb. 1, 1995, at A1, A6. Economist Luis Pazos, Director of the privately-owned Centro Internacional de la Empresa Privada (International Center for the Study of the Private Sector), asserted that the Mexican economy was in a "Catch-22" situation because of its over-dependence on foreign capital inflows, as opposed to more direct investments. Pazos stated that the Mexican government relied on the ratification of the NAFTA, which added safeguards to investors, to correct this imbalance, but the January 1, 1994 peasant uprising in Chiapas delayed the expected shift in the economy. See Int'l Trade Rep., *supra* note 8, at 1952.

10. Wall St. J., *supra* note 9, at A6; 12 Int'l Trade Rep. (BNA) No. 2, p. 60 (Jan. 11, 1995).

11. 12 Int'l Trade Rep. (BNA) No. 1, p. 14 (Jan. 4, 1995). Details of the Emergency Plan included: (i) increasing the minimum wage by 10 percent; (ii) an agreement of major businesses to make an extraordinary effort to maintain lower prices; (iii) government promises to restrict price

firmed reports that the Mexican government negotiated an estimated \$18 billion financial package with international organizations and Mexico's biggest trading partners, the United States and Canada.<sup>12</sup>

However, both financial markets and analysts reacted with skepticism to Zedillo's plan; on January 4, the peso further weakened in trading to 5.60 per dollar, and the Mexican equity market index suffered a 140-point loss early that morning.<sup>13</sup> On January 9, 1995, the Federal Reserve and the Bank of Mexico drew on the \$18 billion emergency-credit facility to intervene in currency markets in support of the peso and managed to lift it by 5.8 percent; however, it soon became clear that these efforts would not have any lasting effects.<sup>14</sup> Hence, on January 12, the Clinton Administration proposed to Congress a Mexican "Aid Package" that included \$40 billion of loan guarantees to Mexico.<sup>15</sup> In the *Mexico Fact Sheet*, the Clinton Administration asserted in relevant part as follows:

If we do not act now, Mexico faces a protracted economic crisis that would have severe consequences for the United States. Such a crisis

*Note 11, continued*

increases on basic goods it supplies, and to cut spending by 1.3 percent of gross domestic product, efforts to investigate and eliminate regulations that reduced competitiveness of Mexican companies; and (iv) greater efforts in assisting small and medium businesses in various sectors and in privatizing the nation's ports, railroads, airports, and communications networks. *Id.*

12. *Id.* In Washington, the U.S. Treasury Department and the Federal Reserve announced that the United States was contributing \$9 billion to an \$18 billion stabilization fund, as part of an international expansion of credit to Mexico. In a joint statement, they said that an existing \$6 billion "swap" line between the United States and Mexico was being supplemented with a \$3 billion short-term facility, with the Treasury and the Fed each contributing \$1.5 billion. Canada, the other member of the trilateral North American financial group, was to supplement its C\$1.0 billion swap facility between the Bank of Canada and the Bank of Mexico with an additional C\$500 billion. The package also included a \$3 billion line-of-credit in which a number of major international banks were participating, and \$5 billion from the Bank for International Settlements, guaranteed by the central banks of some of the member countries. The Bank of Mexico, of course, asserted that it would severely limit commercial credit in order to control inflation, with exceptions made for the agricultural sector, small- and medium-size businesses, and export-promoting activities. According to the Mexican Investment Board, the \$18 billion, together with the Bank of Mexico's international reserves of \$6.15 billion, would be available to stabilize the domestic financial market, but would not be used to finance the current account deficit of more than \$27 billion. The Board stated that the deficit would be funded chiefly by direct foreign investment and "moderate" borrowing by the public and private sectors. *Id.*

13. Int'l Trade Rep., *supra* note 10, at 60.

14. For a broad discussion of the issues surrounding the financial crisis in Mexico, see, e.g., *Mexico: Financial Focus—Strong Medicine Needed to Cure Mexico's Economic Ills*, Reuter Textline, Lloyds List, Feb. 4, 1995; Michael Marray, *Mexico: Euromoney Supplement on Mexico*, Euromoney, Jan. 18, 1995; CNN, *Inside Business*, Transcript No. 244 (Jan. 8, 1995); Tim Golden, *Mexicans Find Dreams Devalued*, N.Y. Times, Jan. 8, 1995, at sec. 4, p. 5, col. 1.

15. 12 Int'l Trade Rep. (BNA) No. 3, p. 157 (Jan. 18, 1995) (providing the *Clinton Administration Fact Sheet on Mexico*).

would hit the United States' economy hard. Mexico is our third-largest export destination ... [N]early 700,000 U.S. jobs depend directly on sales to Mexico ... California sells \$5 billion worth of goods to Mexico yearly; Michigan sells \$6 billion, nearly 20 percent of its export sales; Arizona and New Mexico also sell near 20 percent of their export sales to Mexico; Texas sells Mexico \$13 billion worth of products, more than one-third of its export sales. These and other states which rely heavily on trade with Mexico could see declines in income, as well as job losses ..."

[A] Mexican crisis could spread to other emerging market economies, which are the fastest-growing customers for U.S. products, thereby hindering the U.S. economic recovery ... Investors in other developing countries could withdraw the funds that are fueling growth in these new markets. Because Mexico is a prototype for developing markets, the risks in this case are unique ...

A protracted Mexican economic crisis is preventable because Mexico is currently facing a financial loss of confidence—not fundamental problems in its economy. ... Mexico's economy is fundamentally strong. The Mexicans are pursuing disciplined economic and fiscal policies. Their ratio of debt to national income is moderate, at about 40 percent. ... Mexico's main problem is a credit squeeze, or loss of liquidity, brought on because fearful investors have halted new lending to Mexico. ...

As investment tapered off, demand for Mexico's currency, the peso, also declined. *This undermined investor confidence further, and generated concerns that Mexico could not afford to pay off some \$40 billion worth of short-term obligations—including dollar-indexed bonds, CD's and bank credits—coming due over the next 6 months. As long as investors and lenders stay out of Mexico, it will not be able to pay its bills.* However, if the United States backs loans to Mexico to stretch out maturities, renewed confidence should be sufficient to bring investors back without guarantees. To help Mexico through its liquidity crisis, the administration is working with Congressional leadership on a loan guaranty of up to \$40 billion.<sup>16</sup>

In this initial proposal, the Clinton Administration asserted that (i) the Mexican government would pay the United States up front and in cash for the right to use the loan guaranty, and that it would provide backing in the form of proceeds from PEMEX's petroleum sales, along with other conditions, to help ensure that the United States would be repaid, and (ii) the support package would be a one-time event, and not a precedent.<sup>17</sup> However, by January 17 lawmakers from both parties and in both houses of Congress asserted that they needed more detailed information about the Clinton Administration's plan to offer the loan guarantees to Mexico—particularly the plan's collateralization

16. Int'l Trade Rep. *supra* note 15, at 157-59.

17. *Id.* at 157; see also *id.* at 107.

scheme-before they could support it.<sup>18</sup> While Congress considered the Clinton Administration proposal, on January 26 the International Monetary Fund (IMF) tentatively approved \$7.8 billion in loans for Mexico that would allow the Mexican government to borrow in support of the peso in foreign-exchange markets.<sup>19</sup> In addition, and in connection with an initiative to raise additional financing of approximately \$10 billion from a group of non-G-10 countries, the Executive Board of the IMF approved on a contingency basis the augmentation of the overall resources available under the standby arrangement by \$10 billion.<sup>20</sup>

### C. FEBRUARY 1995

#### 1. U.S. & International Response

Unfortunately, by January 31 it became clear that Congress would not imminently approve the loan guaranty package, and with Mexico's currency reserves dwindling to \$3.5 billion, the Mexican government would almost certainly be forced to default on its short-term debt unless the U.S. reacted quickly. Hence, President Clinton, by Executive Order on February 1, authorized Mexico to have access to a further \$11 billion in the U.S. exchange-stabilization fund, to in effect give Mexico access to a total of \$20 billion from these reserves.<sup>21</sup> The President announced that in addition to the United States' \$20 billion exposure, the IMF would contribute a \$17.8 billion medium and long-term lending package for Mexico, for a total of \$37.5 billion in lending.<sup>22</sup>

18. See *Mexico*, Int'l. Bus. & Fin. Daily (BNA), Jan. 19, 1995. In fact, several lawmakers sought a complete U.S. pullout from the NAFTA and appeared at a press conference to announce the "NAFTA Withdrawal Act of 1995." See 12 Int'l Trade Rep. No. 3, p. 106 (Jan. 18, 1995). Nonetheless, House Republicans began circulating a draft of a Mexican Loan Guaranty Bill late January 24 amid growing pessimism that a bill could be brought to the floor later that week, and Treasury Secretary Robert E. Rubin and Federal Reserve Board Chairman Allen Greenspan briefed lawmakers on the Clinton administration's package on January 25. See 12 Int'l Trade Rep. No. 4, p. 200 (Jan. 25, 1995).

19. Wall St. J., *supra* note 9, at A6.

20. Press Conference with Michel Camdessus, Director, International Monetary Fund, *IMF Program of Assistance for Mexico*, Fed. N. Serv., Feb. 2, 1995, available on LEXIS. In other words, to the extent that contributions of governments and central banks fell short of the targeted \$10 billion, the IMF would make the balance available from its own resources. Thus, this additional amount of \$10 billion would assuredly be available to Mexico. *Id.*

21. *Mexico—Clinton Opts to Use Executive Powers to Aid Mexico with \$20 Billion Backing*, Int'l Bus. & Fin. Daily (BNA) Feb. 2, 1995.

22. Int'l Bus. & Fin. Daily, *supra* note 21. Further, the Bank for International Settlements would extend \$10 billion in short-term lending to Mexico, while Latin-America and Canada pledged \$1 billion each. *Id.* The \$20 billion U.S. contribution essentially provided three types of support to Mexico: short-term swaps, coming from the Federal Reserve, making up \$5-\$6 billion of the total, swaps with maturities of 3 to 5 years and securities guarantees with maturities of 5 to 10 years. *Id.* For President Clinton's analysis and defense of the Mexican loan guaranty package, see CNN, News-International, Transcript Nos. 996-6, 996-9 (Feb. 1, 1995).

## 2. Zedillo Administration Response

President Zedillo simultaneously announced that the Mexican government would soon be moving to sell off ports and highways and open the railroads and satellite telecommunications to private investors for the first time to raise foreign reserves while also ensuring private investors that free-market reforms were still on track.<sup>23</sup> Moreover, Adrian Lajos Vargas, the Chief Executive of PEMEX, asserted on February 8 that PEMEX would go ahead with the long-delayed sale of its petrochemical businesses in the next few weeks to add to Mexico's foreign reserves.<sup>24</sup> Hence, the Mexican financial crisis appeared to have been momentarily thwarted in the short-term through the joint efforts of international organizations, foreign central banks, the Clinton Administration and the Mexican government itself.

23. *Zedillo Announces More Privatizations in Mexico*, Agence France Presse, Feb. 3, 1995, available on LEXIS. Article 25 of the Mexican Constitution establishes the Federal government's role in the Mexican economy. It states that the Federal government shall plan, conduct, coordinate and direct the economic activities of the country. It also determines that the Federal government will have the property and control of certain strategic areas established in Article 28 of the Constitution and that it may participate concurrently with the social and private sectors in order to organize certain priority areas of economic growth. In addition to the Constitution, the Foreign Investment Law of 1993 specifically sets forth the strategic areas exclusively reserved for the State; these specifically (i) petroleum and other hydrocarbons; (ii) basic petrochemicals; (iii) electricity; (iv) generation of nuclear energy...; (vi) satellite communications; ... (x) railroads; ... (xiii) control, supervision and surveillance of seaports, airports and heliports. See *Ley de Inversion Extranjera*, art. 5, D.O. Dec. 27, 1993 (hereinafter the "Foreign Investment Law"). However, although these areas are specifically reserved to the Mexican government for investment, Paragraph VI of Article 25 of the Mexican Constitution *opens the door to privatization because it establishes that the Federal government, in accordance with the needs of the country, will promote the establishment and/or the enhancement of the activities performed by private and/or social entities, subjecting them to the adequate modalities and organization, as well as the legal provisions needed for the efficient use of the productive resources.* Finally, Paragraph VIII states that the Federal government will protect and promote the economic activities be developed by the private sector, and will provide the conditions necessary so that this sector can contribute to the national economic growth. Hence, at least one Mexican authority proffers that these Articles will be liberally construed by the Zedillo Administration to allow for future privatizations in order to help the Mexican government stabilize its financial crisis. See Javier M. Gallardo Guzman, *Nafta Implementation Update: Legal Considerations of the Economic Package Proposed to Face the Economic Crisis* (Jan. 1995), presented in "International Lawyering in the Americas," Dallas, Texas, Jan. 26-27, 1995, at B-1 - B-20.

24. Allen R. Myerson, *Pemex Chief Sees Sale of Units Soon*, N.Y. Times, Feb. 9, 1995, at sec. D, p. 6, col. 6. For a full discussion of the energy and petrochemical industries in Mexico and the Mexican laws regulating the specific procedures for procurement, see Michael E. Arruda, *Effect of the North American Free Trade Agreement on Trade Between the United States and Mexico in the Energy and Petrochemical Industries*, 1 TULSA J. COMP. & INT'L L. 191 (Spring 1994); *Mexican Procurement Under NAFTA: Regulatory, Business and Legal Considerations*, 4 Mex. Trade & L. Rep. No. 9, Sept. 1, 1994.

#### D. RISKS & CONSEQUENCES

However, regardless of any positive consequences generated by the U.S.-initiated guaranteed loan package, the Mexican economy will take a substantial amount of time to recover from the effects of the peso devaluation. During that recovery period, a weak peso and uncertain availability of U.S. dollars for repayments will in all likelihood limit the ability of U.S. companies, and certainly the enthusiasm of their lenders, to do business in Mexico; however, Mexico's financial problems facilitate no economic reasons to expect that its difficulties will turn into a "generalized financial crisis" for Latin America or for developing countries as a whole. Nonetheless, it is clear that Mexican companies are faced with increasing competition from foreign entities, and their customers will undoubtedly begin negotiating contract revisions to protect both the U.S. and Mexican parties from currency risk and inflation. Hence, the Mexican financial crisis poses Chief Financial Officers of companies from both countries with a series of tough choices: (i) whether contracts for new projects should include renegotiation clauses, currency hedges and/or other methods to ensure a set exchange rate, and other contract terms to protect the project's ongoing viability during this period of uncertainty; (ii) whether to ride the fluctuations of floating-rate funding on the domestic peso market; or (iii) whether to risk exchange losses on long-term fixed-rate foreign currency debt.<sup>25</sup>

Moreover, the willingness of commercial banks and other lenders to provide financing, not just for projects in Mexico but for simple export sales to its customers, will likely be significantly reduced in the near future.<sup>26</sup> In any event, Mexico badly needs more efficient peso capital markets to bring down the cost of capital and to help both Mexican and foreign entities reduced volatility in their funding costs.<sup>27</sup> Therefore, the business sector's judgment of the Zedillo Administration, and hence the continuing success of the NAFTA, will be strongly influenced by their success in developing them.

### *III. Implementation and Preparatory Legislation for Integrating the NAFTA Chapters into the Mexican Legal Framework*

#### A. COMPETITION POLICY, MONOPOLIES AND STATE ENTERPRISES (NAFTA CHAPTER 15)

As is true with most developing economies, competition and antitrust policy has traditionally not been a major area of concern in Mexico. In fact, although Mexico has had antitrust legislation for almost 60 years, antitrust enforcement is a relatively new concept

25. See Murray, *supra* note 14; John A. Detzner & George R. Gonzales, *Doing Business in Post-Devaluation Mexico*, reprinted in 2 Inter-Am. Trade & Inv. Law No. 12, Feb. 3, 1995, at 244.

26. Detzner & Gonzales, *supra* note 25, at 244. Further, U.S. companies that have operated on an open-account basis for their long-time Mexican customers may find themselves unable to continue offering such terms, either as a result of an internal risk assessment or at the direction of their commercial banks. *Id.* at 244. The ability of Mexican companies to obtain local financing, and even letters of credit, as well as U.S. dollars for repayment, likewise will be restricted. *Id.*

27. Murray, *supra* note 14.

in Mexico because the Mexican government has never enforced the statute.<sup>28</sup> Prior to the enactment of the Federal Law on Economic Competition of 1993 (the Competition Law), no antitrust enforcement agency or private antitrust actions existed.<sup>29</sup> Hence, the NAFTA Chapter 15<sup>30</sup> provides little in the way of concrete mechanisms for developing the kind of coordinated or joint antitrust regime that is required for genuine integration of the Mexican, Canadian and U.S. markets. Instead, the NAFTA signatories provided for general commitments to cognizable antitrust objectives: (i) to apply their domestic antitrust rules to prevent anti-competitive business practices; (ii) to cooperate and coordinate in enforcing those rules; and (iii) to use regulatory controls to ensure that State enterprises or State-designated monopolies observed the commitments their government has made in the NAFTA.<sup>31</sup>

### 1. Overview of NAFTA Chapter 15

The NAFTA Chapter-15 contains three central provisions. First, the signatories recognized that preventing anti-competitive activity would enhance the NAFTA objectives. Hence, each signatory "recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement" in the North American region.<sup>32</sup> The signatories further agreed to cooperate in administering their own antitrust legislation by exchanging information, providing mutual assistance among enforcement agencies, and notifying the other signatories as to actions taken against foreign companies.<sup>33</sup> Notably, antitrust controversies and enforcement issues are specifically exempted from the NAFTA dispute settlement provisions.<sup>34</sup>

Second, each government has the ability to provide for a monopoly at its own discretion; however, as with State enterprises, the NAFTA mandates that such monopolies cannot discriminate against the local investments of other NAFTA signatories in exercising licensing, fee-setting, approval powers, or in selling the monopolized good or service.<sup>35</sup> The NAFTA also imposes additional rules on monopolies that are not used to regulate State-owned enterprises. These rules include the following: (i) the monopoly must act "solely in accordance with commercial considerations" in selling or purchasing the monopolized good or service, "including with regard to price, quality, availability, mar-

28. Sergio Garcia-Rodriguez, *Emergence of Mexico's Antitrust Enforcement Agencies*, reprinted in 1 *Inter-Am. Trade & Inv. Law No. 48*, Sept. 30, 1994, at 190.

29. Garcia-Rodriguez, *supra* note 28, at 190.

30. North American Free Trade Agreement, drafted Aug. 12, 1992, revised Sept. 6, 1992, U.S.-Mex.-Can., ch. 15, 32 I.L.M. 605 (entered into force Jan. 1, 1994) [*hereinafter* NAFTA].

31. Paul, Hastings, Janofsky & Walker, *North American Free Trade Agreement: Summary and Analysis*, at 73 (rev. ed. 1993).

32. NAFTA, *supra* note 30, art. 1501.

33. *Id.* art. 1501.

34. Hence, where controversial antitrust-related actions are taken by one signatory government in a way that aggravates the other, the complaining government can only request consultations; there is no guaranty that the acting government will agree to consult over the action, and the offended government cannot obtain independent NAFTA panel review. See Paul, Hastings, Janofsky & Walker, *supra* note 31, at 74.

35. NAFTA, *supra* note 30, art. 1502; Paul, Hastings, Janofsky & Walker, *supra* note 31 at 75.

ketability, transportation, and other terms and conditions of purchase or sale"; (ii) the monopoly cannot discriminate against goods or services provided by another NAFTA-signatory entity in buying or selling the monopolized good or service; and (iii) the monopoly cannot use its advantages to engage in anti-competitive acts in non-monopoly markets, "including through the discriminatory provision of the monopoly good or service, cross-subsidization or predatory conduct."<sup>36</sup>

Third, each government is free to establish State-owned enterprises at its discretion. However, the establishing government must ensure (if it has delegated to the enterprise powers to perform governmental functions) that the enterprise does not use those powers to impair the rights of open investment established by Chapter 11 of the NAFTA—i.e., national treatment, non-discrimination, and an absence of performance requirements.<sup>37</sup>

## 2. Mexico's Antitrust Law

In conjunction with the obligations posed by the NAFTA, the Mexican government passed the Federal Law on Economic Competition, in December 1992.<sup>38</sup> The foremost purpose of the Competition Law is to provide for free economic competition through the elimination of monopolies, monopolistic practices, restraints of trade and other anti-competitive market practices.<sup>39</sup> Hence, the Competition Law is broadly encompassing in scope, and apparently applies to any economic entity, whether through an agent or firm, regardless of its principal place or nature of business or nationality.<sup>40</sup> Although, the Competition Law does not apply to constitutional monopolies known as strategic activities, such as the petroleum industry, basic petrochemicals, satellite communications, and railroads,<sup>41</sup> it should be noted that Mexican parastatals are deemed to be economic agents, not constitutional monopolies, and therefore are subject to the Competition Law provisions.<sup>42</sup> Conversely, Mexican intellectual property companies, labor unions, cooperatives and labor associations selling their products abroad are exempted from the Competition Law provisions.<sup>43</sup>

### a. Monopolistic Practices

The Competition Law clearly prohibits monopolistic practices, and distinguishes between *absolute monopolistic practices* and *relative monopolistic practices*. Horizontal anti-competitive agreements (i.e., absolute monopolistic practices) are defined in the

36. NAFTA, *supra* note 30, art. 1502.

37. *Id.* art. 1503; Paul Hastings, Janofsky & Walker, *supra* note 31, at 74.

38. Ley Federal de Competencia Economica, D.O. Dec. 24, 1992, entered into force June 1993 [*hereinafter* Competition Law]; see also Francisco Fuentes-Ostos, *Antitrust Considerations in Mexico*, LatinFinance No. 48, June 1993, at M04.

39. Competition Law, *supra* note 38, art. 2.

40. Rogelio Lopez-Velarde, *Mexico's New Antitrust Law*, 1-2 (1993).

41. See Foreign Investment Law, *supra* note 23, art. 5. The strategic activities are specifically exempted from the Competition Law provisions. Competition Law, *supra* note 38, art. 4.

42. Lopez-Velarde, *supra* note 40, at 2; see also *Report of the Task Force of the Antitrust Section of the American Bar Association on the Competition Dimension of the North American Free Trade Agreement*, Mar. 25, 1994, at 54 [*hereinafter* ABA Report].

43. Competition Law, *supra* note 38, arts. 5 & 6.

Competition Law as agreements among competitors to join forces to fix prices, restrict output and distribution of goods or services, divide markets or otherwise manipulate the public bidding process.<sup>44</sup> If one of the above is proven in a Mexican court, it is deemed illegal per se and can result in severe civil punishment under the Competition Law provisions.<sup>45</sup> However, the Competition Law allows for most vertical-type agreements (i.e., relative monopolistic practices), except those made with the intent of effectively driving competitors from the market or otherwise impeding their access to it.<sup>46</sup> Such vertical agreements may include: (i) geographical distribution restrictions; (ii) resale price maintenance; (iii) tying and other after-market agreements; (iv) reciprocal dealing, exclusive dealing, or otherwise refusal to deal; (v) agreements not to compete; and (vi) any other practices that illegitimately impede or affect competition.<sup>47</sup> Hence, to determine whether such vertical agreements are unlawful under the Competition Law, Mexican courts must effectuate an economic analysis similar to those employed by U.S. courts.<sup>48</sup>

*b. Mergers and Acquisitions*

The Competition Law further introduced regulatory provisions on mergers and acquisitions (*concentraciones*). A *concentracion* is defined under the Law as any merger, acquisition, consolidation or any other act that combines corporations, associations, shares, assets or trusts, between competitors, customers, suppliers or other business entities.<sup>49</sup> The elements of proof necessary to characterize a *concentracion* as anti-competitive (i.e., if the purpose or effect is to diminish, impair or hamper competition or free-market participation in Mexico) focuses on the existence of substantial power over the

44. *Id.* art. 9.

45. *Id.* art. 35.

46. See Lopez-Velarde, *supra* note 40, at 5.

47. See Competition Law, *supra* note 38, art. 10.

48. ABA Report, *supra* note 42, at 61-62. Elements of proof include: (i) that the alleged company or person had substantial power over the relevant market, and (ii) that the company or person intended to harm the competition processes in Mexico. "Substantial power" is determined by factors such as: (i) marketshare and whether the entity has the ability to engage in unilateral price fixing or to otherwise restrict access to the market without actual or potential competitors being able to refute that ability; (ii) the existence of barriers to market entry and possibilities of altering those barriers; (iii) the existence of and relative market power of the competitors; (iv) the parties' access to sources of input; (v) recent activity and conduct; and (vi) other criteria to be established in the Competition Law Regulations. Competition Law, *supra* note 38, art. 13. "Relevant market" is determined by: (i) the potential of substituting the good or service through other suppliers, whether foreign or national, and considering technological aspects, consumer input in the substitute good or service, and the time required to effectuate the substitution; (ii) the cost of moving substitute goods across geographic areas and the time required for them to enter a market; (iii) the costs of potential buyers to reach other markets; and (iv) tariffs or other trade restrictions that limit consumer access to alternative sources of supply or limit the provider's access to other customers. *Id.* art. 12.

49. Competition Law, *supra* note 38, art. 16; see also Robert L. Kimball, *Mexico: Corporate Mergers and Acquisitions*, LatinFinance No. 63, Dec. 1994, at S26.

relevant market, the degree of concentration in the relevant market, and other factors to be included in the Competition Law regulations.<sup>50</sup>

c. *The Federal Competition Commission*

Most importantly, the Competition Law created the Federal Competition Commission (FCC), an independent administrative enforcement agency charged with conducting investigations, issuing administrative rulings and generally enforcing the Competition Law against entities engaged in anti-competitive market practices.<sup>51</sup> The FCC has the ability to impose civil penalties and enjoin anti-competitive market practices without intervention of the Mexican courts, but FCC rulings may be challenged through judicial review.<sup>52</sup>

In June 1994, the FCC released its long-awaited annual report for the 1993-94 term, which set forth the investigations and cases resolved over the period.<sup>53</sup> While the policy statements and specific administrative rulings contained in the report are not legally binding under Mexican law, they represent the guiding principles for the FCC's application of the standard antitrust rules to date.<sup>54</sup> Nonetheless, the FCC aggressively enforced the Competition Law over 1993-94 in the area of monopolistic practices over the term by initiating 16 investigations in various sectors of the Mexican economy. The most significant investigations resulted in consent decrees in two long-restricted markets—the credit card market and gasoline-station franchising.<sup>55</sup> The first investigation involved Mexico's three largest banks—Bancomer, Banamex and Banco Serfin—in the open "coordination" of their credit card operations.<sup>56</sup> The second investigation involved the market practices of PEMEX-Refinancion, a subsidiary of PEMEX, in lieu of alleged tying arrangements and exclusive dealings (considered "relative monopolistic practices") in connection with the franchise of gasoline stations and the sale of oil lubricants. Aside from these consent decree rulings, 6 of the 16 FCC investigations resulted in the agency imposing civil penal-

50. *Id.* art. 18. See also *supra* note 61. Further, the Competition Law includes notification procedures for any mergers, consolidations or acquisitions (i) that exceed U.S. \$55 million or more, (ii) transactions involving the acquisition of 35 percent or more of the assets or shares of another entity with assets or sales in excess of U.S. \$55 million, or (iii) when the merging entities' joint assets or annual sales exceed U.S. \$220 million and the transaction involves the additional accumulation of assets or shares of U.S. \$22 million or more. *Id.* art. 20. See also Rogelio Lopez-Velarde and Augustin Berdega-Prieto, *Antitrust Enforcement in Mexico*, *Int'l Fin. L. Rev.*, Sept. 1994, at 34-35.

51. *Id.* art. 23. The FCC is comprised of five commissioners appointed by the Chief Executive for 10-year terms, subject to renewal, and is vested with broad powers to enforce the Competition Law. *Id.* arts. 24-26.

52. See Sergio Garcia-Rodriguez, *Managing Free Competition in Mexico*, *The Recorder*, Aug. 29, 1994, at 7.

53. See Garcia-Rodriguez, *supra* note 52, at 7.

54. *Id.* at 7. The only legally binding antitrust rules are those created in the Competition Law, implementing regulations and judicial determinations. See Lopez-Velarde, *supra* note 50, at 34.

55. Sergio Garcia-Rodriguez, *The Year in Review: Mexico's New Antitrust Agency*, reprinted in 1 *Inter-Am. Trade & Inv. Law No.* 49, Oct. 7, 1994, at 194.

56. Garcia-Rodriguez, *supra* note 55, at 194.

ties totaling \$750,000.00; however, the FCC also dismissed many investigations on grounds that they failed to state a cause of action under the Competition Law.<sup>57</sup>

#### IV. Other Post-NAFTA Regulations and Developments

##### A. INDUSTRIAL PROPERTY LAW AMENDMENTS AND REGULATIONS

###### 1. 1994 Amendments to the Industrial Property Law

On August 2, 1994, the Mexican Congress passed a comprehensive package of amendments to the Law of Development and Protection of Industrial Property,<sup>58</sup> the majority of which took effect October 1, 1994. Besides redesignating these statutes as the "Industrial Property Law,"<sup>59</sup> the 1994 amendments effectively (i) transferred administrative oversight of industrial property rights in Mexico from the Secretaria de Comercio y Fomento Industrial (SECOFI) to the newly created Instituto Mexicana de la Propiedad Industrial (the Institute), (ii) amended the Industrial Property Law to comply with certain requirements of the NAFTA, and (iii) made technical improvements to the original form of the Industrial Property Law.<sup>60</sup> Most importantly, the 1994 Amendments provided the Institute with enforcement procedures similar to injunctive powers.<sup>61</sup> The

57. *Id.* at 194; see also Lopez-Velarde, *supra* note 50, at 35. In lieu of the FCC's vigorous enforcement efforts, some discussion has ensued among officials in the Federal Trade Commission promoting the examination of the North American Antitrust Statutes of each signatory country to see if they may be harmonized in the future so as to provide a uniform set of antitrust rules under the NAFTA. See 12 Int'l Trade Rep. No. 5, p. 223 (Feb. 1, 1995).

58. Ley de Fomento y Proteccion de la Propiedad Industrial, D.O. June 27, 1991 [*hereinafter* Industrial Property Law]. For a comprehensive discussion of the Industrial Property Law, see John B. McKnight & Carlos Muggenburg, *Mexico's New Intellectual Property Regime: Improvements in the Protection of Industrial Property, Copyright, License and Franchise Rights in Mexico*, 27 Int'l Law 27 (Spring 1993); Rodolpho Sandoval & Chung-Pok Leung, *A Comparative Analysis of Intellectual Property Law in the United States and Mexico, and The Free Trade Agreement*, 17 Md. J. Int'l L. & Trade 145 (Fall 1993). Moreover, for a comprehensive discussion of the NAFTA rules pertaining to intellectual property, see Foster & Alexander, *Opportunities for Mexico, Canada and the United States: A Summary of Intellectual Property Rights Under the North American Free Trade Agreement*, 20 Rutgers Comp. & Tech. L. J. 67 (1994); Levy & Weiser, *The NAFTA: A Watershed for Protection of Intellectual Property*, 27 Int'l Law 671 (Fall 1993); Paul, Hastings, Janofsky & Walker, *supra* note 31, at 83-99.

59. Decreto por el que se Reforman, Adicionan y Derogan Diversas Disposiciones de le Ley de Fomento y Proteccion de la Propiedad Industrial, D.O. Aug. 2, 1994 [*hereinafter* 1994 Amendments].

60. John B. McKnight, *Outlook for Franchising in Mexico—Current Problems and Long-Term Solutions*, (Jan. 1995), presented in "Lawyering in the Americas," Dallas, Texas, Jan. 26-27, 1995, at D-8.

61. Prior to these Amendments, the administrative agency did not have injunctive powers. Rather, enforcement was limited to the temporary or permanent closure of the business, or administrative arrest. See Gerardo Olea & Gary Doyle, *Mexico Advances Important Intellectual Property*

Institute's new powers to provide injunctive relief include (i) the power to order the accused infringer to suspend its circulation of goods; (ii) the prohibition of the commercialization and use of the products and the impounding or confiscation of goods; and (iii) the authority to temporarily or permanently close the infringer's business.<sup>62</sup>

The 1994 Amendments also give the Mexican judicial authorities the ability to utilize these enforcement procedures. Article 228 of the revised Industrial Property Law states that the judicial authorities may adopt the enforcement measures in the Law and those found in international treaties to which Mexico is a signatory.<sup>63</sup> Another important addition to the Industrial Property Law is the clarification of the requirements for the protection of patents under the Law. Under revised Article 229, in order to claim the protection of the Law, it is necessary that the patentholder label the products' packaging with a notice that the product is protected under the Industrial Property Law or other legal protections.<sup>64</sup> Other changes in the Industrial Property Law to patents made by the 1994 Amendments included (i) a clarification of the procedures to patent biotechnology and (ii) the burden of proof requirements for "process" patent infringement.<sup>65</sup> Future changes to the Industrial Property Law are being considered, and the Institute has begun to publish a monthly review (the *Gaceta*) detailing industrial property developments. Nevertheless, these new modifications should have the intended effect of boosting investment in products and services.<sup>66</sup>

## 2. 1994 Regulations to the Industrial Property Law—Focus on Franchising Requirements

As the Salinas Administration came to an end, regulations to the Industrial Property Law and for the recently established Mexican Institute of Industrial Property (the Institute) were published on November 23, 1994, and became effective on December 8, 1994.<sup>67</sup> These regulations essentially measured, defined and secured the protections afforded to intellectual properties such as patents, trademarks and industrial design/trade secrets.<sup>68</sup> The 1994 Regulations specifically (i) addressed new patent application proce-

### Note 61, continued

*Protection*, 1 Inter-Am. Trade & Inv. Law No. 41, Aug. 12, 1994, at 162. The injunctive relief provisions entitle a party to seek relief through the Institute in relation to (i) the actual or imminent infringement of an industrial property right; (ii) the possibility of suffering irreparable harm as a result of an alleged infringement; or (iii) the justified reason to preserve relevant evidence in regard to an alleged infringement. 1994 Amendments, *supra* note 59, art. 199(bis) *et seq.*, as discussed in McKnight, *supra* note 60, at D-8.

62. 1994 Amendments, *supra* note 59, arts. 199(bis), 212 (bis), as discussed in Olea & Doyle, *supra* note 61, at 162.

63. 1994 Amendments, *supra* note 59, art. 228, as discussed in Olea & Doyle, *supra* note 61, at 162.

64. 1994 Amendments, *supra* note 59, art. 229, as discussed in Olea & Doyle, *supra* note 61, at 162.

65. *Id.* Individuals presumed to be infringing on existing industrial property rights now have the burden of proof that their good or process is not an infringement. Previously, the existing holder was required to prove infringement. See 1 Inter-Am. Trade & Inv. Law No. 41, Aug. 12, 1994, at 161.

66. Olea & Doyle, *supra* note 61, at 162.

67. Reglamento de la Ley Propiedad Industrial, D.O. Nov. 23, 1994 [*hereinafter* 1994 Regulations]; 2 Inter-Am. Trade & Inv. Law No. 4, Dec. 2, 1994, at 221.

68. *Id.* at 221.

dures and other specific methods for defining industrial property rights; (ii) defined procedures to seize or halt distribution of products violating these property rights; (iii) defined licensing procedures for third parties seeking use of inactive patents; and (iv) defined the powers and responsibilities of the Institute, its directors and subdirectors.<sup>69</sup>

In addition, the 1994 Regulations addressed two specific areas of interest to franchisors: pre-sale franchise disclosure and franchise agreement recordation requirements.<sup>70</sup> First, Article 65 of the 1994 Regulations requires that the following information be provided to potential franchisees: (i) the franchisor's name, corporate name, address and nationality; (ii) a description of the franchise; (iii) the number of years the franchisor has operated the subject franchise business; (iv) the intellectual property rights (i.e., both industrial property rights and copyrights) comprising the franchise; (v) the types and amounts of payments to be made by the franchisee to the franchisor; (vi) a description of the technical assistance and services to be provided by the franchisor to the franchisee; (vii) a definition of the geographical territory within which the franchise will be operated; (viii) information indicating whether the franchisee is entitled to subfranchises of third parties and, if so, the requirements and terms for doing so; (ix) the franchisees' obligations with respect to confidential information provided by the franchisor; and (x) the franchisees' rights and obligations under the franchise agreement.<sup>71</sup> If a party fails to provide the appropriate pre-sale franchise disclosure, a franchisee could be entitled to seek rescission of the agreement and the return of any funds paid to the franchisor under Mexican and State civil codes, be able to seek damages in lost profits resulting from the failure to provide a public disclosure, and under Article 214 of the Industrial Property Law, file a complaint with the Institute seeking imposition of civil fines.<sup>72</sup>

Second, the 1994 Regulations clarified the requirements for recording licensing and franchise agreements. Article 10 of the 1994 Regulations requires that an application for recordation of a franchise agreement must be submitted to the Institute and delineate the following information: (i) the names of the franchisor and franchisee and their respective corporate names, addresses, nationalities and domiciles; (ii) the term of the franchise agreement; (iii) whether the franchise agreement exclusively reserves to the franchisor the right to initiate legal action to protect its industrial property rights under the franchise agreement; (iv) the products or services identified by the trademarks or servicemarks licensed under the franchise agreement; and (v) any other information required by official standard forms.<sup>73</sup> Further, Article 10 allows parties to delete from the filed franchise agreement the terms pertaining to the amounts to be paid by the franchisee to the fran-

69. *Id.*

70. See McKnight, *supra* note 60, at D-9. The Mexican market for franchises started to develop upon deregulation of foreign investment and liberalization of the Transfer of Technology Law in 1990 and the publishing of the 1991 Industrial Property Law. See *Reglamento de la Ley Sobre el Control y Registro de la Transferencia de Tecnologia y el Uso y Explotacion de Patentes y Marcas*, D.O. Jan. 9, 1990.

71. 1994 Regulations, *supra* note 67, art. 65, as discussed in McKnight, *supra* note 60, at D-10. These disclosure obligations apply to a franchisor granting master franchise rights to a subfranchisor and also apply to a subfranchisor granting subfranchise rights to a subfranchisees. *Id.*

72. *Id.* at D-11.

73. 1994 Regulations, *supra* note 67, art. 10, as discussed in McKnight, *supra* note 6,0 at D-11.

chisor, including royalty rates, and also permit deletion of any descriptions of confidential information, including those which pertain to the forms and methods of distribution in the commercial use of goods and services.<sup>74</sup>

#### B. NEW RULES FOR BUSINESS VISAS (FMN)

On November 30, 1994, Release RE 1.1 was published in the Federal Official Gazette (FOG) to amend Release RE.-1 regarding the rules applied to the temporary entry of "business visitors" according to the NAFTA. This last release, published on May 9, 1994 in the FOG, created the immigration form (FMN) for "business visitors" under NAFTA.

This new Release has as its specific purpose to facilitate the distribution of FMN's not only through the Mexican Consulates in Canada and the U.S., but also through travel agencies, airlines and immigration agents at the ports of entry to Mexico. Likewise, companies which perform international business may request to the Immigration National Institute (INI) an authorization to possess FMN immigration forms that must be used under their strict responsibility and in compliance with the rules issued by the INI.

Furthermore, this Release expressly establishes that foreigners that enter into Mexico under a "business visitor" status (FMN) are neither authorized to perform paid-for activities nor to maintain a labor relationship without obtaining a prior approval of the INI pursuant to the Population General Law.

On the other hand, "business visitors" who wish to extend their period of stay in Mexico, must appear before the INI to apply for an exchange of their FMN for an FM3, delivering the former for its cancellation. In addition, foreigners must declare that their activity has not changed, and that no labor relationship has been maintained or created. Likewise, foreigners must prove sufficient earnings to cover their living expenses while in Mexico.

Finally the Release establishes that if a foreigner cannot leave the country before the expiration of his FMN, the INI may issue a letter of definitive departure for up to 30 days to conclude his period of stay in Mexico.<sup>75</sup>

—Chris Olive

74. *Id.* art. 10, as discussed in McKnight, *supra* note 60, at D-12. Moreover, the 1994 Amendments eliminated provisions providing that the recordation of a license or franchise agreement could be rejected for "public policy" reasons or in the event the agreement in question excluded the applicability of the Industrial Property Law. See 1994 Amendments, *supra* note 59, art. 150, as discussed in McKnight, *supra* note 60, at D-9. The Mexican government has found franchising to be a good and safe way to promote modernization and technology acquisition for most services and manufacturing processes. Quality standards and service excellence promoted by the franchising system are now recognized as useful in making Mexican industry more competitive. See *Non-Fast Food Franchising*, 4 Mex. Trade & L. Rep. No. 4, Apr. 1, 1994. As a result, the Mexican market for franchises grew 404 percent from U.S. \$38.8 million in 1991 to U.S. \$156.8 million in 1993, just for franchises registered by the Mexican Franchise Association. *Id.* Sales of franchise establishments also grew 400 percent in the same period. *Id.*

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