# NAFTA Largely Responsible for the Obesity Epidemic in Mexico

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## INTRODUCTION

Obesity has notoriously been an American problem.[1] However, in 2013, Mexico surpassed the United States to become the most obese country in the world.[2] There are a number of suspected causes for Mexico's rise in the ranks. On a global scale, there is an increased availability of obesogenic foods, largely as a result of globalization trends such as "McDonaldization" and "Coca-Colonization."[3] In

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1. John P. Elder, *Mexico and the USA: The World's Leaders in the Obesity Epidemic*, 55 SALUD PUBLICA DE MEXICO S355 (2013) ("[T]he United States until very recently has had the highest prevalence of adult obesity internationally (excepting countries with small populations such as Belize and Cook Islands)."). *See also Adult Obesity Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/data/adult.html (last visited Apr. 13, 2016) ("More than one-third (34.9% or 78.6 million) of U.S. adults are obese."); *An Epidemic of Obesity: U.S. Obesity Trends*, HARVARD SCHOOL OF PUBLIC HEALTH, http://www.hsph.harvard.edu/nutritionsource/an-epidemic-of-obesity/ (last visited Mar. 24, 2016) (discussesing the upward trend of the prevalence of obesity in the United States over time).

2. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, THE STATE OF FOOD AND AGRICULTURE 2013 STATISTICAL ANNEX 77–78 (2013), *available at* http://www.fao.org/docrep/018/ i3300e/i3300e.pdf [hereinafter FAO STATE OF FOOD AND AGRICULTURE] (showing that in 2013, the prevalence of obesity in Mexico's adult population was 32.8 percent, while the United States' rate was 31.8 percent). *See also* Dudley Althaus, *How Mexico Got So Fat*, GLOBALPOST (July 8, 2013), http://www.globalpost.com/dispatch/news/regions/americas/mexico/130705/mexican-fattest-country-obesity (referencing the release of the FAO report).

3. *See generally* GEORGE RITZER, THE MCDONALDIZATION OF SOCIETY 1 (2013) (defining 'McDonaldization' as "the process by which the principles of the fast-food restaurant are coming to dominate more and more sectors of American society as well as the rest of the world"). *See also* P. Zimmet, *Globalizaiton, Coca-Coloniztion and the Chronic Disease Epidemic: Can the Doomsday Scenario Be Averted?*, 247 J. INTERNAL MED. 301 (2000) (discussing the definition author Arthur Koestler used when he coined the term "Coca-Colonization": "[T]he impact of the ways of Western societies on developing countries"); *Coca-Colonize Definition*, DICTIONARY.COM, http://www.dictionary.com/browse/coca-colonize (last visited Apr. 13, 2016) ("[T]o bring a foreign country under the influence of U.S. trade, popular culture, and attitudes.").

Mexico's case, the changing food environment is linked to the North American Free Trade Agreement (NAFTA).[4] In particular, NAFTA's leniency toward Foreign Direct Investment (FDI), defined as "an investment by an enterprise from one country into an entity or affiliate in another," acts as a catalyst to bring about these changes.[5]

The objectives of NAFTA are clear. Most broadly, the treaty expressly reflects the intent of the Canadian, United States, and Mexican governments (collectively, the Parties) to eliminate all barriers to trade between them.[6] Another stated objective carries equal weight. In implementing NAFTA, the Parties intended to "increase substantially investment opportunities" across borders.[7] The Parties succeeded in this initial effort. Most significantly, the treaty's Chapter Eleven—which details acceptable FDI practices—has

4. North American Free Trade Agreement, Dec. 8, 1992, 32 I.L.M. 289 [hereinafter NAFTA]. Despite the fact that NAFTA is a tri-governmental treaty, this Note mainly discusses the negative impact NAFTA has had on the spread of non-communicable disease in Mexico, and not Canada. This Note argues that the effect of NAFTA's lax language is more dramatic in Mexico due to the differences in the level of development between the United States and Mexico at the time NAFTA was enacted, and the impact that difference had in negotiating the agreement. Clark et al., *Exporting Obesity: US Farm and Trade Policy and the Transformation of the Mexican Consumer Food Environment*, 18 INT'L J. OCCUPATIONAL & ENVTL. HEALTH 55 (2012) (noting that NAFTA was the first proposed trade agreement between countries that vary so significantly in size and development). *See also* MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE 1 (2003). Cameron and Tomlin argue that this dynamic gave the U.S. more bargaining power at the outset of NAFTA negotiations. *Id*. at 18 ("[F]ormal cooperation and the creation of new institutions are very difficult tasks when there are great asymmetries of power between two states."). Looking at the GDP of the three countries during the year NAFTA negotiations began, the U.S. economy was advanced far beyond that of both Canada and Mexico combined (United States GDP at $6.174 trillion; Mexico GDP at $314.4 billion; Canada GDP at $608.3 billion). The World Bank data function, *available at* http://data.worldbank.org/country.

5. Corinna Hawkes, *The Role of Foreign Direct Investment in the Nutrition Transition*, 8 PUB. HEALTH NUTRITION 357, 358 (2004). ("It is well known that FDI (along with trade, communication and migration, etc.) has been a key process generating greater global economic integration (globalisation)"). *Id*. at 357–58.

6. *See* NAFTA, *supra* note 4, art. 102 ("The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored nation treatment and transparency, are to: a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the parties.").

7. NAFTA, *supra* note 4, art. 102 ("The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored nation treatment and transparency, are to: . . . c) increase substantially investment opportunities in the territories of the Parties.").

reinforced the power of American transnational corporations by increasing their already-global reach.[8]

While NAFTA acts to stimulate investment and economic gain to interested and able investors and investor-corporations,[9] its effective limitation on governments' ability to regulate has fostered lasting and detrimental public health issues in Mexico.[10] Regulatory limitations in NAFTA and its corresponding agreements have already impeded some countries' attempts at public health regulation.[11] At the root of this is NAFTA's broad language,[12] which provides for extensive trade liberalization between the Parties but does not leave much room for the Parties to regulate in support of their legitimate governmental interests. As this Note will discuss in detail, while there are some chapters of NAFTA that authorize restraints on free trade for reasons related to human health,[13] it is unlikely that these carve-outs are sufficient enough to adequately combat the spread of non-communicable diseases such as obesity.[14]

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8. *See generally* NAFTA, *supra* note 4, at ch. 11 (Investment) discussed *infra* Part III.

9. Stephen Zamora, *Rethinking North America: Why NAFTA's Laissez Faire Approach to Integration Is Flawed, and What to Do About It*, 56 VILL. L. REV. 631, 644–45 (2011).

10. Alberto R. Salazar, *NAFTA Chapter 11, Regulatory Expropriation, and Domestic Counter-Advertising Law*, 27 ARIZ. J. INT'L & COMP. L. 31 (2010) ("Trade agreements are believed to both facilitate the expansion of the international economy and contribute to national growth. Sometimes that comes at the expense of curtailing the ability of governments to regulate their economies to achieve national policy goals. This may be the case when, for instance, governments promote healthy eating to fight obesity and hunger"). *See also* Arturu Jimenez-Cruz & Monsterrat Bacardi-Gascon, *The Fattening Burden of Type 2 Diabetes on Mexicans*, 27 DIABETES CARE 1213, 1213 (2004) ("[B]etween 1993 and 2000, the prevalence of overweight and obesity increased from 55% to 62% among adults"). Currently, more than one in three Mexican adults is obese. OECD, OBESITY UPDATE (2014), *available at* http://www.oecd. org/health/Obesity-Update-2014.pdf.

11. *See* discussion about Mexico's soda tax, Chile's STOP! attempted legislation and the WTO fallback, *infra* Part IV.

12. Zamora, *supra* note 9, at 632 ("NAFTA's scope was broad but shallow—it covers most of the economic terrain, but it leaves unregulated, or unattended, the geopolitical dimensions of North America's future.").

13. *See* NAFTA, supra note 4, chs. 7, 9.

14. *Noncommunicable Diseases*, WHO, http://www.who.int/mediacentre/factsheets/fs355/en/ (last updated Jan. 2015) ("Noncommunicable diseases (NCDs), also known as chronic diseases, are not passed from person to person. They are of long duration and generally slow progression.") This Note primarily focuses on one type of non-communicable disease, obesity. The numbers indicating the spread of obesity are startling and the burden is disproportionately placed on developing countries. *See also* Abdesslam Boutayeb, *The Double Burden of Communicable and Non-Communicable Diseases in Developing Countries*, 100 TRANSACTIONS ROYAL SOC'Y TROPICAL MED. HYGIENE 191, 192 (2006) ("If the present trend

This Note attempts to fuse the seemingly opposing interests of liberalizing trade and investment with the protection of legitimate public health interests. In Part I, this Note details NAFTA and provides an overview of the relevant international trade agreements that were influential in its implementation. Part II focuses on globalization, specifically highlighting the changing food demographics and food cultures in the world. This Part also considers the extent of the effects of NAFTA's free trade policy on the obesity epidemic in Mexico. Part III contemplates FDI as the most direct contributor to the spread of non-communicable diseases in Mexico, and highlights some of NAFTA's provisions that are particularly enabling. In Part IV this Note examines NAFTA in detail, exposing its limitations and the impact those limitations have on the Parties' ability to adequately intervene in this global public health crisis. Lastly, Part V proposes a number of solutions to enable the Parties to regulate in the public health sphere, while maintaining NAFTA's free trade objectives.

## I. THE NORTH AMERICAN FREE TRADE AGREEMENT

In order to contextualize the implementation of NAFTA and understand its impact on the Parties, it is necessary to look back to the General Agreement on Tariffs and Trade (GATT).[15] The GATT, which originally took effect in 1948, was considered a "provisional agreement" of "limited effectiveness" that was instituted to reduce tariffs and quotas between participating nations.[16] The GATT was originally signed by 23 countries, including the United States, but when it grew to involve 128 nations, the GATT was replaced by the

is maintained, it is predicted that, by 2020, NCDs will account for 80% of the global burden of disease, causing seven out of every ten deaths in developing nations . . . .").

15. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

16. *The GATT Years: From Havana to Marrakesh*, WTO.ORG, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last accessed Apr. 13, 2016) ("GATT was provisional with a limited field of action, but its success over 47 years in promoting and securing the liberalization of much of world trade is incontestable"). NAFTA also borrowed some provisions from GATT such as the "most-favored nation principle" and "national treatment," discussed *infra* Part III.

World Trade Organization (WTO) in January of 1995.[17]

The WTO serves as an international forum within which member countries can sort out trade relationships with one another.[18] As an intergovernmental organization, the WTO has developed a number of agreements that cover a range of topics pertinent to international trade, including procedures required in the trade of goods as well as dispute settlement procedures.[19] Together, the WTO (which incorporates the GATT) and NAFTA control the trade relationship between the United States, Canada, and Mexico.[20]

It is against this backdrop that we can start to understand the influential role NAFTA has over trade between Mexico and the United States. In 1994, Canada, Mexico, and the United States joined forces to establish a free trade area through NAFTA.[21] In doing so, the countries came to an agreement that sets restrictions on activities with the potential to impede this newly created free trade.[22] In relevant part, the treaty eliminates import and export tariffs and

17. *See* GATT, *supra* note 15. *See also The 128 Countries That Had Signed GATT by 1994*, WTO.ORG, https://www.wto.org/english/thewto_e/gattmem_e.htm (last accessed Apr. 13, 2016). The WTO incorporated the GATT as amended in 1994 at the Uruguay Round Agreement, an eight-year series of trade negotiations that led to the formation of the WTO. *See generally* THE WTO AGREEMENTS SERIES: GENERAL AGREEMENT ON TARIFFS AND TRADE, WTO *available at* https://www.wto.org/english/res_e/booksp_e/agrmntseries2_gatt_e.pdf (last accessed Apr. 13, 2016). Hereinafter, any reference to "WTO" intends to include pre-1995 GATT unless otherwise mentioned.

18. *Who We Are*, WTO.ORG, *available at* https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last accessed Apr. 13, 2016).

19. *See generally WTO Legal Texts*, WTO.ORG, *available at* https://www.wto.org/english/docs_e/legal_e/legal_e.htm (last accessed Mar. 30, 2016). These agreements developed as a result of the Uruguay Round.

20. *See* NAFTA, supra note 4, art. 103 (indicating where NAFTA stands in relation to other agreements: even when NAFTA applies, Parties maintain their rights under GATT; when NAFTA conflicts with another law, NAFTA trumps). *See also* MAURY E. BREDAHL & ERIN HOLLERAN, TECHNICAL REGULATIONS AND FOOD SAFETY IN NAFTA 74 (1997), *available at* http://ageconsearch.umn.edu/bitstream/16906/1/ag970071.pdf ("The NAFTA and WTO Agreements together govern the trade relationship between the United States, Canada and Mexico. The important difference between NAFTA and WTO, as Hooker and Caswell note, is that the WTO has 'institutional arrangements for binding arbitration of differences between countries on safety regulation.'").

21. *See* NAFTA, *supra* note 4, art. 101 ("The Parties to this Agreement, consistent with Article XXIV of the *General Agreement on Tariffs and Trade*, hereby establish a free trade area.").

22. NAFTA, *supra* note 4, art. 101.

incentivizes cross-border investment.[23] To balance these trade liberalizations, NAFTA provides the Parties with guidelines on how to regulate on a national level within the confines of the treaty, and provides a procedure to settle disputes.[24] Unfortunately, however, many of these provisions are overbroad and provide the Parties with little clarity about acceptable actions—and importantly—the outer limits of acceptable regulatory action.[25]

The interaction between NAFTA and the WTO agreements only adds to this ambiguity. NAFTA's Article 103 first sets forth the nebulous relationship: "The Parties affirm their existing rights and obligations . . . under the General Agreement on Tariffs and Trade (now WTO) and other agreements to which such Parties are party,"[26] and it subsequently empowers NAFTA to hold in the case of any inconsistency between NAFTA and these other agreements.[27] In large part, NAFTA mirrors many of the fundamental aspects of WTO agreements. In addition, some NAFTA chapters even expressly defer to GATT for authority.[28] For example, pursuant to NAFTA's Chapter Nine, member countries "affirm with respect to each other their existing rights and obligations relating to standards-related measures under the [WTO] Agreement on Technical Barriers to Trade."[29]

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23. *See generally* NAFTA, *supra* note 4, chs. 1, 11.

24. *See generally* NAFTA, *supra* note 4, chs. 7, 9 (allowing for measures to protect human health), ch. 11 (setting forth procedures for investment-related disputes) and ch. 20 (setting forth procedures for other disputes).

25. *See generally* Gabrielle Kaufmann-Kohler, *Arbital Precedent: Dream, Necessity or Excuse*?, 23 ARB. INT'L (2007) (discussing how the absence of precedent in international arbitration leads to unpredictable outcomes). *See also* Anthony DePalma, *NAFTA's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES (Mar. 11, 2001), http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html?pagewanted=all ("The lack of a traditional appeal process, transparency and legally binding precedent, along with the wide scope of what can be challenged under the free-trade investment rules, have made people wary in all three nations, including government officials.").

26. NAFTA, *supra* note 4, art. 103(1). As we will see in Chapter Nine discussed *infra* Part IV, NAFTA defers to GATT's international standards.

27. NAFTA, *supra* note 4, art. 103(2) ("In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, *except as otherwise provided in this Agreement*") (emphasis added).

28. *See, e.g.*, NAFTA, *supra* note 4, art. 903 (abiding by GATT Technical Barriers to Trade).

29. NAFTA, *supra* note 4, at ch. 9. *See also* GATT, *supra* note 15. Confusingly, NAFTA authors restated this deference to GATT in Chapter Nine, despite already stating in Article 103

Because it is not readily clear when these agreements overlap, and when they do, which takes precedent, the Parties are forced into regulatory guesswork, potentially opening them up to a NAFTA suit down the line. As a result, because this ambiguity makes regulation and policy-making more difficult, the effect is essentially uncapped power for investors.

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of Chapter One that the parties' reaffirm their obligations under GATT. While Article 103 itself may not be confusing, it is not always clear how this provision interacts with references to other agreements.

## II. GLOBALIZATION AND THE "NUTRITION TRANSITION"

Global food norms are shifting as a result of globalization. Health scholars call this trend the "Nutrition Transition," defined as the "dual process of dietary convergence towards processed food consumption and dietary adaptation to a wider range of processed foods targeted at different niche markets."[30] Put simply, as global food systems change, an increasing number of individuals and entire populations are consuming unhealthy "Western diets,"[31] which include an increased amount of animal products, vegetable oils, sweeteners, and processed foods.[32]

In a pre-NAFTA North America, Mexico spent approximately

30. Corinna Hawkes, *Uneven Dietary Development: Linking the Policies and Processes of Globalization with the Nutrition Transition, Obesity, and Diet-Related Chronic Illnesses*, 2:4 GLOBALIZATION & HEALTH 1, 2–3 (2006). Hawkes also discusses an important finding on global market integration: "[G]lobal market integration facilitates not only convergence in consumption habits (as is commonly assumed in the 'Coca-Colonization' hypothesis), but adaptation to products targeted at different niche markets." *Id*. at 1. *See* discussion of integrated global markets as a result of lax FDI regulations *infra* Part III. The "convergence" Hawkes describes is characterized by "an increased reliance on a narrow base of staple grains, and increased consumption of meat and meat products, dairy products, edible oil, salt and sugar, and a lower take of dietary fiber." *Id*. at 2–3. Hawkes defines dietary adaptation as the "increased consumption of brand-name processed and store-bought food, an increased number of meals eaten outside the home, and consumer behaviors driven by the appeal of new foods available." *Id*. *See also The Nutrition Transition and Obesity*, FOOD & AGRIC. ORG. UNITED NATIONS, http://www.fao.org/focus/e/obesity/obes2.htm (last visited Mar. 2, 2016) (describing the obesity in the developing world as a result of the "nutrition transition," "a series of changes in diet, physical activity, health, and nutrition") [hereinafter FAO].

31. BM Popkin & P. Gordon-Larsen, *The Nutrition Transition: Worldwide Obesity Dynamics and Their Determinants*, 28 INT'L J. OBESITY 52, 52 (2004) ("Modern societies seem to be converging on a diet high in saturated fats, sugar, and refined foods but low in fiber—often termed the 'Western diet.'"). *See also* FAO, *supra* note 30 ("Another element of the nutrition transition is the increasing importation of foods from the industrialized world. As a result, traditional diets featuring grains and vegetables are giving way to meals high in fat and sugar.").

32. GINA KENNEDY ET AL., FAO, GLOBALIZATION OF FOOD SYSTEMS IN DEVELOPING COUNTRIES: A SYNTHESIS OF COUNTRY CASE STUDIES 124 (2004), *available at* http://www.fao.org/3/a-y5736e.pdf ("Globalization is having a major impact on food systems around the world. It is affecting availability and access to food through changes to food production, procurement, and distribution, in turn bringing about a gradual shift in food culture, with consequent changes in dietary consumption patterns and nutritional status that vary with the socio-economic strata."). *See also* Hawkes, *supra* note 30 at 1 ("In a nutrition transition, the consumption of foods high in fats and sweeteners is increasing throughout the developing world.").

$1.8 billion per year on food imports.[33] As of 2011, post-NAFTA Mexico spends about $24 billion per year on food imports.[34] Unsurprisingly, a large number of these United States-to-Mexico exports are of obesogenic foods and other "unhealthy commodities."[35] For example, post-NAFTA exports to Mexico from the United States of high fructose corn syrup—a highly caloric sweetener linked to obesity[36]—are up by a factor of 863.[37] The impact on the health of Mexican citizens is tangible and costly.[38] While there are a number of suspected causes that contribute to this pandemic, in Mexico, NAFTA's lenient FDI provisions are at fault.

## III. FOREIGN DIRECT INVESTMENT AS THE VECTOR TO THE SPREAD OF NON-COMMUNICABLE DISEASE

### *A. FDI Overview*

FDI comes in many flavors. For the purposes of this Note, FDI is the process by which an enterprise in one country makes a long-term

33. Laura Carlsen, *NAFTA Is Starving Mexico*, CIP AMERICAS PROGRAM (Oct. 20, 2011), http://www.cipamericas.org/archives/5617.

34. Carlsen, *supra* note 33.

35. David Stuckler et al., *Manufacturing Epidemics: The Role of Global Producers in Increased Consumption of Unhealthy Commodities Including Processed Foods, Alcohol, and Tobacco*, 9:6 PLOS MED. 1, 1 (2012) ("'Unhealthy commodities'—soft drinks and processed foods that are high in salt, fat, and sugar, as well as tobacco and alcohol—are leading risk factors for chronic non-communicable diseases."). The number of these exports has increased dramatically. *See generally* Clark et al., *supra* note 4. *See also* Bolling et al., *U.S. Firms Invest in Mexico's Processed Food Industry*, 22 FOODREVIEW 26 (1999) ("U.S. exports of processed foods to Mexico, mostly processed meats, poultry, animal fats, and vegetable oil, increased from $1.1 billion in 1990 to $2.8 billion in 1998"); *U.S.-Mexico Trade Facts*, U.S. OFFICE TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/americas/mexico# (last accessed May 26, 2016) (noting that in 2013, obesogenic exports to Mexico amounted to $1.8 billion in corn, $1.5 billion in soybeans, $1.4 billion in dairy products, $1.2 billion in pork and pork products, and $1.2 billion in poultry meat).

36. Miriam Bocarsly et al., *High-Fructose Corn Syrup Causes Characteristics of Obesity in Rats: Increased Body Weight, Body Fat, and Triglyceride Levels*, 97 PHARMACOLOGY, BIOCHEMISTRY & BEHAVIOR 101, 101 (2010).

37. Tracie McMillan, *How NAFTA Changed American (and Mexican) Food Forever*, NPR (Feb 13, 2015), http://www.npr.org/sections/thesalt/2015/02/13/385754265/how-nafta-changed-american-and-mexican-food-forever.

38. *See, e.g.*, Elder, *supra* note 1, at S355; FAO STATE OF FOOD AND AGRICULTURE, *supra* note 2.

investment in a foreign enterprise by acquisition.[39] Through this transaction, the investor-enterprise becomes a foreign affiliate and transnational parent to the foreign enterprise.[40] When compared to other forms of international investment, FDI is unique in that the investor maintains a level of control in management and decision-making in the investment.[41]

Firms are incentivized to invest in activities abroad for a number of reasons, employing both supply-side and demand-side strategies.[42] On the supply side, firms benefit from FDI in places where they can use subsidiaries to realize economies of scale.[43] On the demand side, firms are able to expand their brands internationally by tapping previously untapped and otherwise hard-to-reach markets.[44] Mexico, for example, is a prime candidate for FDI, as it has an attractive 116 million consumers with an aggregate purchasing power of over one trillion dollars.[45]

On one hand, countries are receptive to FDI because of its reputation of boosting economic development.[46] As a general matter, FDI flows from industrialized countries to developing countries,

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39. RAFAEL LEAL-ARCAS, INTERNATIONAL TRADE AND INVESTMENT LAW: MULTILATERAL, REGIONAL AND BILATERAL GOVERNANCE 168 (2010). *See also* IMAD A. MOOSA, FOREIGN DIRECT INVESTMENT: THEORY, EVIDENCE AND PRACTICE 7 (2002); Hawkes, *supra* note 5, at 358.

40. MOOSA, *supra* note 39, at 8 ("A foreign affiliate is defined as 'an incorporated or unincorporated enterprise in which an investor, who is resident in another economy, owns a stake that permits a lasting interest in the management of that enterprise'"). *See also* LEAL-ARCAS, *supra* note 39.

41. LEAL-ARCAS, *supra* note 39, at 169–70. Other types of FDI can occur by creating a company, joint-venture, or by way of financing. *Id*.

42. *Id.* at 171 ("FDIs may be motivated either by demand factors that reflect the attractiveness of the host-country, or by the characteristics of supply of the investors' country"). *See also* Hawkes, *supra* note 5, at 357.

43. MOOSA, *supra* note 39, at 74 ("In general, it seems that FDI can exert an impact on the output of the host country if it is possible to absorb surplus resources and/or improve efficiency through alternative allocations").

44. Hawkes, *supra* note 5, at 360.

45. *NAFTA at Twenty: Accomplishments, Challenges, and the Way Forward: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs*, 113th Cong. 9 (2014) (the Subcommittee on the Western Hemisphere of the House of Representatives gathered to have a hearing to evaluate NAFTA twenty years after its implementation).

46. MOOSA, *supra* note 39, at 73 ("FDI, by affecting capital accumulation, ought to be capable of influencing economic development."). *See generally* Lawrence Haddad, *Redirecting the Nutrition Transition: What Can Food Policy Do?*, 21 DEVELOPMENT POL'Y REV. 599 (2003).

thereby bringing about important changes in technology and productivity levels beyond what would occur organically by way of domestic investment.[47] On the other hand, despite these upsides to international investors, FDI has a number of negative impacts on the host country.[48] Because of the economies of scale achieved by investors, local producers often struggle to compete and must eventually surrender to international corporate giants.[49] In Mexico, small farmers have even joined forces to push for a re-negotiation of the treaty.[50] NAFTA's provisions that enable FDI contribute to the pervasive obesity epidemic in Mexico, by introducing and increasing the availability of processed and other obesogenic foods. This Part will assess the sections of NAFTA that are especially enabling to FDI.

### *B. NAFTA Chapter One: Objectives*

NAFTA's first chapter states the objectives of the treaty, which include the Parties' desire "to eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties," and "to increase substantially investment opportunities in the territories of the Parties."[51] NAFTA has done just that. Economic studies suggest that NAFTA is responsible for a 40 to 70 percent increase in FDI.[52] In the food and beverage industries alone, US investment into Mexico grew from

47. MOOSA, *supra* note 39, at 75. *See also* LEAL-ARCAS, *supra* note 39, at 179 ("The main arguments in favor of FDI in developing countries are: immediate capital formation, creation of new employment, upgrading of infrastructure facilities, and transfer of skills in technology and management.").

48. LEAL-ARCAS, *supra* note 39, at 178 ("Developing countries have a number of fears that prevent them from accepting any kind of negotiations on FDI in a multilateral organization. Among these fears is the possible reduction of their room for maneuver in domestic policies.").

49. *See e.g.*, Clark et al., *supra* note 4, at 57 (describing the negative impact free trade has had on white corn production in Mexico). *See also*, LEAL-ARCAS, *supra* note 39, at 229 ("NAFTA's agricultural provisions have been so extreme that Mexican family farmers are demanding a re-negotiation or nullification of the treaty, after its first phase of initial implementation led to the displacement of millions of Mexican farmers.").

50. Carlsen, *supra* note 33.

51. NAFTA, *supra* note 4, art. 101.

52. ALFREDO CUERVAS, CHANGES IN THE PATTERNS OF EXTERNAL FINANCING IN MEXICO SINCE THE APPROVAL OF NAFTA 24 (July 2002).

$2.3 billion in 1993 to $8.7 billion in 2007.[53]

While the treaty's broad objectives are meant to be tailored by its principles and rules,[54] as discussed *infra*, functionally there are few limitations on this expansive text. These boundless objectives are at the root of the negative impacts of NAFTA's extensive trade liberalization.

### *C. NAFTA Chapter Eleven: Investment and Investor-State Disputes*

NAFTA's Chapter Eleven is highly criticized for favoring investor interests above all.[55] Most significantly, NAFTA is the only multilateral trade agreement with such expansive protections for private investors.[56] Scholars point to a few Chapter Eleven provisions that were instrumental in spurring the significant growth in United States' FDI between 1993 and 2009.[57] Three provisions in particular

53. *NAFTA, Canada & Mexico: Mexico Trade & FDI*, USDA (Mar. 14, 2014), http://www.ers.usda.gov/topics/international-markets-trade/countries-regions/nafta,-canada-mexico/mexico-trade-fdi.aspx.

54. NAFTA, *supra* note 4, art. 102 ("The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to: (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; (b) promote conditions of fair competition in the free trade area; (c) increase substantially investment opportunities in the territories of the Parties; (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory; (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement").

55. NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 135 (Todd Weiler ed., 2004) ("Environmentalists, labor organizers and human rights advocates all decry the secrecy, potential disruptiveness to ordinary lawmaking, and placing of investors' interests before those of the broader public.") [hereinafter NAFTA INVESTMENT LAW AND ARBITRATION]. *See also* LEAL-ARCAS, *supra* note 39, at 229 ("NAFTA represents the gold standard of corporate rights in trade and investment agreements because it includes hitherto unheard of corporate privileges, including investor-to-state dispute resolutions."); DePalma, *supra* note 25 (describing the popular impression of the investor-state dispute mechanism as a "secret government").

56. Chris Tollefson, *Games Without Fronteirs: Investor Claims and Citizen Submissions Under the NAFTA Regime*, 27 YALE J. INT'L L. 141, 143 (2002).

57. IMITIAZ HUSSAIN, REEVALUATING NAFTA: THEORY AND PRACTICE 36–37 (2012). Just fifteen years after NAFTA was instituted, the total FDI tripled, amounting to $138 billion. *Id*. *See also* NAFTA, *supra* note 4, at ch. 11 (fostering a favorable investment environment abroad).

are most relevant to the United States' FDI into Mexico's processed food industry.

Article 1102 affords "national treatment" to each of the participating countries.[58] The article sets forth that "each Party shall accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors."[59] This same section is repeated with regard to national treatment for investments.[60] For clarity purposes, NAFTA expressly states that no Party may "impose on an investor of another Party a requirement that a minimum level of equity . . . be held,"[61] or "require an investor of another Party . . . to sell or otherwise dispose of an investment."[62] As discussed herein, when these issues are brought to the attention of a NAFTA tribunal, panelists deciding on an Article 1102 claim must first determine how a measure has impacted an investor/investment in order to later adjudicate whether or not one party received more favorable treatment.[63]

The Most Favored Nation (MFN) principle of Article 1103 is similar in effect to national treatment and was created to preserve NAFTA's principles in case of subsequent international agreements.[64] In short, MFN requires that all North American investors be treated the same.[65] Together, Articles 1102 and 1103

58. NAFTA, *supra* note 4, art. 1102 (designating national treatment status to investors). *See also* HUSSAIN, *supra* note 57, at 136–37. NAFTA also borrowed the concept of "National Treatment" from GATT. NAFTA, *supra* note 4, art. 301. National Treatment necessitates the absence of discrimination in both taxes and regulations between domestic and foreign goods. *Id*.

59. NAFTA, *supra* note 4, art. 1102(1).

60. *Id.* art. 1102(2) ("Each Party shall accord to investments of investors of another Party treatment no less favorable than it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.").

61. NAFTA, *supra* note 4, art. 1102(4)(a).

62. *Id.* art. 1102(4)(b).

63. NAFTA INVESTMENT LAW AND ARBITRATION, *supra* note 55, at 29 ("The test is whether any relevant competitor is receiving more favorable treatment than the claiming investor or its investment."). *Id.*

64. HUSSAIN, *supra* note 57, at 36. *See also* Timothy Hughes, *NAFTA Tribunal Considers Issues of Res Judicata and Customary International Law Minimum Standard of Treatment*, HERBERT SMITH FREEHILLS ARBITRATION NOTES (Nov. 14, 2014), http://hsfnotes.com/arbitration/2014/11/14/nafta-tribunal-considers-issues-of-res-judicata-and-the-customary-international-law-minimum-standard-of-treatment/.

65. NAFTA, *supra* note 4, art. 1103 (Most-Favored-Nation Treatment). *See also* LEON TRAKMAN & NICOLA RANIERI, REGIONALISM IN INTERNATIONAL INVESTMENT LAW 104–

make it clear that regardless of whether a measure appears discriminatory on its face (de jure discrimination) or if it is discriminatory in its application (de facto discrimination), it can be considered a barrier to trade.[66] Put simply, irrespective of the Parties' legitimate intentions in adopting trade-restrictive measures, the fact that a particular measure in its effect is more trade-restrictive to international investors is enough to violate NAFTA.[67]

Article 1105 mandates minimum standards of treatment.[68] This section provides that other Parties' investments be treated "in accordance with international law, including fair and equitable treatment and full protection and security."[69] This section acts as an affirmative duty on the Parties to treat investments of other Parties at a designated floor level.[70] Because Article 1105 requires the Tribunal to judge in accordance with international law, this section affords the panel members with expansive authority to determine what is fair and equitable under the treaty.[71]

Issues that arise between Parties or between Investors and Parties are settled pursuant to Chapter Eleven's special rules on investor-state disputes.[72] Article 1115 provides the mechanism for investors to

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05 (2013) (detailing what is required under most-favored-nation treatment).

66. *See generally* HUSSAIN, *supra* note 57.

67. Tollefson, *supra* note 56, at 154.

68. NAFTA, *supra* note 4, art. 1105 (Minimum Standard of Treatment). *See also* HUSSAIN, *supra* note 57, at 38 (explaining that the United States and Canada developed the minimum standard of performance provision to protect their developed economies from developing economies, like Mexico's at the time). The Minimum Standard of Treatment "established a performance floor to compensate for the developed-developing gaps in production and costs." *Id.*

69. NAFTA, *supra* note 4, art. 1105(1). Any measures adopted by a Party must also be non-discriminatory to other Parties. NAFTA, *supra* note 4, art. 1105(2) ("Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.").

70. Tollefson, *supra* note 56, at 155.

71. Todd Weiler, *NAFTA Chapter 11 Jurisprudence: Coming Along Nicely*, 9 SW. J.L. & TRADE AMERICAS 257 (2003). *See also* Tollefson, *supra* note 56, at 155.

72. NAFTA, *supra* note 4, art. 1115. Prior to NAFTA, trade agreements only permitted governments to enforce agreements on other governments. Schaffer et al., *Global Trade and Public Health*, 95 AM. J. PUB. HEALTH 23, 27 (2005). Today, corporations can sue to enforce this international treaty for loss of current or future profits, even if the alleged loss of profits is caused by governmental regulation to protect human health. *Id.*

bring a NAFTA claim; investor-state disputes are not subject to NAFTA's other dispute settlement chapter.[73] Under Article 1116, investors may sue a Party alleging an injury to itself, and under Article 1117, investors are given the power to bring a NAFTA claim on behalf of an enterprise.[74]

Under Article 1120(2), the NAFTA tribunal is granted broad discretion to determine whether or not it has jurisdiction over a particular claim.[75] The arbitration committee consists of three arbitrators, one appointed by each of the disputing Parties, and the third appointed by agreement of the disputing Parties.[76] Unlike the rules of interpretation that most international tribunals are subject to, in accord with the Vienna Convention—which requires tribunals to attend to the plain meaning of the text—the NAFTA tribunal is granted broad authority to interpret text in light of NAFTA's objectives.[77] This authority is problematic. Because NAFTA's objectives are broad and terms that are critical to the effect of the document remain undefined or unclear, there is little predictability for the Parties as to how they will fare in the dispute process.

While there have only been a few cases adjudicated by the NAFTA tribunal, some are especially notable. In *Cargill, Inc. v.*

73. NAFTA, *supra* note 4, art. 1115 ("[T]his Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.").

74. *Id.* arts. 1116, 1117 (Article 1116: Claim by an Investor of a Party on Its Own Behalf; Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise).

75. *Id.* art. 1120(2) ("The applicable arbitration rules shall govern the arbitration except to extent modified by this Section."). *See also* Weiler, *supra* note 71 at 251. ("All arbitral rules made available to investors under NAFTA Article 1120 contain a provision which vests the tribunal with the authority to determine whether it has jurisdiction to hear the dispute before it. NAFTA does not modify this power. Therefore, under Article 1102(2) the tribunal's discretion to decide whether it has jurisdiction to hear a claim is untrammeled.").

76. *See generally* NAFTA, *supra* note 4, ch. 7.

77. NAFTA INVESTMENT LAW AND ARBITRATION, *supra* note 55, at 110 ("Article 31(1) of the Vienna Convention provides the golden rule of treaty interpretation. It requires a tribunal to focus on the plain meaning of the text before it while being mindful not only of its placement within the context of the treaty but also of the objects and purposes of the treaty."). NAFTA provides a list of objectives in Article 102 and a prescription for how the tribunal must interpret the text. *See generally* NAFTA, *supra* note 4, ch 1. It follows that when interpreting the text, the tribunal considers NAFTA's broad objectives including the promotion of conditions of fair competition in the free trade area, elimination of barriers to trade, and the promotion of increased investment opportunities. *Id.*

*United Mexican States*, Cargill, Inc. of the United States sued the Mexican government on behalf of its subsidiary Cargill de Mexico, a seller of high fructose corn syrup.[78] The suit came after Mexico attempted to place a 20 percent tax on the production and sale of soft drinks that contained high fructose corn syrup, a measure which Cargill claimed—and the NAFTA tribunal affirmed[79]—was in violation of Article 1102, National Treatment.[80] As a result, the Mexican government was forced to fork over more than $77 million.[81] Similarly, as a result of the same tax, in *Corn Products International v. United Mexican States*, Corn Products, Inc. a U.S. corporation in the business of high fructose corn syrup production sued on behalf of its Mexican subsidiary Arancia CP.[82] Corn Products claimed this tax would cause its suppliers to drop its product, effectively destroying the market.[83] The tribunal again decided against Mexico and awarded Corn Products International $58.4 million.[84]

These decisions make it clear that the investor-state dispute resolution mechanism of Chapter Eleven favors investors, which in turn facilitates FDI. By granting investors power to bring a NAFTA claim on behalf of themselves or a corporate entity, investors are sufficiently incentivized to challenge Parties' regulatory measures. This is more likely to be true in the obesity context. As discussed further in Part IV, regulation against risk factors of non-communicable diseases is especially likely to be difficult under the

78. Cargill, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009).

79. *Cargill*, ¶ 189 (noting the requirements for a successful claim to be brought under section 1102: the foreign investor/investment be in like circumstances with domestic investors/investments, and the treatment of the foreign investor/investment is less favorable than the domestic investor/investment).

80. *Cargill*, ¶ 2 ("Specifically, the Tribunal holds that Respondent violated Article 1102 in that Cargill de Mexico was in 'like circumstances' with domestic suppliers of cane sugar to the soft drink industry and that the treatment accorded to it was less favourable than the treatment accorded to domestic investors or their investments.").

81. *Cargill*, ¶ 5. *See also id.* ¶¶ 431–540 (discussing the damage determination).

82. Corn Prods. Int'l v. United Mexican States, ICSID Case No. ARB (AF)/04/1, Award (Aug. 18, 2009).

83. *Id.*

84. *Id. See also* Hillary Russ, *Mexico Pays Corn Products $58M NAFTA Award*, LAW360 (Jan. 26, 2011), http://www.law360.com/articles/222117/mexico-pays-corn-products-58m-nafta-award.

current NAFTA regime.

### *D. United States FDI in Mexico: Transnational Corporations*

The term transnational corporation (TNC) is an umbrella term generally used to describe international conglomerates that were started in one country, but have expanded operations internationally.[85] Examples include Coca-Cola, McDonald's, PepsiCo, and Yum! Brands.[86]

Prior to NAFTA's implementation, around 1987, the Mexican government reformed a restrictive FDI barrier, which previously limited the amount of equity a foreign investor could hold in a Mexican company to 49 percent.[87] The reform eliminated the minority ownership restriction and subsequently, international investment increased (Mexican FDI Reform).[88] Since NAFTA's inception, transnational corporations have been inclined to enter emerging markets like Mexico.[89]

TNCs are likely to invest, as they historically have demonstrated a way to reach previously-untapped markets.[90] Lenient regulations enable large TNCs to lower prices, open up new purchasing channels, optimize the effectiveness of marketing and advertising, and ultimately increase profits for their companies.[91] This type of growth is typically available to a US corporation that purchases an existing market leader, which can then capitalize on already-existing branding and marketing techniques in a foreign market and expand its products

85. *See* "TRANSNATIONAL CORPORATION," WEST'S ENCYCLOPEDIA OR AMERICAN LAW (2008). *See also* MOOSA, *supra* note 39, at 6 (discussion about multinational corporations).

86. *See generally* MOOSA, *supra* note 39 at 6 (list of widely-known multinational corporations). *See, e.g.*, *Global Divisions*, PEPSICO, http://www.pepsico.com/company/global-divisions (last accessed Apr. 16, 2016); *Our Company: The Coca-Cola System*, COCA-COLA, http://www.coca-colacompany.com/our-company/the-coca-cola-system/ (last accessed Apr. 16, 2016); *Discover McDonalds*, MCDONALD'S, http://www.aboutmcdonalds.com/mcd/country/map.html (last accessed Apr. 16, 2016); and *Yum! Brands Feed The World*, YUM! BRANDS (last viewed Apr. 16, 2016), http://www.yum.com/brands/.

87. HUSSAIN, *supra* note 57, at 36.

88. *Id.*

89. LEAL-ARCAS, *supra* note 39, at 170–75 (economic analysis of FDI). *See also* Hawkes, *supra* note 5, at 360 (discussing economic incentives for corporations to have operations abroad).

90. Hawkes, *supra* note 5, at 360.

91. LEAL-ARCAS, *supra* note 39, at 170–75.

to a larger consumer base.[92] The TNC is subsequently able to retain the existing consumer base and marketing techniques of the former Mexican firm, while simultaneously crushing competition from local firms.[93] Transnational corporations also benefit from intangibles such as access to knowledge possessed by local companies regarding local market conditions and consumer preferences.[94]

### *E. U.S. FDI in Mexico: Processed Food and Drinks*

In the processed food and drink industries, the impact of NAFTA is clear. In 1987, before NAFTA was enacted, the United States' FDI in the processed food industry amounted to a mere $210 million; by 1997, that number rose to $5 billion.[95] The Mexican FDI Reform facilitated transnational food and drink corporations' ability to capitalize on efficiencies arising out of economies of scale by investing in foreign manufacturing facilities for their processed food products.[96] By directly investing in Mexican manufacturing facilities, these corporations are able to save on wages, taxes, and other operational costs, thereby increasing profits.[97]

Further, direct investment by food and drink TNCs increases the presence of each brand, aiding the Nutrition Transition by increasing the availability—and thereby impacting desirability—of obesogenic food and drinks.[98] At present, Mexico is presently the world's third-largest receiver of U.S. FDI in the processed food and beverage industry.[99]

The sugary drink industry experienced a huge boom in the wake

92. Hawkes, *supra* note 5, at 360. Investing in many national markets allows transnational food corporations to benefit from economies of scale in marketing and advertising. *Id.*

93. *Id.* at 360–61.

94. *Id.* at 360.

95. Bolling, *supra* note 35.

96. Hawkes, *supra* note 5, at 360L65.

97. *See, e.g.*, Mike Esterl & John Revill, *PepsiCo, Nestlé to Invest in Mexico*, WALL ST. J. (Jan. 24, 2014, 10:38 AM), http://www.wsj.com/articles/SB10001424052702304632204579340471417509380?mg=id-wsj.

98. Hawkes, *supra* note 5, at 362.

99. Economic Research Service, *Mexico Trade & FDI*, USDA (Mar. 14, 2014), http://www.ers.usda.gov/topics/international-markets-trade/countries-regions/nafta,-canada-mexico/mexico-trade-fdi.aspx. Seventy-five percent of United States FDI is in companies that produce highly processed foods, such as meat, poultry, and snack foods. Bolling, *supra* note 35, at 26.

of NAFTA. One example highlighting this surge concerns the incredible increase in the amount of Coca-Cola Company beverage products imbibed over the course of the NAFTA period.[100] Just before NAFTA, in 1991, each person on average in Mexico consumed approximately 290 eight-ounce servings of Coca-Cola beverage products.[101] By 2002, this number nearly doubled, growing to 486 servings per person.[102] In 2013, as NAFTA approached its twentieth anniversary, this number increased yet again to 745 servings.[103] For frame of reference, this number significantly surpasses the United States' average intake of regular Coca-Cola, which has hovered around 401 servings per person per year.[104]

The snack market was similarly affected.[105] Entities from the United States have more than a 98 percent share of Mexico's import market for snack foods.[106] According to PepsiCo, "even if the per capita consumption rate of salty snacks for Brazil, India or China is doubled, their consumption levels will be far below those of Mexico."[107] PepsiCo has even announced plans to invest $5 billion into its subsidiary Latin American Foods to continue growing within the rapidly emerging Mexican salty snacks market.[108] This suggests the trend of FDI expansion into Mexico is still relevant.

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100. PER CAPITA CONSUMPTION OF COMPANY BEVERAGE PRODUCTS, COCA-COLA (2012), *available at* https://www.coca-colacompany.com/annual-review/2011/pdf/2011-per-capita-consumption.pdf [hereinafter PER CAPITA CONSUMPTION].

101. *Id.* In the United States, consumption rates were nearly identical to those in Mexico, at 292 servings per person per year. *Id*.

102. *Id.* In the United States, consumption rates were at 407 servings per person per year. *Id.*

103. *Id*

104. PER CAPITA CONSUMPTION, *supra* note 100.

105. Hawkes, *supra* note 5, at 360 (in discussing the presence of FDI in the food processing industry, "Mexico, for example, attracted US $5 billion of FDI in food processing from the USA in 1998, a 25-fold increase from US $210 million in 1987").

106. DONALD A. HODGEN, U.S. DEP'T OF COMMERCE, SNACK FOODS—2003 (2004), *available at* http://www.ita.doc.gov/td/ocg/snacks03.pdf.

107. Trefis Team, *A Look at Sabritas as PepsiCo Steps Up Investment in Mexico*, FORBES (Feb. 5, 2014), http://www.forbes.com/sites/greatspeculations/2014/02/05/a-look-at-sabritas-as-pepsico-steps-up-investment-in-mexico/.

108. *PepsiCo Plans to Invest $5 Billion in Mexico Over Next 5 Years as Part of Push into 'Emerging Markets'*, FOX NEWS LATINO (Jan. 28, 2014), http://latino.foxnews.com/latino/money/2014/01/28/pepsico-plans-to-invest-5-billion-in-mexico-over-next-5-years-as-part-push-into/ (last visited Apr. 16, 2016) ("PepsiCo has invested aggressively over the last few years in emerging markets—calling Mexico 'one of the most attractive markets in Latin America.'").

## IV. NAFTA'S LIMITS ON GOVERNMENTAL REGULATORY ABILITY

NAFTA clearly facilitated FDI, which in turn provided real economic benefits for investors.[109] Unfortunately though, the same agreement that enabled FDI inhibits the Parties' ability to effectively regulate against the threat of non-communicable diseases.[110] In short, much of NAFTA's language is ambiguous. The ambiguity contributes too much of the Parties' regulatory guesswork, as governments struggle to decipher the text and construct regulatory or policy measures that can be implemented within the confines of the treaty. This, in turn, lends great deference to the panel members responsible for interpreting the text in the event of a dispute.[111] This Part will provide an overview of the central NAFTA ambiguities that perpetuate the treaty's breadth.

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109. *See, e.g.*, Hawkes, *supra* note 5; Bolling, *supra* note 35.

110. NAFTA, *supra* note 4, chs. 7, 9.

111. Devin Odell *NAFTA's Threat to Domestic Health and Environmental Laws*, 17 ENVIRONS 1 (1993), *available at* http://environs.law.ucdavis.edu/volumes/17/1/odell.pdf ("In other words, the panel may essentially substitute their own judgment for that of voters or legislature as to the best way to achieve food safety goals.").

### *A. "Barrier to Trade"*

Despite the treaty's first stated objective, "to eliminate barriers to trade,"[112] the text does not include an explicit definition for the important term, "barrier to trade." However, the treaty does broadly distinguish between tariff and nontariff barriers to trade.[113] Tariff barriers are as they appear—a tax imposed by one government on the import or export of goods.[114] Alternatively, nontariff barriers are more non-descript. These can include regulations, policy, or other measures that have the effect of restricting international trade.[115] This Note focuses on the implications of a hazy definition of what amounts to a nontariff barrier to trade, specifically in the context of Parties' ability to regulate in order to protect the public health interests of their nations.

Unsurprisingly, Tribunals must regularly determine whether a Party's action amounts to a barrier to trade. Without sufficient understanding of how the Tribunal will interpret this key term, Parties are forced to hedge their bets when determining whether or not a particular regulatory or policy measure will violate NAFTA. At best, this guesswork is inefficient. Parties will spend time and money developing policy to protect the legitimate interests of their citizens without any *a priori* indication about the survivability of their efforts. At worst, Parties are left potentially exposed to costly dispute settlement proceedings with results that depend on Tribunal panelists' subjective interpretation of the text.[116]

Notwithstanding the uncertainty over what amounts to a nontariff barrier to trade, NAFTA includes two chapters through which the Parties' can attempt to adopt measures—laws, regulations, procedures, requirements, or practices—that can impact trade.[117] On

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112. NAFTA, *supra* note 4, art. 103.

113. *Id.* ch. 3, sections B and C.

114. *Id.* ch. 3, section B. *See also Tariff Barrier*, BLACKS LAW DICTIONARY (9th ed. 2009) ("A schedule or system of duties imposed by a government on imported or exported goods,").

115. NAFTA, *supra* note 4, at ch. 3, section C. *See also Nontariff Barrier*, BLACKS LAW DICTIONARY (9th ed. 2009) ("[A]n official policy, other than a tariff, that restricts international trade, especially by limiting imports or exports.").

116. Odell, *supra* note 111, at 2.

117. NAFTA, *supra* note 4, chs. 7, 9. *See also id*. ch. 2 ("Measure includes any law, regulation, procedure, requirement or practice."). Measures created under Chapter 7 and

their face, these carve-outs appear to give the Parties just the room they need to regulate against risk factors of obesity and other non-communicable diseases. However, as discussed *infra*, these chapters are narrowly tailored and therefore are unlikely to give the Parties the requisite leeway needed to combat these multi-factored diseases.

### *B. Chapter 7(B): Sanitary and Phytosanitary Measures*

Chapter Seven provides that member countries can "maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline, or recommendation."[118] On its face, this explicit allowance for regulation for the sake of protecting human life or health in chapter seven seems as though it could help parties tackle non-communicable disease.

However, there are limits on this power.[119] Measures created pursuant to this chapter must be based on adequate scientific principles, as demanded by Article 712(3), and they must be of the appropriate level of protection as determined by risk-assessment procedures detailed in Article 715.[120]

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Chapter 9 are both allowed but are subject to strict standards such as scientific principles and comprehensive risk assessments, discussed further *infra* Part IV.

118. NAFTA, *supra* note 4, art. 712(1) ("Right to take sanitary and phytosanitary measures").

119. Zamora, *supra* note 12, at 632. This chapter was included in NAFTA's text to focus on the risks associated with animal and plant pests and diseases, food additives, food contaminants, and any other direct or indirect harm to humans, animals, and plants. *See also* NAFTA, *supra* note 4, ch. 7.

120. NAFTA, *supra* note 4, art. 712(3).

> 3. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is:
>
> a) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions;
>
> b) not maintained where there is no longer a scientific basis for it; and
>
> c) based on a risk assessment, as appropriate to the circumstances.

*Id.* NAFTA, *supra* note 4, ch. 7.

> 1. In conducting a risk assessment, each Party shall take into account:
>
> a) relevant risk assessment techniques and methodologies developed by

These conditions have the potential to be especially limiting in proffering obesity countermeasures, as obesity and other non-communicable diseases result from multiple factors that are a product of the sorts of foods available and an individual's choice.[121] Despite the extensive research available linking such factors to the obesity epidemic,[122] these links are unlikely to meet the highly-technical scientific principles and risk-assessment procedures and standards required by Chapter Seven. It is this type of confining language that necessarily needs to be adjusted to properly address this pervasive

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international or North American standardizing organizations;

b) relevant scientific evidence;

c) relevant processes and production methods;

d) relevant inspection, sampling and testing methods;

e) the prevalence of relevant diseases or pests, including the existence of pest-free or disease-free areas or areas of low pest or disease prevalence;

f) relevant ecological and other environmental conditions; and

g) relevant treatments, such as quarantines.

2. Further to paragraph 1, each Party shall, in establishing its appropriate level of protection regarding the risk associated with the introduction, establishment or spread of an animal or plant pest or disease, and in assessing the risk, also take into account the following economic factors, where relevant:

a) loss of production or sales that may result from the pest or disease;

b) costs of control or eradication of the pest or disease in its territory; and

c) the relative cost-effectiveness of alternative approaches to limiting risks.

3. Each Party, in establishing its appropriate level of protection:

a) should take into account the objective of minimizing negative trade effects; and

b) shall, with the objective of achieving consistency in such levels, avoid arbitrary or unjustifiable distinctions in such levels in different circumstances, where such distinctions result in arbitrary or unjustifiable discrimination against a good of another Party or constitute a disguised restriction on trade between the Parties.

*Id.*

121. *See generally* CDC, VITAL SIGNS: ADULT OBESITY (Aug. 2010), *available at* http://www.cdc.gov/vitalsigns/pdf/2010-08-vitalsigns.pdf (pointing to factors such as excess sugar in the diet, low levels of physical activity, and expense of quality food). *See also* C.K. Wells, *Obesity as Malnutrition: The Role of Capitalism in the Obesity Global Epidemic*, 24 AM. J. HUM. BIOLOGY 261, 261 (2012). ("[O]besity develops from exposure to the 'obesogenic niche,' comprising diverse factors predisposing to weight gain.").

122. *See generally* Wells, *supra* note 121.

and growing public health problem.[123]

123. *See, e.g.*, Jimenez-Cruz & Bacardi-Gascon, *supra* note 10; Ketevan Rtveladze et al., *Obesity Prevalence in Mexico: Impact on Health and Economic Burden*, 17 PUB. HEALTH NUTRITION 233 (2013) (noting research exhibits on the rise in non-communicable disease in Mexico).

### *C. Chapter 9: Standards-Related Measures*

Similar in scope to Chapter Seven, Chapter Nine concerns the construction of nontechnical standards-related measures for, among other things, "the protection of human, animal or plant life or health, the environment or consumers, and any measure to ensure its enforcement or implementation."[124]

As in Chapter Seven, there are limits to the Parties' power to regulate pursuant to Chapter Nine. In particular, "no Party may prepare, adopt, maintain, or apply any standards-related measure with a view to or with the effect of creating an unnecessary obstacle to trade."[125] According to the treaty, an obstacle should not be deemed unnecessary where "the demonstrable purpose of the measure is to achieve a legitimate objective" and where "the measure does not operate to exclude goods of another Party that meet that legitimate objective."[126] In attempt to clarify this vague standard, NAFTA defers to the WTO Agreement on Technical Barriers to Trade (WTO TBT Agreement) to define the scope of barriers that are allowed by Chapter Nine:[127]

> [T]echnical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia:* . . . protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information . . . .[128]

While Chapter Nine does at least appear to have more leeway than Chapter Seven in allowing governments to regulate for the sake of protecting human health, the vague language makes the outer

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124. NAFTA, *supra* note 4, ch. 9 ("The scope of this chapter covers measures that may directly or indirectly affect trade in goods or services between Parties.").

125. *Id.* art. 904(4).

126. *Id.* art. 904(4)(a)-(b).

127. *Id.* art. 903 ("[T]he Parties affirm with respect to each other their existing rights and obligations relating to standards-related measures under the GATT Agreement on Technical Barriers to Trade and all other international agreements.").

128. *Technical Barriers to Trade: Technical Explanation*, WTO.ORG, https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm (last accessed Apr. 17, 2016).

boundary of what is allowed under NAFTA and the WTO TBT Agreement largely unclear. This haziness conceivably complicates the regulatory process at the front end, as Parties determine how to allocate their regulatory efforts.

With the hope of avoiding unnecessary trade disputes, WTO members meet three times each year, forming what is called the WTO Technical Barriers to Trade committee (TBT Committee).[129] At these meetings, members may raise concerns about the legality of other members' trade measures.[130] Because NAFTA's Chapter Nine is modeled after the WTO TBT Agreement,[131] the TBT Committee's reaction to a recent Chilean proposal is particularly relevant to our understanding of the challenges Mexico may face in the regulatory process.[132] The proposed amendment would require certain categories of food to be labeled with a large "stop sign" to indicate to, and warn consumers of, the types of foods that are obesogenic.[133] Despite Chile's intention to "fight an epidemic of obesity," members of the TBT Committee expressed concern that it would create unnecessary obstacles to trade.[134]

The Chile proposal is but one of many "trade concerns"[135] brought up at recent TBT committee meetings that attempt to address the obesity epidemic.[136] How these trade concerns are dealt with at the

129. *Id.*

130. *WTO 2015 News Items*, WTO.ORG (Nov. 6, 2015), https://www.wto.org/English/news_e/news15_e/tbt_10nov15_e.htm.

131. *Compare* NAFTA, *supra* note 4, at ch. 9 *with Uruguay Round Agreement: Agreement on Technical Barriers to Trade*, WTO.ORG, https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (last accessed Apr. 17, 2016).

132. *Members Discuss Guidelines for Trade-Friendly Regulation and Stop Sign for "Junk Food"*, WTO.ORG (Mar. 13, 2013), https://www.wto.org/English/news_e/news13_e/tbt_13mar13_e.htm [hereinafter *Members Discuss Guidelines*] ("Pursuant to the amendment, certain categories of food would need to bear labels designated to inform and encourage consumers to avoid excessive intake which may lead to obesity and related non-communicable diseases.").

133. *Id.*

134. *Id.* After a two-year process of notifying the WTO and member countries about the amendment, asking for feedback, etc., it was finally instituted in 2015. Modifica Descreto Supreme No. 977, de 1996, del Ministerio de Salud Reglamento Sanitario de Los Alimentos, Abr. 16, 2015 (Chile), *available at* http://cspinet.org/new/pdf/chilean-food-labeling-law-2015.pdf.

135. *See, e.g.*, *Members Discuss Guidelines*, *supra* note 132.

136. *Record Number of New Trade Concerns Raised in Standards Committee in 2014*, WTO.ORG (Nov. 4, 2014), https://www.wto.org/english/news_e/news14_e/tbt_04nov14_e.htm.

WTO-level provides insight into how such measures would be treated if proffered by a NAFTA Party. However, NAFTA Parties are subject to an added burden that can impede regulatory efforts—broad and largely unrestrained deference to the tribunal in NAFTA investor-state disputes is likely to add an extra layer of uncertainty to the regulatory process.

## V. PROPOSAL

### *A. Amend NAFTA's Language*

Despite the collaboration of Mexico, Canada, and the United States to create a comprehensive and favorable agreement for the people of North America, NAFTA has gridlocked the Parties in a powerless position to protect their respective citizens.

What is lacking in NAFTA's language is flexibility that would enable the parties to strike a balance between the private interests of free trade and foreign investment with public policy concerns.[137] This Note proposes that it is necessary to revise some of the broad language of NAFTA to mitigate the effects of the many concerning outcomes the agreement has fostered since its ratification in 1994. The following provisions of the relevant portions of Chapters One, Seven, Nine, and Eleven include proposed changes that could assuage the negative effects of the agreement.

Chapter One: Objectives

> Proposed Article 102(2). *The Parties shall interpret and apply the provisions of this Agreement and provisions of measures taken in furtherance of this Agreement in light of the plain meaning of the text in accordance with the rules of interpretation set forth in Article 31(1) of the Vienna Convention.*[138]

NAFTA provisions and measures created by the Parties that are in

137. Salazar, *supra* note 10, at 59.

138. NAFTA, *supra* note 4, art. 102(2) ("The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.").

conflict with NAFTA should be subject to the rules set forth in the Vienna Convention, which requires Tribunal panelists to rule based on the plain meaning of the text. At present, Tribunals are granted considerable discretion, the outer limits of which merely require the tribunal to make decisions based on the broadly-stated NAFTA goals in Article 102.[139] Requiring the tribunal to engage in interpretive techniques that analyze the plain meaning alone will not only foster consistency amongst decisions, but also likely to restrict the NAFTA tribunal's trend of ubiquitously holding for investor-corporations. This could also work to benefit the Parties as they develop regulatory and policy measures, since the NAFTA text will hold. It should be noted, however, in order for this sort of provision to work and provide the Parties with adequate notice, the NAFTA text as a whole will have to be tightened up such that key terms and standards are expressly defined.

> Chapter Seven: Agriculture and Sanitary and Phytosanitary Measures
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> Proposed Article 712(3). *Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains, or applies is (a) based on scientific principles, taking into account relevant factors including, where appropriate, the transmission of non-communicable and/or multi-factored disease; and (b) based on a risk assessment, as appropriate to the circumstances and the relevant scientific and correlational understandings of the risk factor(s) as determined by the status of the disease as communicable or non-communicable.*[140]

Expanding the current language of Article 712 to include non-communicable and multi-factored diseases will increase the ability of Parties to regulate beyond the strict bounds of the term 'scientific principles.' This change is important; while recent improvements in

139. Weiler, *supra* note 71, at 251.

140. NAFTA, *supra* note 4, art. 712(3) ("Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is: a) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions; b) not maintained where there is no longer a scientific basis for it; and c) based on a risk assessment, as appropriate to the circumstances.").

public health have decreased the mortality rate from infectious disease, doctors report a marked increase in the spread of non-communicable disease, which typically result from a number of factors, not all of which are explicitly scientific.[141] Considering the supposed relationship between NAFTA and non-communicable diseases, it is necessary that NAFTA reflect the contemporary categorization of non-communicable disease as an important public health issue.

> Proposed Article 724. *Scientific basis means a reason based on reasonably reliable empirical, experimental, correlational, or other scientific data or information derived from using scientific methods.*[142]

The term 'scientific basis' implies the need for conclusive empirical data in support of a hypothesis. Obesity and other non-communicable diseases are complex conditions that result from a number of potential combinations,[143] each of which does not necessarily have concrete empirical data to support the connection.[144] By expanding the definition of scientific basis to include less-traditional types of scientific data collection, the Parties have increased flexibility to regulate non-communicable diseases.

> Chapter Nine: Standards-Related Measures
>
> Proposed Article 907(1). *A Party may, in pursuing its legitimate objectives, conduct an assessment of risk. In conducting an assessment, a Party may take into account, among other factors relating to a good, class of goods, or service (a) available scientific evidence or technical information; and (b) in the case of a non-communicable or multi-factored disease, available correlational data that*

141. *See generally* Zimmet, *supra* note 3.

142. NAFTA, *supra* note 4, art. 723 ("[S]cientific basis means a reason based on data or information derived using scientific methods.").

143. Mayo Clinic Staff, *Obesity: Risk Factors*, MAYO CLINIC, http://www.mayoclinic.org/diseases-conditions/obesity/basics/risk-factors/con-20014834 (last visited Apr. 17, 2016) (explaining that some common causes of obesity include genetics, family lifestyle, inactivity, and unhealthy eating and diet habits). *See also* Wells, *supra* note 121.

144. *See generally* Wells, *supra* note 121.

*exhibits risk factors.*[145]

Similar to the proposed changes to Chapter Seven, expanding the definition of what constitutes a legitimate risk assessment under NAFTA is beneficial to Parties that wish to regulate non-communicable diseases, which typically rely on correlational—rather than causal—scientific links.

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145. NAFTA, *supra* note 4, art. 907(1) ("A Party may, in pursuing its legitimate objectives, conduct an assessment of risk. In conducting an assessment, a Party may take into account, among other factors relating to a good or service: a) available scientific evidence or technical information; b) intended end uses; c) processes or production, operating, inspection, sampling or testing methods; or d) environmental conditions.").

> Chapter Eleven: Investment
>
> Proposed Article 1135(1). *Where a Tribunal makes a final award against a Party, the Tribunal may award, reasonable monetary damages, equitable relief, or some combination thereof.*[146] *Where appropriate, the Tribunal shall require negotiations between the parties to ensure an outcome that balances the needs of the parties.*

The addition of equitable relief as a remedy under NAFTA could help control the availability of burdensome damage awards. It is unreasonable to require the Parties to pay significant amounts of money to corporations for implementing regulatory measures that are in the best interests of the public. This proposed section also grants the Tribunal authority to require negotiations between parties—in the course of a settlement or otherwise. Ideally, the Tribunal will mandate negotiations between the parties where the absence of a Party's challenged measure is at odds with protecting the public.

### *B. Changes at the WTO Level*

In 2013, the TBT Committee started to develop guidelines about how to regulate in a trade-friendly manner.[147] The goal in setting these guidelines was to converge members' regulatory efforts to both more effectively protect the public and provide predictability to businesses.[148]

Coordinating this multinational effort should be a priority for the WTO, and should be adopted by the NAFTA parties, as there are many inter-governmental treaties that are difficult to interpret. In the NAFTA context, guidelines could be helpful as the Parties try to understand the extent of allowable regulatory action under the treaty.

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146. NAFTA, *supra* note 4, art. 1135(1) ("Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: a) monetary damages and any applicable interest; b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.").

147. *Members Discuss Guidelines*, *supra* note 132. *See also* WTO Secretariat, *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995*, G/TBT/1/Rev. 12 (June 9, 2011) (discussing generally the focus of the committee to reduce unnecessary barriers to trade).

148. *Members Discuss Guidelines*, *supra* note 132.

If adopted by the Parties to NAFTA, this set of guidelines would help clarify the ambiguities discussed in Part IV of this Note, and consequently, the Parties could proffer regulations to combat the spread of obesity.

## CONCLUSION

The often American-borne non-communicable diseases such as obesity are spreading rapidly in an increasingly-global economy. In Mexico, the effect of globalization is amplified as a result of NAFTA. As such, the positive outcomes of NAFTA for the Parties must be viewed in light of the tight hold the treaty has over the Parties' ability to regulate and the subsequent detriment to the Mexican public. This Note argues that this damage could be slowed, stopped, or even reversed, if the Parties renegotiated the fundamentally-flawed aspects of the treaty.