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Mexico's Foreign Investment Act of 1993

JORGE A. VARGAS*

Since mid-1989, when the Mexican Government published the 1989 Regulations ("1989 Regulations") to the 1973 Act to Promote Mexican Investment and Regulate Foreign Investment ("1973 Act"),¹ foreign investors throughout the world eagerly awaited new and modern legislation to regulate foreign investment in Mexico. The international business community sought a modern act to substitute for the rigid legal framework of the 1973 Act. The business community desired a federal statute that would favor foreign investment and promote international trade. These hopes were realized in 1993 when the Administration of President Carlos Salinas de Gortari enacted a new Foreign Investment Act ("1993 Act").²

The new federal statute, enacted on December 28, 1993, formally repealed the 1973 Act.³ Until the Regulations to the 1993 Act are drafted and published, which is likely to take a year or more, the 1989 Regulations will continue to govern foreign investment in matters not inconsistent with the substantive provi-

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1. See *Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera* [Regulations to the Act to Promote Mexican Investment and Regulate Foreign Investment], DIARIO OFICIAL DE LA FEDERACIÓN [D.O.], May 16, 1989 [hereinafter 1989 Regulations]. For an unofficial English translation of the Regulations, see Gonzalez Vargas Bryan & Gonzalez Baz, *Foreign Investment in Mexico: A Summary of Laws and Regulations* 15 (1991).

2. *Ley de Inversión Extranjera* [Foreign Investment Act] § 1, D.O., Dec. 27, 1993. For an English translation of the text of this Act, see 33 I.L.M. 207, 207-24 (1994) [hereinafter 1993 Act].

3. *Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera* [Act to Promote Mexican Investment and Regulate Foreign Investment], D.O., Mar. 9, 1973 [hereinafter 1973 Act]. For the English translation of the 1973 Act, see 12 I.L.M. 463 (1973). The Government of Mexico published an English text of the 1973 Act in 2 NATIONAL COMMISSION OF FOREIGN INVESTMENTS, FOREIGN INVESTMENTS: JURIDICAL FRAMEWORK AND ITS APPLICATION 43-64 (1984).

sions of the 1993 Act.⁴ Therefore, before discussing the 1993 Act, Part II of this Article summarizes the key provisions of the 1973 Act providing the foundation for the 1989 Regulations. Part III specifically focuses on the powerful regulatory body created by the 1973 Act, namely the National Commission of Foreign Investments. Part IV then analyzes the 1989 Regulations adopted by the Commission, and the changes these Regulations made to the 1973 Act. Finally, Part V discusses the similarities and differences between the 1993 Act and the 1973 Act, and focuses on the improvements made by the 1993 Act to the 1973 Act sanction provisions. This Article concludes that the 1993 Act drastically changes Mexico's approach toward foreign investment and, indeed, seeks to promote such investment where it once discouraged it.

In the following section, this Article introduces the main reasons for Mexico's more relaxed position regarding foreign investment.

I. THE NEW ACT RESPONDS TO DOMESTIC AND INTERNATIONAL FACTORS

The 1993 Act should not be perceived as an isolated act of the Salinas Administration. In fact, the format, content, and even the timing of the new Act reflect the overall modernization process currently underway at the domestic level in Mexico. Additionally, certain international, economic, and political factors,⁵ including the passage of the North American Free Trade Agreement ("NAFTA") were taken into consideration.⁶

4. See 1993 Act, *supra* note 2, art. 4.

5. For an explicit enumeration of these factors in an official statement accompanying the proposed legislative bill that President Salinas sent to Congress, see *Exposición de Motivos*, Nov. 24, 1993, Doc. 011/LV/93 (Año III) [hereinafter *Exposición de Motivos*].

6. NAFTA creates a largely barrier-free economic partnership between Canada, Mexico, and the United States, to be implemented gradually over 15 years. NAFTA's goal is to establish a \$6.7 trillion regional market area from the Yukon in Alaska to Yucatán, Mexico, affecting 360 million people. NAFTA phases out tariffs on some 9,000 kinds of goods exchanged among the three countries. The Agreement also covers issues relating to environmental and labor standards. See, e.g. *NAFTA Prevails; Clinton Wins Major Battle on Free Trade*, ARIZ. REPUBLIC, Nov. 18, 1993, at A1.

On December 17, 1992, NAFTA was signed in San Antonio, Texas, by then U.S. President George Bush, Prime Minister Brian Mulroney of Canada, and Mexican President Carlos Salinas de Gortari. William E. Clayton, Jr., *U.S., Mexico, Canada Sign Free Trade Deal*, HOUSING CHRON., Dec. 18, 1992, at A32.

The Canadian Parliament ratified NAFTA in May 1993. Ernie Freda, *NAFTA: Victory in the House; Trade Pact Tidbits; Sideshows in the NAFTA Carnival*, ATLANTIC J.

Domestically, the 1993 Act clearly responds to the impetus of economic openness and industrial modernization, characteristic of the Salinas Administration.⁷ Following the introduction of a profound transformation in the legal system of Mexico,⁸ the promulgation of the 1993 Act should be interpreted as a logical continuation of President Salinas' major legislative reform.

At the same time, political observers suggest that this legislative enactment, and especially the timing of the eventual publication of the official Regulations, or lack thereof, are connected to the final outcome of the Mexican Presidential elections that will take place in August 1994. The new Regulations are likely to be included among the very first official acts of the new Administration, and their publication is expected to send a clear, direct, and very strident message to the international business community.

At the global level, the 1993 Act is nothing more than a consequence of the international trade liberalization that Mexico effectively conducted over the past five years.⁹ The progressive

& CONST., Nov. 18, 1993, at A10. Although Canadian Prime Minister Jean Chrétien voiced opposition to NAFTA, he agreed to enact the Agreement if certain changes were made to it. *Id.* NAFTA received final approval from the U.S. Congress on November 20, 1993. *Clinton Wins on Trade Pact*, S.F. EXAMINER, Nov. 21, 1993, at A1. The Mexican Senate, in conformity with Article 76, paragraph I of the Mexican Constitution, approved NAFTA on November 22, 1993. *With 56-2 Vote, Mexican Lawmakers Give Easy Final Approval to NAFTA*, L.A. TIMES, Nov. 23, 1993, at A6. The trilateral international instrument took effect on January 1, 1994. Diane Linquist, *Today's the Day the Tariffs Tumble; NAFTA is in Effect Along the Borders*, SAN DIEGO UNION TRIB., Jan. 1, 1994, at A1.

7. For a comprehensive and current perspective of the changes taking place in Mexico today as a result of President Salinas' modernization policies, see Carlos Salinas de Gortari, Fifth State of the Nation Address (Nov. 1, 1993). See also Rudiger Dornbusch, *Mexico's Economy at the Crossroads (Mexico: Tradition and Transition)*, 43 J. INT'L AFF. 313, 313-26 (1990); Norman Bailey, *The Mexican Economy As 1987 Begins (Mexico and the United States: Strengthening the Relationship Conference)*, 18 CAL. W. INT'L L.J. 31, 31-34 (1987); Barry Sanders, *The New Mexican Industrial Development Plan*, 14 INT'L LAW. 652, 652-58 (1980).

8. As of December 1993, Salinas' fifth year in office of a six-year term, President Salinas sent Congress approximately one hundred major legislative bills affecting Mexico's economy, political system, environmental policy, religious institutions, human rights, indigenous populations, fishing and navigation system, and treaties, among others. All of these bills were passed by Congress, thus adding, amending, or repealing legal provisions found in Mexico's Constitution and federal statutes, codes, and regulations, as well as international agreements.

9. For an overview of Mexico's role in international trade, see Carlos Salinas de Gortari, MEXICAN AGENDA 101-11 (13th ed. Mexico, 1992).

content of the 1993 Act is an important embodiment of this trend. President Salinas cited a number of reasons for this liberalization: the shortage of international capital; the transition toward a market economy taking place in Eastern Europe and in the former Soviet republics; and, notably, the fact that the generation and reception of foreign investment continue to be concentrated in the developed countries due to legal uncertainty, problems with infrastructure, and the relatively limited size of the existing markets in most developing countries.¹⁰

NAFTA deserves a special commentary.¹¹ Without question, NAFTA constitutes a major political triumph for President Salinas. Considering the clear consequences that this trilateral agreement will produce for Mexico's economy, foreign trade, industrial infrastructure, technology transfer, and environmental protection, the close and direct relationship between NAFTA and foreign investment becomes evident. The timing of the official publication of the 1993 Act and, more importantly, the formulation of its principles, rules, and general legal content were determined by the fate of NAFTA.

The passage of this trilateral agreement by the U.S. Congress encouraged a quick response by Mexico. Among the different versions of a new foreign investment act that had been discreetly circulating in business, banking, legal, and political circles in Mexico and abroad in recent years,¹² the Salinas Administration apparently chose the "best" version to suit the complex circumstances of the moment.

It is unclear whether Mexico would have chosen the same legislative version of the new statute that was published on December 27, 1993, had the U.S. Congress rejected NAFTA. Reflecting the unprecedented importance that Mexico attributes to NAFTA, the 1993 Act sent by President Salinas to the U.S. Congress on November 24, 1993, formed a part of a legislative

10. *Exposición de Motivos*, *supra* note 5, at iii.

11. For the full text of NAFTA, see North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296.

12. Informal versions of a new foreign investment act, commonly referred to as "proyectos de ley," or drafts, appeared shortly after the enactment of the 1989 Regulations, which were published in mid-June of that year. For a discussion of these drafts, see *Nueva Ley: Máximas Facilidades al Inversionista Extranjero* [A New Act: Maximum Benefits to the Foreign Investor], EPOCA, Jan. 25, 1993, at 6-9; Jorge Sánchez Estrada, *Proyecto de Ley de Inversión Extranjera*, PRONTUARIO DE ACTUALIZACIÓN FISCAL, June 1993, at 8-12.

package consisting of fifteen bills affecting a variety of strategic areas of the Mexican economy.¹³

II. THE 1973 FOREIGN INVESTMENT ACT

The 1973 Act represents Mexico's first attempt to systematize and codify, in a single statute, the various legal provisions on foreign investment previously scattered in a number of different federal statutes,¹⁴ including Article 27 of the Mexican Constitution of 1917.¹⁵ In essence, Article 27 and other provisions contained in the Federal Constitution¹⁶ were the source and inspiration for most of these statutes.

Enacted during the Administration of President Luis Echeverría Alvarez, the Act To Promote Mexican Investment and Regulate Foreign Investment was considered to be somewhat unfair and unduly restrictive to foreign investors. The most commonly criticized aspects of this Act included:

1. The so-called "forty-nine to fifty-one percent" principle, which stipulated that foreigners may not invest more than forty-nine percent in any venture in Mexico;¹⁷

13. See *Decreto que reforma, adiciona y deroga disposiciones de diversas leyes relacionadas con el Tratado de Libre Comercio [The Decree that amends, adds and repeals provisions of several laws relating to the North American Free Trade Agreement]*, D.O., Dec. 22, 1993.

14. See COMMERCE & INDUSTRIAL DEVELOPMENT MINISTRY, LEGAL FRAMEWORK FOR DIRECT FOREIGN INVESTMENT IN MEXICO 99-102 (1990).

15. Prior to the enactment of the 1973 Act, foreign investors were required to go through a rather complicated, lengthy, and slow legal and administrative path to comply with the numerous federal and local statutes and their respective regulations. Obstacles included the General Corporations Act, the Organic Act of Article 27, paragraph 1 of the Constitution, the Federal Tax Code, the General Mining Act, the Agrarian Reform Act, the Communications and General Transportation Act, and the Population Act. The administrative procedures included the filing of numerous applications before local, state, and federal authorities, depending upon the nature and scope of the foreign investment activity.

16. Mexico's 1917 Constitution contains two severe limitations on foreign investment: (1) the outright prohibition of foreign direct ownership over immovable assets within the so-called "Restricted Zone" Article 27, paragraph 1; and (2) the statutory agreement, known as the "Calvo Clause," that requires foreigners "who acquire properties of any kind in the Mexican Republic" to consider themselves as Mexican nationals regarding those properties, not to invoke the protection of their governments with respect to such properties, and, in case of a violation, to forfeit to the government of Mexico the properties thus acquired. CONST. art. 27, para. 1 (Mex.).

17. 1973 Act, *supra* note 3, art. 5.

2. The ample discretion granted to Mexican authorities in authorizing foreign investment projects;¹⁸
3. The large number of "activities" reserved exclusively to the Government of Mexico, Mexican nationals, or Mexican corporations with an "Exclusion of Foreigners Clause";¹⁹
4. The outright prohibition of foreigners to acquire "direct ownership (title) over land and water" in the "Prohibited Zone" including foreign corporations, and Mexican corporations without "an Exclusion of Foreigners Clause";²⁰ and
5. The requirement that "foreigners who acquire properties of any kind in the Mexican Republic"²¹ abide by the "Calvo Clause."²²

18. *Id.* Specifically, these discretionary powers were granted by the 1973 Act to the National Commission of Foreign Investments. *Id.* arts. 11-17.

For a general overview on these questions, see Ewell E. Murphy, Jr., *The Echeverriean Wall: Two Perspectives on Foreign Investment and Licensing in Mexico*, 17 TEX. INT'L L.J. 135-54 (1982); Ewell E. Murphy, Jr., *U.S. Trade and Investment in Mexico: An Overview of the Eighties*, 12 INT'L LAW. 573-84 (1980).

19. 1973 Act, *supra* note 3, arts. 4-5. Activities reserved exclusively for the Government of Mexico are the same as those listed in the 1993 Act, such as petroleum, basic petrochemicals, radioactive minerals, electricity, railroads, and telegraph. *Id.*

Activities reserved exclusively to Mexican nationals or to Mexican corporations with an "Exclusion of Foreigners Clause" include radio and television, urban and inter-urban vehicle transportation, air and maritime transportation within Mexico, forestry resources exploitation, gas distribution, and other activities specified in the applicable statutes. *Id.* The 1973 Act does, however, give limited access to foreign investors in some of these activities. *Id.*

20. 1973 Act, *supra* note 3, arts. 3, 7. For the definition of the so-called "Forbidden Zone" (*Zona Prohibida*), see *id.* art. 18 (defining the zone as ". . . within a strip 100 kilometers wide along Mexico's borders and 50 kilometers wide inland from its coasts."); see also 1989 Regulations, *supra* note 1, art. 1, para. XIII. The 1989 Regulations changed the name of this strip to the "Restricted Zone" (*Zona Restringida*), which sounds less harsh. See *id.*

21. 1973 Act, *supra* note 3, arts. 4-5.

22. See *supra* note 16. Under the "Calvo Clause," the contractor agrees to be governed exclusively by the laws of the country in which the contract was formed, thereby waiving the right to diplomatic intervention by the foreigner's state. See David E. Graham, *The Calvo Cause: Its Current Status as a Contractual Renunciation of Diplomatic Protection*, 6 TEX. INT'L L. F. 289 (1971). The majority of Latin American countries require the insertion of the "Calvo Clause" in contracts with foreign nationals. Mexico admitted that the Clause probably does not prohibit the government of the foreign national from intervening, but does prohibit the foreign national from seeking intervention. For further discussion of the "Calvo Clause," see generally Alwyn V. Freeman, *Recent Aspects of the Calvo Clause and the Challenge to International Law*, 40 AM. J. INT'L L. 121 (1946).

In his official message to the Federal Congress, President Salinas summarized his opinions regarding the 1973 Act as follows:

The [1973 Act] reflects the economic reality of Mexico and the world, as it was at the beginning of the decade of the 70s, which was considerably different from the one that prevails today. At that time, the general trend among developing countries was to establish mechanisms and legal régimes with an excessive regulatory emphasis regarding the participation of foreign investment in their economies.

This Act . . . has a very restrictive character, and its provisions, granting a considerable margin of discretion to the authorities, generate legal uncertainty and create confusion in the application of its principles and concepts. Therefore, after being in force [in Mexico] for over twenty years, it has failed to reflect the situation and the needs of the country as they stand today.²³

Despite the numerous criticisms directed against the 1973 Act, the statute remained in force for twenty years.

III. THE NATIONAL COMMISSION OF FOREIGN INVESTMENTS

The National Commission of Foreign Investments ("Commission") is the most intriguing mechanism created by the 1973 Act;²⁴ without it, the old Act would have been obsolete shortly after its enactment.

The Commission is composed of seven members of the Presidential cabinet who are experienced in foreign investment.²⁵ Article 12 of the 1973 Act enumerates the powers of the Commis-

The United States has never accepted the Calvo doctrine and does not regard waiver of diplomatic protection as binding on the U.S. Government. See THE CENTER FOR LATIN AMERICA, REFERENCE MANUAL ON DOING BUSINESS IN LATIN AMERICA (1979).

23. *Exposición de Motivos*, *supra* note 5, at viii (translation by author).

24. For an excellent study on the nature and legal functions of the Commission, see JAIME ALVAREZ SOBERANIS, *EL REGIMEN JURÍDICO Y LA POLÍTICA EN MATERIA DE INVERSIONES EXTRANJERAS EN MÉXICO* [THE LEGAL REGIME AND POLICIES ON FOREIGN INVESTMENT IN MEXICO] 317-44 (1990).

25. Article 11 of the Act created the Commission and assigned its seven Minister members: (1) Interior (*Gobernación*), (2) Foreign Affairs (*Relaciones Exteriores*), (3) Finance and Public Credit (*Hacienda y Crédito Público*), (4) National Resources (*Patrimonio y Fomento Industrial*), (5) Industry and Commerce (*Industria y Comercio*), (6) Labor and Social Welfare (*Trabajo y Previsión Social*), and (7) Presidency (*Presidencia de la República*). 1973 Act, *supra* note 3, art. 11. See also NATIONAL COMMISSION OF FOREIGN INVESTMENTS, *supra* note 3, at 51.

sion.²⁶ The very broad powers enumerated in the first four paragraphs of the Article is the clearest mandate of absolute discretionary power on foreign investment matters that was ever granted to any governmental agency.

Legally, the Commission has been characterized as an "Inter-Secretarial Commission" that performs a consultive function.²⁷ The Commission does not function as a collegiate body that generally adopts its decisions by the votes of its members; rather, it operates as an aggregate of its seven Cabinet members, each keeping his respective subject matter jurisdiction and powers.²⁸ Therefore, when a case is submitted to the Commission, it is not decided by a collective vote; rather, the case is analyzed and decided by the competent Cabinet member who exercises exclusive jurisdiction over the case.²⁹

Paragraph I of Article 12 empowers the Commission to decide upon any increase or reduction in the percentage of foreign investment in any geographical area of Mexico,³⁰ including important urban centers such as Mexico City and certain rural areas such as Pénjamo or Guanajuato. The Commission may also regulate foreign investment in any economic activity, such as fishing, forest exploitation, certain communication, and transportation services provided that Mexican law does not specifically regulate these activities.³¹ Pursuant to this power, the Commission regularly engages in "negotiations" with foreign investors to determine the viability of opening or establishing a foreign-funded business project in any part of Mexico. Government officials use these negotiations to explore foreign investors' interest in changing the geographical location of the project by offering "incentives."³² These incentives might consist, for example, of an increase in the percentage of foreign investment or tax reductions at the local level.³³

26. 1973 Act, *supra* note 3, art. 12.

27. See JORGE BARRERA GRAF, *LA REGULACIÓN JURÍDICA DE LAS INVERSIONES EXTRANJERAS* [*Judicial Regulation of Foreign Investments in Mexico*] 158 (1981).

28. *Id.*

29. For a detailed legal analysis on the composition and functions of this Commission, see IGNACIO GÓMEZ PALACIO, *INVERSIÓN EXTRANJERA DIRECTA PORRÚA* [DIRECT FOREIGN INVESTMENT] 151-86 (1985).

30. 1973 Act, *supra* note 3, art. 12, para. I.

31. *Id.*

32. *Id.*

33. *Id.*

Paragraph II of Article 12 authorizes the Commission to decide "the percentages and conditions in which foreign investment shall be accepted in specific cases" because of "exceptional circumstances" or "special treatment."³⁴ For example, if a given area in Mexico needs assistance to develop its economy and thus reduce its rate of unemployment, the Commission would develop a strategy offering special treatment to foreign investors. In these cases, the Commission would attempt to persuade investors to construct their enterprise in a pre-selected location of Mexico by means of different incentives.³⁵

The Commission also applies this strategy to authorize a larger percentage of foreign investment in those activities expressly regulated by Article 5 of the 1973 Act.³⁶ Although this provision specifically regulates the maximum foreign investment percentages in certain activities, the end of Article 5 grants the Commission power to decide "on the increase or reduction of the percentage . . . when it judges this to be in the interest of the country's economy. It may also establish the conditions under which foreign investment will be accepted in specific cases."³⁷

Paragraphs III and IV of Article 5 authorize the Commission to allow foreign investment in future and existing business enterprises.³⁸ The Commission can also decide to establish new fields of economic activity or add new production lines.³⁹

It appears that the Commission is endowed with ample powers to adjust the requirements of the seemingly inflexible and rigid 1973 Act to comport to the economic conditions of the country at any given time. Thus, based on a lucid understanding of the national interests and priorities of Mexico as a nation, foreign investment would be channeled either to pre-determined geographical locations and/or to specific types of industries or businesses. This channeling would occur in consonance with domestic and international policies.

34. *Id.* art. 12, para. II.

35. *Id.*

36. *Id.* art. 5.

37. *Id.*

38. *Id.* art. 5, paras. III, IV.

39. *Id.*

A. Mexican Criteria for Foreign Investors

To foreign investors, the 1973 Act was an enormous, complicated machine. Rather than operating this machine in a purely mechanical manner, the Commission was created to run it in a creative manner. Thus, the major role of the Commission was to adjust the incoming flow of foreign investment to accommodate changes in the political, industrial, social, legal, and even cultural arenas.

The Commission's criteria for authorizing foreign investment included, for example, whether the investment would be complementary to national investment and whether it would displace national business enterprises. The Commission also considered the effect of foreign investment on Mexico's balance of payments, its impact on employment, its incorporation of domestic inputs and components in the manufacturing process, its contribution to the development of the lesser-economically-developed zones, its favorable contribution and assistance to the country's technological research and development, and its respect for Mexico's social and cultural values.⁴⁰

The two most important criteria to determine whether to authorize any foreign investment project were contained in the first and last Paragraphs of Article 13: (1) "[t]he extent to which it complemented national investment",⁴¹ and (2) "[t]he extent to which it complied with and contributed to the achievement of national development policy objectives."⁴² As a consequence of the severe economic crisis experienced by Mexico in 1982,⁴³ however, these criteria were somewhat redirected in order to follow the National Development Plan of 1983-1988, advanced by President Miguel de la Madrid Hurtado at the beginning of his

40. *Id.* art. 13. For a detailed legal and administrative evaluation of each of the criteria enumerated in this Article and the manner in which the Commission applied them to specific cases, see PALACIO, *supra* note 29, at 187-206.

41. 1973 Act, *supra* note 3, art. 13, para. I.

42. *Id.* art. 13, para. XVII.

43. Most experts agree that Mexico's economic crisis of 1982 was caused by Mexico's over-reliance on petroleum resources to finance massive public sector spending. The increased borrowing from international banking institutions, hyper-inflation, overvaluation of the *peso*, nationalization of its banks, imposition of exchange controls, and massive capital flight were also contributing factors. See Alexander Hoagland, *Overview: Perspective from an American Lawyer in Mexico*, 18 INT'L LAW. 287 (1984).

Administration.⁴⁴ The Secretariat of Commerce and Industrial Development, in close coordination with the President of the Republic, formulated the "redirected" criteria without formally amending Article 13 of the 1973 Act. The Secretariat did so by publicly announcing the criteria, now known as "Guidelines for Foreign Investment,"⁴⁵ and launching an intense dissemination and promotional campaign.⁴⁶

As of December 1987, the accrued foreign investment in Mexico totaled \$20,927 million. Of this amount, 65% of the investment was generated by the United States; 6.9% was from the Federal Republic of Germany; 4.7% was from Japan; 4.7% was from the United Kingdom; and 4.4% was from Switzerland. Other countries, including Spain, France, Sweden, Canada, the Netherlands, Belgium, and Italy, contributed a total of 10%.⁴⁷

44. 2 NATIONAL COMMISSION OF FOREIGN INVESTMENTS, *supra* note 3, at 9-20. Among other measures, this Plan established

a set of guidelines to increase external technological, administrative and financial resources required for the Mexican development process. Toward this end, expansion and diversification of the national productive capacity is oriented to be utilized to complement resources from abroad, and in this way foreign technological, administrative and financial contributions be adapted flexibly to national development priorities for optimum rational contribution.

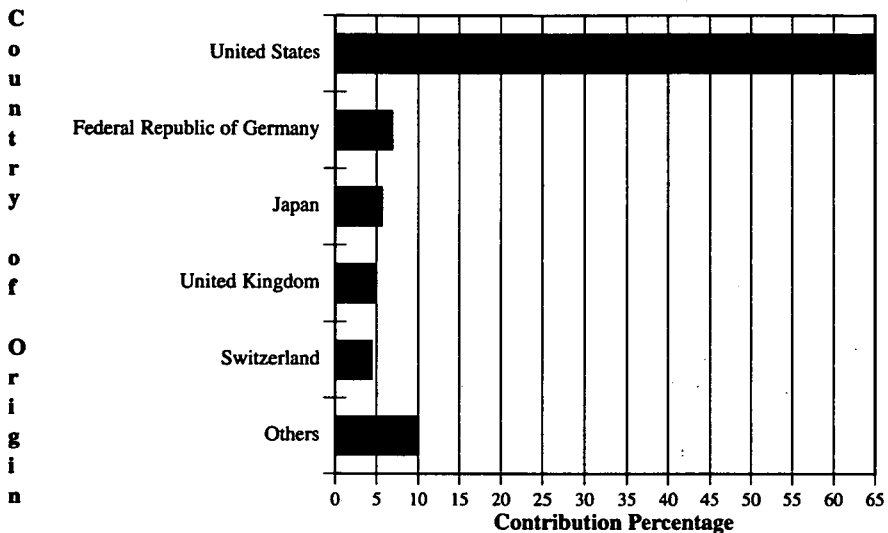
Id. at 12. For the original text, see *Plan Nacional de Desarrollo*, 1983-1988 (Poder Ejecutivo Federal, Secretaría de Programación y Presupuesto, May 1983).

45. 2 NATIONAL COMMISSION OF FOREIGN INVESTMENTS, *supra* note 3, at 21-29. The Guidelines consist of a series of short- and medium-term strategies designed to attract the much needed foreign capital to Mexico. *Id.*

46. For the English and French translations of the text of the 1973 Act, the Guidelines for Foreign Investment, a summary of the National Development Plan (1983-1988), the Technology Transfer Act and its Regulations, and Resolutions 1-13 of the National Commission of Foreign Investments, see *id.* This publication and other related materials were circulated internationally through Mexican embassies and consulates.

47. SOBERANIS, *supra* note 24, at 72.

Foreign Investment in Mexico by Country of Origin for 1987



SOURCE: EL REGIMEN JURIDICO Y LA POLITICA EN MATERIA DE INVERSIONES EXTRANJERAS EN MEXICO.

B. Importance of the "General Resolutions" of the Commission

The Commission determined whether to authorize foreign investment, based on the pre-established criteria, by issuing Resolutions (*Resoluciones*). Article 12, paragraph VI and Article 23, paragraph V, of the 1973 Act provide the legal basis for the issuance of these Resolutions.⁴⁸ Article 53 of the Regulations of the National Registry of Foreign Investments give additional legal support.⁴⁹

From a legal viewpoint, the Resolutions are divided into General and Specific Resolutions.⁵⁰ The Resolutions must be

48. See 2 NATIONAL COMMISSION OF FOREIGN INVESTMENTS, *supra* note 3, at 52, 59.

49. Reglamento del Registro Nacional de Inversiones Extranjeras [Regulations of the National Registry of Foreign Investments], art. 53, *reprinted in* COMISIÓN NACIONAL DE INVERSIONES EXTRANJERAS, MARCO JURÍDICO Y ADMINISTRATIVO DE LA INVERSIÓN EXTRANJERA EN MÉXICO [LEGAL AND ADMINISTRATIVE FRAMEWORK OF FOREIGN INVESTMENT IN MEXICO] 39-63 (1988) [hereinafter FRAMEWORK OF FOREIGN INVESTMENT].

50. Article 12, para. VI provides: "[T]he National Commission on Foreign Investment shall have the following powers: . . . VI. To establish the criteria and requirements for application of legal provisions and regulations regarding foreign investment." 2 NATIONAL COMMISSION OF FOREIGN INVESTMENTS, *supra* note 3, at 53. For the original text, see 1973 Act, *supra* note 3, art. 12, para. VI.

registered at the National Registry of Foreign Investment,⁵¹ and they are published by the Commission.⁵²

These Resolutions, originally designed to adjust the provisions of the 1973 Act to the economic and political reality of Mexico at any given time, are legally intriguing because they may have been issued to carve out specific exceptions to the tenor of the 1973 Act. In other words, the Resolutions created exceptions to benefit foreign investors, even if those exceptions ran against a literal interpretation of the Act. This departure from the text of the 1973 Act led jurists in Mexico to question the constitutionality of these Resolutions, generating controversy among legal, business and political circles.⁵³ Nevertheless, in 1977, the Mexican Supreme Court determined that the criteria established in these Resolutions "must be followed by the heads of the different agencies of the Federal Executive which compose the Commission."⁵⁴

The General Resolutions were important for any foreign investor in Mexico both for cosmetic and substantive reasons. To investors from a country like the United States, a nation with a common law tradition, these Resolutions clearly represent, on one hand, the most current application of the provisions of the 1973 Act to a specific case. On the other hand, they constitute a legally binding rule that the federal authorities on foreign investment would tend to apply to future cases.

In sum, the latest General Resolutions of the Commission give a foreign investor a practical sense of decision-making by Mexican authorities regarding foreign investment projects, which is based

51. See 2 NATIONAL COMMISSION OF FOREIGN INVESTMENTS, *supra* note 3, at 59.

52. For a detailed analysis of the legal content of each of the resolutions issued by the Commission and of the functions of the National Registry of Foreign Investment, see SOBERANIS, *supra* note 24, at 345-417.

53. See PALACIO, *supra* note 29, at 239. Palacio argues that the issuance of General Resolutions by the Commission constitutes "a reglementary act which, pursuant to the Constitution (art. 89, para. I), corresponds exclusively to the President of the Republic." He further argues that if these Resolutions

go beyond the text of the 1973 Act, then the General Resolutions would constitute a legislative act. Both the legislative and the reglementary act cannot, for obvious Constitutional reasons, be carried out by the Commission. Therefore, . . . it is concluded that the issuance of General Resolutions by the Commission constitutes an unconstitutional act.

Id. (emphasis added) (translation by author).

54. See *Ejecutoria*, AMPARO Y REVISIÓN (1977) reprinted in L. PEREZNIETO CASTRO & M.E. MANSILLAR, MANUAL PRACTICO DEL EXTRANJERO EN MEXICO [PRACTICAL MANUAL FOR THE FOREIGNER IN MEXICO] 316 (1991) (citing a single decision by Mexico's Supreme Court) [hereinafter PRACTICAL MANUAL].

on the political, economic, and legal winds prevailing in Mexico at any given time. Endowed with such ample powers, the Commission would determine the final location of a specific foreign investment project, directing it toward a certain city or state, depending on the nature and the financial or technological importance of the industry or business in question.

From its creation in 1973 until 1987, the Commission issued fifteen General Resolutions. These Resolutions were duly published in the official gazette, which addressed different foreign investment matters.⁵⁵ The passage of time, compounded by the proliferation of Resolutions, the varied nature of the issues addressed, and the somewhat diverse interpretations given to these Resolutions by the federal authorities, made foreign investors uneasy and confused.

In the early 1980s, foreign investors appeared to be adrift on what may be characterized as an administrative sea formed by Resolutions, the rigid text of the 1973 Act, and an increasing number of federal officials' statements on foreign investment. Foreign investors perceived that there was no legal certainty in the foreign investment area. Furthermore, after the economic crisis of 1982, foreign investors were still very reluctant to venture into the Mexican market.

In 1984, the Commission attempted to liberalize the legal regime applicable to foreign investment by publishing guidelines for foreign investors. These guidelines depart considerably from the legal premises established by the 1973 Act.⁵⁶ For instance, numerous exceptions were offered to foreign investors regarding the "forty-nine to fifty-one percent" rule, a fundamental premise traditionally upheld without exception by all the previous administrations in Mexico.⁵⁷ The guidelines failed to attract sufficient

55. For the text of these General Resolutions, see 2 NATIONAL COMMISSION OF FOREIGN INVESTMENTS, *supra* note 3, at 149-95. Some of the legal questions addressed by these Resolutions include criteria to approve applications, and regarding in-bond companies (*maquiladoras*), company management, trust funds, authorizing and underwriting stock quoted in the Mexican Stock Exchange, closing of new establishments, agreements on real estate sales operations published abroad, and new economic activities and products. *Id.*

56. For an incisive analysis on the content and application of the Guidelines, see Sandra E. Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AM. J. INT'L L. 281 (1986).

57. See *supra* text accompanying note 17.

foreign investors,⁵⁸ however, because the Commission did not enact specific administrative rules for the implementation of the new and quite revolutionary official policy.⁵⁹ Another crucial consideration was that foreign entrepreneurs felt neither secure nor willing to follow an official pronouncement that the Government of Mexico labeled as "guidelines," which did not constitute a legislative amendment or a regulatory enactment and which were not even published in Mexico's *Diario Oficial de la Federación*.⁶⁰

In order to alleviate the unease of foreign entrepreneurs, the Commission issued a General Resolution on November 24, 1987. The General Resolution systematized, updated, and codified all of the Resolutions previously issued by the Commission between 1973 and 1987, and simplified and expedited the Commission's functions and administrative procedures.⁶¹

According to a Mexican Government official, the overall purpose of this Resolution was "to further clarify and define the criteria and procedures" to be followed by the Commission, specifically as they relate to: (1) deregulation of direct foreign investment activities; (2) simplification of its administrative procedures; (3) lending transparency to the normative content of the General Resolution; and (4) systematic coordination of said Resolutions.⁶² This enactment reflects the policy of "selective promotion" of direct foreign investment established by President de la Madrid.⁶³

Unquestionably, the General Resolution made two important contributions to the field of foreign investment. First, from a *de facto* viewpoint, it became the official code on foreign investment in Mexico. The tenor of the Resolution simplified the administra-

58. Maviglia reports that the Commission approved a limited number of foreign investment projects in such sectors as tourism, priority industries, advanced technology, capitalization and investments preserving employment, and for priority activities of Mexican corporations with severe economic problems. Maviglia, *supra* note 56, at 293.

59. *Id.*

60. For an excellent legal review of these guidelines, see Jorge Camil, *Mexico's 1989 Foreign Investment Regulations: The Cornerstone of a New Economic Model*, 12 HOUS. J. INT'L L. 2 (1989).

61. *Resolución General que Sistematiza y Actualiza las Resoluciones Generales emitidas por la Comisión General de Inversiones Extranjeras* [General Resolution that Systematizes and Updates the General Resolutions Issued by the National Commission of Foreign Investments], reprinted in FRAMEWORK OF FOREIGN INVESTMENT, *supra* note 49, at 65-97.

62. See FRAMEWORK OF FOREIGN INVESTMENT, *supra* note 49.

63. *Id.*

tive procedures and, at the same time, instilled confidence in foreign investors and gave them a sense of legal certainty. Second, the Resolution was a solid legal and political step towards the enactment of the 1989 Regulations—the most progressive development in the history of foreign investment in Mexico.

From January 1983 to November 1988, the Commission approved 1,249 foreign investment projects involving 772 corporations. This amounted to a total of \$13.5 billion, representing close to sixty percent of the cumulative foreign investment at the time.⁶⁴

IV. THE REGULATIONS OF 1989

The 1989 Regulations are an unprecedented step toward liberalizing the foreign investment legal code in contemporary Mexico. The Regulations not only represent a sharp and unprecedented break from past economic policy in Mexico,⁶⁵ but they shatter the traditional legal principles that have been embedded in Mexico's legal system since the 1910 Revolution and the Constitution of 1917, which were strongly nationalistic and predisposed against foreign capital.

President Salinas de Gortari included, *inter alia*, the following recitals in the introductory section of the corresponding decree:⁶⁶

[W]hereas in the process of modernizing the national economy, the participation of foreign investment cannot be indiscriminate although it is needed to complement the efforts of domestic savings;

Whereas it is convenient to encourage that direct foreign investment which avoids increasing Mexico's foreign indebtedness and contributes in a positive manner to the balance of payments abroad;

Whereas in the process of modernization and structural change of the national economy, the criteria and procedures which regulate foreign investment must be adjusted and simplified;

64. SOBERANIS, *supra* note 24, at 74.

65. See Arturo Carrillo, *The New Mexican Revolution: Economic Reform and the 1989 Regulations of the Law for the Promotion of Mexican Investment and the Regulation of Foreign Investment*, 24 GEO. WASH. J. INT'L L. & ECON. 647, 681 (1991).

66. The Presidential decree was enacted pursuant to Article 89, paragraph I of the Mexican Constitution. In countries such as Mexico and France, where the government has a very strong executive power, over ninety-five percent of the legislative bills are generated by the President of the Republic.

Whereas any process of investment demands a legal régime offering certainty, permanence, transparency and security.⁶⁷

The principles and rules that President Salinas established in the 1989 Regulations were neither original nor creative. In many respects, these Regulations simply expand the promotional and liberalization policies that Salinas' predecessor initiated a few years before.⁶⁸ Nonetheless, they did achieve more successful results. President de la Madrid may not have pursued the enactment of similar regulations because he was forced to devote his attention to more pressing economic matters, such as the restructuring of Mexico's large external debt, the control of inflation, and the consequences of the 1985 earthquake.⁶⁹

Most commentators agree that, when President Salinas took office in December 1988, the Mexican economy was in such turmoil, and the need for foreign investment so imperative, that he had no other choice but to enact the Regulations.⁷⁰ The most pressing need at that time was to improve the economy and, thereby, elevate the standard of living and the well-being of Mexican citizens.⁷¹

Once President Salinas made the decision to liberalize Mexico's legal regime for foreign investment by departing from traditional models, he was confronted with the predicament of choosing the most appropriate legal avenue to guarantee the desired outcome. Salinas had two distinct choices: (1) to repeal the 1973 Act or utilize the General Resolutions to accomplish that objective; or (2) to complement and detail the content of the 1973

67. *Reglamento de la Ley, Considerandos*, reprinted in PRACTICAL MANUAL, *supra* note 54, at 334-35 (translation by author).

68. *Id.*

69. See Camil, *supra* note 60, at 12-13.

70. *Id.*

71. Given the importance of the 1989 Regulations to the business and legal communities in the United States, the publication of the Regulations generated a prolific wave of specialized literature. See, e.g., Julio C. Treviño, *Mexico: The Present Status of Legislation and Government Policies on Direct Foreign Investments*, 18 INT'L LAW. 297 (1984); Héctor Rojas, *New Foreign Investment Regulations of Mexico*, 18 INT'L BUS. LAW. 135 (1990); Dionisio Kaye, *Mexico: Liberalizing Foreign Investment*, 4 TEMP. INT'L & COMP. L.J. 79 (1990); Augustin Santamarina, *A Practical Outline of the Foreign Investment Laws, Regulations and Policies of Mexico*, 6 PRIVATE INVESTMENTS ABROAD 1 (1990); Charles DuMars, *Liberalization of Foreign Investment Policies in Mexico: Legal Changes Encouraging New Direct Foreign Investment*, 21 N.M. L. REV. 251 (1991); J. H. Kepner, Jr., *Mexico's New Foreign Investment Regulations: A Legal Analysis*, 18 SYRACUSE J. INT'L & COMP. L. 41 (1992).

Act by enacting the long-overdue and never-published corresponding Regulations.⁷²

Repealing the 1973 Act may have generated unmanageable political problems for a new Administration that had been in power for only a few months and that reputedly had lost the Presidential vote in Mexico City. Critics anticipated that President Salinas would face strong opposition from Congress and probably would not receive the Congressional votes necessary to pass the proposed legislative bill.⁷³ On the other hand, the General Resolutions were not the best avenue for providing foreign investors with the legal certainty they so strongly demanded.⁷⁴ Moreover, the constitutionality of the General Resolutions was questionable.

President Salinas instead relied on the strong regulatory powers that the Mexican Constitution expressly confers upon the Executive⁷⁵ by enacting the 1989 Regulations by presidential decree.⁷⁶ Rather than lessening the debate over the constitutionality of the new enactment, however, the publication of the new Regulations renewed the controversy on this question.

Two schools of thought surfaced. One school argued that the new Regulations were constitutional because (1) they did not contravene the Mexican Constitution, (2) they were issued by the President pursuant to his authorized constitutional powers, and (3) they were signed by all the corresponding members of the Presidential cabinet, thus complying with the constitutional act of "*Refrendo*."⁷⁷ The other school argued that the Regulations were

72. See Camil, *supra* note 60, at 13.

73. Given the controversial nature of a legislative bill on this matter, and the fact that the representatives of the opposition parties number almost half of all members of the Mexican Congress, Alvarez Soberanis explains that Salinas did not follow this avenue because it would have deepened existing differences among the different political factions. See SOBERANIS, *supra* note 24, at 185.

74. See *supra* part III.B.

75. See CONST. art. 89, para. I (Mex.). Article 89 grants the President the power "[t]o promulgate and enforce the laws enacted by Congress, providing for their exact observance at the administrative level." *Id.* (translation by author).

76. The 1973 Act did not have specific Regulations (*Reglamento*) accompanying it. The only regulations officially published with regard to the 1973 Act were those governing the *modus operandi* of the Foreign Investment Registry. *Reglamento del Registro Nacional de Inversiones Extranjeras*, D.O., Dec. 28, 1973; 2 NATIONAL COMMITTEE OF FOREIGN INVESTMENTS, *supra* note 3, at 65-92.

77. See Camil, *supra* note 60, at 13 n.111; see also Legal Opinion Addressed by Dr. Luis Miguel Díaz to Lic. Miguel Jáuregui, Chairman of the Mexican Legislation

unconstitutional because both the 1973 Act and the Mexican Constitution were designed to regulate, not promote foreign investment.⁷⁸

Most specialists in Mexico agree that the 1989 Regulations amended the 1973 Act, thereby liberalizing and streamlining the legal framework applicable to foreign investment in that country. As stated by the Secretariat of Commerce and Industrial Development ("SECOFI"), "these Regulations represented the government's commitment to earning for Mexico its full share of world economic activity and to achieving for the Mexican people the job, career, earning, and quality-of-life opportunities available only through a modern, open economy."⁷⁹ This marked change in the official policy of the new Administration prevented the federal judicial system from formally deciding the constitutionality of the 1989 Regulations.

A. Changes Made by the 1989 Regulations

The 1989 Regulations introduced a number of important changes to the 1973 Act, creating a novel regime for direct foreign investment.⁸⁰ First, the 1989 Regulations allowed for majority foreign ownership, without official authorization, for investment in companies engaged in activities not included in the Classification,⁸¹ provided the following six criteria are met:

1. A maximum investment of \$100 million in fixed assets;
2. Direct external funding provided through subscriptions of capital contributions, external credit, or foreign funds intermediated by Mexican financial institutions;

Committee, American Chamber of Commerce of Mexico (July 13, 1989). Dr. Díaz concluded that the final determination of the constitutionality issue rests with the Mexican Supreme Court. *Id.*

For the meaning and legislative use of "*Refrendo*," see CONST. art. 92 (Mex.). It reads: "All of the regulations, decrees, agreements and orders of the President [of the Republic] must be signed by the Secretary of State or by the Head of the Administrative Department having jurisdiction over the matter, and without this requirement they will not be obeyed." *Id.* (translation by author). See also 7 DICCIONARIO JURÍDICO MEXICANO [MEXICAN JURIDICAL DICTIONARY] 383-84 (Instituto de Investigaciones Jurídicas ed., 1984).

78. *Id.* See IGNACIO GOMEZ PALACIO, LEY DE INVERSION EXTRANJERA Y SU REGLAMENTO COMENTADOS 139-40 (1989).

79. See MEXICO AND THE FOREIGN INVESTOR: A PARTNERSHIP FOR GROWTH (1989) [hereinafter MEXICO AND THE FOREIGN INVESTOR].

80. See COMMERCE & INDUSTRIAL DEVELOPMENT INDUSTRY, *supra* note 14, at 101.

81. *Id.*

3. Location of industrial plants outside the country's three major industrial metropolitan areas (Mexico City, Monterrey, and Guadalajara);
4. A balance between foreign exchange income and outlays during the first three years of operation;
5. Permanent jobs and continuous training for workers; and
6. Adequate technology and observance of applicable environmental regulations.⁸²

This constitutes the most drastic departure from the "forty-nine to fifty-one percent" principle contained in the 1973 Act. The 1989 Regulations provided an appendix containing the Classification of Economic Activities and Products ("Classification").⁸³ The Classification establishes the proportion of foreign capital allowed in various economic activities and manufacture of products pursuant to the 1973 Act and other applicable federal statutes.⁸⁴

SECOFI explained the Classification as follows:

[T]he new Regulations supersede all previously existing rules or decrees applicable to foreign investment and, for the purpose of establishing clear and non-discretionary guidelines, creates a basic Classification . . . that will serve to differentiate projects subject to one form of limitation or another from those not subject to restriction of any kind.⁸⁵

The great majority of activities considered for establishment in Mexico under the new Regulations are not subject to limitation or restriction and, consequently, are not included in the Classification.⁸⁶

82. UNITED STATES EMBASSY, MEXICO: FOREIGN INVESTMENT REPORT 10-11 (1993).

83. *Regulación Específica y General para la Inversión Extranjera Directa con base en la Clasificación Mexicana de Actividades Económicas y Productos* [Specific and General Regulation for Direct Foreign Investment based upon the Mexican Classification of Economic Activities and Products], reprinted in PRACTICAL MANUAL, *supra* note 54, at 387-94 [hereinafter Classification].

84. The Classification established six different types of economic activities: (1) activities exclusively reserved to the Mexican state, (2) activities reserved to Mexican citizens, (3) activities under a specific regulation allowing the participation of foreign investment up to 34% in the corporation's capital, (4) activities under a specific regulation allowing foreign investment of up to 40% in the corporation's capital, (5) activities with a specific regulation allowing foreign investment up to 49% in the corporation's capital, and (6) activities requiring a special resolution from the National Commission of Foreign Investments to allow any majority foreign investment participation. *Id.* at 395.

85. *See* MEXICO AND THE FOREIGN INVESTOR, *supra* note 79.

86. *Id.*

The second important change, introduced by the 1989 Regulations, allows foreign investors to obtain temporary ownership of Mexican corporations engaged in specified activities reserved for Mexican investors, or activities in which foreign investment is limited to a maximum percentage ranging from thirty-four to forty-nine percent through the creation of a twenty-year trust.⁸⁷ As a result of this provision, twenty-year temporary foreign investments are allowed in air and maritime transportation and in gas distribution—areas originally reserved for Mexican nationals.⁸⁸

The notion of temporary investment also permits significant foreign participation in areas of the Mexican economy where foreign investment was formerly limited to forty-nine percent.⁸⁹ Some of the twenty-year trusts authorized by the Commission are for Mexican corporations experiencing financial or operational difficulties, or corporations having a high potential for exports.⁹⁰

Third, under the 1989 Regulations, foreign investment is allowed to expand activities of existing corporations by opening new establishments, moving operations into new fields of economic endeavor, and manufacturing new products, all without authorization from the Commission. In particular, this applies to *maquiladoras*, high-export corporations, and trading companies.⁹¹

Fourth, permission is granted for the establishment of trusts (*fideicomisos*) through which foreign investors can acquire voting and pecuniary rights, even when the forty-nine percent limit is exceeded⁹² or the investment is in areas or activities previously restricted.⁹³

87. See 1989 Regulations, *supra* note 1, tit. 3, chs. 1-2, 4.

88. See Camil, *supra* note 60, at 17.

89. These activities included (1) exploitation of national mineral reserves (34%), (2) production of secondary petrochemicals (40%), and (3) manufacture of automotive parts. *Id.* at 10 n.79. See 1973 Act, *supra* note 3, art. 5.

90. See UNITED STATES EMBASSY, *supra* note 82 at 11; Mexico and the Foreign Investor, Temporary Indirect Investment Through Trusts, *supra* note 79.

91. See 1989 Regulations, *supra* note 1, arts. 6, 28-29.

92. *Id.* art. 10, paras. I-II.

93. *Id.* art. 36. Article 36 allows foreign investors to acquire the beneficiary use to land and waters, including their accessions, located outside the Restricted Zone, with the prior authorization from the Secretariat of Foreign Affairs ("SRE"). *Id.* The Article provides that no such authorization is necessary for ownership acquisition of immovable assets by corporations outside of the Restricted Zone. *Id.*

Fifth, the 1989 Regulations allow for real estate investment trusts in the Restricted Zone, granting beneficiary rights to foreign investors for thirty years for industrial, tourism, or residential purposes, thereby providing a mechanism for extending the original term by means of consecutive trusts.⁹⁴ Renewal of the new thirty-year period is automatic and is obtainable within forty-five working days of application for an additional thirty years. This change allows foreign investors to avoid transfer costs and income tax liabilities.⁹⁵ The Regulations did not establish a limitation on the number of trusts that may be authorized in favor of the same beneficiary.⁹⁶

Prior to the new Regulations, there was no explicit provision in Mexico's domestic legislation designed to dispel the mounting concern shared by most foreign investors regarding the final disposition of their *Fideicomisos* at the expiration of the original term; this absence had been a source of misgivings and apprehension for decades. The Regulations of 1989 were drafted in such a manner as to provide an answer and a practical solution to this vexing question.

Sixth, the 1989 Regulations set up special trust funds to liberalize foreign access to the Mexican stock market. These neutral investment trusts allow corporations listed on the stock exchange to issue stock conferring no corporate rights.⁹⁷ The stock is listed under a special series labeled "N," for neutral, to be subscribed only by Mexican banks through a trust. The subscribing banks are then authorized to issue ordinary, non-voting participation certificates that can be acquired by foreigners.⁹⁸ The "N" series stock is classified neutral because it is not taken into account when determining the amount and percentage of foreign investment in the issuing corporation's capital stock.⁹⁹ Foreign investors can directly acquire these participation certificates in the Mexican stock market or indirectly acquire them

94. *Id.* art. 20. Article 20 authorizes the SRE to approve a new trust, provided the following conditions are met: (1) retention of the same beneficiary, (2) retention of the same terms and conditions, and (3) timely application prior to the expiration of the corresponding trust. *Id.*

95. See MEXICO AND THE FOREIGN INVESTOR, *supra* note 79.

96. See Camil, *supra* note 60, at 17.

97. 1989 Regulations, *supra* note 1, art. 13, para. I.

98. *Id.* art. 13, para. II.

99. *Id.* art. 13, para. III.

through foreign financial institutions for their accounts or on behalf of third parties.¹⁰⁰ Based on these certificates, these foreign financial institutions may issue depository receipts to be traded in foreign stock markets.¹⁰¹

Seventh, the 1989 Regulations require foreign investment applications to be acted upon within forty-five working days of the date on which the Commission creates the new file of the project concerned.¹⁰² This requirement applies to projects that do not meet the six criteria of Article 5 of the Regulations¹⁰³ and to projects restricted by industry or sector.¹⁰⁴ Approval, however, is automatic if a formal response is not received from the Commission within forty-five working days from the date of application.¹⁰⁵

The removal of the broad discretionary powers from the Commission, as well as the simplification and increased efficiency of its *modus operandi*, may be listed among the major innovations introduced by the 1989 Regulations.

Eighth, the 1989 Regulations created a Committee for the Promotion of Investment in Mexico ("Investment Committee"), which provides counseling to SECOFI.¹⁰⁶ Its major function is to establish a concerted program for the promotion of investment in Mexico and to coordinate investment with the public and private sectors.¹⁰⁷ In addition, the Investment Committee is to create "a national directory of Mexican investors interested in carrying out co-investments with other Mexican companies or foreign companies, as well as a catalogue of investment projects and proposals for execution in Mexico."¹⁰⁸

Finally, the 1989 Regulations simplified and made more efficient the functions of the National Registry of Foreign Investments and its inscription procedures.¹⁰⁹

100. *Id.*

101. *Id.*

102. *Id.* art. 2.

103. *See id.* art. 5.

104. *See* MEXICO AND THE FOREIGN INVESTOR, *supra* note 79. These restricted projects require the explicit authorization of the Commission. *Id.*

105. *Id.*

106. *See* 1989 Regulations, *supra* note 1, art. 41.

107. *Id.*

108. *See* COMMERCE & INDUSTRIAL DEVELOPMENT MINISTRY, *supra* note 14, at 102.

109. *See* 1989 Regulations, *supra* note 1, arts. 42-79. Inscription was required only for: (1) foreign individuals and corporations, (2) corporations with foreign investment, and (3)

The 1989 Regulations and their impact upon Mexico's economy were encouraging. Foreign investment increased significantly following their enactment.¹¹⁰ This increase, however, was not the consequence of these Regulations, but was the direct result of the overall modernization policies advanced by the Salinas Administration, particularly in the economic and legal areas.¹¹¹

A number of decisive policies were designed to redirect the economy. These included: (1) controlling inflation through agreements with labor, business, and government; (2) renegotiating foreign debt; (3) liberalizing trade, thereby making Mexican firms more efficient through international competition; (4) privatizing public enterprises; (5) revamping the tax system; (6) strict fiscal discipline to avoid inflationary pressures; and (7) developing urgent public works needed for economic growth.¹¹²

The Salinas Administration also profoundly transformed Mexico's legal system. In the last five years, the Administration has pursued an intensive and systematic program of legislative revision that has affected the Mexican Constitution¹¹³ as well as numerous federal statutes,¹¹⁴ codes,¹¹⁵ and regulations.¹¹⁶ Le-

trusts.

110. See Jorge A. Vargas, *The New Foreign Investment Act of Mexico*, 33 I.L.M. 207, 208 (1994).

111. *Id.*

112. OFFICE OF THE PRESS SECRETARY TO THE PRESIDENT, MEXICAN AGENDA, BACKGROUND INFORMATION ON MEXICO 5-6 (1990).

113. For the amendment to the Mexican Constitution, see D.O., Jan. 6, 1992; D.O., Jan. 28, 1992; D.O., Mar. 5, 1993; D.O., Aug. 20, 1993; D.O., Sept. 3, 1993; D.O., Sept. 6, 1993; D.O., Oct. 25, 1993.

114. During the five years he has been in office (1989-1993), President Salinas has introduced amendments to or promulgated legislative bills in relation to some fifty federal statutes. See generally *La ley de Sociedades Mercantiles* (The Mercantile Corporations Act), D.O., June 11, 1992; *Ley de Vias Generales de Comunicación* (the General Communications Ways Act), D.O., June 15, 1992; the Stock Market Act, D.O., July 23, 1992; *Ley Federal de Competencia Económica* (the Federal Act on Economic Competence), D.O., Dec. 24, 1992; *Ley Federal de Turismo* (the Federal Tourism Act), D.O., Dec. 31, 1992; *Ley Federal sobre Metrología y Normalización* (the Federal Act on Metrology and Normalization), D.O., July 1, 1992; *Ley Forestal* (the Forestry Act), D.O., Dec. 22, 1992; *Ley General de Bienes Nacionales* (the General Act of National Assets), D.O., Jan. 3, 1992 (translation of titles by author).

115. For the amendments to the Codes, see Decree Amending the Civil Code for the Federal District on Ordinary Matters and for the Republic on Federal Questions, D.O., Jan. 7, 1988; Decree Amending the Code of Civil Procedure for the Federal District, D.O., Jan. 12, 1988; Decree Amending the Federal Code of Civil Procedure, D.O. Jan. 7, 1989; Decree Amending the Code of Commerce, D.O., Jan. 4, 1989 (translation of titles by

gal reform has been particularly intense in areas that impact domestic and foreign investment, such as commercial and business law,¹¹⁷ natural resource law,¹¹⁸ environmental protection, and conflict of laws.¹¹⁹

Considering the scope, depth, and swiftness of the changes in key areas of the Mexican legal system,¹²⁰ it would not be an exaggeration to depict this unprecedented activity as a legal revolution.

V. THE NEW FOREIGN INVESTMENT ACT OF 1993

After five years of leadership,¹²¹ it is clear that the economic, legal, and political policies advanced by the Administration of President Salinas de Gortari are being favorably received by foreign investors and international financial institutions.

The volume of foreign investment flowing into Mexico between January 1989 and November 1993 indicates the degree of support these policies are generating abroad. According to SECOFI, Mexico received \$37.7 billion during that four-year period, exceeding the goal of \$24 billion originally planned by 57.5%.¹²² Consequently, the accrued total foreign investment

author).

116. See, e.g., Reglamento de la Ley General de Población (Regulation to the General Population Act.), D.O. Aug. 31, 1992, Nov. 16, 1992; Reglamento del Código Fiscal de la Federación, D.O. Mar. 31, 1992, Apr. 17, 1992; Reglamento de Agents de Seguros y de Fianzas, D.O. May 17, 1993 (translation of titles by author).

117. On the recent amendments to Mexico's Ley de Fomento y Protección de la Propiedad Industrial (Act for the Promotion and Protection of Industrial Property), D.O., June 27, 1991, see Gretchen A. Pemberton & Mariano Sony, Jr., *Mexico's 1991 Industrial Property Law*, 25 CORNELL INT'L L.J. 103 (1992).

118. See generally Ley de Pesca (Fishing Act), and its Regulations D.O., June 25, 1992, July 21, 1992; Ley de Aguas Nacionales (National Waters Act), D.O., Dec. 1, 1992; Regalmentos de la Ley Minera (Regulations to the Mining Act), D.O., Mar. 29, 1993.

119. See Jorge A. Vargas, *Enforcement of Foreign Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure*, 20 NW. J. INT'L L. & BUS. (forthcoming 1994); Jorge A. Vargas, *Conflict of Laws in Mexico: The New Rules Introduced by the 1988 Amendments*, 33 INT'L LAW. (forthcoming 1994).

120. See Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 L. & POL'Y INT'L BUS. 391 (1993).

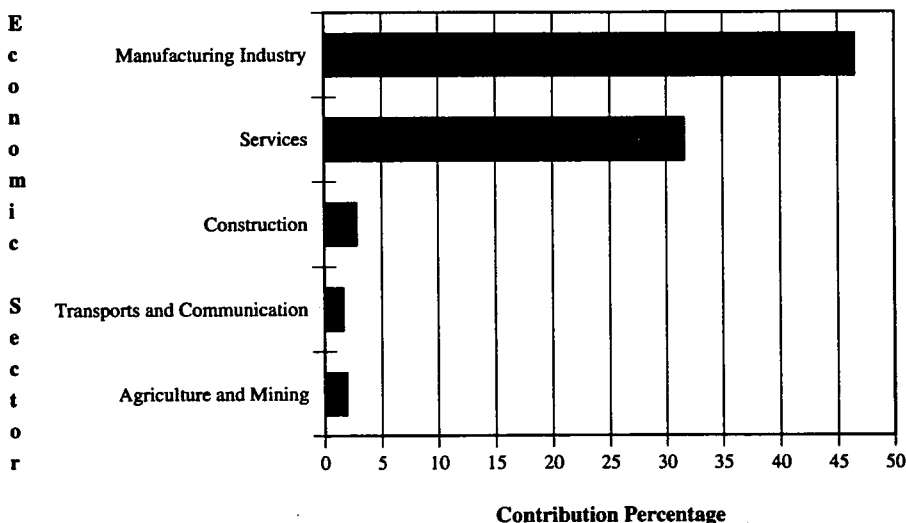
121. President Salinas took office on December 1, 1988. For an overview of the conditions prevailing in Mexico when he assumed the Presidency, and for an articulation of the major policies and programs that he planned to advance during his six-year term, including the promotion of foreign investment, see Carlos Salinas de Gortari, *Inaugural Address of Dec. 1, 1989*.

122. See Secretariat of Commerce and Industrial Development, *Evolución de la Inversión Extranjera en México [Evolution of Foreign Investment in Mexico]*, Nov. 1993,

amounted to \$61.8 billion.¹²³ Total foreign investment between January and November of 1993 amounted to \$11.6 billion: \$1.9 billion (16.5%) were authorized by the Commission; \$2.7 billion (23.3%) were projects registered with the National Registry of Foreign Investments; and \$7 billion (60.2%) consisted of investments in the stock market.¹²⁴

Incoming foreign investment was directed at manufacturing (46.5%), services (31.6%), construction (2.8%), transportation and communication (1.6%), and agriculture and mining (1.9%).

Distribution of Foreign Investment by Economic Sector for 1993



SOURCE: EVOLUCION DE LA INVERSION EXTRANJERA EN MEXICO.

at 1. In his Fifth State of the Nation Report, submitted to the Mexican Congress on November 1, 1993, President Salinas stated:

The cumulative amount of foreign investment so far during my Administration represents more than 34 billion dollars in pesos; this is 40% more than the goal for my entire six-year term of office. Between January and September of 1993, foreign investment reached the equivalent of 8 billion dollars, 18% more than in the corresponding period in 1992, and has financed the creation of 1,000 new companies.

CARLOS SALINAS DE GORTARI, FIFTH STATE OF THE NATION REPORT 36 (1993) (emphasis added).

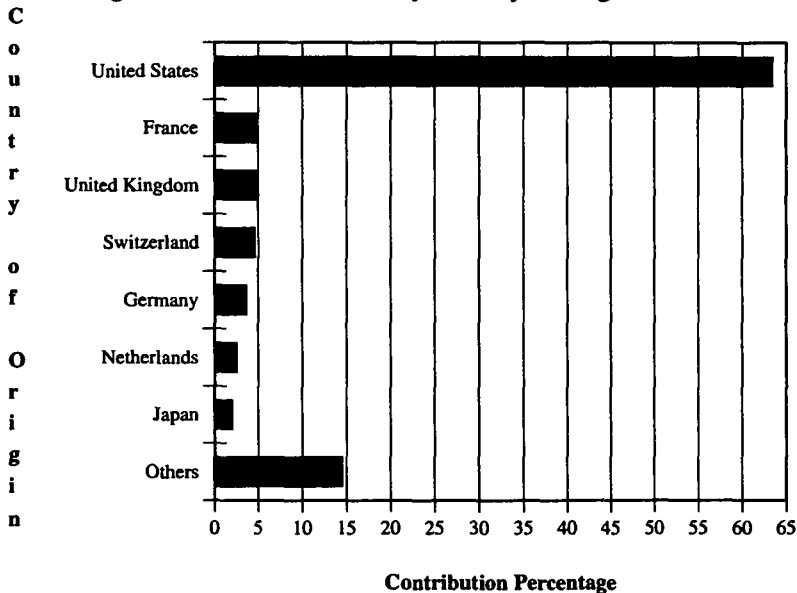
123. SALINAS DE GORTARI, *supra* note 122, at 2.

124. *Id.*

Manufacturing investments centered on food, drinks, and tobacco (38.9%), metal products, machinery, and equipment (22.1%), the chemical industry (17.1%), and basic metal industries (11.3%). In the area of services, professional and technical services received 46.5%, restaurants and hotels received 22.2%, and leasing and management of real estate received 20.1%.¹²⁵

Most of the foreign investment (71.9%) originated from North America, with the United States contributing 70.6% and Canada contributing 1.4%; 12.9% originated from the European Economic Community ("EEC"), divided among the United Kingdom (4.0%), Germany (2.5%), and France (1.7%); 2.4% originated from the Pacific Rim countries; 2.3% originated from the European Association of Free Trade; and 10.5% originated from other sources.¹²⁶ Therefore, the United States continues to be the largest investor with 63.4%, followed by France with 4.7%, the United Kingdom with 4.7%, Switzerland with 4.6%, Germany with 3.6%, the Netherlands with 2.5%, and Japan with 2.0%.¹²⁷

Foreign Investment in Mexico by Country of Origin for 1993



SOURCE: EVOLUCION DE LA INVERSION EXTRANJERA EN MEXICO.

125. *Id.* at 3.

126. *Id.*

127. *Id.*

In a formal statement sent by President Salinas to the Mexican Congress explaining the reasons why Mexico should embrace a new foreign investment act,¹²⁸ Salinas asserted:

The purpose of this bill for a Foreign Investment Act (*Ley de Inversión Extranjera*) is to establish a new legal framework which, in full compliance with the Constitution, promotes competitiveness in the country, provides legal certainty to foreign investment in Mexico and establishes clear rules to channel international capital to productive activities.¹²⁹

Salinas also underscored that, according to the International Monetary Fund, Mexico received the most foreign investment among developing countries and was eighth in foreign investment among all countries in 1991.¹³⁰ Moreover, Salinas added that, according to the U.S. Department of Commerce, Mexico climbed from the seventh to the second position in receiving investment from the United States.¹³¹

The most distinctive feature of the 1993 Act is its clear policy to promote, not regulate, foreign investment. Although the new federal statute breaks away from the legal and administrative rigidity imposed by the 1973 Act, it shares some of the traditional policies of the old Act. At the same time, the 1993 Act advances some of the policies of liberalization and flexibility already contained in the 1989 Regulations to a higher legal plateau. Overall, the 1993 Act unquestionably represents the most progressive legal framework ever formulated in Mexico to govern foreign investment.

The content of the 1993 Act may be divided into three categories: (1) provisions contrary to the 1973 Act, (2) provisions in consonance with the 1973 Act, and (3) provisions in symmetry with the 1989 Regulations.

A. *Provisions Contrary to the 1973 Act*

The 1993 Act contains a number of innovative features. First, the new Act liberalizes access to and participation in foreign investment in Mexico by streamlining and expediting the corre-

128. See *Exposición de Motivos*, *supra* note 5.

129. Vargas, *supra* note 110, at 207.

130. *Id.*

131. *Id.*

sponding administrative procedures.¹³² The most marked departure from the 1973 Act is the abandonment of its traditional "forty-nine to fifty-one percent" rule.¹³³

Second, the new Act adopts a clear promotional attitude aimed at attracting foreign capital to Mexico. In his statement to Congress, President Salinas asserted that "foreign investment has become, in recent history, a basic instrument in the economic development of nations," and also recognized that, "in the last years, several events have produced a shortage of international capital."¹³⁴ In order to guarantee the continuous flow of foreign capital to a given country, President Salinas declared the necessity of the following specific factors: (1) the stability of its economic policy, (2) the existence of clear and permanent rules on investment matters, (3) competitive tax rates at an international level, (4) absence of excessive economic regulations, and (5) access capacity to other markets.¹³⁵

Finally, the 1993 Act eliminates the imposition of performance requirements upon foreign investors, thus reducing to a minimum the exercise of discretionary powers on the part of competent Mexican authorities, including the Commission.¹³⁶

In certain cases, when foreign investors have needed the Commission's authorization to initiate a foreign investment project, the Commission customarily authorized the project by conditioning authorization upon the performance of certain requirements by the interested foreign investor.¹³⁷ The imposition of these requirements was arbitrary, often imposed on a case-by-case basis, depending upon the nature and special characteristics of the individual project. In most cases, however, the performance requirements had a direct relationship to the creation of a given number of permanent jobs, the requirement that a percentage of produced goods be sold either to the Mexican domestic market or abroad, or the buying of supplies from Mexican producers.¹³⁸

132. *Id.*

133. *See supra* text accompanying note 17.

134. *See* OFFICE OF THE PRESIDENT, *supra* note 128 (translation by author).

135. *Id.* According to President Salinas, Mexico has been able to compete favorably in attracting foreign capital, "thanks to the soundness of its economic policy and to [the formulation of] a number of specific actions designed to promote [foreign] investment." *Id.* (translation by author).

136. *See* Vargas, *supra* note 110, at 209.

137. *See* Camil, *supra* note 60, at 15.

138. *Id.*

The elimination of performance requirements, including export requirements, capital controls, and domestic content percentages, was included in order to place the 1993 Act, especially Articles 8 and 9,¹³⁹ in symmetry with the pertinent NAFTA provisions.¹⁴⁰

B. Provisions in Consonance with the 1973 Act

Despite its relative progress and openness, the 1993 Act continues to maintain a number of traditional legal policies and institutions. It is not difficult to understand why the drafters of the new statute lacked the courage to break away from past molds. One of the strongest arguments in favor of retaining certain traditional policies, especially in an area as delicate as foreign investment, must be couched in historic and economic terms rather than legal concepts. For example, notwithstanding the recent emergence of a climate of intergovernmental cooperation and mutual respect that seeks to modify the difficult relations of the past,¹⁴¹ Mexico continues to have inherent reservations about its unavoidable situation as neighbor of the most powerful nation in the world.¹⁴² Thus, from an historic and economic perspective, this new warmer climate may be superficial rather than substantive.

Additionally, because of this chronic distrust, Mexico may feel more secure if it continues to keep exclusive control over certain natural resources and activities, such as petroleum, electricity, nuclear energy, and satellite communications. This approach is enunciated in Articles 5 and 6 of the 1993 Act, and is said to be for strategic and security considerations.¹⁴³

A number of years will have to pass before Mexico will even consider eliminating the most drastic of the restrictive policies of the 1993 Act. These policies consist of the activities exclusively

139. Articles 8 and 9 of the 1993 Act require an authorization from the Commission for certain foreign investment projects. For the English translation of these Articles, see Vargas, *supra* note 110, at 215.

140. See NAFTA, *supra* note 11, chs. IV (domestic content percentage, rules of origin), XI, arts. 309, 1106 (export requirements).

141. See SALINAS DE GORTARI, *supra* note 122, at 15.

142. *Id.* at 16. Despite the time elapsed, Mexico still vividly recalls the enormous territorial loss suffered as a consequence of the unjust war against the United States in 1846-1848, concluded in accordance with the terms contained in Article V of the Treaty of Guadalupe Hidalgo.

143. See Vargas, *supra* note 110, at 213.

reserved to the Mexican Government and those restricted to Mexican nationals.¹⁴⁴ If these restrictions are ever eliminated, it may be a gradual exercise in close consonance with the economic recovery that NAFTA is expected to trigger. It is likely to take place only as a direct result of a strong economy and a sound democratic system with respect for human rights and for the environment, however, and not as a proposition initiated by a country plagued with socio-economic and political problems principally caused by an unfair distribution of wealth.

The 1993 Act incorporates into its new text important traditional policies that were originally included in the 1973 Act.

1. Activities Reserved to the Government

The new Act continues to maintain a large number of activities reserved exclusively to the Mexican Government as enumerated in Article 5.¹⁴⁵ These activities involve: (1) petroleum, (2) basic petrochemicals, (3) electricity, (4) nuclear energy, (5) radioactive minerals, (6) satellite communications, (7) telegraph services, (8) radiotelegraphic and postal services, (9) railroads, (10) issuance of paper money and minting of money, and (11) control, supervision, and surveillance of ports, airports, and heliports.¹⁴⁶

The activities enumerated in Article 5 of the 1993 Act are actually more extensive than those listed in Article 4 of the 1973 Act.¹⁴⁷ In other words, there are more activities exclusively reserved to the Government of Mexico in the current Act than in the old Act. Most of the activities listed in the 1993 Act, however, coincide with those listed in Category 1 of the Mexican Classification of Economic Activities and Products, which is annexed to the 1989 Regulations.¹⁴⁸

In consonance with Mexico's modern policy of deregulation, the 1993 Act slightly relaxes the traditional monopolistic intrusion of the Mexican Government in some activities previously considered strategic, such as mining, railroads, and wireless communica-

144. 1993 Act, *supra* note 2, art. 5.

145. For the text of Article 5, see *id.*

146. *Id.* art. 5.

147. 1973 Act, *supra* note 3, art. 4. Article 4 did not include radioactive minerals, satellite communications, radiotelegraphic services, postal services, issuance of paper money, minting of money, or surveillance of ports, airports, and heliports. See *id.*

148. For the complete list in the Classification, see PRACTICAL MANUAL, *supra* note 54, at 387-96; Bryan & Baz, *supra* note 1, at 77-88.

tions.¹⁴⁹ The new statute, consistent with the 1989 Regulations, allows a variable degree of foreign investment in these areas. In the mining area, for example, this applies to exploitation and processing of mineral coal,¹⁵⁰ extraction and processing of iron¹⁵¹ and non-ferrous metallic minerals¹⁵² (e.g., gold, silver, mercury, lead, zinc, copper), exploitation of feldspar and gypsum,¹⁵³ and the extraction and processing of other non-metallic minerals.¹⁵⁴

With regard to railroads, Article 7 of the 1993 Act allows up to forty-nine percent foreign investment participation in "[s]ervices related to the railroad sector, consisting in passenger services, maintenance and rehabilitation of tracks, switchers, repair shops for locomotive and hauling equipment, organization and commercialization of unitary trains, management of inland freight railroad stations and railroad communications."¹⁵⁵

In the area of wireless communications, Article 8 of the new Act allows up to forty-nine percent foreign participation in the area of cellular telephones, if the Commission grants authorization.¹⁵⁶

The Classification included a category for banking institutions¹⁵⁷ exclusively reserved to the Mexican Government. The new Act, departing from the 1989 Regulations, allows foreign investors to participate in certain activities in the banking and financial areas, up to thirty percent and forty-nine percent

149. See 1973 Act, *supra* note 3, art. 4, paras. d-g. All of these activities were reserved exclusively for the Government.

150. See Classification, *supra* note 83, at 387. Category 2100, Level 3 allows for the participation of foreign investment of up to 34% in the corporation's capital for activities with a specific regulation. *Id.* See also *supra* notes 83-84 and accompanying text.

151. *Id.* at 388 (Category 2310, Level 3).

152. *Id.* (Category 2320, Level 5 allowing foreign investment of up to 49%).

153. *Id.* (Category 2910, Level 5).

154. These minerals include phosphoric rock, fluoride, sulphur, and salt. See *id.* (Category 2920, Levels 3, 5).

155. 1993 Act, *supra* note 2, art. 7, para. IV(s). In the Classification, railroad transportation service, listed as Category 7111, Level 1, is reserved exclusively to the Government of Mexico. Classification, *supra* note 83, at 391.

156. 1993 Act, *supra* note 2, art. 8, para. IX. The Classification included Category 7200, Telephone Services and Other Telecommunication Services, as Level 5. Telegraph services appeared as an economic area reserved exclusively to the Mexican Government. Classification, *supra* note 83, at 392.

157. Classification, *supra* note 83, at 392 (Category 8110: Services of credit, banking and auxiliary credit institutions). Within this category, banking and financial trusts are exclusively reserved to the Mexican government. *Id.*

respectively.¹⁵⁸ In the thirty percent bracket, the activities in which foreign investors can participate include: credit institutions of multiple banking services, corporations that control financial groupings, and stock brokerage and advice.¹⁵⁹ In the forty-nine percent category, the acceptable activities include: financial leasing offices, financial factoring corporations, and other financial corporations.¹⁶⁰

A few words about the notion of economic activities reserved exclusively to the Mexican State are relevant. There is no question that, under international law, Mexico, as well as any other nation-state, has the sovereign right to reserve certain activities to its exclusive and absolute control.¹⁶¹ Traditionally, this approach has been applied to a select number of activities perceived to have a direct impact upon national security or other vital interest of the state.¹⁶² This basic concept may explain why, for example, petroleum and other hydrocarbons, nuclear energy, radioactive minerals, the issuance of paper money, and the minting of money have always been under the exclusive control of the Government of Mexico. The national perception of what a strategic interest is, or even the definition of what constitutes a vital interest, is subject to change, depending on time and progress made in science and technology.

As the preceding analysis suggests, however, recent legislative and administrative experience proves that the extremely nationalistic policy of Mexico, traditionally applied since the turn of the century to some of these economic activities, is becoming less restrictive. This less restrictive policy leads towards a more open legal framework favoring the promotion of foreign investment. With the continued growth of the Mexican economy, the overall modernization of the country, and the gradual, effective implementation of NAFTA, this new attitude may continue. If this trend continues, satellite communications, electricity, basic petrochemicals, ports, and railroads may soon be open to foreign investors.

158. 1993 Act, *supra* note 2, art. 7, paras. III-IV.

159. Vargas, *supra* note 110, at 214.

160. *Id.*

161. *Id.*

162. *Id.*

2. Activities Reserved to Mexican Nationals

As enumerated in Article 6, the new Act perpetuates the existence of a number of activities exclusively reserved to Mexicans or to Mexican corporations with an Exclusion of Foreigners Clause.¹⁶³ These activities consist of the following: (1) national land transportation for passengers, tourism, and freight, not including messenger and package-delivery services; (2) retail gasoline sales and liquified petroleum gas; (3) radio broadcasting services and other services in radio and television, other than cable television; (4) credit unions; (5) development banking institutions; and (6) rendering of professional and technical services.¹⁶⁴

The 1973 Act lists only five activities in this category.¹⁶⁵ Surprisingly, the 1989 Regulations are quite prolific in this area, listing thirty-two economic activities exclusively reserved to Mexican nationals.¹⁶⁶ Because Article 4 of the 1993 Act provides that, until the new Regulations to the new statute are published, the 1989 Regulations "shall continue to be in force in everything not inconsistent with this Act,"¹⁶⁷ it is valid to assume that most, if not all, of the thirty-two activities appearing in the 1989 Regulations continue to be in force.

In order to avoid any possible circumvention of the restrictions imposed on foreign investors by Article 6 of the new Act, this Article explicitly establishes in its final part: "Foreign investment cannot participate in a direct manner in the activities and corporations mentioned in this article, nor through trusts, agreements, social or statutory covenants, pyramid schemes or any other mechanism granting them any control or participation, save what is provided in Title V of this Act."¹⁶⁸

163. 1993 Act, *supra* note 2, art. 6.

164. *Id.* paras. I-VI.

165. See 1973 Act, *supra* note 3, art. 4, paras. a-f.

166. Classification, *supra* note 83, at 387, 391-93 (Categories 1200: Silviculture; 7112: Freight Automotive Transport; 7113: Other Ground Transportation; 7120: Aquatic Transportation; 7130: Air Transportation; 8110: Services of Credit, Banking, and Auxiliary Credit Institutions; 8120: Service Financial Institutions of the Stock Market; 8130: Service of Insurance and Bond Institutions; 9411: Entertainment Services (e.g., movies, theater, radio, and television) Provided by the Private Sector; 9732: Services Relating to Aquatic Transportation) (translation by author).

167. See 1993 Act, *supra* note 2, transitory art. 4.

168. *Id.* art. 6, *in fine*.

Article 6 of the new Act establishes a schedule allowing foreign investment to have gradual, but increasing, participation in economic activities exclusively reserved to Mexicans; these activities include international ground transportation for passengers, tourism and freight between points within the territory of Mexico, and the service of administering bus terminals for passengers and related services. According to this Article, foreign investment may participate in up to forty-nine percent of the capital stock of Mexican corporations as of December 1995, up to fifty-one percent as of January of 2001, and up to one hundred percent, as of January 1, 2004.¹⁶⁹

Article 7 of the new Act maintains a limitation on foreign investment by preserving four categories with fixed maximum foreign investment percentages.¹⁷⁰

3. Activities with Fixed Maximum Percentages

The fixed maximum percentages imposed on foreign investment are divided into four levels:

1. Up to 10% in cooperatives;
2. Up to 25% of the capital stock of Mexican corporations in national air transportation, air taxi transportation, and specialized transport;
3. Up to 30% of the capital stock of Mexican corporations that are corporations controlling financial groupings, credit institutions of multiple banking services, and brokerage houses; and
4. Up to 49% of the capital stock of Mexican corporations that are involved in insurance, bonds, money exchange, general deposit warehousing, manufacturing and selling of explosives, firearms and cartridges,¹⁷¹ printing and publication of domestic newspapers, cable television, basic telephone services, freshwater and coastal fishing in

169. *Id.* transitory art. 6.

170. *Id.* art. 7, paras. I-IV. For the corresponding Article, see 1973 Act, *supra* note 3, art. 5.

171. To allow foreign investment participation in this area, Article 3 of the new Act amended Articles 46 and 47 of *Ley Federal de Armas de Fuego y Explosivos* [*Federal Act of Firearms and Explosives*], D.O., Jan. 11, 1972.

Mexico's exclusive economic zone,¹⁷² or shipping corporations.¹⁷³

C. Provisions in Symmetry with the 1989 Regulations

Some scholars have suggested that the 1989 Regulations took Mexico's business and legal communities by surprise.¹⁷⁴ The 1993 Act, however, is a logical extension of the 1989 Regulations. As such, the 1993 Act is expected to be in close legal symmetry both with the content and format of the 1989 Regulations. Because the publication of the new regulations to the 1993 Act is likely to take some time,¹⁷⁵ foreign investors should closely scrutinize the 1989 Regulations, especially the Classification of Economic Activities.¹⁷⁶ Foreign investors must remember that these regulations will continue to be in force in Mexico for foreign investment matters not inconsistent with the new federal statute.¹⁷⁷

Four areas of the new Act appear to be inspired by the 1989 Regulations: (1) a simplified version of the "*Fideicomiso*," (2) neutral investments, (3) implicit approval of foreign investment projects, and (4) a more efficient National Registry of Foreign Investments.

1. A Simplified Version of the "*Fideicomiso*"

The Mexican legal institution of *Fideicomiso* (a Mexican trust) is derived from the common law notion of a trust¹⁷⁸ and was utilized for decades¹⁷⁹ to circumvent legally the outright prohibi-

172. For an analysis of the creation and legal aspects of this oceanic space, see Jorge A. Vargas, *La Zona Económica Exclusiva de México [Mexico's Exclusive Economic Zone]* (1980).

173. See Vargas, *supra* note 110, at 214.

174. See Camil, *supra* note 60, at 2.

175. See *supra* text accompanying note 4.

176. See *supra* note 84.

177. 1993 Act, *supra* note 2, transitory art. 4.

178. For a detailed description of the origin, content, and types of "*Fideicomisos*," including a comparison with the institution of trust in U.S. law, see RODOLFO BATIZA, *EL FIDEICOMISO* 75-101 (1976).

179. A presidential decree of April 1971 and, later, Article 18 of the 1973 Act allowed certain Mexican banking institutions to serve as trustees for foreign nationals so that they could have the beneficiary use of real estate located within the "Prohibited Zone." The title to the property was held by the Mexican bank, as trustee. See *Acuerdo que autoriza a la Secretaría de Relaciones Exteriores para conceder a las instituciones nacionales de crédito permisos para adquirir como fiduciarias el dominio de bienes inmuebles destinados*

tion of Article 27, Paragraph 1 of Mexico's 1917 Constitution.¹⁸⁰ Article 27 forbade foreigners from having direct ownership over immovable assets in the Restricted Zone.¹⁸¹ This severe limitation initially posed an insurmountable obstacle for the development of real estate for industrial, tourist, and residential purposes in borders and coastal areas of Mexico. This later led to the use of a number of subterfuges to circumvent the constitutional prohibition.¹⁸² The situation improved slightly due to the Presidential decree of 1961, which allowed Mexican banks to serve as trustees and hold title over immovable assets located in the Prohibited Zone while the beneficiary, a foreign national or a Mexican corporation with an exclusion of foreigners clause, enjoyed the beneficiary use of said assets. Article 20 of the 1973 Act, however, provided that the duration of these Mexican trusts could not exceed thirty years.¹⁸³

The vagueness of this Provision created a growing concern among foreigners with beneficiary rights in the Prohibited Zone because they did not know what was going to happen to their rights at the expiration of the thirty-year trust. Fortunately, the 1989 Regulations solved this problem in a fair and practical

a la realización de actividades industriales y turísticas en fronteras y costas [*Agreement Authorizing the Secretariat of Foreign Affairs to Issue Permits to National Credit Institutions to Acquire, as Trustees, Direct Ownership of Immovable Assets to be Used for Industrial and Tourism Activities in Frontiers and Coastlines*], D.O., Apr. 30, 1971; 1973 Act, *supra* note 3, art. 18.

180. CONST. art. 27, para. I (Mex.) The Article provides:

Only Mexicans by birth or by naturalization and Mexican corporations [with an exclusion of foreigners clause] may have the right to acquire the direct ownership of lands, waters, and their accessions, or to obtain concessions for the exploitation of mines and waters . . . [W]ithin a strip of 100 kilometers along the borders and 50 kilometers along the coasts, foreign nationals, for no reason whatsoever, may acquire the direct ownership over lands and waters.

Id. (translation by author).

181. See 1989 Regulations, *supra* note 1, art. 27.

182. See Victor Villaplana, *The Forbidden Zones in Mexico*, 10 CAL. W. L. REV. 47-51 (1973); Gilberto Gutierrez Quiroz, *Investments in Real Property in Mexico: An Overview of Constitutional and Statutory Restrictions*, 12 ARIZ. L. REV. 270, 279-89 (1970).

183. 1973 Act, *supra* note 3, art. 20. Article 20 provides that:

The duration of trusts to which this chapter refers shall in no case exceed thirty years. The trust institution shall always retain legal ownership of the real estate held in trust; it shall have the right to lease it for periods of not over ten years and, *on expiration of the trust, it may transfer ownership rights to persons legally qualified to acquire them.* The Federal government reserves the right to verify the fulfillment of the purposes of the trust at any time.

Id. at 58 (emphasis added).

manner by extending the original term through consecutive trusts.¹⁸⁴

The new 1993 Act continues the liberalization introduced by the 1989 Regulations with regard to Mexican trusts in the Restricted Zone.¹⁸⁵ Of the changes established by the new federal statute in this area, three are most significant.

The first change was the extension of the duration of the *Fideicomisos* from thirty to fifty years. This duration may be renewed at the request of the interested party.¹⁸⁶ Future renewal of the original fifty-year term is likely to become automatic if certain conditions are met. The beneficiary, terms, and conditions of the trust must remain the same. Additionally, the application for renewal must be made prior to the expiration of the original trust.¹⁸⁷ Until the new Regulations are published, pertinent Articles of the 1989 Regulations will continue to be in force to complement and detail this section of the new federal statute.¹⁸⁸

The second change was pursuant to Article 10 of the 1993 Act. Under the provision, Mexican corporations with an Exclusion of Foreigners Clause, or those corporations that have entered into the "Calvo Clause" agreement,¹⁸⁹ may acquire direct ownership over immovable assets in Mexico's national territory when those assets are used for non-residential activities such as industrial, commercial, and tourism purposes.¹⁹⁰ This new method of acquisition through a Mexican corporation¹⁹¹ clearly simplifies the transaction by eliminating the cumbersome trust mechanism.

The final provision of the 1993 statute, however, continues to maintain the use of the *Fideicomiso* when foreign natural persons

184. See *supra* text accompanying notes 94-98.

185. Articles 11-14 of the 1993 Act, regarding "Real Estate Trusts over Immovable Assets in the Restricted Zone," track rather closely the content of Articles 36-38 of the 1989 Regulations. See 1993 Act, *supra* note 2, arts. 11-14; 1989 Regulations, *supra* note 1, arts. 36-38.

186. 1993 Act, *supra* note 2, art. 13.

187. See *supra* text accompanying notes 95-96.

188. See 1989 Regulations, *supra* note 1, arts. 20-22, 36-38.

189. For the Mexican legal definition of the "Calvo Clause" agreement, see 1973 Act, *supra* note 3, art. 3; see also *supra* notes 16, 22 and accompanying text.

190. 1993 Act, *supra* note 2, art. 10, para I. This Article provides that the acquisition has to be "registered" with the SRE when the assets are located within the Restricted Zone. *Id.*

191. This portion of the Article appears to have been based upon Article 36 of the 1989 Regulations. See 1989 Regulations, *supra* note 1, art. 36.

or foreign legal entities acquire beneficiary rights¹⁹² over immovable assets located in the Restricted Zone for residential use.¹⁹³ Presumably, because of security concerns, the Mexican Government decided to maintain the traditional application of the "Calvo Clause" when foreign nationals and foreign entities use their real estate beneficiary rights in the Restricted Zone for residential purposes.¹⁹⁴ By using the *Fideicomiso*, which requires each foreign applicant to enter into the Calvo agreement directly with the Secretariat of Foreign Affairs, the Government of Mexico will be able to exercise a more powerful and direct influence upon the foreign applicant. This conveys the idea that the real estate in question is subject to the application of Mexican law and that the foreign applicant is legally considered a Mexican national with regard to such assets and, thus, deserves no special treatment and has no special rights under Mexican law. The application of the "Calvo Clause" to this type of transaction, however, appears to be excessive and unduly unfair to foreign nationals.

2. Neutral Investments

The 1989 Regulations introduced the notion of "neutral investment" into the Mexican legal system.¹⁹⁵ Article 18 of the 1993 Act defines neutral investment as "that invested in Mexican corporations or in authorized trusts . . . [that] is not taken into account in calculating the percentage of foreign investment in the capital stock of Mexican corporations."¹⁹⁶

Neutral investment was created to liberalize foreign access to the Mexican stock market.¹⁹⁷ Neutral investment is represented either by instruments issued by fiduciary institutions¹⁹⁸ or by

192. 1993 Act, *supra* note 2, art. 12. Article 12, unlike the 1989 Regulations, provides for the first time a detailed explanation of the concept of "use and development of immovable assets located in the Restricted Zone." *Id.*

193. *Id.* art. 10, para. II.

194. Article 14 of the 1993 Act provides that the Secretariat of Foreign Affairs shall decide these cases "taking into consideration the economic and social benefit that the conduct of these operations produces for the nation." 1993 Act, *supra* note 2, art. 14.

195. See 1989 Regulations, *supra* note 1, arts. 13-45.

196. 1993 Act, *supra* note 2, art. 18 (describing the neutral investment concept). See also *supra* text accompanying notes 97-101 (analyzing the 1989 Regulations on neutral investment trusts).

197. See COMMERCE & INDUSTRIAL DEVELOPMENT MINISTRY, *supra* note 14, at 100; Camil, *supra* note 60, at 18.

198. 1993 Act, *supra* note 2, art. 19.

special series of shares, which may be series "B" or series "A."¹⁹⁹ In addition, the Act authorized the Commission to decide on neutral investments that international financial corporations seek to make in the capital stock of other corporations for development purposes.²⁰⁰ There is no doubt that the 1989 Regulations, as well as SECOFI's experience with regard to these matters, will play a decisive role in interpreting these provisions of the new Act.

3. Implicit Approval of Foreign Investment Projects

Article 8 of the 1993 Act enumerates eleven economic activities that require authorization from the Commission for investments exceeding forty-nine percent in these activities or in Mexican corporations.²⁰¹ These activities include port services, shipping corporations, administration of air traffic terminals, private education, legal services, cellular telephones, construction of oil pipelines, and drilling of oil and gas wells.²⁰²

Consistent with the 1989 Regulations,²⁰³ the new Act requires the Commission to decide on these projects within forty-five working days from the date of the application.²⁰⁴ If the Commission fails to decide within this time period, the application is considered approved under the terms submitted.²⁰⁵

The 1993 Act also increases the number of members on the Commission from seven to nine.²⁰⁶

199. *Id.* art. 20. Investments made in capital stock with no voting rights or with limited corporate rights are considered neutral if prior authorization is obtained from SECOFI and, when applicable, from the National Securities Commission (*Comisión Nacional de Valores*). *Id.*

200. *Id.* art. 22.

201. *Id.* arts. 8, paras. I-XI, 9.

202. *Id.*

203. 1989 Regulations, *supra* note 1, art. 2. *See also supra* notes 104-07 and accompanying text.

204. *See supra* note 109.

205. 1993 Act, *supra* note 2, art. 23.

206. *See* SOBERANIS, *supra* note 24, at 321. The members are: (1) the Secretary of the Interior (*Gobernación*); (2) the Secretary of Foreign Affairs (*Relaciones Exteriores*); (3) the Secretary of Finance and Public Credit (*Hacienda y Crédito Público*); (4) the Secretary of Social Development (*Desarrollo Social*); (5) the Secretary of Energy, Mines and Parastate Industries (*Energía, Minas y Industria Paraestatal*); (6) the Secretary of Commerce and Industrial Development (*Comercio y Fomento Industrial*); (7) the Secretary of Communications and Transport (*Comunicaciones y Transportes*); (8) the Secretary of Labor and Social Welfare (*Trabajo y Previsión Social*); and (9) the Secretary of Tourism (*Turismo*). 1993 Act, *supra* note 2, art. 23. *See also supra* note 25.

4. A More Efficient National Registry of Foreign Investments

A number of Articles in the new Act detail the functions of the National Registry of Foreign Investments.²⁰⁷ The Registry includes the following entities:

1. Mexican corporations with foreign investment participation;
2. Foreign natural persons or foreign legal entities that routinely conduct acts of commerce in Mexico and subsidiaries of foreign investors established in Mexico; and
3. Trusts of capital corporate stock or shares in immovable assets and neutral investments by virtue of which rights are created in favor of foreign investment.²⁰⁸

Compared with the 1989 Regulations, the 1993 Act simplifies and expedites the Registry procedures.

VI. SANCTIONS IN THE NEW ACT

The 1993 Foreign Investment Act devotes its final section²⁰⁹ to the last three Articles of the 1973 Act, which attempted to establish a punitive mechanism.²¹⁰ The New Act develops this mechanism in greater detail.

When foreign investors violate the provisions of the 1993 Act, SECOFI has the power to revoke the authorizations granted.²¹¹ Article 38 of the 1993 Act specifies the core sanctions available against foreign investors. The specific penalties applied depend upon the kind of activities or omissions SECOFI construes as

207. 1993 Act, *supra* note 2, arts. 31-36. See also *supra* note 109 and accompanying text.

208. For comparison, see 1989 Regulations, *supra* note 1, arts. 42-65.

209. 1993 Act, *supra* note 2, arts. 37-39.

210. See 1973 Act, *supra* note 3, arts. 28-31. For example, sanctions are imposed for not registering certain investments with the National Registry of Foreign Investment. Article 31 imposes

imprisonment up to nine years and fines up to \$50,000 pesos . . . to whoever simulates any action that permits the enjoyment or use in fact by the individuals, corporate bodies, or economic entities . . . of properties or rights reserved to Mexicans or whose acquisition is subject to requirements or authorizations that have not been fulfilled or obtained.

Id. art. 31.

211. 1993 Act, *supra* note 2, art. 37. Article 37 of the 1993 Act seems to have been patterned after Article 28 of the 1973 Act. See 1973 Act, *supra* note 3, art. 28.

violating the federal Act.²¹² In general, most of the sanctions consist of fines, ranging from the minimum salary in Mexico City²¹³ (approximately \$4.50 per hour) to one thousand times that salary (approximately \$4,500).²¹⁴ The maximum fine is five thousand times the minimum salary (approximately \$22,500) and is reserved for foreign investors who conduct acquisitions or any other act requiring authorization from the Commission without such authorization.²¹⁵

This section of the Act also includes a provision specifically directed at the official functions performed by *fedatarios públicos*.²¹⁶ Under Mexican law, the notion of *fedatarios públicos* currently includes not only the traditional institution of public notaries,²¹⁷ but also the more modern concept of *Corredores públicos*.²¹⁸ The new Act, however, simply refers to the notarial laws and the Federal Act of Public Brokers (*Ley Federal de Correduría Pública*) in the application of the corresponding sanctions when violations of these statutes are committed.²¹⁹

To a certain extent, it seems paradoxical that a federal statute designed deliberately by the Government of Mexico to attract and promote the flow of foreign investments to the host nation penalizes investors and business entrepreneurs who have risked their capital by investing it in that country. When foreign investors conduct business in Mexico, or in any other host nation, in violation of that nation's domestic legislation, the host nation clearly has a sovereign right to exercise jurisdiction to curb those actions and, in particular, to prosecute and penalize the commis-

212. 1993 Act, *supra* note 2, arts. 37-38. See Vargas, *supra* note 110, at 220-21.

213. 1993 Act, *supra* note 2, art. 38, para. III.

214. *Id.* paras. II, VI.

215. *Id.* para. I.

216. *Id.* art. 39.

217. For a current description of the important and sometimes indispensable professional legal services rendered by public notaries in Mexico, see National Association of the Mexican Notariate, EL NOTARIO Y SU FUNCIÓN, *El Notario y su Función*, in REVISTA INTERNACIONAL DEL NOTARIADO, Año XLI, No. 86 (1990).

218. See *Ley Federal de Corraduría Pública* [Federal Act of Public Brokers] and its Regulations, D.O., June 4, 1993. Pursuant to these recent statutes enacted by President Salinas, *corredores públicos* have been legally empowered to render the same services traditionally provided by *notarios públicos* only. Articles 2 and 3 of this statute authorize SECOFI to ensure the efficiency of the services provided by *corredores públicos*, as auxiliaries to commerce, guaranteeing the legal security of the acts in which they intervene. *Id.*

219. 1993 Act, *supra* note 2, art. 39.

sion of any illicit acts. Yet, in the eyes of foreign investors, it does not appear to be a very sound policy to include punitive provisions in a statute designed to attract foreign investors.

A more subtle way to regulate these rather delicate foreign investment violations is to penalize those eventual offenses, not in the text of foreign investment legislation, but in other pertinent provisions of domestic legislation of the host country. Most modern foreign investment statutes utilize this method. For example, the penal provisions may be included in a tax code, a corporations act, a penal code, or even in a special international bilateral agreement with the country whose investors play an important role in the host nation.

Mexico will likely continue to adopt a more international attitude towards business and foreign investment matters, the penal provisions of the 1993 Act will find their way into the text of another statute.

VII. CONCLUSION

Mexico's Foreign Investment Act of 1993 is not an isolated legal phenomenon. Rather, it is part of the general modernization policies advanced by the current Administration of President Carlos Salinas de Gortari. Combined with NAFTA, the overhauling of its legal system, and the gradual, but systematic, upgrading of its industrial and scientific institutions, the new Act is clearly a response to Mexico's vigorous initiative to reach the status of a mid-size power by the beginning of the next century.

The 1993 Act drastically alters the approach Mexico took on foreign investment matters for decades. Instead of continuing the closed and restrictive approach that made Mexico infamous among foreign investors during the last two decades, the 1993 Act adopts a liberal and promotional policy in favor of foreign investment. The specialists in this field are certain that the new Act breaks away from the old model.

Undoubtedly, the decision to incorporate the new promotional policies into the 1993 Act took serious reflection. To depart from old traditions always takes courage. The favorable response to the 1989 Regulations, both domestically and internationally, paved the way for President Salinas' technical Administration to push forward his modernization and promotional policies.

Although the 1993 Act marked a departure from the 1973 Act, it still shares, in some respects, the same kind of mentality

that supported the traditional statute two decades ago. For instance, the Act still provides for the economic areas excluding foreign investment and those reserved exclusively to Mexican nationals. If the Act eliminated, or at least kept to a minimum, these restrictive provisions, the international community would have viewed the new Act in a more positive and constructive manner. Also, transfer of the punitive measures from the text of the new Act into the corpus of another legislative enactment would have been a more diplomatic legislative technique.

Perhaps the largest deficiency of the 1993 Act is its failure to set up an international mechanism for the settlement of foreign investment disputes. This mechanism would have been the most important section of the 1993 Act; yet, it is ostensibly absent from its text. Over the past half century, Mexico surprised the international legal and business communities by adhering to an absolute, territorialized policy that virtually excluded the application of foreign law in that country. Since 1988, however, the nation has made an unprecedented effort to change this nationalistic attitude and to embrace a more modern approach to the conflict of laws and other international legal matters. Therefore, it would be in keeping with this new trend if Mexico adopts an international legal avenue for the peaceful settlement of controversies involving foreign investors.

Throughout this century, the Mexican court system has not had an international reputation for fairness, efficiency, and honesty. Even today, foreign investors tend to be reluctant and apprehensive about relying on the objectivity and professional competence of Mexican judges. Understandably, this distrust, shared by most foreign investors, adversely affects the flow of foreign capital to Mexico. Now that NAFTA is in force, however, there is a growing expectation that Mexico's new Administration, which will be inaugurated on December 1, 1994, will continue to advance vigorously the overall modernization policies that Mexico has so aptly applied over the last decade.

The 1993 Act determines the flow of foreign capital to Mexico. This is, however, only one of several factors that constantly interact in the complex and dynamic equation of foreign investment. In addition to a promotional legal framework that fosters foreign investment to that nation, international investors and entrepreneurs—who are becoming more sophisticated and global-oriented in their policy-making decisions—are also looking

to Mexico for an adequate set of domestic factors that define that nation's true investment climate. Such factors may include an impartial court system, respect for human rights, a healthy and educated population, a modern industrial infrastructure, a democratic political system, environmental protection, an honest and capable government, and political stability.

The 1993 Foreign Investment Act is a vital tool in Mexico's efforts to set an example to other developing countries, especially those in Latin America and the Caribbean. Foreign investors look to Mexico's future with an air of confidence and optimism.

