

## Law and Business Review of the Americas

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Volume 3 | Number 1

Article 8

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1997

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### Recommended Citation

David J. Drez III, *Direct Foreign Investment in Mexico's Telecommunications Market*, 3 LAW & BUS. REV. AM. 112 (1997)  
<https://scholar.smu.edu/lbra/vol3/iss1/8>

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# Direct Foreign Investment in Mexico's Telecommunications Market

David J. Drez, III\*

With the passage of the North American Free Trade Agreement (NAFTA), the markets of the United States, Canada and Mexico were significantly opened to investment.<sup>1</sup> Telecommunications was particularly affected by the NAFTA, to the extent that one chapter of the agreement was devoted solely to the industry. Mexico presents the greatest opportunities for investors, service-providers, and end users of telecommunications equipment and services.<sup>2</sup>

This comment examines the Mexican telecommunications market and relevant laws and treaties that affect foreign investment in that market. Section I provides general information about the Mexican telecommunications market and discusses some recent developments and changes in the market. Section II discusses Mexico's Foreign Investment Law of 1993, enacted pursuant to the NAFTA, and analyzes the provisions of that law which affect foreign investors in Mexico's telecommunications market. In 1995, Mexico passed its first Federal Law of Telecommunications, which is examined in Section III. Finally, Section IV looks at the NAFTA's investment provisions, specifically the Annexes to the agreement, some of which impact telecommunications directly and coincide with the previously discussed investment and telecommunications laws.

## I. The Mexican Telecommunications Market.

The Mexican telecommunications industry is dominated by *Telefonos de Mexico* (Telmex), which was a state-owned monopoly until its privatization in 1990.<sup>3</sup> The decision to privatize Telmex was part of the 1989 *Reglamento de la Ley para Promover la Inversion Mexicana y Regular Inversion Extranjera* (Regulations to the Law to Promote Mexican Investment and Regulate Foreign Investment, or RLPMI).<sup>4</sup> Those regulations set out the conditions under which the new private owners could participate in Telmex.<sup>5</sup> Government regulation was designed to provide minimum standards for expansion of

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1. See generally, Dean C. Alexander, *The North American Free Trade Agreement: An Overview*, 11 INT'L TAX & BUS. LAW 48 (1993).
2. See, Rebecca Reynolds Bannister, Symposium: Pacific Rim Trader - The Mexican Market and NAFTA, 17 U. PUGET SOUND L. REV. 533, 540-541 (Spring 1994).
3. *Mexico: Americas Review 1997*, AMERICAS REVIEW WORLD OF INFORMATION, August 1, 1996, available in WESTLAW, 1996 WL 9628133, [hereinafter "Americas Review"].
4. Rafael X. Zahralddin and C. Todd Jones, *Venture Capital Opportunities and Mexican Telecommunications After the Passage of NAFTA and the Ley De Inversion Extranjera*, 20 DEL. J. CORP. L. 899, 923 (1995). The RLPMI is discussed in the text, *infra* Section II-A.
5. Roberto Newell, *So You Want to Buy a Telco? (Privatization is Taking Place Worldwide)*, TELEPHONY, October 12, 1992.

Telmex's network.<sup>6</sup> Telmex was required to expand the network by 12% each year until 1996.<sup>7</sup> A five year moratorium on competition was instituted in hopes of bringing costs in line with rates.<sup>8</sup> The new license granted to Telmex included specific limitations on time to complete installations and provided standards for transmission quality.<sup>9</sup>

Upon privatization, Grupo Carso, S.A. de C.V., Southwestern Bell, and France Telecom became the new owners of Telmex.<sup>10</sup> Grupo Carso owns over 10% of Telmex, while Southwestern Bell and France Telecom hold 5% each.<sup>11</sup> Telmex also was granted a monopoly on long-distance service which lasts until January 1, 1997, and on local service until 2026.<sup>12</sup> The end of that monopoly will open the market to competition.

In 1995, Mexico's largest one hundred companies included only two telecommunications providers; number one was Telmex and number seventy was Grupo Iusacell.<sup>13</sup> Telmex was the leader in profits and number of employees.<sup>14</sup> Cross-border telephone traffic between Mexico and the United States exceeds two billion minutes per year, and is the second largest telecommunications traffic stream in the world.<sup>15</sup> Thus, the telecommunications industry in Mexico is highly centralized, and recent liberalization of foreign investment and telecommunications law presents an enormous opportunity for foreign investors.<sup>16</sup>

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6. Pankaj Tandon, *Welfare Effects of Privatization: Some Evidence From Mexico*, 13 B.U. INT'L L.J. 329, 345 (1995).

7. *Id.*

8. *Newell, supra* note 3.

9. *Id.*

10. *Javier Flores, Telmex Wires Up*, 3 NO. 2 MEX. TRADE & L. REP. 17, 18 (1993) [hereinafter, Flores - Telmex].

11. *Id.* Southwestern Bell holds an additional 5% of non-voting shares. *Javier Flores, Telecommunications*, 5 NO. 5 MEX. TRADE & L. REP. 19, 20 [hereinafter, Flores - Telecommunications]. The group of investors in Telmex purchased 20% of the \$8 billion company for \$1.75 billion. Tandon, *supra* note 4, at 344. Six months after privatization, an additional 15% of the stock was sold on international exchanges, and the company was revalued at \$15 billion. *Id.*

12. *Inside Latin American Telecommunications: Mexico*, INSIDE TELECOM, June 20, 1995, available in WESTLAW, 1995 WL 8553453 [hereinafter, "Inside Telecom"].

13. Carlos A. De Juana and Joshua Chafin, *The Top Companies Shaping Business in Mexico*, MEXICO BUSINESS, July/August 1996, at 50-51. Grupo Iusacell deals primarily with cellular telephone service and is the chief rival of Telcel, Telmex's unit in the cellular market. Barry Geldzahler, *Get a Good Partner (Mexican Telecommunications Market)*, TELEPHONY, June 24, 1996, available in WESTLAW, 1996 WL 8644721. Grupo Iusacell had a 30% market share in cellular communications and experienced 6% growth in 1995. *Id.* Telcel maintained a 57% market share and experienced 31% growth in 1995. *Id.*

14. *De Juana and Chafin, supra* note 11.

15. *Inside Telecom, supra* note 10.

16. *See generally*, Ley de Inversion Extranjera [hereinafter FIL], D.O., 27 Diciembre, 1993, (reprinted in MEXICO BUSINESS REVIEW, April, 1994, at 26, Carlsmith Ball, trans.). *See also*, Federal Telecommunications Law [hereinafter FTL], D.O., June 7, 1995 (Ma. Teresa Leonor del Consuelo Flores Amezcua, trans., on file with author). The FTL is discussed at section III, *infra*.

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The lack of telecommunications infrastructure in Mexico is also an attractive feature for foreign investors.<sup>17</sup> The line density in Mexico is only ten lines per one hundred people, compared to nearly fifty lines per one hundred people in the United States.<sup>18</sup> In Mexico City, where 40% of Mexico's phones are located, the line density is only nineteen lines per one hundred people.<sup>19</sup> The boom in telecommunications has pushed the wait to nearly two years for customers to receive a new line.<sup>20</sup>

One issue in the opening of Mexico's long-distance market was the fee Telmex charged competitors for connection to and use of the company's lines.<sup>21</sup> The price eventually was set by the Ministry of Communications and Transportation at 5.32 cents per minute, significantly lower than the 14.7 cents per minute Telmex originally sought.<sup>22</sup> The Ministry also provided that the rates would fall to 4.7 cents per minute in 1998, and would not exceed 3.15 cents per minute from 1999-2001.<sup>23</sup>

The opening of the long-distance market has several competitors poised to begin service in Mexico by January, 1997. The eight competitors to Telmex are: (1) Avantel; (2) Alestra; (3) Iusatel; (4) Marcatel; (5) Cableados y Sistemas; (6) Miditel; (7) Unicom; and (8) Investcom.<sup>24</sup> Avantel is a partnership between Mexico's Group Financiero and Banamex-Accival and U.S.-based MCI.<sup>25</sup> Alestro is composed of Grupo Financiero Bancomer and Grupo Alfa of Mexico, AT&T and GTE of the U.S., and Spain Telecom.<sup>26</sup> Iusatel consists of Mexico's cellular company Iusacell and Bell Atlantic of the U.S., which owns a significant share of Iusacell.<sup>27</sup> Thus, all the service providers are joint ventures among Mexican companies and foreign corporations. In accordance with the *Ley de Inversion Extranjera* (Foreign Investment Law of 1993)(FIL), all these entities are subject to the 49% ceiling on direct foreign investment and are thus majority controlled by Mexican enterprises.<sup>28</sup>

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17. Geldzahler, *supra* note 11.

18. *Id.*

19. Larry Luxner, *Special Report: Mexico Reaches for New Telecom Heights*, TELEPHONY, February 3, 1992, available in WESTLAW, 1992 WL 11391981.

20. Geldzahler, *supra* note 11.

21. *Id.*

22. *Id.* Telmex is also requesting payments from each competitor of \$107 million per year, compared to the figure between \$33.5 million and \$53.5 million offered by the competitors. *Three Conglomerates Enter Long Distance Telephone Market, Constituting First Direct Competition for Telmex*, SOURCEMEX ECONOMIC NEWS AND ANALYSIS ON MEXICO, August 21, 1996, available in WESTLAW, 1996 WL 7994079 [hereinafter SOURCEMEX].

23. Geldzahler, *supra* note 11. The charge for domestic long-distance is 2.5 cents per minute, in an effort by the Mexican government to stimulate investment plans for domestic long-distance service. *Id.* Unless otherwise indicated, all monetary amounts referred to throughout this article are in U.S. dollars.

24. SOURCEMEX, *supra* note 22.

25. *Id.* In early November 1996, British Telecom announced plans to purchase MCI for \$20.88 billion. *What's News - Business and Finance*, THE WALL STREET JOURNAL, November 5, 1996.

26. SOURCEMEX, *supra* note 22.

27. *Id.* See also, accompanying text, *supra* note 13.

28. See FIL, D.O., December 27, 1993, art. 7.

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Domestic long distance service in Mexico opened to competition in August, 1996, and Avantel, Alestra and Iusatel all initiated service at that time.<sup>29</sup> When the market for international long-distance opens in January, customers can expect a reduction of over 20% in long-distance fees, and overall line density will increase to nearly eighteen lines per one hundred people by the end of the century.<sup>30</sup> Telmex is expected to retain nearly 60% of the long-distance market which has been estimated to be worth nearly \$15 billion in 1996.<sup>31</sup>

Mexico's telecommunications market has also experienced expansion outside the area of basic telephone service. Cellular telephone service, in particular, has undergone enormous growth in Mexico since its introduction in late 1989.<sup>32</sup> Mexico's cellular market is now the largest in Latin America.<sup>33</sup> On their introduction in 1989, cellular telephones cost nearly \$2000.<sup>34</sup> Now, phones are nearly free as part of promotional marketing.<sup>35</sup> Service fees remain high, ranging from \$800 to \$2000 per month in 1992.<sup>36</sup> The country is divided into nine regions for cellular telephone service concessions, allowing two service providers per region.<sup>37</sup>

Satellite communications are the primary responsibility of *Telecomunicaciones de Mexico* (Telecomm).<sup>38</sup> Mexico replaced the two Morelos satellites in 1994, with two new satellites called the Solidaridad system.<sup>39</sup> Recent liberalization of satellite regulation and investment policy in the Federal Telecommunications Law (FTL) will increase opportunities for modernization and investment in Mexico's satellite communications system.<sup>40</sup>

Internet service is among the most recent developments in Mexico's telecommunications market. On March 25, 1996, MCI and Financiero Banamex-Accival of Mexico, launched "InternetMCI de Avantel" in Mexico through their joint venture, Avantel.<sup>41</sup> Businesses in Mexico will no longer be required to obtain private network connections to a node in the United States for internet access.<sup>42</sup> Avantel offers customers the option of purchasing a dedicated line with increased capacity and speed.<sup>43</sup>

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29. SOURCEMEX, *supra* note 22.

30. *Id.*

31. *Id.* 20% of the long-distance market is expected to go to Avantel and Alestra, with the rest divided among the other six competitors. *Id.* Telmex's position is evidently enhanced by its partnership with Sprint. *Id.*

32. *LATIN AMERICAN TELECOM REPORT: CELLULAR*, June 1, 1993, available in WESTLAW, 1993 WL 2690858.

33. *Inside Telecom*, *supra* note 12.

34. Geldzahler, *supra* note 13.

35. *Id.*

36. *Luxner*, *supra* note 19.

37. *Id.* Telmex's cellular division, Telcel, was granted a concession in each region. *Id.* Grupo Iusatel, Bell Atlantic and Motorola also obtained concessions. *Id.*

38. *Communications - Telecom Development Projects*, MEXICO BUSINESS MONTHLY, April 1, 1996, available in WESTLAW, 1996 WL 8155028.

39. See Flores-Telmex, *supra* note 10, at 20. See also AMERICAS REVIEW, *supra* note 3.

40. See generally, FTL, D.O., June 7, 1995.

41. *Communications: MCI's Avantel Launches Internet in Mexico*, MEXICO BUSINESS MONTHLY, May 1, 1996, available in WESTLAW, 1996 WL 8155079.

42. *Id.*

43. *Id.*

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Mexico's telecommunications market is full of opportunities and in the midst of modernization. New services continue to be offered. Direct foreign investment will play an important role in the development of the telecommunications industry in Mexico.

## II. The Foreign Investment Law of 1993.

### A. INTRODUCTION.

Foreign investment gained prominence in Mexico in the late 1970s, the decade which saw the passage of the *Ley Para Promover La Inversion Mexicana y Regular La Inversion Extranjera* (Law to Promote Mexican Investment and to Regulate Foreign Investment, or FIL) in 1973.<sup>44</sup> Foreign investment was severely limited, however, as the law reflected a desire to protect national interests and placed numerous restrictions on direct foreign investment.<sup>45</sup> The era of restrictive policies was largely the result of nationalistic tendencies and a desire for industrialization.<sup>46</sup>

Limitation on foreign investment was eased somewhat in 1989, when the Salinas Administration enacted the RLPMI, allowing 49% foreign ownership in certain sectors of the economy.<sup>47</sup> Finally, in 1993, the Mexican legislature passed the FIL, which provides clearer guidance and promising opportunities to the foreign investor.<sup>48</sup>

Direct foreign investment and investors are subject to the FIL, which repealed the previous 1973 Law.<sup>49</sup> The RLPMI remains in force until regulations implementing the entire FIL are issued, to the extent it does not contradict the FIL.<sup>50</sup>

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44. Zahralddin and Jones, *supra* note 4, at 906.

45. Ramon H. Bravo, *Mexican Legal Framework Applicable to Operations Involving Financial Services*, 25 ST. MARY'S L.J. 1239, 1241 (1994).

46. M. Angeles Villarreal, *Mexico's Changing Policy Toward Foreign Investment: NAFTA's*, 3 NO. 8 MEX. TRADE & L. REP. 16 (1993).

47. Bravo, *supra* note 45, at 1241.

48. FIL, D.O., DECEMBER 27, 1993. SEE ZAHRALDDIN AND JONES, *SUPRA* NOTE 4, AT 917.

49. Zahralddin and Jones, *supra* note 4, at 918. Mexican foreign investment policy is primarily the responsibility of the executive branch. Michael W. Goldman, et al., *An Introduction to Direct Foreign Investment in Mexico*, 5 IND. INT'L & COMP. L. REV. 101, 103 (1994). Legislation is passed on the basis of presidential recommendations and becomes effective only after it is promulgated by the president and published in the *Diario Oficial de la Federacion*. *Id.* Prior to 1973, foreign investment policy was promulgated through a variety of administrative decrees. Villarreal, *supra* note 46, at 16.

50. Timon L. Marshall, *Foreign Investment in Mexico*, MEXICO BUSINESS REVIEW, April, 1994, at 21, 22.

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## B. RELEVANT PROVISIONS.

### 1. *Scope of the FIL.*

The FIL's stated object is "to establish the rules by which foreign investment can be channeled to the country and to ensure that such investments contribute to the national development."<sup>51</sup> The FIL is exclusive in nature, allowing up to 100% direct foreign investment of ownership in those industry sectors which are not specifically mentioned in the statute.<sup>52</sup> Telecommunications is among the industry sectors the FIL specifically regulates.<sup>53</sup>

The FIL defines foreign investment in three separate ways: (1) foreign investment in any percentage of the capital stock of a Mexican Company; (2) a Mexican corporation's investment if the majority of that corporation is owned by foreign investors; and (3) foreign investment in any of the activities or actions covered by the FIL.<sup>54</sup>

### 2. *Limitations on Certain Activities*

The FIL imposes certain limitations on different categories of activities. The statute divides industry sectors accordingly: (1) those reserved exclusively to the state; (2) those Mexican companies required to have a foreign exclusion clause<sup>55</sup> in their company's by-laws; (3) those in which foreign investment is allowed up to a certain percentage; and (4) those in which foreign investment may only exceed the limits through a favorable decision of the *Comision Nacional de Inversion Extranjeras* (National Foreign Investment Commission, or NFIC).<sup>56</sup> The limitations on foreign investment cannot be exceeded through trusts, covenants, partnership agreements or articles of association.<sup>57</sup>

In providing for investment in the telecommunications industry, the FIL classifies satellite communications, telegraph services and radiotelegraphy as activities reserved exclusively to the state.<sup>58</sup> The FTL, however, has amended that article to exclude satellite communications from this restriction.<sup>59</sup>

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51. FIL, D.O., December 27, 1993, art. 1.

52. *Id.*, art. 4. See also Goldman, et al., *supra* note 49, at 115-116. For example, up to 100% foreign investment is allowed in construction activities and manufacture and assembly of automobile parts. Lic. Jorge Camil, et al., *Restrictions of Foreign Investment, in AN INTRODUCTION TO DOING BUSINESS IN MEXICO* 45, 49 (William E. Mooz, Jr. ed., 1995).

53. See generally, FTL, D.O., June 7, 1996.

54. *Id.*, art. 2.

55. A foreign exclusion clause is an express agreement in the by-laws of a company that prohibits the company from admitting foreign investors as partners or shareholders. FIL, D.O., December 27, 1993, art. 2.

56. Lic. David Hurtado Badiola, *Summary of Recent Legislative and Administrative Developments in Mexico*, 2 U.S.-MEX. L.J. 65, 69-70 (1994). See generally, FIL, D.O., December 27, 1993.

57. FIL, D.O., December 27, 1993, art. 6.

58. *Id.*, art. 5 (VI), (VII), (VIII).

59. FTL, D.O., June 7, 1995, First Transition Provision. The FTL is discussed at section III, *infra*.

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Radio broadcasting services and other radio and television (other than cable television) are reserved exclusively to Mexican nationals or Mexican companies with a foreign exclusion clause.<sup>60</sup> Thus, no direct foreign investment is allowed in these sectors.<sup>61</sup>

The FIL sets different percentage ceilings on direct foreign investment in a particular sector.<sup>62</sup> Among those are cable television and basic telephone service, in which the ceiling on direct foreign investment is set at 49%.<sup>63</sup> Certain activities allow investment over 49% provided that the NFIC issues a favorable decision.<sup>64</sup> The sole telecommunications activity under this provision is cellular telephone service.<sup>65</sup> Up to 100% direct foreign investment is allowed in cellular telephone service, provided the NFIC grants the request of the interested parties.<sup>66</sup> NFIC approval is always required when direct foreign investment in a Mexican corporation exceeds 49% and the total assets of the corporation exceed a predetermined amount set by the NFIC.<sup>67</sup>

The NFIC is composed of the secretaries of various ministries of the Mexican government, including the *Secretaria de Comunicaciones y Transportes* (Secretariat of Communications and Transport, or SCT).<sup>68</sup> The NFIC is charged with formulating policy affecting foreign investment and generally promoting foreign investment in Mexico.<sup>69</sup>

### 3. *Petitions for Investment Under the FIL.*

The NFIC is responsible for petitions, the initial step for foreign investment in Mexico.<sup>70</sup> Entities seeking to invest in certain sectors which allow direct foreign invest-

60. *Id.*, art. 6.

61. See FIL, D.O., December 27, 1993, art. 5. See also FTL, D.O., June 7, 1995, art. 9.

62. See Goldman, et al., *supra* note 49, at 118. The FIL breaks different sectors of the economy into percentage brackets up to which foreign investment may not exceed. *Id.* The different percentage bracket are: (1) up to 10%; (2) up to 25%; (3) up to 30%; (4) up to 49%; and (5) over 49%. *Id.*

63. FIL, D.O., December 27, 1993, art. 7 (IV)(m) and (IV)(n).

64. *Id.*, art. 8. Some activities allowing over 49% foreign investment are: private education, legal services, credit information companies, and insurance agents. *Id.*, art. (IV), (V), (VI), and (VIII).

65. FIL, D.O., June 7, 1995, art. 8 (IX).

66. *Id.*

67. *Id.*, art. 9. At the time the FIL was passed, the amount was initially set at 85 million New Pesos. *Id.*, Transition Provision 10.

68. *Id.*, art. 23. In addition to the SCT, the NFIC is composed of the Ministers of the Interior; Foreign Affairs; Finance and Public Credit; Social Development; Energy, Mines and Parastatal Industries; Trade and Industrial Development; Labor and Social Security; and Tourism. *Id.* Each Minister is allowed to designate a deputy minister to serve as a representative. *Id.* The NFIC is also authorized to invite authorities with expertise in a given matter to participate in sessions. *Id.* The NFIC is chaired by the Minister of Trade and Industrial Development and has an Executive Secretary and Committee of Representatives. *Id.*, art 24 The Committee of Representatives are appointed by the Ministers. *Id.*, art. 25.

69. *Id.*, art. 26. Additionally, the NFIC has the authority to "establish the criteria for the application of legal and regulatory provisions in the area of foreign investment through the issuance of general resolutions" and consult various departments of government in matters concerning foreign investment. *Id.*

70. Goldman, et al., *supra* note 49, at 119. See FIL, D.O., December 27, 1993, art. 28. See also Bravo, *supra* note 45, at 1241.



ment up to a given percentage, such as basic telephone service and cable television, are subject to a decision of the NFIC as to the terms and condition of their participation.<sup>71</sup> The NFIC has forty-five days to review petitions, and approval is automatic if no decision is rendered in the applicable period.<sup>72</sup> This provision ensures administrative efficiency for foreign investment in Mexico.<sup>73</sup>

In evaluating petitions, the NFIC uses the following criteria: (1) impact on employment and training; (2) technological advantages; (3) compliance with environmental laws; and (4) general contribution to productivity.<sup>74</sup> The NFIC may impose conditions on foreign investment to the extent those conditions do not distort international trade.<sup>75</sup>

#### 4. *Acquisition of Real Property Under the FIL.*

Under the FIL, acquisition of real property is limited to Mexican companies with a foreign exclusion clause if that property is situated within the "Restricted Zone."<sup>76</sup> Corporations may invest directly, however, in Mexican companies holding title to real property in the "Restricted Zone."<sup>77</sup> Trusts are allowed in the "Restricted Zone" upon approval of the Ministry of Foreign Affairs and provided that the trust beneficiaries are foreign individuals or entities or Mexican corporations with no foreign exclusion clause.<sup>78</sup> Trusts within the "Restricted Zone" are limited to non-residential purposes.<sup>79</sup> Trusts may have a term of up to fifty years and are renewable.<sup>80</sup>

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71. FIL, D.O., December 27, 1993, art. 28. See also Marshall, *supra* note 51, at 23.

72. FIL, D.O., December 27, 1993, art. 28.

73. See Zahralddin and Jones, *supra* note 4, at 918 (contending that the forty-five day waiting period in the FIL is the most important deviation from previous foreign investment regulation).

74. FIL, *supra* note 16, art. 29. See also Bravo, *supra* note 45, at 1241. These criteria supplement the criteria in the RLPMI, which are: (1) investment in fixed assets are prohibited from exceeding \$100 million; (2) foreign capital must fund the investment; (3) industrial projects are prohibited in Monterey, Mexico City or Guadalajara; and (4) foreign investment must create permanent jobs and promote worker training. Goldman, et al., *supra* note 49, at 119. Annex II to the NAFTA includes the same criteria with the exception of the impact on environmental laws. North American Free Trade Agreement, Dec 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 705 [hereinafter NAFTA]. Thus the FIL has expanded on some of the policies promulgated in the NAFTA.

75. FIL, D.O., December 27, 1993, art. 29.

76. *Id.*, art. 10. The "Restricted Zone" is Mexican territory extending one hundred kilometers from the country's borders and fifty kilometers from the coast. *Id.*, art. 3.

77. Marshall, *supra* note 51, at 23. See FIL, D.O., December 27, 1993, art. 10.

78. FIL, D.O., December 27, 1993, art. 11.

79. *Id.* See also, Marshall, *supra* note 51, at 23.

80. FIL, D.O., December 27, 1993, art. 13.

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### 5. *Registration Requirements of the FIL.*

Before a company may incorporate in Mexico, prior approval of the *Secretaria de Relaciones Exteriores* (Secretariat of Foreign Affairs) is required.<sup>81</sup> Such companies must have a foreign exclusion clause or comply with Article 27, Section 1 of the Mexican Constitution.<sup>82</sup> To qualify to do business in Mexico, those foreign entities are required to register with the Ministry of Trade and Industrial Development.<sup>83</sup>

All foreign entities desiring to carry on continuing commercial acts in Mexico must also register with the Public Registry of Commerce.<sup>84</sup> The Ministry of Trade and Industrial development administers this Registry and has fifteen days to grant a company's registration request.<sup>85</sup>

The National Register of Foreign Investment, under the FIL, includes all Mexican companies with foreign investment and foreign individuals or entities doing business in Mexico.<sup>86</sup> The register is not public and companies are required to register within forty days of the formation of the company or participation in foreign investment.<sup>87</sup> Registration receipts are issued to registered companies and must be renewed annually.<sup>88</sup>

### 6. *Neutral Investment Under the FIL.*

The FIL provides for "neutral investment" in Mexican companies.<sup>89</sup> Neutral investment is not considered foreign investment, nor is it included in the ceilings applied to foreign investment.<sup>90</sup> Neutral investment under the FIL allows fiduciary institutions

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81. *Id.*, art. 15.

82. *Id.*, Article 27 of Mexico's Constitution nationalized Mexico's natural resources, created the "Restricted Zone," and requires foreigners conducting business in Mexico to waive their right to assert their status as foreign citizens. Goldman, et al., *supra* note 49, at 105.

83. FIL, D.O., December 27, 1993, art. 17.

84. *Id.*, art. 17.

85. *Id.*

86. *Id.*, art. 32. Also included in the National Register of Foreign Investments are "Stock or partnership trusts, real property and neutral investment trusts in which the beneficial rights are held by foreign investors." *Id.*

87. *Id.*, art. 32.

88. *Id.*, art. 33, 35.

89. *See generally, Id.*, art. 18.

90. *Id.* Neutral investment is defined in the FIL as investment in Mexican companies "which shall not be taken into account in determining the percentage of foreign investment in the capital stock of Mexican corporations" and made in accordance with the neutral investment provisions of the FIL. *Id.*

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to issue neutral investment instruments with exclusive financial rights, or limited corporate rights with no voting privileges.<sup>91</sup> Issuance of neutral investment instruments is contingent upon prior approval of the Ministry of Trade and Industrial Development.<sup>92</sup> Neutral investment is the only avenue of investment which may exceed the proscriptions of the FIL, such as activities reserved exclusively to Mexican nationals, and is thus an important tool for foreign investors.<sup>93</sup>

#### 7. Sanctions Under the FIL.

One final aspect of the FIL is the provision for sanctions. Any action contrary to the FIL may result in the levying of sanctions by the Ministry of Trade and Industrial Development.<sup>94</sup> Parties receive the benefit of a hearing prior to the imposition of sanctions.<sup>95</sup> However, these provisions apply to all investors and investments that are regulated by the FIL: Mexican nationals and companies, and foreign nationals and companies.<sup>96</sup>

If an investor engages in activities which require prior approval of the NFIG without obtaining such approval, a fine of one thousand to five thousand wages may be imposed.<sup>97</sup> A foreign legal entity that carries on commercial activity without the approval of the Ministry of Trade and Industrial Development is subject to the same fine.<sup>98</sup> Violation of the neutral investments provision may result in a fine of one hundred to three hundred wages fine.<sup>99</sup>

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91. *Id.*, art. 19. Neutral investments were created under the FIL to increase foreign access to Mexico's stock market. Jorge A. Vargas, 4 NO. 2 MEX. TRADE & L. REP. 7, 9 (1994).

92. FIL, D.O., December 27, 1993, art. 20.

93. Camil, *supra* note 51, at 50. See FIL, D.O., December 27, 1993, art. 6.

94. *Id.*, art. 37.

95. *Id.* art. 38. The Ministry of Trade and Industrial Development is responsible for imposing sanctions and takes the following factors into consideration: (1) nature of the violation; (2) seriousness of the action; (3) ability of the offender to pay; (4) time of non-compliance; and (5) the total value of transaction. *Id.*

96. Goldman, *et al.*, *supra* note 49, at 121. See FIL, D.O., December 27, 1993, art. 37.

97. *Id.*, art. 38 (I). "Wages" are the daily minimum wages in effect at the time of the violation. *Id.*, art. 38. The daily minimum wage in Mexico, as of November, 1996, was approximately \$25 new pesos, equivalent to U.S. \$3, payable weekly based on a maximum six day/48 hour work week. Marlene M. Martin, *On the Job in Mexico*, SAN ANTONIO BUSINESS JOURNAL, November 1, 1996, available in WESTLAW, 1996 WL 11762888. A 17% increase in the minimum wage is planned for 1997. *Labor Business & Government Sign New Anti-Inflation & Economic Growth Pact*, SOURCEMEX ECONOMIC NEWS & ANALYSIS ON MEXICO, November 1, 1996, available in WESTLAW, 1996 WL 7994107.

98. FIL, D.O., December 27, 1993, art. 38 (II).

99. *Id.* art. 38 (III).

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### III. The Federal Telecommunications Law.

#### A. INTRODUCTION.

While the FIL is an indicium of Mexico's liberalization of foreign investment participation, the FTL exemplifies the heightened status of the telecommunications industry in the Mexican government's agenda.<sup>100</sup>

On June 7, 1995, the Mexican legislature passed Mexico's first law devoted solely to telecommunications.<sup>101</sup> The FTL replaces an antiquated 1940 statute and a series of regulations from 1990, both of which formerly governed communications in Mexico.<sup>102</sup> The FTL is designed to "regulate the use, development, and exploitation of the radio spectrum, telecommunications networks, and satellite communications."<sup>103</sup>

#### B. RELEVANT PROVISIONS OF THE FTL.

##### 1. *Scope of the FTL.*

The FTL defines telecommunications as "all emission, transmissions or reception of signs, signals, written documents, images, voice sounds or information, of any nature, via cables, radioelectricity, optical or physical means, or other electromagnetic systems."<sup>104</sup> Furthermore, the radio spectrum, telecommunications networks, and satellite communications systems are considered the "general paths of communication" under the FTL.<sup>105</sup> Thus, the broad, inclusive scope of the FTL covers virtually every aspect of the telecommunications industry.<sup>106</sup>

The general paths of communication are under federal jurisdiction, and any controversy surrounding the implementation of the law are subject to the jurisdiction of Mexico's federal courts.<sup>107</sup> The FTL also provides that the development or operation of any telecommunications system must adhere to the applicable environmental regulations.<sup>108</sup>

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100. See generally, FTL, D.O., June 7, 1995.

101. *New Telecom Law Opens Market, Reduces Role of Government*, LATIN AM. L. & BUS. REP., July 31, 1995, available in WESTLAW, 1995 WL 10426820.

102. *Id.* In addition, Mexico's telecommunications policy was altered by the obligations it undertook in the NAFTA. *Id.*

103. FTL, D.O., June 7, 1995, art. 1.

104. *Id.*, art 3 (XIV).

105. *Id.*, art. 4.

106. See generally, *Id.*

107. *Id.*, art. 5,6. Controversies handled by Mexico's Federal Courts are non-prejudicial to any arbitration proceedings. *Id.*, art. 6. Thus, a decision by Mexico's courts would have no impact on a dispute settled under the NAFTA, for example.

108. *Id.*, art. 5. Specifically, this environmental requirement applies to the installation, operation and maintenance of any equipment designed for public telecommunications network services. *Id.* Companies must also comply with municipal and urban development requirements. *Id.*

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The FTL includes a section on the "Social Coverage of Public Networks."<sup>109</sup> This provision requires the SCT to strive towards the provision of telecommunications services for the whole country.<sup>110</sup> The social goal of the law is to ensure access to telecommunications networks in a manner that assists public and social services.<sup>111</sup>

2. *Secretariat of Communications and Transport (SCT).*

The FTL's objectives are to promote the development of telecommunications in Mexico and foster healthy competitions in the telecommunications industry to provide better prices, consumer choice, and quality.<sup>112</sup> The SCT is charged with attaining the objectives of the law.<sup>113</sup> The SCT has primary responsibility for telecommunications policy in Mexico.<sup>114</sup> Among other duties, the SCT must regulate telecommunications; oversee interconnection among different service providers; issue standards; establish procedures; negotiate international accords regarding telecommunications; promote research and development; establish telecommunications networks; promote cultural values and identity; and interpret the FTL.<sup>115</sup>

3. *Limitations on Foreign Ownership.*

The FTL, like the FIL, applies ceilings on the percentage of foreign ownership allowed in sectors of the telecommunications industry.<sup>116</sup> Foreign investment in telecommunications may not exceed 49% except in cellular telephone service.<sup>117</sup>

Article Nine of the FTL reserves public telegraph services and radiotelegraph service exclusively to the state, in accordance with the FIL.<sup>118</sup> Articles Fourteen through Twenty-three of the FTL govern the radio spectrum, which under the FIL, is limited to Mexican nationals or corporations with a foreign exclusion clause.<sup>119</sup> Thus, no direct

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109. See FTL, D.O., June 7, 1995, art. 50-51.

110. *Id.*, art. 50.

111. *Id.*

112. *Id.*, art. 7.

113. *Id.*

114. *Flores-Telmex*, *supra* note 11, at 18. There are three Deputy Secretaries of the SCT: (1) Infrastructure; (2) Transport; and (3) Communications and Technological Development. *Id.*

115. FTL, D.O., June 7, 1995, art. 7.

116. See *Id.*, art. 12. See generally, FIL, D.O., December 27, 1993.

117. FTL, D.O., June 7, 1995, art. 12. Foreign ownership may exceed 49% in cellular telephone service only following a favorable decision of the NFIC. FIL, D.O., December 27, 1993, art. 8.

118. See FIL, December 27, 1993, art. 5.

119. *Id.*, art. 6. The FIL provides that radio broadcasting and other radio and television services are precluded from direct foreign investment. *Id.* The exception to this is cable television services, which is not restricted to Mexican individuals or corporations with a foreign exclusion clause and has a 49% ceiling on direct foreign investment. *Id.*

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foreign investment is allowed in public or radiotelegraph services or services utilizing the radio spectrum.<sup>120</sup>

#### 4. *Licenses and Applications Under the FTL.*

Prior to operating or installing a public telecommunications network, interested parties must apply for a license with the SCT.<sup>121</sup> The application must include: (1) general information on the applicant; (2) planned services to be provided; (3) technical details of the project; (4) investment and quality plans; (5) business plan; and (6) documents demonstrating the applicant's financial and technical capability.<sup>122</sup> Upon submitting an application, the SCT has one hundred-twenty days to review the application and determine whether to grant a license.<sup>123</sup>

Specifically, licenses are required under four circumstances: (1) use or development of a national frequency band; (2) installation, exploitation or operation of a public telecommunications network;<sup>124</sup> (3) utilization of a geostationary<sup>125</sup> or satellite orbit position; and (4) exploitation of the rights of transmission and reception of foreign satellite signals received in Mexico.<sup>126</sup> The licenses provided for under the FTL are only available to Mexican nationals or corporations.<sup>127</sup>

Licenses issued by the SCT define the rights and obligations of the licensee, as well as its duration and geographical commitment.<sup>128</sup> Licenses may be issued for a term of up to thirty years, and are renewable under the terms of the license, provided the licensee requests renewal before the beginning of the last one-fifth of the existing license term.<sup>129</sup> Private telecommunications networks are exempt from the license requirement, provided those networks do not seek to exploit their services commercially.<sup>130</sup>

120. See FIL, D.O., Decemeber 27, 1993, art. 5. See also, FTL, D.O., June 7, 1995, art. 9 and Second Transition Provision (repealing that portion of the FIL classifying satellite communications as an activity reserved exclusively to the state).

121. FTL, D.O., June 7, 1995, art. 24.

122. *Id.*

123. *Id.*, art. 25. The SCT may request additional information from the applicant within the one hundred-twenty day period. *Id.*

124. A public telecommunications network is defined by the FTL as "a telecommunications network used to provide commercial telecommunications services" and does not include terminal equipment or networks beyond the terminal connection point. *Id.*, art. 36(X).

125. Geostationary orbital positions are those that allow a satellite to orbit at essentially the same speed as the earth thus providing continuous satellite coverage to a specific area. *Id.*, art. 3(VII).

126. *Id.*, art. 11.

127. *Id.*, art. 12.

128. *Id.*, art. 26(IV), (V) and (VII).

129. *Id.*, art. 27.

130. *Id.*, art. 28. Private telecommunications networks are those "designed to satisfy the specific telecommunication service needs of certain individuals which do not involve the commercial exploitation of [the] network's services or capacity." *Id.*, art. 3(IX).

5. *Permits.*

Aside from license and application requirements, SCT permits are required prior to establishing or operating a telecommunications services resale company or a transmitting ground station.<sup>131</sup> Permits require substantially the same information as applications for public telecommunications networks and are reviewed by the SCT within ninety days.<sup>132</sup> Value-added services, however, require only that the firm register with the SCT.<sup>133</sup> Additionally, receive-only ground stations do not require a permit from the SCT.<sup>134</sup>

6. *Interconnection Requirements.*

The FTL requires that licensees of public telecommunications networks allow for interconnection and interoperability of their networks through the use of "open network architecture."<sup>135</sup> The SCT has the duty of developing and administering the technical plans and specifications for interconnection.<sup>136</sup> The plans include details on numbering, switching, signaling, transmitting, and the establishment of rates.<sup>137</sup> In developing the plans, the SCT must consider the interests of both users and licensees.<sup>138</sup> Three goals exist for the plans regarding interconnection: (1) the development of new telecommunications licensees and services; (2) non-discriminatory treatment among licensees; and (3) the promotion of healthy competition.<sup>139</sup>

The FTL mandates that parties enter into an express agreement regarding interconnection.<sup>140</sup> Parties are required to sign an agreement within sixty days of either party's request.<sup>141</sup> Upon the request of both parties, or in the event of failure to reach an agreement, the SCT will decide on the conditions for interconnection.<sup>142</sup> The SCT has sixty days to set such conditions.<sup>143</sup>

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131. *Id.*, art. 31.

132. *Id.*, art. 32.

133. *Id.*, art. 33. Value-added services use a public telecommunications network and "affect the format, content, code, protocol, storage or similar aspects of the information transmitted by a user and [] market additional, different, or restructured information to users, or [] require user interaction with stored information." *Id.*, art. 3(XII).

134. *Id.*, art. 34. Permits are not required for transmitting ground stations in the event the stations comply with the established standards and do not cause interference to other telecommunications systems. *Id.*

135. *Id.*, art. 41.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*, art. 42.

141. *Id.*

142. *Id.* In the event the SCT is forced to set conditions for interconnection, its decision is limited to the conditions the interested parties could not agree upon. *Id.*

143. *Id.*, art. 42.

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Interconnection agreements must identify the terminal connection points of the network and allow independent access to the networks with non-discriminatory rates.<sup>144</sup> Additionally, parties are prohibited from offering volume discounts in interconnection rates.<sup>145</sup> Agreements must provide that parties act reciprocally as to price and conditions of agreements with parties providing similar service.<sup>146</sup>

#### 7. *Obligations of Licensees.*

The FTL puts certain obligations on public telecommunications network licensees in addition to interconnection agreements.<sup>147</sup> Parties must allow licensees and permit-holders to resell the services obtained from their networks.<sup>148</sup> Licensees are prohibited from interrupting any signals between interconnected parties without prior approval from the SCT.<sup>149</sup> Parties also are required to provide telecommunications services in a non-discriminatory fashion.<sup>150</sup> In addition, the FTL mandates that existing telecommunications assets that are available to one licensee, such as transmission towers and cables, must be available on equal terms to other licensees.<sup>151</sup> No party may obtain exclusive rights over any of those assets.<sup>152</sup>

Agreements with foreign nations regarding reciprocal access to international long-distance markets are the responsibility of the SCT.<sup>153</sup> Such agreements pertain to those licensees desiring to offer services abroad in order to increase competition in the international long-distance market.<sup>154</sup> Cross-border transmission facilities may be

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144. *Id.*, art. 43 (I) and (II).

145. *Id.*, art. 43(III). In interconnection agreements, parties must also: (1) establish interconnection at the most technically feasible point; (2) ensure the provision of all necessary equipment at both parties' facilities; (3) guarantee adequate capacity for traffic demands; (4) use the most efficient point to deliver communication to the user and to the final destination; (5) provide information to identify origin and destination numbers, number billed, time of call, and any operator assistance; (6) provide information for billing purposes. *Id.*, art. 43(V)-(XI).

146. *Id.*, art. 43(IV).

147. *See generally, Id.*, art. 44.

148. *Id.*, art. 44(I).

149. *Id.*, art. 44(II). Licensees may also modify their networks with the consent of all interested parties. *Id.*

150. *Id.*, art. 44(VI). Parties must also act non-discriminatory in providing information to subscribers, affiliates, third-parties and subsidiaries. *Id.*, art. 44(X).

151. *Id.*, art. 45.

152. *Id.*

153. *Id.*, art. 46. In entering such agreements, the SCT has the goal of reciprocal access for those licensees interested in cross-border services. *Id.*

154. *Id.*, art. 46.

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installed only with the express authorization of the SCT, and are limited to entities already possessing a public network license.<sup>155</sup> Authorization for cross-border transmission requires interested parties to submit the proposed interconnection agreements to the SCT, who may then deny authorization if Mexico's general interests are prejudiced in any way.<sup>156</sup> When cross-border transmission involves an agreement with a foreign government, interested parties must request that the SCT participate in the agreement.<sup>157</sup>

The FTL allows licensees and permit-holders to freely establish their own rates.<sup>158</sup> Prior to charging rates, however, those entities must be registered with the SCT.<sup>159</sup> Additionally, operators of networks are prohibited from applying their rates in a discriminatory manner.<sup>160</sup> Licensees are allowed to set their rates at a level which provides for "the recovery of at least the average incremental long-term cost."<sup>161</sup>

#### 8. *Satellite Communications.*

The FTL has a separate provision for licensing satellite communications. Licenses for orbital positions and the rights to reception and transmission of satellite signals are granted in the same fashion as frequency bands in the radio spectrum: public auction.<sup>162</sup> In the auction, the government sets minimum requirements for participation and parties are required to provide relevant information regarding their plans and ability.<sup>163</sup>

Licenses are also granted the right to transmit and receive signals from foreign satellites, provided that the relevant treaties exist between Mexico and the originating nation.<sup>164</sup> Such treaties must grant reciprocal rights to Mexican satellites, and licenses are granted exclusively to corporations established in accordance with Mexican law.<sup>165</sup>

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155. *Id.*, art. 47.

156. *Id.* The SCT may alter the agreement to reflect conditions of proportionality and reciprocity in the services that are the subject of the interconnection. *Id.*

157. *Id.*

158. *Id.*, art. 60.

159. *Id.*, art. 61.

160. *Id.*

161. *Id.*, art. 63.

162. *Id.*, art. 29.

163. *Id.* The FTL requires the following for parties to participate in an auction: (1) service and investment commitments and proposals; (2) business plans; (3) technical specifics; (4) a favorable opinion rendered by the Federal Commission on Competition; (5) intended frequency bands and geographic areas of use; (6) requested term of the license; and (7) fulfillment of the applicable criteria. *Id.*, art. 16.

164. FTL, D.O., June 7, 1995, art. 30.

165. *Id.*

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The portion of the FTL which governs satellite communications requires a party obtaining a license to place a satellite in orbit within five years after a license is granted.<sup>166</sup> Furthermore, licensees who place satellites in geostationary orbit are required to establish their operation and control centers in Mexico.<sup>167</sup> The FTL does not require that satellite and operational control centers be operated by Mexican nationals, but states that the centers "shall preferably be operated by Mexicans."<sup>168</sup> Entities holding a license to provide satellite services are allowed to sell the communications services in other countries provided that the appropriate legislation exists in that country and the Mexican government has a relevant treaty.<sup>169</sup> Licensees are required to respect the intellectual property rights of the signals broadcasted by their satellites.<sup>170</sup>

In April, 1996, the United States and Mexico reached an agreement on the provision of satellite services.<sup>171</sup> The agreement permits U.S. satellites to provide services to and from Mexico.<sup>172</sup> Mexican satellites are granted similar rights for providing services in the United States.<sup>173</sup> The agreement should provide a broader market for satellites of the United States and Mexico, while offering consumers more choice.<sup>174</sup> The agreement provides an example of implementation of the FTL, which accounts for such agreement under Article Thirty.

#### 8. *Register of Telecommunications.*

The FTL includes a provision for establishing a "Register of Telecommunications" (the "Register").<sup>175</sup> The Register includes all licenses, permits and assignments; value-added services; taxes on licenses and permits; termination of rights

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166. *Id.*, art. 56.

167. *Id.*, art. 57.

168. *Id.*

169. *Id.*, art. 58.

170. *Id.*, art. 59.

171. *Telecommunications: U.S.-Mexico Satellite Accord Struck; Opens Each Other's Market to Competition*, U.S. MEX. FREE TRADE REP., May 15, 1996, [hereinafter "Satellite Accord"]. The agreement is officially called, "Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Transmission and Reception of Signals from Satellites for the Provision of Satellite Services to Users in the United States of America and the United Mexican States." *Id.* The agreement was concluded on April 28, 1996 through the State Department and does not require ratification by the U.S. Senate. Angela Drolte, *U.S. Mexico Satellite Accord Opens Competition in Each Market*, 13 INT'L TRADE REP. 722 (BNA), May 1, 1996.

172. Satellite Accord, *supra* note 171.

173. Drolte, *supra* note 171.

174. *Id.*

175. FTL, D.O., June 7, 1995, art. 64.

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and obligations; assignment of frequency bands; interconnection agreements; rates of telecommunications services; and any document which is relevant to license or permit-holder's operation.<sup>176</sup> The information in the Register is public to the extent it is not legally confidential.<sup>177</sup>

Foreign investors in telecommunications would additionally be bound to the registration requirement of the FIL.<sup>178</sup> The FTL, however, does not indicate who possesses the burden of registration, and states only that "the [SCT] shall keep a Register."<sup>179</sup> Unlike the FIL, the FTL does not include specific time restrictions on when companies must register.<sup>180</sup>

### 9. *Compliance and Sanctions.*

Compliance with the FTL is verified by the SCT.<sup>181</sup> Licensees and permit-holders must allow the SCT access to all of their facilities to ensure compliance.<sup>182</sup> Parties are required to bear any costs incurred by the SCT in verifying compliance.<sup>183</sup> Aside from allowing general on-sight inspections, license and permit-holders must modify their accounting procedures in accordance with the FTL.<sup>184</sup> Accounting information must be separated by service, region, function and network components.<sup>185</sup> The SCT also requires companies to provide complete and accurate information to the public regarding their services.<sup>186</sup>

The FTL provides for various sanctions and penalties in the case of non-compliance.<sup>187</sup> Selling telecommunications services without a license, failing to meet interconnection and operation obligations, failing to keep separate accounting books, and intercepting transmitted information through public networks all result in a fine of ten thousand to one hundred thousand wages.<sup>188</sup> Interruption of service in an area where a licensee is the sole service provider may result in a fine of four thousand to forty thousand wages.<sup>189</sup> The same fine also applies to non-compliance with the conditions of a

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176. *Id.*

177. *Id.*, art. 65.

178. FIL, D.O., December 27, 1993, art. 32.

179. FTL, D.O., June 7, 1995, art. 64.

180. *See Id.*, art. 64-5.

181. *Id.*, art. 67.

182. *Id.*

183. *Id.*

184. *Id.*, art. 68.

185. *Id.*

186. *Id.*

187. *See generally, Id.*, art. 71.

188. *Id.*, art. 71(a)(I), (IV), and (V). *See* accompanying text, *supra* note 98, for an explanation of wages.

189. *Id.*, art. 71(b)(II).

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license or permit, billing errors and mistakes in database information of users and directories.<sup>190</sup> Violation of rate or equipment provisions or failure to comply with registration requirements may result in a fine of two thousand to twenty thousand wages.<sup>191</sup> For repeat violations, the SCT is authorized to double the fine.<sup>192</sup>

If a party operates telecommunications services in Mexico without a license, the SCT is authorized to seize the property, facilities and equipment used in violating the law.<sup>193</sup> Additionally, companies that "obstruct [the] general paths of communication" forfeit the same rights.<sup>194</sup> Such requirements mandate strict compliance with the FTL, and coupled with the law's broad definition of telecommunications, result in regulation of the entire telecommunications industry.<sup>195</sup>

#### 10. *Transition Provisions.*

The FTL contains "Transition Provisions" that provide important information on the implementation and effect of the law as well as schedules for the opening of markets.<sup>196</sup> First, the FTL expressly repeals Clause VI of Article Five of the FIL, which reserved satellite communication as an exclusive activity of the state.<sup>197</sup> Additionally, public telecommunications service licensees are prohibited from providing basic long-distance service until August 10, 1996, unless existing licensees fail to comply with the expansion and efficiency conditions of their licenses.<sup>198</sup> If a licensee has entered into an inter-connection agreement, that licensee may begin providing national and international long-distance service on January 1, 1997.<sup>199</sup>

The FTL also mandates that the Executive Branch of the Mexican government create a separate administrative agency for telecommunication, apart from the SCT.<sup>200</sup> On August 9, 1996, Mexico created the *Comision Federal De Telecomunicaciones* (Federal Telecommunications Commission, or FTC).<sup>201</sup> The FTC is related to the SCT, but is not under its direct control.<sup>202</sup>

Carlos Cassasus Lopez, the former deputy secretary of the SCT, was appointed to

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190. *Id.*, art. 71(b)(III) and (IV).

191. *Id.*, art. 71(c).

192. *Id.*

193. *Id.*, art. 72.

194. *Id.*

195. *See generally, Id.*

196. *See generally, Id.*

197. *Id.*, Second Transition Provision. *Cf.* FIL, D.O., December 27, 1993, art. 5.

198. *Id.*, Seventh Transition Provision.

199. *Id.*, Tenth Transition Provision.

200. *Id.*, Eleventh Transition Provision.

201. *Communication: New Phone Commission Created*, MEX. BUS. MONTHLY, September 1, 1996.

202. *Id.* For example, the SCT could not overturn a decision of the FTC. John Nagel, *Mexico Creates Telecommunications Commission To Monitor Market Opening to Foreign Investment*, 13 INT'L TRADE REP. 1301 (BNA), August 14, 1996. In addition, the SCT has authorized the *Organo Regulador de Telecomunicaciones*, telecommunications regulating agency, to handle the opening of Mexico's telephone markets. SOURCEMEX, *supra* note 22.

head the commission.<sup>203</sup> The FTC is a four member panel whose primary duty is to supervise and administer interconnection of various networks.<sup>204</sup> The FTC is also responsible for the implementation and administration of the FTL.<sup>205</sup> The FTC's oversight and regulatory duties in Mexico's telecommunications industry are somewhat similar to those of the Federal Communications Commission in the United States.<sup>206</sup>

#### IV. The North American Free Trade Agreement.

##### A. INTRODUCTION.

Four provisions of the North American Free Trade Agreement (NAFTA) have a direct impact on the telecommunications industry: (1) Chapter 9 - Standards; (2) Chapter 11 - Investment; (3) Chapter 12 - Services; and (4) Chapter 13 - Telecommunications.<sup>207</sup> Coupled with the liberalization of Mexico's foreign investment policy, the Investment Chapter of the NAFTA strongly affects the market, as foreign investment is subject to the FIL, FTL and Chapter 10 of the NAFTA.

##### B. CHAPTER 11 - INVESTMENT.

###### 1. *Scope of Chapter 11.*

The impact of the NAFTA on direct foreign investment in Mexico's telecommunications market is obvious in the scope of Chapter 11, governing investment.<sup>208</sup> The chapter applies to: (1) investors of another party; (2) investors of another party in a party's territory; and (3) all investments in a party's territory.<sup>209</sup> Chapter 11 is a subordinate chapter of the NAFTA, in that inconsistencies between it and other chapters are resolved in favor of the other chapter.<sup>210</sup>

###### 2. *Treatment of Investors and Investments.*

Chapter 11 begins with provisions regarding the treatment to be accorded to member nations. Investors and investments of another party are treated no less favorably

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203. *Id.*

204. Nagel, *supra* note 202.

205. *Id.*

206. *Sourcemex*, *supra* note 22.

207. Cf. Alexandra Field, *Current Developments in the FCC; Telecommunications and the NAFTA*, 25 LAW & POL'Y INT'L BUS. 1145, Spring, 1994 (Analyzing Chapters, Nine, Twelve and Thirteen as the three basic chapters affecting telecommunications under the NAFTA).

208. citation

209. NAFTA, *supra* note 74, art. 1101. Cf. Goldman, et al., *supra* note 47, at 121 (explaining that the three goals of the NAFTA's Chapter 11 are: (1) creation of a secure and stable investment climate; (2) the removal of non-tariff and tariff barriers to foreign investment; and (3) effective dispute resolution for investors and nations).

210. NAFTA, *supra* note 74, art. 1112.

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than a nation treats its own investors and investments in like circumstances.<sup>211</sup> This treatment applies with respect to “the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”<sup>212</sup> Parties are restricted from establishing different equity thresholds regarding foreign investment or requiring investors of another party to dispose of an investment by reason of their nationality.<sup>213</sup> The NAFTA also requires parties to accord investors or investments of another party treatment no less favorable than most-favored nation status.<sup>214</sup> Investors in other NAFTA nations are accorded the better of most-favored nation status or national treatment.<sup>215</sup>

The NAFTA establishes minimum standards of treatment for investors and investments.<sup>216</sup> Treatment must be in accordance with international law, which includes “fair and equitable treatment and full protection and security.”<sup>217</sup> Parties are precluded from imposing performance requirements on foreign investors.<sup>218</sup> Prohibited performance requirements include: (1) export levels; (2) domestic content standards; (3) purchase preferences; (4) export/import values and volumes; (6) territorial restrictions on sales; (7) technology transfers; and (7) exclusive supplier agreements.<sup>219</sup> No nationality restrictions are permitted for the senior management or board of directors of a foreign investment.<sup>220</sup> Parties are permitted, however, to require that a majority of the board of directors or similar body of a foreign investment be of that party’s nationality or residents of that party.<sup>221</sup>

Under the NAFTA, parties are allowed to institute certain formalities for the establishments of investments of another party’s investors.<sup>222</sup> Additionally, a party may require that investors or investments provide routine information, as long as that party agrees to maintain the confidentiality of potentially prejudicial information.<sup>223</sup>

### 3. Transfers.

Investment-related transfers of a foreign investment or investor must be allowed freely and without delay.<sup>224</sup> Transfers include: profits, dividends, interest, capital gains, royalty payments, fees and any amounts derived from the investment.<sup>225</sup> Parties are per-

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211. *Id.*, art. 1102. Treating foreign investors in accordance with treatment of domestic investors is commonly known as “national treatment.” Goldman, et al., *supra* note 47, at 122.

212. NAFTA, *supra* note 74, art. 1102.

213. *Id.*

214. *Id.*, art. 1103.

215. *Id.*, art. 1104. See also Goldman, et al., *supra* note 47, at 122.

216. citation

217. NAFTA, *supra* note 74, art. 1105.

218. *Id.*, art. 1106.

219. *Id.*

220. *Id.*, art. 1107.

221. *Id.* This restriction does not apply if the requirement materially inhibits the ability of a foreign investor to exercise control over the investment. *Id.*

222. *Id.*, art. 1111. Formalities established by a nation may not circumscribe the general benefits accorded to investors under Chapter 11. Rodolpho Sandoval, *Chapter 11: Investments Under the North American Free Trade Agreement*, 25 ST. MARY’S L.J. 1195, 1199 (1994).

223. NAFTA, *supra* note 74, art. 1111.

224. *Id.*, art. 1109.

225. *Id.*

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mitted to restrict transfers if the transfers violate or question a good-faith application of that country's bankruptcy, securities or criminal laws.<sup>226</sup>

#### 4. *Expropriation and Nationalization.*

Expropriation and nationalization of existing foreign investments is only permitted only in four circumstances: (1) for a public purpose; (2) on non-discriminatory terms; (3) in compliance with due process of law; and (4) upon payment of compensation.<sup>227</sup> Compensation must be equal to the fair market value of the investment, and must include interest from the date of the expropriation, provided payment is in G7 currency.<sup>228</sup>

#### 5. *Dispute Settlement.*

The remainder of Chapter 11 contains provisions for dispute settlement. The dispute settlement section of Chapter 11 is designed to establish a settlement vehicle "that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal."<sup>229</sup>

Parties are initially required to attempt to settle claims through consultation and negotiation if possible.<sup>230</sup> Two different types of claims are recognized: (1) a claim by an investor of party on its own behalf; and (2) a claim by an investor of a party on behalf of an enterprise.<sup>231</sup> In either case, the claims are initiated by filing a notice of intent to the disputing party at least ninety days before the claim is submitted.<sup>232</sup>

Six months must elapse following the event that gave rise to the claim before the claim will be submitted under either: (1) the ICSID Convention, provided that both parties are parties to the Convention; or (2) the Additional Facility Rules of ICSID, provided that at least one party is a party to the Convention; or (3) the UNCITRAL Arbitration Rules.<sup>233</sup>

226. *Id.*

227. *Id.*, art. 1110. Although Chapter 11 provided protection from expropriation, investors or investment may be denied the benefits of Chapter 11 if the ownership of an enterprise is held by a non-NAFTA nation and either: (1) diplomatic relations do not exist between the denying party and the involved non-NAFTA nation; or (2) the denying party maintains measures that prohibit transactions with the enterprise. *Id.*, art. 1113. See also Sandoval, *supra* note 222, at 1200.

228. NAFTA, *supra* note 74, art. 1110. G7 currency is that of one of the G7 nations: Canada, France, Germany, Italy, Japan, Great Britain, and the United States. *Id.*, art. 1139.

229. *Id.*, art. 1115.

230. *Id.*, art. 1118.

231. *Id.*, art. 1116, 1117.

232. *Id.*, art. 1119. International arbitration is appropriate for breaches of Chapter 11's provision or conduct of government run monopoly that is counter to the NAFTA. Goldman, et al., *supra* note 49, at 125.

233. *Id.*, art. 1120. The ICSID is the International Centre for Settlement of Investment Disputes. *Id.*, art. 1139. The ICSID Convention is the Convention of the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965. *Id.* The UNCITRAL Arbitration Rules are the rules of the United Nations Commission on International Trade Law. *Id.*

Following arbitration, a party may be awarded monetary damages plus interest, restitution and costs incurred.<sup>234</sup>

6. *Annexes to Chapter 11.*

Chapter 11's scope is broad and inclusive. The real application and understanding of the chapter's impact is best understood when viewed in light of the annexes to the NAFTA. The annexes list many exceptions to Chapter 11, several of which specifically impact the telecommunications industry.

Annex I contains reservations for existing measures and liberalization commitments. The schedule of Mexico in Annex I provides that foreign nationals or enterprises, or Mexican enterprises without a foreign exclusion clause, may not acquire land in the Restricted Zone.<sup>235</sup> Mexico deems any lease over ten years within the Zone to be an acquisition.<sup>236</sup> The NFIC, in considering applications for acquisitions or establishments of investments in restricted activities, is instructed to evaluate: (1) the effect on employment and training; (2) technological impact; and (3) general contribution to productivity and competition.<sup>237</sup> Additionally, the NFIC is able to impose any performance requirement not specifically prohibited by Chapter 11.<sup>238</sup>

The NFIC's review is limited to those investments which are direct or indirect acquisitions in a Mexican enterprise that exceed 49% in an unrestricted sector.<sup>239</sup> Annex I also restricts foreign national participation in a Mexican cooperative production enterprise to 10%, and no foreign national is allowed to engage in administrative or managerial activities in cooperative production enterprises.<sup>240</sup>

Broadcasting, multi-point distribution systems and cable television are required to use the Spanish language for the distribution of radio or television programming.<sup>241</sup> Use of another language is allowed, however, provided approval is granted by the Secretaria de Gobernacion.<sup>242</sup> Furthermore, Spanish language or subtitles is required for advertising in Mexico.<sup>243</sup>

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234. *Id.*, art. 1135.

235. *Id.*, Annex I. See accompanying text, *supra* note 75 for an explanation of the "Restricted Zone." This provision is directly in accordance with Article 1, Section 27 of Mexico's Constitution and remains unchanged in the FIL. FIL, D.O., December 23, 1993, art. 10. However, the FIL allows trusts to hold real property in the restricted zones, marking a significant change from the NAFTA. *Id.*, art. 11. See text, *supra* at II-B-4.

236. NAFTA, *supra* note 74, Annex I.

237. *Id.* The FIL expanded the criteria used by the NFIC to include adherence to environmental laws and regulations. FIL, D.O., December 27, 1993, art. 29.

238. NAFTA, *supra* note 74, Annex I. Cf. FIL, D.O., December 27, 1993 (Stating that the NFIC has the authority to "determine the terms and conditions of foreign investment activities" specifically regulated by the FIL).

239. NAFTA, *supra*, note 74, Annex I.

240. *Id.*

241. *Id.* Cf. NAFTA, *supra* note 74, art. 1106 (prohibiting domestic content restrictions within performance requirements).

242. NAFTA, *supra* note 74, Annex I.

243. *Id.*

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Foreign investment, direct or indirect, may not exceed 49% in the operation or provision of cable television in Mexico.<sup>244</sup> In order to operate or construct a cable television, a concession must be granted by the SCT.<sup>245</sup> Concessions are granted only to Mexican nationals and Mexican enterprises.<sup>246</sup> Providers of enhanced or value-added services are also required to obtain a permit, and U.S. and Canadian firms may provide the services without establishing a presence in Mexico.<sup>247</sup> Foreign investment is allowed up to 100% in enhanced and value-added services.<sup>248</sup> Foreign investment by a foreign government or foreign state enterprise is prohibited altogether in Mexican enterprises engaged in communications.<sup>249</sup>

Annex II consists of reservations for future measures. Mexico may promulgate any measure relating to providing or broadcasting multi-point distribution systems, uninterrupted music and high definition television services.<sup>250</sup> Mexico also reserved the right to adopt relevant measures regarding telecommunications transport networks and transport services.<sup>251</sup> Mexico also maintains an exclusive reservation over all aspects of satellite communications and radiotelegraphy.<sup>252</sup>

In Annex III, which contains activities reserved to the state, Mexico reserved an exclusive right to perform and regulate investment in : (1) satellite communications; (2) telegraph services; and (3) radiotelegraph services.<sup>253</sup> In the FTL, Mexico repealed the reservation of satellite communications as an activity reserved exclusively to the state.<sup>254</sup>

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244. *Id.* The 49% ceiling on direct foreign investment in cable television is also provided for in the FIL. See FIL, D.O., December 27, 1993, art. 7.

245. NAFTA, *supra* note 74, Annex I. The FTL does not specifically cover cable television or concessions for such rights. Cf. FTL, D.O., June 7, 1995. However, cable television would fall under the FTL's definition of "telecommunications," and thus be subject to the requirements of the law. See FTL, D.O., June 7, 1995, art. 3. Thus, cable television service requires a license under the FTL. *Id.*, art. 11.

246. NAFTA, *supra* note 74, Annex I. The FTL provides that licenses may only be granted to Mexican nationals or corporations. FTL, D.O., June 7, 1995, art. 12.

247. NAFTA, *supra* note 74, Annex I. This provision did not include videotext and enhanced packet switching, until July 1, 1995, when the restriction was lifted. *Id.*

248. *Id.*, Annex I. Value-added services do not require a license from the FTL but do require the service provider to register with SCT. FTL, D.O., June 7, 1995, art. 33. Foreign investment is limited to 49% for videotext and enhanced packet switching. NAFTA, *supra* note 73, Annex I.

249. NAFTA, *supra* note 74, Annex I.

250. *Id.*, Annex II.

251. *Id.* Telecommunications transport networks include facilities to provide basic telephone service, long-distance service, rural telephone service, cellular service, telephone booth service, satellite service, paging and mobile telephone service. *Id.* Transport services "typically involve the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information." *Id.* Mexico did specifically adopt measures regarding telecommunications transport networks and transport services in the FTL. See generally, FTL, D.O., June 7, 1995.

252. NAFTA, *supra* note 74, Annex II. Restrictions on satellite communications were liberalized significantly in the FTL. See generally, FTL, D.O., June 7, 1995. See also, text, *supra* at IV-B-8. Radiotelegraphy is an activity reserved to the state in the FIL. FIL, D.O., December 7, 1993, art. 5.

253. NAFTA, *supra* note 74, Annex III.

254. FTL, D.O., June 7, 1995, Second Transition Provision

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Annex IV contains exceptions to the most-favored nation status within Chapter 11.<sup>255</sup> In Annex IV, Mexico is not required to accord most-favored nation status to "telecommunications transport networks and telecommunications services, or to the production sale or licensing of radio and television programming."<sup>256</sup>

In Annex V, dealing with miscellaneous commitments, Mexico limits the resale of the circuit capacity of private networks to 30% of the network's capacity.<sup>257</sup> The NAFTA, as evidenced by the annexes to the agreement, has a significant impact on the direct foreign investment in Mexico's telecommunications market. In conjunction with the FTL and FIL, the NAFTA clearly establishes the rules for Canadian and U.S. investors in Mexico's telecommunications market.

## V. Conclusion.

Mexico, in passing the FIL and participating in the NAFTA, lifted many barriers to direct foreign investment. The current status of Mexico's telecommunications market and underdeveloped telecommunications infrastructure present promising opportunities for domestic development and increased foreign investment. In passing the FTL, Mexico has affirmed its commitment to improving telecommunications, which will undoubtedly benefit business in general. The FIL, coupled with the FTL, provides clearer guidance and a broader market for foreign investors. Investors in the United States and Canada have even greater opportunities as a result of the NAFTA. Increased investment will lead to greater consumer choice, competition and lower prices, benefitting Mexican telecommunications consumers and investors.

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255. NAFTA, *supra* note 74, Annex IV.

256. *Id.* This exception does not include measures included in Chapter Thirteen. *Id.*

257. *Id.*, Annex V.

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