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Foreign Investment in Mexico from the Perspective of the Foreign Investor.

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FOREIGN INVESTMENT IN MEXICO FROM THE PERSPECTIVE OF THE FOREIGN INVESTOR

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I. Introduction	776
II. Basic Considerations	776
A. Business Culture	776
B. Legal System	777
C. Pick Your Partners Carefully	779
D. Earn Your Partner's Trust	779
E. Seek Professional Advice	780
F. Establish a Government-Relations Program	780
III. Understanding Mexico's Motives and Rationales for Regulation	780
A. Historical Background	780
B. The Mexican Constitution	782
IV. Foreign Investment in Mexico: The Legal Framework	784
A. Regulation Prior to 1973	784
B. The Foreign Investment Law of 1973	785
C. The Regulations of the Foreign Investment Law	787
D. The Resolutions of the Foreign Investment Commission (FIC)	790
E. The Investor's Response to Recent Changes	790

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V. The Impact of the NAFTA on Mexican Foreign Investment Regulation	791
A. Minority-Foreign Ownership and Control.....	791
B. Guarantees Against Foreign-Investment Restrictions.....	792
C. National Treatment.....	793
D. Most-Favored-Nation Treatment	793
E. Nondiscriminatory Treatment	794
F. Performance Requirements	794
G. Further Exceptions and Reservations	796
1. Real Estate	796
2. Acquisitions of Established Investments	797
H. Investment in Classified Construction Activities	797
I. Service Contracts for Drilling of Petroleum and Gas Wells	798
J. Commercialization of Petroleum Products	798
K. Automotive-Parts Industry	799
L. Maquiladora Industry	799
M. Land Transportation	799
VI. Conclusion.....	800
VII. Appendix A	801
VIII. Appendix B.....	802

I. INTRODUCTION

The economic revolution occurring in Mexico is acclaimed throughout the world. Among the more prominent aspects of this revolution have been the rapid opening of the economy, the departure from statism, the encouragement of increased private-sector activity, and an economic-stabilization program that has reduced inflation. A factor contributing to the continuation of the economic revolution in Mexico has been, and will continue to be, foreign investment in the country. The liberalized foreign-investment regulations enacted in May 1989 and the positive attitude of the Foreign Investment Commission (FIC) in approving foreign investment proposals have promoted, in recent years, a more favorable environment for foreign investors. The Mexican government recently completed negotiating the NAFTA, a proposed free-trade agreement with the United States and Canada. The government is now considering what additional actions may be required to compete successfully with those other nations trying to attract scarce investment funds.

II. BASIC CONSIDERATIONS

A. *Business Culture*

The foreign investor in Mexico must be aware of certain important fea-

tures of the Mexican business culture. While strongly entrepreneurial, the business culture is derived from a system of patronal control in which the controlling entity is perceived as having the complete and unquestionable authority to direct an enterprise and those who work for that enterprise.¹ This aspect of the business culture is substantially moderated by political reforms reflected in the Constitution of Mexico. The Constitution, as will be discussed later, establishes the government as “the rector of the economy” and legitimizes unions.² The federal labor laws of Mexico are founded upon the Constitution. These laws vest extensive rights of collective bargaining in workers and then place these rights under the protection of the government. Consequently, there is a continual tension between business and union leaders, a tension that does not substantially benefit either one of the groups involved.³

The political structure of Mexico also strongly affects investors. The Constitution delegates enormous powers to the executive branch, permitting this branch effectively to establish and administer investment policies.⁴

The modern business environment in Mexico is strongly influenced by the Spanish language and several ancient cultures. The influence of these factors is very complex and has been the subject of much analysis.⁵ Indeed, the cultural influence is evident in the thousands of encounters foreign investors face with Mexican businesspersons and government officials when establishing and managing investments in Mexico. No investor or advisor should seriously consider investing in Mexico without spending some time and effort studying the Spanish language as used in Mexico and the ancient cultures that have been important to the formation of modern Mexico.

B. *Legal System*

The Mexican legal system is based on the civil-law system of Europe, which originated in Roman law.⁶ The predominant characteristic of the Mexican system is that the system is based upon legislatively enacted codes that set forth broad principles of law. These codes are applied to specific cases by judges using deductive reasoning.⁷ Their approach to declaring and

1. Juan M. Steta, *Labor Relations*, in *DOING BUSINESS IN MEXICO* 20.1-.12 (1992).

2. *Ley Federal del Trabajo* (L.F.T.) §§ 358, 359; *DICCIONARIO JURIDICO MEXICANO Sindicato I* (1989); NÉSTOR DE BUEN, *DERECHO DEL TRABAJO* 551-53 (6th ed. 1985).

3. NÉSTOR DE BUEN, *DERECHO DEL TRABAJO* 358 (4th ed. 1981).

4. FELIPE TENA R., *DERECHO CONSTITUCIONAL MEXICANO* 445-67 (1990).

5. See generally John M. Bruton, *A Different Culture: Cultural Considerations in Doing Business in Mexico*, in 1 *DOING BUSINESS IN MEXICO* 4.02-.04 (1992) (noting that businessperson's views are influenced by political and cultural considerations).

6. GUILLERMO F. MARGADANTS, *INTRODUCCIÓN A LA HISTORIA DEL DERECHO MEXICANO* 28-41 (1984).

7. See Hope H. Camp, Jr., *Binding Arbitration: A Preferred Alternative for Resolving*

applying the law sharply contrasts with the common-law approach, which is based on *stare decisis*.

There are certain specific substantive and procedural differences between the Mexican and United States legal systems that the foreign investor must note. The Mexican Civil Code provides for limited damages in civil cases, unlike the United States, which permits unlimited damages for some causes of action.⁸ In Mexico, injunctive relief is not available when damages are irreparable or unmeasurable in monetary terms.⁹ In the United States, however, an injunction may be the preferred remedy for resolving commercial disputes. The entire trial process is different in Mexico. For example, Mexican law does not provide for extensive pre-trial discovery, although the United States federal procedural rules allow for broad discovery. In Mexico, evidence is presented by producing documentation to the trial judge, who may directly question witnesses and adduce the validity of such evidence. In contrast, the preferred method of presenting evidence in the United States is for lawyers to question witnesses in court in front of a jury. In Mexico, the jury plays no part in adjudicating civil disputes.¹⁰

A fundamental difference between the legal systems of Mexico and the United States is found in the concept of jurisdiction. Under United States common law, jurisdictional issues are analyzed in terms of whether a court has jurisdiction over a case. In contrast, civil-law systems, like Mexico's, differentiate between concepts of jurisdiction and competence.¹¹ In civil-law systems, courts have jurisdiction because they have the authority to declare the law; the courts have the power to exercise judicial functions. However, not all courts are competent to determine a specific case. The difference in terminology is because the English word "jurisdiction" refers to all competencies of the state and each one of its organs; while the Spanish word "*jurisdicción*," and its equivalent in other European languages, has a meaning restricted to the exercise of the judicial function.¹²

Another fundamental difference between the two systems is that the Mexican legal system is very formalistic. Many transactions, such as mortgages and other forms of security, are void by operation of law unless they are

Commercial Disputes Between Mexican and U.S. Businessmen, 22 ST. MARY'S L.J. 717, 720 (1991) (delineating fundamental differences between Mexican and United States legal systems).

8. *Id.*

9. *Id.*

10. *Id.* at 721.

11. See generally Fernando Alejandro Vázquez Pando, *Mexican Law of Judicial Competence*, 12 Hous. J. INT'L L. 337, 337-59 (1991) (discussing Mexican law of judicial competence).

12. *Id.*

executed in the presence of a Mexican Notary Public.¹³ Therefore, American standardized forms are insufficient, as such forms do not provide for the required notarization and do not comply with other Mexican formalities.

Despite differences between the legal systems of the United States and Mexico, the growing commercial relationship between the two countries is well-recognized.¹⁴ It is clear that the NAFTA will bolster the already-growing relationship between the United States, Mexico, and Canada.¹⁵

C. *Pick Your Partners Carefully*

Personal relationships are pivotal to making successful investments in Mexico. Experience teaches that such relationships are often more important than the cold economic calculations required for any investment. The most important relationship that any foreign investor will ever have in Mexico is with his or her Mexican partner. This is because a reliable Mexican partner will serve as a buffer against the disappointment often created by the labyrinth of Mexican commercial, legal, social, and political systems. Having a Mexican partner with a working knowledge of the Mexican system will facilitate most activities performed in Mexico, including the acquisition of permits. The partnership may also assist in dealing with any local labor problems. Ideally, to be of assistance, a Mexican partner should be visible in the community and experienced in Mexican business.

D. *Earn Your Partner's Trust*

Despite the importance of personal relationships to transacting business in Mexico, North American businesspersons often have considerable difficulty appreciating the importance of the personal aspects of conducting business with Mexican businesspersons, lawyers, accountants, and other advisors. For example, a request by a Mexican associate for a personal favor should generally be regarded as a compliment. It is a statement of confidence and trust in the person of whom the request is made. Therefore, it is clear that the North American edict that business matters be kept separate from personal matters be moderated considerably to ensure a successful investment in Mexico. It is important to know your Mexican associates, also their families and personal interests. In order to know your Mexican partners, associ-

13. See Jorge Camil, *Litigation in Mexico*, 19 SW. U. L. REV. 1171, 1173 (1990) (stating that Mexican law is formalistic process requiring notarization).

14. See A. Ogarrio & L. Pereznieta, *Mexico United States Relations: Economic Integration and Foreign Investment*, 11 Hous. J. INT'L L. 223, 223 (1990) (citing importance of Mexico-United States relations); see William D. Rogers, *Approaching Mexico*, 72 FOR. POL. 196, 197 (1988) (stating that importance of relationship between Mexico and United States is "without parallel").

15. PETER MORICI, *TRADE TALKS WITH MEXICO: A TIME FOR REALISM* 2-3 (1991).

ates, and advisors, it is necessary to invest time and attention to the personal aspects of their lives and your personal relationship with them.

E. *Seek Professional Advice*

The importance of retaining competent Mexican legal counsel to facilitate investment in Mexico cannot be understated. Attorneys in the United States who have experience doing business in Mexico and who have contacts with the Mexican legal community will be invaluable to the foreign investor who must choose Mexican legal counsel. Choosing a lawyer in Mexico is very much like buying a pair of shoes. Appearance is important, but fit is critical. It is crucial to invest the time to evaluate several lawyers or law firms before deciding which lawyer, or firm, might provide the best representation. The same care devoted to the selection of a Mexican lawyer should be exercised in the selection of a Mexican accountant.

F. *Establish a Government-Relations Program*

In Mexico, “know-whom” is often more important than “know-how.” It is important to develop a network of people in government or in the private sector who are politically involved and who (1) can understand your business and its problems well enough to explain them to key governmental officials and (2) have the capacity to take actions legally that will help you solve your government-related problems.

A government-relations program is deficient if it does not emphasize understanding the Mexican government’s motives and rationale for current regulations. Finally, the utilization of United States legal counsel experienced in Mexican business transactions is critical to structuring an effective government-relations strategy and program.

III. UNDERSTANDING MEXICO’S MOTIVES AND RATIONALES FOR REGULATIONS

A. *Historical Background*

The continual political and economic instability experienced in Mexico throughout the nineteenth century reflected the inability of the newly independent Mexican society to achieve a consensus or a political and economic direction. The earliest emergence of a consensus came when Porfirio Díaz took control of the government in 1876 and launched a successful program of economic growth.¹⁶

16. See Sandra F. Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AM. J. INT'L L. 281, 283 (1986) (relating concerns about foreign domination during Díaz regime); see also DANIEL COSÍO VILLEGAS, *HISTORIA MODERNA DE MÉXICO LA REPÚBLICA RESTAURADA* 634-39 (1955) (discussing magnitude of

Three factors help to explain the transition from stagnation to growth. First, political stability emerged. Between 1876 and 1911, only two men occupied the presidency: Manuel González (1880-1884) and Díaz (1876-1880; 1884-1911). Second, vast Mexican resources and the stability of the Díaz era attracted a deluge of foreign investment. This increase in foreign investment helped to secure unprecedented stability in Mexico. Third, the initial deluge of foreign investment in transport systems encouraged growth in the Mexican economy, both internally and externally.¹⁷

The Díaz program, however, inspired a fear that the increasing foreign influence would exploit Mexico's natural resources and labor.¹⁸ Much of the nationalistic resistance to foreign investment that persists today originated from the prominence attained by foreign enterprises during the lengthy Díaz regime. This nationalistic sentiment was exacerbated during the Mexican Revolution (1910-1917). Since banks and foreign companies believed that Victoriano Huerta's regime would extend the prerogatives and concessions that Díaz had conferred, they actively supported Huerta's administration and attempted to impede the revolutionary trend.¹⁹ When Huerta was defeated by Carranza, banks and foreign companies were forced to face the consequences of having supported one of the most despised men in Mexican history.

One of the salient objectives to emerge during the country's revolution was the goal to recover Mexico's economic destiny. This goal was an essen-

railroad construction in Mexico). A good example of this success is railway construction. In 1880, Mexico had only 700 miles of track, and efforts by both the federal and state governments to promote a railway system had failed. Under Díaz, railway concessions were again opened to foreign investors, and over one-third of all foreign investment during the Díaz period was devoted to railroad construction. By 1910, over 12,000 miles of track had been built. A second major concentration of foreign investment was in the extractive industries. Twenty-four percent of all foreign funds flowed into mining and metallurgy, and another three percent into petroleum production.

United States investments, which by 1911 accounted for 38% of all foreign investment, were highly concentrated in railroad construction and in the extractive industries. Over 41% of all foreign investment was allocated to railway construction, and over 38% to mining and metallurgy. Money from the United States accounted over 47% of foreign capital in railway construction and 61% in mining. Sandra F. Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AM. J. INT'L L. 281, 283 (1986).

17. Sandra F. Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AM. J. INT'L L. 282, 283 (1986).

18. *Id.*

19. See ERNESTO LOBATO LOPEZ, *EL CRÉDITO EN MÉXICO* 256-57 (1945); see also JAIME ALVAREZ SOBERANIS, *EL RÉGIMEN JURÍDICO Y LA POLÍTICA EN MATERIA DE INVERSIONES EXTRANJERAS EN MÉXICO* 57-60 (1991) (discussing distribution of property in Mexico); MIGUEL WIONZEK, *EL NACIONALISMO MEXICANO Y LA INVERSIÓN EXTRANJERA* 10-11 (1967) (discussing conflict between providing necessary industry and loss of national control).

tial tenet of every subsequent administration. The Mexican Constitution, promulgated in 1917, placed restraints on foreigners' economic activities and ownership of land in Mexico. These constitutional restrictions formed the basis and were the harbingers of future limitations on the role of foreign-investment capital and management.

B. *The Mexican Constitution*

The Mexican government maintains and is guided by a series of well-defined policies and principles based on the Mexican Constitution.²⁰ In economic matters, for example, the Constitution requires the government to follow nationalist policies, antecedents of which date back more than thirty years.²¹ Such policies and antecedents enshrined in the Constitution formed the basis for nationalizing the banks and the system of exchange controls adopted in 1982 when the peso was devalued.

During that devaluation period, public officials recognized that Mexico was facing the most serious economic crisis of its modern history.²² To respond to the crisis, the government prepared significant plans and directives. First, the Constitution was amended in 1983,²³ permitting the federal government to adopt measures of great scope in economic matters and to reorient the principles governing the actions of the state and private individuals. One of those measures was the National Development Plan (PND) of 1983, authorized by President Miguel de la Madrid. The PND²⁴ was the instru-

20. MEX. CONST. (amended 1983). The Mexican Constitution was promulgated February 5, 1917. *Id.*

21. See JAIME ALVAREZ SOBERANIS, *EL RÉGIMEN JURÍDICO Y LA POLÍTICA EN MATERIA DE INVERSIONES EXTRANJERAS EN MEXICO* 58-59 (1991) (noting trend of nationalism commencing in 1910).

22. See CARLOS FELIPE DVALOS MEJIA, *DERECHO BANCARIO Y CONTRATOS DE CRÉDITO* TOMO II 71-78 (2d ed. 1992) (listing series of events which led to peso devaluations in early 1980s).

23. D.O., Feb. 3, 1983 (amending articles 16, 25, 27 §§ XIX, XX, 28, 73 §§ XXIX-A, XXIX-E, XXIX-F of MEX. CONST.); see also JOSÉ FRANCISCO RUIZ MASIEU & DIEGO VALADES, *NUEVO DERECHO CONSTITUCIONAL MEXICANO* 502-04 (1983) (comparing actual and original text of Constitution).

24. National Development Plan [PND], 1983-1988, Federal Chief Executive (May 1983); see also Julio C. Treviño, *Mexico: The Present Status of Legislation and Governmental Policies on Direct Foreign Investments*, 18 INT'L LAW. 297, 300 n.12 (1984) (listing provisions of PND). This plan, invaluable to Mexican public officials, is also an indispensable reference document for the private sector. The plan was prepared under the inspiration and supervision of President de la Madrid. It is a 430-page document containing a very detailed explanation of the political and economic policies that govern Mexico, a diagnosis of Mexico's national problems, purposes and strategies for solutions in a national and international context, and the basis for implementing of those strategies. The chapters on development financing analyze participation of private capital, with an emphasis on industrial development and foreign trade.

ment that articulated the development policies of the administration and provided for their implementation.

The constitutional amendments that were approved create a broad system of powers vested in the Congress and the Federal Chief Executive. The amendments allow "the Federal Government to plan and carry out *all* the strategy of development of the country in accordance with the PND."²⁵ Article 28 of the Constitution, as amended, lists the strategic areas reserved exclusively to state control and adds new areas to the list, including public service of banks and credit.²⁶ Three articles, Article 28, together with amended Articles 25 and 26, establish the foundation for the economic, political, and social structure of the country. These articles define the role of the Mexican state in the economy. For example, amended Article 25 provides that "[t]he law shall encourage and protect the economic activity of private parties and shall create conditions for development in the private sector that will contribute to national economic development."²⁷

By virtue of the foregoing articles, the Mexican state is defined as the "rector" of the economy²⁸ and the economic system. The Constitution describes this system as a "mixed economy," a hybrid between a market and state-planned economy. During the present administration (1988-1994), this model is being modified to adapt to the dramatic changes facing the country.²⁹

Finally, the document discusses the ties of the country with the international economy and states the application of foreign investment policy.

25. Julio C. Treviño, *Mexico: The Present Status of Legislation and Government Policies on Direct Foreign Investments*, 18 INT'L LAW. 297, 299 (1984).

26. D.O., Sept. 1, 1982. Until August 1982, Mexican banks had always been owned and managed by the private sector. As a consequence of a decree enacted by the General Congress in September 1982, President Lopez Portillo nationalized all the assets of the banks. As a result, banking institutions that were considered regular mercantile companies were transformed into national credit corporations. *Ley Reglamentaria del Servicio Público de Banca y Crédito*, D.O., Sept. 1, 1982. See generally MIGUEL ACOSTA ROMERO, *LEGISLACIÓN BANCARIA* 96-150 (2d ed. 1989) (characterizing banking system in Mexico). On May 2, 1990, President Salinas submitted to the General Congress a proposed bill of amendments to the Constitution providing for reprivatization of banks. The proposal was approved and, as a result, all banks have been reprivatized, and a new banking law has been enacted.

27. MEX. CONST. art. 25 (amended 1983).

28. *Id.* A synonym for this word could be "coordinator."

29. See Fernando Snchez Ugarte, *Mexico's New Foreign Investment Climate*, 12 HOUS. J. INT'L L. 243, 248-51 (1990) (suggesting goals for industrial policy). The industrial policy of the present administration rests on five basic strategies:

1. internationalizing Mexican industry;
2. upgrading productivity levels through technological development and promotion of the philosophy of higher quality;
3. deregulating economic activities;
4. promoting export; and
5. strengthening the domestic economy.

In order properly to assess changes, it is important to note that for over forty years Mexico had a closed economy. The government sought to industrialize the country by substituting Mexican products for imports. This process created a large domestic industrial sector. Unfortunately, few manufactured goods were exported.

Along with the debt crisis of the early 1980s, rapidly increasing inflationary pressure produced high levels of investor uncertainty. This uncertainty caused slow growth rates in the overall economy and the retention of obsolete technology in the industrial sector. Whatever competitiveness Mexican industry offered resulted from the low wages paid throughout the job sector. The Mexican government attempted to solve these problems through several measures. These measures were outlined in the National Development Program for 1989-1994 and the National Program for Industrial Modernization and Foreign Trade for 1990-1994. Both of these initiatives emphasized the role of private investment as the engine of economic development and the role of government as the driver of the engine.³⁰

IV. FOREIGN INVESTMENT IN MEXICO: THE LEGAL FRAMEWORK

A. Regulation Prior to 1973

Mexico's current foreign-investment policies are derived from administrative policy declarations rather than legislation. For most of the period from World War II to 1973, foreign-investment policy was characterized by an emphasis on increasing exports and protecting existing national industries from domestic competition by foreign investors.³¹ The policies were derived from a multitude of decrees applied by the executive branch of the government on a case-by-case basis. A prospective foreign investor was forced to examine the policies and practices of the federal executive branch to ascertain if, and to what extent, a business could be established in Mexico.

The Emergency Decree of 1944³² granted extensive discretionary control over foreign capital to the Ministry of Foreign Affairs. The decree was intended to avert disruption of the economy caused by temporary investments of flight capital. The decree introduced restraints on the "creation, modification, liquidation, and transfer of stock of Mexican companies" with foreign shareholders that were organized subsequent to enactment of the decree. While it originally affected few and relatively insignificant activities, the Emergency Decree was nonetheless the precursor to more restraints on for-

30. *Id.*; 428 D.O. 1 (1989) (*Plan Nacional de Desarrollo* 1989-1994).

31. ROGER D. HANSEN, *LA POLITICA DEL DESARROLLO ECONÓMICO* 67 (1973).

32. Emergency Decree, D.O., July 7, 1944; Sandra F. Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AM. J. INT'L L. 281, 285 (1986).

eign investment.³³

Between 1940 and 1965, foreign investment almost quadrupled. By 1969, it exceeded two billion dollars. However, the “rules of the game” were not yet clear.³⁴ By 1970, the only legal restrictions on the amount of foreign participation in industrial activities were those resulting from the application of the Emergency Decree and the exclusion of both domestic and foreign private participation in nationalized industries. However, the Mexican government used other techniques to divest foreigners of control and ownership, including tax incentives and the selective application of import controls. The government demonstrated a preference to shape its policies flexibly to encourage individual investment projects. This flexibility was possible because there was no general body of law structuring foreign investments. The government adopted specific statutory restraints only in selected industries. The resulting attitude towards foreign investment was one of cautious acceptance. Foreign investment was encouraged as a complement to domestic investment, and the Ministry of Commerce and Industrial Promotion insisted on “Mexicanization”³⁵ and industrial integration.

Between 1972 and 1976, Mexico extended control over foreign investment through legislation. The Law to Promote Mexican Investment and Regulate Foreign Investment (FIL), enacted in 1973, was of utmost importance. Its purpose was to codify existing laws, regulations, and policies, and it established the National Foreign Investment Commission (FIC). The FIC was formed to exercise discretionary powers under the framework of the FIL and the National Registry of Foreign Investment (FIR).³⁶

B. *The Foreign Investment Law of 1973*

The Mexican Constitution grants to the legislature the power to prescribe laws regulating foreign investment. The Constitution permits Congress to “issue laws for the purpose of promoting Mexican investment and regulate foreign investment.” It was under this authority that the FIL was enacted in

33. Sandra F. Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AM. J. INT'L L. 281, 285 (1986).

34. *Id.*

35. “Mexicanization” refers to the process by which the percentage of Mexican participation in an industry is increased, usually to at least 51%. For some industries the percentage had to be increased to more than 51%.

36. *Ley para Promover la Inversión Mexicana Y Regular la Inversión Extranjera [FIL] [New Foreign Investment Law]*, D.O., Mar. 9, 1973, translated in ** DOING BUSINESS IN MEXICO pt. IV, A.4-1 to A.4-53 (Michael W. Gordon ed., 1992). For an updated discussion of the 1991 FIL see generally LIC. Y.C.P. ENRIQUE CALVO NICOLAU & C.P. ENRIQUE VARGAS AGUILAR, *LEY DE INVERSION EXTRANJERA CORRELACIONADA* (3d ed. 1991) (outlining 1991 FIL).

1973.³⁷

The FIL contains numerous defensive and regulatory measures with regard to foreign investment. For example, Article V states the 51-49% general rule for Mexican and foreign-capital investment, which was designed to stimulate joint ventures at the point of incorporation. Article IV exclusively reserves certain industries to the Mexican government and domestic investors. Article VIII requires approval from the FIC when foreign investors wish to acquire Mexican concerns. Article XII grants the Commission discretionary authority to decide on the expansion of existing foreign investment.³⁸

The FIC consists of representatives of the President and seven ministries and, according to the FIL, meets on a monthly basis. Pursuant to its statutory powers, the FIC may: (1) increase or reduce the percentage of foreign participation in geographical areas of economic activity when there are no required definite percentages; (2) establish the terms and conditions under which the investment will be received; (3) prescribe specific percentages and conditions for those projects which "may justify special treatment"; (4) authorize projected foreign investors in companies established or to be established in Mexico; (5) authorize the participation of existing foreign investors in new areas of economic activities or in new product lines; and (6) establish "requirements and criteria" for the application of foreign investment laws and regulations.³⁹ The FIL requires application of the law although there are no "regulations" per se.

The FIL also sets forth the criteria that the FIC is to apply to determine whether foreign investment is in the best interest of the country. The FIL denotes the requirements that this kind of investment must fulfill. To meet these requirements, the investment must: (1) be complementary to Mexican investment; (2) not displace national business enterprises that are operating satisfactorily; (3) have positive effects on the balance of payments, particularly on the increase of Mexican exports; (4) assess its effects on employment and training of Mexican technical and management personnel; (5) incorporate domestic inputs and components in the manufacture of products; (6) finance its operations with resources from abroad; (7) contribute to the development of the less-economically-developed zones or regions; (8) contribute to technological research and development; (9) comply with and contribute to the achievement of national development; and (10) comply

37. MEX. CONST. art. 73, § XXIX-F.

38. Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [FIL Reg.] [New Foreign Investment Regulations] art. 4, 5, 8, 12, D.O., May 16, 1989, translated in ** DOING BUSINESS IN MEXICO pt. IV, app. 4 (Michael W. Gordon ed., 1992).

39. *Id.* arts. 11, 12.

with Mexico's policies on development.⁴⁰

C. *The Regulations of the Foreign-Investment Law*

Mexico's impetus for change stems, among other things, from the economic crisis in 1982. After continual economic growth from 1960 to 1980, the sudden drop in world oil prices precipitated a dramatic decline in the Mexican economy.⁴¹ Subsequent years brought soaring inflation rates, an exploding external debt of over one hundred billion dollars,⁴² and the flight of billions of dollars in capital.

Both the de la Madrid and Salinas administrations responded to these ills by initiating economic restructuring. Among the measures taken, the Salinas administration continued an anti-inflation pact initiated under President de la Madrid,⁴³ completed the renegotiation of Mexico's foreign debt, opened the economy to foreign competition,⁴⁴ and substantially reduced the government's presence in the economy through privatization and deregulation.⁴⁵

In this context, the Salinas administration recognized the importance of attracting foreign investment. However, significant obstacles stood in the way of any proposals to amend the FIL, probably the most significant of which was the division in the Mexican House of Representatives. This division raised serious political questions as to the success of any legislative attempt to liberalize foreign investment restrictions.⁴⁶ In order to circumvent such obstacles, the President issued the new regulations to the FIL (FIL

40. *Id.* art. 13.

41. See David B. Hodgins, Comment, *Mexico's 1989 Foreign Investment Regulations: A Significant Step Forward, But Is It Enough?*, 12 HOUS. J. INT'L L. 361, 361-62 (1990) (recounting Mexico's economic decline).

42. Jonathan Peterson, *Mexican Reform Will Give U.S. Investors a New Lease on Life*, L.A. TIMES, May 22, 1989, IV, at 2, col. 1.

43. The Pact for Stability and Economic Growth reduces inflation by controlling prices, wages, and the rate of exchange. Originally established during the Miguel de la Madrid administration, it is still in effect.

44. Deborah Riner, *What the Numbers Tell Us: Growing Confidence in the Mexican Economy*, BUS. MEX., Jan./Feb. 1992.

45. The program to sell off state-owned enterprises began under the de la Madrid administration (1982-1988). Through privatization closure, merger or transfer of state-owned companies from federal to state or regional entities, the number of state-owned enterprises dropped from 1,155 in 1982 to 269 by the end of 1991. Even more impressive than the number of entities sold is their net worth. Total revenues for the administration to June 1991 were over 4 billion United States dollars. Laura Carlsen, *Changing Hands: Mexico's Privatization Program Proceeds in the Transfer of State-Owned Enterprises to Private Hands*, BUS. MEX., June 1991. The sum mentioned before does not include banks, telephone shares, or steel Mills.

46. Ignacio Gómez-Palacio, *Mexico: A Difficult Task*, 12 HOUS. J. INT'L L. 253, 259 (1990).

Regulations).⁴⁷

The President's authority to issue regulations is granted by Article 89, Paragraph I of the Mexican Constitution.⁴⁸ However, the scope of the regulations is necessarily limited to the underlying law. Separation of powers, a governing concept fundamental to the Constitution, requires that the President carry out acts that provide for the exact observance of the law issued by the legislative branch.⁴⁹ Consequently, any act in contravention of this principle would be considered a breach of the constitutional regime.

The FIL Regulations do not readily promote foreign investment because the regulations do not grant incentives such as abatements, tax breaks, or cost reductions. The main benefit the FIL Regulations confer to foreign investors lies in deregulation.⁵⁰ Article 5 of the FIL Regulations provides that upon incorporation foreign investors may hold any proportionate interest in the capital stock of Mexican business enterprises, without FIC's approval, if they comply with the following six requirements:⁵¹

- 1) Investments must be made in fixed assets used to conduct the company's economic activities in amounts up to that periodically set by the Commerce and Industrial Development Ministry (from 1989 through 1992 this amount was one hundred million dollars);⁵²
- 2) Investments must be funded by outside sources;⁵³
- 3) Industrial establishments must carry out industrial or manufacturing activities outside of the growth-

47. Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [FIL Reg.] [New Foreign Investment Regulations], D.O., May 16, 1989, *translated in* ** DOING BUSINESS IN MEXICO pt. IV, app. 4 (Michael W. Gordon ed., 1992).

48. MEX. CONST. § 89. Paragraph I of the Mexican Constitution confers upon the President of the Republic the following capacities, among others:

- (a) that of promulgating the laws issued by the Congress of the Union; (b) that of executing said laws; and (c) that of providing administrative authority to promulgate regulations. This last provision allows the Executive to issue general and abstract provisions, whose purpose is the execution of the Law, developing and complementing in detail the provisions included in the legislation issued by the Congress of the Union. . . . [The regulation] is an alternate norm that has its measure and justification in the law. . . . [T]he regulation provides the general and abstract media that must be used to apply the law to concrete cases.

MEX. CONST. § 89, para. I (Jaime M. Alvarez Garibay trans.).

49. Ignacio Gómez-Palacio, *The New Regulation on Foreign Investment in Mexico: A Difficult Task*, 12 HOUS. J. OF INT'L L. 253, 259 (1990).

50. *Id.*

51. Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [FIL Reg.] [New Foreign Investment Regulations], art. 5, D.O., May 16, 1989, *translated in* ** DOING BUSINESS IN MEXICO pt. IV, app. 4 (Michael W. Gordon ed., 1992).

52. *Id.* art. 5, § I.

53. *Id.* art 5, § II.

controlled geographical zones;⁵⁴ 4) Incorporated companies shall maintain, as a minimum, a balanced-accumulated-foreign-currency budget during their first three years of operation;⁵⁵ 5) Investors must create permanent jobs and establish worker training and development programs;⁵⁶ and 6) Investors must employ adequate technology and meet environmental requirements.⁵⁷

Automatic approval is possible only if the activities conducted by the company are not included in the Catalog of Classified Activities.⁵⁸

These requirements effectuate governmental policies designed to encourage foreign investment that, as will be examined below, complements and bolsters the Mexican economy. The One Hundred Percent Foreign-Ownership Rule represents a dramatic deviation from the earlier rule limiting foreign investment to 49%.

Other important areas, such as foreign investment through trusts, investment by International Financial Development Institutions, neutral investment,⁵⁹ temporary foreign investment, expansion of foreign investment,⁶⁰ and the purchase and rental of real property, are also contemplated in the FIL Regulations.

Notwithstanding the above, and while enhancing foreign investment opportunities and eliminating the FIC-approval requirement in many cases, Article 5 of the FIL Regulations directly contravenes Articles IV and V of the FIL Act.⁶¹ Because the FIL is an act that was approved by Congress and enacted by the legislature, it is superior to the FIL Regulations. Therefore, provisions of the FIL Regulations that contradict the FIL and other laws enacted by Congress "appear to be technically illegal and unconstitutional."⁶² However, according to information furnished by the General Office of Foreign Investment, the constitutionality of the FIL Regulations has

54. *Id.* art. 5, § III. The term "growth-controlled geographical zones" refers to Mexico City, the surrounding suburbs of the state of Mexico, Guadalajara, and Monterrey.

55. FIL Reg. art. 5, § IV.

56. *Id.* art. 5, § V.

57. *Id.* art. 5, § VI.

58. The FIL Regulations include a classification of economic activities and products that are subject to some kind of restriction. These restrictions range from number 1 to number 6, with number 1 being an absolute restriction (such as prohibition of extraction of petroleum or minting coin) and number 6 requiring the FIC's prior approval for foreign investors to hold a majority interest (such as Air Navigation Services).

59. FIL Reg. art. 13.

60. *Id.* arts. 23, 27.

61. Ignacio Gomez-Palacio, *The New Regulation on Foreign Investment in Mexico: A Difficult Task*, 12 HOUS. J. OF INT'L L. 253, 259 (1990) (noting that One Hundred Percent Rule contravenes FIL Act).

62. *Id.* at 262.

not been challenged in the Mexican courts.⁶³

D. *The Resolutions of the Foreign Investment Commission (FIC)*

When the FIL was enacted in 1973, it was conceived as a flexible instrument capable of being adapted to regulate the complex and changing economic phenomenon of foreign investment. One way to achieve this flexibility is through General Resolutions, which the FIC is entitled to issue.⁶⁴ Among several General Resolutions issued by the FIC is: the General Resolution that systematizes and updates the General Resolutions issued by the Mexican Foreign Investment Commission, published in the Official Gazette on February 3, 1988. This resolution was repealed by the FIL Regulations. However, the FIC continues to issue General Resolutions dealing with specific matters.⁶⁵ It is important to bear in mind that foreign investment in Mexico is, as a result, governed by the FIL, the FIL Regulations, and the General Resolutions.

E. *The Investor's Response to the Recent Changes*

In 1990, David B. Hodgins wrote:

The New Regulations have significantly altered the investment environment for potential investors. While many foreign investors have responded favorably, investor response to the New Regulations appears to be mixed, and many deterrents to significant foreign investment remain. . . . To boost foreign investment from 3.1 billion dollars in 1988 to 4.5 billion dollars in the mid-1990's . . . appear[s] overly optimistic.⁶⁶

In 1992, two years since Hodgins's commentary, the foreign-investment targets envisioned by the Salinas administration have proven to be very realistic.⁶⁷ Investments from Germany, Mexico's largest investor after the United States, and Great Britain account for 5.8% of all foreign investment in Mexico. German investment in Mexico at the end of 1990 was approxi-

63. Telephone Interview with Mr. Fernando Heftye, Technical Secretary of the General Office of Foreign Investment (FIC), in Mexico City (Aug. 1992). The mechanism for a challenge to the Constitutionality of the Regulations would be an *amparo*.

64. The General Resolutions deal with many specific topics and some authors consider them to be unconstitutional. *Contra* JAIME ALVAREZ SOBERANIS, *EL RÉGIMEN JURÍDICO Y LA POLÍTICA EN MATERIA DE INVERSIONES EXTRANJERAS EN MÉXICO* 351 (1991).

65. *Id.* at 350.

66. David B. Hodgins, *Mexico's 1989 Foreign Investment Regulations: A Significant Step Forward, But Is It Enough?*, 12 *HOUS. J. INT'L L.* 361, 369 (1990); see Rosemary R. Williams, *Has Mexico Kept the Promise of 1984? A Look at Foreign Investment Under Mexico's Recent Guidelines*, 23 *TEX. INT'L L.J.* 417, 427 (1988) (citing fear of some investors despite Mexico's recent attitude of encouraging investment in Mexico); Matt Moffett, *Mexico Loosens Investment Rules for Foreigners*, *WALL ST. J.*, May 16, 1989 (permitting 100% foreign ownership).

67. See Appendix A *infra* (tracing levels and categories of foreign investment in Mexico).

mately two billion dollars, and approved investment projects will double that amount by the middle of 1994.⁶⁸ Moreover, during 1991, it became clear that foreign investment was beginning to play a major role in setting prices in the Mexican stock market.⁶⁹ By the end of 1990, foreign investment in the stock market totaled four billion dollars.⁷⁰ The flow was even greater in 1991. In May of that year, the government sold most of its remaining non-voting capital stock in Teléfonos de México (Telmex, the country's monopoly telephone company) through an international equity offering for over two billion dollars.⁷¹

During the first quarter of 1992, direct foreign investment in Mexico reached almost 5,518.9 million dollars. In view of the above, accumulated foreign investment from 1989 until June 1992 totaled 23.308 million dollars.⁷²

V. THE IMPACT OF THE NAFTA ON MEXICAN FOREIGN INVESTMENT REGULATION

Certain investment provisions of the NAFTA may require fundamental changes in the legal structure of Mexico that currently regulates Foreign Direct Investment (FDI).⁷³ The provisions addressing national treatment and most-favored-nation status dispose of some of the most aggravating restrictions of the 1973 legislation that have bedeviled foreign investors for almost twenty years.⁷⁴

Before the foreign investor takes too much comfort in the articles that limit investment restrictions, he or she must study the provisions with reservations and exceptions that modify the sweeping language of the liberalizing articles. An examination of the liberalizing articles and a comparison with existing law reveals that the reservations and exceptions articles preserve certain limitations present in existing Mexican law.

A. *Minority-Foreign Ownership and Control*

A basic tenet of the 1973 Mexican law is that foreign investors are generally allowed only a maximum of 49% ownership of an investment and can-

68. Commerce and Industrial Development Ministry, Statistics of the General Direction of Foreign Investment (1992) (unpublished manuscript, on file at Ministry of Commerce and Industrial Development, Mexico City).

69. Timothy Heyman, *Foreign Investment in the Mexican Stock Market*, BUS. MEX., Jan./Feb. 1992.

70. *Id.*

71. *Id.*

72. See Appendix B *infra* (tracing level of foreign investment in Mexico).

73. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., chs. 11, 12, 13, 14, 17, 20 (text revised Sept. 6, 1992).

74. NAFTA ch. 11, arts. 1102, 1103.

not exercise more than 49% of the management and control of that investment.⁷⁵

As was mentioned above, the liberalizing regulations of 1989⁷⁶ generally permit 100%-foreign ownership. It must be remembered, however, that the regulations do not have the same stature as other law and may only interpret or clarify the law.⁷⁷ Mexican regulations that are seen to modify or limit a statute are subject to constitutional attack.⁷⁸

Treaties, on the other hand, are the supreme law of Mexico and supersede previously enacted legislation.⁷⁹ Once the NAFTA is ratified by the Mexican Congress, it will be superior in the Mexican legal hierarchy to the Mexican FIL. When the ratification process is complete, none of the parties to the NAFTA will be able to modify it unilaterally. Thus, the rules for trade and investment among the parties will be made permanent, subject only to changes agreed upon by the three parties. The importance of such permanency cannot be overstated. Many believe that the greatest barrier to long-term foreign investment in Mexico has been the uncertainty felt by foreigners, which stems from the changes that occur in foreign-investment restrictions from one six-year presidential term to another. This uncertainty has been evident whether the foreign investment was for 100% of the venture or less than 100% of the venture.

In addition to fostering greater certainty, the NAFTA injects more transparency into the rules that govern foreign investment in Mexico. Rather than relying only on liberal regulations that can be changed from one day to the next, or the discretion of government officials to apply the law in a liberal fashion, the NAFTA essentially requires the parties (except for the defined exceptions) to permit foreign investment in their respective countries based on economic decisions made by investors.⁸⁰

B. *Guarantees Against Foreign-Investment Restrictions*

The articles in Chapter 11 on national treatment, most-favored-nation treatment, non-discriminatory treatment, and minimum standard treatment, express a unity of purpose among the three parties to avoid unilateral restrictions on foreign investment. Indeed, the four articles just mentioned bar such restrictions in four separate, and well-developed methods. Having nu-

75. Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [FIL] [New Foreign Investment Law], art. 5, D.O., Mar. 9, 1973, *translated in* ** DOING BUSINESS IN MEXICO pt. IV, A.4-1 to A.4-53 (Michael W. Gordon ed., 1992).

76. *Id.*

77. *Id.*

78. GABINO FRAGA, DERECHO ADMINISTRATIVO 102-10 (1986).

79. MEX. CONST. art. 133.

80. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., ch. 11, arts. 1102-1105 (text revised Sept. 6, 1992).

merous methods emphasizes the parties' desire that unilateral restriction of foreign investment, at least among the contracting parties, not interfere in the effectuation of the purposes of the NAFTA.

C. *National Treatment*

The negotiated text of the NAFTA requires each party "to accord to investors of another party" treatment no less favorable than it accords to its own investors with respect to the "establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."⁸¹ This same principle is repeated in sub-section (2) of the same article with respect to "investment of another party."⁸² Sub-section (3) of the article extends the requirements of "national treatment" to states and provinces of the parties.⁸³ The article goes on "[f]or greater certainty" to explain that no party shall require that a minimum level of equity be held by a national in the territory of the party where the investment is made or to require the investor of another party to sell or otherwise dispose of an investment in the territory of the party where the investment is made.⁸⁴

This article of the NAFTA is clearly at odds with the principle of minority-foreign ownership and control that is the hallmark of the Mexican FIL.⁸⁵ Since the 1989 regulation of the law cannot change the law itself, only the NAFTA can provide the assurance that the liberalization of restrictions on foreign investment will remain intact.⁸⁶ In fact, subject to careful study of the liberalizing investment provisions of the NAFTA, upon application and after ratification, these provisions may substantially expand the freedom of foreign investors to invest in Mexico.

D. *Most-Favored-Nation Treatment*

Article 1103 of the NAFTA goes beyond FIL Regulations in that national policy requires "treatment no less favorable" to "non-party" investors than to "party" investors.⁸⁷ Thus, the standards available to the "party" investor are extended to the "non-party" investor on an equal basis. The notion of

81. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., ch. 11, art. 1102(1) (text revised Sept. 6, 1992).

82. *Id.* art. 1102(2)

83. *Id.*

84. *Id.*

85. Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [FIL] [New Foreign Investment Law] art. 5, D.O., Mar. 9, 1973, translated in ** DOING BUSINESS IN MEXICO pt. IV, A.4-1 to A.4-53 (Michael W. Gordon ed., 1992).

86. NAFTA ch. 11, arts. 1102, 1103.

87. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., ch. 11, art. 1103 (text revised Sept. 6, 1992).

most-favored-nation treatment is clearly inconsistent with the text and spirit of the Mexican FIL.

E. *Nondiscriminatory Treatment*

As if to make the principles of national treatment and most-favored-nation treatment absolutely clear, this brief NAFTA article requires that each party “accord to investors of another party and investments of investors of another party the better of treatment required under the two previous articles.”⁸⁸ The Mexican FIL, in contrast, is openly discriminatory in favor of national investment and is specifically designed to permit foreign investment only in areas where national investment is lacking.⁸⁹

F. *Performance Requirements*

A major barrier to foreign investment in Mexico has been performance requirements.⁹⁰ Article 1106(1) of the negotiated the NAFTA text describes these requirements and flatly prohibits a party from imposing them. The article also prohibits the enforcement of any commitment or undertaking in connection with the establishment, acquisition, expansion, management, conduct, or operation of an investor’s investment, regardless of whether the investor is a party or a non-party, if the commitment is:

- (a) To export a given level or percentage of goods or services;
- (b) To achieve a given level or percentage of domestic content;
- (c) To purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
- (d) To relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) To restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

88. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., ch. 11, art. 1103 (text revised Sept. 6, 1992).

89. Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [FIL] [New Foreign Investment Law] art. 13, § II, D.O., Mar. 9, 1973, *translated in* ** DOING BUSINESS IN MEXICO pt. IV, A.4-1 to A.4-53 (Michael W. Gordon ed., 1992).

90. Decreto que Determina Reglas para la Aplicación del Decreto para el Fomento y Modernización de la Industria Automotriz, D.O., Nov. 30, 1990; Decreto para el Fomento y Modernización de la Industria Automotriz, D.O., Dec. 11, 1989.

- (f) To transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws; or
- (g) To act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.⁹¹

These requirements were the heart and soul of the well-known automobile decrees of the 1980s and applied to the assembly of automobiles as well as the manufacture of automobile parts in Mexico by foreign enterprises.⁹² Even the liberal 1989 FIL Regulations did not eliminate these requirements with the sweeping finality of the NAFTA articles.

In addition to prohibiting such requirements, Article 1106 (3) of the text prohibits a party from conditioning receipt of advantages in connection with an investment in the territory of the party by requiring the investors of a party or of a non-party:

- (a) To purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
- (b) To achieve a given level or percentage of domestic content;
- (c) To relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
- (d) To restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.⁹³

The “advantages” referred to should be understood to relate to tax and energy subsidies that may be applied for in particular cases.⁹⁴ Even the requirements for maintaining a balance of foreign exchange are prohibited,⁹⁵ although these requirements are fundamental to the 1989 FIL regulations.⁹⁶

The relief from performance requirements is qualified. Any party may condition “receipt of an advantage” to invest in its territory on requirements

91. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., ch. 11, art. 1106 (text revised Sept. 6, 1992).

92. *Id.*

93. *Id.* ch. 11, art. 1106(3).

94. National Development Plan [PND], 1983-1988, Federal Chief Executive (Mex., May 1983).

95. NAFTA ch. 11, art. 1106(1)(d).

96. Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [FIL Reg.] [New Foreign Investment Regulations] art. 5, § IV, D.O., May 16, 1989, translated in ** DOING BUSINESS IN MEXICO pt. IV, app. 4 (Michael W. Gordon ed., 1992).

“to locate production, provide a service, train or employ workers, construct or expand facilities, or carry out research and development, in its territory.”⁹⁷ Because the liberation from performance requirements is not applicable to any requirement not listed in paragraphs (1) and (3) of Article 1106, it would appear that requirements or limitations on foreign investment in Mexico set out in the 1989 regulations may be applied. One such requirement is the directive that the investor locate a plant in a particular location in Mexico.⁹⁸

G. *Further Exceptions and Reservations*

In addition to the exceptions and the reservations just described, annexes I, III, and IV of the negotiated text set out a laundry list of limitations that will either delay the liberalizing impact of the NAFTA on foreign investments or indefinitely except from the NAFTA certain activities in Mexico that interest foreign investors. Among some of the more significant exceptions or reservations are the following.

1. Real Estate

Foreigners, including Mexican enterprises without a foreigners-exclusion clause, may not acquire “direct dominion” over land or water within 100 kilometers of the national border or within 50 kilometers of the coast.⁹⁹ Certificates of Ordinary Participation (COP) may be acquired by foreigners, however, and these certificates permit the holder to control real estate located in the prohibited zones.¹⁰⁰ A COP may be issued by a Mexican credit institution that has been granted authorization to acquire through a trust the title to real estate intended for industrial and tourist activities in the Restricted Zone for a period not to exceed thirty years. The trust may be renewed if (1) the beneficiaries remain the same, (2) the terms of the Trust are unchanged, (3) a request for extension is made within 360 to 181 days prior to termination, and (4) the provisions of the Mexican FIL and its regulations are observed.¹⁰¹ These provisions of the NAFTA echo Article 36 of the 1989 FIL Regulations.¹⁰²

97. NAFTA art. 1106.

98. FIL Reg. art. 5, § III.

99. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., Annex I, I-M-1, 2, 3 (text revised Sept. 6, 1992).

100. *Id.*

101. *Id.*

102. Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [FIL Reg.] [New Foreign Investment Regulations] art. 36, D.O., May 16, 1989, *translated in* ** DOING BUSINESS IN MEXICO pt. IV, app. 4 (Michael W. Gordon ed., 1992).

2. Acquisitions of Established Investments

Annex I permits the Mexican Foreign Investment Commission (FIC) to evaluate applications for the acquisition or establishment of an investment in restricted activities. The FIC must consider: “(a) effects on employment and training; (b) its technological contribution; [and] (c) in general its contribution to increase the Mexican industrial production and competitiveness.”¹⁰³

This provision of the Annex also allows the FIC to impose performance requirements that are not prohibited by Article 1106 of the Investment Chapter. This exception to the National Treatment (Article 1102) and the Performance Requirements (Article 1106) becomes effective January 1, 1994.

The performance requirements affect all of the investment activity described in Annex I and will make investment in some of the areas included in the Annex more difficult. Apart from its restrictive nature, this provision of the negotiated text is important because it clarifies and makes permanent the criteria for obtaining foreign investment approval for acquisition or investment applications.¹⁰⁴

Next, Annex I establishes an exception to national treatment (Article 1102) with respect to foreign acquisition of more than a 49%-ownership interest in a Mexican enterprise located in an unrestricted area. The exception creates monetary thresholds on the maximum amount of foreign investment in the unrestricted areas. When the maximum amounts are exceeded, the FIC must give its approval before a foreigner can acquire the additional ownership interest. The monetary thresholds are: twenty-five million dollars for the first three years; fifty million dollars for the next three-year period; seventy-five million dollars for the following three years and one hundred fifty million dollars during the tenth year that the agreement is in force.¹⁰⁵

This exception should actually aid the foreign investor because it provides a clear standard as to the amount of money that can be invested in an existing enterprise in the unrestricted sectors before the investor must first seek the Mexican government’s approval.

H. *Investments in Classified Construction Activities*

Certain types of construction activity in Mexico are classified under the 1989 Regulation of the FIC. Annex I provides that the Mexican FIC must approve foreign ownership, directly or indirectly, that exceeds 49% of the

103. NAFTA Annex I, I-M-4.

104. *Id.* Annex I, I-M-4, I-M-5.

105. *Id.* Annex I, I-M-7.

ownership interest of enterprises established or to be established in Mexico that “carry out construction activities as set out in the classification mentioned above.”¹⁰⁶ This restriction ends after the NAFTA has been in force five years. Then, the investor of another party may own 100% of the construction enterprise without the FIC’s approval, even if it is in a classified area.¹⁰⁷

I. *Service Contracts for Drilling of Petroleum and Gas Wells*

Annex I provides an exception to national treatment (Article 1102) with respect to service contracts for drilling of petroleum and gas wells. Risk-sharing service contracts are prohibited. With respect to non-risk-sharing service contracts for such drilling, the FIC’s prior approval is required “for investors of another party and their investments to own, directly or indirectly, more than 49% of the ownership interest of an enterprise established or to be established in Mexico. . . .”¹⁰⁸ The duration of this exception is “indeterminate.”¹⁰⁹

J. *Commercialization of Petroleum Products*

There are two important exceptions that apply to this area of activity. One exception prohibits foreigners from engaging or investing in enterprises that engage in the distribution of liquified petroleum gas.¹¹⁰ The duration of this exception is “indeterminate.”¹¹¹ This exception is discouraging for those who would look for immediate participation in the distribution of liquid petroleum gas in Mexico. Note well, however, that the duration of this restriction is indeterminate, and this matter could be the subject of future negotiations.

Next, Annex I permits only Mexican nationals and Mexican enterprises operating under the Foreigners Exclusion Clause to “acquire, establish and operate retail outlets engaged in the resale of gasoline, diesel, lubricants, oils and additives.”¹¹² This provision requires study and discussion with the representatives of *Petróleos Mexicanos* to determine the extent that the annex may limit franchising to foreign investors who wish to participate in the re-

106. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., Annex I, I-M-26 (text revised Sept. 6, 1992).

107. NAFTA Annex I, I-M-26.

108. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., Annex I, I-M-27, 28 (text revised Sept. 6, 1992).

109. *Id.* Annex I, I-M-28.

110. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., Annex I, I-M-32 (text revised Sept. 6, 1992).

111. *Id.* Annex I, I-M-31, I-M-32.

112. *Id.* Annex I, I-M-33.

tail sale of gasoline or the retail sale of other products connected to the retail sale of gasoline.

K. *Automotive Parts Industry*

The Mexican FIC limited foreign ownership and participation in the manufacture of automotive components to 40%. That limitation was maintained in the 1989 liberalization regulation.¹¹³ Annex I of the NAFTA text, however, provides that the percentage of ownership immediately may increase to 49% and even to 100%, provided that the investor qualifies as a national supplier. A national supplier is an enterprise that (a) must obtain a national value-added of at least 20%; and (b) must not be controlled by or directly related to the manufacture of motor vehicles.¹¹⁴

While this provision of the NAFTA (Article 1102) is an exception to national treatment, it offers a substantial improvement in the conditions under which a maker of automobile parts can enter into an investment in Mexico.

L. *Maquiladora Industry*

The current directive still requires plant owners to obtain a permit from the Ministry of Commerce and Industrial Development to sell more than 50% of a product of a plant in the domestic market. However, after the first year of the agreement, this limit increases to 55% of the total value of the plant exports, and the limit continues to increase on an annual basis through the seventh year. Then, the annual amount that may be sold with such a permit reaches 85% of the value of the maquiladora's exports. From the eighth year on, no permit is required to sell to the domestic market.¹¹⁵

M. *Land Transportation*

Three years after the NAFTA has been signed, a person from Canada or the United States will be permitted to provide cross-border truck services to or from the territory of the border states (Baja California, Sonora, Chihuahua, Coahuila, Tamaulipas, and Nuevo Leon). Such truck services will be permitted to enter and depart Mexico through different ports of entry in

113. Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [FIL Reg.] [New Foreign Investment Regulations] Classification 3841, D.O., May 16, 1989, *translated in* ** DOING BUSINESS IN MEXICO pt. IV, A.4-1 to A.4-53 (Michael W. Gordon ed., 1992); Ley para Promover la Inversión Mexicana Regular la Inversión Extranjera [FIL] [New Foreign Investment Law] art. 5(c), D.O., Mar. 9, 1973, *translated in* ** DOING BUSINESS IN MEXICO pt. IV, app. 4 (Michael W. Gordon ed., 1992).

114. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., Annex I, I-M-37 (text revised Sept. 6, 1992).

115. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., Annex I, I-M-42, 43 (text revised Sept. 6, 1992).

these border states.¹¹⁶ Six years after the NAFTA has been in force, cross-border truck services may go into and out of any part of the territory of Mexico.¹¹⁷ Bus cross-border service will be permitted anywhere in the territory of Mexico three years after the NAFTA has been in force.¹¹⁸

Three years after the NAFTA has been signed, foreigners may own up to 49% of an enterprise that provides bus service, tourist transportation, and truck services for the transportation of international cargo between points in the territory. This percentage increases to 51% after the NAFTA has been in force 7 years and increases to 100% after 10 years. Foreign ownership of an enterprise providing truck service for domestic cargo is not permitted. The duration of this prohibition is "indeterminate."¹¹⁹

VI. CONCLUSION

Opportunities for the foreign investor in Mexico are brighter than they have been in fifty years. Nevertheless, the investor will make better decisions by being mindful of the substantial cultural and legal differences between the two countries, as well as the history of foreign-investment regulation in Mexico. This is true in negotiating the establishment of investments, joint ventures, and licensing agreements. With respect to the history of the FIL Regulation, an understanding of these directives is fundamental to predicting what the future may hold in this important area of human activity. Most foreign investors look forward to the day when investment policies in Mexico will be more transparent. Mr. Jaime Serra, Minister of Trade and Industrial Development, announced that the FIL and the FIL Regulations will be amended in order to adopt the NAFTA. These amendments, the recent history of Mexico's liberalization of foreign investment controls, and the commitments that Mexico has undertaken in the NAFTA, move Mexico closer to having a market that is driven and controlled by economic forces rather than government edict.

116. North American Free Trade Agreement [NAFTA], Aug. 12, 1992, U.S.-Mex.-Can., Annex I, I-M-86 (text revised Sept. 6, 1992).

117. *Id.*

118. *Id.* Annex I, I-M-86.

119. *Id.* Annex I, I-M-87.

1993]

FOREIGN INVESTMENT IN MEXICO

801

VII. APPENDIX A

**AUTHORIZED FOREIGN INVESTMENT ACCORDING TO ITS APPLICATION
(INVERSION EXTRANJERA DIRECTA AUTORIZADA POR LA CNIE POR
TIPO DE SOLICITUD)**

**(Enero. - Junio de 1992) January-June 1992
(Millones de Dolares) Millions of Dollars**

Application (Tipo de Solicitud)	Total Amount of Investment (Monto Total de Inversion)	Total Amount of FDI (Monto Total de IED)	Amount of FDI 1st Year (Monto de IED 1er Año)	Number of Projects (Numero de Proyectos)
TOTAL	1,771.43	1,395.60	578.20	157
New Companies (Nuevas Sociedades)	661.02	503.92	60.90	65
New Facilities (Nuevos Establecimientos)	19.11	18.31	9.78	17
New Activities (Nuevas Actividades)	82.35	82.28	31.33	7
New Lines of Products (Nuevas Lineas de Productos)	0.00	0.00	0.00	0
Trusts (Fideicomisos)	170.80	144.14	44.24	13
Transfer of Shares (Adquisicion de Acciones)	832.17	641.73	428.01	33
Reconsiderations (Replanteamientos)	5.98	5.22	3.94	22
Mergers (Fusiones)	0.00	0.00	0.00	0

Source: SECOFI: Office of Foreign Investment
(Fuente: SECOFI: Direccion General de Inversion Extranjera)

VIII. APPENDIX B

Information prepared by the General Direction of Foreign Investment, in June 1992, compared with the information provided by the FIC in 1987, for the period 1983–1987

FOREIGN INVESTMENT
(Millions of U.S. Dollars)

Period	New in the Year	ACCUMULATED	
		During the Six Year Period	Historic Balance
1971	168.0	168.0	3,882.4
1972	189.8	357.8	4,072.2
1973	287.3	645.1	4,359.5
1974	362.2	1,007.3	4,721.7
1975	295.0	1,302.3	5,016.7
1976	299.1	1,601.4	5,315.8
1977	327.1	327.1	5,642.9
1978	383.3	710.4	6,026.2
1979	810.0	1,520.4	6,836.2
1980	1,622.6	3,143.0	8,458.8
1981	1,701.1	4,844.1	10,159.9
1982	626.5	5,470.6	10,786.4
1983	683.7	683.7	11,470.1
1984	1,442.2	2,125.9	12,899.9
1985	1,871.0	3,996.9	14,628.9
1986	2,424.2	6,421.1	17,053.1
1987	3,877.2	10,298.3	20,930.3
1988	3,157.1	13,455.4	24,087.4
1989	2,913.7	2,913.7	27,001.1
1990	4,978.4	7,892.1	31,979.5
1991	9,897.0	17,789.1	41,876.5
1992			
JANUARY	1,158.7	18,947.8	43,035.2
FEBRUARY	1,525.4	19,314.5	43,401.9
MARCH	3,039.3	20,828.4	44,915.8
APRIL	4,080.4	21,869.5	45,956.9
MAY	5,786.4	23,574.5	47,661.9
JUNE	5,518.9	23,308.0	47,395.4

SOURCE: Commerce and Industrial Development Ministry