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AMERICAN INVESTMENT IN MEXICO

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A. MEXICAN POLICY GENERALLY

Historically, Mexico has accepted the idea of foreign investment into its economy. However, since the Revolution in 1910, there has been a continuous movement toward "Mexicanization", control of the economy by Mexican nationals, which has accelerated in recent years.¹ Mexico believes that it must grow out of any economic dependency on foreigners. Since American² citizens are the primary foreign investors in Mexico, this attitude has particularly affected them.³

The theory of adverse effects from "dependency" has gained much currency in Mexico and other underdeveloped nations since World War II.⁴ A country is dependent when its present economy is substantially owned and managed by foreigners, and when it habitually looks abroad for capital, technology, and management for economic growth. Dependency is said to perpetuate unequal bargaining positions between Mexicans and foreigners. It is criticized for preempting expansion of indigenous business interests, and displacing financing for nationals. It is also criticized for its effect of limiting the transfer of

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1. See Creel, "Mexicanization", *A Case of Creeping Expropriation*, 22 Sw. L.J. 281 (1968); Section C of this article *infra*.

2. For convenience in this article, citizens of the United States of America will be referred to as *Americans*, as distinguished from citizens of Mexico, even though Mexico is also geographically in the continent of North America.

3. *Investing, Licensing and Trading Conditions Abroad* (Mexico Section), in BUS. INT'L MAR. 1977 at 4 [hereinafter cited as *Conditions Abroad*].

4. J. COCKCROFT, A. FRANK & D. JOHNSON, *DEPENDENCE AND UNDERDEVELOPMENT: LATIN AMERICA'S POLITICAL ECONOMY* (1972).

technology, and adding to an adverse balance of payments.⁵

The present Mexican attitude about foreign investment is a product of its national history. Spain, as a colonializer, carried out extensive, and occasionally brutal, exploitation of the people in what is now Mexico.⁶ The next important foreign involvement in the economy of Mexico came during the rule of Porfirio Diaz, from the 1870's until the Revolution.⁷ Foreign investment was actively sought by the government and the stability of the country became attractive to investors. In the last years of the "Porfiriato", foreigners controlled the electric power industry, the major extractive industries, and most railroads. Foreign interests controlled large portions of almost all sections of the economy. The waves of capital stimulated prosperity among a relatively small part of the Mexican people. The poverty of the great majority of Mexicans became marked next to the few rich Mexicans involved with the foreign investment.⁸ A period of revolution and turmoil existed from 1910 until the late 1920's. Foreign investment dropped dramatically and continued to drop during the 1930's. It dropped to a low of about \$411 million by 1940 according to one estimate.⁹ The low investment by 1940 was greatly influenced by the 1938 expropriation of the petroleum industry, begun and owned until then by American and Dutch companies.¹⁰ After 1940 however, foreign investment in Mexico began to grow anew from \$584 million in 1945, to \$919 million in 1955, \$1.7 billion in 1965, and an estimated \$3.4 billion for 1975.¹¹ The estimate of foreign investment in 1977 was \$5-6 billion, about 5% of the total investment in Mexico, including the public sector.¹²

Mexico passed comprehensive new laws in the early 1970's affecting foreign investment. The new laws are advantageous in that they more clearly define the requirements of foreign investors and what foreign investments are possible. There is still much discretion, however, with the Mexican government and its agencies for expanding or limiting the possible areas of investment. These laws do not reflect impul-

5. *Id.*

6. For a general history of Mexico, see M. MEYER & W. SHERMAN, *THE COURSE OF MEXICAN HISTORY* (1979) [hereinafter cited as MEYER] or N. CHEETHAM, *MEXICO: A SHORT HISTORY* (1971).

7. See J. HERGET & J. CAMIL, *AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM* 12-16 (1978); J. DAVIDS, *AMERICAN POLITICAL AND ECONOMIC PENETRATION OF MEXICO, 1877-1920* (1976); Comment, *United States Antitrust Laws and Mexican Foreign Investment Laws: A Comparative Study*, 13 *HOUS. L. REV.* 576-77 (1976).

8. See MEYER, *supra* note 6, at 453-75.

9. H. MAY & J. FERNANDEZ, *IMPACT OF FOREIGN INVESTMENT IN MEXICO* 63 (1971).

10. *Id.*

11. *Id.*

12. See *Conditions Abroad*, *supra* note 3, at 4.

sive nationalistic whim or reaction to a single foreign corporation. They are neither excessively chauvanistic or isolationist, nor do they deny the right or ability to make a profit.

B. NOTES ON MEXICO & AMERICAN INVESTMENT IN THE RECENT PAST & PRESENT

United States investment in Mexico fluctuated in the 1950's. Since 1960 a significant increase in direct American investment has occurred. Between 1965 and 1968, 7% of new businesses in Mexico were entirely foreign owned, 11% were financed by majority foreign capital, and 47% were financed by minority foreign capital.¹³ The great majority of this foreign capital was American. From 1960 to 1974 the book value of American investments in Mexico rose from \$0.8 to about \$2.85 billion.¹⁴ At the end of 1976, with \$2.2 billion invested in the manufacturing sector alone, total direct investment from the United States was \$3.17 billion, according to official figures, or about 65-80% of the foreign investment in Mexico.¹⁵ There are an estimated 1,000 or more businesses owned by U.S. citizens in Mexico.¹⁶ A major retreat of this capital did not occur after the new legislation in the 1970's.

In 1970 the average return for direct United States investment was 8% overall and 9% in the manufacturing sector. In 1972 the figures were 6.2% and 7.3% respectively.¹⁷ The later decrease was apparently due to the minor economic recession in 1971 and 1972 which also occurred in the United States.

Massive petroleum resources have been discovered in Mexico recently.¹⁸ Mexican government plans in early 1979 were for production to increase from a little more than a million barrels per day (bpd) to 2.25 million bpd by 1982, and petroleum exports to increase from the 200,000 bpd in late 1978 to 1.1 million bpd by 1982.¹⁹ Such success has occurred in discovery and production work, however, that the state

13. Gordon, *The Contemporary Mexican Approach to Growth with Foreign Investment: Controlled but Participatory Independence*, 10 CAL. W. L. REV. 1, 6 n.13 (1973).

14. Jova, *Private Investment in Latin America: Renegotiating the Bargain*, 10 TEX. INT'L L.J. 455, 464 (1975); *Conditions Abroad*, *supra* note 3, at 4. For a table of past American investments in Mexico, including their earnings by year, and sector of the Mexican economy, see 19 STATISTICAL ABSTRACT OF LATIN AMERICA 370 (1978).

15. STATISTICAL ABSTRACT OF LATIN AMERICA, *supra* note 14, at 368.

16. See Gordon, *supra* note 13, at 25.

17. BUS. LATIN AMERICA, Dec. 14, 1972, at 395. See note 47 *infra*.

18. See E. WILLIAMS, THE REBIRTH OF THE MEXICAN PETROLEUM INDUSTRY (1979); BUS. WEEK, Jan. 15, 1979, at 64; Washington Post, Oct. 9, 1979, at A2, col. 1; N.Y. Times, May 7, 1978, § 3, at 3, col.1; N.Y. Times, Dec. 25, 1978, at 18, col. 1.

19. National Industrial Development Plan announced in early 1979, *cited in Conditions Abroad*, *supra* note 3, at 3. In the Spring of 1980 an update of government plans was announced in the Plan Global de Desarrollo, 1980-1982.

owned Mexican petroleum company, Petroleos Mexicanos,²⁰ increased its production goals for this year to 2.5 million bpd, and exported more than 365,000 bpd in March of 1979—a figure that is 80.7% higher than the year before.²¹ Approximately 80% of the oil exports, which will have doubled in about a year to 500,000 bpd by the end of 1980, will go to the United States.²² Primary petrochemical capacity is planned to triple from 1979 to 1982, to 18.6 million metric tons annually, according to the Mexican government's intensive program for developing the country's petroleum industry.²³ Soaring world oil prices will bring at least \$8 billion into Mexico in 1980.²⁴

Though not as fast as the growth of the Mexican petroleum industry, the rapid growth of the population of Mexico is expected to continue. Infant mortality rate²⁵ in 1973 was 52.0, down from the 1930-34 rate of 135.1.²⁶ Caloric intake in the average Mexican diet doubled between 1910 and 1970.²⁷ The average growth rate of Mexico's population is 3.4% annually,²⁸ whereas that of the United States is 0.6% annually.²⁹ The 1980 population of Mexico is approximately 67 million, as compared to approximately 220 million in the United States.³⁰ Mexico has the second largest population of any nation in Latin America. Only Brazil exceeds it. The population of Mexico just twenty years from now is expected to almost double its present size, to 120 million.³¹

Mexico has problems with inflation which the potential investor should be aware of. In 1973 and 1974 the inflation rate was a little higher than 20%.³² Inflation slowed to 16.2% in 1978, but may go up to 18% in 1980.³³ With the consumer price index for all items set at 100.0 in 1970, the index in November of 1978 had more than tripled in eight years, and stood at 326.5.³⁴ Nonetheless, real growth, as measured by gross domestic product in purchaser's value, averaged 5.7% annually

20. Commonly referred to as *Pemex*.

21. *Conditions Abroad*, *supra* note 3, at 3.

22. DEP'T STATE BULL., Oct., 1979, at 65.

23. *See Conditions Abroad*, *supra* note 3, at 3.

24. *Id.*

25. Infant mortality rate reflects the number of deaths during the first year after birth in an average group of one thousand.

26. This compares with U.S. rates of 64.6 and 17.7 for the same times. STATISTICAL ABSTRACT OF LATIN AMERICA, *supra* note 14, at 95.

27. MEYER, *supra* note 6, at 679.

28. *Id.*

29. THE WORLD ALMANAC AND BOOK OF FACTS 593 (1980).

30. THE STATESMAN'S YEARBOOK 846, 1371 (1979/1980); THE WORLD ALMANAC AND BOOK OF FACTS, *supra* note 29, at 560, 592 (1980); DEP'T STATE BULL., Mar., 1979, at 55.

31. MEYER, *supra* note 6, at 679.

32. *Id.* at 674. *See generally* J. THOMPSON, INFLATION, FINANCIAL MARKETS, AND ECONOMIC DEVELOPMENT: THE EXPERIENCE OF MEXICO (1979).

33. *Conditions Abroad*, *supra* note 3, at 1.

34. 34 MONTHLY BULL. OF STATISTICS, U.N. 182 (Feb. 1980).

between 1970-75, was 4.2% in 1975, 2% in 1976, 3.2% in 1977, 6.6% in 1978, and estimated at 7.5% in 1979 and 8% in 1980.³⁵

It should be noted in considering the establishment of a business in Mexico that the socio-economic environment presently has many differences from that normally found in the United States.³⁶ For example, though Mexico's northern border region is slightly better off in its education-level statistics than the rest of the country, 1970 statistics reflect that of its population over fifteen years of age, 20% never attended school, less than 34% completed elementary school, and only about 4% completed secondary school.³⁷

Housing is overcrowded, and only about 50% of dwellings have indoor plumbing.³⁸ In 1977, there was still only about one telephone for every 18 people. While that is more than double the number of telephones in Mexico seven years ago, in the United States, there was nearly a telephone for every person.³⁹

The socio-economic makeup of the people of Mexico has traditionally been characterized as a people forming two classes, the few rich and the many poor.⁴⁰ This dichotomy has basically continued with only some change.⁴¹ Moreover, the unskilled or semi-skilled worker in Mexico generally has to work a little longer than his contemporary in the United States for the income that he gets. Statistics indicate that the Mexican manufacturing worker is accustomed to a 45 hour work week as compared to the average 40 hour work week of American workers.⁴²

The language of Mexico is an obvious barrier to most Americans. A useful source for Americans interested in investing in Mexico is the annual *Anglo-American Directory of Mexico*.⁴³ The directory lists, by

35. *Conditions Abroad*, *supra* note 3, at 3.

36. See generally J. SCHLAGHECK, *THE POLITICAL, ECONOMIC, AND LABOR CLIMATE OF MEXICO* (2d ed. 1975) [hereinafter cited as SCHLAGHECK]; M. GRINDLE, *BUREAUCRATS, POLITICIANS AND PEASANTS IN MEXICO* (1977) [hereinafter cited as GRINDLE]; and H. WRIGHT, *FOREIGN ENTERPRISE IN MEXICO: LAWS AND POLICIES 3-50* (1971) [hereinafter cited as WRIGHT].

37. *VIEWS ACROSS THE BORDER* (S. Ross. ed. 1978).

38. *Id.*

39. *STATISTICAL ABSTRACT OF LATIN AMERICA*, *supra* note 14, at 157.

40. See e.g., D. PERKINS, *THE UNITED STATES AND LATIN AMERICA 50-51* (1978).

41. "No matter how it is measured, the degree of inequality in the distribution of Mexican income exceeds that of most of the world's developing countries. Only within the top 5% of Mexico's income bracket is a trend toward more equal distribution noticeable." R. HANSEN, *MEXICAN ECONOMIC DEVELOPMENT: TODAY'S "MIRACLE" AND YESTERDAY'S HERITAGE 175* (1970). See also M. SINGER, *GROWTH, EQUALITY AND THE MEXICAN EXPERIENCE* (1969); N.Y. Times, Aug. 31, 1978, at 145, col. 1. For recent studies of the power hierarchy and system in Mexico, see P. SMITH, *LABYRINTHS OF POWER* (1979); J. REYNA & R. WEINERT, *AUTHORITARIANISM IN MEXICO* (1977).

42. *STATISTICAL ABSTRACT OF LATIN AMERICA*, *supra* note 14, at 166.

43. Its 48th edition in 1980, the 600-700 page directory address is Calle Monclov 2-A,

Mexican state, the name, address, telephone number, occupation, and club and/or organization membership of several thousand American, British and Canadian residents of Mexico. It also contains a directory of the American and British diplomatic corps in Mexico, a current list of names, telephone numbers, and addresses of Mexican government departments, and a classified section for Mexico directed at those who are primarily English speaking.⁴⁴

The previously cited statistics on growing American investment in Mexico reflects the confidence of many Americans in Mexico as a suitable environment for international investment.⁴⁵ Even with the previously mentioned socio-economic problems of Mexico, and the barrier of a different language from that of the vast majority of people in the United States, the new petroleum wealth of Mexico should greatly stimulate the economy of the expanding Mexican population, and give investors, as well as Mexico itself, a good opportunity for growth and development.

Mexico, like most of the world, has a civil law system, as distinguished from the common law system in all of the United States except Louisiana. Court decisions do not have binding effect by their precedent under a civil law system, as they generally do within the common law. Rather than the common law system's combination of statutes and prior case law, the sole source of law in a civil law system such as Mexico's, other than the national constitution, is the body of enactments of the legislature.⁴⁶ The principle enactments in Mexico that affect the business of American investors are:⁴⁷

Apartado Postal 27-210, Mexico 7, D.F. Official sources of business information in Mexico are: Nacional Financiera (Venostiano Carranza 25, Mexico 1 D.F.); Mexican Institute of Foreign Trade (Alfonso Reyes No. 30, Mexico 11 D.F.); Banco de Mexico (Condesa No. 6, Mexico 1 D.F.); and the Secretariat of National Properties and Industrial Growth (Insurgentes sur No. 552, Mexico D.F.). The address of the American Chamber of Commerce in Mexico is Lucerna 78, Mexico 6 D.F. American banks having representative offices in Mexico City include: Chemical Bank, Citibank, First Pennsylvania Bank, Manufacturers Hanover Trust, Marine Midland Bank, Republic National Bank of Dallas, Security Pacific National Bank, Chase Manhattan Bank, First National Bank of Chicago, Wells Fargo Bank, and United California Bank.

44. The classified section lists attorneys, banks, building material suppliers, hotels, investment and personnel consultants, real estate consultants, etc., by Mexican state.

45. See generally PRICE, WATERHOUSE & CO., *DOING BUSINESS IN MEXICO* (1975); WRIGHT, *supra* note 36; Blake, *The Climate for Foreign Investment in Mexico* and Cuaron, *The Present Climate for Investment in Mexico: An Overview; Current Economic Situation; Government Attitude Toward Foreign Investment*, in *DOING BUSINESS IN MEXICO* 1-22 (E. Newberger ed. 1974) [hereinafter cited as *DOING BUSINESS IN MEXICO*]; *Should Investment Capital Stay Home: A Mexican-U.S. Dialogue*, 68 *PROC. AM. SOC. INT'L L.* 58 (1974).

46. AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM, *supra* note 7, ch. III.

47. See also Acevedo, *Legal Protection of the Environment in Mexico*, 8 *CAL. W. INT'L L.J.* 22 (1978). See generally R. KERR, *A HANDBOOK OF MEXICAN LAW* (1976); A. MAYAGOITIA, *A GUIDE TO MEXICAN LAW* (1977); H. CLAGETT & D. VALDERRAMA, *LAW & LEGAL LITERATURE IN MEXICO* (1973); GENERAL SECRETARIAT O.A.S., *A STATEMENT OF*

- (1) the 1973 foreign investment law (ley para promover la inversion Mexicana y regular la inversion extranjera);⁴⁸
- (2) the 1973 law on transfer of technology (ley sobre el registro de la transferencia de tecnologia y el uso y explotacion de patentes y marcas);⁴⁹
- (3) the 1976 law on inventions and trademarks;⁵⁰
- (4) the commercial code (codigo de comercio);⁵¹
- (5) the bankruptcy law (neuva ley de quibras y de suspension de pagos);⁵²
- (6) the general law of mercantile companies (ley general de sociedades mercantiles);⁵³
- (7) the general law of negotiable instruments and credit transactions (ley general de titulos y operaciones de credito);⁵⁴
- (8) the civil code, Book II, "Of Property", and Book IV, "Of Obligations";⁵⁵
- (9) the labor law;⁵⁶
- (10) the tax law;⁵⁷ and
- (11) the immigration law.⁵⁸

THE LAWS OF MEXICO IN MATTERS AFFECTING BUSINESS (4th ed. 1970) [hereinafter cited as O.A.S., LAWS OF MEXICO]. To examine the law of a particular Mexican State, see H. CLAGETT, A GUIDE TO THE LAW AND LEGAL LITERATURE OF THE MEXICAN STATES (1947). Commerce Clearing House, Chicago, Illinois, periodically publishes Spanish-English editions of the laws of Mexico concerning investment, labor, social security, anti-pollution, and income and commercial receipts law. BUSINESS LATIN AMERICA, One Dag Hammerskjold Plaza, N.Y., N.Y. 10017, publishes a weekly report to managers interested in Latin America which includes a brief synopsis of the most recent changes in Mexican law, when they occur. *E.g.*, BUS. LATIN AMERICA, Jan. 2, 1980, at 3.

48. See Section C, *infra*.

49. See Section E, *infra*.

50. See Section D, *infra*.

51. See O.A.S., LAWS OF MEXICO, *supra* note 47, at 30-31, 63-73, 88-95, and 168.

52. See Section M, *infra*.

53. 85 Diario Oficial (D.O.), July 28, 1934. See Section G, *infra*.

54. See O.A.S., LAWS OF MEXICO, *supra* note 47, at 209-30; WRIGHT, *supra* note 36, at 314-37; Munger, *Rights and Priorities of Secured Creditors of Personality in Mexico*, 16 ARIZ. L. REV. 767 (1974); Gerber, *Secured Credit Devices in Latin America: A Comparison of Argentina, Brazil, and Mexico*, 23 U. MIAMI L. REV. 677 (1969).

55. For English translation, see O. SCHOENRICH, THE CIVIL CODE OF MEXICO (1950). See O.A.S., LAWS OF MEXICO, *supra* note 47, at 74-87, 242-52.

56. Federal Labor Laws, 299 D.O. 1, April 1, 1970. ARTHUR ANDERSEN & Co., TAX AND TRADE GUIDE TO MEXICO 105-23 (2d ed. 1972) [hereinafter cited as TAX AND TRADE GUIDE TO MEXICO]; O.A.S., LAWS OF MEXICO, *supra* note 47, at 145; Villereal, *Certain Aspects of Mexican Labor Law Especially as They Affect Foreign Owned Businesses*, 6 CAL. W. L. REV. 234 (1970); Sandoval, *The New Mexican Federal Labor Law: An Analysis* (pt. I), 2 LAW. AM. 386 (1970), (pt. II), 3 LAW. AM. 11 (1971); Tanner, *Immigration, Importation and Labor Law Applicable to Foreign Businessmen in Mexico*, 4 DEN. J. INT'L L. & POL'Y 63 (1974). See also M. CLARK, ORGANIZED LABOR IN MEXICO (1973).

57. See Section P, *infra*.

58. 322 D.O. 1, Jan. 7, 1974. See generally O.A.S., LAWS OF MEXICO, *supra* note 47, at 13-28; WRIGHT, *supra* note 36, at 196-217; *Immigration, Importation and Labor Law Applicable to Foreign Businessmen in Mexico*, *supra* note 56; Peckham, *Dual Mexican-American Nationality: A Vehicle to Investment*, 1 CAL. W. INT'L L.J. 115 (1970).

American business has often invested abroad in the form of a single package of capital, management, and technology.⁵⁹ This has generally been considered a desirable method from the American point of view. If a Mexican corporate form is used this traditional investment package may have to be altered to comply with the new laws of Mexico.

C. THE 1973 LAW ON FOREIGN INVESTMENT

The 1973 Law to Promote Mexican Investment and Regulate Foreign Investment⁶⁰ (hereinafter Investment Law) has three main objectives:⁶¹

- (1) To limit foreign investment to 49% of capital in Mexican business associations if they are formed after May 8, 1973;
- (2) To limit post-Investment Law foreign investment in Mexican business associations *existing before* May 8, 1973 to no more than 25% of an association's capital and/or 49% of its fixed assets or lease rights. (Thus there is an incentive for an American to start a new Mexican company so that only Objective (1) will be in effect); and
- (3) To guard against foreign control in the management or administration of a Mexican business association.

The term "foreign investor" is broadly interpreted under the Investment Law, and includes foreign individuals, foreign business associations, foreign economic units without legal status (*e.g.*: trusts, joint ventures, and pledges of shares), and Mexican business associations where the majority of capital is owned by foreigners, or where

59. R. MIKESSELL, UNITED STATES PRIVATE AND GOVERNMENT INVESTMENT ABROAD 51 n.16 (1962).

60. Ley para Promover la Inversion Mexicana y Regular la Inversion Extranjera, Feb. 18, 1973, 317 D.O. 5, Mar. 9, 1973, effective May 8, 1973; reprinted in 12 INT'L LEGAL MATERIALS 643 (1973) (English translation found in J. VEGA, MEXICAN REAL ESTATE 55 (1976) [hereinafter cited as Investment Law]).

61. See generally CHANGING LEGAL ENVIRONMENT IN LATIN AMERICA: MANAGEMENT IMPLICATIONS 276-99 (S. Holland & E. Ferrer ed. 1974) [hereinafter cited as MANAGEMENT IMPLICATIONS]. Trevino, *New Rules Affecting Foreign Investments in Mexico—The 1973 Law on Foreign Investments*, in DOING BUSINESS IN MEXICO, *supra* note 45, at 23-36; *Investing in Mexico—Recent Trends*, [1975] PRIVATE INVESTORS ABROAD 123; [1974] PROC. AM. SOC'Y INT'L L. 58-75; Ramirez & Hyde, *Mexico's New Transfer of Technology & Foreign Investment Laws—To What Extent Have the Rules Changed?*, 10 INT'L LAW. 231 (1976) [hereinafter cited as *Rules Changed?*]; Vizcaino, *The Law on Foreign Investments*, 7 GA. J. INT'L & COMP. L. 33 (1977); Hollman, *Mexican Restrictions on Foreign Investments and Technology*, 20 PRAC. LAW. 55 (1974); Rojas-Magnon, *Recent Developments Under the Mexican Foreign Investment Law and the Law Regulating the Transfer of Technology*, 8 LAW. AM. 1 (1976); Comment, *United States Antitrust Laws and Mexican Foreign Investment Laws: A Comparative Study*, 13 HOUS. L. REV. 571 (1976).

management is controlled by foreigners.⁶²

In relation to Objective (2), an American must file an application with the National Commission on Foreign Investment (hereinafter Commission) if he desires to acquire more than 25% of capital interest in a Mexican corporation formed prior to May 8, 1973. The Commission may allow a percentage over 25% and set conditions on its ownership. It may also force a reduction of American (foreign) interest to 25% in the Mexican business associations existing prior to May 8, 1973.⁶³

The percentage limits cited in Objective (2) are not requirements with retroactive effect without affirmative Commission action to reduce the foreign interest existing prior to May 8, 1973. American and other foreign ownership interests may retain their percentage ownership in excess of Objective (2) limits as long as there is no Commission action to reduce it and the stock interests were registered with the National Registry on Foreign Investment by November 5, 1973.⁶⁴

Several areas of the economy are exclusively reserved for the Mexican state. The railroads and electricity are examples.⁶⁵ Other areas are specifically reserved for Mexicans or Mexican companies with an exclusion-of-foreigners-clause in their corporate by-laws. Radio, television, and gas distribution are examples of these.⁶⁶ A third group of activities does not completely exclude foreigners, but limits them to a percentage. In the manufacture of parts for cars, for example, foreigners can only have a 40% capital participation.⁶⁷

There may be exceptions made to all the restrictions on foreign investment. The Commission has power to increase or reduce percent-

62. Investment Law, *supra* note 60, art. 2.

63. For a discussion of "Mexicanization" see Section U, *infra*. See also Siqueiros, *Administrative Aspects of Foreign Investment in Mexico*, 4 CAL. W. L. REV. 269 (1968).

64. Investment Law, *supra* note 60, art. 2.

65. *Id.* art. 4. Certain activities are reserved exclusively for the State: (a) Petroleum and other hydrochemicals; (b) Basic petrochemicals; (c) Exploitation of radioactive minerals and the generation of nuclear energy; (d) Mining in cases to which the law refers; (e) Electricity; (f) Railroads; (g) Telegraphic and wireless communications; and (h) Other activities established in specific laws.

66. *Id.* The following activities are reserved exclusively for Mexicans or for Mexican companies with an exclusion-of-foreigners clause in their corporate by-laws: (a) Radio and television; (b) Urban and interurban automotive transportation and federal highways transport; (c) Domestic air and maritime transportation; (d) Exploitation of forestry resources; (e) Gas distribution; and (f) Others established in specific laws, or regulations issued by the Federal Executive.

67. *Id.* art. 5. Foreign investors may participate in the capital of enterprises engaged in the following activities, in the indicated maximum of capital proportions: (a) Exploitation of natural resources of mineral substances subject to special concessions—34%; (b) Secondary products of the petrochemical industry—40%; (c) Manufacture of parts for automotive vehicles—40%; (d) Exploitation of utilization of mineral substances subject to regular concessions—49%; and (e) All other activities, unless the National Commission for Foreign Investment establishes a different percentage—49%.

age restrictions in geographic areas, parts of the economy, or in special cases, when it considers it in the best interests of the national economy.⁶⁸ Its decisions are based on the general policy of the Investment Law. It has been suggested by commentators that exceptions will rarely be granted.⁶⁹ An example of an exception that has been allowed is the lifting of restrictions from companies primarily involved in an export business.⁷⁰ The apparent reasoning of the Commission was that the export business has obvious and exceptional need for foreigners to be involved with it, and thus the creation of an exception to the restrictions against foreign participation would be in the best interest of Mexico. In making its determinations the Commission is to use the list in article 13 of the Investment Law.

If an American wants more percentage participation in a Mexican business association than the law directs as a general rule, he must apply to the Commission for permission. Moreover, application for an interest in a Mexican company formed prior to May 8, 1973 in excess of 25%, or for ownership or lease rights in excess of 49% of its fixed assets, can lead to the following procedure. The Commission may grant a 90 day period, renewable once, in which any Mexican national or business may buy the interest the American desires on the same terms agreed upon by the seller with the American. In other words, any Mexican citizen or legal entity would have the opportunity to exercise a priority option in regard to the interest the American desires and has bargained for.⁷¹ Even if no Mexican buyer appears, the Commission retains discretion to ultimately deny an excess interest.

The Investment Law does not limit profit margins as the Andean Common Market Decision 24 does.⁷² The Commission may require an investment to be sold to a Mexican if the profit return is extremely high, however. The effect on balance of payments, otherwise, would place it within the grounds article 13(III) provides for rejecting an investment, *i.e.*, it would have a negative effect on the country.

Generally, the American (foreign) participation in management of a Mexican company cannot exceed American (foreign) ownership, and

68. Investment Law, *supra* note 60, art. 5. Vizcaino, *supra* note 61, at 33, 37.

69. Hollman, *supra* note 61, at 57. From 1973 to 1976 only ten exceptions were made by the Mexican government, and generally these exceptions contained provisions for "Mexicanization" after a period of time. *Conditions Abroad*, *supra* note 3; Rojas-Magnon, *supra* note 61.

70. Vizcaino, *supra* note 61, at 37. See also N.Y. Times, Mar. 24, 1979, at 25, col. 3.

71. Investment Law, *supra* note 60, art. 9.

72. For a comparison with the Andean Common Market law concerning foreign investment, see Murphy, *The Andean Common Market and Mexico: A Foreign Investment Profile*, 13 TEX. INT'L L. J. 307, 311-16 (1978); Schill, *The Mexican and Andean Investment Codes: An Overview and Comparison*, 6 LAW & POL'Y INT'L BUS. 437 (1974).

is thus generally relegated to a minority position.⁷³

Mexican companies that allow foreign investment are not allowed to issue bearer shares under the Investment Law. The shares must be nominative, and registered. Thus, as distinguished from bearer shares which Americans cannot own, all stock owned by Americans or other foreigners is made a matter of public record by its registration with the government.⁷⁴ The Investment Law has provisions for foreigners who acquire bearer shares in Mexican companies. Bearer securities may not be obtained by Americans without approval of the Commission, and they must then be converted into nominative shares, including those acquired before the Investment Law's 1973 enactment.⁷⁵ In sum, shares representing American capital in Mexican business associations shall be nominative in all cases, and registered with the National Registry of Foreign Investment.⁷⁶ Penalties for failure to register include loss of dividend,⁷⁷ invalidation of acts inconsistent with the Investment Law, and fines of up to 100,000 pesos (about \$4,500).⁷⁸ Notaries and brokers may lose their licenses for certifying documents not properly authorized.⁷⁹

The evasion of restrictions on United States citizens' investments by use of a double tier of corporations has been stymied by the Investment Law. Before 1973 an American corporation would often form a corporation in Mexico. This first Mexican corporation would be one which did not allow foreign participation in it. The American company would then form a second corporation which did allow foreign participation, and would purchase the corporation's bearer shares. The American holder of the bearer shares in the second corporation would then have the second corporation buy a majority interest in the built-for-appearances first corporation. Since a Mexican corporation is a Mexican citizen regardless of who owns its stock, the first corporation could allow the second corporation to buy into it, and still officially not be allowing "foreign" participation. The first corporation, as a "pure" Mexican corporation could deal everywhere in the country, without the restrictions which would otherwise meet its American controllers.⁸⁰ Since 1973 this procedure is no longer an available circumvention of

73. Investment Law, *supra* note 60, art. 8.

74. *Id.* art. 25; Guerrero, *Acquisition of Real Property, Investment in Corporations and Probate Law in Mexico*, 10 REAL PROP. PROB. & TR. J. 427, 440 (1975) [hereinafter cited as Guerrero].

75. Guerrero, *supra* note 74, at 427.

76. *Id.*

77. Investment Law, *supra* note 60, art. 27.

78. *Id.* art. 29.

79. *Id.* art. 2.

80. See Hollman, *supra* note 61, at 57.

restrictions. All shares owned by American citizens must now be nominative, and registered. The Investment Law now defines foreign investors to include Mexican business associations in which foreigners have a majority interest, or control.⁸¹

D. THE 1976 LAW ON INVENTIONS & TRADEMARKS

The 1976 Law on Inventions and Trademarks (hereinafter Invention Law)⁸² changes much of the prior law of the last three decades on patents, trademarks, and unfair competition.⁸³ Now many inventions are not patentable. Those concerning medicine, nutrition, alloys, and nuclear energy are examples.⁸⁴

Nonpatentable inventions may be protected by a Certificate of Invention for a nonextendable 10 year period,⁸⁵ if meeting the same requisites as a patent.⁸⁶ The owner may exploit the invention himself, receive a royalty from a third party exploiter during the certificate's life,⁸⁷ and sue for infringement.⁸⁸ The certificate does not exclude others from using the invention; it merely allows the inventor to collect royalties. The prerequisites for obtaining a certificate include registering any contract in which a third party is allowed to exploit the invention.⁸⁹

The possibility of expropriation is provided for under the Invention Law. In applying for a certificate one must submit in advance to the exercise of such power by the Mexican government if it is in the national interest to use that power.⁹⁰

Once the certificate expires the invention goes into the public domain whereby anyone can exploit it without paying royalties to the inventor.⁹¹ The Certificate of Invention is becoming popular in

81. Investment Law, *supra* note 60, art. 2.

82. The Law on Inventions and Trademarks, D.O. 334, Feb. 10, 1977.

83. See generally Vargus, *Major Innovations Regarding Trade and Service Marks in the Newly Revised Mexican Law on Inventions and Marks—A Mexican Perspective*, 66 TRADEMARK REP. 188 (1976); Lanaham, *Trademarks in Mexico—A United States Perspective*, 66 TRADEMARK REP. 205 (1976); and Medina, *Significant Innovations of the New Mexican Law on Inventions and Trademarks*, 7 GA. J. INT'L & COMP. L. 5 (1979).

84. The Law on Inventions and Trademarks, *supra* note 82, art. 10, §§ I-VI.

85. *Id.* arts. 34, 66, & 67.

86. *Id.* arts. 4-7, & 65.

87. *Id.* arts. 67 & 71.

88. *Id.* arts. 77, 211, & 214.

89. The Law to Register the Transfer of Technology and Use of Patents and Trademarks (Ley Sobre el Registro de la Transferencia de Tecnologia y el Uso Y Explotacion de Patentes y Marcas), eff. Jan. 29, 1973, 315 D.O. 50, Dec. 30, 1972, art. 68, para. 2 [hereinafter cited as Transfer Act].

90. The Law on Inventions and Trademarks, *supra* note 82, arts. 63, 64, & 79.

91. *Id.* art. 75.

developing countries like Mexico, because it gives conditional and relatively quick access to foreign technology.

If a patent is obtained, exploitation of it in Mexico must begin within three years of issuance.⁹² The Invention Law requires "an actual industrial exploitation and under adequate conditions in regard to quality and price."⁹³ The importation of products manufactured in accordance with a patent is not deemed to be exploitation. Thus an American company could not block Mexican production by obtaining a patent in Mexico, and then selling into that country only goods made through the invention in the already existing factories in the United States. At least the American company could not do this after the three year limit is passed.⁹⁴ If not exploited by then access to the patent may be obtained by anyone in Mexico who persuades the Bureau of Inventions and Trademarks that they should have an obligatory license to it.⁹⁵ The Bureau establishes how long such a license will last, and how much royalty shall be paid to the owner of the patent.⁹⁶

The Invention Law extends the scope of trademarks to the furnishing of services.⁹⁷ The length of time a trademark is enforceable has been reduced from 10 years to 5 years. It may be renewed indefinitely, as before, but only for 5 year periods now.⁹⁸

The Invention Law contemplates a trademark's nationality in terms of which country it was first registered in. If a trademark was "originally registered" outside of Mexico it may be put on goods made in Mexico only in conjunction with a trademark "originally registered" in Mexico.⁹⁹ Thus if an American corporation wants to use a trademark in Mexico that it registered in the United States before registering in Mexico, it must accompany that trademark with another one that was registered in Mexico before anywhere else. The Mexican trademark must be displayed with equal prominence on the product with the American trademark.¹⁰⁰ The foregoing rule applies only to goods manufactured in Mexico and does not apply to imports from the United States into Mexico.

92. *Id.* art. 41.

93. *Id.* art. 43.

94. *Id.* art. 41.

95. *Id.* art. 50.

96. *Id.* art. 52.

97. *Id.* art. 87.

98. *Id.* art. 112.

99. *Id.* arts. 127, 128, & 12. See the example of International Harvester cited in Sec. U, *infra*. For English translation of arts. 127 & 128 see A.B.A., TECHNOLOGY TRANSFER: LAWS & PRACTICE IN LATIN AMERICA 245-47 (1978) [hereinafter cited as A.B.A.]. See generally James, *Linking Foreign with Mexican Trademarks: Boon or Bane?*, 8 CAL. W. INT'L L. J. 43 (1978).

100. See James, *supra* note 99.

E. THE 1973 LAW ON TRANSFER OF TECHNOLOGY

The 1973 Law to Register the Transfer of Technology and Use of Patents and Trademarks¹⁰¹ (hereinafter Transfer Act) has as its objective the reduction of balance of payments problems by controlling the import of costly technology, much of which has been overpriced in relation to the actual knowledge and skill added to the Mexican economy.¹⁰² Mexico has apparently subscribed to the theory of various commentators that current patent law existing among developed nations of the world operates to discriminate against developing nations.¹⁰³

Agreements covered by the Transfer Act are enumerated within it.¹⁰⁴ Basically, the scope of the Transfer Act covers all contracts that provide for technological assistance, or use of patents or trademarks by foreigners in Mexico. The place where the agreement is made does not matter.¹⁰⁵ The Transfer Act provisions encompass oral agreements.¹⁰⁶ Contracts dealing with patents or trademarks will generally be obvious.

101. Transfer Act, 315 D.O. 45, Dec. 30, 1972.

102. See generally A.B.A., *supra* note 99, at 1-59; MANAGEMENT IMPLICATIONS, *supra* note 61; Soni, *Principle Governing the Transfer of Technology—Basic Requirements of the New Law—Practical Problems and Experiences Under the New Law*, DOING BUSINESS IN MEXICO, *supra* note 45, at 37-75; Epstein, *Introduction to Recent Developments in Mexican Law: Politics of Modern Nationalism*, 4 DEN. J. INT'L L. & POL'Y 1, 5 (1974); *Rules Changed?*, *supra* note 61; Ebb, *Transfers of Foreign Technology in Latin America: The Birth of Antitrust Law?*, 43 FORDHAM L. REV. 719 (1975); Camp & Magnon, *Recent Development under the Mexican Foreign Investment Laws and the Law Regulating the Transfer of Technology*, 8 LAW. AM. 1 (1976); and Soberanis, *Legal Aspects Concerning the Technology Transfer Process in Mexico*, 7 GA. J. INT'L AND COMP. L. 17 (1977) [hereinafter cited as *Transfers of Technology in Mexico*].

103. See C. OKOLIE, LEGAL ASPECTS OF THE INTERNATIONAL TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES (1975); U. ANDERFELT, INTERNATIONAL PATENT LEGISLATION AND DEVELOPING COUNTRIES (1971); and Greer, *The Case Against Patent Systems in Less Developed Countries*, 8 J. INT'L L. & ECON. 223 (1973). See also Manila Declaration Regarding Commodities, Trade Negotiations, Transfer of Resources & Technology, & Economic Cooperation, UNCTAD DOC.TD/195, *reprinted in* 15 INT'L LEGAL MATERIALS 414 (1976).

104. See Transfer Act, *supra* note 89. Article 2 provides: The registration in the Register . . . is obligatory for all documents containing acts, contracts or agreements of every nature which are effective in the National Territory and which have been entered into for the following purposes:

- (a) The licensing of the use or exploitation of trademarks;
- (b) The licensing of the use or exploitation of patents for inventions, improvements, industrial models and drawings;
- (c) The furnishing of technical information by plans, diagrams, models, instruction sheets, instructions, formulas, specifications, formation and training of personnel or otherwise;
- (d) The supplying of basic or detailed engineering plans for the building of facilities or manufacture of products;
- (e) Technical assistance in whatever form it may be furnished;
- (f) Services for the administration and operation of business enterprises.

105. *Transfer of Technology in Mexico*, *supra* note 102, at 19.

106. *Id.*

"Technological assistance" is given a broad interpretation to encompass as much activity in relation to technology transfer into Mexico as is reasonably possible.¹⁰⁷

The objective of the Transfer Act is to "strengthen the bargaining power of the national buyers and to allow local enterprises access to the best available technology in the best conditions of opportunity, quality and prices."¹⁰⁸

Parties must register with the National Registry of Transfer of Technology (hereinafter Registry) within 60 days of the agreement. This is more than a formality. The chances of not being allowed to register are usually substantial.¹⁰⁹ The Registry has great discretion. Additionally, by article 7 of the Transfer Act it must deny registration of agreements in designated cases.¹¹⁰ For example:

- (1) When their purpose is the transfer of technology freely available in the country, provided this is the same technology;
- (2) When the price or consideration does not represent the technology acquired or constitutes an unjustified or excessive burden on the national economy;
- (3) When provisions are included which permit the supplier to regulate or intervene directly or indirectly, in the administration of the transferee of the technology;
- (4) When there is an obligation to assign onerously or gratuitously to the supplier of the technology, the patents, trade-marks, innovations or improvements obtained by the transferee.

The Registry has 90 days after submission in which to reject the agreement.¹¹¹ If there is no action by the Registry within 90 days the agreement is deemed registered.¹¹²

107. Transfer Act, *supra* note 89, art. 2, § e.

108. *Transfers of Technology in Mexico*, *supra* note 102, at 18.

109. As of Dec. 16, 1977, of technology agreements submitted for registration to the Registry, 5,912 had been granted and 2,009 denied. A.B.A., *supra* note 99, at 35; *See generally* Radway, *Negotiating with Latin American Governments: Technology Transfer and Service Agreements*, 9 LAW. AM. 282 (1977).

110. Transfer Act, *supra* note 89, art. 7. A total of 14 grounds are given in art. 7.

111. The Registry's statistics of November 1974 reflected the following percentages of cited violations among the technology agreements submitted to the Registry which were denied (in order of frequency of cited violation): (1) excessive price or unwarranted burdens: 79.7%; (2) excessive term: 39.6%; (3) volume or price limitations: 38.2%; (4) export restrictions: 26.6%; (5) grant-back requirements: 25.8%; (6) research & development limitations: 23.9%; (7) foreign courts or laws to be used for disputes arising from the agreement: 22.2%; (8) purchasing requirements: 14.0%; (9) management intervention: 9.7%; (10) complementary technology prohibitions: 4.8%; (11) exclusive sales agent requirements: 1.4%; (12) exclusive sales arrangements: 1.2%; (13) Mexican technology available: 1.2%; (14) foreign personnel requirements: 0.2%. A.B.A., *supra* note 99, at 31-32.

112. Transfer Act, *supra* note 89, art. 10.

The effective date of the Transfer Act was January 29, 1973. It is noteworthy, for those who had business in Mexico prior to this date, that the Transfer Act, unlike the Investment Law, has *ex post facto* effect. All contracts within the scope of the Transfer Act that were in operation before the effective date must have been registered in their unamended state before May 1, 1973, and have been amended to comply with the Transfer Act by January 28, 1975.¹¹³ Denial of registration or failure to register causes the contract to be null and void in Mexico, and thus, any contractual payments to be nondeductible for Mexican tax purposes.¹¹⁴

An adverse determination on registration may be appealed for reconsideration within eight days of notification of the original determination.¹¹⁵ The appeal from an adverse reconsideration decision is to the Mexican Federal District Court by *amparo*, by raising a constitutional question. Further review would be to the Mexican Federal Circuit Court, and then to the Supreme Court of Mexico.¹¹⁶

The Registry has the power to investigate the implementation of agreements that are registered with it, at any time.¹¹⁷ Article 13 of the Transfer Act imposes a duty of absolute secrecy on personnel in the Registry with regard to any technical data in the agreements registered, or before the Registry.¹¹⁸

In December, 1974, the Ministry published a "Summary of the General Criteria of Application of the Transfer Act" (hereinafter Summary).¹¹⁹ The publication was an attempt to elucidate the criteria of article 7 of the Transfer Act under which registration of agreements must be denied. The Summary, though not law, is meant to bring more uniformity and predictability to article 7 exclusions. It may be analogized to the Official Comments to the Uniform Commercial Code in the United States.

Two of the most important points that the Summary makes are that technology must be sold to Mexicans rather than leased, and that the sale must take place in as short a period of time as practical.¹²⁰ Much of the Summary deals with how to determine the reasonableness of compensation to a foreigner for his technology.¹²¹

113. *Id.* art. 2.

114. *Transfers of Technology in Mexico*, *supra* note 102, at 28.

115. Transfer Act, *supra* note 89, art. 14.

116. See Section J, *infra*.

117. Transfer Act, *supra* note 89, art. 5.

118. *Transfers of Technology in Mexico*, *supra* note 102, at 28.

119. See *Rules Changed?*, *supra* note 61, at 235-38.

120. *Id.* at 238.

121. "Summary of the General Criteria of Application of the Transfer Act", at pt. II, art. 7; *Rules Changed?*, *supra* note 61, at 236.

The allowed rate of compensation from an average of the agreements registered has been about three percent of net sales. Higher rates often appear in relation to electronics, chemicals, telecommunications, and medicines. The highest rates of return allowed appear to have been about seven percent of net sales.¹²²

F. INVESTMENT BY AMERICAN PETROLEUM BUSINESS?

Investment options for Americans in oil and gas activity is generally limited to opportunities to contract with the Mexican petroleum industry, Pemex.¹²³ The law in Mexico requires that compensation in such situations generally be in terms of an absolute sum rather than any form of percentage of the production.¹²⁴ Private companies from the United States have been hired to do work and to give technological assistance with most activities at some time in recent years, including exploration, extraction, pipeline operations, transportation by vehicle or vessel, and the refining process.¹²⁵ One particular example of the need of Pemex to contract with a foreign oil company was when the opportunities of petroleum offshore, under the continental shelf of Mexico, began to be explored. Pemex purchased an offshore drilling rig, but had to contract for extensive technical assistance from an American oil company in order to learn how to make it function.¹²⁶

G. BUSINESS ORGANIZATION ALTERNATIVES

1. *The Corporation*

The source of law on the corporation (sociedad anonima) is the General Law of Mercantile Organizations.¹²⁷ According to its terms

122. *Id.*

123. See generally PAN AMERICAN UNION, MINING AND PETROLEUM LEGISLATION IN LATIN AMERICA 214-36 (2d ed. 1969); Echegoyen, *Problems of Investment in Latin America in the Petroleum Industry*, 1 Hous. J. INT'L L. 37 (1978); Murphy, *Oil Operations in Latin America: The Scope for Private Enterprise*, 2 INT'L LAW. 455 (1968); *Symposium: Government and Private Enterprise in Latin American Petroleum Development*, 9 VAND. J. TRANS-NAT'L L. 473 (1976); Comment, *Nationalism as a Factor in Legislation Restricting Foreign Investment: Extractive Industries in Mexico*, 45 IND. L. J. 616 (1970).

124. Petroleum Laws (Reglamento de la Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petroleo), D. O., 235 Aug. 25, 1959, Sec. 2 at 1. For an example of an exception in the form of a joint venture with a Du Pont subsidiary, see *Conditions Abroad*, *supra* note 3, at 6.

125. See R. MANKE, MEXICAN OIL AND NATURAL GAS, POLITICAL, STRATEGIC AND ECONOMIC IMPLICATIONS 84-91 (1979).

126. *Id.* at 88.

127. Ley general de Sociedades Mercantiles, 85 D.O., Aug. 3, 1934, Sec. 2 at 593 [hereinafter cited as General Law of Mercantile Organizations]. See generally ERNST & ERNST, CHARACTERISTICS OF BUSINESS ENTITIES, MEXICO (Int'l Bus. Series 1967); R. MARTINEZ-ESCOBAR, GUIDE TO BUSINESS IN MEXICO (1972); R. SHAFER, MEXICAN BUSINESS ORGANIZATIONS: HISTORY AND ANALYSIS (1973); O.A.S., LAWS OF MEXICO, *supra* note 47, at 32-36, 38-43; ARTHUR ANDERSEN & Co., *supra* note 56, at 11-19; WRIGHT, *supra* note 36, at

there must be a minimum of five founders. They must be shareholders, though requirements are met if four of the five only have one share apiece.

There must be at least two directors on the corporation's board of directors. A minority interest of 25% or more has the right to be represented by a director. Americans, or other foreigners, may serve on the board of directors only in proportion to the foreign capital authorized and invested in the corporation. There is no requirement of labor representation on the board.

A minimum of 25,000 pesos, 20% of which must be paid in immediately, is required to begin a corporation. If the corporation authorizes capital for itself of more than 25,000 pesos, 5% of net profits will have to be placed in escrow until the legal reserve of 20% of authorized capital can be maintained.

Taxes and fees for incorporation are insubstantial, though attorney's fees may not be.¹²⁸ Except for corporations on the stock exchange, there are no public disclosure requirements. The corporation must appoint an examiner or examiners at a stockholder's meeting, however, to oversee corporate activities. A 25% minority interest can select an examiner or examiners in addition to the one or more selected by the majority interest.

A corporation may issue registered or bearer shares, but may only issue registered shares to Americans or other foreigners. Division into preferred and common stock may be made. Preferred shares must receive a cumulative dividend before the common shares receive the benefit of corporate profits. Preferred stock must be able to vote on major changes concerning the corporation, such as merger, dissolution, or transformation. Labor shares may be issued for personal service. For the first 10 years the founders may receive 10% of the annual profit through founder bonds, if the shareholders receive at least a 5% dividend for the year in question.

2. *The Limited Liability Company*

The source of law on the limited liability company (*sociedad de responsabilidad limitada*) is also the General Law on Mercantile Organizations.¹²⁹ It provides for an organization where liability of each

218-41; Barnhill, *Mexican Business Associations*, 4 TEX. INT'L L. F. 79 (1968); Haro, *A Brief Comparison of the Law of Business Organizations in the United States and Mexico*, 7 AM. BUS. L.J. 255 (1970).

128. *Conditions Abroad*, *supra* note 3, at 10.

129. See *supra* note 127. See generally O.A.S., LAWS OF MEXICO, *supra* note 47, at 37-38; Eder, *Limited Liability Firms Abroad*, 13 U. PITT. L. REV. 193-220 (1952); Crawford, *The*

member is limited to his or her amount of contribution to the organization. The organization is an independent entity surviving the death or bankruptcy of members, but subject to dissolution if all of its shares become property of one person.

At least 5,000 pesos must be subscribed, with at least 50% actually paid in, to form a limited liability company. A reserve is required to be established and maintained from 5% of annual profits.

Shares are not signified by certificates as they are with corporations. The limited liability company keeps a record of shares in its books. Shares may be common or preferred. Interest, of 9% or less annually, may be given on shares for three years if the articles of association provide for this.

The primary difference from a corporation is the restriction upon transferability of interests. Transfer of shares is not allowed without the approval of all members of the limited liability company, though the articles of association may reduce this to approval by the members representing 75% of the outstanding capital. A transfer of shares is not effective until it is recorded on the limited liability company's books.

The articles of the limited liability company may designate one or more managers (*gerente*) who need not be members. A manager may be removed at any time without cause unless otherwise established by the articles. If no manager is designated, all actions of the limited liability company must be concurred in by all of the members. A supervisory council (*consejo de vigilancia*) may also be established by the articles of the limited liability company, and may consist of members or nonmembers selected by the members.

There must be at least one meeting of members every year at the domicile of the limited liability company. Members contributing one third or more of the limited liability company's capital may call for an otherwise unscheduled meeting.

3. *The General Partnership, Limited Partnership, and Limited Partnership with Shares*

The general partnership (*sociedad en nombre colectiva*), and limited partnership (*sociedad en comandita simple*) in Mexico are essentially the same as they are in the United States. The applicable law in Mexico for all three forms of partnership is the General Law of Mercantile Organizations.¹³⁰

Mexican Limited Liability Company, 13 TUL. L. REV. 258 (1939); 16 VA. J. INT'L L. 445 (1976).

130. See note 127 *supra*. See generally O.A.S., LAWS OF MEXICO, *supra* note 47, at 36-

In the general partnership the name of at least one of the partners must be used. If the names of all partners are not used the phrase *y compania* (and company) or its equivalent must appear at the end of the firm name.

In the limited partnership the liability of the general partners (comanditados) is unlimited, as distinguished from the liability of the limited partners (comanditarios) which is limited to their capital investment into the organization. If a limited partner participates in management of partnership business, includes his name in the firm name, or holds himself out as a general partner he becomes liable as if he was a general partner.

A limited partnership with shares (*sociedad en comandita por acciones*) is almost identical to a limited partnership, except in regard to the partnership interests being represented by shares, and their transferability. The shares of a limited partner are freely transferable. The shares of a general partner, however, cannot be transferred without the agreement of all other general partners and two-thirds of the limited partners. The name used by the limited partnership with shares must include the words *Sociedad en Comandita por Acciones*, or their abbreviation, S. en C. por A.

4. *The Joint Venture*

The joint venture (*asociacion en participacion*) in Mexico is very similar to the joint venture in the United States.¹³¹ The joint venture is not an independent legal entity. No public notice or filing is necessary, though the agreement for a joint venture must be in writing. The Ministry of Finance in Mexico does not have a system for taxing a joint venture. Participants are advised to seek written response from the Ministry of Finance in regard to their individual tax responsibility.¹³²

5. *Branch of an American (Foreign) Business Organization*

Mexico's General Law on Mercantile Organizations,¹³³ Section 251, allows a foreign business organization to establish a branch opera-

37; ARTHUR ANDERSEN & Co., *supra* note 56, at 21-22; Gladstone, *Theory and Operation of Partnerships under the Latin American Codes*, 16 TUL. L. REV. 27 (1941).

131. See generally Gordon, *The Joint Venture as an Institution for Mexican Development: A Legislative History*, 1978 ARIZ. ST. L. J. 173 (1978). The Mexican government has entered a number of joint ventures with private firms having American interests. For example, DuPont's Mexican subsidiary has a minority position in Petroquimica Mexicana and Tetraetilo de Mexico, with Pemex (the state owned Mexican petroleum corporation) owning the majority interest. *Conditions Abroad*, *supra* note 3, at 11.

132. ARTHUR ANDERSEN & Co., *supra* note 56, at 22.

133. See note 127 *supra*.

tion in Mexico with the permission of the Mexican government.¹³⁴ Permission to establish a branch must be gained from the Ministry of Industry and Commerce, and the Ministry of Foreign Relations. To seek such permission translations by an authorized translator must be made of the corporate charter or partnership agreement, of the resolution authorizing establishment of the branch, the capital assigned to the branch, and the offices designated to the branch. If permission is granted the branch must register with the Public Registry of Commerce.¹³⁵

Mexico's administrative and tax laws applicable to a Mexican business organization are also applicable to a branch of a foreign business organization. In addition, the annual balance sheet of a foreign branch, certified by a certified public accountant, is supposed to be published publicly, though this requirement is not generally enforced.¹³⁶

6. *The Individual Proprietorship*

As in the United States, an individual in Mexico may operate a business as a sole proprietorship (*empresa individual*). The individual, however, may be found liable for his or her debts to the entire extent of personal assets, saving the exceptions provided by the bankruptcy law of Mexico.

7. *General Requirements for a New Business*

Except for a joint venture, and an individual proprietorship, all of the foregoing business entities must comply with the following to establish themselves for business in Mexico: (1) gain a permit from the Ministry of Foreign Relations (regardless of whether those seeking the permit are Mexican citizens or not); (2) the organizers must sign the articles of incorporation or association in the presence of a Mexican notary public; and (3) the charter and articles of the organization must be recorded with the Public Registry of Commerce in the area where the organization has its domicile.¹³⁷

Except for a joint venture, all of the foregoing business organizations, including an individual proprietorship, must comply with the following additional requirements to establish themselves for business in Mexico: (1) give notification of the new business operations to the So-

134. See generally O.A.S., *LAWS OF MEXICO*, *supra* note 47, at 46-50; ARTHUR ANDERSEN & Co., *supra* note 56, at 11-12; *Conditions Abroad*, *supra* note 3, at 11.

135. ARTHUR ANDERSEN & Co., *supra* note 56, at 11.

136. *Id.* at 12.

137. *Id.* at 12-13.

cial Insurance Institute, local and federal tax department officials, the Ministry of Health, and the Statistics Bureau of the Ministry of Industry and Commerce; and (2) affiliate immediately after opening business with the local chamber of industry or chamber of commerce.¹³⁸

H. OPERATING IN MEXICO AS A UNITED STATES OR MEXICAN CORPORATION

A corporation incorporated in the United States and wanting to operate in Mexico under its foreign charter may have an agency or branch in Mexico if permission is granted by the Department of Industry and Commerce.¹³⁹ It must also register with the Public Records of Property and Commerce.¹⁴⁰

An American corporation should consider whether it would be better for it to do business in Mexico as a foreign corporation, or, if it cannot gain an excepted status from the National Commission on Foreign Investment, as a holder of a minority interest (generally) in a corporation formed under the laws of Mexico.

The advantages of incorporating in Mexico are numerous.¹⁴¹ Working as a Mexican corporation significantly removes the stigma of alienness. The establishing of a branch or agency of a United States corporation in Mexico usually entails procedures that are longer, and a little more expensive,¹⁴² than forming a corporation by Mexican laws. Tax exemptions and other benefits for which a Mexican corporation is eligible would not be available to an American branch or agency.¹⁴³ There are fewer problems and risks involved in getting immigration permits for company personnel from the United States when the company is a Mexican one rather than the branch of a United States company.¹⁴⁴ An American branch is faced with restrictions on ownership of real estate in Mexico.¹⁴⁵ Incorporation in Mexico is relatively simple. Only one registration is required. There is only one corporation law in Mexico, the General Law of Mercantile Organizations, rather than one in each state, as in the United States.

The disadvantages of incorporation in Mexico are numerous also. The American interest will now almost always be relegated to a minor-

138. *Id.* at 13.

139. General Law of Mercantile Organizations, *supra* note 127, art. 250.

140. *Id.* art. 251.

141. For the view that establishing a foreign branch in Mexico is disadvantageous, see *Conditions Abroad*, *supra* note 3, at 11.

142. Gonzalez-Baz, *A Survey of Mexican Laws Affecting Foreign Businessmen*, 4 DEN. J. INT'L L. & POL'Y 343 (1974) [hereinafter cited as *A Survey of Mexican Laws*].

143. *Id.*

144. *Id.* See note 58 *supra*.

145. See Section O, *infra*.

ity position.¹⁴⁶ Thus there is a loss of control, plus the costs of finding a reasonably capable Mexican investor or group of investors to make up at least 51% of the corporation's capital participation, and management.¹⁴⁷ Expenses of a branch or agency in Mexico could be placed on home office books in the United States and be included as operating expenses for tax purposes.¹⁴⁸ A Mexican corporation may not hire more than 10% non-Mexican workers in relation to its total labor force.¹⁴⁹ More than 10% American employees could be used if there is a need for skilled workers that cannot be filled locally, and permission is granted for this excess percentage by the Mexican government.¹⁵⁰ The percentage of the total salary given cannot exceed the percent of foreigners employed by the firm.¹⁵¹

I. THE CALVO CLAUSE

Article 27 of the Mexican Constitution requires foreigners engaging in any land transaction in Mexico to consent to Mexican laws and legal remedies, and waive any protection from their own national government.¹⁵² Failure to give this consent to the Secretary of Foreign Relations may cause the land to be confiscated, or the risk of use denied. The effect of Article 27 on land transactions has been similarly accomplished in other Latin American transactions by what has become known as the "Calvo Clause".

The theory of the Calvo Clause was pronounced by the Argentine author and diplomat Carlos Calvo in the 1850's.¹⁵³ The gist of the Calvo Clause is that a foreigner contractually agrees to submit any dispute arising from the contract to the local courts for resolution according to local law. The doctrine seeks to contractually exclude the possibility of direct or indirect intervention into the matter by the foreign national power of which one of the parties is a citizen. The clause has been popular in Mexico, as in all of Latin America, particularly because of historic concern about American intervention to protect the rights of its citizens.¹⁵⁴ The United States has maintained the position that the contractual waiver by its citizens does not waive the rights of

146. See Section C, *supra*.

147. In regard to finding a Mexican participant see F. DEROSI, *THE MEXICAN ENTREPRENEUR* (1971).

148. *A Survey of Mexican Laws*, *supra* note 142, at 43.

149. Federal Labor Law, D.O. 299, April 1, 1970, art. 7 Sec. 2.

150. *Id.*

151. *Id.*

152. LA CONSTITUCION MEXICANA art. 27 (Mex.).

153. H. VRIES, *THE LAW OF THE AMERICAS* 99 (1965).

154. D. SHEA, *THE CALVO CLAUSE* 21 (1955). See also W. KANE, *CIVIL STRIFE IN LATIN AMERICA: A LEGAL HISTORY OF U. S. INVOLVEMENT* (1972).

the United States government in a matter.¹⁵⁵

United States corporations registering to do business in Mexico must agree to the Calvo Clause. Indeed, the 1973 Investment Law states that foreigners acquiring interests in property of *any kind* in Mexico shall be considered Mexican nationals in relation to that property, and must not invoke the protection of their governments in respect to it, on penalty of forfeiting the property to Mexico.¹⁵⁶

J. ACCESS TO COURTS

An American corporation validly doing business in Mexico has legal capacity to use the courts of Mexico.¹⁵⁷ The Mexican government has always proclaimed that foreigners and nationals will be treated equally under the law. The Constitution has such a provision in Article 1. The Mexican judiciary's writ of amparo is available to test the constitutionality of actions or laws.¹⁵⁸ The Law of Nationality and Naturalization reiterates the position and provides that foreigners have a right to diplomatic intervention if the courts of Mexico deny justice or willfully and maliciously delay administration of justice.¹⁵⁹

K. ARBITRATION CLAUSES

Unlike in the Andean Common Market,¹⁶⁰ investment agreements in Mexico may include reference to an impartial agency to resolve disputes arising from the interpretation or performance of the agreement.¹⁶¹ The arbitration procedure in Mexico is essentially the same as it is in the United States.¹⁶² Mexico has ratified the Convention on the

155. H. VRIES, *supra* note 153, at 100; Comment, *The Calvo Clause: It's Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEX. INT'L L. F. 289 (1971).

156. Investment Law, *supra* note 60, art. 2.

157. General Law of Mercantile Organizations, *supra* note 127, art. 250. See generally O.A.S., LAWS OF MEXICO, *supra* note 47, at 9-10; Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L.J. 785 (1974); Perez, *An Introduction to the Legal Structure of Mexico for the Foreign Investor*, 4 CAL. W. L. REV. 1 (1968); *Notes on Judicial Review in Mexico and the United States*, 5 INTER. AM. L. REV. 253 (1963).

158. See R. BAKER, *JUDICIAL REVIEW IN MEXICO, A STUDY OF THE AMPARO SUIT* (1971); K. KARST & K. ROSEN, *LAW AND DEVELOPMENT IN LATIN AMERICA* (1975); C. SCHWARZ, *THE MEXICAN WRIT OF AMPARO: AN EXTRAORDINARY REMEDY AGAINST OFFICIAL ABUSE OF INDIVIDUAL RIGHTS* (1969); Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. W. INT'L L.J. 306 (1979); Camargo, *The Claim of 'Amparo' in Mexico: Constitutional Protection of Human Rights*, 6 CAL. W. L. REV. 201 (1970).

159. The Law of Nationality and Naturalization, 82 D.O. 237, Jan. 20, 1934, art. 32.

160. Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses and Royalties, Art. 51, adopted Dec. 31, 1970, Registro Oficial No. 264. See 11 INT'L Legal Materials 126 (1972).

161. The law of Mexico dealing with both civil and commercial arbitration is the Code of Civil Procedure of Mexico, Title VIII; *On Arbitration Procedure (Judicio Arbitral)*, reprinted in J. WHELESS, *COMPENDIUM OF THE LAWS OF MEXICO* 493 (1938).

162. J. VANCE & H. CLAGETT, *A GUIDE TO THE LAW AND LEGAL LITERATURE OF MEX-*

Recognition and Enforcement of Foreign Arbitral Awards.¹⁶³ The National Registry on the Transfer of Technology has indicated the general acceptability of such clauses for the agreements it reviews. The Director General of the Registry has commended the use of the Interamerican Commission of Commercial Arbitration for these purposes.¹⁶⁴

L. ANTITRUST

Article 28 of the Mexican Constitution prohibits all monopolies except for the coining of money, the postal service, telegraph, radio, printing of paper money, and use of patents and copyrights. The Law Concerning Monopolies (*Ley de Monopolios*)¹⁶⁵ provides: "Within the terms of Article 28 of the Constitution, monopolies and other controls are prohibited." "Monopoly" is defined as including: "any concentration or cornering in industry and commerce as well as any situation created with the intent to permit one or several persons to dictate prices for goods or services, to the detriment of the general public or of any social group."¹⁶⁶

The laws of Mexico which set price ceilings on particular products¹⁶⁷ obviate price fixing schemes as to those products. Moreover, the products which have price ceilings set by the government are particularly in fields of consumer necessity where the political reaction pushing for enforcement of the antitrust laws would expectably be strongest. Also, much of the large scale industry in Mexico is state-owned. Businesses in Mexico have seldom been charged with violating Mexico's constitutional and statutory law against price fixing and monopolization.¹⁶⁸

Whether operating in the form of a Mexican business organization, or as a branch of an American organization, monopolization activities or otherwise restraining trade in Mexico may lead to liability under antitrust law of the United States if the restraining activity in

ICO 101 (1945). See generally Damke, *Commercial Arbitration in Mexico*, 1 INT'L ARB. J. 162 (1945); Straus, *Why International Commercial Arbitration is Lagging in Latin America: Problems and Cures*, 33 ARB. J. 21 (1978); *Private Versus State Arbitration in Latin America*, 4 CAL. W. INT'L L.J. 121 (1973); Note, *The Future of Arbitration in Latin America: A Study of Its Regional Development*, 8 CASE W. RES. J. INT'L L. 480 (1976); Debevoise, *The Arbitrability of Gaps in Long Term Scientific, Technical and Industrial Development Contracts*, 17 HARV. INT'L L.J. 122 (1976).

163. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, (1970) 3 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

164. Transfers of Technology in Mexico, *supra* note 102, at 28.

165. Law Concerning Monopolies, 85 D.O. 1141, Aug. 31, 1934, art. 1. See generally Graf, *Unfair Competition in Mexican Law*, in *A Symposium on Law and Government* 91-121 (1958); O.A.S., LAWS OF MEXICO, *supra* note 47, at 177-86.

166. Law Concerning Monopolies, *supra* note 165, art. 3.

167. See *Conditions Abroad*, *supra* note 3, at 12.

168. ERNST & ERNST, MEXICO, A NATIONAL PROFILE 18 (1971).

question affects the commerce of the United States.¹⁶⁹

M. BANKRUPTCY

Bankruptcy may be voluntarily declared. It is involuntarily declared by the following situations: (1) failure to pay debts as they become due; (2) insufficient property found to satisfy the judgment when execution has been levied; (3) business closed without someone left to meet debts as they arise; (4) an assignment for the benefit of creditors; (5) fraud, fictitious or ruinous activity to avoid debts; and (6) non-compliance with obligations contracted for with creditors in suspension of payments proceedings.¹⁷⁰ Involuntary bankruptcy may be declared by the person, any creditor, the Public Ministry, or a court of Mexico upon any of the above events.¹⁷¹ The bankruptcy of a partner in Mexico does not thereby place the partnership into bankruptcy proceedings.¹⁷²

Once a bankruptcy declaration is approved by a court: (1) a receiver and inspector are appointed; (2) the bankrupt must present his books and records and a balance sheet to the court within 24 hours; (3) the bankruptcy declaration is publicly registered; (4) creditors are to file their claims within forty-five (45) days from the last publication of the bankruptcy declaration; and (5) a meeting of creditors is called for.¹⁷³ The receiver collects and protects the property of the estate.¹⁷⁴ There may be one, three or five inspectors depending on the amount of property involved. The permanent inspectors are elected by the creditors and take over from the inspector temporarily appointed by the court.¹⁷⁵ The inspectors are to protect the interests of the creditors throughout the bankruptcy proceedings.¹⁷⁶

In Mexico there are three types of bankruptcy: fortuitous, culpable, and fraudulent,¹⁷⁷ classified according to the cause of the bankruptcy. In the United States, claims against a debtor-in-bankruptcy are

169. *See* *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). *See generally*, K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* (1958).

170. General Bankruptcy Law, 137 D.O. 1, April 20, 1943, art. 2 [hereinafter cited as *Bankruptcy Law*]. *See generally* O.A.S., *Laws of Mexico*, *supra* note 47, at 50, 56-63; *Bankruptcy & Composition: The Commercial Laws of the Republic of Mexico*, in *DIGEST OF COMMERCIAL LAWS OF THE WORLD* 24 (Nat. Assoc. of Credit Mgrs. 1966); Hansen & Young, *Bankruptcy in Mexico*, 4 *TEX. INT'L L.J.* 140 (1968) [hereinafter cited as *Hansen & Young*].

171. O.A.S., *LAW OF MEXICO*, *supra* note 47, at 56.

172. *Bankruptcy Law*, *supra* note 170, art. 4.

173. *Id.* art. 15.

174. *Id.* art. 198.

175. O.A.S., *LAW OF MEXICO*, *supra* note 47, at 58.

176. *Bankruptcy Law*, *supra* note 170, art. 67.

177. *Id.* arts. 91-114.

based on fraud or negligence, but there are no similar distinctions between types of bankruptcy under Mexican law. Fortuitous bankruptcy is caused by misfortunes and nonculpability on the part of the debtor. Culpable bankruptcy is when the debtor did not use average reasonable prudence in the operation of the debtor's business. Fraudulent bankruptcy is when the debtor fraudulently decreased the assets of what became the bankruptcy estate. Criminal liability is attached to a finding of culpable or fraudulent bankruptcy. A debtor convicted of fraudulent bankruptcy serves from five to ten years, and is liable for a fine of up to ten percent of the amount that was acted with fraudulently.¹⁷⁸ If a company is convicted of culpable or fraudulent bankruptcy its officers, managers or directors who are responsible for the relevant acts of the company are held liable.¹⁷⁹

A debtor in bankruptcy may not leave the locality of the bankruptcy proceedings without the permission of the court.¹⁸⁰ The administration of the estate is turned over to the receiver except for the debtor's homestead (*patrimonio familiar*).¹⁸¹

The priority of creditors is as follows: (1) wages, expenses connected with the illness that caused death, and burial expenses; (2) mortgages; (3) creditors with special privileges (*liens* generally); (4) common creditors in business transactions; and (5) common creditors in transactions governed by the Civil Code.¹⁸² To be rehabilitated, a debtor in fortuitous bankruptcy must formally promise to pay all of its debts arising prior to the declaration of bankruptcy as soon as its economic circumstances permit it.¹⁸³

Composition may be sought as an alternative to bankruptcy. The creditors convene to seek an agreement, under jurisdiction of the bankruptcy court. Preferred or secured creditors do not have to participate. A majority of the other creditors, representing at least three-fifths of the nonpreferred or unsecured liabilities, must accept a plan. If approved by the bankruptcy judge the composition plan is binding.¹⁸⁴

N. HAVING AN ATTORNEY IN MEXICO

In view of the Calvo Clause an American corporation might theoretically consider having one of its attorneys from the United States become licensed to practice in Mexico. Obtaining such a license, in

178. O.A.S., LAWS OF MEXICO, *supra* note 47, at 59.

179. Bankruptcy Law, *supra* note 170, art. 101.

180. O.A.S., LAWS OF MEXICO, *supra* note 47, at 60.

181. Bankruptcy Law, *supra* note 170, art. 115.

182. *Id.* arts. 260-73.

183. O.A.S., LAWS OF MEXICO, *supra* note 47, at 59.

184. Hansen & Young, *supra* note 170, at 145-46.

addition to the burden of learning the laws of Mexico, requires a procedure uncommon to obtaining a license by citizens or aliens in the United States. Though the Mexican Constitution prohibits discrimination against foreigners, the federal law of professions of Mexico prohibits foreigners from practicing law.¹⁸⁵ This discrimination has been declared unconstitutional several times by the Supreme Court of Mexico.¹⁸⁶ The holding in Mexico only applies to the particular case however. It has no legal precedential value. Each American must bring a suit in amparo for himself all the way to the Supreme Court of Mexico to become an attorney in Mexico.

A Mexican attorney is necessary not only for his advice, but for expediting many procedures in the Mexican bureaucracy, such as applying for a trust to use land in the forbidden zone, or applying for the acquisition of more than 25% of the capital in a corporation formed before May 8, 1973, for example.

O. AMERICAN ACCESS TO REAL PROPERTY IN MEXICO

1. *Evolution and Basic Law of the Forbidden Zone*

By the Constitution of Mexico the *forbidden zones* are 100 kilometers (approximately 60 miles) from the borders, and 50 kilometers (about 30 miles) from the seacoast, where no alien can acquire direct ownership of lands or waters.¹⁸⁷ Since Spanish colonization, Mexico has restricted the ownership of land by aliens. In the 1880's there was a law prohibiting aliens from acquiring land in Mexican states adjoining the United States. It may be remembered that the Texas Revolution was fomented by English-speaking immigrants who settled in the Mexican state of Tejas. There is, therefore, a self-preservation concept behind the Constitutional clause, which has been reinforced by Mexican history. The revolution which produced the Mexican Constitution of 1917 was also interested in nationalistic land reform at a time when

185. Law of Professions, 150 D.O. 1, May 26, 1945; Regulations, 152 D.O. 3, Oct. 1, 1945. See generally in regard to the legal profession, legal education, and notaries in Mexico, J. HERGET & J. CAMIL, *supra* note 7, at 89-98; O.A.S., LAWS OF MEXICO, *supra* note 47, at 53-55; Perry, *Understanding the Mexican Attorney: Legal Education and Practice of Law in Mexico*, 10 INT'L LAW. 167 (1976) [hereinafter cited as Perry]. See also Margadant, *The Mexican Notariate*, 6 CAL. W. L. REV. 218 (1970).

186. Perry, *supra* note 186, at 178.

187. LA CONSTITUCION MEXICANA, art. 27, sec 13, para. 7 (Mex.). See generally R. TANCER & J. ZANOTTI, THE MEXICAN LAW OF FOREIGN REAL ESTATE INVESTMENT IN THE PROHIBITED ZONES: AN OVERVIEW (1974); Zanotti, *Mexico's Forbidden Zones*, LAW & SOC. ORDER 455 (1973); Aranda, *Acquiring Property in Mexico's 'Forbidden Zone': Estate Planning Considerations*, 115 TRUSTS & EST. 666 (1976); *Seminar on the Law of Real Property Acquisition in Mexico*, 12 ARIZ. L. REV. 265 (1970); Guerrero, *supra* note 74; Vilaplana, *The Forbidden Zones in Mexico*, 10 CAL. W. L. REV. 47 (1973) [hereinafter cited as Vilaplana].

much of the land was directly or indirectly controlled by foreigners. About 45% of the total land area of Mexico is in the "forbidden zone."

2. *Prestanombres*

One common method of circumventing the restrictions on foreign investment has been the now illegal *prestanombres* (name lenders). A Mexican citizen holds title to property that an American could not own outright. The Mexican does this usually for a substantial fee and/or percentage of the profits that go to the foreigner from the use of the land. The deal almost always includes that the *prestanombre* will vote in the business as directed by the foreigner.

The new laws do not allow foreign control to be hidden by the *prestanombre* device. Fines for such conduct can go up to 50,000 pesos (about \$2,250) and a prison term of up to nine years.¹⁸⁸ Businessmen are not as concerned with the new law as with the extent of enforcement of it. Enforcement of restrictive laws has not been thorough in the past.¹⁸⁹ The Mexican government will probably still have substantial difficulty in complete enforcement. The new law certainly evidences the intent of tighter control, however, and the use of the *prestanombre* device will probably cost more in the future. In addition, if the *prestanombre* later decides not to cooperate, or dies, or the device is discovered by forthright Mexican officials, total loss of the American investment may occur.

3. *The Trust Device and the Forbidden Zone*

As evidenced by a 1971 decree allowing the trust device in the forbidden zones,¹⁹⁰ the Mexican government has accepted the idea of allowing foreign investment into the zones to help stimulate tourist and industrial development of the coastal and border areas. Articles 18 to 22 of the Investment Law carry this through by establishing a procedure by which a foreign company or individual, or a Mexican company that allows foreign participation, may acquire the use of land in the forbidden zone. The use must be for industrial or tourist activity. The Ministry of Foreign Relations must authorize the activity and land use. It has almost complete discretion to allow or deny the subject proce-

188. Investment Law, *supra* note 60, arts. 28, 29, & 31.

189. Gordon, *The Contemporary Mexican Approach to Growth With Foreign Investment: Controlled But Participatory Independence*, 10 CAL. W. L. REV. 1, 6 n.13.

190. Decree of April 29, 1971 by former Pres. Echeverria. See generally Guerrero, *supra* note 74; Vilaplana, *supra* note 187, at 59-72; Quiroz, *Investment in Real Property in Mexico: An Overview of Constitutional and Statutory Restrictions*, 12 ARIZ. L. REV. 270, 279 (1970); Batiza, *The Evolution of the Fideicomiso (Trust) Concept Under Mexican Law*, 11 MIAMI L. J. 478 (1957).

ture. A Mexican bank is allowed to acquire the land in the zone, and hold it as trustee for the purpose of leasing to foreign interests and/or a Mexican company which allows foreign participation. The trust may not exceed 30 years. It is not yet clear whether this will be renewable, but the prudent planner will presume that it will not be renewed. A lease contract with the trustee must be entered into. It cannot exceed a term of 10 years. This can be renewable twice, to fill the 30 years of the trust. A recommendation from the Inter-Secretarial Consultive Commission in favor of the trust permit is necessary before the Secretary of Foreign Relations will approve it. The decisions of the Consultive Commission are not published. There is no judicial review of its decision. There is also the consideration of the initial expense of providing the project's detailed plans and data to the Consultive Commission, along with the expense of attorney's fees, before even knowing if a trust will be allowed. The waiting period for a decision may often be about a year. Unless the government makes an exception, the trust, despite its disadvantages, is the only means by which an American can legally use land in the forbidden zone.

4. *American Use of Land Outside of the Forbidden Zone*

Land for commercial and business purposes may be acquired by American individuals outside the forbidden zone, to the extent necessary for business operations, by first obtaining the consent of the Ministry of Foreign Affairs (Secretario de Relaciones Exteriores). An American company can acquire land outside the forbidden zone by the same procedure. In either case, Americans and all foreigners must agree in writing with the Ministry of Foreign Affairs that they will be treated as Mexican citizens under Mexican law.¹⁹¹ An American company may lease land outside the forbidden zone for terms not exceeding 10 years, with the permission of the Ministry of Foreign Affairs.¹⁹²

5. *Use of Mexican Rural Land*

A special problem is encountered if the lease of rural property, for a factory site or otherwise, is desirable to the American company. Rural property is any property outside the limits of a city, town, or village. Corporations are generally denied the right to possess an interest in, or administer, rural property.¹⁹³ However, a company may present evi-

191. Quiroz, *supra* note 190.

192. Meek, *Land Transfer and Finance in Mexico*, 4 DEN. J. INT'L L. & POL'Y 27 (1974) [hereinafter cited as Meek]. See generally Kozolchyk, *The Mexican Land Registry: A Critical Evaluation*, 12 ARIZ. L. REV. 308 (1970).

193. Meek, *supra* note 192, at 30. See generally J. VEGA, MEXICAN REAL ESTATE (1976);

dence, with its application to the Ministry of Foreign Affairs, that the rural land is essential to the corporate purposes. In addition to the Ministry of Foreign Affairs, the governor of the Mexican state in which the land is located must consent to corporate use of rural land within his state.¹⁹⁴

P. TAXES IN MEXICO GENERALLY

The principal taxes relevant to a potential investor in Mexico are: (1) the tax on the income of business enterprises; (2) the tax on the income of individuals; and (3) the commercial revenues tax.¹⁹⁵ The highest rate of the progressive income tax on individuals and business enterprises is 42%. This highest rate is applied to personal income over about \$3500 per year, and to business enterprise income over about \$40,000 per year.¹⁹⁶ A surcharge may raise the rate to 48.65% for businesses with income between \$40,000 and \$120,000 a year.¹⁹⁷ There are no state income taxes.¹⁹⁸

Deductions from taxable income are generally not as liberal as under American law.¹⁹⁹ The most important deductions for a business are: (1) cost of goods sold; (2) depreciation and amortization; and (3) ordinary and necessary business expenses. These deductions are strictly construed. For example, depreciation is generally limited to about 5% per year.²⁰⁰ The primary deductions for personal taxable income are: (1) income from Social Security; (2) limited charitable donations; (3) medical expenses; (4) interest payments; (5) some ordinary and necessary business expenses; and (6) a personal exemption of about \$720, plus \$480 for a spouse, and \$240 for each lineal descendant.²⁰¹

The commercial revenues tax is collected on (1) sales; (2) leases of property; (3) commercial agencies and commissions; and (4) rendering

Rivera-Farber, *An Introduction to Secured Real Estate Transactions in Mexico*, 12 ARIZ. L. REV. 290 (1970); Doving, *Land Reform in Latin America*, 46 LAND ECON. 264 (1970).

194. LA CONSTITUCION MEXICANA, art. 27, sec. 4, para. 6 (Mex.).

195. See generally ARTHUR YOUNG INTERNATIONAL, MEXICO TAX AND BUSINESS INFORMATION (1976) [hereinafter cited as ARTHUR YOUNG INTERNATIONAL]; Genaro, *Mexico-Dividend, Interest, Royalties, Technical Service Fees and the Tax Aspects as to Foreign Investments and the Transfer of Technology*, in DOING BUSINESS IN MEXICO, *supra* note 45, at 75-97; Nieto, *Income Taxation of Foreign Business in Mexico*, 29 PROCEEDINGS INST. FED. TAX. N. Y. U. 59 (1971); Johnson, *Maximization of United States Foreign Tax Credit for Mexican Tax*, in DOING BUSINESS IN MEXICO, *supra* note 45, at 177-251; Miller, *Mexican Taxation: Law and Practice*, 4 DEN. J. INT'L L. & POL'Y 79 (1974) [hereinafter cited as Miller]; Miranda, *Tax Incentives for 'Mexicanized' Companies*, 25 TAX. LAW. 419 (1972).

196. Miller, *supra* note 195, at 80.

197. *Id.* at 82.

198. *Id.*

199. *Id.* at 80.

200. *Id.* at 84.

201. *Id.*

of services.²⁰² The regular federal rate is 1.8%. The federal and state government have concurrent jurisdiction over the tax; and the state may levy its own tax on the above transactions. Generally, the state tax ranges from 1% to 1.2%, and the combined commercial revenues tax is thus usually about 3%.²⁰³

Q. MEXICAN TAX CREDIT AND TARIFF INCENTIVES

A new tax incentive program was announced by the Mexican government in 1979.²⁰⁴ Though the program specifically excludes firms where a majority interest is non-Mexican, majority foreign-owned companies may qualify if they give assurances of Mexicanization of the company within a time specified by the applicant.²⁰⁵ Applications for the tax credits—Certificados de Promocion Fiscal (Ceprofis)—are made to the Secretariat of National Properties and Industrial Growth (SPIG).²⁰⁶ If they approve of the application, a priority-category designation is made of the applicant based on the product involved and the region where the business is or will be located.²⁰⁷ Priority, which translates into a higher tax credit, is being given to Mexico's border and coastal regions, which are generally less industrialized than the country's interior at the present time. Once a priority category designation has been made by SPIG, a specific amount of tax credit is allocated by the Secretary of Hacienda (Treasury) after consultation with the applicant investor as to the amount of investment involved.²⁰⁸ Additional tax credit may be obtained for investment in a new industry, particularly a small industry,²⁰⁹ or expansion of an existing industry; for purchasing equipment produced in Mexico; and for creation of jobs.²¹⁰ Generally 25% tax credit may be gained for creating jobs; up to 5% credit may be gained for purchasing Mexican-made equipment; and up to 25% tax credit may be gained for a high priority geographical location of the industry.²¹¹

202. Federal Law on the Commercial Receipts Tax (*Ley Federal de Impuesto Sobre Ingresos Mercantiles*), 201 D.O. Sec. 2, Dec. 31, 1951, *amended by* Decree of Dec. 21, 1952, art. 1.

203. ARTHUR ANDERSEN & Co., *supra* note 56, at 83.

204. *See* Decree in regard to tax-credit incentives, 353 D.O. 4, March 6, 1979. On tax incentives generally *see* ARTHUR YOUNG INTERNATIONAL, *supra* note 195, at 36-41; O.A.S., LAWS OF MEXICO, *supra* note 47, at 113-15.

205. *Conditions Abroad*, *supra* note 3, at 21.

206. *Id.* at 23.

207. *Id.* at 24.

208. *Id.* at 23.

209. A "small industry" is one whose total assets are not over 200 times the annual minimum wage in Mexico City. *Id.* at 25.

210. *Id.* at 24. *See also* Decree, *supra* note 204.

211. *Conditions Abroad*, *supra* note 3, at 24.

Up to a 15-20% reduction of federal income tax is given by the Mexican government for establishing "new" and "necessary" industries.²¹² It should be clearly understood that generally this incentive only goes to companies with, at most, a 49% interest owned by Americans or other non-Mexicans, unless assurances of future Mexicanization of majority interests are made.²¹³ A "new" industry is one which produces goods not previously made in Mexico.²¹⁴ A "necessary" industry is one which produces goods which were not previously manufactured enough in Mexico to meet Mexican market demand.²¹⁵ Apparently a major objective of the incentives is to favorably affect the balance of trade. Exemptions from import duties are available if the goods are not made in Mexico and are needed in the production process of the "new" or "necessary" industry.²¹⁶ Export duties are lifted from these industries if at least 60% of direct cost of the finished product is incurred in Mexico.²¹⁷ The federal stamp tax is totally removed from qualifying businesses, as is the federal portion of the commercial receipts tax.²¹⁸

R. THE MAQUILADORA OPERATION

In his inaugural comments on December 1, 1970, then President Echeverria stated that preferences would be given to foreign investments for new industries which manufacture articles for export. As a result, factories wholly owned by Americans have been allowed into the forbidden zone along the United States-Mexico border and have proven to be profitable businesses.²¹⁹ Manufactured parts or materials for processing (temporary imports) are sent to these factories from the United States or some other country to be worked on and assembled,

212. *Id.*

213. *Id.*

214. O.A.S., LAWS OF MEXICO, *supra* note 47, at 113. *See generally* Gomex-Palacio, *Defining "New Lines of Products" Under Mexico's Foreign Investment Law*, 8 CAL. W. INT'L L.J. 74 (1978).

215. O.A.S., LAWS OF MEXICO, *supra* note 47, at 113.

216. *Conditions Abroad*, *supra* note 3, at 24.

217. *Id.*

218. Law for the Development of New and Necessary Industries (Ley de Fomento de Industrias Diario Oficial Neuvas y Necesarias), 208 D.O. 7, Dec. 31, 1954, Jan. 4, 1955, art. 14.

219. *See generally* R. FERNANDEZ, THE UNITED STATES-MEXICO BORDER (1977); D. BAERRESEN, THE BORDER INDUSTRIALIZATION PROGRAM OF MEXICO (1971); Taylor & Bond, *Mexican Border Industrialization*, M.S.U. BUS. TOPICS (Spring 1968); Wanatabe, *Constraints on Labour-Intensive Export Industries in Mexico*, 109 INT'L LAB. REV. 23 (1974); Cowan, *Mexican Border Industrialization Program*, 8 COMP. JUR. REV. 17 (1971); Walker, *Border Industries with a Mexican Accent*, 4 COLUM. J. WORLD BUS. 25 (1969); Inman & Tiraldo, "Mexican Dividend: 'Las Maquiladoras'", 9 INT'L LAW. 431 (1975) [hereinafter cited as Inman & Tiraldo]; *The Maquila Boom*, FORBES, Dec. 10, 1979, at 102, 104 [hereinafter cited as *The Maquila Boom*]; N.Y. Times, Feb. 22, 1979, § A, col. 1, at 18.

and sent back into the United States, or some third country, as a finished product ready to be sold. These operations are called "Maquiladoras" in Mexico.²²⁰ They help the Mexican unemployment problem, and the gross national product and balance of trade of Mexico. The number of such factories has increased from 20 in 1966 to 476 in 1974.²²¹ Employment in Maquiladora plants rose from 20,327 in 1970 to 53,680 in early 1974,²²² and stands at about 110,000 Mexican citizens presently.²²³ Gross receipts from products manufactured at Maquiladora plants and exported was \$278 million in 1973, and \$443 million in 1974.²²⁴ By March, 1975, a third of the income and employment in the border region came from the Maquiladora industry.²²⁵

Maquiladoras have primarily concentrated on the final stages of manufacturing, assembly, and product finishing (thus "maquila", the Spanish allusion to grinding corn, and the fee from it).²²⁶ Manufactured parts may be *imported* into Mexico duty free to be assembled, and then *exported* into the United States with American customs duty only charged on the value added by the assembly.²²⁷ Likewise, the Mexican export duty is only on the value added by the assembly.²²⁸ The 1971 restriction that a Maquiladora factory could not be located within 12.5 miles of the United States border²²⁹ was abolished the following year.²³⁰ Permission may be granted by the Secretariats for a certain percentage of the finished products from a Maquiladoras to be sold inside Mexico itself.²³¹ This is a change from another 1971 restriction, whereby the plant had to export all of its products.²³²

A "Maquiladora" has been defined by the Mexican government as any manufacturing plant that (a) with 'temporarily imported machinery', regardless of cost, exports its total production, or (b) with machinery already set up to supply the domestic market turns to either partial

220. The word "maquilar" in Spanish means: "to measure and take dues for grinding corn; to clip, retrench, cut off." CASSELL'S SPANISH DICTIONARY 547 (1968).

221. VIEWS ACROSS THE BORDER 148 (S. Ross. ed. 1978).

222. *Id.*

223. *The Maquila Boom*, *supra* note 219, at 102.

224. Banco de Mexico, *Informe anual preliminar*, 1974 (Preliminary Annual Report), *appearing in* EXCELSIOR, Feb. 27, 1975.

225. VIEWS ACROSS THE BORDER, *supra* note 221, at 148. See this volume with regard to the economic importance, energy sources, politics, culture, health, and ecology of Mexico's northern border region.

226. *Id.* at 160.

227. Inman & Tiraldo, *supra* note 219, at 431 n.2.

228. Vilaplana, *supra* note 187, at 51.

229. Customs Code (Codigo Aduanero), D.O., March 15, 1971, eff. March 18, 1971, art. 321.

230. Customs Code, For the Assembly Industry, 314 D.O. 3, Oct. 30, 1972, art. 321.

231. Inman & Tiraldo, *supra* note 219, at 432.

232. Customs Code, *supra* note 229, art. 1.

or total export production, so long as the direct manufacturing cost of the product to be exported is below 40 per cent.²³³

The Maquiladoras are an example of the Commission's power to make exceptions to the Investment Law, and an example of the trust device being permitted in the forbidden zone. Permission for such an assembly plant operation must be obtained from the Secretariat of Finance and Public Credit, and the Secretariat of Industry and Commerce. Formal registration of the plant with the Public Registry is necessary once it is ready to function.²³⁴

The U.S. regulation which is apparently most relevant to the Maquiladoras operation is section 807 of the Tariff Schedule of the United States.²³⁵ Duty is placed on only the value added abroad, which in the case of the Maquiladoras operations is generally only the labor of the workers assembling, painting, or otherwise finishing the product.

Advantages for an American investor in pursuing a Maquiladoras operation include the following: ease of access from northern Mexico to United States markets; relatively low labor costs; proximity to sister plants or facilities in the United States;²³⁶ and favorable customs laws. If the American investor incorporates in Mexico, even though wholly owning the Maquiladoras assembly plant, he may nonetheless have the right to preferential treatment if the products are exported to member countries of LAFTA (Latin American Free Trade Association).²³⁷ The condition for this preferred treatment is that at least 50% of the product content be Mexican or from some other LAFTA country.²³⁸ A United States corporation can compete with most of the products that now come into the U.S. from Japan, Taiwan, and Hong Kong by using the low labor costs of the Maquiladoras operation.²³⁹

Some examples of major American corporations that have estab-

233. Customs Law, 314 D.O. 3, Oct. 31, 1972. Definition (Reglamento), art. 321.

234. Customs Code, *supra* note 229, art. 5.

235. "Articles assembled abroad in whole or in part of fabricated components, the products of the United States, which a.) were exported in condition ready for assembly without further fabrication . . . c.) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting . . . a duty upon the full value of the imported article less the cost or value of such products of the United States." 19 U.S.C. § 1202, Tariff Act of 1930, § 807.

236. About 350 American managers of Maquiladora plants live across the border from Juarez, with their children in American schools. *The Maquila Boom*, *supra* note 219, at 103.

237. Members include Mexico and all the nations of South America. *DOING BUSINESS IN LATIN AMERICA* 46 (T. Gannon ed. 1968). See generally C. FURTADO, *ECONOMIC DEVELOPMENT IN LATIN AMERICA*, 197-204 (1970); Comment, *Latin American Free Trade Association*, 11 UTAH L. REV. 297 (1967).

238. See Resolution 11, March 30, 1972, and Resolution 13, April 13, 1962 of the Permanent Executive Committee of LAFTA.

239. Inman & Tiraldo, *supra* note 219, at 431.

lished Maquiladora border plants in northern Mexico are General Instruments, Sears & Roebuck, Hughes Aircraft, Kimberly-Clark, Litton Industries, Magnavox, Memorex, Motorola, Republican Corporation, Samsonite, Ampex, General Electric, General Motors, Westinghouse, and Chrysler.²⁴⁰

The daily wage for workers in northern Mexico is about equal to the hourly wage for workers in the United States.²⁴¹ In regard to concern about lower productivity from Mexican workers, 61 of the 63 companies interviewed by the American Chamber of Commerce expressed that they were satisfied with the productivity of Mexican workers, and indicated that absenteeism and tardiness was low among them.²⁴²

Since American labor unions feel the competition from Maquiladora plants,²⁴³ it may be expected that they will continue to pressure the American Congress for import protection in regard to them. No concerted protectionism in regard to the Maquiladoras has appeared in United States laws or regulations yet.

S. UNITED STATES-MEXICO TRADE AGREEMENT

The United States and Mexico signed the first trade agreement to come from the "Tokyo Round" of the GATT negotiations on December 2, 1977.²⁴⁴ Trade between the two countries had gone on since 1951 without an official agreement.²⁴⁵ Both countries made concessions in reducing their respective trade barriers, but the overall impact of the agreement on the United States-Mexico trade will be relatively small in comparison to total trade between the two nations.²⁴⁶ Imports into Mexico will still have to obtain an import license, and generally be subject to a tariff.²⁴⁷ The last bilateral treaty between Mexico and the United States was the Treaty of Peace, Friendship, Limits and Settlement of February 2, 1848.²⁴⁸ There is little in the treaty directly concerning American investors.

240. R. FERNANDEZ, *THE UNITED STATES-MEXICO BORDER* 135 (1977) [hereinafter cited as R. FERNANDEZ]; *The Maquila Boom*, *supra* note 219, at 431.

241. Wages generally are about \$50 for a 48 hour work week, at present. *The Maquila Boom*, *supra* note 219, at 102.

242. R. FERNANDEZ, *supra* note 240, at 144.

243. *VIEWS ACROSS THE BORDER*, *supra* note 221, at 160.

244. Agreement on Trade Matters, Dec. 2, 1977, United States-Mexico. See Rooney, *The United States-Mexico Trade Agreement of 1977*, 13 *TEX. INT'L L.J.* 435 (1978) [hereinafter cited as Rooney].

245. Rooney, *supra* note 244, at 435-36.

246. *Id.* at 435.

247. *Id.*

248. 9 Stat. 922, T.S. No. 207, entered into force May 30, 1848.

T. THE MEXICAN STOCK EXCHANGE

Mexico has three stock exchanges. The one in Mexico City²⁴⁹ accounts for about 93% of the total national registered stock volume.²⁵⁰ The other two are in Guadalajara and Monterey. On the Mexico City exchange, volume has increased tenfold in the last two years, from 300,000 shares a day to three million shares a day currently.²⁵¹ The number of corporations listed has grown to about 450, with about 100 actively traded.²⁵² There are three Mexican investment funds actively traded.²⁵³ One substantial avenue of U.S. investment has been through the purchase of bank securities of various Mexican banks. These have been popular because of their high interest income.²⁵⁴ It is estimated that only 20% to 30% of all stock trading is done on one of the stock exchanges. The majority of trading is accomplished through banks, brokerage firms, or other financial institutions.²⁵⁵

All Americans and other foreigners must register their stock.²⁵⁶ This is an inconvenience that any Mexican bank or brokerage firm will perform for a reasonable fee added to the transaction.²⁵⁷ The powerful regulatory agency for the stock exchange is the Comision Nacional de Valores.²⁵⁸ There are no capital gains taxes on a sale of stock traded through the stock exchange.²⁵⁹

U. A RISK OF INVESTMENT IN MEXICO: EXPROPRIATION AND "MEXICANIZATION"

Article 27 of the Mexican Constitution states:

Ownership of the lands and waters within the boundaries of

249. The address for the stock exchange in Mexico City is Bolsa de Valores de Mexico, S.A. de C.V., Uruguay 68, Mexico, D.F. At least two American brokerage firms, Merrill, Lynch, Pierce, Fenner & Smith, and E.F. Hutton & Co., are represented in Mexico City. See generally R. ESSLEN, *THE COMPLETE BOOK OF INTERNATIONAL INVESTING* 269-281 (1977); Ramirez & Ritch, *The Public Sale of Shares in Mexico*, 2 *STUDIES L. & ECON. DEV.* 23 (1967).

250. R. OPIE, *BUSINESS—MEXICO—1973*, at 199 (Am. Chamber of Commerce of Mexico 1973) [hereinafter cited as R. OPIE].

251. *FORBES*, Oct. 29, 1979, at 52.

252. *Id.* Some of the corporate shares actively traded include: Telemex (national telephone corp.); Altos Hornos, or Fundidora (steel); Ind. Resistol (chemicals); Moresa, Tremec, or Eaton (automotive); San Luis (silver); Tolteca (cement); Ind. Penoles (mining); and Loreto (paper).

253. R. ESSLEN, *HOW TO BUY FOREIGN SECURITIES* 94 (1974) [hereinafter cited as R. ESSLEN].

254. Gonzalez-Baz, *A Survey of Mexican Laws Affecting Foreign Businessmen*, 4 *DEN. J. INT'L L. & POL'Y* 47 (1974).

255. R. OPIE, *supra* note 250, at 199.

256. R. ESSLEN, *supra* note 253, at 94.

257. *Id.*

258. *FORBES*, Oct. 29, 1979, at 52.

259. R. OPIE, *supra* note 250, at 200.

the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property. Private property shall not be expropriated except for reasons of public use and subject to payment of indemnity.²⁶⁰

In 1937 Mexico nationalized a railroad as a prelude to the well-known expropriation of the foreign-owned petroleum industry a year later. Electrical power was nationalized in 1960. Mexico still celebrates on March 18 because of the expropriation of the foreign-owned petroleum industry on that date in 1938. They apparently view it as a declaration of economic independence day.²⁶¹

The threat of expropriation is more visible in some areas of the Mexican economy than others. The pharmaceutical industry, for example, is 90% owned by foreigners—65% American interests, and the rest European. A leader of one of the labor unions urged President Echeverria to nationalize this industry to lower drug prices.²⁶² This suggested nationalization was partially accomplished in late 1974. Mexico founded a state-owned corporation²⁶³ to take over the supply of six pharmaceutical companies involved with the production of diosgynim-based steroid and hormone drugs.

OPIC, the Overseas Private Investment Corporation, was created in the United States in 1969.²⁶⁴ While it may provide insurance for the risk of expropriation by the Mexican government to American private investors, much of OPIC's insurance covers risks in Latin America and the Caribbean. It covers only new investments or additions to existing investments, and must have approval of the host Mexican government. If the American investor is not paid by the insurance program, in the case of catastrophic losses which the insurance program cannot recover, the United States government succeeds to the claim and pursues direct negotiations with the Mexican government. Investors must assume part of the risk when their plans are large or in particularly sensitive areas.

There are some private insurance companies that provide coverage for expropriation risk. The Investment Insurance International (I.I.I.),

260. See J. WHELESS, *COMPENDIUM OF THE LAWS OF MEXICO* (2d ed. 1938).

261. See generally H. KNUDSON, *EXPROPRIATION IN THE AMERICAS* 115-58 (A. Lowenfield ed. 1971); Lacey, *Protection of Foreigner's Rights in Mexico*, 13 *INT'L LAW*, 83 (1979). For an analysis of the expropriation in the petroleum industry see W. GORDON, *THE EXPROPRIATION OF FOREIGN OWNED PROPERTY IN MEXICO* (1941).

262. *Times of the Americas*, Feb. 7, 1973, at 5.

263. *Productos Quimicos Vegetales Mexicanos*.

264. United States Pub. L. No. 91-175, Pt. I § 105, Dec. 30, 1969, 22 U.S.C.A. § 2191. See generally H. STEINER & D. VAGTS, *TRADITIONAL LEGAL PROBLEMS* 471-81 (1976); *The OPIC Gravy Train*, *NATION*, Mar. 25, 1978, at 327-30; *BUS. WEEK*, July 18, 1977, at 18-19.

associate of Lloyds of London, for example, covers such political risks. The I.I.I. policies, in particular, would not be available to new investors in Mexico generally, since one of the conditions for expropriation coverage by that company is that the assured exercise control over the management of his assets.²⁶⁵ If a Mexican corporate form is used, such control by Americans is not usually possible now in view of the 1973 Investment Law.

A 51% government position was gained in the national telephone industry by 1972 after initial commitment in the early 1960's, and gradually increasing participation.²⁶⁶ This action was taken as an alternative to expropriation.

Mining was "nationalized" by fade out demands in 1961 but in the form of gradual "Mexicanization." Foreigners were given 25 years (by 1986) to sell the majority of equity capital to Mexican nationals. This move was an expropriation by Mexicanization rather than a take-over by the government as nationalization is usually understood.²⁶⁷ The Mexican government even gave an inducement of substantial tax relief for early sale to Mexican nationals. As a result of this relatively diplomatic manner in which Mexicanization has been approached, many American mining investors have continued to keep their capital in Mexico, but now in the role of minority shareholders.²⁶⁸ Generally, the likelihood of fade out legislation appears to be greater than the sudden take-over by the Mexican government.

An example of the strategy of Mexicanization by a leading international corporation may be seen in the case of International Harvester (IH).²⁶⁹ IH faced serious obstacles to its growth potential in Mexico because of the 1973 Law on Investment, and specific Mexican legislation in the automotive industry. A 1977 decree concerning automotive engines designated diesel engines and diesel truck manufacture strictly for producers having a Mexican majority. IH had been in Mexico for at least 40 years. Choosing Mexicanization rather than withdrawal of investment in Mexico, it decided to pursue a joint venture with private

265. E. BAKLANOFF, EXPROPRIATION OF U.S. INVESTMENTS IN CUBA, MEXICO, AND CHILE 143 (1975).

266. *Id.* at 46.

267. Ley Reglamentaria del Artículo 27 Constitucional en Materia de Explotacion y Aprovechamiento de Recursos Minerales, Feb. 5, 1961, D.O., Feb. 6, 1961, as amended by decree of Dec. 29, 1965, D.O., Jan. 4, 1966. See generally Mainero, *Mining in Mexico*, 4 CAL. W. L. REV. 287 (1968); Borek, *Evaluating a Developing Institution Mexicanization of Mining*, 13 ARIZ. L. REV. 673; Mainero, *Legal and Practical Aspects of Mexicanization under the Mining Law of Mexico*, 18 ROCKY MT. MIN. L. INST. 595 (1973). See also Hilinski, *United States Tax Aspects of Mexicanizing Existing Operations*, in *DOING BUSINESS IN MEXICO*, *supra* note 45, at 147-77.

268. 19 STATISTICAL ABSTRACT OF LATIN AMERICA, *supra* note 14, at 370.

269. BUSINESS LATIN AMERICA, Feb. 13, 1980, at 55-56.

Mexican interests. Potential candidates were reviewed and a selection was made. The new minority position for IH required a lot of adjustment in thinking. In effect, only a veto is still held by IH on the board of directors of the joint venture now. The Mexican partner appoints three board directors, and IH selects two. Four directors' votes are required for approval of an action by the joint venture.

IH continues to insist on its trademark being placed on the front of the heavy-duty tractors made by the joint venture. Pursuant to the new Mexican trademark law, however, the name of the Mexican participant, FAMSA, also appears on the truck, though in a somewhat less visible spot. The letterhead of the venture now shows the IH identification on one side and the identification of the Mexican participant on the other side. The venture has proved successful so far and plans to expand greatly, from a production of 1200 trucks last year to production of 4000 this year.

V. A RISK OF INVESTMENT IN MEXICO: CURRENCY VALUE CHANGE

Since World War II there have been four devaluations of the peso. The first was in 1949 with a change of 4.85 to 8.65 pesos per dollar. In 1954 there was a second devaluation. The exchange rate changed to 12.50 pesos per dollar. The latest two devaluations were in 1976.²⁷⁰ The peso fell from 12.50 to 20.50 per dollar, a 60% devaluation, in September of 1976. A month later it was devalued an additional 40%. The dollar was devalued in 1971 and 1973.²⁷¹ The current exchange rate is about 23 pesos per dollar. Thus the risk of a devaluation of either country's currency appears to be a substantial one in Mexican-American transactions where a significant length of time is involved. Long-term loans between Americans and Mexicans are thus especially vulnerable to changes in currency value.

In the event of a devaluation the courts in America and Mexico will generally not go beyond giving recovery for the absolute amount of currency bargained for. They will not, generally, take the devaluation into account. Thus the general rule in Mexico and the United States is the nominalistic principle that a dollar contracted for is always a dollar, regardless of inflation or devaluation.²⁷² Likewise with a peso, of

270. MEYER, *supra* note 6, at 676. The reasons for the devaluations were to stimulate investment and to assist the ailing balance of trade. R. LOONEY, MEXICO'S ECONOMY: A POLICY ANALYSIS WITH FORECASTS TO 1990, at 116-21 [hereinafter cited as R. LOONEY]. In 1975 imports exceeded exports in Mexico by \$3.5 billion. MEYER, *supra* note 6, at 675.

271. The text of the U.S. announcement in 1973 appears in 1973 IMF SURVEY 56 (1973).

272. Kariv, *Contracts Under Monetary Fluctuations: The Legal Effects of Devaluation*, 65 Nw. U. L. REV. 533, 538-45 (1970) [hereinafter cited as Kariv].

course. The nominalistic principle applies only where the money amount of the obligation is firmly fixed.

There are ways of avoiding the effects of nominalism. It does not apply to unliquidated debts. A change in monetary value will be taken into account in that case. Where the contracting parties treat the currency as a commodity rather than as money, as a kind of merchandise instead of value, nominalism will not apply.²⁷³

The courts of the United States and/or Mexico might consider the change in circumstances if the devaluation of Mexican or American money was extreme, or inflation was extreme. The German courts, as an example, took extreme inflation into account in delivering judgments during that country's dismal economic woes of the 1920's.²⁷⁴ Official notice of revalorization of a debt is a radical step however, and is foreseeable only in theory.

Protective clauses of various kinds may be used not only for the risk of revalorization but also for the problem of inflation.²⁷⁵ For example, the protective clause of payment in a specific kind of money may be agreed upon. Swiss francs, German marks, or some other currency may be used, or a group of currencies may be chosen and the currency out of the group which changes the least during the life of the contract be used. Foreign currency clauses often take the form of multiple currency alternatives for the creditor's benefit. The creditor is allowed to choose the currency in which he wants the obligation paid when the debt comes due. Other than France, there is hardly any judicial invalidation of foreign currency debts among the nations of the world.²⁷⁶ It is unlikely that Mexico will invalidate the use of such clauses, especially in international contract settings. Almost all legal systems agree, moreover, that the use of foreign currency clauses can be invalidated only by specific legislation.²⁷⁷ The parties may contract that the exchange rate existing at the beginning of the agreement will be used to convert the profit of pesos into dollars. Revaluation and devaluation of either would then be risked by each of the parties.

An "escalator clause" is another form of protective clause that may be agreed upon. An example would be installments adjusted in accordance with official cost of living statistics, but not to fall below nominal values agreed upon initially in the contract.

273. F. MANN, *THE LEGAL ASPECT OF MONEY WITH SPECIAL REFERENCE TO COMPARATIVE, PRIVATE, AND PUBLIC INTERNATIONAL LAW* 245 (1971) [hereinafter cited as MANN].

274. A. NUSSBAUM, *MONEY IN THE LAW, NATIONAL AND INTERNATIONAL* 215 (1950) [hereinafter cited as A. NUSSBAUM]; Kariv, *supra* note 272, at 545-48.

275. On Mexico's inflation problem, see Section B, *supra*.

276. Dach, *Conversion of Foreign Money*, 3 AM. J. COMP. L. 162 (1954).

277. MANN, *supra* note 273, at 154.

The use of index clauses is a protective clause device more than two centuries old.²⁷⁸ The obligation is paid in reference to the value of a specific amount of goods or services. For example, the price of one thousand pounds of 5% tungsten alloy steel from the Bethlehem Steel Mills in Birmingham, Alabama, or the cost of a taxi ride from the Houston Intercontinental Airport to downtown Houston, might be value bargained for in a contract. Monetary fluctuations will not affect the specific value contracted for. A common provision is to index the obligation with several alternative goods or services. This is to protect against occasional gluts in the market of a particular commodity or service chosen as an index.

The protective clause of payment in a specific amount of gold or payment in a specific amount of gold value may be agreed upon. Such a clause is legal and enforceable in the United States since October 28, 1977.²⁷⁹

A sophisticated advance on the gold value clause is the "unit of account" system. Debts are denominated in such units rather than a national currency. The unit is the value of 0.8867088 grams of gold.²⁸⁰ The United States creditor and Mexican debtor agree to a loan of a certain amount of units of account at a certain interest rate. The worth of gold may change by the time the debt is due, however. Thus the unit of account system may add or subtract the amount of gold value change in the unit at the time of payment. This calculation is done by use of reference currencies. The "base value" of a unit is expressed in terms of the dollar, the peso, and 16 European currencies in relation to the value of the gold in the unit at the time the contract is entered into.²⁸¹ If two conditions are met before the time of payment, the gold content of the unit will change. The first condition is that the gold value of all the reference currencies must have changed since the time of contracting, either being devalued or revalued. The second condition is that the gold values of at least two-thirds of the reference currencies (twelve currencies) must have changed in the same direction, either being devalued or revalued. The change in the amount of gold in the unit at payment will be to the same extent as the majority direction

278. I. FISHER, *STABLE MONEY: HISTORY OF THE MOVEMENT* 12 (1934).

279. Pub. L. 95-147, § 4(c), Oct. 28, 1977, 91 Stat. 1229 eliminated the effect of 31 U.S.C. § 463 for obligations entered after Oct. 28, 1977. See also *The U.S. Legalizes Multicurrency Deals*, BUS. WEEK, Nov. 7, 1977, at 23-24. Prior to the Depression of the 1930's and the 1933 law making gold clauses illegal, a clause in which a certain amount of gold was specified as payment was a standard part of long term contracts in the United States. A. NUSSBAUM, *supra* note 274, at 225-27. See generally Comment, *Legal Problems in Compensation Under Gold Clauses of Private International Law Agreements*, 63 GEO. L.J. 817 (1975).

280. Kariv, *supra* note 272, at 565-69.

281. *Id.*

currency which has altered the least since the time of contracting. The nations whose currency is chosen for reference, and the number of nations which are chosen may be varied from the example by agreement. The unit account system appears to be the best in an international loan transaction of substantial size, in minimizing the risk of currency value change, for both the creditor and the debtor.

W. PROSPECTS FOR UNITED STATES INVESTMENT IN THE FUTURE

On June 9, 1967, the Ministry of Industry and Commerce published a list of product industries it seeks to develop inside the country. The list changes over time with the needs of the country. The original list of 1967, and its amendments, are the basis for the determinations of which industries are "new" or "necessary" in Mexico and thus given substantial incentives by the Mexican government. Such incentives will continue into the foreseeable future. An American who exports a good of a particular type to Mexico that is on the list may consider using the incentives available, and invest in developing production in Mexico. If he does not, and someone else does, the tariff duties on the product will usually rise since the good is then produced inside the country.

One possible plan which may prove profitable is the following: Establish a Maquiladora operation next to the United States border on an item that can be profitably exported to the United States. The corporate form would be American, a branch having been established in Mexico. Often a business takes a loss for the first couple of years of its operation. These losses could be written off for United States taxes. The good produced should be on the list which would make it a "new" or "necessary" industry if a Mexican corporation was producing the good. The location and item of production should also be planned to take advantage of Mexican tax and tariff incentives discussed in Section Q. Within two years hopefully enough screening of possible buyers who are Mexican nationals, and training of Mexican nationals in the technical aspects of the business, will be accomplished so that the enterprise can be incorporated as a Mexican corporation with prospects of success. At least 51% of the company would then be sold to Mexican nationals to comply with the Investment Law, and to take advantage of the incentives and lack of restrictions involved with operating as a Mexican controlled company.²⁸² As in the International Harvester ex-

282. See generally Sonnenreich, *Protecting the United States Minority Shareholder in Joint International Business Ventures in Latin America*, 5 VA. J. INT'L L. 1 (1964).

ample cited in Section U, enough seats on the Board of Directors should be maintained by American interests to maintain veto power.

The economic factors for predicting United States investment in Mexico can be complex, but all revolve around the basic principle that United States investment will flow to Mexico when the best rate of return with the least amount of risk appears to be there, compared to other markets.

Psychological factors that exist in the real world also have to be dealt with in predicting the amount of American future investment in Mexico. Nationalism, xenophobia, foreign values and consumption tastes, and inability to exert or eventually achieve majority ownership and control of a Mexican corporation's affairs, are all important factors influencing the amount of investment. Indeed, there is some uncertainty among American business people about Mexico because of the history of expropriation, and the tone of anti-private and/or anti-American politics espoused by various leaders in Mexico.²⁸³

Substantial petroleum deposits have recently been found in Mexico. In view of the growing scarcity of that resource, the discovery of petroleum certainly brightens the overall economic future of Mexico.

Real GNP growth in Mexico has averaged about six to seven per cent since 1940 which is a good rate on the world scene. In 1974 Mexico's real growth was six per cent while the United States and many other industrialized nations were showing a considerably more stagnant growth rate.²⁸⁴

Mexico is a relatively stable country, especially by Latin American standards. The PRI, Partido Revolucionario Institucional, has been in power since the 1920's, and will most likely remain in power for the foreseeable future.²⁸⁵

Mexico has no controls on exchange of currency. It has no limitations on repatriation of capital.²⁸⁶

The possibilities for U.S. investment in Mexico seem good enough

283. See generally HOW LATIN AMERICA VIEWS THE U.S. INVESTOR 95-117 (R. Vernon ed. 1966); Sloan, *Political Environment for U.S. Investment in Latin America*, 1 HOUS. J. INT'L L. 1 (1978); and Rogers, *A Challenge for U.S. Investment In Latin America: Some Unconventional Suggestions*, 4 LAW & POL'Y INT'L BUS. 557 (1972). For a view that the Mexicanization program is a disincentive to investment see Murphy, *Decision 24, Mexicanization, and the New International Economic Order: The Anatomy of Disincentive*, 13 TEX. INT'L L.J. 289 (1978).

284. Jova, *Private Investment in Latin America: Renegotiating the Bargain*, 10 TEX. INT'L L.J. 485 (1975).

285. See R. HARMON, *A SELECTED AND ANNOTATED GUIDE TO THE GOVERNMENT AND POLITICS OF MEXICO* (1977); R. HANSEN, *THE POLITICS OF MEXICAN DEVELOPMENT* (1971); G. WYNIA, *THE POLITICS OF LATIN AMERICAN DEVELOPMENT* (1978).

286. See Freud, *Repatriation of Mexican Funds*, in *DOING BUSINESS IN MEXICO*, *supra* note 45, at 127-47.

to watch for, and consider.²⁸⁷ Generally, they should prove worthwhile if Mexico's government continues to desire and assure foreign investment; the country's economic vitality continues; its natural economic resources are developed advantageously; foreign investors feel some degree of welcome in the country; and Mexico continues its economic, social, and political changes in a stable manner.

287. See generally Votaw, *Problems in Financing Latin American Investment*, 1 Hous. J. INT'L L. 21 (1978). For forecasts for the next ten years, see R. LOONEY, *supra* note 269.