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SUMMARY OF RECENT LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS IN MEXICO

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I. INTRODUCTION

Mexico's economy has been opened under the administrations of President de la Madrid and President Salinas within the past seven years, ending a long-lasting era of protectionism. Accordingly, there have been broad and significant legislative and administrative changes affecting trade and investment in Mexico in order to promote a more free and competitive market. The following discussion presents an outline of the most important recent legislative and administrative changes.

II. ENVIRONMENTAL LAWS

In January 1988, the Salinas administration implemented new environmental legislation,¹ which exemplifies the most advanced and demanding environmental laws in the world. Due to the high cost involved in the transformation of industrial plants to comply with such laws, it is very difficult for the Mexican government to enforce the new environmental law. Mexican authorities, however, are committed to gradual enforcement without severely affecting the Mexican economy and its industry.²

III. NEW AGRARIAN LAW

The Agrarian Law was one of the most important legislative reforms enacted by a Mexican President during this century. In January 1992, the Salinas administration proposed important amendments to Article 27 of the Mexican Constitution;³ and in February 1992, a new Agrarian Law⁴ was enacted pursuant to those amendments. Hopefully, the new Agrarian Law terminates the controversial agrarian reform (which endured for almost sixty years), which was based upon the free distribution of real property to communities of farmers.

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1. *Ley General del Equilibrio Ecológico y la Protección al Ambiente [General Law of Ecological Equilibrium and Environmental Protection]*, DIARIO OFICIAL DE LA FEDERACIÓN [OFFICIAL GAZETTE OF THE FEDERATION - hereinafter D.O.], at 23-57 (Jan. 28, 1988) (Mex.).

2. See Lic. Leopoldo Burguete-Stanek, *Regulations to Protect the Environment in Mexico*. U.S.-MEX. L.J. 73 (1994) (article in this publication).

3. The amendments were published in the Diario Oficial. See D.O., at 2-4 (Jan. 6, 1992) (Mex.).

4. *Ley Agraria [Agrarian Law]*, D.O., at 2-35 (Feb. 26, 1992) (Mex.).

At the same time, the new law recognizes the legal capacity and autonomy of existing agricultural communities in Mexico (the *ejidos*). Moreover, it authorizes the *ejidos* to engage in commercial activities and to form business associations, such as corporations, or contribute their individual real property to the business associations, in order to improve their productivity and economy. This reform is of historic significance because, for the first time, the *ejidos* are allowed to operate as actual business entities without the drastic limitations imposed under the old law. The *ejidos* are now able to make their own decisions if such decisions are agreed upon by the majority of the members (the *ejidatarios*). Similarly, the *ejidatarios* may now directly utilize their individual real property of the *ejido* or temporarily assign their property rights to other *ejidatarios* or third parties. They may also transfer such rights to other *ejidatarios* or to other residents within the same *ejido*.

The provisions of the new Agrarian Law and its related constitutional amendments could translate into a lengthy dissertation, thus, the following summary of the principal provisions is presented:

1) Article 27 of the Mexican Constitution was amended to allow stock corporations to acquire real property in rural areas to the extent necessary to accomplish their purposes.

2) Accordingly, Section 126 of the new Agrarian Law provides that business or civil corporations may own real property for agricultural purposes, livestock purposes, or to exploit timber resources to the extent authorized by law, if these corporations are engaged in the production, transformation, or commercialization of agricultural products, livestock, or timber.

3) Section III of Article 126 requires the capital stock of these corporations to include a special series of shares (Series "T") representing the value of the real property conveyed to the corporation or the money invested to acquire the real property.

4) Article 130 allows foreign investors to acquire a maximum of forty-nine percent (49%) of Series "T" shares within these corporations. Therefore, foreign investment is allowed in order to obtain funds for the acquisition of real property but is limited to 49% of the value of the real property.

IV. INTELLECTUAL PROPERTY LAWS

In June 1991, a new Intellectual Property Law was enacted.⁵ The purpose of the new law is to modernize Mexican industrial property legislation and provide protection for technology in a manner that is comparable to the protection provided in the United States, Canada, and Western Europe.

The new Intellectual Property Law affects several areas: (1) it significantly broadens patent protection, particularly in the chemical and phar-

5. *Ley de Fomento y Protección a la Propiedad Industrial* [Law for the Promotion and Protection of Industrial Property], D.O., at 4-31 (June 27, 1991) (Mex.).

maceutical fields; (2) it extends the term of patent protection to 20 years commencing from the date of filing the patent application, or to 14 years commencing from the date of issuance; (3) it extends the term of trademark registrations from five years to ten years; and (4) it increases sanctions for improper disclosure of trade secrets. The new law also replaces both the 1976 *Ley de Invenciones y Marcas* (Law of Inventions and Trademarks)⁶ and the 1982 *Ley Sobre el Control y Registro de la Transferencia de Tecnología y el Uso y Explotación de Patentes y Marcas* (Law on the Control and Registration of Technology Transfer and the Use and Exploitation of Patents and Trademarks).⁷

V. ECONOMIC COMPETITION LAW

In December 1992, the Mexican government enacted a new Federal Economic Competition Law⁸ which became effective on June 22, 1993. The purpose of the Economic Competition Law is to protect the competitive process and free access to the marketplace through the prevention and elimination of trusts, trust-related practices, or activities that restrict the efficient functioning of the goods and services market. The *Comisión Federal de Competencia* (Federal Competition Commission), a new executive body, was created under this law and consists of five members appointed by the Mexican President. The Commission is a division of the *Secretaría de Comercio y Fomento Industrial* ("SECOFI" - Secretariat of Commerce and Industrial Promotion). It is already active in analyzing and issuing authorizations for acquisitions that are required to obtain clearance under the Economic Competition Law. Regulations under the law have not been adopted.

The main provisions of the Economic Competition Law address *monopolios* (monopolies), *prácticas monopolísticas* (monopolistic practices), and *concentraciones* (combinations). Regarding monopolistic practices, the law distinguishes between absolute and suspect monopolistic practices and identifies several monopolistic practices. For example, *prácticas monopolísticas absolutas* (absolute practices)⁹ are always considered a violation of the law, and therefore are null and void per se. *Prácticas monopolísticas relativas* (suspect practices)¹⁰ are prima facie evidence of a potential violation of the law.

Regarding combinations, Article 16 of the Economic Competition Law defines a combination as an illegal practice if it is the result of a merger, acquisition, or any other act in which business entities or assets become

6. *Ley de Invenciones y Marcas* [Law of Inventions and Trademarks], D.O., at 13-20 (Feb. 10, 1976) (Mex.).

7. *Ley Sobre el Control y Registro de la Transferencia de Tecnología y el Uso y Explotación de Patentes y Marcas* [Law on the Control Registration of Technology Transfer and the Use and Exploitation of Patents and Trademarks], D.O., at 23-28 (Jan. 11, 1982) (Mex.).

8. *Ley Federal de Competencia Económica* [Federal Economic Competition Law], D.O., at 6-15 (Dec. 24, 1992) (Mex.).

9. *Id.* art. 9.

10. *Id.* art. 10.

concentrated among competitors, suppliers, clients or any other form of business. Additionally, if the purpose or effect of the combination is to impair competition within the same or similar market of goods or services, then the combination is illegal. To determine whether a combination is illegal and subject to prosecution, the Commission considers the market power of the business in question over the relevant market and the degree of concentration in that market.

Finally, it is worth noting that the Economic Competition Law requires that notice be provided to the Commission before completing transactions that:

(1) have an aggregate value exceeding the equivalent of approximately \$56 million (U.S.);

(2) entail the accumulation of thirty-five percent (35%) or more of the assets or shares of a business in which the assets or sales amount to a higher sum than the equivalent of approximately \$56 million (U.S.); or

(3) involve two or more parties that, jointly or severally, have assets or annual sales volumes higher than the equivalent of approximately \$224 million (U.S.), and the transactions entail an additional accumulation of assets or capital stock in excess of the equivalent of approximately \$22 million (U.S.).

VI. INTERNATIONAL TRADE LEGISLATION

In July 1993, a new International Trade Law¹¹ was enacted in order to consolidate the role of international trade in Mexico. Its declared purposes as set forth in Article 1 of the law are: (1) to regulate and promote international trade; (2) to increase the competitiveness of the national economy; (3) to promote the efficient use of the productive resources of the Mexico; (4) to adequately integrate the Mexican economy with the international economy; and (5) to contribute to the enhancement of the people's wealth.

This new International Trade Law clearly defines the scope of the powers of the Mexican executive branch. The executive branch can regulate, restrict, or prohibit the importation or exportation of goods and the transit of foreign goods in the Mexican territory. These powers are invoked by the executive branch when it decides that it is a matter of urgency in accordance with the provisions of Article 131 of the Mexican Constitution.

Additionally, the International Trade Law defines the powers of the *Secretaría de Comercio y Fomento Industrial* ("SECOFI" - Secretariat of Commerce and Industrial Promotion). SECOFI is granted the power (1) to administer regular activities that are related to international trade, such as the establishment of non-tariff regulations and restrictions and

11. *Ley de Comercio Exterior* [Law of Foreign Commerce], D.O., at 49-74 (July 27, 1993) (Mex.).

the rules of origin, (2) to administer and resolve proceedings relating to foreign unfair trade practices and safeguards; and (3) to promote exports.

VII. FOREIGN INVESTMENTS

Mexican policies and regulations of foreign investments have undergone major changes. In 1989, the purposes of the Foreign Investment Law, as enacted in 1973,¹² were drastically modified by very liberal regulations.¹³ As a major advance towards liberalization, these regulations allow foreign investors to actively participate in Mexican corporations by owning up to 100% of capital stock in Mexican corporations if certain performance requirements are satisfied.

The most recent and crucial achievement of the Salinas administration was the enactment of a new Foreign Investment Law¹⁴ in December 1993. This new Foreign Investment Law clearly defines the rules for the participation of foreign investment in Mexican companies, liberalizes certain sectors which were limited in whole or in part to foreign investors, and repeals the performance requirements established by the former regulations.

The general rule under Article 4 of the Foreign Investment Law is that foreign investors may:

- (1) participate in any proportion in the capital stock of Mexican companies;
- (2) acquire fixed assets;
- (3) engage in new fields of economic activity;
- (4) manufacture new product lines;
- (5) open and operate establishments; and
- (6) expand or relocate existing establishments, except as otherwise provided by the law. This new provision creates numerous business opportunities because the rule is limited only by express provisions of the law itself, or by other specific laws.

The new Foreign Investment Law respects the activities reserved to the Mexican States by the Mexican Constitution, which are known as *áreas estratégicas* (strategic areas), as listed in Article 5 of the new law. These strategic areas include oil and other hydrocarbons, basic petrochemicals, electricity, generation of nuclear energy, radioactive minerals, satellite communications, telegraph service, radio-telegraph service, postal service, railroads, currency issuance, control, supervision, and vigilance of ports, airports, and heliports. The new law, however, liberalizes the participation of foreign investment in certain activities connected to those areas, such as services relating to railroads, the provision of fuel or lubricants, the

12. *Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera* [Law to Promote Mexican Investment and Regulate Foreign Investment], D.O., at 5-9 (Mar. 9, 1973) (Mex.).

13. See *Reglamento de la Ley par Promover la Inversión Mexicana y Regular la Inversión Extranjera* [Regulations of the Law to Promote Mexican Investment and Regulate Foreign Investment], D.O., at 11-37 (May 16, 1989) (Mex.).

14. *Ley de Inversión Extranjera* [Foreign Investment Law], D.O., at 92-99 (Dec. 27, 1993) (Mex.).

construction of pipelines for the transportation of oil and gas, and the drilling of oil and gas wells, in which foreign investors may acquire up to forty-nine percent (49%) of the shares or other interests.

Also, the new law reserves certain activities to Mexican individuals or Mexican companies that contain a foreigner exclusion clause in their bylaws. The list provided in Article 6 of the new law is more limited than the list provided in the repealed law. The list in the new law includes: domestic surface transportation of passengers, tourism and freight (but excludes messenger and package delivery service); retail gasoline and L.P. gas distribution; radio broadcasting and other radio and television service (excluding cable); credit unions; development banking; and a supply of professional and technical services pursuant to express provisions of law.

Additionally, Article 7 of the new Foreign Investment Law lists a group of other areas in which foreign investors is limited to maximums of 10%, 25%, 30%, or 49% of the shares, depending on the area of business. Article 8 lists several areas in which foreign investors may freely participate to a maximum of 49%, but can exceed 49% if a favorable resolution is granted by the *Comisión Nacional de Inversiones Extranjeras* (Foreign Investment Commission). These activities include services related to maritime vessels, administration of airports, education, credit reporting, insurance agents, cellular telephones, and port services.

In addition, the new law establishes a requirement under Article 9 which provides that approval shall be required by the *Comisión Nacional de Inversiones Extranjeras* for acquisitions in existing Mexican companies that have a total asset value over an amount to be established annually by the *Comisión*. Approval is required if, directly or indirectly, foreign participation would exceed 49%. The amount is currently set at \$85 million (new pesos) (approximately \$27.3 million (U.S.)).¹⁵

The new Foreign Investment Law also expands the concept of *inversión neutra* (neutral investment),¹⁶ which is a non-participatory financial investment that is not characterized as foreign investment for the purposes of the limitations provided by the law. The new law extends neutral investment to companies not necessarily quoted on the *Bolsa Mexicana de Valores* (Mexican Stock Exchange) and further permits investment in preferred stock, but the stock carries limited voting rights and are to be considered neutral. Investment in preferred stock is subject to prior authorization by SECOFI, but if the stock is quoted on the Mexican Stock Exchange by the *Comisión Nacional de Valores* (National Securities Commission), then the *Comisión* provides the authorization.

Neutral investment in holding companies of financial groups, commercial banks, and brokerage houses is also possible through *fideicomisos* (trusts). In these cases, SECOFI approves the investment once it obtains

15. *Id.* tit. 5, ch. II, art. 19.

16. See Article Transitory Tenth of the Foreign Investment Law. The approximate amount of 27.3 million dollars is based upon the Mexican interbank rate of exchange of December 28, 1993 (\$3.1080 new pesos per U.S. dollar) as reported by the newspaper "El Economista."

the prior approval of the *Secretaría de Hacienda y Crédito Público* (Secretariat of Finance and Public Credit) and the *Comisión Nacional de Valores* (National Securities Commission).

Finally, the new Foreign Investment Law introduced a major change regarding ownership of real property. Companies interested in foreign investment are now permitted to freely own real property in Mexico, provided that it is not within the Restricted Zone (within 100 kilometers of the U.S.-Mexico border or within 50 kilometers of the coasts). If the real property is located within the Restricted Zone, companies interested in foreign investment may acquire the real property if it is to be used for non-residential activities, as long as the acquisition is registered with the *Secretaría de Relaciones Exteriores* (Secretariat of Foreign Affairs). If the property is to be used for residential purposes, it may be acquired through a trust only.

VIII. CONCLUSION

The discussion presented in this article highlights recent developments in the law and administrative regulations in Mexico. In the future, the application of these laws and regulations will provide interesting and challenging opportunities for legal practitioners both in the United States and in Mexico.

