

MEXICO'S NEW FOREIGN INVESTMENT REGULATIONS: A LEGAL ANALYSIS

J. Hayden Kepner, Jr.*

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* B.A., M.B.A., J.D. Associate at Weil, Gotshal & Manges.

I. INTRODUCTION

On May 16, 1989, the President of Mexico, Carlos Salinas de Gortari, issued new Regulations¹ on the 1973 Law to Promote Mexican Investments and Regulate Foreign Investment.² These Regulations govern all aspects of domestic and foreign investment in Mexico. The Regulations reflect the current administration's belief in a free market approach to Mexico's economic problems, and significantly liberalize Mexico's legal restrictions governing foreign investment.³

Under the new Regulations, the Mexican government will now automatically approve most foreign investment projects of under \$100 million. To qualify for such automatic approval, an investor must meet six basic requirements.⁴ For investment projects not qualifying for automatic approval, the Regulations have simplified and sped up the process for seeking government authorization.⁵ The Regulations have also opened up areas of investment previously off limits to foreign involvement.⁶

Though these new Regulations seem to open Mexico up for foreign investment, they cause potential legal problems of which an investor must be aware. The Regulations are vague and confusing in many areas, and the Mexican government exercises great discretion in interpreting many of its provisions. Moreover, the Regulations, as they are written, appear to violate certain provisions of Mexico's Constitution.⁷ If so, a potential investor may one day find, that though he followed the Regulations to the letter, he nonetheless violated Mexican law. This could have serious ramifications for both himself and his investment.

1. Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [Regulation of Law to Promote Mexican Investment and Regulate Foreign Investment], 427 D.O. 11, May 16, 1989 [hereinafter Regulations].

2. Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [Law to Promote Mexican Investment and Regulate Foreign Investment], 316 D.O. 5, March 9, 1973 [hereinafter Foreign Investment Law], reprinted in Law to Promote Mexican Investment and to Regulate Foreign Investment and its Regulations, (1990) (unpublished translation, on file with Bancomer, New York, New York).

3. See LAFFAN ET AL., THE REGULATION OF FOREIGN INVESTMENT LAW 1 (1989).

4. Regulations, *supra* note 1, art. 5. For a list of the requirements, see *infra* notes 66 - 71 and accompanying text.

5. See Regulations, *supra* note 1, arts. 2, 82.

6. See *id.* arts. 23 - 26.

7. CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [Political Constitution of the United States of Mexico] [hereinafter MEX. CONST.].

II. THE FOREIGN INVESTMENT LAW OF 1973

A. General Provisions

Mexico has had a long and generally dismal experience with most forms of foreign involvement, including foreign investment.⁸ Consequently, a strong, nationalistic sentiment against foreign investment developed in Mexico's populace.⁹ As a result of this sentiment, Mexican presidents and legislatures have taken various steps throughout this century to eliminate foreign involvement in and perceived domination of their economy.¹⁰ In 1973, this process culminated in the passage of the Law to Promote Mexican Investment and Regulate Foreign Investment (the Law).¹¹

The Law is defensive in nature, reflecting Mexican nationalistic sentiment and distrust of foreign influence. As a general rule, the Law restricts foreign investors to 49% ownership of most new businesses.¹² The Law also restricts the acquisition of existing businesses by foreign investors¹³ and the expansion of an existing foreign-owned business.¹⁴

The Law created the National Commission of Foreign Invest-

8. See ALAN RIDING, *DISTANT NEIGHBORS: A PORTRAIT OF THE MEXICANS* 30 - 93 (1984) (giving a concise history of Mexico, including its experiences with foreign interference). See also Ewell E. Murphy, *Expropriation and Aftermath: The Prospects for Foreign Enterprise in the Mexico of Miguel de la Madrid*, 18 *TEX. INT'L L.J.* 431, 433 (1983) [hereinafter *Expropriation and Aftermath*]. By 1910, foreigners owned over 50% of Mexico's industry. This was one of the contributing causes to the Mexican Revolution of 1910 - 1917. *Id.*

9. See RIDING, *supra* note 8, at 458 - 92.

10. See, e.g., *MEX. CONST.*, *supra* note 7, art. 27 (governing the ownership of land in Mexico, and including the restrictive "Calvo Clause" pertaining to foreigners); Decreto que establece la necesidad transitoria de obtener permiso para adquirir bienes, a extranjeros, y sociedades mexicana que tengan o tuvieren socios extranjeras [Decree establishing the transitional need to obtain permission to acquire foreign goods and Mexican companies that have or had foreign associates], 145 *D.O.* 2, July 7, 1944 (the Emergency Decree of 1944, which granted extensive discretionary controls over foreign capital to the Secretariat of Foreign Relations)[hereinafter *Emergency Decree of 1944*]. See also HARRY WRIGHT, *FOREIGN ENTERPRISE IN MEXICO* 51 - 163 (1971) (detailing a thorough description of the history of foreign investment in Mexico during this century, including laws and government policies affecting it).

At times, Mexico did more than merely pass laws and issue decrees restricting foreign investment. In the 1930s, President Lazaro Cardenas gained the eternal reverence of Mexico's populace by nationalizing the foreign owned railroads and oil industry. *Id.* at 68 - 70 (discussing specific events leading up to the expropriation). See also RIDING, *supra* note 8, at 227 - 33 (discussing the oil expropriation in Mexican history).

11. See *supra* note 2. See generally Ewell E. Murphy, *The Echeverrian Wall: Two Perspectives on Foreign Investment and Licensing in Mexico*, 17 *TEX. INT'L L.J.* 135 (1982) [hereinafter *Echeverrian Wall*] (an excellent discussion of Mexico's foreign investment restrictions).

12. See Foreign Investment Law, *supra* note 2, art 5.

13. *Id.* art 8.

14. *Id.* art. 12(IV).

ment (F.I.C.) to administer the Law and oversee and regulate all forms of foreign investment.¹⁵ The Law broadly defines foreign investment to include virtually any investment activity dominated or controlled by non-Mexicans.¹⁶ The Law regulates foreign investment in business enterprises, the acquisition of property, and in any other activity to which the law refers.¹⁷

The Law also specifically restricts investment activity in certain specified areas. It reserves various strategic economic activities exclusively for the Mexican government, and no private entity, domestic or foreign, may invest in those areas.¹⁸ The law reserves investment in a second category of economic activities exclusively for Mexicans, or to Mexican companies that exclude any foreign ownership of the company.¹⁹ The law also specifically restricts foreign ownership of companies operating in certain other industries to 40% or less of the outstanding stock.²⁰

In all other areas of economic activity not specified in the Law, foreign investors must receive permission from the F.I.C. to own more than 49% of the capital stock of a new company.²¹ A foreigner must also obtain permission from the F.I.C. if he wishes to purchase over 25% of an existing Mexican business,²² purchase or lease over 49% of the fixed assets of such enterprises,²³ or expand an existing foreign investment.²⁴ Additionally, the Law also empowered the F.I.C. to vary these percentage limitations for foreign ownership in specific areas, when the F.I.C. judged that the country's best interests so required.²⁵

It is important to realize that the Law did not in itself ban major-

15. See *id.* art. 11.

16. See Foreign Investment Law, *supra* note 2, art. 2. See also GOMEZ PALACIO, ANÁLISIS DE LA LEY DE INVERSION EXTRANJERA EN MEXICO [Analysis of the Foreign Investment Law in Mexico] 25 - 38 (1974) (explaining the broad Foreign Investment Law definition of "foreign investor").

17. See Foreign Investment Law, *supra* note 2, art. 2.

18. *Id.* art. 4. These activities include petroleum, petrochemicals, exploitation of radioactive materials and nuclear energy, some mining operations, electricity, railroads, telegraph and wireless communication. *Id.*

19. *Id.* art. 5. These activities include radio and television transmission, transportation, forestry, and gas distribution. *Id.* Foreigners are not allowed to own stock in Mexican companies that contain an exclusion of foreigners clause.

20. *Id.* These activities include the exploitation and use of materials, secondary petrochemicals, and the manufacture of automotive components. *Id.*

21. Foreign Investment Law, *supra* note 2, art. 5.

22. *Id.* art. 8.

23. *Id.*

24. *Id.*

25. See Foreign Investment Law, *supra* note 2, art. 12(IV).

ity foreign ownership in all business enterprises in Mexico. It merely required potential foreign investors to seek permission from the F.I.C. before making their investment. Mexico would permit no foreign investments without prior F.I.C. approval,²⁶ and severe penalties exist for failure to comply with this requirement.²⁷ The Law lists a number of factors which the F.I.C. should consider in deciding whether to grant approval of a foreign investment.²⁸ Given its discretionary authority, however, and following the political philosophy of the time, the F.I.C. permitted very few foreign investments throughout the 1970s.²⁹

The 1970s were boom years for Mexico, which experienced one of the highest economic growth rates in the world.³⁰ The government invested heavily in its economy, financed both by its newfound oil wealth³¹ and foreign loans.³² Mexico generally did not allow direct foreign investment during this period because the economy was doing well without it.³³ Mexico was becoming prosperous and saw no rea-

26. *Id.* art. 12(III).

27. *Id.* art. 28.

28. *Id.* art. 13.

29. See Sandra E. Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AM. J. INT'L L. 281, 293 (1986). Some foreign investments were approved in such sectors as "tourism, priority industries, advanced technology, capitalization and investments preserving employment, and for priority activities of Mexican corporations with severe economic problems. [However] . . . the overwhelming majority of these exceptions have been contingent upon agreement eventually to Mexicanize." *Id.* With the restrictions on establishing foreign owned subsidiaries, one might expect foreign companies to have established branches in Mexico instead. However, this has generally not been the case:

Although a few companies have set them up, branches are at a disadvantage for several reasons. They are not well regarded by Mexican authorities; they cannot own real estate; they cannot deduct payments to the parent for royalties, interest, fees or other services. Furthermore, establishing a branch takes more time and money than establishing a corporation, and branch charters usually contain more restrictions than corporation charters. In addition, Mexican authorities have not yet precisely defined the requirements for establishment of branches under the 1973 investment law.

Establishing a Branch, Bus. Int'l; Investing, Licensing & Trading, Sept. 1, 1991, available in LEXIS, NSAMER Library, INLITR File. See also ALEXANDER C. HOAGLAND JR., COMPANY FORMATION IN MEXICO (1972) (describing ways to open a branch and reasons not to).

30. *Expropriation and Aftermath*, *supra* note 8, at 436. Between 1977 and 1981, Mexico's Gross National Product grew at an average annual rate of 8.5%. *Id.*

31. *Id.* See also RIDING, *supra* note 8, at 90, 212 - 213

32. *Expropriation and Aftermath*, *supra* note 8, at 436. The Foreign Investment Law only restricted direct foreign investment. Mexico did not restrict indirect investment in the form of loans.

33. See *id.* As a significant exception to this general rule, however, Mexico did permit a certain form of foreign investment known as *Maquiladoras*. *Maquiladoras* are export-oriented assembly plants. The government has allowed foreigners to own up to 100% of *Maquiladoras* without requiring approval of the F.I.C. *Maquiladors* were, and still are, a significant industry in Mexico, with more than 550 such plants in 1989. See Buchanan, *The Legal Regime of the*

son to share its wealth with foreigners.³⁴

In 1981, however, Mexico's economic bubble burst. The worldwide fall in oil prices exposed the structural weakness of Mexico's economy. Corruption and inefficiency characterized Mexico's bloated State-owned industries.³⁵ Capital flight sent over 80 billion Mexican held dollars abroad.³⁶ Mexico found itself unable to repay its massive external debt, which totaled \$107 billion by 1989.³⁷ Foreign banks stopped lending money, and domestic savers invested abroad.³⁸ Mexico entered into an economic crisis that continues to this day.³⁹

B. 1984 Guidelines and General Resolutions

Miguel de la Madrid, Mexico's President from 1982 to 1988, realized the desperate need to obtain direct capital investment from abroad in order to finance Mexico's floundering economy. In 1984, the de la Madrid Administration issued Guidelines for Foreign Investment and its Promotional Objectives (Guidelines).⁴⁰ The main objective of the Guidelines was "the active, systematic and selective promotion of foreign investment in specific activities considered the most important for 'a fair and balanced growth of the Mexican

Maquiladora Industry, In-Bond Industry II - Industria Maquiladora 24 (1989). See generally John E. Tarbox, Note, *An Investor's Introduction to Mexico's Maquiladora Program*, 22 TEX. INT'L L.J. 109 (1986) (explaining the history and structure of the *Maquiladora* program).

34. See *Expropriation and Aftermath*, *supra* note 8, at 450. By 1982, only three percent of investment in Mexico was foreign-owned. *Id.*

35. See *id.* at 436 - 438; RIDING, *supra* note 8, at 91. The percentage of state-owned industries grew dramatically during the 1970s and early 1980s. It has been estimated that the state-controlled portion of Mexico's economy grew from 10% in the 1960s to 70% by 1982. *Expropriation and Aftermath*, *supra* note 8, at 450.

36. THE NEWS, Aug. 2, 1989, at 35. Other estimates put the figure around \$50 billion. See *Mexican Government is offering Tax Breaks for Repatriated Funds*, WALL ST.J., Aug. 3, 1989, § 1, at 8. See also RIDING, *supra* note 8, at 213 - 19, 528. Among other problems, this capital flight led to the expropriation of Mexico's banks in 1982. See generally *Expropriation and Aftermath*, *supra* note 8 (analyzing the expropriation and its potential effects on foreign enterprise in Mexico).

37. *Mexico: Mexican Government Plans New Measures to Attract More Investment After Slowdown*, 6 INT'L Trade Rep. (BNA) 364 (March 22, 1989) [hereinafter *Government Plans*]; Mexico's external debt has also been estimated at \$100 billion. See Karl Schoenberger, *Japan, Mexico Vow Closer Economic Ties*, L.A. TIMES, Sept. 6, 1989, (Foreign Desk) at 6. See also Foreign Investment Client Report: Mexico (June 1989) at 2 (American Embassy Report) [hereinafter *Foreign Investment Report*].

38. See RIDING, *supra* note 8, at 531.

39. See *id.* at 213 - 19.

40. Comisión Nacional de Inversiones Extranjeras, Lineamientos sobre Inversiones Extranjeras y Propositas de su Promoción [National Commission on Foreign Investments, Guidelines on Foreign Investments and Proposals for its Promotion] (1984) [hereinafter *Guidelines*]. For a thorough analysis of the Guidelines, see generally Maviglia, *supra* note 29.

economy.'⁴¹

These guidelines substantially liberalized the requirements for an investor to receive F.I.C. approval for a foreign majority owned investment. Basically, the guidelines said that the F.I.C. would grant approval to select foreign investments it deemed beneficial to the Mexican economy,⁴² and listed priority industrial activities that should receive favorable treatment.⁴³

Also, the F.I.C. issued general resolutions gradually opening the door to certain potential foreign investment projects. One such resolution allowed small to medium-sized foreign investments meeting certain requirements to bypass the F.I.C. altogether, and thus gain automatic approval.⁴⁴ Another resolution provided that the F.I.C. would consider foreign capital invested from certain international development corporations to constitute neutral capital and not foreign investment.⁴⁵

The Guidelines and subsequent resolutions marked a fundamental shift in Mexico's policy toward foreign investors. No longer would the policy be merely defensive; rather it turned "active and systematic, promoting the formation of foreign investment alternatives according to needs derived from national development priorities."⁴⁶ Indeed, from 1984 until 1988, the F.I.C. approved a high percentage of proposed foreign investments.⁴⁷ Under these Guidelines, the F.I.C. granted 100% foreign ownership to investments made by several for-

41. Maviglia, *supra* note 29, at 294.

42. See Guidelines, *supra* note 40, at 2 - 3. Under the Guidelines, the F.I.C. was to base its foreign investment decisions on several factors, including the technology offered, the number and type of jobs created and the venture's export potential. An important consideration was that "the directed foreign investment [would] contribute positively to development objectives without displacing domestic investment." Guidelines, *supra* note 40, at 2 - 3.

43. See *id.* Although the Guidelines listed a number of specific industries that would receive favorable treatment, they can be grouped into three broad categories: 1) particularly complex industries utilizing large investments per man-hour; 2) rapidly changing high-tech fields; and 3) export oriented fields. *DOING BUSINESS IN MEXICO* § 15.07[1][a] (1989).

44. See Resolución General No. 15 de la Comisión Nacional de Inversiones Extranjeras de la Pequeña y Mediana Industria [General Resolution No. 15 of the National Commission on Foreign Investments of Small and Medium Industry], 398 D.O. 9, Sept. 2, 1986.

45. See Resolución General No. 14 de la Comisión Nacional de Inversiones Extranjeras de las Sociedades Financieras Internacionales para el Desarrollo [General Resolution No. 14 of the National Commission on Foreign Investments for the International Financial Development Companies], 398 D.O. 8, Sept. 2, 1986.

46. Maviglia, *supra* note 29, at 295 (quoting NATIONAL FOREIGN INVESTMENT COMMISSION OF MEXICO, FOREIGN INVESTMENTS, JURIDICAL FRAMEWORK AND ITS APPLICATION 14 (1984)).

47. From 1982 - 1988, "93 percent of all requests for majority foreign ownership presented to Mexico's National Commission of Foreign Investment were approved." *Unfair*

eign companies, including IBM, Hewlett-Packard and Honda.⁴⁸

Potential foreign investors were still skeptical, however.⁴⁹ The Guidelines were not of a binding, legal nature, but rather mere policy determinations of the de la Madrid Administration.⁵⁰ Regardless of the Guidelines, potential investors still had to obtain approval of the F.I.C., a long and cumbersome process.⁵¹ Great uncertainty existed as to whether the F.I.C. would approve proposed investment projects.⁵² Also, the government periodically issued restrictive de-

Trade Practices: Witnesses at ITO Hearing Differ on Impact of Mexico's Investment Barriers to U.S. Firms, 6 Int'l Trade Rep. (BNA) 488 (April 19, 1989).

Foreign investment attorneys point out, however, that the above statistic is misleading. Before submitting a request to the full Commission, the request is almost always screened by the Executive Secretary of the F.I.C. If he indicates the request will not be approved, then the request is rarely submitted to the full Commission. The most frequent reasons for rejecting proposed foreign investments were "the displacement of domestic producers, unacceptable location (such as Mexico City), insufficient benefits in the form of export revenues or a prospective burden on a sector's balance of payments." *Basic Approval Procedure for New Investments and Expansions*, Bus. Int'l; Investing, Licensing & Trading, Aug. 1, 1989, available in LEXIS, NSAMER Library, INLITR File.

48. Rosemary R. Williams, Note, *Has Mexico Kept the Promise of 1984? A Look at Foreign Investment Under Mexico's Recent Guidelines*, 23 TEX. INT'L L.J. 417, 437 - 38 (1988). Foreign investors made many of these investments in the form of debt-equity swaps, which have since been discontinued. See generally Michael J. Tucker, Note, *Debt-Equity Swaps in Mexico*, 23 TEX. INT'L L.J. 443 (1988) (examining debt-equity swaps in Mexico).

49. See Williams, *supra* note 48, at 440.

50. See Maviglia, *supra* note 29, at 298 - 99.

51. The average time an investor had to wait between submitting his application and receiving approval was one and one-half years. *Mexico: Changes in the Law Said to Fall Short of Reform Needed to Attract Major Foreign Investors*, 6 Int'l Trade Rep. (BNA) 629 (May 17, 1989) [hereinafter *Changes*].

52. The author interviewed several Mexican attorneys on this subject and had the opportunity to observe negotiations between Mexican foreign investment attorneys and the F.I.C. The general process of gaining approval usually involved several informal sessions between the Mexican lawyers representing potential investors, and the office of the Executive Secretary of the Foreign Investment Commission. The lawyers would try to structure the terms of the potential investment following the general policies expressed in the Guidelines. They would then try to present the project in its most favorable terms to the Executive Secretary. The Secretary, or his staff, would review the project, and give a general indication of the odds of the Commission approving the project.

If the Secretary indicated the F.I.C. would not approve the proposed project, the foreign investor had three basic choices. He could either drop the matter right there. He could try to alter his proposed project to abide more closely with the Guidelines. Or he could seek out a Mexican partner to be the majority owner of the project.

If, however, the Secretary indicated the F.I.C. would approve the proposed investment, he would submit the proposal to the Commission at its next session. This could be several months away, however, as the Commission did not meet at regular times. When the Commission did meet, the Secretary would then argue the merits of the proposed project before it, which would usually follow the Secretary's recommendation.

Although there seems to be room for much subjectivity in this process, the F.I.C. apparently made its determination in a fair, honest and reasonably objective manner. In fact, given Mexico's reputation as being a country with more than a fair amount of corruption, both

crees,⁵³ or restricted investment through de facto prohibitions.⁵⁴

Upon his election in 1988, one of Salinas' objectives was to increase foreign investment in Mexico. In order to stimulate investment, foreign investors needed more legal certainty and clarity involving the Mexican government's reaction to potential investment projects.⁵⁵ President Salinas tried to address these concerns in the Foreign Investment Regulations he issued in 1989.⁵⁶

III. THE NEW FOREIGN INVESTMENT REGULATIONS

A. Purpose and Scope

The purpose of the new Regulations is to increase foreign investment in Mexico.⁵⁷ Salinas hopes foreign investment will increase to

lawyers and professors alike stressed that bribes never played a part in any of the F.I.C.'s determinations. Interviews conducted in Mexico City, July - Aug. 1989 [hereinafter Interviews].

53. See, e.g., Decreto para el Fomento y la Regulación de la Industria Farmaceutica [Decree for the Expansion and Regulation of the Pharmaceutical Industry], D.O., Feb. 23, 1984; Decreto para la Racionalización de la Industria Automotriz [Decree for the Consolidation of the Automobile Industry], 370 D.O. 3, Sept. 15, 1983.

54. For example, investment has been restricted in the manufacture or trade in computers. Foreign Investment Report, *supra* note 37, at 45.

55. *Government Plans*, *supra* note 37.

56. Regulations, *supra* note 1. Although the author tries to provide a clear, concise explanation of the Regulations, it is not an easy task. The Regulations are poorly written, convoluted and extremely confusing. Several prominent Mexican law firms specializing in foreign investment could not agree on the meaning of a number of passages. Most hoped to gain a clearer understanding through subsequent case-by-case rulings by the F.I.C.

There were several interesting theories promulgated as to why the regulations were so confusing. Some claimed that the Mexican government was not entirely sure how much or what type of foreign investment it wanted to allow. By deliberately issuing such confusing regulations, the government would always be able to come up with some reason to deny a proposed investment, if it so desired. Another theory is that the Salinas Administration wished to guard itself against criticism from the Left. The confusing Regulations would leave few concrete passages that the Left could point to while accusing Salinas of "selling out" the country to foreigners. One prominent attorney suggested that the confusion was entirely inadvertent on the part of the government. He said confusion is merely what results when economists try to write laws.

In any case, for other concise analyses of the Regulations, see COMITE PARA LA PROMOCIÓN DE LA INVERSIÓN EN MÉXICO, MEXICO AND THE FOREIGN INVESTOR - A PARTNERSHIP FOR GROWTH (1989) [hereinafter PARTNERSHIP] (pamphlet available from F.I.C.); AM. CHAMBER OF COM., TRANSLATION AND ANALYSIS OF THE REGULATION OF THE FOREIGN INVESTMENT LAW (1989). For a more thorough analysis, see GOMEZ PALACIO, LEY DE INVERSIÓN EXTRANJERAS COMITADA Y SU REGLAMENTO [Law on Foreign Investment and Its Regulation] (1989).

57. See Regulations, *supra* note 1. Both the Regulations and Mexico's new National Development Plan speak of the need for foreign investment to modernize the economy, create jobs, increase exports, help the balance of payments, and increase Mexico's ability to compete

six billion dollars per year by 1994.⁵⁸ To this end, he designed the new Regulations to liberalize restrictions on foreign investment, as well as to clarify and simplify the legal environment of foreign investment, and provide certainty to the potential investor.⁵⁹

The Regulations repeal all existing administrative regulations, decrees and other provisions involving foreign investment, leaving only the Regulations and the Law as the legal documents governing foreign investment.⁶⁰ Like the Law, the Regulations govern foreign investment activity in opening new businesses,⁶¹ acquiring existing Mexican companies,⁶² and expanding the activities of existing foreign investments.⁶³ The Regulations also liberalize and clarify rules involving foreign investment in the restricted zones.⁶⁴

B. Investments in Unclassified Activities

I. New Investments

In general, the Regulations permit majority foreign ownership in most areas of economic activity, while retaining restrictions in certain strategic areas. In order to provide investors with a comprehensive list of those strategic areas in which foreign investment is still specifically restricted, the Regulations provide a classification system of certain economic activities.⁶⁵ However, most economic activities lie outside this classification system altogether.

For unclassified activities, the Regulations have significantly liberalized the restrictions on potential foreign investments. In fact, the

internationally. See *id.*; Poder Ejecutivo Federal, Plan Nacional de Desarrollo 1989 - 1994 [Federal Executive Authority, National Plan for Development] 428 D.O. 1 (1989).

Mexico's economy has experienced little growth over the last six years, and foreign lending sources are reluctant to loan more money to Mexico. Therefore, Salinas is looking for direct foreign investment to finance Mexico's growth in the near future.

58. *Government Plans*, *supra* note 37. This goal will be difficult to achieve. Though direct foreign investment into Mexico totaled \$3.7 billion in 1987 and \$3.1 billion in 1988, much of that was due to debt-equity swaps which have since been canceled or cut back. *Id.*

59. See *Regulations*, *supra* note 1, preamble. According to Mexico's Secretary of Commerce, Jaime Serra Puche, the Regulations favor "investment that brings 'fresh resources' to Mexico, is 'accompanied by new technologies,' and promotes nonoil exports." *Government Plans*, *supra* note 37.

60. *Regulations*, *supra* note 1, arts. 2 transitory, 3 transitory.

61. *Id.* art. 5.

62. *Id.* art. 7.

63. *Id.* arts. 27 - 29.

64. *Regulations*, *supra* note 1, arts. 16, 22, 36 - 38.

65. *Regulación Especifica y General Para la IED con Base en la Clasificación Mexicana de Actividades Economicas y Productos* [Specific and General Regulation for the IED with a Base in the Mexican Classification of Economic Activities and Products], 427 D.O. 32, May 16, 1989 [hereinafter *Classification*]. See also discussion *infra* part III.C.

Regulations permit up to 100% foreign ownership of businesses in unclassified areas. Prior F.I.C. approval is no longer required for foreign investments in these areas provided the following six requirements are met:

- (1) The investment in fixed assets during the pre-operational period of the project does not exceed \$100 hundred million;⁶⁶
- (2) The foreign investor finances the project with funds obtained from abroad;⁶⁷
- (3) Any industrial facilities of the project locate in areas other than Mexico City, Guadalajara, or Monterrey;⁶⁸
- (4) The accumulated foreign exchange flows must at least balance over the first three years of the project's operations;⁶⁹
- (5) The project will create permanent jobs and provide for training and development of its employees;⁷⁰ and
- (6) The project will utilize adequate technology and comply with all environmental laws and regulations.⁷¹

Provided the investment project meets all six of these requirements, it should be automatically approved, and will require no prior authorization from the F.I.C.⁷²

If, however, the potential project does not meet all of the above requirements, it may still be possible to obtain F.I.C approval for the project.⁷³ In such a case, the investor must make a formal application

66. Regulations, *supra* note 1, arts. 5(I), 4 transitory.

67. *Id.* art. 5(II). If a company already has investments in Mexico, the new investment may be made out of resources generated from the previous investment. *Id.* Also, "[a]t the end of the pre-operational period, the paid-in capital stock must equal at least 20% of the aggregate investment in fixed assets." *Id.*

68. *Id.* art. 5(III), Resolucion General Numero 2 que Establece Criterios Para la Aplicación de Diversas Disposiciones del Reglamento de la Ley para Promover la Inversion Mexicana y Regular la Inversion Extranjera [General Resolution No. 2 Establishing Criteria for the Application of Different Aspects of the Law to Promote Mexican Investment and Regulate Foreign Investment], Regla 2, 429 D.O. 10, June 21, 1989.

69. Regulations, *supra* note 1, art. 5(IV). Companies are deemed to have commenced operations on the day they first receive revenue from the sale of a product or the performance of a service. *Id.* art. 5(IV).

70. *Id.* art. 5(V).

71. *Id.* art. 5(IV). Mexico is very concerned about its pollution and environmental contamination problems and is now enacting strict regulation for their control. See *Mexico is Poised to Toughen Enforcement of Pollution Law*, Bus. Int'l; Business Latin America, June 12, 1989, available in LEXIS, NSAMER Library, BUSLAM File.

72. Regulations, *supra* note 1, art. 5. See also *Changes, supra* note 51.

73. In order to decide whether to grant authorization, the Commission is required to take five factors into consideration. See *infra* notes 89 - 94 and accompanying text.

According to various foreign investment lawyers, and the F.I.C. itself, the article 5 criteria are weighted differently. That is, assuming all the other criteria are met for a potential investment, an investment exceeding \$100 million will almost certainly be approved. How-

for approval. The F.I.C. must grant its approval or express specific objections to a project submitted to it for consideration within forty-five days from the date of application.⁷⁴ Otherwise, the F.I.C. will be deemed to have approved the project.⁷⁵ Also, the F.I.C. does not need to approve foreign investments in *Maquiladoras* or other special export-oriented activities.⁷⁶

2. Acquisition of Existing Mexican Companies

In order to acquire an existing Mexican company, the general rule is that foreign investors must obtain authorization to acquire over 49% of the stock or assets of the corporation.⁷⁷ However, for a three year period, ending May 16, 1992, the Regulations waive this requirement in unclassified areas. Thus, a foreign investor may acquire up to 100% of an existing Mexican company without prior F.I.C. approval. The investor must agree to increase the fixed assets of the corporation by at least 30%, and meet the six article 5 criteria discussed above.⁷⁸ After May 16, 1992, a foreign investor must again seek the Ministry's authorization to acquire over 49% of an existing Mexican company.⁷⁹ However, the investor needs no authorization to acquire less than 49% of a company.⁸⁰

3. Expansions of Existing Foreign Investments

A foreign investor may expand his economic activity in Mexico by opening new facilities, relocating his existing facilities, or diversifying into new fields of economic activities or new lines of products.⁸¹

ever, a project that would locate its industrial plants in Mexico City, or that would rely heavily on imports without exporting corresponding amounts, will most probably be denied.

74. Regulations, *supra* note 1, art. 2. F.I.C. requests for more information can result in an extension of this deadline.

75. *Id.* art. 2.

76. *Id.* art. 6.

77. *Id.* art. 7.

78. Regulations, *supra* note 1, art. 6 transitory.

79. *Id.* art. 6 transitory.

80. *Id.* art. 7.

81. Article 1 of the Regulations, *supra* note 1, makes the following definitions:

Facility relocation: the opening of a new facility and the complete shutdown of the prior facility. *Id.* art. 1 (XVII).

New facility: any area on any site physically independent or different from the facility that foreign investors actually have opened and operate, where they intend to carry on their industrial, commercial and service activities, with the foreign investor's own personnel or with third party's personnel that renders services to the same foreign investor and regardless of the legal title whereby they hold, use or enjoy the facility. *Id.* art. 1 (XVI).

New field of economic activity: any activity other than the activity actually carried out by an established foreign investor after becoming such, on a continued, commercial and non-experi-

Specific rules govern each of these three possibilities. However, in most cases, a foreign investor may expand his activities without need of prior F.I.C. approval.⁸²

C. Investments in Classified Activities

I. General Provisions

The Regulations provide a classification system of four broad areas of economic activities, each with varying degrees of national or strategic importance.⁸³ Special rules and restrictions govern investments in each area.⁸⁴ The Regulations reserve some activities exclusively for the State, and prohibit private entities, both foreign and domestic, from participating in these activities.⁸⁵ The Regulations reserve other activities exclusively for Mexican investors, and totally prohibit foreigners from investing in these activities.⁸⁶ The Regulations reserve still other activities for Mexican majority ownership and control, and restrict foreigners to specified percentages of minority ownership in corporations engaged in these activities.⁸⁷ Finally, the

mental fashion, which implies entering into a different class under the Classification. *Id.* art. 1 (XIV).

New product line: any product or group of products other than those actually manufactured or made by an established investor after becoming such, on a continued, commercial and non-experimental fashion, which implied entering into a different class under the Classification. *Id.* art. 1 (XV).

82. Basically, such expansions will not require the Ministry's authorization provided the foreign investor meets the six article 5 criteria, and makes a new investment of at least 10 % of the net value of the fixed assets of the existing investment. *Id.* arts. 28(I), 29.

83. See Classification, *supra* note 65.

84. *Id.* at 37.

85. *Id.* These activities include: Extraction of petroleum, basic petrochemical activities, natural gas, and petroleum refining; Uranium treatment and uses of nuclear fuels; Minting Coins; Generation, transmission, and supply of electrical energy; Railway transportation; Telegraphs; Banking, funds and financial trusts; Extraction and/or use of uranium and radioactive materials. PARTNERSHIP, *supra* note 56, at 8.

86. Classification, *supra* note 65, at 37. These activities include: Forestry and forest nurseries; Retail sales of liquid gas; Auto-freight transportation services in general as well as urban and suburban automobile passenger transportation; Coastal maritime transportation as well as high seas and coastal towing services; Transportation service on Mexican registry airplanes and by airtaxis; Credit institutions other than banks, funds and financial trusts; Services by: stock brokerages, stock exchange investment companies, bond and insurance institutions, and independent pension funds; Transmission of radio and television programs; Notaries, customs agencies, and representatives; Administration of maritime, lake and river ports. PARTNERSHIP, *supra* note 56, at 8.

87. Classification, *supra* note 65, at 37. Activities where a foreign investor's ownership is limited to 34% include: Exploitation and/or use of carbon and minerals containing iron; Extraction or use of phosphoric rock and sulfur.

Activities where a foreign investor's ownership is limited to 40% include: Secondary petrochemicals; Manufacture and assembly of automotive parts and accessories. Activities where

Regulations reserve some areas for Mexican majority ownership, unless a foreign investor obtains specific approval from the F.I.C. to participate in these activities with majority ownership or control.⁸⁸

In determining whether to grant foreign majority ownership in activities normally reserved for domestic control, the F.I.C. must take into consideration five factors.⁸⁹ The investment must complement national investment.⁹⁰ It should have a positive effect upon Mexico's balance of payments, and increase its exports.⁹¹ It must have a positive effect on employment, both on the number of jobs created and the wages to be paid.⁹² The investment must contribute to the development of Mexico's less developed regions.⁹³ Finally, it must contribute to Mexico's technological growth and development.⁹⁴

It is significant that the F.I.C. must now consider far fewer factors than previously required under the Law.⁹⁵ In particular, the F.I.C. no longer must consider the potential displacement of Mexican investment or the extent to which a project uses domestic inputs in the creation of its final product.⁹⁶ This reflects Mexico's changing at-

a foreign investor's ownership is limited to 49% include: Fishing and growing of fish species; Extraction or use of metallic minerals not containing iron other than uranium and radioactive minerals; Extraction or use of rocks, clays, and sands, such as feldspar and gypsum; Extraction or use of nonmetallic minerals other than phosphoric rock and sulfur; Manufacture of explosives and fireworks; Manufacture of firearms and cartridges as well as specialized trade in such items; Internal port as well as river and lake transportation services; Telecommunications services, including telephones, aside from telegraphs; Rental agencies. PARTNERSHIP, *supra* note 56, at 9.

88. Classification, *supra* note 65, at 37. These activities include: Agriculture, such as felling trees and collection of forest products; Livestock and game; Newspaper and magazine publication; Derivatives of the mineral carbon (coke and others); Building, construction, and installation; Maritime transportation services on the high seas as well as tourist boat rental services; Administration of roads, bridges, and auxiliary services; Air navigation services and administration of airports and heliports; Vehicle towing services; Operating and investment company services; Educational services performed by the private sector; Legal, accounting, and auditing services; Services related with financial, insurance, and bond institutions. PARTNERSHIP, *supra* note 56, at 9.

89. Regulations, *supra* note 1, art. 82. This represents a significant change from the Foreign Investment Law, which requires the F.I.C. to take several more factors into consideration in making its decisions. See Foreign Investment Law, *supra* note 2, art. 13.

90. Regulations, *supra* note 1, art. 82; Foreign Investment Law, *supra* note 2, art. 13.

91. Regulations, *supra* note 1, art. 82; Foreign Investment Law, *supra* note 2, art. 13.

92. Regulations, *supra* note 1, art. 82; Foreign Investment Law, *supra* note 2, art. 13.

93. Regulations, *supra* note 1, art. 82; Foreign Investment Law, *supra* note 2, art. 13.

94. Regulations, *supra* note 1, art. 82; Foreign Investment Law, *supra* note 1, art. 13.

95. See Foreign Investment Law, *supra* note 2, art. 13. Other factors the F.I.C. should take into consideration are: 1) maintaining the companies in operation; 2) helping the recovery of the companies' growth capacity; and 3) adding to the economic and financial feasibility of the companies as productive enterprises. Regulations, *supra* note 1, art. 25.

96. Historically, the FIC would almost never authorize a foreign investment that would displace a domestic industry. See *infra* note 142 and accompanying text.

titude towards allowing more international competition within its borders.⁹⁷

2. Special Trust Arrangements

Even in classified areas, foreigners may invest up to the specified percentage limitations without requiring authorization from the F.I.C.⁹⁸ Moreover, in certain cases, foreigners may exceed the specified percentage limitations on foreign ownership, and even obtain control over activities normally reserved exclusively for Mexican ownership, through temporary trust arrangements.⁹⁹ The F.I.C. must approve these trust arrangements, where foreigners may indirectly invest in and obtain control over specified corporations.¹⁰⁰ The F.I.C. is authorized to grant such arrangements if the Mexican company is facing grave financial difficulties or is unable to obtain domestic financing to make necessary expansions.¹⁰¹ The F.I.C. may grant such trust arrangements for a maximum of twenty years.

Foreign investors may also invest in Mexican companies in the

97. Such changes include joining GATT, privatization of state-owned industries, etc. See *infra* notes 212 - 21 and accompanying text.

98. LAFFAN, *supra* note 3. See also Classification, *supra* note 65, at 37 (listing the percentage amounts that foreign investors may own of a Mexican company without requiring authorization by the F.I.C.).

99. Regulations, *supra* note 1, arts. 23 - 26. Such activities include "domestic air and maritime transportation," "gas distribution," "exploitation and use of materials," "secondary petrochemicals," "manufacture of component parts for automotive vehicles," and "those established in specific laws or regulations issued by the Executive Branch." Foreign Investment Law, *supra* note 2, arts. 4, 5.

100. Regulations, *supra* note 1, arts. 23 - 26.

101. The text of article 23 reads in part,

The ministry may grant the authorization to which the above paragraph refers only in the following instances:

I. When the companies are undergoing an extremely unbalanced financial situation, an insolvency situation or technical bankruptcy situation or a situation which is close to that, or suspension of payments or bankruptcy declared by a court, provided that this is a result of:

a) The existence of substantial amounts of debts or liabilities payable by them that were assumed prior to the day on which these Regulations become effective, and are mainly denominated in foreign currency.

b) A drastic drop in their aggregate sales.

II. When the companies need to make new capital investments in order to:

a) Increase their aggregate goods or services production, by opening up and operating new facilities, or the manufacture of a new product line, in order to export most of their additional production.

b) Technologically modernize or renew the facilities they operate or the fixed assets they use, in order to export a significant volume of the production.

Id. art. 23.

form of Neutral Investment Trusts.¹⁰² In this way, Mexican companies may have access to foreign capital through the public placement of certificates representing the companies' shares.¹⁰³ These certificates represent only economic rights in companies, and do not grant the holders of such certificates voting rights or control over the management of the company.¹⁰⁴ Such certificates may be obtained by foreign investors through the Mexican stock market or from foreign financial institutions.¹⁰⁵

D. Investments in the Restricted Zones

1. Real Estate

The Mexican Constitution specifically excludes foreigners from owning real estate within the "Restricted Zones."¹⁰⁶ The Restricted Zones include all lands within 100 kilometers of the borders, or 50 kilometers from the coast.¹⁰⁷ However, the Regulations provide for investments in these areas through special trust arrangements.¹⁰⁸ Foreigners may obtain beneficiary rights in real estate trusts in the Restricted Zones for a period of thirty years, if they obtain permission of the Ministry of Foreign Relations.¹⁰⁹ These trusts are renewable an indefinite number of times.¹¹⁰ The Ministry has a maximum of forty-five days to rule on a request for authorization of such trusts.¹¹¹ The Ministry is required to grant such authorization if the foreign investor makes new investments in tourism or industry.¹¹²

2. Companies

Foreigners may also invest in existing companies that own land in the Restricted Zones.¹¹³ However, they must obtain authorization

102. *Id.* arts. 13 - 15.

103. *Id.*

104. Regulations, *supra* note 1, arts. 13 - 15.

105. *Id.*

106. MEX. CONST., *supra* note 7, art. 27.

107. *Id.* See generally Foreign Investment Law, *supra* note 2, arts. 18 - 22; MEX. CONST., *supra* note 7, art. 27(I).

108. Regulations, *supra* note 1, arts. 16 - 20, 36.

109. *Id.* arts. 16 - 20.

110. *Id.* The Regulations do not specify exactly how many times a foreigner may renew these trusts. However, according to Lic. Carlos Camacho Gaos, Mexico's Director General of Foreign Investment, the trusts are renewable for an indefinite number of times. Lic. Carlos Camacho Gaos, Address at Houston, Texas (Sept. 28, 1989) (discussing the Mexican government's current policy in the field of foreign investment) [hereinafter Camacho Address].

111. *Id.* art. 1.

112. Regulations, *supra* note 1, art. 17.

113. *Id.* arts. 10 - 12.

from the Ministry of Foreign Relations, and make new investments in tourism or industry.¹¹⁴

E. Other Requirements for Foreign Investors

In order to incorporate in Mexico, all foreign investors or corporations with foreign stockholders must receive authorization from the Ministry of Foreign Relations.¹¹⁵ The Ministry routinely grants such authorization,¹¹⁶ provided that the foreigner agrees to abide by the "Calvo Clause."¹¹⁷ The Calvo Clause requires that all foreign investors, and all foreign participants in Mexican corporations, agree to be regarded as Mexicans concerning their stock or real property holdings in Mexico.¹¹⁸ Further, the foreigners must agree not to call upon their respective governments for protection of their property rights in Mexico, and if they do so, they automatically forfeit all of their equity interests in Mexico.¹¹⁹

Foreign investors, and Mexican corporations with foreign stockholders, must also register with the National Registry for Foreign Investment, a routine procedure.¹²⁰ Through registering, they must provide certain detailed information to the Registry concerning their corporation and its activities in Mexico.¹²¹

IV. LEGAL PROBLEMS WITH THE REGULATIONS

A. Inconsistencies Between the Law and the Regulations

Though the Regulations are supposed to clarify the Law,¹²² certain inconsistencies exist between the Regulations and the Law.¹²³ In some cases, the Regulations seem to ignore the Law, in other cases they exceed the scope of the Law, and in still other cases, the Regulations appear to allow investors to violate the Law itself.¹²⁴ These inconsistencies should cause some concern to potential foreign investors.

114. *Id.* art. 12.

115. *Id.* arts. 30 - 35.

116. Interviews, *supra* note 52.

117. Foreign Investment Law, *supra* note 2, art. 3; Regulations, *supra* note 1, art. 31. The Calvo Clause, named after a nineteenth century Argentine diplomat, is a defense against diplomatic protection of foreign investors. See WRIGHT, *supra* note 10, at 99.

118. Regulations, *supra* note 1, art. 31.

119. *Id.*

120. *Id.* art. 52.

121. *Id.* arts. 54, 59, 60, 61.

122. See Regulations, *supra* note 1, preamble.

123. See *infra* notes 136 - 48 and accompanying text.

124. See *infra* notes 136 - 48 and accompanying text.

President Salinas issued the Regulations under the regulatory powers delegated to him by article 89 of the Mexican Constitution.¹²⁵ Article 89 of the Mexican Constitution empowers the Executive branch to provide for the execution of the laws of the country.¹²⁶ However, the same article also forbids the President from issuing regulations that exceed the scope of the law that the regulations are supposed to enforce.¹²⁷ As the present Regulations appear to exceed the scope of the Law in several areas, there is concern that the Regulations may not be constitutional.¹²⁸

According to Mexican Constitutional law, article 89 gives the President the power to enact regulations necessary for the execution of the nation's laws.¹²⁹ However, he may not alter or modify the laws.¹³⁰ Neither may he exercise his regulatory power independently of any law.¹³¹

The purpose of regulations is to develop and complete in detail the general norms contained in the laws.¹³² However, regulations are subordinate to laws.¹³³ They may neither exceed the scope of a law, nor contradict it; they must respect the law in both letter and spirit.¹³⁴ They may not contain provisions contrary to those of the statute they regulate.¹³⁵

The present Regulations, however, seem to contain provisions contrary to those of the Law. One obvious inconsistency between the Law and the Regulations involves the role of the F.I.C. The Law generally restricts foreign ownership of Mexican companies to a maximum of 49%, and requires specific prior F.I.C. authorization for any exception to this rule.¹³⁶ Moreover, under the Law, the F.I.C. may

125. MEX. CONST., *supra* note 7, art. 89(I). See Jorge Camil, *Mexico's 1989 Foreign Investment Regulations: The Cornerstone of a New Economic Model*, 12 HOUS. J. INT'L L. 1, 2 (1989).

126. The powers and duties of the President include the power "[t]o promulgate and execute the laws enacted by the Congress of the Union . . ." MEX. CONST., *supra* note 7, art. 89(I).

127. Such regulations must provide for the law's "exact enforcement in the administrative sphere." MEX. CONST., *supra* note 7, art. 89. It is a settled rule of Constitutional Law that a regulation may not exceed the law it purports to regulate. See FELIPE T. RAMIREZ, *DERECHO CONSTITUCIONAL MEXICANO* [Mexican Constitutional Law] 464 - 68 (1985).

128. See Camil, *supra* note 125, at 13.

129. See RAMIREZ, *supra* note 127, at 464.

130. *Id.*

131. *Id.*

132. See *id.* at 468; WRIGHT, *supra* note 10, at 16.

133. See RAMIREZ, *supra* note 127, at 467; WRIGHT, *supra* note 10, at 16.

134. See RAMIREZ, *supra* note 127, at 468.

135. See WRIGHT, *supra* note 10, at 16.

136. See Foreign Investment Law, *supra* note 2, arts. 5, 12.

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alter general percentage restrictions involving foreign investments in various areas,¹³⁷ and further regulate certain economic activities of foreign investments.¹³⁸ The new Regulations, on the other hand, severely diminish the F.I.C.'s authority in many areas, and permit 100% foreign ownership in most industries without requiring any F.I.C. authorization.¹³⁹

Also, the Law lists seventeen criteria the F.I.C. is to consider when determining whether to permit a particular foreign investment in a restricted area.¹⁴⁰ The new Regulations, while retaining certain discretionary power in the F.I.C., cut those criteria down to five.¹⁴¹ Significantly, the F.I.C. is no longer to consider the potential displacement of existing Mexican investment in the proposed activity.¹⁴² This may be good for competition within Mexico, yet it alters Mexico's traditional protection of its domestic industries. Indeed, foreign competition may force many of Mexico's industries and companies out of business.

Additionally, the new Regulations allow for foreign investment through temporary trust arrangements in areas which the Law specifically reserves for Mexican ownership or control.¹⁴³ Again, this may indicate a desire to increase foreign investment and open up areas of the economy to competition, but majority investment in these activities clearly violates the Law.

137. *Id.* arts. 5, 12.

138. *Id.* arts. 12 - 17. For example, the Law requires the F.I.C. to approve any expansion of an existing foreign investment. *Id.*

139. Under the Regulations, no authorization of the F.I.C. is needed for investments meeting the requirements of article 5. Regulations, *supra* note 1, art. 5. In all other cases involving investments in unclassified activities, the Regulations require only the authorization of the Ministry of Commerce. *See, e.g., id.* arts. 7, 12, 13, 23. However, General Resolution number 1 issued by the F.I.C. on June 21, 1989, provides for authorization by the F.I.C. where it is needed by the Ministry. Resolucion General Numero 1 que Establece un Procedimiento Expedido para que la Comisión Nacional de Inversiones Extranjeras Emita Resoluciones Especificas [General Resolution No. 1 Establishing an Expeditious Proceeding so that the National Commission of Foreign Investment May Emit Specific Resolutions], 429 D.O. 8, 9, June 21, 1989.

140. *See* Foreign Investment Law, *supra* note 2, art. 13.

141. *See* Regulations, *supra* note 1, art. 82.

142. *See id.* For years, the restriction against displacing local industries has been a fundamental principle in the F.I.C.'s decision making process. *See* DOING BUSINESS IN MEXICO, *supra* note 43, §§ 15.04, 15.07.

Mexico's National Development Plan of 1983-1988 makes clear the government's attitudes at that time towards displacement of domestic industry. It says foreign investment allowed into Mexico should always be complementary to the Mexican economy and there should be no substitution of fields covered. Maviglia, *supra* note 29, at 293 (citing Federal Chief Executive, National Industrial Development Plan (1983)).

143. *See* Regulations, *supra* note 1, arts. 23 - 26.

The Law requires authorization by the Ministry of Commerce and Industrial Promotion for foreign investors to acquire more than 25% of an existing business.¹⁴⁴ The Regulations expand that percentage limitation to 49%,¹⁴⁵ and waive it altogether for foreign acquisitions in non-classified activities for a three year period.¹⁴⁶

Finally, the Law requires that the F.I.C. set criteria for the Ministry of Foreign Relations to consider in its decisions whether to authorize foreign-controlled trust arrangements in the forbidden zone.¹⁴⁷ The Regulations bypass the F.I.C. by requiring the Ministry to grant such requests if the foreign investor makes new investments in tourism or industry.¹⁴⁸ Again, this provision seems to exceed the scope of the Law.

Though these differences may seem trivial, because the purpose of the Regulations is to streamline and simplify procedures for potential foreign investors, they could nevertheless have serious implications for foreign investors. A potential investor should be very concerned if his investment activities appear to violate in any way the provisions of the Law. Article 28 of the Law clearly specifies that "[a]ctions undertaken in violations of the provisions of this law . . . shall be null and void and shall therefore have no validity before any authority."¹⁴⁹ The Law also provides for other sanctions for the violation of its provisions.¹⁵⁰

Though the Regulations repeal all other administrative provisions dealing with foreign investment,¹⁵¹ they leave the Law itself entirely intact. The Regulations were issued by the President, who has no authority to repeal or amend any laws. Only the legislature may repeal or amend the Law. Therefore, given the contradictions between the Law and the Regulations, some provisions of the Regulations seem clearly unconstitutional.

B. Consequences if the Regulations Are Unconstitutional

Obviously, a potential foreign investor has cause to worry if certain aspects of the Regulations are not constitutional. However, he

144. Foreign Investment Law, *supra* note 2, art. 8.

145. Regulations, *supra* note 1, art. 7.

146. *Id.*, art. 6 transitory.

147. Foreign Investment Law, *supra* note 2, arts. 18, 19.

148. Regulations, *supra* note 1, art. 17.

149. Foreign Investment Law, *supra* note 2, art. 28.

150. *See id.* arts. 27 - 31. This includes fines "up to the value of the operation." *Id.* art. 28.

151. Regulations, *supra* note 1, transitory arts. 2, 3.

should have less worry than one would have in the United States. In Mexico, an individual may only challenge the constitutionality of a law or administrative action in a unique Mexican process called *Amparo*.¹⁵²

Only Mexican Federal courts, including the Supreme Court, have the power to grant an *Amparo*.¹⁵³ An *Amparo* is analogous to an injunction against government violations of civil rights.¹⁵⁴ It is a combination of procedural instruments and remedies, each with a specific protective function.¹⁵⁵ The *Amparo* serves to protect individuals against unconstitutional actions taken by government authorities, including acts of the Executive Branch.¹⁵⁶

In order to gain an *Amparo* hearing, the complaining individual must petition the appropriate tribunal.¹⁵⁷ The petition must contain the name or the authority responsible for the Constitutional guarantee, the act complained of, and the specific Constitutional provisions violated.¹⁵⁸ After a hearing, if the Court grants the *Amparo* it will suspend the unconstitutional act.¹⁵⁹

Only a person suffering harm from a law or an administrative decision may bring an *Amparo* suit.¹⁶⁰ In the case of the present Regulations, such a person could be a competitor who suffers the ill effects of increased competition from a foreign investor allowed into Mexico under the Regulations. The act complained of would be the government's failure to deny a specific foreign investment. The burden of proof on the petitioner is quite severe, however. He must not only prove that the government's action unjustly harmed him, he must also prove that the proper application of the Law would have prevented the harm.¹⁶¹

152. WRIGHT, *supra* note 10, at 28 - 29. See generally JUVENTINO V. CASTRO, *LECIONES DE GARANTIAS Y AMPARO* [Lectures on Garantias and Amparo] 261 - 552 (2d ed. 1978) (comprehensive treatise on *Amparos*); RICHARD D. BAKER, *JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT* (1971) (an English language explanation of *Amparos*).

153. See *DOING BUSINESS IN MEXICO*, *supra* note 43, § 27A.03[5].

154. Paul Bernstein, Comment, *El Derecho y El Hecho: Law and Reality in the Mexican Criminal Justice System*, 8 *CHICANO L. REV.* 40, 50 (1985).

155. DEAN RUSK CENTER FOR THE NAT'L GOVERNOR'S ASS'N COMM. ON INT'L TRADE AND FOREIGN RELATIONS, *COMPARATIVE FACTS ON CANADA, MEXICO AND THE UNITED STATES* 147 (1981).

156. *Id.* at 146.

157. See *DOING BUSINESS IN MEXICO*, *supra* note 43, § 27A.03.

158. *Id.* § 27A.03[2].

159. See BAKER, *supra* note 152, at 233 - 38; CASTRO, *supra* note 152, at 493 - 523.

160. *DOING BUSINESS IN MEXICO*, *supra* note 43, § 27A.03[2].

161. See BAKER, *supra* note 152, at 164 - 74. Most foreign investment attorneys interviewed feel this burden would be too great for potential competitors to overcome. A competi-

Even if a court grants an *Amparo*, however, its power is limited. The judiciary cannot overturn a statute or regulation.¹⁶² At best, it can only declare a law or administrative action unconstitutional as applied in a specific case.¹⁶³ Though it may grant an injunction in a particular case, it may not grant a blanket injunction against further government acts.¹⁶⁴ There is no *stare decisis*; the court will decide each case brought before it on its individual merits.¹⁶⁵ No court may ever strike down a law or regulation.¹⁶⁶

Mexico does have a "weak cousin" to *stare decisis*, however, in its *jurisprudencia*.¹⁶⁷ *Jurisprudencia* occurs when a super majority of the Supreme Court, sitting en banc, issues five consistent decisions on a particular point of law, uninterrupted by a contrary decision.¹⁶⁸ Once established, *jurisprudencia* is binding on all Federal Courts, but not on other governmental agencies.¹⁶⁹ The judiciary may not strike down a statute, nor issue a blanket injunction against executive action.¹⁷⁰ Thus, in spite of *jurisprudencia* to the contrary, Mexican administrative agencies, such as the F.I.C., may execute statutes or policies the judiciary has ruled unconstitutional.¹⁷¹ And though any individual may seek an *Amparo* to protect himself from governmental actions violating *jurisprudencia*, in reality, the Supreme Court rarely, if ever, establishes *jurisprudencia* contrary to the Executive position

tor would have to prove that the foreign investment allowed under the new Regulations actually harmed his business. He would face at least three distinct difficulties in so doing.

First, he would have to show that had the F.I.C. followed the provisions of the F.I.L., it would not have allowed the foreign investment. The F.I.L. empowers the F.I.C. to permit majority owned foreign investment into Mexico, provided it considers the provisions of article 13.

Secondly, he would have to prove that he was harmed by that particular investment. Since Mexico has now joined GATT, its industries are no longer protected against foreign competition in the form of products manufactured abroad and imported into Mexico. So, it is probable that domestic industries would face competition in that form, not merely direct competition from competitors incorporated in Mexico.

Third, monopolies are unconstitutional in Mexico. See MEX. CONST., *supra* note 7, art. 28. In the past, however, lack of foreign competition in Mexico created *de facto* monopolies. So a plaintiff, seeking to prove that foreign competition harmed his business, may inadvertently be showing he had a monopoly, and thus himself guilty of a constitutional violation.

162. See WRIGHT, *supra* note 10, at 29; Bernstein, *supra* note 154, at 50.

163. See WRIGHT, *supra* note 10, at 29; Bernstein, *supra* note 154, at 50.

164. Bernstein, *supra* note 154, at 50.

165. See WRIGHT, *supra* note 10, at 21 - 30.

166. Bernstein, *supra* note 154, at 50.

167. See BAKER, *supra* note 152, at 251 - 66.

168. *Id.*

169. *Id.*

170. *Id.*

171. BAKER, *supra* note 152, at 251 - 66.

on questions of major policy significance.¹⁷²

The F.I.C. itself does not seem overly concerned about an *Amparo* nullifying a F.I.C. decision regarding foreign investment.¹⁷³ Not surprisingly, the Mexican government believes the Regulations to be entirely constitutional.¹⁷⁴ Mexican officials argue that the Law itself provides the authority for the Regulations.¹⁷⁵ Article 5 of the Law grants the F.I.C. authority to vary the percentage limitations for foreign investment projects in specific instances.¹⁷⁶ Because the Constitution grants the President authority to create the F.I.C.,¹⁷⁷ officials argue that the President has an inherent right to direct the F.I.C. as well.¹⁷⁸ Under this authority, the president, by issuing a comprehensive regulation, is expanding the percentage limitations in a general sense, rather than determining such matters on a case by case basis.¹⁷⁹

In the same article, the Law directs foreign investors to comply with the "percentages and conditions specified in . . . laws or regulations."¹⁸⁰ This sentence implies that such regulatory power exists. Since regulatory power is within the domain of the executive branch,¹⁸¹ officials argue that the Law itself grants the President the right to regulate foreign investment.

Both of these arguments fail, however. The Mexican Constitution gives the power to regulate foreign investment to the legislature, not to the President.¹⁸² The President can merely assist in implementing the laws created by the legislature.¹⁸³ Any regulations issued by the executive may contradict neither the letter nor the spirit of the Law.¹⁸⁴ The Law empowers the F.I.C. to vary percentage restrictions in specific cases,¹⁸⁵ while the Regulations allow potential investors to bypass the F.I.C. altogether.¹⁸⁶ Clearly this is contradictory. Some

172. *Id.*

173. Officials interviewed by the author at the Foreign Investment Commission maintain that all provisions of the Regulations are completely constitutional. Interviews, *supra* note 52.

174. Camacho Address, *supra* note 110.

175. *Id.*

176. Foreign Investment Law, *supra* note 2, art. 5.

177. See JORGE BARRERA GRAF, LA REGULACIÓN JURÍDICA DE LAS INVERSIONES EXTRANJERAS EN MÉXICO [Judicial Regulation of Foreign Investment in Mexico] 156 - 60 (1981).

178. Camacho Address, *supra* note 110.

179. *Id.*

180. Foreign Investment Law, *supra* note 2, art. 5.

181. See *supra* notes 129 - 35 and accompanying text.

182. See MEX. CONST., *supra* note 7, art. 73 (XXIX-F).

183. See *supra* notes 129 - 35 and accompanying text.

184. See *supra* notes 129 - 35 and accompanying text.

185. See *supra* note 25 and accompanying text.

186. See *supra* notes 65 - 76 and accompanying text.

legal authorities go even farther, and argue that the President has no authority to issue regulations with the effect of promoting foreign investment.¹⁸⁷

Nonetheless, the odds of someone bringing a successful *Amparo* action against the Regulations are slim. Mexican Presidents have traditionally regulated foreign investment through executive proclamations and decrees.¹⁸⁸ Protests against them have been largely ineffective.¹⁸⁹ Only one person has ever brought a successful *Amparo* action against an executive decision involving foreign investment.¹⁹⁰ That action took place in 1961.¹⁹¹ In that suit, the Ministry of Foreign Relations, acting under the authority granted it by the 1944 emergency wartime decree,¹⁹² had denied a proposed investment project.¹⁹³ As the Mexican legislature had since repealed the wartime decree, the court reasoned it could no longer serve as the basis for Ministry of Foreign Relation's authority over foreign investment.¹⁹⁴ However, the court did not rule on the general authority of the executive branch to regulate foreign investment.¹⁹⁵

Furthermore, that action was brought by an individual who had his proposed investment denied.¹⁹⁶ He claimed that the executive branch had overstepped its authority by restricting investment.¹⁹⁷ The present Regulations, on the other hand, do not restrict investment. Rather, they liberalize investment opportunities.¹⁹⁸ Potential investors would not bring action for having their projects granted. Rather, a potential Mexican competitor would have to bring such action, claiming the government harmed him by failing to deny a foreign investment project. This is a significant difference. Also, since there is no *jurisprudencia* on this issue, one has no way of knowing

187. See CAMIL, *supra* note 125, at 13 n.111 (citing I. GOMEZ PALACIO, LEY DE INVERSION EXTRANJERA Y SU REGLAMENTO COMENTADOS [Commentary on the Foreign Investment Law and Its Regulations] 139 - 40 (1989)).

188. See WRIGHT, *supra* note 10, at 95 - 150.

189. *Id.* at 111.

190. *Id.* at 111 - 13 (citing *In re Quimica Industrial de Monterrey, S.A.*, 66 *Semanario (6th)* 25 (3d pt.) (1963)).

191. *Id.*

192. See The Emergency Decree of 1944, *supra* note 10.

193. WRIGHT, *supra* note 10, at 111 - 13 (citing *In re Quimica Industrial de Monterrey, S.A.*, 66 *Semanario (6th)* 25 (3d pt.) (1966)).

194. *Id.*

195. *Id.*

196. See *id.*

197. See WRIGHT, *supra* note 10, 111 - 13 (citing *In re Quimica Industrial de Monterrey, S.A.*, 66 *Semanario (6th)* 25 (3rd pt.) (1966)).

198. See *supra* notes 57 - 121 and accompanying text.

how a Mexican court would rule on this issue.¹⁹⁹

Mexico is a civil law country.²⁰⁰ The legislature, rather than the judiciary, makes the laws.²⁰¹ Other than *jurisprudencia*, cases have little, if any, precedential value.²⁰² Law schools do not teach cases in their classrooms;²⁰³ lawyers do not cite them in their briefs.²⁰⁴ Reporters that publish court holdings do so with little, if any, statements of the facts.²⁰⁵ Civil law countries rely on face value clarity of their statutes, rather than judicial interpretation. Any ambiguity in a statute, therefore, may cause great uncertainty.

It is precisely this uncertainty that is frustrating about the Regulations. A foreign investor has no way of knowing what potential legal pitfalls may befall him in the future.²⁰⁶ By trying to provide legal certainty in issuing these Regulations, the Salinas government has done just the opposite; a potential foreign investor is now more uncertain of his status than ever.

In order to protect himself from this uncertainty, a potential investor should strictly comply with the Law and seek formal approval from the F.I.C. before making any foreign investments in Mexico, even if the Regulations do not so require. The F.I.C. will almost certainly grant such approval, assuming the project meets all the requirements of article 5 of the Regulations. An investor will only have to wait a maximum of forty-five days for a decision.²⁰⁷ By going through the formal steps required by the Law, a foreign investor should be able to protect himself against the possible ill effects of a later *Amparo* action.

C. Why Regulations and Not New Law?

The obvious question, then, is why Salinas sought to issue Regulations that exceed the Law, rather than simply replace or amend the Law itself. Part of the reason lies in the strength of the Executive branch in Mexico, where executive proclamations and policies tradi-

199. See WRIGHT, *supra* note 10, at 113.

200. See GUILLERMO FLORIS MARGADANT, HISTORY, STRUCTURE AND CHARACTER OF MEXICAN LAW 6 - 10 (1981) (paper written for the Conference on "Legal Aspects of Trade and Investment Between the U.S. and Mexico").

201. *Id.*

202. *Id.*

203. Bernstein, *supra* note 154, at 46.

204. *Id.*

205. WRIGHT, *supra* note 10, at 27.

206. Cf. WRIGHT, *supra* note 10, at 18 - 21 (discussing the consequences of uncertainty in the administration of laws in Mexico).

207. Regulations, *supra* note 1, art. 1.

tionally have had the effect of law, even if technically they were not.²⁰⁸ However, in this case, the main reason Salinas did not amend the law is probably political.

As previously discussed, Mexicans are historically skeptical about foreign investment in their country. If Salinas tried to change the Law, he would face accusations of "selling out" his country to foreigners.²⁰⁹ Salinas' political party, *Partido Revolucionario Institucionalizado (P.R.I.)*, is at its weakest point in history,²¹⁰ and any attempt to change the Law would undoubtedly meet opposition not only from opposition political parties, but within the *P.R.I.* itself. It was politically much safer to allow the Law to remain unamended, while making executive regulatory changes that alter the application of the Law.²¹¹

Salinas may still face accusations and opposition, but much less so than if he tried to get Mexico's legislature to change the Law itself. By following his present strategy, Salinas can wait and see how the country reacts to increased foreign investment. Depending on the effect of the Regulations and public reaction, Salinas can always repeal the Regulations, amend them, let them stand as they are, or change the Law later if he feels it is necessary.

D. What if the Regulations Are Repealed?

Another potential concern of foreign investors is that the Regulations could become politically unpopular. If so, either the present administration or a future one may repeal them. In such a case, however, any change in the Regulations would probably contain a "grandfather clause," protecting any foreign investment permitted under the present Regulations.²¹² Historically, Mexico has allowed existing foreign investment to stand, even while restricting future for-

208. See MARGADANT, *supra* note 200, at 3.

209. *Government Plans*, *supra* note 37.

210. In the 1988 Presidential Elections, Salinas officially won only 50.4% of the vote in a three candidate election. Due to the probability of fraud, the actual margin of victory was probably much less. In the lower house, Salina's party, *Partido Revolucionario Institucionalizado* or *P.R.I.*, retains a bare majority of seats. *Political Forecast*, Bus. Int'l; Investing, Licensing & Trading, Aug. 1, 1989, available in LEXIS, NSAMER Library, INLITR File.

During the state election of July, 1989, for the first time in history, the *P.R.I.* acknowledged losing a governorship. The *Partido Accional Nacional* won the governorship of the state of Baja California. See THE NEWS, July 14, 1989, at 2.

211. See *Government Plans*, *supra* note 37.

212. Cf. *Mexico: Witnesses at ITC Predict Positive Impact from Recent Trade Liberalization Measures*, Int'l Trade Rep. (BNA) No. 48 at 1604 (Dec. 6, 1989) (Mexican officials pointing out that regulations in Mexico have "high legal status" and cannot be changed retroactively).

ign investment.²¹³ Also, the Mexican Constitution probably prohibits the government from ex post facto disallowing any existing foreign investments.²¹⁴

This does not mean, however, that the government could not harass an existing foreign investment. The government could prohibit the project from expanding, relocating, entering into new fields of economic activity or producing new lines of products.²¹⁵ The investment could suffer higher taxation than domestic firms, unfavorable labor laws, and discrimination against government procurements.²¹⁶ It could face a maze of legal and administrative restrictions.²¹⁷ Most severely, it could face difficulties remitting any profits out of the country.²¹⁸ In short, a foreign investment could face severe pressure to Mexicanize.²¹⁹

This possibility, and worse, exists in all countries in which a foreigner may invest. Historically, however, Mexico has treated foreign investors comparatively well,²²⁰ and has gone to great lengths to protect their investments.²²¹ Given the direction Mexico's economic policies have been moving in the last few years, there is every reason to believe it will continue to welcome foreign investment.²²²

213. See *Foreign Investment Report*, *supra* note 37, at 5.

214. The text of article 14 reads in part, "[n]o law shall be given retroactive effect to the detriment of any person whatsoever." MEX. CONST., *supra* note 7, art. 14. One prominent Mexican law firm stated in a flyer to its clients, "[r]egardless of remote future restriction: Investments made according to these regulations will not be affected because of the constitutional provision that prohibits the retroactive application of prejudicial laws or regulations." Goodrich, Riqueime & Assoc., Regulation of the Foreign Investment Law (Outline) 18 (June 26, 1989) (client service flyer).

215. See *Echeverrian Wall*, *supra* note 11, at 138 - 39.

216. See *id.*

217. These could include "local-content requirements, price controls, ceilings on foreign equity, tax concessions, import licenses and access to foreign exchange." *Organizing*, Bus. Int'l; Investing, Licensing & Trading, Aug. 1, 1989, available in LEXIS, NSAMER Library, INLITR File. See also WRIGHT, *supra* note 10, at 164-95 (discussing governmental policies which affect the conduct of enterprises in Mexico).

218. Presently, profits and dividends are freely remittable out of Mexico. *Transfer of Profits and Dividends, of Interest, of Royalties and Fees*, Bus. Int'l; Investing, Licensing & Trading, Aug. 1, 1989, available in LEXIS, NSAMER Library, INLITR File.

219. *Expropriation and Aftermath*, *supra* note 8, at 433. The process of Mexicanization refers to excluding foreigners from majority control of a corporation's shares or management. See also WRIGHT, *supra* note 10, at 161 - 63 (explaining pressures to Mexicanize).

220. According to the U.S. Embassy in Mexico City, "[t]raditionally, foreign investors as a group have been treated well and most problems have been resolved in a fair and equitable fashion." *Foreign Investment Report*, *supra* note 37, at 5.

221. Even in the rare cases of nationalizations, such as the oil and railroad expropriations, the Mexican government eventually compensated foreign companies. WRIGHT, *supra* note 10, at 73.

222. The present Mexican government views "growth promoting investment capital as an

V. APPLICATION AND EFFECT OF THE REGULATIONS

A. Application of the Regulations

The Mexican government has thus far liberally used its discretionary authority to favorably interpret the various criteria of the Regulations. The vast majority of foreign investment applications have been approved since the new Regulations went into effect.²²³ Also, the government is easing restrictions in previously off-limit areas through the use of executive decrees. For example, in August of 1989, the government reclassified fourteen basic petrochemicals into secondary classifications, thereby permitting limited foreign investment in companies manufacturing those petrochemicals.²²⁴ Moreover, the government apparently permits foreign investors to circumvent the requirement that their financing must come from a foreign source, by allowing them to finance their investments through foreign currency borrowed from Mexican banks.²²⁵

Furthermore, the F.I.C. has discretionary power to permit foreign investment in percentages greater than limits specified in the Regulations. It may do so when it determines that an investment will have extraordinary economic benefits to Mexico through, for example, enhancing export earnings or increasing employment and wages. With its discretionary authority, there is speculation that the F.I.C. may effectively waive the legal cap on foreign participation in various classified areas.

The liberal interpretation of the Regulations by the F.I.C., as well as favorable decrees by the Salinas Administration, would seemingly inspire confidence in foreign investors. Ironically, however, it is this broad discretionary power of the F.I.C. and the Mexican government that still gives investors cause for concern. While the present administration may actively seek to increase foreign participation in Mexico's economy, it is entirely possible that a later administration may seek to reverse this trend. If so, the discretionary power of the

essential cog in its export diversification program and an alternative to additional borrowing that aggravates the servicing of Mexico's \$107.4 billion foreign debt." *Government Plans*, *supra* note 37.

223. See *Basic Approval Procedure for New Investments and Expansions*, Bus. Int'l; Investing, Licensing & Trading, Sept. 1, 1990, available in LEXIS, NSAMER Library, INLITR File. The F.I.C. approved 94% of the foreign investment applications it received in 1989, and 100% during the first five months of 1990. *Id.*

224. *Mexico: Mexican Government Eases Restrictions on Investment in Petrochemicals Sector*, 6 Int'l Trade Rep. (BNA) No. 33 at 1069 (Aug. 16, 1989).

225. *Mexico: U.S. Delegates to Legal Exchange Encouraged by Mexico's Progress on Investment Reforms*, 7 Int'l Trade Rep. (BNA) No. 28 at 1069 (July 11, 1990).

F.I.C. and the executive branch could turn against potential investors, and future decrees and interpretations could restrict, rather than expand, investment opportunities.

B. Possible Future Changes in the Law or Regulations

The Salinas Administration seems receptive to the concerns of foreign investors who desire more certainty and clarity involving their investments. Moreover, the United States may seek a change in Mexico's Foreign Investment Law as a condition for ratifying the Free Trade Agreement. It is possible that Salinas will amend the Law and/or the Regulations to both provide clear legal authority for 100% foreign investments and eliminate the discretionary authority of the F.I.C. in approving investment projects. Given the political volatility of such a move, however, no concrete changes to the Law were proposed before the mid-term nationwide congressional elections held on August 18, 1991.²²⁶

Possible future changes in the Law could include eliminating the F.I.C. and the provisions that make distinctions between foreign and domestic private investment. Less radically, the current six categories of industry classifications could be reduced to three: (1) State only, (2) Mexican only, and (3) Open to 100% foreign ownership.²²⁷ New provisions could provide for automatic renewal of the twenty-year trusts, which permit temporary majority foreign ownership in areas where such ownership is prohibited by law.²²⁸ Better yet, the requirements for trust ownership in certain industries and properties could be eliminated altogether. Restrictions in mining and railroad sectors are likely to be further relaxed.²²⁹ Majority foreign ownership is expected to be permitted in Mexico's telecommunications, banking and financial sectors by 1994.²³⁰ These changes, and more, could eventually come about through legislative action. However, the F.I.C. is expected to continue using decrees to redefine areas in which to per-

226. See *Foreign Investment Regulations*, Bus. Int'l; Business International Forecasting, March 1, 1991, available in LEXIS, NSAMER Library, BIFSVC File. The mid-term elections were held on August 18, 1991 and the P.R.I. won the direct elections with 61.4% of the votes. This is seen as a vote of confidence for Salinas and will further legitimize his government. See *Political Stability - PRI Victory*, Bus. Int'l; Economic Risk Service, Oct. 1, 1991, available in LEXIS, NSAMER Library, MEXICO File.

227. *Sluggish Investment May Provoke Investment Code Changes*, Bus. Int'l; Business Latin America, May 28, 1990, available in LEXIS, NSAMER Library, BUSLAM File.

228. *Id.*

229. *Foreign Investment Regulations*, Bus. Int'l; Business International Forecasting, Oct. 1, 1991, available in LEXIS, NSAMER Library, BIFSVC File.

230. *Id.*

mit greater amounts of foreign participation in investment projects than currently provided for under the Law or the Regulations.

C. Other Developments Affecting Foreign Investment

The new Regulations do not act in a vacuum. Recent changes in the tax laws make Mexico a more attractive spot for foreign investment.²³¹ Mexico's entry into the General Agreement on Tariffs and Trade (GATT) in 1986,²³² and the privatization of its industries have opened up its economy to increased competition.²³³ The dramatic lowering of inflation²³⁴ and interest rates,²³⁵ and the recent reduction and restructuring of its foreign debt²³⁶ may signal a profound improvement of its internal economy.

The restrictive Transfer of Technology Law²³⁷ was liberalized in 1990, significantly relaxing conditions for technology licensing agree-

231. *Mexico's Tax Changes Will Cut Corporate Tax Burden*, Bus. Int'l; Business Latin America, Feb. 6, 1989, available in LEXIS, NSAMER Library, BUSLAM File (effective January 1, 1989, Mexico repealed its 50% dividends withholding tax affecting foreign companies. Dividend distributions of foreign companies will now be taxed only once, at the 35% corporate tax rate). See generally *Comparative Corporate Tax Rates: Mexico and South America*, Bus. Int'l; Business Latin America, available in LEXIS, NSAMER Library, BUSLAM File, April 25, 1989 (for a comparison of corporate tax rates among Mexico and major Latin American countries).

232. See Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339 (1988) (for a thorough analysis of the implications of Mexico's entry into GATT).

Among other effects resulting from Mexico's entry into GATT, the number of products subject to prior import licensing fell from 11,951 in 1982 to only 325 by the end of 1988. *Foreign Investment and Trade Regulations*, Economist Publications, Ltd.; Country Profile, Nov. 15, 1989, available in LEXIS, NSAMER Library, COUPRF File.

233. Under the de la Madrid Administration (1982-88), the number of state owned companies dropped from over 1,000 to 449. Salinas is continuing this policy of privatization. *Privatisation Will Continue*, Economist Publications, Ltd.; Country Report, Feb. 14, 1989, available in LEXIS, NSAMER Library, MEXICO File.

234. Inflation in Mexico has declined from a rate of 160% in 1987, to an annual rate of just over 16% in 1989. Foreign Investment Client Report, *supra* note 37 at 3.

235. See Harvey Rice, *Free Trade Hopes and Government Policy Draw Foreign Investment*, UPI, April 16, 1991 (noting interest rates have dropped to 21% from 47% a year ago). *Id.*

236. See *Spotlight on Issue of the Year: The Mexican Boom*, International Reports - IBC USA, Inc. (Mexico Service), Dec. 11, 1991, available in LEXIS, NSAMER Library, MEXICO File.

237. Ley sobre el registro de la transferencia de tecnologia y el uso y explotacion de patentes y marcas [Law Regarding the Registration of Technology Transfer and the Use and Exploitation of Patents and Trademarks], 15 D.O. 45, Dec. 30, 1972. See *Echeverrian Wall*, *supra* note 11, at 139 - 41, 149 - 50. See generally Geoffrey Kransdorf, Note, *Intellectual Property, Trade, and Technology Transfer Law: The United States and Mexico*, 7 B.C. THIRD WORLD L.J. 277 (1987) (analyzing intellectual property and technology transfer laws in the Mexico).

ments and providing more assurances and protection for foreign investors bringing advanced technology into Mexico.²³⁸ The government also plans to liberalize restrictions governing the use of patents and trademarks.²³⁹ In May of 1990, the government approved a constitutional amendment permitting private ownership, including limited foreign ownership, of commercial banks.²⁴⁰ And potentially most significant, the proposed Free Trade Agreement, if ratified by the United States, should encourage more foreign investment in Mexico. In particular, a successful Free Trade Agreement may encourage significantly more Mexican investment by the Japanese or other countries seeking duty free entry into the United States for their goods.

D. Effect on Foreign Investment

The last question concerns the effect the Regulations will actually have on foreign investment. This, of course, is impossible to predict accurately. Some critics, feel the Regulations do not go far enough.²⁴¹ They believe that Mexico, even under the new Regulations, is still too restrictive on foreign investment, thereby discouraging potential foreign investors. Critics are also concerned about the discretionary authority remaining in the hands of the F.I.C. with regard to proposed investments that do not meet all of the requirements needed for automatic approval.

However, the effects of these Regulations have already been positive.²⁴² Direct foreign investment was up to \$1.73 billion in the first quarter of 1991, a 108% increase over the same period in 1990.²⁴³ New foreign investment in Mexico could reach \$5 billion in 1991 if the investment trend continues.²⁴⁴

By liberalizing its investment restrictions, coupled with its low

238. See *Policy Towards Foreign Investment*, Bus. Int'l; Business International Forecasting, May 1, 1990, available in LEXIS, NSAMER Library, BIFSVC File.

239. Ley de Invencciones y Marcas [Invention and Trademark Law], 334 D.O. 7, Feb. 10, 1976. See *Government Plans*, supra note 37; *Echevarrian Wall*, supra note 11, at 141-42, 150. See generally Kransdorf, supra note 237 (analyzing intellectual property and technology transfer laws in Mexico).

240. See *Incoming Direct Investment*, Bus. Int'l; Financing Foreign Operations, Oct. 1, 1990, available in LEXIS, NSAMER Library, MEXICO File.

241. *Changes*, supra note 51.

242. See *Spotlight on Issue of the Year: The Mexican Boom*, International Reports - IBC USA, Inc. (Mexico Service), Dec. 11, 1991, available in LEXIS, NSAMER Library, MEXICO File.

243. Rice, supra note 235.

244. *Id.* (much of this investment should result from the Mexican government's selling of 54% of the state-owned telephone company).

cost of labor and its proximity to United States' markets, Mexico should become a very desirable place for foreign investment.²⁴⁵ Already, it is the third largest trading partner with the United States.²⁴⁶ It has a population of over 80 million potential consumers.²⁴⁷ Total foreign investment, even with the restrictive laws and policies of the past, totaled \$26.5 billion by mid-1990.²⁴⁸ While traditionally the U.S. has been by far the largest foreign investor in Mexico, other nations, particularly Japan are significantly increasing their investment in Mexico.²⁴⁹ Whether the new changes in Mexico's foreign investment environment achieve Salinas's goal of \$6 billion annually in new foreign investment by 1994, however, remains to be seen.

VI. CONCLUSION

The new Regulations seek to achieve several purposes. They attempt to liberalize the legal barriers to foreign investment in Mexico. The Foreign Investment Commission now has less discretion to arbitrarily deny a potential project. Also, the legal steps a foreign investor must take to invest in Mexico seem both simpler and clearer.

However, these Regulations exceed the Law in some areas, and seem to allow potential investors to violate the letter of the Law in making investments.²⁵⁰ This causes concern over the constitutionality and legality of various provisions of the Regulations. In order to protect himself, a foreign investor should strive to comply with the letter of the Law as much as possible, in particular by seeking prior authorization from the F.I.C. before he makes any investment.²⁵¹ Such authorization should take no more than forty-five days to obtain, and the F.I.C. will almost certainly approve projects which meet the six

245. Mexico's foreign investment regulations compares favorably to regulations of most major Latin American countries. For a comparison, see *Foreign Investment Regulations at a Glance*, Bus. Int'l; Business Latin America, available in LEXIS, NSAMER Library, BUSLAM File, March 27, 1989 (this comparison was made before Mexico's new Regulations were issued).

246. *DOING BUSINESS IN MEXICO*, *supra* note 43, § 15.10.

247. See *Social and Demographic Trends*, Bus. Int'l; Business International Financing, Oct. 1, 1991, available in LEXIS, NSAMER Library, BIFSVC File.

248. See Larry Rohter, *Stop the World, Mexico is Getting On*, N.Y. TIMES, June 3, 1990, § 3, at 1.

249. See *Plan to Double Foreign Investment*, Bus. Int'l; Business Latin America, available in LEXIS, NSAMER Library, BUSLAM File, June 19, 1989 (Mexico is actively courting investors from the Pacific Basin, Japan and Europe in an attempt to diversify its sources of foreign investment).

250. See *supra* notes 136 - 48 and accompanying text.

251. See *supra* notes 206 - 07 and accompanying text.

article 5 requirements of the Regulations.²⁵²

Moreover, the Regulations do not provide the clarity and certainty foreign investors need. The F.I.C. still has discretion to interpret various provisions of the Regulations and decide upon their applicability to specific proposed investment projects. The Mexican government can seemingly arbitrarily reclassify industries so as to permit greater or lesser degrees of foreign participation in those industries. While the government's actions in these regards have thus far been favorable to foreign investors, there is no guarantee such favorable sentiment will continue. While there eventually may be some concrete legislative change in this area, it is doubtful that Mexico will amend or replace the Foreign Investment Law in the immediate future. For this reason, at present, foreign investors must live with the relative legal uncertainty created by the Regulations.

The Regulations continue the relaxation of the 1973 Foreign Investment Law begun under the de la Madrid Administration. They are part of Mexico's commitment to modernize its economy, and open itself up for competition. Salinas rightfully believes that clarity and predictability in Mexico's legal environment should increase foreign investment. In issuing these Regulations, Salinas tried to provide foreign investors with the legal certainty they sought.

Ironically, however, he achieved the opposite result. The legal environment for foreign investors in Mexico is now more confusing than ever. The new Regulations appear to violate the Law and if so are unconstitutional. This leaves a potential investor vulnerable to the possible ill effects of an *Amparo*. Furthermore, the Regulations still allow the government much discretion in interpreting provisions or reclassifying industries open to foreign investment. Regardless of the constitutionality of the Regulations, however, or the attitude of the present Mexican administration, one thing is certain: the Law, for now, remains unchanged. Any investor who violates any of its provisions risks losing his investment, and does so at his peril.

252. See *supra* notes 206 - 07 and accompanying text.