BUYING PROPERTY IN MEXICO'S "RESTRICTED ZONE": THE MISSED OPPORTUNITY THAT WAS THE 2013 BELTRONES PROPOSAL TO AMEND ARTICLE 27 OF THE MEXICAN CONSTITUTION

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I. INTRODUCTION

On April 3, 2013, Manlio Fabio Beltrones introduced a proposal to amend the Mexican Constitution.[1] The proposal suggested amending the provision of Article 27 of the Mexican Constitution of 1917, which prohibits foreigners from owning land within the "Restricted Zone."[2] The "Beltrones Proposal" quickly sailed through the Mexican Constitutional Commission of the Federal Congress (Chamber of Deputies) where the Chamber voted to approve the measure on Saturday April 20, 2013.[3] As of February 2014, the Mexican Senate was still considering the proposal, which if passed would have sent shockwaves through the entire Mexican economy. However, by late February the initiative was rejected, according to a report from the Secretary of Government. The rejection occurred because the Mexican Senate did not adhere to the procedure set forth in Article 89, number 2, Section III of the Rules of the Chamber of Deputies.[4]

This Note proposes the general idea that the Beltrones amendments would have been successful in the short term because they would have allowed more foreigners to buy real estate. However, the proposed amendments did not allow individual foreigners to engage in any non-residential activity within the Restricted Zone. This Note argues that in the long run the proposed amendments may not have been nearly as successful as anticipated, because much of what foreigners would want to do near the border or the coast revolves around small businesses or professional services, which the proposed amendments prohibited. Those who do not comply with this requirement would have been subject to having their land expropriated, a proposition that would have scared off investors. Presumably, Americans who want to buy real estate in Mexico, or who plan to expatriate, are entrepreneurial individuals who would enjoy maintaining a small operation near the coast or border. Therefore, the final argument is that Mexico

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1 Tim Johnson, *Buying Land Near Mexico's Coasts*, MEXICO UNMASKED, (Apr. 5, 2013), http://blogs.mcclatchydc.com/mexico/2013/04/buying-land-near-mexicos-coasts.html. The author is a correspondent and the Mexican Bureau Chief in Mexico who writes and reports legislative updates for the McClatchy Newspapers.

2 *Id.*; Linda Neil, *Buying Property Along the Beaches of Mexico*, BAJAINSIDER.COM, http://www.bajainsider.com/baja-real-estate/coastal-property-mexico.htm#.VPzDJvnF-So (last visited Mar. 8, 2015).

3 Ricardo Bours, *Imminent Amendment to the Mexican Constitution Article 27*, THE WRIT, July 2013, at 5.

4 John Glaab, *The Fideicomiso Will Continue, Amendment to Article 27 of the Mexican Constitution Has Been Rejected*, YUCATAN TIMES (Feb 9, 2014), http://www.theyucatantimes.com/2014/02/the-fideicomiso-will-continue-amendment-to-article-27-of-the-mexican-constitution-has-been-rejected/.

should let go of its fear of foreigners, which is driven by its past history of land and sea invasions, and look more to the future and building its economy.

Although Mexico has been liberalizing its policies for the past twenty-five to thirty years, it remains a fact that too much technicality, expense, and red tape still exists to impede foreign investors. The country should take the final steps in opening its arms to foreign investors who will employ people and bring in tax revenue. In order to support the analysis that Mexico should open its arms to foreign investment dollars, this Note will bring in comparative analyses from other nations that have recently shunned xenophobia by eliminating laws that prevent foreign ownership and investment in land and real estate. This Note avoids the topic of security as it is difficult to quantify the negative effects of the operations of drug cartels in Mexico.

Part I introduces the Beltrones Proposal and its importance. Part II gives an overview of the history of Mexico and its effects on land ownership, including legislation pertaining to a foreigner's rights to land ownership. Part III explains how a foreigner can buy property in Mexico as the law stands now, and Part IV examines how foreigners buy property in Mexico versus other comparable countries, and the effects of that foreign investment.

II. OVERVIEW AND ANALYSIS OF PAST LEGISLATION AND THE MISSED OPPORTUNITY THAT WAS THE BELTRONES PROPOSAL

A. Why Was the Proposal Significant?

The proposal was significant because the Restricted Zone in Mexico is termed as the area within 100 kilometers of the border, or 50 kilometers of the ocean.[5] The passage of the Beltrones Proposal would have had large ramifications

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5 Constitucion Politica de los Estados Unidas Mexicanos [C.P.], art. 27, Diario Oficial de la Federacion [DO], 5 de Febero de 1917 (Mex.), *translated in Political Constitution of the United Mexican States*, TRIBUNAL ELECTORAL DEL PODER JUDICIAL DE LA FEDERACIÓN, http://portal.te.gob.mx/en/consultations/political-constitution-united-mexican-states (last visited Mar. 15, 2015). Article 27 contains the following terms:

> The property of all land and water within national territory is originally owned by the Nation, who has the right to transfer this ownership to particulars. Hence, private property is a privilege created by the Nation.
>
> Expropriations may only be made when there is a public utility cause.
>
> The State will always have the right to impose on private property constraints dictated by "public interest." The State will also regulate the exploitation of natural resources based on social benefits and the equal distribution of wealth. The state is also responsible for conservation and ecological considerations.

in both Mexico and the United States, because it would have further opened up desirable areas of Mexico to the plethora of wealthy American baby boomers interested in retiring near the ocean, but who may not have been able to afford to do so within the United States.[6] However, in order to become law, the proposal needed to go through a lengthy process.[7] It needed to be passed by the Mexican Senate, approved by a majority of the state legislatures (at least seventeen of the thirty-four states), and signed by President Enrique Pena Nieto.[8] If the proposal had become law it would have had huge ramifications for Mexico.[9] There are estimates that U.S. investment in Mexican real estate could have doubled, and the proposal by itself could have caused a real estate boom in Mexican coastal areas.[10]

> All natural resources in national territory are property of the nation, and private exploitation may only be carried out through concessions.
>
> Nuclear fuel may only be exploited and used by the State. The use of Nuclear elements in the Nation may only have peaceful purposes (i.e., Mexico cannot build nuclear weapons).
>
> This article also deals with other subtleties on what constitutes Mexico's territory. Foreign citizens cannot own land within 100 km of the borders or 50 km of the sea; however, foreigners can have a beneficial interest in such land through a trust (fideicomiso), where the legal ownership of the land is held by a Mexican financial institution. The only precondition *sine qua non* to granting such a beneficial interest is that the foreigner agree that all matters relating to such land are the exclusive domain of Mexican courts and Mexican jurisdiction, and that in all issues pertaining to such land, the foreigner will conduct him or herself as a Mexican, and settle any issues arising from their interest in such land exclusively through Mexican courts and institutions. The stipulated consequence of a failure to abide by these terms is forfeiture to the nation of their interests in all lands where the foreigner has such beneficial interests.
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> That an area of land next to the coast (20 meters from the highest tide line) is federal property which cannot be sold to particulars.

1917 Constitution—Current Constitution of Mexico, IB HISTORY OF THE AMERICAS: MEXICO, https://mexicoibhota.wordpress.com/culture/1917-constitution/ (last visited Apr. 24, 2015).

6 *See generally* Daniel B Wood, *Why US Baby Boomers Are Retiring in Latin America*, CHRISTIAN SCI. MONITOR, (Dec. 1, 2013), http://www.csmonitor.com/World/Americas/2013/1201/Why-US-baby-boomers-are-retiring-in-Latin-America-video.

7 Johnson, *supra* note 1.

8 *Id*.

9 *See generally* Andrew O'Reilly, *Buying Mexico: Americans Salivate Over Owning a Slice of Pacific Beachfront; Locals Mixed*, FOX NEWS LATINO, (Oct. 10, 2013), http://latino.foxnews.com/latino/money/2013/10/10/us-buyers-could-soon-own-properties-on-mexico-coasts-much-to-chagrin-some/.

10 *Id*.

<u>B. Violence, Drugs, Theft, and Expropriation—Dangers Posed to Americans in Mexico</u>

It is worth noting that many Americans see Mexico as a violent and unsafe country.[11] Transnational Criminal Organizations (TCOs) are well entrenched in narcotics trafficking and other unlawful activities throughout Mexico.[12] The TCOs themselves are fighting a violent struggle to control vital drug trafficking routes that run from the south of Mexico all the way to the United States border.[13] However, according to the U.S. Department of State, "[m]illions of U.S. citizens safely visit Mexico each year for study, tourism, and business, including more than 150,000 who cross the border every day."[14] In 2012 alone, more than twenty million U.S. citizens visited Mexico.[15] The Mexican government values American tourist dollars, and over the years has made a considerable effort to protect U.S. citizens and other visitors of major tourist destinations.[16] Further, there is no clear or definitive evidence that TCOs have consistently or systematically targeted U.S. visitors and residents based on their nationality.[17] Resort areas and tourist destinations in Mexico generally do not fall victim to the high levels of drug-related violence or crime that is consistently reported in the border region and in areas along major trafficking routes.[18] Generally, most of those killed in narcotics-related violence in Mexico have been members of TCOs; however, innocent persons have also been victims.[19] The number of U.S. citizens reported to the Department of State as murdered in Mexico in 2011 was 113, which decreased to 71 in 2012.[20] The Department of State does not delineate or divulge how many of these deaths were drug related, nor how many of these deaths might have been U.S.-citizen members of TCOs.[21]

Despite there being few reports of Americans getting caught up in Mexican violence, the stigma continues, largely due to the shock and awe of incidents that are reported in the media. Events to consider are headline-grabbing incidents, such as a spring 2012 theft, when twenty-two passengers from a Carnival cruise ship were robbed at gunpoint on a sightseeing bus outside the

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11 *See* Mariano Castillo, *Mexico: As Dangerous—and Safe—As Ever*, CNN NEWS (June 9, 2013), http://www.cnn.com/2013/06/09/world/americas/mexico-security/.

12 *Mexico Travel Warning*, U.S. DEP'T OF STATE (Dec. 24, 2014), http://travel.state.gov/content/passports/english/alertswarnings/mexico-travel-warning.html.

13 *Id*.

14 *Id.*

15 *Id.*

16 *Id*.

17 *Mexico Travel Warning, supra* note 12.

18 *Id.*

19 *Id*.

20 *More Americans Murdered in Mexico than in Any Other Country in the World*, FOXNEWS.COM (May 20, 2013), http://latino.foxnews.com/latino/news/2013/05/20/more-americans-murdered-in-mexico-than-any-other-country-in-world/.

21 *Mexico Travel Warning, supra* note 12.

Pacific Coast town of Puerto Vallarta.[22] In February 2013, six Spanish tourists were raped by masked gunmen in the resort of Acapulco, prompting the Spanish government to issue a travel alert for Mexico.[23] In March 2013, "at least seven people were killed in a shooting at a bar on the outskirts of the Cancún resort area on the eastern Yucatán Peninsula."[24] Despite the risk of violence, many Americans have expatriated to Mexico, and though highly publicized incidents of American expatriates or tourists getting caught up in Mexican violence do exist, they are small in number.

Crime is not the only worry for Americans, as signing a "Calvo Clause"[25] opens a foreign investor to the outside possibility of expropriation in the event that things go wrong. Expropriation occurs when the government decides to seize and sell off a property, usually the result of illegal or prohibited activity. Expropriations of investments have been reported, but have been few and far between, especially since the 1980s.[26] Drug cartels and drug violence persists in Mexico as well, but it is unclear what kind of effect this violence has on American investors who would like to purchase beachfront property. The answer is likely none. This type of influence constantly fluctuates and is nearly impossible to quantify and apply to investment. This Note will, at most, minimally touch on the effects of Mexican drug violence and the fear of land expropriation. Violence and expropriation will always remain in the background, but the fact is that foreign involvement in violence and expropriation in Mexico is rare.[27]

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22 *Violent Crime Is Haunting Mexico's Tourism*, PRONEKUT.COM, http://pronekut.com/news.php?readmore=19 (last visited Feb. 7, 2015).

23 *Id.*

24 *Id.*

25 *Antecedents—What Is the Calvo Clause?*, INT'L CMTY. FOUND., http://www.icfdn.org/publications/housing/007.php (last visited Mar. 8, 2015) (explaining that a Calvo Clause is an agreement whereby a foreigner agrees that if he or she attempts to use the influence of his or her home government against Mexico in any dispute, Mexico may appropriate the land owned by the foreigner).

26 Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, (Aug. 30, 2000), *available at* http://italaw.com/documents/MetacladAward-English.pdf.

27 *See generally* Angela Winters, *Mexico and Expropriation: The Case of the German-American Coffee Company*, 6 ANTHÓS 1, 237-59 (2014), *available at* http://pdxscholar.library.pdx.edu/anthos/vol6/iss1/14 (discussing foreign involvement in expropriation and violence in Mexico).

C. What Does the Proposal Mean for Mexico?

On August 24, 2013, Mexican President Enrique Peña Nieto announced that the Mexican government was making an investment of $8.63 billion to improve the Mexico tourism sector.[28] The announcement signaled an effort to bring in foreigners who might spend money in Mexico, or even emigrate to Mexico and buy real estate. Tourism is the third most important income sector in the Mexican economy—an economy that has "suffered declines in revenue since the Calderon administration due to the global financial crisis of 2009, the H1N1 influenza in the same year, and a negative public image of the country regarding violence."[29] Tourism is so important to Mexico that it generates about nine percent of gross domestic product (GDP) and directly employs 2.5 million people.[30] In 2012 alone, "Mexico received 23 million international tourists and 178 million domestic tourists, generat[ing] total revenues of 11 million dollars."[31] The highest number of foreign tourists visiting Mexico come from the United States and Canada. To a lesser extent, tourists come from countries such as the United Kingdom, Spain, and South American nations.[32] Additionally, a large amount of tourism revenue is generated by individuals who do not reside in Mexico full time. American retirees, expatriates, or other wealthy individuals who might have bought property in areas affected by the Beltrones Proposal would likely have spent a large amount of time in the country and generated more revenue than a typical tourist.[33]

Over the past forty years, Mexico has slowly liberalized its policies surrounding the availability of real estate to foreigners.[34] However, these policies have been slowed somewhat by continuing xenophobia. Mexico has traditionally

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[28] *8.63 Billion Dollars Invested into Mexico Tourism Industry*, YUCATAN TIMES (Aug. 24, 2013), http://www.theyucatantimes.com/2013/08/8-63-billion-dollars-invested-into-mexico-tourism-industry/.

[29] *Id.*

[30] *Mexico: Tourism Last Year Generated 11 Million Dollars: New Administration Faces New Challenges to Overcome the Image of Insecurity in Some Areas*, AGENCIA EFE (Jan. 23, 2013), http://www.sandiegored.com/noticias/33389/Mexico-Tourism-last-year-generated-11-million-dollars/.

[31] *Id.*

[32] *Id.*

[33] Rafael Romo, *U.S. Retirees Living Well in Mexico*, CNN NEWS (May 15, 2014), http://www.cnn.com/2014/05/15/world/americas/us-mexico-retirees.

[34] *See generally* Michael Boreale, *Beachfront Property in Arizona?: Loosening Restrictions on Foreign Acquisition of Mexican Real Estate and the Implications for Arizona Investors*, 22 ARIZ. J. INT'L & COMP. L. 389, 389-411 (2005) (taking an in depth look at Mexico's slow but deliberate liberalization of its land policies and suggesting that Mexico continue on that path, while finding a way to preserve its past).

feared foreigners, but the fears of 100 years ago simply are not applicable today.[35] As a result of its past, Mexico has continually refused to open its borders to large numbers of retiring Americans. Millions, if not billions, of dollars were at stake for Mexican companies. Mexico continues to compete with the United States and Central America for the money of wealthy Americans. Currently, Mexico's policies lag behind those of Central America and it is important that Mexico realize the importance of opening up its economy to a possible influx of foreign cash, creating jobs throughout the Mexican economy. It is notable, however, that there exists a large contingent of Mexicans who showed outrage at the Beltrones Proposal. This group of people created and signed a petition which was sent to the Mexican government, and takes the stance that if only a small portion of American millionaires buy land in Mexico, no Mexican will ever again have the opportunity to buy beachfront property in their home country.[36] This proposition is largely overblown, as Mexico's coastline is expansive and Americans would likely want to be near resort communities; however, it is important to note that distrust of foreigners could be a major impediment to Americans who might invest in Mexico.[37]

D. History

1. Pre-Mexican Revolution

In order to begin to understand Mexican politics and foreign policy, one must first begin with a general history. Mexico is no stranger to invasion. Its first war as an internationally recognized nation—with Texas—took place from 1835 to 1836, ultimately ending with Texas gaining its independence.[38] The Mexican American War of 1846–1848 followed, and ceased when U.S. troops were in Mexico City.[39] Because of contentions over land use and ownership with Texas and the United States between 1835 and 1848, Mexico lost half its territory to the United States. Subsequently, in 1853, Mexican President Santa Ana negotiated the Gadsden Purchase in which he made an ill-fated decision to sell a piece of the state of Sonora to the United States for $10 million.[40] The corrupt Santa Ana reportedly pocketed the money.[41] After Texas gained its independence and Santa

[35] Gustavo Arellano, *The Mexican on Undue Xenophobia and the Evil Eye*, PHX. NEW TIMES (June 26, 2008), http://www.phoenixnewtimes.com/2008-06-26/news/the-mexican-on-undue-xenophobia-and-the-evil-eye/full/.

[36] *See, e.g.*, O'Reilly, *supra* note 9.

[37] *Id.*

[38] Hugh Holub, *Invade Mexico . . . Again?*, VIEW FROM BAJA ARIZ. (Feb. 26, 2011), https://viewfrombajaarizona.wordpress.com/2011/02/26/invade-mexico…again/.

[39] *Id.*

[40] *Id.*

[41] *Id.*

Ana sold what is now Southern Arizona and parts of New Mexico, the attempted land-grabs and invasions did not stop. Fertile farmland in Northern Mexico and Baja California was so coveted by American farmers and miners that, between 1850 and 1860, American pioneers with manifest destiny on their minds engaged in numerous "campaigns called 'filibusters'" during which these farmers and miners formed private armies and "invaded Mexico in attempts to seize Sonora and Baja California."[42] These filibusters became so frequent and annoying to the Mexican Government that, on April 7, 1857, a group of American invaders led by Alexander Crabb were rounded up near Caborca, Sonora, and executed by firing squad, beheaded, and left for the birds.[43] Not including the many "filibusters," Mexico has been invaded thirteen times by the United States and Texas.[44]

In addition to American intervention by land, the French invaded by sea. On January 5, 1863, the Franco-Mexican War began when the French seized and began to bomb the Mexican port of Veracruz.[45] The conflict arose over the payment of a debt, and French Emperor Napoleon III decided to invade Mexico with the goal of using Mexico as a French colony.[46] Within a year and a half, the French sacked the Mexican capital, Mexico City, and Napoleon III awarded Maximilian I the Mexican crown.[47] The French did not leave Mexico until the United States threatened war, blocked Veracruz, and expelled Maximilian on May 31, 1866.[48] Due to repeated invasions, or "interventions," the Mexican Government and people have always been extremely sensitive to their sovereignty, and the country's foreign policy has always been centered on the prevention of invasion from the north.[49]

2. The Mexican Revolution

The Mexican Revolution began in 1910 and ended in 1917, when the Mexican government adopted the current Constitution. Prior to the Revolution, the government was run by Portfolio Diaz, who was essentially a dictator. However, he was good at attracting foreign investment.[50] In fact, the regime under President Diaz was almost too good at recruiting businessmen and

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42 *Id.*

43 *Henry A. Crabb, Filibuster, and the San Diego Herald*, 19 SAN DIEGO HIST. SOC'Y Q. 1 (Diana Lindsay ed., 1973), *available at* http://www.sandiegohistory.org/journal/73winter/crabb.htm.

44 *See* Holub, *supra* note 38.

45 *See* HUBERT HOWE BANCROFT ET AL., HISTORY OF MEXICO VOL. VI, 1861–1887.

46 *Id.* at 28-41.

47 *Id.* at 137-39.

48 *Id.* at 304-21.

49 Holub, *supra* note 38.

50 Donald J. Mabry, *Porfirio Diaz (1830-1915)*, LATINAMERICANSTUDIES.ORG, http://www.latinamericanstudies.org/mexican-revolution/porfirio-diaz.htm (last visited Feb. 9, 2015).

investment capital from outside countries: the country and its economy was heavily influenced and practically run by foreign nationals.[51] Diaz was in power from 1876 until 1910, and by the turn of the twentieth century the Mexican people were discontented with the way the government functioned.[52] Sixty percent of the population of Mexico was of Indian descent, and those native to Mexico were quickly losing traditional lands to whites.[53] While the regime of President Diaz was in power, large land conglomerates held the political influence to force the sale of large amounts of land that had been held by natives.[54] This foreign influence in Mexico can be attributed to President Diaz's strong belief in free enterprise. Free enterprise naturally favored individuals who maintained the ability to use their wealth to manipulate.[55] By the turn of the nineteenth century, close to eighty percent of Mexico's land mass had been acquired by approximately 1,000 wealthy individuals, who held large estates, mines, and plantations ranging anywhere from one thousand to millions of acres of fertile farmland.[56] As this occurred, it forced natives into wage laborer positions in which they could be exploited because "ninety-seven percent of the population in the countryside owned no land."[57]

Finally, in November of 1910, an educated man by the name of Francisco Madero called for an armed revolution against Diaz.[58] The "Madero Rebellion" never truly got started, but the words of Madero incited others in Mexico, and armed rebellions sprang up around the country. These rebellions were led by men such as Emiliano Zapata, Poncho Villa, and Pascual Orozco;[59] they quickly gained steam and forced Portfirio Diaz to set sail for France on May 31, 1911.[60] Francisco Madero gained control of Mexico.

Just as it seemed Mexico would settle after the expulsion of Diaz, civil war broke out once again. Big businesses did not like the liberal policies of Francisco Madero, and soon a force led by Victoriano Huerta seized Mexico City and killed Madero. U.S. President Woodrow Wilson was appalled, and he sent the U.S. Navy to blockade Mexico's eastern seaboard. The Americans landed Marines and killed almost 200 of Huerta's men.[61] Huerta then proclaimed that the country was once again being invaded by the United States and declared a war against "the gringos." Americans kept Huerta busy at Veracruz while Madero

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51 *Id.*

52 *The Mexican Revolution, 1910 to 1917*, MACROHISTORY, http://www.macrohistory.com/h2/ch03mex.htm (last visited Mar. 18, 2014).

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *The Mexican Revolution, 1910 to 1917*, *supra* note 52.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

supporters rallied and re-took Mexico City. Finally, on July 14, 1914, Huerta resigned and sailed for Spain.[62]

Afterwards, a vicious power struggle ensued and Venustiano Carranza declared himself President of Mexico. The supporters of Pancho Villa, however, did not like this disposition, and decided to fight Carranza. Carranza's forces defeated Pancho Villa at Obregon and in mid-October 1915, President Wilson recognized Carranza's government. Villa was outraged and commenced a war on "gringos" whom he felt had wronged him.[63] The men under the command of Villa rode for the United States and crossed the border in January 1916. They killed numerous unarmed Americans at Columbus, New Mexico. The event triggered outrage in American newspapers, and since 1916 was an election year, President Wilson felt he needed to act. Wilson sent 12,000 U.S. soldiers into Mexico after Pancho Villa. The troops under General William Pershing wilted in the heat and came up empty-handed. Meanwhile, in Mexico City, the Carranza regime was working to draft a new constitution.[64]

3. The 1917 Constitution

The framers and drafters of the post-revolution 1917 Constitution did not forget the heavy foreign influence, which largely caused the 1910 Mexican Revolution. The drafters of the new constitution scorned foreign investors and other non-Mexicans "living in luxury abroad while their estates in Mexico went to seed."[65] The 1917 Constitution was written with the outlook that the ownership of land was to service the needs of the populace.[66] The framers gave Mexico's Congress and state legislatures the broad and encompassing power to issue laws to eliminate "large estates, to force large landowners to sell their lands and to make purchases of their lands easy through installments."[67] Confiscation and expropriation of foreigners' land was a last resort in the event that a foreigner resisted the coming changes in Mexico.[68] If a foreigner wanted to own land the foreigner could do so; however, the foreigner had to sign a Calvo Clause,[69] and

62 *The Mexican Revolution, 1910 to 1917*, *supra* note 52.

63 *See* EILEEN WELSOME, THE GENERAL AND THE JAGUAR: PERSHING'S HUNT FOR PANCHO VILLA (2006).

64 *Id.*

65 *Id*. at 38.

66 V. NIEMEYER, JR., REVOLUTION AT QUERÉTARO: THE MEXICAN CONSTITUTIONAL CONVENTION OF 1916-1917 32 (1974).

67 *The Mexican Revolution, 1910 to 1917*, *supra* note 52.

68 NIEMEYER, *supra* note 66.

69 By signing the Calvo Clause the foreigner agrees to consider himself a Mexican citizen. The foreign citizen also renounces his right to invoke the protection of the government of his home country.

the land could not be within the "Restricted Zone."[70] The 1917 Constitution limited the workday to eight hours, provided for a minimum wage, a fifteen day vacation, a right for labor unions to strike, and did away with child labor.[71]

However, in the minds of many, the most important provision was Article 27, dealing with land use and ownership.[72] Article 27 limits the right of foreigners to own agricultural property and prohibits foreigners from owning property within 100 kilometers of the border between the United States and Mexico, or within 50 kilometers of the sea. At the time, the provisions were seen as revolutionary. The government was dead set on redistributing land from rich foreigners to the populace.[73] In 1917, when the Constitution was signed, 97 percent of the populace owned no land.[74] By 1920, President Carranza had distributed an average of 3.7 hectares of land to 46,398 different recipients, this being just a small percentage of the fourteen million citizens of Mexico at the time.[75] By 1928, when President Plutarco Calles took office, an average of 10.6 hectares of land had been distributed to 297,428 different recipients, out of the approximately 18 million Mexican citizens in that year.[76]

The progress made directly after the drafting of the 1917 Constitution did not last long, however. Wages remained low in Mexico and widespread poverty persisted. The government had forced foreign investors to move on, and with their investments went the jobs. To make things worse, the Great Depression took hold in the United States, and its effects were felt worldwide, including in Mexico.[77] However, out of the Mexican Revolution grew a new middle class in Mexico. This group of native Mexicans can be described as a modern "business class," which "grew up more based in banking and manufacturing than in land."[78] Despite the new business class that was developing, the country remained in dire straits until Presidents Emilio Portes Gil and Lazaro Cardenas worked to make further land reform a reality during the 1930s.[79] In addition to land reforms, President Gil nationalized the railroad in 1929, and President Cardenas expropriated and nationalized the petroleum industry in 1938.[80] Despite these

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70 The term "restricted zone" refers to land in the areas near the border and coast. Neil, *supra* note 2. Pursuant to Article 27 of the Mexican constitution these are the two areas over which foreigners cannot gain direct ownership.

71 NIEMEYER, *supra* note 66.

72 *Id*. at 138-40.

73 *Id.*

74 *Id.*

75 MICHAEL J. GONZALES, THE MEXICAN REVOLUTION, 1910-1940 239 (2002).

76 *Id.*

77 *See* MICHAEL C. MEYER ET AL., THE COURSE OF MEXICAN HISTORY 439-560 (2003).

78 Dan La Botz, *A Brief History of Mexico: Repression and Revolution*, UEINTERNATIONAL.ORG, http://www.ueinternational.org/Mexico_info/Mexico_history2.php (last visited Oct. 8, 2013).

79 MEYER ET AL., *supra* note 77.

80 *Id.*

socialistic actions, Mexico remained capitalist. It had an economy partially influenced by the government through expropriations and monopolies and partially run by free market capitalism.[81] During Manuel Ávila Camacho's term (1940–1946), Mexico's economy officially recovered from the Great Depression and became more prosperous than it had ever been. Starting with the election of President Camacho in 1940, a thirty-year period known as the "Mexican Miracle" had begun. A series of Mexican Presidents promoted the expansion of industry.[82] With this economic emphasis, cities started to grow rapidly, a result of the shift from an agrarian population to one that worked in industry and services.[83]

For the greater part of 1940 to 1950, Mexico looked inward. Policies were successful, and the government worked in growing Mexico's economy anywhere from three to six percent annually.[84] Foreign-investment policy favored a heavy reliance on "increasing exports and protecting existing national industries from domestic competition by foreign investors."[85] The protectionist tactics kept foreigners from tapping into and extracting Mexico's rich natural resources.[86] Instead, a combination of government funding and Mexican entrepreneurship fueled the country.[87]

However, after Cardenas's term, around 1950, the Mexican government shifted quickly to the right and took a much more conservative approach to economic affairs.[88] The government gradually became far more supportive of foreign capital, including that from the United States, and was much less focused on Mexican workers and the poor.[89] By the late 1950s, Mexico's government had become an authoritarian state, which suppressed popular movements to promote and protect capital.[90] Despite the provisions of the 1917 Constitution, this political outlook slowly gave way to the reintroduction of mass investment by foreigners. Much of this investment was spearheaded by changes and exceptions to the Constitution, legislated in the 1970s.

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81 *Id.*

82 *Id.*

83 Richard Easterlin, *Why Isn't the Whole World Developed?*, 41 J. OF ECON. HIST. 1, app. tbl. 1 (1981).

84 *Id.*

85 Hope H. Camp, Jr., Jaime Alvarez Garibay & Lee Cusenbary, Jr., *Foreign Investment in Mexico from the Perspective of the Foreign Investor*, 24 ST. MARY'S L.J. 775, 784 (1993).

86 *Id.*

87 *Id.*

88 La Botz, *supra* note 78.

89 *Id.*

90 *Id.*

4. Legislative Changes of the 1970s

By 1970, Mexico's economy finally started to lag after 30 years of growth and relative prosperity. President Luis Echeverría Álvarez's term (1970–1976) was riddled with fiscal mismanagement. The government lacked revenue and the problem was exacerbated by a worldwide oil crisis.[91] The government quickly realized that, despite decades of effort to avoid looking outside Mexico for money, it was time to consider allowing more foreign investment dollars. Due to sagging oil and mineral prices, Mexico did not have much to offer in the way of industry or raw materials, but what Mexico did have was "attractive and potentially lucrative" land, within the Restricted Zone.[92]

In 1971, the Mexican government expanded the concept of *fideicomisos*, a form of trust in which a Mexican bank holds the title, and the buyer holds the right of enjoyment to land use and real estate purchases. *Fideicomisos* had been around the Mexican banking scene since 1926, but had never been applied to foreign ownership of land.[93] With the stroke of a pen, on April 29, 1971, President Echevarria issued the Echeverria Proclamation, which authorized Mexican banks to hold real estate "in trust for the benefit of foreigners," a process that has become known as a *fideicomiso*.[94] Thus, under a *fideicomiso*, a foreigner could buy the rights to use land; however, the foreigner would never see the title. Instead, under a *fideicomiso*, the bank holds the title until the foreigner decides he wants to sell his interest in the land to another person. This allowed a foreigner to make money on the purchase or sale of land in Mexico's Restricted Zone. The situation allowed the government and the people of Mexico to maintain the knowledge that the foreigner would not hold direct title to the land, and thus would not hold the ultimate power associated with direct land ownership.[95]

Although groundbreaking, President Echevarria's proclamation establishing the bank trusts did not have the widespread effect that many thought it would.[96] The authorization did not expressly provide a legal loophole around the longstanding provisions of Article 27. Thus, in 1973, the Mexican Congress ratified the Act to Promote Mexican Investment and Regulate Foreign Investment of 1973 (1973 FIA).[97] The 1973 FIA officially allowed foreigners to own an interest in land in the Restricted Zone but required that they sign a Calvo Clause, in addition to going through the process and expense of setting up a *fideicomiso* with a Mexican bank. The 1973 FIA was met with greater fanfare than the 1971 Echevarria Proclamation. Wealthy foreign investors who wanted to invest or own beachfront property poured money into Mexico's economy. However, the 1973

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91 *Id.*
92 Boreale, *supra* note 34, at 396.
93 *Id.*
94 *Id.* at 396-97.
95 *Id*. at 401.
96 *Id.* at 396-97.
97 Boreale, *supra* note 34, at 397.

FIA still was not as effective as the government had intended. The measure was intensely debated by Mexican legislators; the side that favored passage had to give in on two major provisions.[98] First, the length of a *fideicomiso* would be thirty years, and the legislation did not specify what would happen after thirty years or what the process would be to renew.[99] Second, no tax breaks or incentives were put forth to entice foreign investment.[100] Thus, a large portion of initial buyers were those who had wanted to invest in Mexico for years, as well as the super-wealthy who could take larger risks in exchange for short-term enjoyment of Mexican real estate.[101] The everyday middle class foreigner was not willing to risk the uncertainty.

5. Legislative Changes of the 1990s

In 1989, with the economy still sagging, the Mexican government once again revisited the issue of foreign investment in real estate. The 1973 FIA had left many questions unanswered and had failed to provide legitimate incentive for foreigners to bring their money to the shores of Mexico.[102] On May 16, 1989, the Mexican legislature enacted the 1989 Regulations to the Act to Promote Mexican Investment and Regulate Foreign Investment. This list of regulations allowed for any valid thirty-year *fideicomiso* to be renewed for an additional thirty years. The act even went so far as to mandate the approval of any application submitted within one year of the expiration of the initial term.[103]

The 1989 regulations were just the beginning of continuing policy liberalization. In 1993, the government made its biggest statement on foreign investment since the 1973 Act. The Foreign Investment Act of 1993 (1993 FIA) allowed "wholly foreign-owned Mexican corporations to own property for non-residential purposes within the Restricted Zone" for the first time since before the 1910 Revolution.[104] Some scholars have argued that this change in policy actually reflects the goals of the 1917 Constitution. Author Michael Boreale wrote in 2005, "the 1993 FIA reflects the residual attitude of the 1917 Constitution; foreign investment should benefit Mexico as much as the foreign investor."[105]

However, in hindsight the motives behind this major step towards liberalizing property ownership, and thus economic use, were more geared toward fixing the economy. Mexico was an inward-looking country for 30 years and the reasons for liberalizing policy were twofold. First, the 1993 FIA was an act of

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98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.* at 399.
102 Boreale, *supra* note 34, at 398.
103 *Id.*
104 *Id.*
105 *Id.* at 399.

desperation by the government in an attempt to create jobs. Mexico's economy struggled mightily during the period of 1970 to 1993 and the government was finally willing to do whatever was necessary to bring capital into the country in a serious effort to put people to work.[106] Second, the government was working on the North American Free Trade Agreement (NAFTA). Surely, the negotiations over NAFTA put pressure on Mexico to open up its resources to the rest of North America. Prior to NAFTA, Mexico was leery of free trade and the government wanted to regulate everything entering and leaving the country.[107] Effectively, the 1993 FIA killed two birds with one stone.[108] Surely, the government of Mexico would have sold the 1993 FIA as benefitting foreigners just as much as Mexicans, however, it is likely that if the economy had not been in such trouble, and NAFTA not on the table, Mexico would have continued its isolationist interpretation of the 1917 Constitution, which was pervasive throughout the Mexican Legislature for seventy years.[109]

In addition to opening the Restricted Zone to foreign-owned corporations, the 1993 FIA allowed for fifty-year *fideicomisos*. This was another major step as it allowed many investors to set up a *fideicomiso* and not have to worry about ever renewing the bank trust, or at a minimum, eased foreigners' concerns about the uncertainty of thirty-year renewal periods.[110] Although the 1993 FIA continued to move Mexico in the right direction, it was still somewhat misguided. The idea behind the 1993 FIA was that foreign corporations would build hotels, resorts, and restaurants that would employ construction workers in the interim and additional Mexico workers once these establishments opened for business.[111] However, this idea of sustained employment depended on a strong tourism market.

Typically, Mexico is a popular tourist destination. Yet, during the 1990s the Mexican government failed to take action against drug cartels and border violence. Thus, tourism in Mexico did not live up to its potential, and neither has employment. In the end, what the Mexican government has failed to observe is the fact that economic booms are often fueled by residential real estate booms.[112] Typically the economy of a country and the GDP of a country are strongly influenced by the fact that the "economy is tied to residential real estate, whether it is on the financial side, construction, landscaping, carpet, granite—you name

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[106] *Id.*

[107] Boreale, *supra* note 34, at 389.

[108] Michael Wallace Gordon & Jorge A. Vargas, *Mexican Law: A Treatise for Legal Practitioners and International Investors,* 32 U. MIAMI INTER-AM. L. REV. 361 (2001).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] Rick Badie, *The New Real Estate Boom,* YOLANDA GRAHAM (Sept. 3, 2013), http://www.yolandagraham.com/atlanta_real_estate_blog/view/1154/the_new_real_estate_boom.

it."[113] If the government would have opened up a path to allow foreigners to hold direct title in the Restricted Zone in 1993, the nation likely would have had a much better chance at partaking in the economic boom that occurred in the United States in the late 1990s. Instead, during the 1990s Mexico relied only on wholly foreign-owned Mexican companies to drive the economy through the construction of commercial real estate.[114]

After the 1993 FIA failed to garner the reaction the Mexican legislature had hoped, President Ernesto Zedillo issued the 1996 Amendment to the 1993 FIA (1996 FIA Amendment). This allowed foreign investors "outside of a Mexican corporation to acquire title to land in the restricted zone for non-residential purposes."[115] This amendment was very significant: for the first time it opened up the Restricted Zone to foreign small business owners. This small amendment was a major step in the right direction, as it moved towards allowing many foreign investors to stake their claims in Mexico. Small businesses sprung up all along the Mexican coast, employing Mexican nationals in the process.[116] However, this new amendment was also met with xenophobia and angst, which in turn led to new restrictions enacted by the Mexican legislature in 1998.[117]

The 1998 Foreign Investment Regulations (1998 Regulations) did two things. First, they allowed foreigners to hold title within the Restricted Zone for non-residential purposes.[118] Second, they required that the foreigner agree to sign a Calvo Clause, by which the foreigner agrees to consider himself a Mexican and relinquish the protections of his home country.[119] The foreigner does not have to give up citizenship in her home country but must renounce the protections of her home government. The 1998 Regulations defined "residential activities" to consist of dwellings used by the owner or someone leasing or renting the property. Further, the 1998 Regulations defined non-residential activities as "time shares, industrial uses, commercial uses, tourism enterprises, and service related industries."[120] These regulations are, in theory, contradictory to the basis of the 1917 Constitution, but they did not amend the 1917 Constitution. Thus, they are arguably unconstitutional.[121] However, the passage of these regulations was again necessitated by a struggling economy. A declaration proclaiming the 1998 Regulations unconstitutional would have immediately prevented foreigners from owning commercial property in the restrictive zone, but it is likely that the country would have lost hundreds of thousands of jobs soon thereafter. Thus, foreigners

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113 *Id.*

114 Boreale, *supra* note 34.

115 *Id.* at 399.

116 Badie, *supra* note 112.

117 Boreale, *supra* note 34, at 400.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

maintained the ability to own commercial property in the Restricted Zone without a constitutional amendment in place.

6. An Introduction to Manlio Fabio Beltrones

While foreigners' access to land was debated during the 1990s in Mexico, the Governor of the State of Sonora was Manlio Fabio Beltrones. Beltrones, a member of the Partido Revolucionario Institucional (Institutional Revolutionary Party, or PRI), believed that Mexico needed to open up to foreigners completely. On August 26, 1995, Beltrones published a very controversial editorial article in the *Tucson Citizen*, a major newspaper in Tucson, Arizona.[122] The proposal outlined the "process" by which Mexico was opening up to foreign investment, and Beltrones suggested that a large faction of Mexicans actually supported opening up the country to outsiders.[123] Beltrones's ideas were put forth at a time when Mexico had just come away from devaluing the nation's currency. The country refused to accept that nationalism needed to be set aside, and the idea of amending Article 27 was not taken seriously.

The 1995 Beltrones Editorial reads:

> Fast-forward to the end of 1994 and the first several months of 1995. Now we Mexicans are painted as fiscally incompetent, politically corrupt, socially chaotic. The process of change is ignored. Even changes that are strongly in place are discounted. Again and again, Mexico—one of the world's largest and most diverse nations—is presented in monolithic terms. One example is the view that Mexico is unalterably isolationist and nationalist to a fault. Ignored is the debate that is developing over changing a constitutional prohibition against foreigners owning land in our country. Outsiders are skeptical, convinced that Mexican xenophobia is universal and everlasting. That view is distorted. We do love our country. We do have a profound sense of our history. If a Mexican stands at the center of the border of my state, Sonora, with the United States, no matter where he looks in the 180-degree arc that defines the north, from extreme northeast to extreme northwest, he sees vast tracts that were once part of our country—Texas, New Mexico, Arizona, California—a vast landmass that makes up a significant, economically powerful portion of the United States. Those who fought in our revolution were painfully aware of what we had lost. And as those who framed our 1917

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122 Manlio Fabio Beltrones, *Allow Foreigners a Real Stake in Land Investment in Mexico*, TUCSON CITIZEN, Aug. 29, 1995, at A6.

123 *Id.*

constitution wove the awareness and pain of that loss into the document itself, so too is it woven into the soul and consciousness of the Mexican people.

The constitution provides that Mexico's lands and waters and natural riches belong to the Mexican people. Article 27 specifies that no foreigner may own land within 100 kilometers of the border or within 50 kilometers of our coast. There are ways around the proscription, although it is absolute with respect to residential property. Non-Mexicans can set up a Mexican corporation and buy property for non-residential purposes. Foreign individuals can gain rights to land for residential use via special land trusts, but they can't own that property. Viewed from the outside, this may seem an isolationist position. Looked at from within, it can appear a reasonable response to history. Many Mexicans today look at the restriction on land ownership and shake their heads. Many believe that it is outdated and outmoded, that it stifles economic development and, equally important, sends a message that we are a closed society. But they are disinclined to make their position public or move for change for fear that they might be perceived as something less than patriotic. Nevertheless, it is time to reconsider. Fear that foreigners, by owning Mexican land on which to establish homes or businesses, somehow have the power to undermine our sovereignty may have had validity in another epoch. No longer. Times have changed. Americans or Canadians or Germans armed with beach blankets and sun block and cash to invest in a winter home are hardly a threat. A multinational corporation willing to sink hundreds of millions of dollars into capital investment seems something other than a danger. No country that is developing its economy and industrial base—not the United States in the 19th century, not Germany or Japan after World War II, not Mexico today—can do so effectively without large infusions of foreign capital. If we make it difficult, if we maintain barriers—even barriers that can be circumvented—many potential investors will look to other countries where it is less burdensome to invest. Or they will look to purely financial investment and speculation in our economy. We must ask ourselves: Who is helping Mexican sovereignty? Is it the short-term speculators who undermined the peso and cut its value in half in a matter of weeks? Or is it the long-term investor willing to sink tens of millions of dollars into development, into plants and equipment that will create employment and economic growth? My state would certainly benefit from such a change, as would half of the other

> 30 states in our country. So would the national government and the people as a whole.[124]

It has been eighteen years since Beltrones published his editorial, and now Beltrones is a member of the Mexican Senate.[125] Mexico's economy and tourism industry have been down due to the world financial crisis, economic trouble in the United States, and continuing border and drug violence in Mexico.[126] Beltrones, as of 2013, once again believed that it was time that Mexico set aside nationalism and xenophobia, and open up the country to investment.

7. The Current Regime and the Beltrones Proposal

On December 1, 2000, the National Action Party (PAN Party) candidate, Vicente Fox Quesada, took over as the new President of Mexico. Fox's election ended a seventy-one year run by the PRI Party of Mexico. The PRI party was the product of the Mexican Revolution. It eliminated foreign influence, but also created Mexican oligarchies that effectively "controlled banks, the national oil company, the media, governors and mayors, the state job mill and, to a large degree, crime bosses."[127] The leaders of the party ruled largely "iron-fisted" and "suppressed democracy and dissent while enabling the country to grow and modernize."[128] When the PRI Party started to fall out of favor is disputed. However, contributing factors included a "succession of economic crises beginning in the 1970s, the mishandling of the response to the 1985 Mexico City earthquake, and the flowering of democracies around the world all setting the stage for the PRI's downfall in 2000."[129]

Mexicans had high hopes for the PAN Party, but they were largely disappointed with President Fox Quesada and his successor, Felipe Calderon. By 2012, a majority of Mexicans were frustrated with continuing cartel and border violence, and a bogged-down economy, and they maintained a general feeling that the country should be "further along than it is" allowing for nostalgia to develop

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124 *Id*. This is the full 1995 proposal.

125 Beltrones, *supra* note 122; GEORGE W. GRAYSON, MEXICAN MESSIAH: ANDRÉS MANUEL LÓPEZ OBRADOR 279 (2007).

126 Carrie Kahn, *Mexico's Retailers Welcome Shoppers Over Bargain Weekend*, NPR.ORG (Nov. 18, 2013), http://www.npr.org/2013/11/18/245913192/mexicos-retailers-welcome-shoppers-over-buen-fin-weekend.

127 Randal Archibold, *Mexico Appears Poised to Embrace Party it Ousted in 2000*, N.Y. TIMES, June 29, 2012, at A4.

128 *Id*.

129 *Id*.

"for the perceived protection and stability of yore."[130] By 2012, Mexicans wanted change, and they responded by electing PRI candidate Enrique Pena Nieto.

The election of President Nieto is important for Mexico because it allows for a continuation of PRI policies, which included the continuing liberalization of the Mexican economy underway in the 1990s.[131] In the spring of 2013, PRI lawmaker, Manlio Beltrones, made the first bold step in that direction. Beltrones introduced a proposal to amend Article 27 of the Constitution to allow foreigners to hold direct title to land in the Restricted Zone, without a *fideicomiso*, and for residential purposes.[132] The 2013 Beltrones Proposal said foreigners could acquire title to real estate for residential purposes, but with certain restrictions.[133] The current Text of Article 27 of the Mexican Constitution now reads:

> Only Mexicans by birth or naturalization and Mexican companies have the right to own lands and waters, and to obtain exploitation licenses for mines and waters. The State may grant the same right to foreigners, provided that they agree before the Department of Foreign Affairs to consider themselves as Mexicans regarding such property and not to invoke the protection of their governments in reference to said property, under penalty of forfeiting the property in favor of the country. Foreigners cannot acquire properties within the zone that covers one hundred kilometers along the international borders and fifty kilometers along the beach.[134]

The amended Article 27 would allow foreigners to acquire direct title to land within the prohibited zones as long as they used the land exclusively for residential purposes, with additional restrictions.[135] The restrictions include five separate provisions:

(1) The property must be used exclusively as the owner's residence;
(2) The property must not be used for any commercial, industrial, or agricultural purposes;

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[130] *Id.*
[131] *Id.*
[132] Beltrones, *supra* note 122.
[133] Bours, *supra* note 3.
[134] Constitucion Politica de los Estados Unidas Mexicanos [C.P.], art. 27, Diario Oficial de la Federacion [DO], 5 de Febero de 1917 (Mex.), *translated in Political Constitution of the United Mexican States*, TRIBUNAL ELECTORAL DEL PODER JUDICIAL DE LA FEDERACIÓN, http://portal.te.gob.mx/en/consultations/political-constitution-united-mexican-states (last visited Mar. 15, 2015).
[135] *Will Beachfront Property Reform Bring the End of the Fideicomiso?*, MEXICO BUS. BLOG (May 13, 2013), http://bdp-americas.com/blog/2013/05/13/will-beach-front-property-reform-bring-the-end-of-the-fideicomiso/.

(3) The foreigner must obtain prior permission of Mexico's Foreign Relations Secretariat;
(4) Ownership of the property would revert to Mexico if the owner used the property for a non-residential purpose;
(5) The foreigner must sign a Calvo Clause. Foreigners must agree to consider themselves as Mexicans and to not seek aid from their countries in relation with the real estate they are acquiring, under penalty of losing it in favor of the Mexican government; and
(6) No foreigners may own commercial property of any kind inside a restricted zone.[136]

This proposal put foreigners owning residential property on the same foot as current Mexican corporations that are commercial owners, holding fee simple title to property. Holding property in fee simple means that the owner holds the physical title to the property and may transfer the title as he or she wishes, without encumbrances.[137] The land may be sold without approval from a trustee or the Mexican government.

However, the problem with the proposal is that the Calvo Clause still remains. Investors take the risk of losing their property to the Mexican government. In addition, the Calvo Clause requires more paperwork, more formality, and greater cost. Although the Calvo Clause requirement is likely just a salute to the 1910 Revolution, it is also likely to draw some scrutiny from prospective buyers. In order to understand this concept, it is necessary to briefly discuss the process by which a foreigner currently may acquire land through a *fideicomiso* in Mexico.

III. HOW PROPERTY IS PURCHASED UNDER CURRENT MEXICAN LAW

Under the current system, foreign individuals cannot buy property in the Restricted Zone and hold title in fee simple.[138] This means that the Mexican government and banks hold leverage over foreigners, and those wanting to buy property get to deal with a lengthy system plagued with fees, waiting periods, and uncertainty.

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[136] *Changes to the Fideicomiso Rules for Foreign Ownership,* MEXI-GO! (Oct. 11, 2013), http://blog.mexi-go.ca/changes-to-the-fideicomiso-rules-for-foreign-property-ownership/.

[137] *Id.*

[138] *See* Boreale, *supra* note 34.

A. How a Foreign Individual can Acquire Residential Property in the Restricted Zone

A foreign citizen cannot hold title to land in the Restricted Zone in fee simple; it is required that a trust be used in which a Mexican trustee holds actual title for the foreign citizen.[139] Under current Mexican law, only a Mexican bank with authorization by the Ministry can act as a trustee over real estate located in the Restricted Zone.[140] This *fideicomiso*, or bank trust, ensures that actual title stays in the hands of Mexican citizens and banks, and foreigners only receive an equitable interest.[141] When a foreign citizen decides he wants to purchase property in Mexico, the process starts out just as it does in the United States.[142] The informed buyer should consult a real estate agent.[143] However, the buyer should be aware that in Mexico a license is not required to form a real estate company or to serve in the capacity of an agent. If the investor decides to hire an agent, the agent should be bilingual, from a reputable firm or company, and familiar with trends and pitfalls surrounding the specific area of the Restricted Zone in which the buyer is interested.[144]

Once the buyer locates the property he or she wants to buy, an offer is made. This can be met with a counteroffer or an acceptance.[145] Once an offer or counteroffer is accepted, consideration is given and a contract is formed.[146] The price and any agreed upon conditions of the sale are then put into a promissory agreement.[147] This serves as a "promise to execute a real estate trust or a promise to execute an assignment of the beneficial rights of a real estate trust."[148] This agreement is essential as it legally binds the seller to assist the buyer in acquiring the rights to the property through conveyance of legal title to a trustee, or in the event that the property is already held in trust, then the holder of the beneficial rights is obligated to make an assignment.[149] A valid promissory agreement in Mexico must conform to the following: (1) it must be in writing; (2) all parties must have capacity to contract; (3) all principle elements of the agreement must be noted; and (4) the agreement must specify a time period within which the future

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139 *Id*.

140 Juan F. Moreno, *Closing the Deal: Buying Residential Land in Mexico's "Restricted Zone,"* 38 ARIZ ATT'Y 30, 31 (2002).

141 *Id.*

142 *Id.*

143 *See id.*

144 *Id.*

145 Boreale, *supra* note 34, at 402.

146 *See id.* at 402-03.

147 *See* Manual F. Pasero & Hector Torres, *Foreign Investment in Mexico's Real Estate: An Introduction to Legal Aspects of Real Estate Transactions*, 35 SAN DIEGO L. REV. 783, 791-92 (1998).

148 Boreale, *supra* note 34, at 402.

149 *Id*. at 403.

agreement must be executed.[150] Thus, the promissory agreement does not actually complete the sale, but instead sets forth a framework upon which the deal shall be based, and a time frame during which the paperwork and title transfer will occur.[151]

The next and most important step in purchasing property in the Restricted Zone is to perform a title search.[152] Researching title history in Mexico is not as easy and straightforward as in the United States.[153] It is recommended that a Mexican attorney be hired to perform this task, which can take a period of weeks or months to perform, depending on the complexity of the chain of ownership.[154] Once the title search is completed and cleared by the buyer's attorney, the seller must produce three documents.[155] First is a copy of the title.[156] Second, a certificate of no encumbrances is obtained from the public registry.[157] This certificate will contain: (1) a description of the property; (2) the owner's name; (3) the date the seller acquired the property; (4) and the zoning classification.[158] Finally, a certification of no tax liability must be produced.[159] This document is important as it ensures that the buyer shall not be responsible for any pending tax payments on behalf of the seller.[160] This document is obtained from the property tax department of the treasury office, in the state where the property is located.[161]

Once the seller produces the necessary documents, it is the buyer's responsibility to acquire a property appraisal.[162] The appraisal must include a topographic survey of the property, which can be completed by a bank.[163] However, it is suggested that the buyer hire an attorney specifically licensed to perform such a survey.[164] The appraisal is significant because it is used to determine the amount of property transfer tax to be paid.[165] At closing, the buyer of the property submits one appraisal value to the Ministry, and later, the state assessor does her own appraisal.[166] After closing, the buyer owes two percent of

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150 *Id.*
151 *See id.* at 402.
152 *Id.*
153 Boreale, *supra* note 34, at 403.
154 *Id.*
155 Moreno, *supra* note 140, at 32.
156 *Id.*
157 *Id.*
158 Boreale, *supra* note 34, at 403.
159 Moreno, *supra* note 140, at 32.
160 *Id.*
161 Boreale, *supra* note 34, at 403.
162 *Id.*
163 *Id.* at 404.
164 *Id.*
165 Moreno, *supra* note 140, at 32.
166 *Id.*

the higher of the two appraisal estimates as a transfer tax.[167] Thus, in Mexico, in addition to fees associated with consulting a bank to create a *fideicomiso* trust, hiring a real estate agent, and paying an attorney to do a title search, a buyer must also pay a transfer tax in order to simply gain possession of the property. These fees add up quickly, and when combined with the inability to hold fee simple title, can be a barrier to entry into the Mexico market. If Mexico wants foreign direct investment in its real estate market, it must decide between holding on to its xenophobic past and following models of other progressive countries, which will be discussed later in this Note.

Once the buyer's appraisal is completed, a *compraventa* is required.[168] A *compraventa* is a sales agreement which actually transfers title to the property.[169] The *compraventa* must be in writing, the parties must have the capacity to contract at the time they sign the *compraventa*, and it must be recorded with the public registry in order to be valid.[170] There are two types of *compraventas* which can be executed in the Restricted Zone.[171] The first is a *compraventa* in the form of an irrevocable real estate trust agreement.[172] This type of a *compraventa* actually creates the *fideicomiso*.[173] In order to execute this type of *compraventa*, a bank trustee must be involved, and the bank is responsible for obtaining the trust permit from the Ministry of Foreign Affairs.[174] When the government approves the permit application, a public notary must be retained in order to commit the trust to writing.[175] In Mexico, all public notaries are attorneys, so the attorney hired to do the title search can also be employed to create the *fideicomiso*.[176] In order for the public notary to complete the *compraventa*, certain documents must be in place.[177] These documents include the new title, the certificate of no tax liability, the certificate of no encumbrances, the topographic survey of the real estate, and the appraisal.[178] During the whole process of creating the *compraventa*, the buyer is not involved, except to pay the costs of the bank and public notary.[179] The *compraventa* is completed between the seller and the bank trustee.[180] Once the bank acquires title through the *compraventa* agreement, the buyer acquires beneficiary rights to the enjoyment of the property.[181] Although there is no

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167 *Id.*
168 Boreale, *supra* note 34, at 404.
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.*
173 Boreale, *supra* note 34, at 404.
174 *Id.*
175 *Id.*
176 Moreno, *supra* note 140, at 31.
177 Boreale, *supra* note 34, at 404.
178 *Id.*
179 *Id.*
180 *Id.*
181 *Id*.

official monopoly, Mexico's two biggest banks, Banamex and Bancomer, do most of the *fideicomiso* business.[182] The bank trusts generate lucrative fees, and the actual work performed by the banks is miniscule, as the buyers' attorneys draft most *fideicomisos*.[183] Despite this lack of involvement, the bank typically charges a fee for setting up the trust, another annual fee to maintain the trust, and in the case of a renewal, an additional fee at the end of the thirty-year trust term.[184]

The alternate type of *compraventa* in the Restricted Zone is an assignment of rights agreement.[185] This type of *compraventa* is necessary when the real estate being acquired is already held by another foreign national in a *fideicomiso* trust.[186] An assignment of rights is often preferable, as the buyer will likely save time and money due to the need for less paperwork and less drafting work by banks and attorneys.[187] Because the *fideicomiso* already exists, all that needs to happen is an assignment of the beneficiary rights of the trust.[188] This assignment of rights must be "executed in the presence of a public notary, it must follow the terms and conditions of the original trust agreement, and be registered with the Ministry of Foreign Affairs."[189] In addition, the trustee bank must be notified of the change of trust beneficiary.[190] The completion of a *compraventa*, however, is not the end of the process or the fees, as closing and a title transfer must occur.[191]

In Mexico, like in the United States, the closing and title transfer occur at the same time. The closing is completed by filing a record of the transaction with the public registry.[192] When an individual sets up a *fideicomiso* in the Restricted Zone, title is passed to the bank, not to the individual, so closing is purely between the seller and the bank that receives legal title.[193] Once the registration is complete, the buyer must submit payment to the seller, and the seller then transfers title to the bank.[194] Once payment is completed and the title is in the hands of the bank, the foreigner may enjoy the benefits of the property.[195] In some cases a seller may ask for a down payment to be held in escrow. However, it is recommended that the buyer of Mexican real estate should refuse a request for

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182 Charles R. Winkler, *Foreign Ownership of Mexican Real Estate*, 86 ILL. B.J. 391 (1998).

183 *Id.*

184 *Id.*

185 Boreale, *supra* note 34, at 402.

186 *Id.* at 404.

187 Moreno, *supra* note 140, at 32.

188 *See* Winkler, *supra* note 182, at 393.

189 Boreale, *supra* note 34, at 404.

190 *Id.*

191 *Id.*

192 *Id.* at 404-05.

193 *Id.* at 406.

194 *See* Boreale, *supra* note 34, at 404.

195 *Id.*

funds to be held in escrow, and pay in full upon closing.[196] Problems quickly arise with such down payments because Mexican law does not provide for escrow in which a third party holds money while a transaction takes place.[197] Thus, many bankers and financial agents do not know the true meaning of the word in the American sense. The safest method is to go to a Mexican bank and enter into a "conditional deposit agreement."[198] This agreement can contain conditional instructions for the bank that, in effect, mimic holding money in traditional American escrow.[199]

B. Acquisition of Non-Residential Property in the Restricted Zone

The process for acquiring property for non-residential purposes is much more straightforward than residential property.[200] The Mexican government through the years has attempted to streamline the process in order to spur job growth near the border and coastlines.[201] Currently, approval of foreign ownership of commercial property in the Restricted Zone is almost automatic.[202] The only major remaining drawback to ownership of non-residential property in the Restricted Zone is the requirement that a foreigner or foreign corporation sign a Calvo Clause.[203]

Foreign individuals may form a Mexican corporation, which can be owned by a foreign corporation, and can acquire fee simple title to property.[204] Once title is secured, the foreign-owned Mexican corporation must agree to a Calvo Clause.[205] By signing or adopting a Calvo Clause, the Mexican corporation owned by a foreign entity agrees not to invoke the protections of a foreign government.[206] The agreement further states that in the event that a foreign individual or company tries to invoke these rights, the Mexican government may expropriate the property.[207]

After the property is acquired and the Calvo Clause agreement is signed, the transfer must be reported to the Ministry of Foreign Affairs.[208] This report is

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196 Moreno, *supra* note 140, at 32.

197 *Id.*

198 *Id*. at 33.

199 *Id.*

200 Boreale, *supra* note 34, at 392.

201 *See id.* at 401.

202 Michael T. Madison, Jeff Dwyer & Steven Bender, *Mexican Initiatives to Encourage Foreign Investment in Real Estate-Restricted Zone Property*, 1 LAW OF REAL EST. FINANCING § 2:78 (1981).

203 *Id.*

204 *Id.*

205 Boreale, *supra* note 34, at 400.

206 *Id.* at 392.

207 *Id.*

208 *Id.*

important because it must give extended detail as to the extent of the commercial or non-residential activity, and must contain the location of the property and a copy of the instrument governing over the transaction.[209] The Mexican government strictly monitors whether property is being maintained for residential or commercial purposes, and penalties can be severe.[210] Thus, in the 1998 Regulations, the government approved a program by which a prospective buyer who is unsure if his purpose qualifies as commercial can apply to the Ministry of Foreign Affairs for a determination as to whether the intended purpose will qualify as non-residential.[211] The government wants to encourage job growth for Mexican citizens, so if there is any remote chance that the purposes will create jobs for Mexicans, the Ministry is likely to respond in the affirmative.[212]

Although the outlook on foreign ownership of commercial property is positive, it should also be noted that foreign corporations and individuals still cannot own *ejidos*, which are coastal lands in the form of agrarian communes, created after the Mexican Revolution.[213] The previous efforts and the 2013 Beltrones Proposal still do not address *ejidos*, although over the years, "many non-Mexicans have entered into dicey arrangements that provide them access."[214] It makes little sense why this rich coastal land is not made available to foreign owners who might be able to enhance productivity and spur job growth.[215] However, one possible reason for the restrictions might be a fear that this agrarian land will be torn up and eventually put to uses other than agriculture.[216]

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209 *Id.* at 404.

210 Resolución General por la que se Establece el Criterio para la Aplicación del Artículo 17 de la Ley de Inversión Extranjera Relativo al Establecimiento de Personas Morales Extranjeras en México [General Resolution Establishing the Criteria for the Application of Article 17 of the Foreign Investment Law with Respect to the Establishment of Foreign Business Entities in Mexico], Diario Oficial de la Federación [DO] (8 de Augusto de 2012), *available at* http://www.dof.gob.mx/nota_detalle.php?codigo=5262822&fecha=08/08/2012.

211 *Id.*

212 *The Rise of Mexico*, ECONOMIST, Nov. 24, 2012, *available at* http://www.economist.com/news/leaders/21567081-america-needs-look-again-its-increasingly-important-neighbour-rise-mexico.

213 *See* Richard Fausset, *A Line in the Sand Over Opening Mexico's Beaches to Foreign Ownership*, L.A. TIMES (Oct. 7, 2013), http://articles.latimes.com/2013/oct/07/world/la-fg-mexico-real-estate-20131007.

214 *Id.*

215 *Id.*

216 *Id.*

C. Acquisition of Residential and Non-Residential Property Outside the Restricted Zone

Very few restrictions on the acquisition of property exist outside of the Restricted Zone.[217] This land is less desirable to foreigners, and, in turn, the Mexican government long ago did away with extensive restrictions on foreign ownership.[218] In order to obtain fee simple ownership, foreigners must submit an application to the Ministry of Foreign Affairs before buying the property.[219] The application must still include a Calvo Clause, proof of legal capacity to participate in the transaction, a translation of all documents into Spanish by a certified translator, a survey of the real property, and payment of any and all applicable taxes.[220] If the application is complete when submitted, it is deemed accepted unless within five working days the Ministry publishes notice that the property is wholly within the Restricted Zone, or within 30 days publishes notice that the property is partially within the Restricted Zone.[221]

IV. A COMPARISON OF HOW PROPERTY IS BOUGHT IN MEXICO VERSUS OTHER COUNTRIES AND THE EFFECTS OF FOREIGN DIRECT INVESTMENT

A. Why Analyze Other Nations' Laws and Approach to Foreigners Ownership of Real Estate

In order to understand why Mexico needs to incentivize foreign access to Mexican real estate, it is necessary to look at the process by which foreigners buy land in competing nations. Mexico currently is competing with the Central American countries for potential American and European investors.[222] In recent years, Central American countries have taken steps to further induce foreign investors to buy property in Central America.[223] In addition, the American real estate market has taken a dive.[224] There is a glut of available housing in America and the cheap cost of money, due to low interest rates, means that many

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217 Boreale, *supra* note 34, at 397.

218 *Id.*

219 *Id.* at 405-06.

220 *Id*. at 406.

221 *Id.*

222 *See generally* ECON. COMM'N FOR LATIN AM. AND THE CARIBBEAN, FOREIGN DIRECT INVESTMENT IN LATIN AMERICA AND THE CARIBBEAN (2012), *available at* http://repositorio.cepal.org/bitstream/handle/11362/1152/S2013382_en.pdf?sequence=1 [hereinafter ECONOMIC COMMISSION].

223 *Id.*

224 Vernon Smith, *Disequilibrium in the Housing Market,* NEWSWEEK (Jan. 23, 2011), http://www.newsweek.com/vernon-smith-disequilibrium-housing-market-66953.

Americans have decided to bypass Mexico. This is due in part to the complexity of the current system by which foreigners can purchase real estate. If Mexico is going to compete with its neighbors in the long run for investment dollars, it is going to need to lure this investment by taking steps that will make it easier and more efficient for foreigners to obtain property. Passage of the Beltrones Proposal would have allowed foreigners to hold title in fee simple and would have signaled a big step in the direction of encouraging foreign direct investment in Mexico.

Notably, other developing countries around the world have taken steps to lure foreign investment. These countries sport tropical regions similar to Mexico and are able to provide similar services to visitors. Examples of countries competing with Mexico for investment dollars include Guatemala, Nicaragua, Panama, Belize, the Philippines, and Singapore. Much of this investment process has occurred because the world economy has continued to become more globalized. In order to analyze which approach Mexico should take, and gain insight into what the impact of the 2013 Beltrones Proposal would have been, it is necessary to look at other countries around the world. This analysis will explore whether liberalizing property laws alone can garner significantly more foreign investment.

B. A Comparison of How Foreigners Buy Property in the United States Versus Mexico

In order to better understand the Mexican system and its current shortcomings, it is important to consider how foreigners buy land in the United States versus the more xenophobic Mexican system that is time-consuming and laden with fees.[225] In the U.S, foreign nationals are allowed to own real estate.[226] Under current U.S. legislation, there are very few differences between a foreigner and a U.S. buyer when purchasing real estate.[227] First, foreign nationals can own title in fee simple to U.S. property.[228] There is no need for a foreign national to create a trust or sign a loyalty clause. The only major restriction on foreign ownership of U.S. property is a near-complete restriction on foreign ownership of stock in cooperative buildings.[229] This situation arises from the fact that many co-op boards do not like having foreigners as tenants, and do not want to be forced to

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225 Polyana Da Costa, *How Foreigners Can Buy Real Estate in the US*, YAHOO FIN. (July 16, 2012 3:06 AM), http://finance.yahoo.com/news/foreigners-buy-real-estate-us-070225775.html.

226 *See id.*

227 *Id.*

228 *Id.*

229 Callie Bost, *Even If They're Loaded, It Can Be Tough for Foreigners to Buy Homes in New York City*, BUS. INSIDER (Jul. 3, 2012, 10:50AM), http://www.businessinsider.com/why-its-hard-for-foreigners-to-get-passed-co-op-boards-2012-7#ixzz2pfwE6MCk.

share profits with foreigners.[230] Financing, however, is a different story. Unlike in Mexico, if a foreigner wants to finance their purchase in the United States, they may seek a mortgage on the property if they are able to supply a down payment of between twenty and forty percent.[231] Once the property is purchased, the foreign national is only responsible for keeping up on property taxes.[232] In Mexico, there are no property taxes on residential property, and income tax rates are bracketed ranging from 1.92% to 30%.[233] For some, American property taxes can be shockingly high, and foreign buyers should be aware of this pitfall prior to purchasing property.[234] American property taxes vary by state and county, ranging from 0.18% in Louisiana, to 1.86% in New Jersey, and thus it is important for foreign investors to do their research into local tax rates before making an investment.[235] Finally, once a property is purchased, there are no requirements that the property be kept residential or non-residential so long as the foreign national obeys local zoning laws.[236]

The only major pitfall of tax on foreign investors occurs when and if they decide to sell.[237] The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) imposes capital gains tax on foreign persons selling U.S. real property interests.[238] The tax on the income from capital gains is imposed at regular tax rates on the amount of gain recognized.[239] Thus, those not making money will escape capital gains tax.[240] In order to insure that taxes are paid, transferees of real property interests are required to withhold part of payment in order to satisfy the tax.[241] The standard amount to withhold is ten percent, but this amount may be reduced to an amount that will cover the tax liability upon application in advance of sale, to the Internal Revenue Service.[242] As federal law, FIRPTA

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[230] *Id.*

[231] Da Costa, *supra* note 225.

[232] *Id.*

[233] Steven M. Fry, *Capital Gains Taxes on Mexican Properties*, SURVIVING YUCATAN (Aug. 1, 2014), http://yucalandia.com/living-in-yucatan-mexico/capital-gains-taxes-on-mexican-properties/.

[234] Da Costa, *supra* note 225.

[235] Tonya Moreno, *Best and Worst States for Property Taxes*, ABOUT MONEY, http://taxes.about.com/od/statetaxes/a/property-taxes-best-and-worst-states.htm (last visited Apr. 10, 2014).

[236] *Id.*

[237] Carol D. Sakamoto, *Foreign Investment in Real Property Tax Act of 1980, FIRPTA*, 6 ILL. REAL PROP. § 35:41 (Last Updated Feb. 2013).

[238] *Id.*

[239] *Withholding Required on Certain U.S. Real Property Transactions Involving Foreign Persons, IRS Warns*, IRS (Sep. 16, 2005), http://www.irs.gov/uac/Withholding-Required-on-Certain-U.S.-Real-Property-Transactions-Involving-Foreign-Persons,-IRS-Warns.

[240] Sakamoto, *supra* note 237.

[241] *Id.*

[242] *Id.*

preempts state law and overrides most no recognition provisions as well as those remaining tax treaties with other countries, which provide exemption from tax for such gains.[243]

Ironically, Mexico no longer taxes Americans on capital gains from the sale of residential real estate.[244] Mexico instead has always chosen to ensure that fees and taxes are paid up front, and not just in the event that a foreigner makes a profit or chooses to sell at a profit. This could all be changed by the passage of the Beltrones Proposal which would eliminate the need for a trust in the Restricted Zone, thus reducing the annual payments to a Mexican bank.

The relative ease of foreign entry into the U.S. real estate market has led to the United States being a "world leader in developing and encouraging open foreign investment policies aimed at enhancing the feasibility of cross-border deals and the advancement of domestic opportunities."[245] Unsurprisingly, during the dot-com boom of the 1990s, foreign direct investment in the United States reached an all-time high—about $325 billion.[246] Since the terrorist attacks on September 11, 2001, xenophobia has increased, and foreign direct investment in the United States has dropped sharply.[247] It rebounded all the way up to $310 billion by 2008, but the real estate market collapse again caused foreign investors to shy away from the U.S. market.[248] Investment once again rebounded until another sharp decline in 2012, a year in which foreigners invested only $166 billion in the United States (down 28% from the $230 billion invested in 2011).[249] Further, preliminary reports show foreign direct investment in the United States in

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243 *Id.*

244 J. Beauline, *Overview of Capital Gains in Mexico*, BAJAINSIDER, http://www.bajainsider.com/baja-business/capital-gains-mexico01.htm#.UsXzWdJDuTA (last visited Mar. 9, 2015) (In Mexico there are four categories of real estate property: commercial, industrial, rustic, and residential. "Once the type is identified we know which legislation we must consider regarding taxation on the difference between the cost and the selling price of a real estate property. From these four categories we can now split them so that the first two are both 'commercial real estate property,' the rustic as a property without any construction and residential as a real estate property with a building which is used as a residence or domicile. In other words we now have only three types of real estate property: Commercial, rustic and dwelling." A dwelling or residential property is exempt. A commercial facility will have a tax imposed which will be in relation with the profit made when calculating the price paid at purchase and the amount paid by the buyer when it is sold. If the land has no building and is rustic it will also be taxed).

245 Joanna Rubin Travalini, *Foreign Direct Investment in the United States: Achieving a Balance Between National Economy Benefits and National Security Interests*, 29 NW. J. INT'L L. & BUS. 779 (2009).

246 JAMES K. JACKSON, CONG. RESEARCH SERV., RS21857, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES: AN ECONOMIC ANALYSIS 2 (2013), *available at* https://www.fas.org/sgp/crs/misc/RS21857.pdf.

247 *Id.*

248 *Id.*

249 *Id.*

2013 fell by an additional ten percent.[250] Estimates based on the first two quarters of 2013 suggest that foreign direct investment in the United States could be down by 22% as compared to the same period in 2012.[251]

It should be noted that the United States defines foreign direct investment as the "ownership or control, directly or indirectly, by one foreign person [individual, branch, partnership, association, government, etc.] of 10% or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise."[252]

Foreign direct investments are highly sought after by many state and local governments struggling to create additional jobs in their localities.[253] "As of year-end 2011, foreign firms employed 6.1 million Americans."[254] This number makes up about four percent of the total workforce.[255] The Obama administration, on October 31, 2013, began a new initiative "known as 'Select USA,' to attract more foreign direct investment to the U.S."[256] Through the program, the President's administration aimed to put foreign investment on the same U.S. foreign policy level as promoting exports.[257] President Obama has instructed government officials to make attracting foreign investment one of their "core priorities."[258] Further, Select USA has dispatched U.S. ambassadors to thirty-two large foreign countries with the goal of promoting foreign investment into the United States.[259] The government aims to connect prospective investors with senior U.S. officials.[260] The website of the initiative[261] highlights federal programs that may be available to foreign investors.[262]

C. The Effects of Liberal Policy Towards Foreign Direct Investment in Singapore, the Philippines, the South Pacific, and Central America

In order to get an idea of what the potential effect of the Beltrones Proposal might be on Mexico, it is important to consider efforts made by other countries and regions that have made reasonable efforts to lessen the barriers to entry for foreign investors. Some of these countries and regions are more committed than others, and some are further along in the process. Excellent case

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250 *Id.* at 3.
251 JACKSON *supra* note 246, at 3.
252 15 C.F.R. § 806.15 (2011).
253 JACKSON, *supra* note 246, at 4.
254 *Id*. at 7.
255 *Id.*
256 *Id*. at summary.
257 *Id.*
258 JACKSON, *supra* note 246, at Summary.
259 *Id.*
260 *Id.*
261 SELECTUSA, selectusa.commerce.gov (last visited Apr. 25, 2015).
262 Jackson, *supra* note 246, at Summary.

studies can be conducted when analyzing the effects of Foreign Direct Investment in the Solomon Islands, Singapore, the Philippines, and Central America.

1. Singapore

Singapore is the smallest state in southeastern Asia, yet it is one of the leaders in gaining foreign direct investment and the benefits that stem from foreign investors.[263] In 2003, GDP per capita purchasing power parity for Singapore was $24,481 and "real GDP was growing at an average annual rate of six percent."[264] Studies have shown that foreign direct investment and GDP per capita in the economy of Singapore are directly related.[265] Although Singapore is strategically located as an international shipping hub, much of Singapore's prosperity is a result of the high levels of foreign direct investment.[266] Much of this Foreign Direct Investment is in real estate.[267] In 2007, approximately ten percent of single-family home sales in the United States were made to foreigners, and in 2013 the number was seven percent.[268] In 2013, in Singapore, sales to foreigners constituted close to thirty-five percent of real estate transactions.[269] Unsurprisingly, foreigners in Singapore prefer the prime real estate spots, which has led to some uproar from native-born working class citizens.[270]

However, foreign investment has led to the development of this prime real estate, which has created more jobs for the locals.[271] The consequence of so much prime property being owned by foreigners is that the country's real estate market is now firmly globalized and property values are now directly affected by larger global trends.[272] In order to keep prices up, the government of Singapore has introduced several measures.[273] In 2004, the government allowed foreigners

[263] Mete Feridun & Yaya Sissoko, *Impact of FDI on Economic Development: A Causality Analysis for Singapore, 1976 – 2002*, 4 INT'L J. OF ECON. SCIS. & APPLIED RES. 1, 7 (2003).

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *See* Peta Tomlinson, *Singapore Property Taxes Aim to Deter Foreign Speculators,* S. CHINA MORNING POST, (Mar. 13, 2013, 12:00 AM), http://www.scmp.com/property/international/article/1189254/singapore-property-taxes-aim-deter-foreign-speculators.

[268] Robert Frank, *US Dominates List for Foreign Real Estate Investors,* CNBC (Jan. 7, 2014, 10:38 AM), http://www.cnbc.com/id/101316245.

[269] Wen-Chi Liao et al., *Foreign Liquidity and Ripple Effect to Singapore Housing Market*, (Inst. of Real Est. Stud., Working Paper No. 31, 2012), *available at* http://www.ires.nus.edu.sg/workingpapers/IRES2012-031.pdf.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.*

to purchase homes and land parcels at Sentosa Cove.[274] Then in mid-2005, the government further removed restrictions, which had prohibited foreigners from owning apartments below six stories.[275] This resulted in a bullish market until 2008, when the U.S. housing market collapsed.[276] The world banking system was adversely affected and prices in Singapore collapsed.[277] Foreign buyers swooped in and, since 2008, have reaped the benefits of the "significant appreciation of house prices."[278] Much of this gain was at the expense of local owners.[279] In the spring of 2013, the government of Singapore decided to impose higher property taxes on investors who are not citizens or permanent residents, called the Additional Buyer Stamp Duty (ABSD).[280] The effect of this action is not completely clear, but Singapore's property tax rates have had a cooling effect on speculation.[281]

For obvious reasons, Mexico is not an international shipping hub like Singapore, but the two countries can be compared in that Singapore has, until recently, eliminated all major barriers to entry and maintained little to no property tax.[282] The friendly atmosphere for foreign investors at one point led to their involvement in around twenty percent of all land and real estate transactions in Singapore.[283] The number of construction and design jobs that were brought to the region created a trickle affect across all fields.[284] The new ABSD tax hike on property, however, has had a negative effect, and due to the xenophobic policy in 2013, foreigners only purchased about ten percent of all real estate.[285] According to recent reports, the "15% ABSD may already be the last straw for some," and "foreigners who are buying in Singapore . . . will almost exclusively be buying for their own use, because they need to be here."[286] Singapore will be an interesting case study to follow in the coming years. Anti-foreign direct investment policy may hurt the country's economy, but it is also possible that the tax imposition may be an act of genius; it may cool speculation and avoid a collapse in pricing, such as is what happened in the United States in 2008.

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274 Liao et al., *supra* note 269.
275 *Id*
276 *Id.*
277 *Id.*
278 *Id.*
279 Liao et al., *supra* note 269.
280 Tomlinson, *supra* note 267.
281 *Id.*
282 *See id.*
283 Liao et al., *supra* note 269.
284 *See id*.
285 Tomlinson, *supra* note 267.
286 *Id.*

2. Central America

Mexico's chief rival for investment dollars lies just to the south, in Central America.[287] Foreign direct investment in real estate in Central American nations has been gaining strength and momentum in recent years.[288] It is the product of a decade of policy focused on getting foreigners to bring their investment capital and retirement funds to the region.[289] In 2012, Central America received about $9 billion in foreign direct investment, compared to about $8.5 billion the year before.[290] This number is important to Central American nations as it means foreign direct investment in Central America is catching up to Mexico.[291] In 2011, Mexico received about $21 billion in foreign direct investment to Central America's $8.5 billion.[292] In 2012, Mexico only received about $12 billion while Central America received approximately $9 billion.[293]

These numbers represent a trend in which Central American nations have opened their borders to foreign investors.[294] However, we also must ask whether or not the jobs resulting from foreign direct investments are good jobs, or low-paying, sweat-shop-type employment. Most scholars say that the jobs pay well and are in agreement that foreign direct investment creates "good jobs" for both workers.[295] Multiple studies have shown that foreign firms pay, on average, ten percent to seventy percent more than domestically owned firms in Central America.[296] In addition, foreign-owned and developed firms are willing to buy land, build on it, and then employ untrained workers for whom they are willing to provide training.[297]

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[287] ECONOMIC COMMISSION, *supra* note 222.

[288] *Id.*

[289] *See, e.g.*, Daniel B. Wood, *Why US Baby Boomers Are Retiring in Latin America: Places Such as Mexico, Panama, Costa Rica, and Colombia Attract Record Numbers of American Seniors as They Look for Good—and Affordable—Places to Live*, CHRISTIAN SCI. MONITOR (Dec. 1, 2013), http://www.csmonitor.com/World/Americas/2013/1201/Why-US-baby-boomers-are-retiring-in-Latin-America-video.

[290] *Foreign Direct Investment and Jobs in Latin America*, SHANNON O'NEIL (Sept. 12, 2013), http://shannononeil.com/blog/foreign-direct-investment-and-jobs-in-latin-america/.

[291] *Id.*

[292] ECONOMIC COMMISSION, *supra* note 222, at 11.

[293] Phillip Tagini, *The Effect of Land Policy on Foreign Direct Investments in the Solomon Islands*, 5 J. OF S. PAC. L. 1 (2001), *available at* http://www.paclii.org/journals/fJSPL/vol05/5.shtml#.

[294] *See* Wood, *supra* note 289.

[295] *See Foreign Direct Investment and Jobs in Latin America*, *supra* note 290.

[296] *See id.*

[297] *Id.*

3. Solomon Islands

A look at land policy in the Solomon Islands also provides a good comparison to Mexico, as historically both nations have promulgated land policy that, to a great extent, is intended to hinder the flow of foreign direct investment.[298] Like in Mexico, the Solomon Islands have a history of xenophobic policies.[299] In 1893, the Protectorate was established in the Solomon Islands, which created two major problems that still haunt investors.[300] First, investors have historically had problems, first in identifying the rightful people to deal with concerning land, and, second, with the security of title to land.[301] During the 1920s through the 1940s, the government wrongfully expropriated land from foreign investors.[302] This land was taken during what was called the "waste land" period, and the land was returned to native owners after adjudication.[303] This adjudication was done by what is now termed the Phillips Commission.[304] This Commission began in 1919 after the First World War.[305] Judge Phillips "heard 55 claims against land alienation and returned large tracts of land either because there were defects in the original conveyances, wrong definition[s] of boundaries or because the waste lands were found not vacant."[306] During this period of expropriation of lands owned by foreigners, the government was sympathetic towards its own citizens and provided precious land resources for the local citizens.[307] Today, the government of the Solomon Islands is taking action.[308] Since British colonization, land policies had hindered numerous potential foreign investment projects, which were never realized because of the high cost of securing title to land and with securing the investment.[309] A fight continues between native people who want to preserve certain customary attributes of land tenure and government officials who want to promote foreign direct investment.[310]

In 2007, the government of the Solomon Islands announced the creation of a Land Reform Unit.[311] Up to eighty-four percent of the nation's land is held in customary land tenure agreements, and the reform will better utilize a resource

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298 Tagini, *supra* note 293.
299 *Id*.
300 *Id*.
301 *Id*.
302 *Id*.
303 Tagini, *supra* note 293.
304 *Id*.
305 *Id*.
306 *Id*.
307 *Id*.
308 Tagini, *supra* note 293.
309 *Id*.
310 *Id*.
311 USA INT'L BUS. PUBL'NS, SOLOMON ISLANDS ECONOMIC & DEVELOPMENT STRATEGY HANDBOOK 184 (2007) [hereinafter SOLOMON ISLANDS ECONOMIC HANDBOOK].

that is scarce on the islands.[312] If foreign agri-business, industry, hospitality, and retirees are able to secure land, they will bring investments dollars and, eventually, jobs.[313] The government's current aim is to codify customary land laws and have them elevated to statutory status.[314] These new statutes will get rid of many customary land tenure agreements or, in some cases, will commit the agreements to recorded land deeds.[315] Until the 2007 reform initiative, many prime sites in the Solomons remained under-utilized and the country's economy continued to develop.[316] Foreigners looking to invest have found it near impossible to secure title, and the government intends to change that fact.[317] Although the Solomons do not have constitutional provisions preventing foreigners from entering the market, they are comparable to Mexico in that the process of securing land leaves a lot to be desired. The Solomons will remain an interesting case study for future research.

4. Philippines

The Philippines is an example of a country that, more than twenty years ago, made a concerted effort to welcome Foreign Direct Investment, both in the areas of land reform and in increased commercial activity.[318] The Philippine Foreign Investment Act of 1991 (1991 FIA) liberalized the entry of foreign investment into the Philippines.[319] Under the 1991 FIA, foreign investors are treated as largely equal to Philippine citizens, and must seek approval from the Securities and Exchange Commission. However, despite the recent efforts, long lasting constitutional prohibitions remain in place that hamper a foreigner's ability to hold title to land in fee simple.[320] Currently the Philippine Constitution prohibits a foreigner from owning more than a forty percent interest in land.[321] These firmly rooted protectionist policies "prevent the flow of capital into the country," and many economists believe these xenophobic policies have strongly

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312 *Id.*

313 *Id*. at 185, 190.

314 *Id*. at 190; *but cf.* Satish Chand, *Planning Now for Pacific Land Reform*, DEVPOLICYBLOG (Jun. 23, 2011), http://devpolicy.org/planning-now-for-pacific-land-reform20110623/.

315 SOLOMON ISLANDS ECONOMIC HANDBOOK, *supra* note 311, at 196.

316 *Id*. at 195.

317 *Id.*

318 USA INT'L BUS. PUBL'NS, PHILIPPINE ECONOMIC & DEVELOPMENT STRATEGY HANDBOOK (2009) [hereinafter PHILIPPINE ECONOMIC HANDBOOK].

319 An Act to Promote Foreign Investments, Prescribe the Procedures for Registering Enterprises Doing Business in the Philippines, and for Other Purposes, Rep. Act No. 7042, (1991) (Phil.), *available at* http://www.lawphil.net/statutes/repacts/ra1991/ra_7042_1991.html.

320 PHILIPPINE ECONOMIC HANDBOOK, *supra* note 318, at 276.

321 *Id.*

contributed to the Philippines being a weak economic performer.[322] However, unlike Mexico, the Philippines have made no efforts yet to fix the long lasting prohibitions on foreigners' ability to own land.[323] The Philippines continues to lag behind, and it will be interesting to see if the Philippine government does make any changes, if and when it sees the success of other countries who have removed restrictions on foreigners' ability to own land.

V. CONCLUSION

It is clear that foreign direct investment is essential to the healthy economic growth of developing and prospering economies. The amount of foreign investment in a country is tied directly to the policies, complexity, and expenses that a country's government puts in place with regards to a foreigners' entry into the real estate market. Once foreigners are able to enter a country's real estate market, the investments can lead to jobs, and repeated studies show that the jobs created by foreign direct investment are typically good jobs, especially in Latin American countries.

Approval of the Beltrones Amendment to the Mexican Constitution would have paid immediate dividends to the economy of the country, as it would greatly reduce the cost and complexity of entering the Mexican real estate market. In the long term, issues could have arisen with commercial uses of coastal residential property. However, Mexico would not have been the first country to make changes in order to tear down barriers to entry into the market. Numerous countries around the world have taken similar steps toward securing outside investment in order to keep an economy growing or to develop and to procure investment that can lead to better lives for citizens.

In Mexico, the Beltrones Proposal was a prime opportunity for the country to remove current barriers on foreigners entering the country through the purchase of real estate in the desirable Restricted Zone. In failing to approve the proposal, Mexico once again leaned on its history of land and sea invasions that occurred about 150 years ago. The many Mexican nationals who still exhibit xenophobia towards foreigners who are not tourists have won out for now, and in the process cost their country a chance at moving further into the globalized 21st century economy. Those who claimed the Beltrones Proposal would insure that Mexican nationals will never again be able to afford beach front property clearly still have pull within the government. But this viewpoint is far from the truth, as Mexico's borders and coasts are vast—the coastlines alone encompassing 9,330 kilometers. Indeed some land would be grabbed by foreign nationals, but the rest of the country would reap the benefits from these land purchases and the building projects which would surely follow. The Beltrones legislation had the ability to open Mexico to billions of dollars in U.S. wealth that is held by an aging baby-

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322 *Id.*
323 *Id.*

boomer generation.[324] Research shows that nearly forty percent of potential buyers decide against making a purchase in Mexico because of the restrictions.[325] Although estimates vary, it is possible that Mexico could have witnessed as much as $133.3 billion per year in gross real estate sales.[326] This influx of foreign investment capital would have had an enormous effect on many aspects of the Mexican economy, and in the future the country should strongly consider setting aside the fear of history in order to maximize Mexico's potential windfall from retiring members of the American baby-boomer generation. The clock is ticking.

[324] *Proposed Elimination of Restricted Zone*, ESCAPE ARTIST (Apr. 13, 2013), *available at* http://web.archive.org/web/20130531173341/http://mexico.escapeartist.com/newsletter/proposed-elimination-restricted-zone (on file with author).

[325] Tim Johnson, *Mexico, to Attract U.S. Retirees, May Ease Limits on Landownership,* MCCLATCHY DC (May 9, 2013), http://www.mcclatchydc.com/2013/05/09/190819/mexico-to-attract-us-retirees.html.

[326] *Proposed Elimination of Restricted Zone*, *supra* note 324. Currently about two million Americans have expatriated to Mexico. Aggressive estimates show that as many as ten million baby boomers may be willing to expatriate to Mexico over the next ten to fifteen years. *Id.* Expatriates spend on average $200,000 each on real estate and spend approximately another $2,000 per month while in Mexico. *Id.* These numbers indicate that about 666,000 Americans will be purchasing property in Mexico every year for the next fifteen years. *Id.* If each spends $200,000 on property, it means $133.3 billion per year would pour into Mexico. These numbers are likely on the optimistic side, but they show just how significant the constitutional change could be.