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FREDERICK V. PERRY*

I. INTRODUCTION**

Mexican laws present considerable obstacles to the foreign investor because, in many cases, they differ greatly from those in the United States. For the foreign investor, Mexico's laws often seem restrictive and discriminatory; the culture and the ways of doing business are different. In some instances Mexican laws prohibit certain activities by foreign investors and in others they limit the participation of foreign investors. Generally, all of the normal business and legal considerations for doing business anywhere within the United States must be taken into account for conducting operations in Mexico, and since Mexico is a foreign country, there are additional obstacles with which foreign investors must deal.

Over the last few years, Mexico has been on a roller coaster ride from the peak of apparent economic prosperity\(^1\) to the valley of financial chaos.\(^2\) In August, 1982, the rug was pulled out from under everything. The United States provided some assistance to Mexico by facilitating a one billion dollar grain credit from the Commodity Credit Corporation\(^3\) and a one billion dollar advance payment from

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** The writer thanks Robert M. Sherwood and Mont Hoyt for their advice, comments and assistance in the research and preparation of this article.

1. *The World's Biggest Borrower Hasn't Got a Bean*, ECONOMIST, Aug. 21, 1982, at 49. For the past few years, Mexico has been riding for a fall by using big export earnings from oil to keep the peso overvalued, even though annual consumer price inflation averaged 27% in 1980-81 and the money supply shot up as the economy grew by about 8% a year. In February (of 1982), the government, at last, let the peso float and it fell sharply against the dollar.

*Id.*


3. Congress created the Commodity Credit Corporation in 1984 for the purpose of sta-
the U.S. Department of Energy for the purchase of Mexican oil for the strategic reserve. In addition, Mexico asked the International Monetary Fund\(^4\) for economic assistance in the way of a four billion dollar loan.\(^5\)

The loans, curtailed imports, hard work, and austerity measures\(^6\) may have begun to pay off, and some observers believe the Mexican economy is on the way to righting itself.\(^7\) Others, such as Robert Sherwood, Vice President—Legal for Pfizer Latin America and formerly an adjunct professor at the University of Miami Graduate School of International Studies, have the sense that debt repayment has merely been postponed and harder times may lie ahead.

Press reports in the recent past have indicated that the opinion in Mexico is that there is a need to relax some of the restrictions on foreign investment. However, many close observers believe that no

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\(^{4}\) For a description of the International Monetary Fund, its history, policy and function, see 1 P. STRENG & J. SELACUSE, INTERNATIONAL BUSINESS PLANNING: LAW AND TAXATION, § 2.03[C] (1982).

\(^{5}\) The World’s Biggest Borrower Hasn’t Got a Bean, supra note 1, at 49.


\(^{7}\) In a January 30, 1983 lecture to Professor Robert Sherwood’s class at the Graduate School of International Studies, University of Miami, Ron Dietz of the Miami office of CitiBank N.A. stated in encouraging terms that “Mexico is out of the trough,” and that the domestic austerity measures are having a beneficial effect on the economy.

A March 5, 1984 conversation with respected Mexico City international business lawyer, Juan Mijares, of the law firm of Basham, Ringe y Correa, and a February 1, 1984 conversation with Mont Hoyt of the International Department of the Houston law firm Baker & Botts, corroborated the feeling that the Mexican economy is turning around and the present seems a good time for foreign investment. See also, Latin Opportunity and Mexico’s Happy Creditors, Economist, Aug. 4, 1984, at 11, 60.

Deputy Foreign Trade Minister Luis Bravo reported that production in Mexico has been boosted by a 30 percent increase in exports, and an upswing is reported in all sectors of the economy. Mexico’s foreign trade balance is routine with exports of $9.9 billion and imports of $3.6 billion for the first five months of 1984. United Press International, Aug. 11, 1984 (Section: International; Headline: Mexico News Briefs). See, Will Mexico Make It?, Bus. Wk., Oct. 1, 1984, at 74.

such relaxation is presently needed. If the Mexican economy is now on the road to recovery, or if it is about to set out on that road, this may be a propitious time for entry into the Mexican business scene for the foreign investor. The purpose of this article is to point out some of the obstacles and pitfalls which a United States or other foreign investor will encounter in Mexico, and to outline a procedure or strategy for setting up a business in Mexico.

II. MEXICAN FOREIGN INVESTMENT LAW

At the outset, it should be pointed out that the Civil Code for the Federal District of Mexico states that if a contract, irrespective of the choice of laws clause in that contract, has been entered into in Mexico, or is to be performed or given effect in Mexico, only Mexican law shall govern with respect to that contract. Further, the Mexican Constitution, the Law to Promote Mexican Investment and to Regulate Foreign Investment (Foreign Investment Law), and various other laws and regulations dealing with foreign investment include provisions which not only subject a foreign investor to the same standards of treatment as a Mexican investor, but also require a foreign investor to agree, at the outset, not to invoke the protection of his or her own law in the event of a dispute.

8. On May 20, 1983, Jesus Silva Herzog announced that the Mexican government was "effectively relaxing its laws restricting foreign investment." Wall Street Journal, May 23, 1983. However, in the spring of 1984, Professor Robert M. Sherwood, Adjunct Professor of International Studies, Graduate School of International Studies, the University of Miami and Vice President—Legal for Pfizer International, saw a swing toward a tough stance occurring in the Mexican government vis-à-vis foreign investment.

Julio C. Trevino, a practicing lawyer in Mexico City, a former professor of Private International Law at the National Autonomous University of Mexico, and current Vice-President of the Mexican Bar Association, recently stated:

"It is my opinion that: (a) the Law on Foreign Investment will not be amended; (b) the general rule of 51/49 percent for joint-ventures with foreign capital will not be changed; (c) in certain exceptional cases a majority of foreign capital will be permitted, generally on a temporary basis; and (d) in any event, there will continue to prevail in Mexico a favorable climate for foreign investment, with significant advantages over other countries."


government should a dispute arise regarding the foreigner's investment. If this requirement is not complied with, the foreigner is subject to forfeiture of all his investment to the state. This is traditionally known as the Calvo Doctrine or Calvo Clause in Laws and Contracts and is prevalent throughout Latin America. Consequently, a U.S. based foreign investor could not invoke the protection of the U.S. Government. However, if the U.S. based foreign investor owns a Panamerica or Cayman Islands Corporation, which in turn owns the shares in the Mexican Company, the invocation of U.S. Government protection may not be a violation of the Calvo Doctrine. Some investors have tried this approach, but to date it is unclear whether such a strategem provides effective protection.

The Foreign Investment Law generally imposes a limit of forty-nine percent of foreign ownership of domestic enterprises. In addition to this requirement of Mexican majority ownership, the Foreign Investment Law dictates that there must also be practical Mexican management control. Because of these requirements, a foreign investor will generally have no alternative but to obtain a Mexican joint venture partner or partners who will own at least fifty-one percent of the equity of the corporation. Despite the requirement of Mexican management control, many foreign investors appoint the top officer of the operation—who may be a Mexican or a foreigner. Furthermore, while Mexican citizens may comprise a majority of the board of directors, the foreign investor often runs the enterprise.

Lawyers agree that although there has been some sporadic relaxation of the strict fifty-one percent Mexican equity requirement, any official change in either the government's position or the law has been slow in coming. Despite a fair amount of political machinations and press coverage, Mexico has not officially changed either the Foreign Investment Law or any corresponding regulations in a way which would remove obstacles or restrictions on the great bulk of foreign investment. According to Mont Hoyt, a lawyer specializing in international transactions with the Houston, Texas law firm of Baker &

12. Foreign Investment Law, supra note 11, at art. 3.
14. According to Robert M. Sherwood, Pfizer used this organizational approach, but has never had to put it to the test.
15. Foreign Investment Law, supra note 11, at art. 5.
16. Id.
17. Discussions with attorneys specializing in foreign investment practicing in Mexico City, and executives in U.S.-Mexican joint ventures bear this out.
18. See Trevino, supra note 8.
Botts, his firm has noted a *de facto* loosening in the fifty-one percent Mexican ownership requirement. Mr. Hoyt has stated that his firm has been able to negotiate higher percentages of foreign ownership with the Mexican National Foreign Investment Commission\(^{19}\) (Foreign Investment Commission) on various occasions and has achieved up to one-hundred percent foreign ownership on occasion.

A foreign investor must receive permission from the Foreign Investment Commission if he or she desires more than a forty-nine percent equity ownership.\(^{20}\) If the foreign investor stays within the forty-nine percent equity participation limit, company formation and registration can be accomplished fairly quickly, as only registration with the National Registry of Foreign Investments\(^{21}\) is required, in addition to the normal company formation procedures for any domestic company.\(^{22}\)

On February 16, 1984, the Foreign Investment Commission, in plenary session, made and promulgated a resolution which was immediately reported in the U.S. press as a relaxation of the rules on foreign equity participation.\(^{23}\) In fact, nothing was promulgated in an official way. Nothing appeared in the official gazette (Diario Oficial);
rather "guidelines" were published in newspapers as paid advertising. These advertisements were apparently designed to put in writing that which had been in practice for some time. The advertisements stated that the Foreign Investment Law was adequate and flexible enough so that it required no modification.24

The "guidelines" set forth exceptions to the forty-nine percent foreign equity participation rule in thirty-four categories of industry. These categories include farm machinery, food processing equipment, textile manufacturing equipment, high powered motors and generators, large turbines and turbocompressors, telecommunications, computers, pharmaceuticals, synthetic resins and plastics, photographic equipment, advanced biotechnology, and motorcycles.25

The "guidelines" promise greater flexibility for: (1) companies wishing to locate outside the highly concentrated industrial centers; (2) companies that would create a large number of new jobs; and (3) companies that would produce substantial quantities of goods for export.26

On February 23, 1984, a Presidential decree was issued which, in effect, retracted everything set forth in the "guidelines" as they pertained to the pharmaceutical industry. The decree severely restricts multinational pharmaceutical manufacturers in Mexico, and has been challenged in the courts.27

Some observers believe that it is not politically possible to change


25. Id.

26. Id.


The [new] law allows the Mexican government to award domestically owned companies exclusive permits to manufacture the complex chemical ingredients used in such products as vitamin B, insulin, and antibiotics. Says one U.S. pharmaceutical executive in Mexico City: What this law means is that we, the inventor [of a drug], will be the last person to exercise the right to produce it, and only if no one else here wants to produce it.

The Mexican government's goal is to slice the nation's 240 pharmaceutical companies a bigger piece of the pie. Currently, some 75 foreign companies, led by Bristol-Myers, account for 72% of Mexico's $583 million drug market. The new law could reduce that market share by more than half, according to one U.S. executive. But says Hector Senosiain, general manager of Laboratorios Senosiain, Mexico's largest private drug maker: 'The multinationals will continue to do well because they have the size and the marketing power.'

Id.
the Foreign Investment Law, even though the "guidelines" stated that in the future, further guidelines would be published. One wonders whether future "guidelines" will be as draconian as the February 23rd decree, or whether they will indeed announce a relaxation of restrictions on foreign investment.

Since the "guidelines" were promulgated by means of the press and not via official government publications, they do not have the force of law. However, in some cases there has been a gradual relaxation of the criteria used by the Foreign Investment Commission in permitting foreign investment.

Even so, it appears that in the foreseeable future, foreign investors will be required to have Mexican partners in most areas of activity. Some international business consultants and some large U.S. corporations believe there are significant advantages to investing in Mexico, but there are also risks, possible conflicts of interest, and other problems encountered when one is forced to find a partner. The foreign investor should carefully consider this factor before venturing into Mexico, since it may run counter to the business and management philosophy of many U.S. based companies.

The Foreign Investment Law defines the term "foreign investor" as: (1) foreign persons or companies; (2) Mexican companies in which a majority of capital is owned by foreigners; (3) Mexican companies which are managed by foreigners who may or may not own a majority of the stock; and (4) foreign entities without legal personality as, for example, partnerships.

Under the Foreign Investment Law, foreign management control may not exceed the foreigner's participation in the equity capital. A special permit from the Foreign Investment Commission is required if foreign investors are to be empowered to control the management of any enterprise. However, under the Law, except in special and exceptional cases, foreign investors cannot manage a Mexican company directly or indirectly, and foreign investors are expressly prohibited from electing a number of directors whose ratio to all the directors of a corporation exceeds the ratio of foreign equity to total equity in the

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29. Foreign Investment Law, supra note 11, at art. 2.
30. Id. at art. 5.
31. Id. at art. 8.
corporation. Further, under the current interpretation of the law, a permit is required for the appointment of any foreigner to the board of directors of a Mexican corporation. However, such permits generally have been granted, provided the equity proportionality rules have been observed.

A permit is required from the Foreign Investment Commission for any new establishments which a foreign joint venture wishes to open or for the relocation of any existing establishments. It is therefore likely that each time a foreign investor wishes to open a new facility, such a permit will be required.

Under Mexican law, certain activities may be carried out only by the federal government. These activities are the following: (1) the petroleum industry; (2) the basic petro-chemical industry; (3) the electrical power industry; (4) the railroads; (5) the exploitation of radioactive minerals and the generation of nuclear energy; and (6) telegraphic communications. Certain activities can be conducted only by Mexican citizens or corporations. These are: (1) radio; (2) television; (3) transportation (other than railroads); (4) distribution of gas; and (5) exploitation of forests. Generally, foreigners may engage in all other activities. However, within the categories open to foreign investors, there are limitations in addition to the forty-nine percent general investment limitation. In some ventures, such as mining, for example, foreign participation is limited to thirty-four percent. In secondary petro-chemicals and auto parts industries, foreign equity participation is limited to forty percent.

The National Registry of Foreign Investment registers all foreign investors and investments which are governed by the Foreign Investment Law, all Mexican companies which have securities owned by foreigners, and all trusts in which foreigners participate. Thus, any joint venture having foreign participation must be both approved by

32. Id. at art. 5. However, as mentioned earlier, form and substance often differ, and in many cases the foreign investor appoints and directs the senior executive officer of the joint venture company.
33. See supra note 19.
34. Id.
35. Foreign Investment Law, supra note 11, at art. 12.
36. Id. at art. 4.
37. Id. at arts. 4 and 5.
38. Id. at art. 5.
39. Id.
40. Id. at art. 23.
the Commission on Foreign Investment and registered in the National Registry of Foreign Investment.

A. Real Property

The Mexican Constitution and the Foreign Investment Law deal with the regulation of property ownership by foreigners in Mexico. Under their terms, foreigners may not own property within fifty kilometers of the coast or one hundred kilometers of any border. These areas are known as the prohibited zones, and the prohibition extends to all Mexican companies whose by-laws authorize foreign stockholders. There is, however, a lawful way around the prohibition. In April 1971, then President Luis Echeverria issued a presidential decree which permits a foreigner to acquire a trust right to the use of land in the prohibited zones for a thirty year period.

In all areas other than the prohibited zones, a joint venture company in which a foreign investor owns an equity share would gener-

41. The Mexican Constitution, supra note 10, at art. 27; Foreign Investment Law, supra note 11, at art. 7.
42. Id.
43. 1 DOING BUSINESS IN MEXICO § 15B.03(2) (S. Lefler ed. 1985).
44. Foreign Investment Law, supra note 11, at art. 18. This trust (fideicomiso) is in many respects similar to the common law trust, the foreign party being the beneficiary of the trust. Authorized banks, upon proper application by the foreigner (who need not be a resident or immigrant) may direct a qualified trustee to purchase and hold title to the real property for the beneficiary. Normally, a permit from the Ministry of Foreign Affairs is required. The foreign beneficiary has the right to use, rent, or sublease the trust property subject only to the restriction that any sublease term cannot exceed ten years. The beneficiary may sell his trust property to a qualified buyer or merely let his trust expire. A qualified buyer must be, of course, a Mexican national.

Normally the trustee bank prepares the application for the trust permit which is presented to the Ministry of Foreign Relations. The Ministry of Foreign Relations generally decides each case on its own merits once it has consulted with the Commission on Foreign Investment. The Foreign Investment Commission considers the social and economic effects of any foreign venture on the country. In order to make application to the Ministry of Foreign Relations, the trustee bank must have, among other documents, the following: (a) a certificate of title obtained from the Public Property Register on the property; (b) a certificate of freedom of encumbrances; (c) a copy of the corporate charter, if a corporation is involved; and (d) an appraisal of the real estate for tax and fee purposes.

No one knows what will happen at the end of the thirty year term on the trusts which were set up subsequent to the decree. The Mexican government may amend the law permitting trust renewals for an additional 30 years. However, it is not advisable to purchase land under the trust arrangement expecting such renewal authorization. Foreigners or corporations with foreign participation may lease property in the prohibited zones. However, a lease within the prohibited zone for commercial purposes in excess of 15 years is considered a type of real estate transaction precluded by Article 27 of the Mexican Constitution. Any lessee in such zones cannot sublet either in whole or in part, nor can the leasehold rights be transferred without the consent of the lessor.
ally be permitted to purchase or lease real estate for any purpose except agriculture.  

Foreign nationals or corporations may not acquire title to land anywhere in Mexico, for any purpose. It should be pointed out that a corporation in which fifty-one percent of its equity is owned by Mexicans is, under the law, a Mexican corporation. Indeed any company incorporated in Mexico is considered a Mexican company. The trust arrangement has been used by foreign corporations, and although the Foreign Investment Commission has approved such trusts for areas outside the prohibited areas, these trusts could likely be challenged, since the presidential decree only speaks of trusts in the prohibited zones.

B. Law on the Transfer of Technology

Under Mexican law, registration is required of all contracts, agreements, and all other documents which are entered into for the following purposes: licensing the use of trademarks, patents, improvements, models, or blueprints; providing technical knowledge or know-how through the use of plans, diagrams, models, instruction books, instructions, formulas or specifications; the recruitment and training of personnel; furnishing engineering for the installation of facilities for the manufacture of products; providing technical assistance in any form; or rendering services in respect to the administration and operation of businesses. Agreements falling under this law which are not registered have no legal effect and thus will not be recognized by any public authority nor will they be enforced by the courts. Further, the payment of royalties and technical assistance fees is not permitted under agreements which have not been registered. The law also places restrictions on royalties which can be paid for the transfer of technology.

Depending upon the way in which the foreign investor does business in Mexico, registration may be required under the Law on the Control and Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks. For example, a for-

45. The Mexican Constitution, supra note 10, at art. 27.
46. Id.; Foreign Investment Law, supra note 11, at art. 3.
47. Law on the Control and Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks reprinted in DOING BUSINESS IN MEXICO J-1A-1 - J-2A-11, art. 2 (S. Lefler ed. 1985) [hereinafter cited as Law on Transfer of Technology].
48. Id. at art. 11.
49. See supra note 47.
The foreign investor, wishing to protect his know-how, system, tradename, or service mark, will often license their use to the joint venture company. That license would, ideally, terminate should the joint venture be dissolved for any reason. The foreign investor would then have the legal right to enjoin his erstwhile partner from using such know-how, marks and the like. Additionally, a foreigner may wish to collect management fees or royalties for the joint venture. Both of these types of agreements must be approved and registered.

C. Labor

Mexican labor law is federal in its jurisdiction and covers three basic areas of labor relations. These areas are individual labor relations, collective labor relations, and labor litigation.

Labor laws in Mexico cover many aspects of the labor relationship, and are much more extensive than they are in the United States. Further, Mexican laws are much more protective of the employee than are the laws to which U.S. companies are accustomed. The laws regulate work schedules, overtime, vacation periods, legal holidays, payment of salaries, employment of women and minors, and occupational risks. The labor laws also create a whole panoply of rights for the employees which do not exist in the United States.

Labor unions in Mexico are very powerful and extremely polit-

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51. 1 Doing Business in Mexico, supra note 43, § 20.02.
52. Id. § 20.03.
53. Some of the specific rights afforded workers in Mexico under the Federal Labor Law, are:

1. Probationary Period - An employee’s probationary period is limited to 30 days from the date of hire, and after this 30 day period an employee may not be dismissed because of lack of qualifications for the job.

2. Tenure - After employment for one year, an employee may not be dismissed except for causes which are specifically set forth in the law. If an employee is unjustifiably dismissed, that employee is entitled to severance pay equivalent to three month’s salary plus 20 days salary for each year of employment. If an employee is dismissed for justifiable cause, as that term is defined in the law, written notice must be given to the employee to that effect; otherwise, the dismissal shall be considered unjustifiable. 1 Doing Business in Mexico, supra note 43, § 20.03[2].

3. Profit Sharing - Profit sharing is mandatory in Mexico. A minimum of eight percent of the taxable profits must be distributed among the employees. This payment of profit sharing to employees is a non-deductible expense for income tax purposes. T. Urbina & J. Barrera, supra note 50, at art. 117.

4. Premium for Seniority - When an employee is dismissed, whether with or without cause, the employee has the right to a seniority premium equal to 12 days’ salary for each year of service, with a maximum of twice the minimum wage. After an employee works 15 years...
The labor laws have been evolving precisely because of the political connections of the labor unions, which have become increasingly sophisticated over the years. Collective bargaining is prevalent throughout the country. Generally, collective bargaining contracts are entered into for an indefinite period of time, but they are subject to revision every year for wages and generally every two years with regard to other contract provisions. It should be noted that the labor for the employer, that employee is entitled to this seniority premium even though the employee voluntarily leaves the employment. *Id.* at art. 54.

(5) *Vacation Pay* - Employees are entitled to 25% of their salary for their vacation period when they take their vacations. *Id.* at art. 80.

(6) *Christmas Bonus* - Employees must be paid a Christmas bonus of 15 days’ salary each December. *Id.* at art. 87.

(7) *Housing Allowance* - The employer must pay an amount equal to five percent of his total payroll to a national Fund to finance housing for employees. 1 *DOING BUSINESS IN MEXICO*, supra note 43, § 20.03[6].

(8) *Social Security* - The Mexican social security system covers retirement and occupational risks and a form of what can be equated to workers’ compensation in the United States. The contributions to this system are similar to those in the United States. *Id.* § 20.03[8].

(9) *Training* - Pursuant to a presidential decree of April 28, 1978, worker training and development provisions are mandatory in all collective bargaining agreements. Such training is controlled and coordinated by the federal government, and unions have the right to participate in the preparation of training plans. Furthermore, training generally must be given during working hours, and the creation of a mixed training commission is required. Any training plans must be submitted to the Secretariat of Labor for approval.

(10) *Work Shift* - Under article 61 of the Federal Labor Law, the maximum daytime work shift is eight hours. The maximum mixed shift is seven and one-half hours, and the maximum night shift is seven hours. The maximum work week is six work days a week.

(11) *Overtime* - Under article 67 of the Federal Labor Law, overtime must be paid at twice the regular hourly rates, and there is a nine hour per week limit on overtime. Beyond the nine hour per week limit, overtime is paid at 200% of the regular rate.

(12) *Holiday* - Article 74 of the Federal Labor Law sets forth seven compulsory paid holidays per year which are: January 1, February 5, March 21, May 1, September 16, November 20, and December 25. Presidential inauguration days, which occur every six years, are also compulsory holidays, and the wage rate is three times the regular daily rate.

(13) *Vacation* - Article 76 of the Federal Labor Law spells out vacation entitlements for employees. Pursuant to its terms, the minimum vacation which must be given to an employee is six work days for the first year of service, and this increases by two days for each additional year of service to a maximum of twelve. After the fourth year, the vacation period increases by two days for every five years of service.

(14) *Minimum Wage* - Articles 90 and 91 of the Federal Labor Law provide for a minimum daily wage rate which is decreed yearly by the National Minimum Wage Commission. There are different minimum wage rates for different zones in Mexico. There are currently 89 zones within the Republic. Under the law, certain trades and professions have their own minimum wage rates, which are generally higher than the minimum wage rate.

(15) *Grievance Appeals* - Article 48 of the Federal Labor Law provides fired employees the right to file complaints with the Federal Mediation and Arbitration Board. If the employer cannot prove adequate reasons for dismissal of the employee, the employee is entitled to back wages from the date of dismissal.
unions consider the employee rights set forth in the law only as mini-
mums and that these minimums are usually exceeded in collective
bargaining agreements.

The obligation of an employer to recognize a union will vary de-
pending on whether the union is a company union or an industry
union. An employer is required to recognize a company union if a
minimum of twenty company employees organize themselves into a
union. If an industry union is involved, the company must recog-
nize that union if two of the industry union's members work for the
employer.

Article 25 of the Mexican Federal Labor Law requires that
working conditions be in writing for all employees whether they are
unionized or not. Such a document must include identification of the
employer and the worker, the type of labor relationship, the service to
be performed, where the service is to be performed, the length of the
work day, the wage rate, and the company's responsibilities vis-à-vis
the worker.

Article 7 of the Federal Labor Law sets forth the requirement
that at least ninety percent of the work force employed in companies,
factories, commercial establishments, or any other type of employ-
ment in Mexico should be Mexican citizens. Furthermore, technicians
and professional employees should be Mexican citizens, with the ex-
ception of highly qualified or specialized technicians, who may not
exceed ten percent of the number of the employees in that specialty
within the company. Both the employer and the foreign technician
must train Mexican workers in the specialty field. These restrictions,
however, are not applicable to general managers, directors, or
administrators.

D. Joint Venture Entity

Even though the terms "joint venture" and "joint venture part-
ner" are used throughout this article, the variations of partnership
type entities possible under Mexican law are seldom used in transac-
tions involving foreign investors and would likely not be beneficial to
the foreign investor in the conduct of his or her investment and opera-
tions in Mexico. Thus a "joint venture," as that term is used in this
article, would consist of joint equity participation in a Mexican com-

54. 1 DOING BUSINESS IN MEXICO, supra note 43, § 20.02.
55. Id.
56. Id.
pany. The more commonly used and most appropriate entity would be that of a corporation, *Sociedad Anonima* or *S.A.*, or a corporation with variable capital, *Sociedad Anonima de Capital Variable* or *S.A. de C.V.* The use of the *S.A. de C.V.* is increasing in popularity since such a company's authorized capital may be increased or decreased fairly easily within a range set forth in the articles of incorporation. In the event of any increase or decrease of capital, the Commission on Foreign Investment must be notified if the company has foreign investors. Such notification is a perfunctory act so long as the proportion of foreign equity is not increased.

The *S.A.* is similar in many ways to the United States corporation. The *S.A.* may own real estate, transact business, and sue or be sued in its own name. As in the United States, the Mexican General Law of Commercial Entities (Corporations Law) states that the liability of the *S.A.* shareholders is limited to the amount of their capital contribution. The formation of an *S.A.* requires five shareholders, and their interests in the company are represented by stock certificates.


58. 1 *DOING BUSINESS IN MEXICO*, supra note 43, § 15A.03[3].

59. Corporation Law, supra note 57, at art. 87.

60. *Id.* at art. 89. There are two methods of forming an *S.A.*, however, for purposes of this study I will discuss the privately subscribed *S.A.* The Corporation Law requires that the incorporators execute the articles of incorporation before a Mexican Notary Public. The articles must also be approved by the district court of the company's domicile and then recorded in the Public Commercial Registry. *See id.* at arts. 2, 5, 260, 261.

The promoters must call a shareholders' meeting within 15 days of the issuance of the stock. *Id.* at art. 99.

The Corporation Law sets forth with specificity the data which is required in the articles of incorporation of the *S.A.* *See id.* at arts. 6 and 91.

After the company is formed and approved by the first shareholders' meeting, the minutes of the meeting and the bylaws of the company must be entered into the notarial protocol and registered. *See id.* at art. 101.

The name of the company must be different from that used or owned by any other company, and the name must be followed by the words "*Sociedad Anonima*" or its abbreviation, *S.A.* *See id.* at art. 88.

The minimum capital required to form an *S.A.* is 25,000 pesos paid-in capital. Subscribers of shares who have not fully paid for the shares are liable for the uncalled amount for a period of five years, and they may participate in profit distributions only in proportion to the amount which has been paid in. *See id.* at arts. 89(iii) and 118. Although Corporations Law, article 115 permits the issuance of shares for less than par value, it is not necessary to assign a par value to shares or to place a par value on the certificates. *See id.* at art. 125(vi). There may be different classes of stock issued, but all shares within one class must be of equal value and must give equal rights to their holders. *Id.* at art. 112.
E. The Joint Venture

One risk a foreign investor always runs in approaching a prospective joint venture partner in any foreign country is that he will educate the prospective partner in his manner of doing business. The prospective partner may then decide he does not need the foreigner, break off negotiations, and implement the foreigner's processes or ideas. Therefore, it is always advisable that the foreign investor attempt to convince the prospective joint venture partner that he does indeed need the foreign investor in order to conduct the proposed business operation in Mexico. In order to sell the proposed Mexican partner on this idea, the foreign investor may want to bring him to the foreign investor's headquarters and show him the operations.

The foreign investor should remember that he is an interloper asking a prospective partner to sit and listen and then invest his time and money. Therefore, if the foreign investor wants the prospective Mexican partner to come to the U.S., the foreign investor may wish to consider accompanying such an invitation with an offer to pay the expenses for the trip. He may not accept such an invitation even then, but if it is extended, it may substantially defuse any objections the

Shareholders' meetings must be held in the corporation's domicile. Otherwise, the shareholders' meetings are invalid. Id. at art. 178. As in the United States, there are ordinary and special or extraordinary meetings of shareholders. A quorum for an ordinary shareholders' meeting is one-half of the outstanding capital stock and the majority vote of the stock at the meeting is sufficient for the passage of a resolution. Id. at art. 189. A quorum at an extraordinary meeting is three-fourths of the outstanding capital stock and in order for a resolution to pass, at least one-half of the outstanding capital stock must be voted. Id. at art. 190. The Law does provide that a higher majority percentage can be fixed in the articles of incorporation for an extraordinary stockholders' meeting.

As mentioned above, the joint venture company could be formed as Sociedad Anonima de Capital Variable. The description of the S.A. set forth above generally applies also to S.A. de C.V., with the following differences. Although generally Mexican companies have a capital which is fixed and set forth in their articles of incorporation, the S.A. de C.V. has a somewhat different structure. The Corporation Law requires such a company to have a minimum fixed capital which must be fully subscribed. Id. at art. 217. However, the Law authorizes such a company to have variable capital for which shares may be authorized and held by the company to be subscribed and paid for later when and if they are needed. Id. at art. 216.

If the articles of incorporation permit it, this variable portion of the capital may be increased or decreased without amendment of the articles of incorporation. The shares in such a company must be registered shares. Any company using this type of variable capital structure must use the words "Capital Variable" or its abbreviation "C.V." after its name.

As mentioned earlier, any such corporation, whether it be the S.A. or the S.A. de C.V., must not only be formed and registered as mentioned in this section, but it must also be approved by the Commission for Foreign Investment and registered with the Foreign Investment Registry. All this normally takes a minimum of three months for the formation and approval of any corporation which a foreign investor forms as a joint venture in Mexico.
proposed partner may have to either possibly wasting his time on something relatively unknown or "coming to the foreign investor." If an invitation is extended, that invitation should include those executives of the prospective Mexican partner's company with whom the foreign investor wishes to do business.

It is generally not the policy of U.S. businessmen to pay the expenses of business contacts who come to visit. Moreover, such a proposed visit could prove fruitless. However, when dealing with a proposed partner from a different cultural background, such a gesture should seriously be considered.

Mexican businessmen are generally very polite in their business relationships, placing a high premium on courtesy and protocol. It may prove helpful for the foreign investor to establish that he has looked into the market and the industry and has a very high regard for the prospective Mexican partner, his reputation, and his operations. A certain amount of flattery does not hurt, but it should not be blatant, obviously overdone, or insincere. All actions taken by the foreign investor vis-à-vis the proposed Mexican partner, at this stage, must appear efficient and deliberate, but not hasty.

Mexican businessmen are usually very good negotiators, in large measure because of their ability to bluff and dissemble. Like many good negotiators, they will often continue negotiating from a position of weakness, making it appear that they are in a position of strength. Many times they will hold out until the other party, through frustration and fatigue, or because of fear of seeing a deal fall through, gives in to their demands. Nonetheless, Mexican business negotiators are often willing to compromise.

Mexican business, and businessmen in general, like a little informal chitchat before getting down to business. The purpose is to get to know the other party because mutual respect and trust are important. Things do not generally happen as fast in Mexico as the speed to which U.S. businessmen are accustomed. Mexicans, furthermore, very often live and work under what has been termed the "patron syndrome." "Patron" can be roughly translated as "boss," but it means much more than that. The patron is the giver of all privileges, benefits, and livelihood, is looked up to, and always deferred to. Thus a Mexican businessman may avoid important decisions, without letting on that he is so doing. He will often attempt to defer the decision

61. For a general discussion of cultural considerations in Mexico see 1 DOING BUSINESS IN MEXICO, supra note 43, at ch. 2.
to his boss for fear of either exceeding his authority or of making the wrong decision. It should be noted that for the Mexican businessman, entering into a business transaction with a foreign investor or even moving in that direction is a very delicate and important decision. If the boss makes the wrong decision, he does not lose his reputation or his job, since he is the boss.

Of course, any given joint venture partner may be a powerful and sophisticated company, accustomed to dealing with U.S. citizens and other foreigners. Such a partner may prove to be an exception to the aforementioned characterization. However, the foreign investor should be prepared for, and not be discouraged by, frustration that results from a slow decision making process, or the slow implementation of those decisions.

In Mexico, form is often just as important as, or even more important than, substance. Generally, all acts up to and including serious discussions and negotiations are planned and calculated to give an impression which will, it is hoped, work to the benefit of the one giving the impression.

III. Negotiation Strategy of Mexican Joint Venture

The following discussion sets forth a recommended strategy to follow in the negotiation of a joint venture agreement between a Mexican partner who is to own fifty-one percent of the entity, and a foreign investor who will own the remaining forty-nine percent. I have broken this discussion down into five parts. Part A covers the approach to the prospective joint venture partner and negotiation. Part B deals with the documents necessary to the venture, their drafting, and the steps necessary in company formation and registration. Part C covers some general items which should be dealt with in the company’s formation. Part D sets forth specific items which the foreign investor should attempt to include in the transaction and documents in order to protect itself as a minority shareholder. Part E covers some miscellaneous items which eventually need to be considered, but which are not directly related to the negotiation and formation stages of the venture.

Before discussing the issues mentioned above, it should be noted that the major items of concern in a joint venture strategy, those key areas which require either protection or special attention, are:

(1) The name and logo or service mark, if any, of the foreign investor (the foreign investor may decide that there is no advantage to
the use of his name in Mexico);\textsuperscript{62}

(2) Technical assistance;

(3) The avoidance of vulnerability of the foreign investor as a minority shareholder;

(4) The power to keep the partner in the deal while maintaining the ability to walk away from the deal with the minimum of risk and liability should it, for any reason, prove to be an unsatisfactory venture.

The last item on this list is the area which is the most difficult with which to deal. I do not believe that there is any sure way of obtaining complete protection in this area. However, I do believe that a foreign investor may gain a measure of protection and substantially lower his or her risks in several ways. First, a shareholders' agreement can be drafted and should state that neither party can withdraw from the venture for a period of one to two years. Mexican law provides for very little minority shareholder protection. Further, the foreign investor's name, etc., can be licensed to the joint venture company. This license should terminate if the foreign investor withdraws from the joint venture. A noncompetition clause which prohibits the joint venture partner from conducting a similar business for a period of five years after either withdrawal from or dissolution of the joint venture should also be included in the shareholders' agreement. While the effect of a noncompetition clause is questionable since it would be difficult to enforce, the legal prohibition against use of a logo or name after termination of a license is easier to enforce and should act as a deterrent to an estranged partner. If the business does not work out, it is likely that both parties will wish to dissolve the venture. If the Mexican partner withdraws and tries to compete with the foreign investor, the foreign investor will of course oppose the competition through the courts. In such an event, if the business has proved to be a profitable one, the foreign investor will have the exclusive use of the service mark and name, which will by then, it is hoped, be recognized and accepted in the market. If the business is successful, yet the foreign investor is simply unhappy with the partner or his philosophy, the foreign investor can force dissolution by withdrawing from the venture since the logo and name cannot be used nor can the partner legally compete. The foreign investor can then look for another partner and continue the business with that new partner.

\textsuperscript{62} Provided the foreign investor has registered the service mark under Mexican law.
The foreign investor may wish to draft language into the shareholders' agreement to the effect that should either party wish to withdraw, the other party will have the right to find a qualified buyer for the withdrawing partner's shares. The basis of price for such a buyout should be determined and set forth beforehand in the shareholders' agreement. The foreign investor should decide on some alternative valuation methods prior to entering negotiations.

A. Approaching the Prospective Partner and Negotiation

1. Preliminary Meeting

The preliminary meeting is the first meeting with the prospective joint venture partner, at which time there should be a discussion of the type of business the foreign investor wishes to enter, and the type of business arrangement he or she wants to set up in Mexico. This first discussion is a critical phase, since the foreign investor must first convince the prospective joint venture partner that the foreign investor is a sound, dynamic, and well-run company. Only then can the foreign investor hope to convince the prospective Mexican partner that the business plan has merit. Therefore, this verbal introduction must be well thought out and articulated by someone who is a good salesman—good at convincing people as to the soundness of his or her point of view. Often the foreign investor should include a luncheon in this meeting, since it will provide an informal atmosphere, and allow everyone to get to know each other. Much business is conducted over lunch in Mexico. If the prospective joint venture partner exhibits an interest at this time, the business plan/sales document can be given to the partner. This business plan/sales document should be a carefully written sales tool, outlining the background, strengths, and future plans of the foreign investor. Include a brief explanation of what the foreign investor wishes to do in Mexico and how a Mexican partner would fit into those plans.

An alternative strategy would be to give the business plan/sales document to the prospective partner at a second meeting, after the prospective partner has had a chance to consider the verbal introduction and preliminary discussion. There are advantages and disadvantages in waiting to give the prospective partner the document at a second meeting. One advantage in waiting is that the foreign investor only gives specific information to someone who is really interested. A disadvantage is that some time is lost. The preliminary meeting should be conducted with the very top level personnel of the prospec-
tive joint venture partner and attended by top level people of the foreign investor. If the foreign investor is able to sell the top management of the prospective partner on his company and on the soundness of the plan, the whole process will go much faster and easier.

2. The Preliminary Discussion Phase

During this phase, discussions will be conducted with the prospective joint venture partner. There may be more than one partner with whom the foreign investor is conducting discussions. However, at this stage the foreign investor should limit the serious discussions to only one prospective partner, telling the rest that the foreign investor will consider coming back to them, thereby leaving alternatives should the need arise. During this phase, an agreement in principal should be reached as to the business deal. For each meeting, the foreign investor may wish to prepare an agenda of items to cover, objectives to reach, and minimums and maximums as to negotiating points. This should be private, not for dissemination to the prospective partner. The understanding reached at this stage may be memorialized in a letter of intent. This stage of negotiation, up to and including the execution of a letter of intent, is likely to be very time consuming.

3. Letter of Intent

Some businessmen prefer to dispense with the letter of intent and go on directly to the formal documents. If the letter of intent is used, it should set forth the basic framework of the business deal, setting out a schedule of events with dates, so as to keep the prospective joint venture moving along at a fairly rapid pace. Certain key elements of the joint venture agreement, or shareholders' agreement, should be set forth in the letter of intent in fairly precise form, so as to facilitate the drafting of the shareholders' agreement. Once an agreement in principle is reached, the foreign investor's attorneys should draft the letter of intent and present it to the prospective joint venture partner and its attorneys for their comments. Discussion will thus be based on a document generated by the foreign investor. This document should be in English.

B. Documentation (Contract Drafting), Company Formation and Registration

If possible, it is advisable that the shareholders' agreement be
drafted and executed in English. As already mentioned, certain items set forth in the shareholders' agreement will also appear in the bylaws or the articles of incorporation. The latter two documents will, of necessity, have their official versions in Spanish. The foreign investor should attempt to ensure that there is a provision in the shareholders' agreement which states that the language of the shareholders' agreement shall control. This is necessary in the event a difference of opinion arises as to the meaning of a provision in the Spanish documents due to problems of translation.

1. Shareholders' Agreement

This is the basic joint venture agreement which sets forth the objectives of the parties and their rights and duties in the joint venture relationship. It is generally helpful if this is drafted by the foreign investor's attorneys rather than by the prospective joint venture partner's attorney. The shareholders' agreement should be based upon the letter of intent and the understanding between the parties reached during the preliminary discussions. It is likely that this will be drafted during meetings of attorneys, and it will probably be a very tedious undertaking. The negotiation and drafting of the shareholders' agreement will be the most critical and could be the most time consuming phase of the entire formation stage of the venture. However, if the parties have already drafted a fairly precise letter of intent, it will make this stage much easier. Local counsel should be consulted closely at this stage to ensure, to the extent possible, that the provisions of the shareholders' agreement are enforceable. The shareholders' agreement (to be presented to and approved by the Secretariat of Foreign Affairs) will have two exhibits: the bylaws, which become an integral part of the articles of incorporation, and the service mark and Name Licensing Agreement, if the foreign investor's mark, name, or technology is to be licensed.

2. Articles of Incorporation

Once the shareholders' agreement and its exhibits are approved by the Secretariat of Foreign Affairs, the articles of incorporation are drafted. Under Mexican law, the articles of incorporation generally consist of an agreement between the parties to set up a corporation.\(^63\) While most of the contents of the articles of incorporation are dic-

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\(^{63}\) Corporation Law, *supra* note 57, at art. 91.
tated by statute, some of the basic things which the foreign investor will want in terms of protection as a minority shareholder and in terms of corporate objective should be repeated in the articles of incorporation. These will, of course, also be in the shareholders' agreement and are set forth in Part D below. As mentioned above, the bylaws are included as part of the articles of incorporation. This document will be in Spanish, since it is registered with a notary in Mexico. The foreign investor should have it translated into English for his or her own purposes.

The formation of the company is generally accomplished fairly quickly and amounts to registration in the official record book of a notary. Once the corporation is formed, the articles of incorporation, shareholders' agreement, and data respecting the board of directors are filed with the Foreign Investment Commission.

3. Technical Services Agreement

If the foreign investor is going to supply most of the expertise involved in the operation of the business, then he should probably be reimbursed by the joint venture partner for such continued support of the joint venture. As stated earlier, Mexican law requires that a Technical Services Agreement be registered with the government. Further, Mexican law places a limit on the amount of royalties which can be paid to a foreign corporation for technical services, particularly when those services deal with the transfer into the country of some sort of technology or know-how. In a Technical Services Agreement, one way to bill is to merely charge the joint venture company a per diem rate plus expenses for employees of the foreign investor who travel to Mexico to provide technical assistance, in addition to a fixed monthly rate. This per diem rate could be based upon the type of employee involved. For example, a different per diem rate could be paid for financial vice presidents, than for skilled workers, etc. An alternative method of payment could be a fixed rate per month. This agreement must be registered and approved by the Government Technology Board. The Board must be convinced that the payments are

64. Id.
65. Id. at art. 90. The Mexican notary differs greatly in his function from a notary in the U.S. A Mexican notary is a prestigious public official. For a description of the functions and requirements of a Mexican notary, see Perry, Understanding the Mexican Attorney: Legal Education and the Practice of Law in Mexico, 10 INT'L L.J. 167, 176-77 (1976).
66. Law on Transfer of Technology, supra note 47, at art. 2.
bona fide and not excessive. This will require direct negotiation with the Board.

No deductions for tax purposes can be made by the joint venture company under such an agreement unless it is registered. The total registration and approval time is likely to be in the neighborhood of three to four months, although it could take six months if the Board becomes difficult. Each situation is decided on its merits.

4. Service Mark License Agreement

If the foreign investor's name and logo are to be used in Mexico, they should be registered as a service mark in Mexico. In order to offer the foreign investor some measure of protection, the mark should be licensed to the joint venture.

C. The Joint Venture Company

1. Investment Entity

It is suggested that a special purpose subsidiary of the foreign investor’s company be incorporated in the home country, and that such special purpose subsidiary make the investment in Mexico. This will insulate the foreign investor's company if a claim should be made or a judgment entered in Mexico. An additional advantage of forming a separate special purpose subsidiary in a country such as the United States is that should the foreign investor ever wish to sell his or her Mexican venture, it can do so without the need for Mexican government approval by simply selling the subsidiary's stock.

2. Creation of Joint Venture Entity

As suggested above, the corporation formed should be an S.A. de C.V. Since this is a variable capital company, it gives more flexibility to the equity participants. The company does not have to amend its articles of incorporation each time it needs an infusion of more capital. This is particularly important if the foreign investor expects growth in Mexico to be gradual.

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67. A foreign mark must also be linked or combined with a Mexican mark if it is to be used in Mexico. 1 DOING BUSINESS IN MEXICO, supra note 43, § 30.07[3].

68. To the extent approval of the Foreign Investment Commission was required, it will already have been obtained for the joint venture company, and if there is no increase in foreign equity, merely a transfer of that equity percentage to another foreign investor, requires no permission.
D. Items Necessary in the Documentation for the Foreign Investor's Protection

The foreign investor as a minority shareholder will need protection in certain areas. This protection can be afforded, to a large extent, by giving the foreign investor a veto power over certain items at board of directors' meetings. Many of these items, I believe, are essential in order to protect the foreign investor.

Some of the items will be mentioned in the articles of incorporation, some in the shareholders' agreement, and some in both documents. The items for which the foreign investor should attempt to obtain a veto power are:

(a) opening of new joint venture locations;
(b) authorization of borrowing or encumbrance of assets;
(c) authorization of dividend payments;
(d) authorization of director's fees and compensation arrangements for officers and other managerial personnel;
(e) determination of working capital requirements that appear in the shareholders' agreement;
(f) authorization of transactions between the joint venture company and companies where either members of the board of directors or employees of the joint venture company are directly or indirectly related or affiliated to one or more of the parties involved in the companies contracting with the joint venture company;

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69. Corporation Law, supra note 57, at art. 143. For example, a requirement for a three-fourths majority vote in order to pass certain items can be placed in the bylaws and shareholders' agreement.

70. The writer thanks Mont Hoyt of Baker & Botts for his assistance and suggestions in compiling this checklist.

71. This is the prerogative of the shareholders, not the board of directors. The joint venture partner may have serious problems with the foreign investor having a veto right on this, and this item may require considerable discussion. A possible compromise might be a stipulation in the shareholders' agreement and articles of incorporation that a certain dividend policy (based on a given performance level) will be followed and any deviation from that policy will require a three-fourths vote of the shareholders.

72. Under Mexican law, the shareholders set the remuneration levels of the board members. The board should approve the compensation arrangements for the key employees, such as the general manager (Director General). The general manager should establish compensation arrangements for the remainder of the employees. This could be drafted in such a way that the board must approve any employee who is earning over a given amount of salary. It should be pointed out that there is always a problem of apparent authority vis-à-vis employees in setting their salaries. Thus if a manager were to tell an employee that his salary level was a given amount, even though that amount were to be in excess of the figure authorized by the board, the employee would likely be entitled to it under Mexican law.
(g) amendment of the articles of incorporation or bylaws;
(h) increase or decrease of the share capital (without this veto right, the foreign investor could have its proportionate equity share diluted by the joint venture partner);
(i) alteration of the parties' relative ownership percentages in the joint venture company;
(j) dissolution or liquidation of the joint venture company;
(k) disposition of capital assets in excess of a given amount;
(l) guaranty by the joint venture company of any debt (the foreign investor may wish to make this a guaranty in excess of a given amount of debt);
(m) participation in other enterprises or ventures by the joint venture company;
(n) determination of capital and operating budgets (although this should be worked out and proposed by the general manager, it should be reviewed and approved by the board of directors);
(o) hiring or dismissal of key employees (this should appear in the shareholders' agreement);
(p) expenditures or contractual commitments in excess of a given dollar amount and duration of contractual commitments;
(q) any delegation of authority by the board of directors, including powers of attorney and the appointment of the general manager;
(r) institution or settlement of legal proceedings or arbitration (this could be limited to a dollar amount regarding the legal proceedings or the arbitration, so as not to overly encumber the board);
(s) approval of annual work programs, work plans, sales plans, publicity and advertising programs, capital, operational and investment budgets and other plans (this should appear in the shareholders' agreement);
(t) either veto power respecting the naming of the comisario\(^7\) (a sort of independent, outside examiner/auditor, who reports to the shareholders) or the ability for the foreign investor to name one or more separate comisarios;
(u) determination of the accounting principles to be followed by the joint venture company and creation or liquidation of reserves;
(v) increasing work force of hourly wage earners by more than ten percent over the work force first approved by the board; and,

\(^7\) The position of "comisario" is discussed in 1 DOING BUSINESS IN MEXICO, supra note 43, § 29.07(7)[g].
(w) contracting for work involving development or operation of the joint venture business and related activities.

E. Miscellaneous

1. The Foreign Investor's Mexican Employee

The foreign investor may be unable to put its national in the top position, because the joint venture partner may object. In that event, the foreign investor will likely want to hire a Mexican citizen, who will be friendly to the foreign investor, to be the director general of the joint venture company. The foreign investor will likely want to hire this employee early on, probably during the negotiation stage of the joint venture, in order that the employee can be fully trained in the home country, and so that the employee may be fully apprised of the purposes and policies of the joint venture as well as the foreign investor's philosophy as to its Mexican operation. Further, by being hired at an early stage, the employee can become fully acquainted with all the personnel involved from both the joint venture partner and the foreign investor's company.

It is advisable that this employee be hired at the outset as an employee rather than as a consultant. A consulting agreement should be drafted, and that consulting agreement should be entered into with a subsidiary of the foreign investor in the home country. The sole purpose of this subsidiary should be to hire the employee. In other words, this subsidiary should be separate from that subsidiary which is going to form the joint venture company. Further, all such hiring and the documentation surrounding such hiring should, to the extent possible, be effected and signed in the home country. All this is an attempt to avoid the protection of the Mexican labor laws which the Mexican employee would otherwise enjoy.74 There is no assurance, however, that such an attempt will be successful. Any time one hires a Mexican citizen there are risks arising from the very protective nature of the Mexican labor laws. The foreign investor should make it clear to the employee from the outset that while it is contemplated that he will be the number one or number two employee in the joint venture company, it may not, for various reasons, work out that he is indeed the number one or number two man in the company. Thus, the foreign investor should arrange with him the possibility of termination beforehand and arrange in writing the amount of severance

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74. See supra note 53.
pay he will receive. Of course, it will not be called severance pay in the consulting agreement. It can be given some other name. To the extent possible, services to be performed by the employee and training should take place within the home country. During the early stages, and in general, contacts with the home country should be kept very high.

2. Immigration

The foreign investor will not be able to take its nationals to Mexico on an inmigrante visa until the company is two years old. The inmigrante visa is the best visa for foreign employees to work in Mexico, since it affords the most rights and the most flexibility. It is, however, difficult to obtain. In the interim, before the company is two years old, employees should go to Mexico on the Type II visitante visa. This visa is issued for six months and is renewable for up to two years. It cannot be obtained, however, until the joint venture company is formed and approved, and must be obtained from Mexico. The granting of visas of every type has been very erratic and difficult to predict. Sometimes it takes two to four months, sometimes longer. The policy of the government generally has been to not restrict visas. It has merely been disorganized and erratic. In view of this, the foreign investor will have to obtain the visitante type I visa for its employees as soon as the company is formed and approved. The visitante Type I visa is obtained from the Mexican consulate or embassy in the home country. It is fairly easy and not very time-consuming to obtain. However, this is not the proper visa, since the employee cannot receive payment in Mexico under such a visa. Technically, board members must obtain a visitante visa II to go to Mexico for a board meeting. However, in practice, because of delays this is almost never done and board members usually travel to Mexico with a tourist visa. As a practical matter, certain risks of this type will have to be taken since one either takes such risks or ends up doing nothing, and getting nothing accomplished.

3. Labor Attorney

Because of the complexity of the issues and because of the critical nature of the maintenance of good labor relations, it will likely be essential that the joint venture company employ a good labor attorney. Further, a good labor attorney should be consulted by the for-
eign investor prior to progressing very far in the joint venture
discussion with a prospective partner. Good local professionals, such
as lawyers and accountants, should be consulted from the very early
stages by the foreign investor.

IV. CONCLUSION

Counsel for the foreign investor who wants to set up a business
operation in Mexico should always remember that Mexico is a com-
pletely foreign jurisdiction, with different customs and different laws.
Local counsel, local banks, and local accountants should be consulted
from the beginning.

At the preliminary stages of investigation for a United States cli-
ent, specialists within the American Embassy in Mexico City may
prove helpful. They may provide U.S. counsel for the foreign investor
with an up-to-date assessment of the climate surrounding the particu-
lar industry in which the U.S. investor has an interest. Many U.S.
banks and Big Eight accounting firms have correspondent relation-
ships or branch offices in Mexico City. Discussions with members of
these organizations will also prove very helpful in understanding and
getting a feel for the current business climate in Mexico.

There are strict restrictions on equity participation by a foreign
investor. Depending on the equity ratio the foreign investor has in
mind, he or she may or may not have a difficult time with the Foreign
Investment Commission.

Prospective joint venture partners should be carefully screened to
ensure they are the people you want before approaching them. Local
bankers, lawyers, and accountants are helpful in this process. Before
approaching prospective partners, the foreign investor should be well
prepared to sell the prospective partner on his idea. Once that is ac-
complished, the project should be aggressively pursued. If one comes
to understand the laws and the way of doing business in Mexico, the
successful formation of a foreign investment entity in Mexico can be
accomplished.