

# Regulatory Framework of Corporate Governance in Mexico

– Challenges of the New Securities Exchange Act of 2006 and its effects –

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## Introduction

On the impact of the U.S. economy and its crisis, the global economy is in unsafe situations lately. Particularly for Mexico, a partner of the North American Free Trade Association, the economic bankruptcy of the United States, which is the major importing country, has a severe impact on foreign trade. In addition, Mexico has sought closer economic relationship with the European Union, however, the U.S. economic crisis has impacted this community so it requires a shift of foreign policy. However, the Mexican President Calderon declared the Agenda for Growth and Employment in October 2008 for the National Congress to boost growth and employment which consists of five steps: 1) Expand the infrastructure of government spending, 2) Changing the rules governing the exercise of that spending, 3) Building a new refinery to the oil industry of Mexico, 4) Promote an extraordinary way to small and medium enterprises; 5) Accelerate deregulation and tariff reduction<sup>1)</sup>. The policies of 1) to 3) have been settled to address the current economic crisis, but in terms of policies 4) and 5), Mexico has been conducting various deregulations, or amendments to the regulations to take forward business activities, for instance, the enactment of the Law for the Development of Competitiveness of Micro, Small and Medium Enterprises (Ley para el Desarrollo de la Competitividad de la Micro, Pequeña y

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1) El financiero “*Destaca Calderón fortaleza económica para enfrentar crisis mundial*” (October 9, 2008)

Mediana Empresa) in 2002.

The New Securities Market Law (Nueva Ley del Mercado de Valores: hereafter, NLMV) is in the line of the above-mentioned policies. The Mexican Stock Exchange is created officially in 1886 on the grounds that a mining company began to circulate its shares in 1850, and various legislations have been published with several successive reforms until the present day<sup>2)</sup>.

Recently Mexico has made a number of economic law reforms to strengthen the infrastructure for economic growth, and several research results have been published even in Japan<sup>3)</sup>. The most transcendent in the reforms of corporate laws is the corporate governance. It is a theme that has been progressed in the developing countries for the initiative of IMF, World Bank and OECD on the occasion of the Asian Currency Crisis of 1997. In Latin America, the Latin American Corporate Governance Roundtable has been created by the World Bank and the OECD support in April 2000 and have held several meetings in major cities of the same region once every year until 2003 to exchange views and information between politicians, stock market participants and experts. Finally the White Paper on Corporate Governance in Latin America, that covered the corporate governance reforms in the countries concerned, was published in November 2003<sup>4)</sup>.

In Mexico, the Enterprise Coordinating Council (Consejo Coordinador Empresarial)<sup>5)</sup>, which played the role of leadership in corporate governance reforms, issued a guide called Code of Best Corporate Practices (Código de Mejores Prácticas Corporativas) in June 1999. Thus, the corporate governance reform in Mexico started relatively early

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2) Moreover, in 2005 when the Economic Partnership Agreement between Mexico and Japan entered into force, a mutual cooperation agreement between the Tokyo Stock Exchange and Mexican Stock Exchange was concluded to strengthen the role of the stock market through the agreement.

3) For example, some professor-investigators of the graduate law school of the University of Guadalajara participated with the contribution of thesis on economic law reforms of Mexico in the book: *Globalization and Economic Law Reforms: Perspectives from India, Mexico, Thailand and East Asia* (JRP Series, No. 139, March, 2005), that was compiled by the Institute of Developing Economies.

4) Hoshino, Taeko [2004] *Corporate governance reform in Mexico*, Latin American report, Vol. 21, No. 2, Institute of developing economies, Japan, p. 35 and 37.

compared with the discussion of it at international level because of the Asian economic crisis. This movement started because the corporate governance reform and its strength were essential to monitor the management and operations of enterprises, especially financial institutions because of financial and economic crisis in Mexico that occurred from the end of 1994 to 1995. In addition, the overall business structure in Mexico had caused another problem besides the so-called agent problem (see below). Therefore, the theme of corporate governance has been discussed to address the above-mentioned issues<sup>6)</sup>. Thus, the Securities Market Law reform was carried focusing on the corporate governance in 2001. I omit to describe details because of the existence of an earlier study, but I have to mention that this reform gave legal force to the Code of Best Corporate Practices<sup>7)</sup>.

Through this review in 2001, the corporate governance reform in Mexico achieved a purpose, especially for information disclosure. However, in the United States the so-called Sarbanes-Oxley Law was published in 2002, and the Principles of Corporate Governance of OECD published in 2000 were reformed in 2004, so the corporate governance discussion is still ongoing at the international level. In parallel with this movement, further discussions on the Securities Market Law have been proceeded by the initiative of the Enterprise Coordinating Council in Mexico, and finally this law was abolished and the NLMV was published and enforced from

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5) An industrial entity that coordinates various industry organizations such as the Mexican Business Council of External Trade and the Mexican Republic Employers Confederation. The entity has the role of providing suggestions on business policies to the Legislature.

6) Familiar Calderón, Jorge [2003] *Gobierno corporativo en México, evolución, avances y retos*, Banco internacional de desarrollo, México (report of the second meeting of the regional forum on the financial sector that is PDF file format in [http://www.iadb.org/sds/doc/ifm-jorge\\_familiar-2003.pdf](http://www.iadb.org/sds/doc/ifm-jorge_familiar-2003.pdf); last access: November 1, 2009), p. 3 and 4.

7) The main issues of the reform are: Prohibition of issuance of “stapled shares” (where the shares with or without voting rights are sell simultaneously), unless the non-voting shares are convertible into common stock within five years; Better protection of the rights of minority shareholders. The rights by the ownership of 10–20% of the corporate capital to call meetings and / or to postpone the vote were recognized in listed companies; Greater independence of directors. Over 25% of directors in listed companies should be independents; Establishment of audit committee that the majority of members should be independents including the president; Prohibition of achieving private interests by directors, and a greater disclosure. See: Hoshino, *op. cit.*, p. 41 and 42.

2006.

This paper aims to examine the effects of the NLMV presenting the important features of the Law from the point of view of corporate law. Therefore, first, it observes the general framework of the NLMV, and secondly, it will analyze the objectives and reform points of the NLMV focusing on the corporate governance, that is the topic discussed in Japan to which the Commercial Companies Law was enacted in 2005, and thirdly, the current effects of the NLMV will be presented, and finally, it will be concluded indicating the prospects of corporate law in Mexico in the future.

## **1 General framework of the NLMV**

### **I NLMV and corporate governance**

The corporate governance in Japan has been the subject of active discussion because of financial scandals and mismanagement of companies during the period of economic stagnation after the bursting of bubble economy and therefore it has been argued in the context of corporate law regulating business activities. Instead, the discussion about corporate governance has been done through the NLMV in Mexico. The reason for the difference between Mexico and Japan would depend on following circumstances:

The pursuit of finance for business activities mainly depends on indirect finance (credit by financial institutions) in Mexico. Recently, however, most bank loans have been given to consumption, not to enterprise activities. During 2005, the banks and other financial institutions gave on average 52,603 credits for consumer loans to individuals every day. Thus, the consumer loans to individuals recorded the 70.7 million cases at the end of 2005, against 51.5 million a year earlier. In the same period, the loans to business activities was 3,797 credits each day, and went to 3.5 million cases in 2005 from 4.9 million cases at the end of a year earlier<sup>8)</sup>. This phenomenon shows that Mexico became a country of consumption, although this

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8) Presidencia de la república, “*Dan diario 52 mil créditos al consumo*” (February 23, 2006)

situation hinders enterprise activities in Mexico, especially of SMEs, that need to resort to indirect finance, and it impedes economic growth finally. While the loans by financial institutions were stagnant, making new amendments to the Securities Market Law was necessary to boost business financing.

The discussion of the corporate governance was started in the United States also in Japan because of enterprise scandals such as Enron and Worldcom, and the same thing can be said to Mexico. However, there is another meaning of which the enterprise finance would be facilitated through either domestic or foreign investment forcing to corporations legally the adoption of corporate governance of the international standard to bring correct management (by information disclosure and the minority stockholders' protection, etc.) for what the corporate governance has been discussed in the field of securities market laws.

The discussion of corporate governance, that was more activated in this century, was aimed primarily to “recovery the investor’s confidence” in the so-called advanced countries while in Mexico the purpose of this discussion is to “promote the achievement of the business finance giving greater legal security to investors” which is the main role of the stock exchange market.

Thus, the corporate governance reform made in 2001 brought attention to the promotion of equity finance for enterprises that sought their reorganizations and to the structural solution to problems of the companies that were already listed on the stock exchange market<sup>9)</sup>. In Mexico it is recognized that the joint stock companies issue the shares with restricted rights according to the art. 113 of the Commercial Companies Law (*Ley General de Sociedades Mercantiles*: hereafter LGSM) while there is not any proportional basis according to the capital by which various companies have circulated the packets of common stocks and another ones with restricted rights in order to dilute the rights to vote. According to a research result, the 32 companies representing 57% of the capitalization of the stock market have dual ownership structure where allowed, on average, to wield control over the company by the 35% stockholding. In such companies (23 of them), the shares with full voting have not been circulated or tended to be difficult to purchase in the market<sup>10)</sup>. Moreover, the

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9) See Hoshino, *op. cit.*, p. 38

main purpose of the NLMV is to solve the problem of stagnation of business finance and to promote the finance continuing the corporate governance system established before. In a word, the NLMV recognizes, on the condition of adopting the corporate governance system of international level, the public offering of stocks to promote equity finance through the stock exchange market for SMEs, especially medium-sized enterprises that are new and not yet listed.

The NLMV consists of the 16 titles with the 423 articles, it is the volume three times as large as the old law:

- Title I preliminary provisions
- Title II stock corporations of the securities market
- Title III stock exchange certificates, warrants and other relevant provisions
- Title IV registration and stock offering
- Title V acquisition of securities, subjects to disclosure
- Title VI stock exchange market intermediaries
- Title VII investment advisers
- Title VIII self-regulatory organizations
- Title IX stock trading systems and OTC
- Title X deposit, clearing and settlement of securities
- Title XI other entities involved in developing the securities market
- Title XII external audit and other services
- Title XIII financial authorities
- Title XIV infractions and prohibitions of market and stock market crimes
- Title XV administrative procedures
- Title XVI final provisions

Transitional provisions

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10) Secretaría de Hacienda y Craédito Público [2002] *Avances en el Marco Regulatorio del Mercado de Valores Mexicano en torno a Gobierno Corporativo*, OECD (PPT file format in [www.oecd.org/dataoecd/0/19/2085836.ppt](http://www.oecd.org/dataoecd/0/19/2085836.ppt): last access: November 1, 2009), p. 3.

## II New forms of joint stock companies in the NLMV

As indicated above, the importance of the NLMV lies in broadening the possible financing options for SMEs in a flexible manner. According to the World Bank information of 2006 when the NLMV was enforced, Mexico was in the 125th place among 145 nations on the protection of shareholders<sup>11)</sup>. This date is related to the size of the Mexican stock market, so the NLMV also seeks to create a larger market rooting varieties of corporate governance arrangements and greater protection of shareholders. Currently only about 130 companies are listed on the Mexican stock exchange market, which is relatively low among the member countries of the OECD.

But, from another point of view, it may be said that the Mexican stock market has the greatest potential for what several reforms have been made in the legislations for the purpose of growing the market by establishing various policies for the enterprise finance through which seeks to promote the number of listed companies, financing, and economic development finally.

In this context noted above, the remarkable thing in the arrangements relating to corporate governance in the NLMV is the creation of three new types of companies as opposed to the traditional ones that are regulated in the LGSM<sup>12)</sup>.

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11) World Bank, Doing Business Survey 2006: <http://www.doingbusiness.org/>. Only three countries of Latin America were inferior to Mexico: Honduras, Costa Rica and Venezuela.

12) Although several literatures to promote the new system by practitioners and public organizations (stock exchange, etc.) have been published 3 years after the enforcement of the NLMV, but there are few articles and theses that develop the legal argument on the same law. Among the major literatures, that I have obtained, which describe the three new modalities of companies are the following:

1 Amecap [2008] *Boletín informativo de la Asociación Mexicana de Capital Privado*, AMECAP, México.

2 Baker & Mackenzie [2006] *Boletín bancario y financiero*, No. 2, Baker & Mackenzie, México.

3 BMV [2006] *Calendario de eventos sobre gobierno corporativo para la incorporación de empresas al Mercado de Valores*, BMV, México.

4 De la Fuente Rodríguez, Jesús [2009] *Ley del mercado de valores, análisis, exposición de motivos, jurisprudencia, casos prácticos, disposiciones de las autoridades financieras*, Porrúa, México.

5 Cruz, Guillermo y Aguiñaga, Daniel [2006] *Resumen Ejecutivo sobre la Nueva Ley del Mercado de Valores*, Deloitte, México.

These are:

- (1) Investment Promotion Joint Stock Company (Sociedad Anónima Promotora de Inversión: hereafter SAPI);
- (2) Public Investment Promotion Joint Stock Company (Sociedad Anónima Promotora de Inversión Bursátil: hereafter SAPIB) and
- (3) Public Joint Stock Company (Sociedad Anónima Bursátil: hereafter SAB)

In some of the literatures of Mexico these companies are presented as new “types” or “forms”, but, considering the substance of these new companies, it does not represent “types” but “modalities (modalidades)”. However, in the sense that the companies, that can adopt these modalities, are limited only to joint stock companies, a new regime will be different from the one such as variable capital system (is similar to the authorized capital system in the Anglo-American Law) which any of the six corporations recognized by the LGSM can take. The following are main features of the three companies:

#### (1) SAPI

The SAPI is a type of joint stock companies through which it aims, in theory, to promote or encourage investment from both domestic and foreign investors, allowing

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6 Lavallo Moreno, Luis [2006] *Comentarios a la nueva ley del mercado de valores*, Martínez, Algaba, Estrella, de Haro y Galván-Duque, S.C. (PDF file format in [http://www.maehgd.com/web\\_data/downloads/esp/COMENTARIOS%20NUEVA%20LEY%20DEL%20MERCADO%20DE%20VALORES.pdf](http://www.maehgd.com/web_data/downloads/esp/COMENTARIOS%20NUEVA%20LEY%20DEL%20MERCADO%20DE%20VALORES.pdf): last access: 1 de Noviembre 2009).

7 Robles, Rafael, et. al. [2006] *Comentarios generales de la nueva ley del mercado de valores mexicana*, *Actualidad jurídica*, No. 14, Madrid.

8 Uribe Lara, Guillermo [2006] *Estado actual del gobierno corporativo en México*, *Revista del instituto iberoamericano de mercados de valores*, No. 17, Instituto Iberoamericano de Mercados de Valores, Madrid.

9 Yves Hayaux-du-Tilly L. y Alberto Balderas F. [2006] *Sociedades Anónimas Promotoras de Inversión Bajo la Nueva Ley de Mercado de Valores*, Jáuregui, Navarrete y Nader, S.C. (PDF file format in <http://www.senmuscapital.com/pdf/sapi.pdf>: last access: 1 de Noviembre 2009).

The literature of Dr. De la Fuente Rodriguez consists of the comments on each article of the NLMV, and its content is interesting. Even if there are comments of judicial precedents on stock corporations governed by the LGSM, but the ones that describe the new arrangements in question have not been presented, which will be the subject of future research.

certain derogations or procedures other than those provided in the LGSM. Its main features are:

- (i) Voluntary adoption.
- (ii) Are not subject to the supervision of the National Banking and Securities Commission (Comisión Nacional Bancaria y de Valores de México).
- (iii) Grant additional rights to minority shareholders such as appointing a director, appointing an auditor and convening shareholders' meetings, with 10% of the shares entitled to vote.
- (iv) Allow exceptions to general rules, such as imposing restrictions on the transfer of shares, causes for exclusion from membership, issuing shares with limited corporate rights or property, other than those provided in LGSM.
- (v) Establish rights and obligations that set options to buy or sell shares (Puts, calls, tag alongs, drag-alongs, piggy back, etc.).

## ( 2 ) SAPIB

The SAPIB is in the intermediate position to become the SAB, and can place its shares in the stock market. And the SAPIB has various tax exemptions to which is subject (composition of the Board of Directors, the contents of the disclosure, etc.). The SAPIB can only survive in a maximum period of 3 years and should therefore be transformed to the SAB, the SAPI and / or traditional joint stock company. The details of the characteristics of SAPIB will be described later.

## ( 3 ) SAB

Listed companies before the enforcement of the NLMV are recognized as open companies. By the entry into force of that law, these companies must become to the SABs. In short, the SAB is a public company meeting all of corporate governance requirements under the NLMV and is located in the final phase that the NLMV promotes. The main changes to the arrangements for the SAB are:

- (i) Redefinition of roles and responsibilities of the Board of Directors and the administration. The Board is responsible for the overall strategic vision and the General Director is responsible for the management and business conducts.

- (ii) Consider a group of companies as a single economic unit.
- (iii) Auditor's figure disappears.
- (iv) Establish one or more special committees that are the audit committee and the corporate practice committee. The latter, considering their own functions, corresponds to the nomination committee and remuneration committee in the companies with committees in Japan.

The **Figure I** shows the differences in the structure between the SAB, SAPIB, SAPI and traditional joint stock company under the LGSM.

## **2 SAPIB: to promote the activities of medium sized enterprises and it's financing**

The legislative motives, for having created the three new modalities, were to enroot the corporate governance among enterprises and to transform traditional joint stock companies or SAPIs to SAPIBs and SABs gradually, based on the opportunity of listing of shares in the stock exchange market through which promotes the equity finance. In other words, the corporations regulated by the LGSM, with several exceptions, become to SAPIs which have adopted the corporate governance required by the NLMV. At this point, financial acquisition outside the market is still necessary. Then it would be transformed to SAPIB, which adopt the corporate governance at a higher level than SAPI and are considered ready to list its shares on the stock exchange market. In this sense, the index of listed SAPIBs will be a barometer for measuring the efficiency of the NLMV.

It is necessary to meet the applicable requirements for the SAPIB so that a SAPI may register in the stock exchange market to list its shares. The shares that the SAPIBs issue can only be purchased by institutional investors and / or persons who had declared, by a document, the risk perception that would arise from the acquisition of those shares (so-called qualified investors).

As the **Figure I** shows, the SAPIB can only survive a maximum of 3 years to become to the SAB. In that period, if it is necessary, the SAPIB has to adopt the necessary means of corporate governance and other rules applicable to the SAB.

However, the SAPIB can list shares etc. in the stock market for financial acquisition.

To transform the SAPIB that could be registered in the stock exchange market, the SAPI must meet the following requirements:

- (1) Application for registration of the shares at the stock exchange market and the information disclosure that the National Banking and Securities Commission establishes
- (2) The shareholders' meetings must have taken the following decisions:
  - i-. Add to the name the phrase "bursátil" or its abbreviation "B"
  - ii. Adopt the SAB within 3 years from the date of registration to the stock exchange market
  - iii. Adopt the rules applicable to the SAB gradually according to regulations established by the stock exchange market and to amend the statutes to establish the capital in accordance with the conditions of the SAB within 3 years.
- (3) Have at least one independent director
- (4) Establish the corporate practices committee (if the company provides, the committee will have the same function as the audit committee). The corporate practices committee is chaired by an independent director.
- (5) The secretary of the Board shall confirm the ownership of the shares of each shareholder

After meeting the above requirements and sign up to the stock exchange market, the SAPIB must complete the following matters:

- (1) The guide or securities information sheet that contain the following matters:
  - i-. Difference with the SAB
  - ii. Progressive program for meeting the requirements to transform to the SAB
  - iii. Declaration that the shares issued are only purchased by qualified investors
- (2) Approval of the National Banking and Securities Commission on the appropriate program to meet the requirements for the SAB within 3 years

Thus, the NLMV offers the process for companies to become to be listed progressively with the adoption of new modalities, and, as a result, aims to promote

**Figure 1**  
Difference of the structure between the traditional stock corporations regulated by the LSGM, SAPI, SAPIB and SAB

	SAB	SAPIB	SAPI	SA
Name of company	It should be added the term "Bursáti" or the abbreviation "B" (Art. 22)	It should be included the word "Promotora de Inversión Bursáti" or the abbreviation "P.I.B." (Art. 19)	It should be incorporated the caption "Promotora de Inversión" or the abbreviation "P.I." (Art.12)	It should be added the term "Sociedad Anónima" or the abbreviation "S.A."
Register in the stock exchange	necessary	necessary	unnecessary	unnecessary
Duration	undefined	a maximum period of 3 years (Art. 19)	undefined	undefined
Management and control	Board of Directors in that at least 25% of directors should be independents Committees of independent directors that perform the functions of audit and corporate practices. The figure of auditor is excluded and his duties and responsibilities are transferred to the Board, Audit Committee and external auditor. (Arts. 24, 25 and 26)	Board of Directors with at least one independent director. Corporate Practices Committee chaired by an independent director. (Art. 19)	Board of Directors Audit Committee (Arts. 14 and 15)	Board of Directors Auditor (s)
Functions of the Board of Directors	Establish business strategy and internal control guidelines. Identify alternatives to generate earnings. Monitor the management of the company by the General Director and relevant directors. Approve the financial statements. Approve certain transactions, nominating and compensation of directors with the corporate practices committee's view Approve guidelines and policies relating to accounting matters and internal control with the review of the audit committee (Art. 28)			The company's management is entrusted to director or directors (Art. 142 of LGSJM) Board of Directors will be composed when there are 2 directors o more (Art. 143 of LGSJM)
Functions of audit committee	Investigate possible breaches of which it is aware. Monitor the General Director imposing to him the observance of the agreements of stakeholders' meetings and the Board of Directors. Appoint, supervise, evaluate and remove the external auditors, based on the determination of their fees and activities to be performed. Comment on guidelines for internal control, accounting policies and additional services that the auditor can provide. Discusses the financial statements with directors and external auditors for propose its approval by the Board of Directors. Monitor that operations with related persons should observe relevant provisions of the law. Investigate any breaches to the guidelines and operating policies, internal control and accounting records. If it is necessary, solicit advices to independent experts. Convene shareholders' meetings. (Art. 42)			No regulation
Functions of corporate practices committee	Comment on transactions with related and relevant persons. Comment on appointment, discharge, compensation and lending to the General Director and relevant directors. Propose candidates for directors of enterprise groups. If it is necessary, solicit advices to independent experts. Convene shareholders' meetings (Art. 43)			No regulation
Duties of directors	Duty of Diligence: Be informed, preparing for board meetings and committees, evaluate the adequacy and accuracy of the information, and ensure the proper use and utilization of human and material resources. (Art. 30)			Duty of Diligence (Art. 157 of LGSJM)

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	<p>Duty of Loyalty: Making decisions without conflict of interest, maintain confidentiality of information, ensure that relevant information is made public, and reveal the information needed for the Board of Directors' decision making and the conflicts of interest they have. (Art. 34)</p> <p>Duty of Fidelity: No realize competition with the company or take business opportunities that correspond to the corporation.</p>		<p>Duty of Loyalty (Making decisions without conflict of interest) (Art. 156 of LGSM)</p> <p>Duty of Fidelity (No realize competition with the company) (Art. 312 of Commercial Code)</p>
Business judgment rule	<p>In the approval of operations that would harm to the company, such as execution of action for the responsibility, directors, General Director and relevant executives will be not liable if damages are generated under that have</p> <p>Took decisions and vote based on information supplied by independent experts or external auditors</p> <p>Took business decisions, when these have been the best alternative or negative effects were not predictable</p> <p>Complied with the agreements of the shareholder meeting</p> <p>Met the functional requirements established by law and statutes (Art. 40)</p>		No regulation
General director	<p>Exercise the functions of management and execution of transactions.</p> <p>Propose to the Board of Directors business strategies and internal control guidelines.</p> <p>Responsible for the preparation and content of relevant information of company and its publication.</p> <p>Responsible for the existence and maintenance of accounting, control and registration systems and other functions such as ones that today correspond to the Board of Directors. (Art. 44)</p>		<p>The Board of Directors may appoint from among its members a delegate for the implementation of concrete actions</p> <p>In the absence of special designation, the representation shall correspond to the president of the Board of Directors (Art. 148 of LGSM)</p>
External auditor	<p>Having an independent external auditor. (Art. 41)</p> <p>The external auditor can be called as a guest, with voice without vote, at meetings of the Board of Directors. (Art. 27)</p> <p>Give opinions on the financial statements prepared based on auditing standards, which are related with:</p> <p>Accuracy, adequacy and reasonableness of financial information</p> <p>Accounting principles and significant estimates</p>		No regulation
Information disclosure	<p>Principle of relevance</p> <p>Prospectus</p> <p>Annual Report</p> <p>Annual financial statements audited</p> <p>Quarterly financial statements with attachments</p> <p>(Art. 104)</p>	<p>Principle of relevance</p> <p>Prospectus (including the program of gradual adoption of the SAB regime)</p> <p>Annual Report simplified</p> <p>Annual financial statements audited</p> <p>Quarterly financial statements without attachments</p> <p>(Art. 104)</p>	<p>Publication of the financial statements audited in the official gazette and deposit of the copy authorized in public commercial registry</p> <p>(Art. 177 of LGSM)</p>
Rights of minority shareholders	(Arts. 50, 38 and 51)		(Art. 16)
Designation of director	10%		25% (Art. 144 of LGSM)
Convention of shareholders meetings	10%		33% (Art. 184 of LGSM)
Deferring of vote	10%		33% (Art. 199 of LGSM)
Judicial opposition to resolutions of the shareholders meetings	20%		33% (Art. 201 of LGSM)
Civil action against directors	5%		33% (Arts. 163 and 171 of LGSM)

Source: Proper elaboration based on the NLMV and various dates of the Mexican stock exchange

flexible financing, business activities and economic growth finally.

In these new arrangements as shown in the **Figure I**, there are traditional scheme of auditors based on the LGSM in one side, and the committee system that seeks a clear separation of management and control in the other side (Art. 42 of NLMV), and this framework itself is assimilated to the regime established by the Commercial Companies Law of Japan. However, while it is recognized that the SAPIs and the SAPIBs adopt the auditors system temporarily, it is compelled to establish the committee systems in the SAB, which is the point different from the Japanese law.

The **Figure II** displays the structure of corporate governance focused on the Board and the respective committees in these three companies:

As seen in the Figure II, the continued adoption of corporate governance system of the traditional joint stock companies in SAPIBs and SAPIs is permitted. The NLMV recommends the establishment of the audit committee to SAPIs (Articles 15 and 16-II NLMV) and corporate practices committee to SAPIBs (Art. 19-III NLMV), however, its respective adoptions depend on the decision of each company. In SAPIBs, additionally, the corporate practices committee may perform the functions of the audit committee and its chairman should be an independent director (Art. 19-III NLMV).

So, it is depending on each company whether or not to establish respective committees, and if it is not established, it will be necessary to appoint auditors under the provisions of the LGSM. However, if the committees are established, independent external auditors should be appointed instead of auditors (arts. 15 and 19-III ).

According to the statutes of a SAPI and a SAPIB that I have obtained, their management structures are the following<sup>13)</sup>:

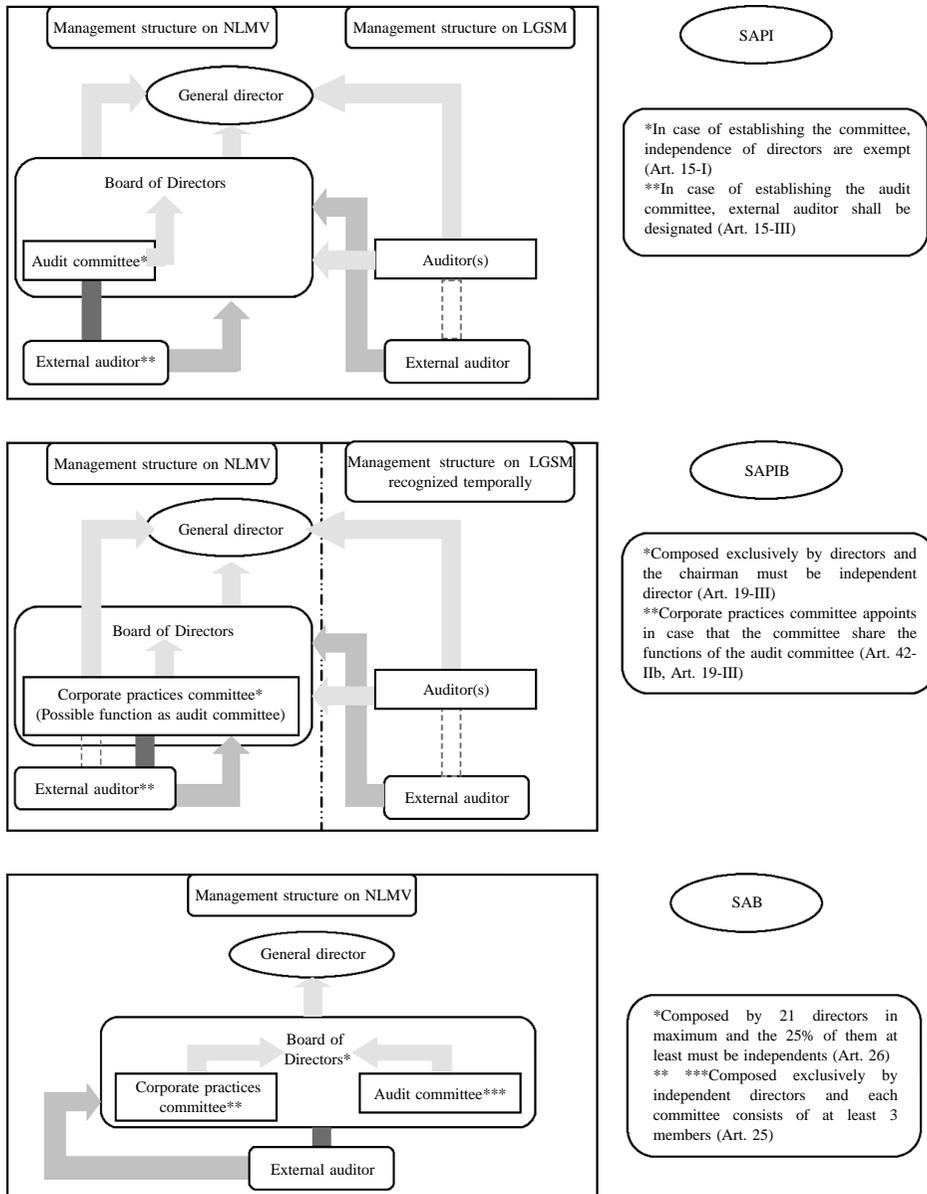
#### (1) SAPI

Number of directors: 7

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13) This information has been gained from the web site of the Mexican stock exchange:  
<http://www.bmv.com.mx/>

**Figure II**  
Structures of management and control in SAPI, SAPIB and SAB



Source: Proper elaboration based on the NLMV

President of the Board of Directors: Appointed by the shareholders' ordinary meeting

Corporate practice committee: 3 members are appointed among the directors

including at least one independent director (who will be the president of it)

Audit committee: 3 members are appointed among the directors including at least one independent director

External auditor: No regulations

Auditors: If above-mentioned committees are not established, one or more auditors will be appointed by the shareholders' ordinary meeting

## (2) SAPIB

Number of directors: 7 (appointed by the shareholders' ordinary meeting: 4 representatives of the shares type "A" and 3 representatives of the shares type "B" including at least one independent director)

President of the Board of Directors: Appointed by the shareholders' ordinary meeting

Executive director: one or more are appointed by the shareholders' ordinary meeting or the Board of Directors

Corporate practices committee: No regulations

Audit committee: No regulations

External auditor: Appointed by the shareholders' ordinary meeting or the Board of Directors

Auditors: One or more will be appointed by the shareholders' ordinary meeting

Thus, it is not required to establish committees for both the SAPI and the SAPIB (temporary for the later), the administrative structure of the two companies cited is not so dissimilar to that of traditional joint stock companies other than the provision of independent director. The NLMV recommends the establishment of committees, however, it seems not to widespread so much in practice. It is recognized that the SAPIB can achieve finance through the public stock offering in the stock exchange market, while only qualified investors may participate in it (mentioned above already) for which they must sign a format that the National Banking and Securities Commission provides its shape. One of the clauses of that format is stated that"... In a SAPIB, a temporary alternative exists retaining the figure of

auditors who are responsible for the surveillance of company as well as other non-listed corporations on the stock exchange market. In this case, the Board will be responsible for the diary operations ....”.

As described above, it is important not to forget that although a SAPIB is registered in the stock market, it does not necessarily mean that it has adopted comprehensive corporate governance system that the NLMV establishes.

### **3 Effects on the corporate governance three years after the enforcement of the NLMV**

The economic crisis in the United States and the influenza H1N1 affected the Mexican economy badly. It was argued that its economic growth during 2009 would fall by 5.5% and the approximately 2 million people would suffer from unemployment<sup>14)</sup>. Therefore it is an urgency matter to maintain and develop the Mexican economy.

The Mexican stock exchange market is relatively small, and as mentioned above, only about 130 companies are listed on it, which is the index lower than that of Brazil (400 companies) and Chile (200 companies). From 2001 to 2008, some 46 companies withdrew from the stock exchange market, while only about 27 were integrated<sup>15)</sup>. So, the Mexican stock market is in development, and there is a shortage of business financing. Given this situation, the new forms of corporations with the adoption of corporate governance at international level have been created as an alternative through which Mexico seeks to provide finance flexibility to enterprises giving legal security for investments of the world in the deepened economic globalization.

The Mexican Private Capital Association (Asociación Mexicana de Capital Privado) estimated in 2007 after the entry into force of the NLMV that some 800,000 SMEs could become to SAPIs, and also the Pricewaterhouse Coopers, the office in Mexico, estimated that about 30 SAPIs could be created annually from 2008<sup>16)</sup>. So, I thought

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14) El porvenir.com “Ven expertos mayor caída por influenza” (May 3, 2009)

15) CNN expansión.com, “Central quiere “estacionarse en la BMV” (June 30, 2009)

that SMEs and / or new companies would adopt the SAPI system successively and several SAPIBs would be listed in the stock exchange market from 2008. However, until September 2009, there was no case that some SAPIBs had been listed in the stock market, but only two SAPIBs are applying for it.

This situation, according to a lawyer of Chadbourne & Parke Mexico, comes from three distortions in the development of enterprises in Mexico<sup>17)</sup>: the first is “the traditional family structure”: in Mexico there is a corporate culture linked to family ties. In other words, Mexican firms do not have the culture of the separation of ownership and control and / or possession and management that the NLMV seeks. The second is the cost arising from the regulatory framework. Various documents for registration and financial statements (usually, of the last two years), prospectus and other legal instruments (records that prove the independence of external auditors and legal consults, etc.) are needed to be submitted to the National Banking and Securities Commission. On the website of the Mexican stock exchange the processes of application by enterprises is revealed widely. The last is the lack of access to financing prior to a public offering. In other words, even if the enterprises want to become to SAPIBs or SAPIs, they do not have finance or appropriate information, for that they could not enjoy the benefits of the law.

According to an official of the National Banking and Securities Commission, it would take 7 or 8 years for SAPIBs to register<sup>18)</sup>. This term means that companies are started with its own fund, make them grow, mature and become profitable to achieve the level required for listing. In Mexico where about 80% of SMEs has broken in recent years it is necessary to realize not only the policies for listed companies but also more supports to micro, small and medium enterprises, which account for 99% of the number of establishments and 66% of the number of employees, to create business that can endure the above-mentioned business progress, and to reflect a clean image of companies with the adoption of corporate governance

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16) CNN expansión.com, “*El año de la transparencia*” (February 19, 2007)

17) El financiero, “*Nueva ley del mercado de valores fracasada en atraer a más empresas*” (July 1, 2009)

18) El porvenir.com, “*Largo camino de las SAPI para cotizar*” (May 30, 2007)

of international level, through that a greater impact of the NLMV and the economic development of Mexico would be fulfilled.

## Conclusion

The discussion of corporate governance in Mexico began relatively early so that the regimes as well as the information disclosure and the protection of minority shareholders have been broadly established by the reform of the Securities Market Law in 2001. That law was abolished in 2005 and the NLMV was published and came into force. Two cases of the NLMV are important from the standpoint of comparative law: The first is the influence of Anglo-Saxon legal system which is evident in the grouping of the duties of directors and in the incorporation of the business judgment rule (See **Figure I**<sup>19</sup>). The second is that the corporate governance movement of Mexico can be captured as an example of legal approaches of developing countries to international standard in the current economic globalization.

The transcendent in the proper framework of the Mexican law is the creation of new forms of corporations that have been treated in this article, which is not seen in other countries.

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19) In the LSGM, the administrator assumes responsibility as mandatory (Art. 157 of the LSGM, Art. 287 of Commercial Code and Art. 2563 of Civil Code for Federal District). That means that the director has a duty to act according to the instructions of compulsory, and in those absence, the mandatory is authorized to act on their referee, as prudence dictates and considering the business as their own. If he lacks of compliance with that obligation, a slight fault in the abstract will be recognized and he will be found to be guilty. García Rendón, Manuel [1999] *Sociedades mercantiles*, 2<sup>a</sup> ed., Oxford, México, p. 193. Besides the duty of care and prudence that come from the mandate, also other duties such as duty of loyalty and fidelity (these can be captured as a duty of loyalty) can be enumerated, and its content is that the director should not profit at the expense of the interests of company. In Mexican law, there has been no clear distinction between the duty of care and the duty of loyalty as in Japan (at least, the systematization from the point of view of duty of care). Especially, under Mexican law, the duty not to compete derived from the duty of loyalty, which is discussed in Japan from the viewpoint of the heterogeneous theory, is regulated by the Code of Commerce, for that there is no clear prohibition in the LSGM. Although the relationship between the duty of care and the duty of loyalty in the new regime is still unclear, but, the distinction created by the NLMV, which had been influenced by the conceptualization in the Anglo-Saxon Law system, sought to make a grouping of director's duties that were inaccurate.

However, there are two problems in the consideration of the regime itself and its effects. The new regulatory framework came to distinguish the ‘public’ companies and the closed corporations with the approach of the introduction of corporate governance and the listing on the stock exchange market, which is the new grouping of companies and corporations, so that the NLMV distinguishes the companies regulated by the LGSM and the ones regulated by the new law.

One problem is the inefficiency of the effects of the NLMV. According to the National Banking and Securities Commission, it is estimated that more time is needed to use the new system, especially the SAPIB, in a general business development since its start-up until the listing. However, the NLMV should aim to enable the ‘existing’ SMEs, especially the medium sized enterprises, to greater market access. Originally, the cycle of the business deployment is a problem besides the one aimed by the effect of the NLMV, in other words, whether a company is subject to the NLMV or the LGSM, or that is a new enterprise or existing company, the NLMV shall establish policies for the maximum use of new system. For that, various promotional measures and incentives to adopt the corporate governance and the stock market (economic support and legal consulting, etc.) would be required.

Another issue is the treatment of the corporations applied to the NLMV by the adoption of the corporate governance and the traditional ones regulated by the LGSM. The corporate governance, for the moment, is obliged to the “open” companies. Originally, the corporate governance seeks to ensure clean management of companies, so that the same concept should be applied to companies regulated by the LGSM. Although various reforms have been done on the LGSM since its enforcement in 1934, but, a drastic revision in that law would be needed in the near future.

Because the literatures and thesis that discuss the new forms of companies created by the NLMV are insufficient, a further research of this aspect will be needed. In addition, it is necessary to carry out an investigation that would conduce to the development of the stock market itself through analysis of laws relating to the NLMV. Taking into account the above-mentioned points, I would like to keep investigating further the development of the NLMV focusing on the following

topics:

- (1) Index of the SAPIBs;
- (2) Adoption of the corporate governance in SAPIBs and SAPIs;
- (3) Potential conflicts related to the duties of directors and the business judgment rules; and
- (4) Development of securities market (including the legal framework on tax rights for investors)

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