

# THE NEW REGULATION ON FOREIGN INVESTMENT IN MEXICO: A DIFFICULT TASK

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## I. INTRODUCTION

Future historians may recognize December 1, 1988, as the turning point in the history of modern Mexico. On December 1, Carlos Salinas de Gortari became the sixty-fourth President of the United States of Mexico. His solutions could prove to be the answer to Mexico's economic crisis, ending its fifteen year roller coaster ride.

From 1982 through 1988, Mexico produced the following annual rates of economic growth, as measured by the percentage change in GNP: -0.5, -5.3, 3.7, 2.8, 3.7, 1.5, and 1.1 respectively. These rates of growth are sadly inadequate to meet the social and economic needs of the country. The Mexican population is estimated to have grown from seventy-three to eighty-eight million during this same period; to achieve a reasonable level of employment, the economy should have created over one million new jobs each year. Due to the recession, however, the economy was able to create only a small percentage of the new jobs necessary to relieve the social pressures of unemployment.<sup>1</sup>

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1. The Mexican Department of Economic Studies prepared a study entitled *Traumático Giro Económico de México en 10 años: Banamex* (Traumatic Economic Turn of Mexico in 10 Years: Banamex). In connection with the increase in the economically active population, the study stated:

Between 1950 and 1970, the total population almost doubled, but this growth was not constant. The greatest increase occurred during the latter years of the sixties, when population growth reached its highest—3.5 percent annually; at such a rate of growth, a community will double its population every twenty years. During the seventies, this growth rate slowed somewhat, until, according to the 1980 census, the population was 66.8 million, with an average annual growth rate of 3.2 percent. In the eighties we grew 2.5 percent every year, extending the duration of the population increase to 28 years. Therefore, the problem during the 1980's was not so much the demographic increase . . . but that of the portion of the population which was at a working age. [T]he social challenge . . . in the eighties has been to provide jobs to that large group of people reaching working age. The problem was aggravated with the recession, and the result was the creation of alternative ways of working: the ambulant merchant and the underground economy. From 1980 to 1985, 1.3 million persons annually entered the work force. The economically active population increased substantially due to demographic growth and because the incorporation of women into the job market also increased. In 1930, 4.3 percent of women aged 12 or older were either working or seeking a job. In 1980, this number increased to 28

The Mexican economy was burdened by increasing rates of inflation, as well as high levels of unemployment. In an effort to retain capital and attract investors, President Miguel de la Madrid<sup>2</sup> raised the annual interest rate on deposits at the nationalized banks<sup>3</sup> to ninety percent, while inflation reached highs of 160 percent. By the close of 1988, the earning power of the average Mexican worker had declined sixty percent over the last eight years.<sup>4</sup> This drop dramatically increased the gap in the distribution of wealth, which continues to be Mexico's most critical problem.<sup>5</sup>

While the domestic economy remained at a stand-still, foreign creditors demanded payment in hard currency to service the mounting burden of external debt. Mexico's inability to increase exports<sup>6</sup> and to attract foreign direct investment,<sup>7</sup> coupled with an ongoing problem of capital flight,<sup>8</sup> made timely payments an almost impossible burden.

percent. The demographic increase has therefore combined with the poor economic conditions which began in 1982. The economic recuperation must contemplate the creation of jobs.

Excelsior, Dec. 11, 1989, at 1, col. 4.

2. Miguel de la Madrid Hurtado was president of Mexico from December 1, 1982 to November 30, 1988.

3. Mexican banks were nationalized, and a generalized exchange control system was established, on September 1, 1982. However, this exchange system was repealed only a few months later on December 20, 1982. See Gómez-Palacio, *Mexico's Foreign Exchange Controls. Two Administrations - Two Solutions. Thorough and Benign*, 16 MIAMI INTER-AM. L. REV. 267 (1984); Gourage, *International Banking: Nationalization of Mexican Banks and Foreign Exchange Controls*, 24 HARV. INT'L L.J. 212 (1983); Zamora, *Exchange Control in Mexico: A Case Study in the Application of the IMF Rules*, 7 HOUS. J. INT'L L. 103 (1984); Zamora, *Peso-Dollar Economics and the Imposition of Foreign Exchange Controls in Mexico*, 22 AM. J. COMP. L. 99 (1984).

4. In one area of Mexico, wages declined from US \$8.54 (210.00 Mexican pesos) in 1981 to US \$3.40 (9,160.00 Mexican pesos) in 1982.

5. Alan Riding states: Not only has the economy been unable to create sufficient jobs - the most effective instrument for social amelioration - but it has also permitted and even promoted concentration of wealth. It can be no coincidence that Mexico and Brazil, the two Latin American countries that have enjoyed the fastest economic growth since the 1950's, display the most skewed distribution of income and wealth in the Americas. According to government estimates in 1977, the wealthiest 20% of the population controlled 54.4% of all income. See A. RIDING, *DISTANT NEIGHBORS* 220-222 (1985).

6. Total exports constituted US \$20,929 million in 1982, compared with US \$20,656 in 1987 and US \$20,657 in 1988. 197 INSTITUTO NACIONAL DE ESTADÍSTICA, GEOGRAFÍA E INFORMÁTICA, CUADERNO DE INFORMACIÓN OPORTUNA Aug. 1989, at 82.

7. During Mexico's oil-booming economy, direct foreign investment increased over 17% per year, which amounted to US \$2.3 and US \$2.5 billion dollars in 1980 and 1981, respectively. From 1982 to 1983, the figures dropped to US \$1.6 billion to US \$4 billion. Despite the establishment of the "swap" program in 1986, a program devised to convert Mexican foreign debt into pesos, direct foreign investment only grew from US \$22 to US \$25.7 billion between 1982 and 1988. 21 *Revista Expansión* No. 519, July 5, 1989, at 40.

8. Mexican-held bank deposits in the United States totaled roughly US \$13.1 billion in 1987, according to the Federal Reserve Board. This figure is only a part of overall capital flight, since a substantial portion is invested in real estate, securities, and other unregistered assets. Thus, the true figure for aggregate capital flight from Mexico since 1976 lies somewhere between US \$15 and US \$53 billion. While some Mexican government experts have estimated totals of approximately US \$26 billion for the 1976-85 period, American academics who have studied the issue generally accept slightly higher figures: US \$36 billion in one case, around US \$30 billion in others. It would seem that US \$30 to US \$35 billion as the total

In the face of changing global economics, one of President Salinas' first objectives was to alter Mexican trade and foreign investment policies. In the area of trade, President Salinas extended the liberalization policies first begun by President de la Madrid, further dismantling the system of import licensing and tariff barriers that characterized Mexican trade policies since the 1930's.<sup>9</sup>

Crucial to Mexico's economic development was its ability to attract greatly needed capital. President Salinas recognized the renegotiating of current foreign debt as the first step in a complicated process to stimulate the interest of foreign investors. Equally important, President Salinas saw the need to attract new foreign investment. However, significant obstacles stood in the way of any proposals to change the foreign investment laws: Mexico's Constitution; the Foreign Investment Law of 1973 (FIL); and division in the Mexican House of Representatives, which could hamper attempts to pass new foreign investment legislation. With the immediate need at hand of having to renegotiate Mexico's foreign debt and increase the flow of hard currency into the country, President Salinas decided to circumvent these obstacles and show his good faith to the international investment and banking community, by personally issuing the new regulations to the Foreign Investment Law (FIL Regulation).<sup>10</sup> This article will address the main provisions of the new FIL Regulation in light of the FIL and the Constitution.

## II. MEXICO'S CONSTITUTION AND FOREIGN INVESTMENT LAW

The Mexican Constitution<sup>11</sup> contains no provision for the promotion of foreign investment, nor does it grant any preferential rights to foreigners; on the contrary, the Constitution takes a defensive position

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which actually left Mexico in the 1976-85 period is a reasonable figure. Fernando Solana, the chairman of the Mexican Banking Association and president of Mexico's largest bank, stated in early 1988 that the total value of Mexican assets in the United States had reached US \$40 billion. This was the highest public estimate given to date by a senior government official. Yet, if one were to average out over a ten-year period the approximately US \$30 to US \$35 billion which fled Mexico, the result is a yearly transfer abroad of between 2 and 3% of the nation's GNP. While this is half the foreign savings the country has acquired per year over the past several decades, it is not a significant part of Mexico's wealth or capital stock. Capital flight is an extremely harmful phenomenon at the margin, but its importance should be neither underestimated nor exaggerated. J. CASTAÑEDA & R. PASTOR, *LIMITS TO FRIENDSHIP. THE UNITED STATES AND MEXICO* 255-56 (1988).

9. See Siqueiros, *Legal Framework for the Sale of Goods Into Mexico*, 12 *HOUS. J. OF INT'L L.* 291 (1990)(this issue).

10. Because this new FIL Regulation is only a regulation, and not a law, it does not need Congressional approval.

11. *CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS*, published in the *Diario Oficial de la Federación [D.O.]* Feb. 5, 1917 [hereinafter *MEX. CONST.*].

regarding foreigners.<sup>12</sup> Moreover, article thirty-three<sup>13</sup> grants the President the power to deport any foreigner "whose stay he may deem inconvenient," without any form of hearing. Further, the Constitution prohibits foreigners from holding direct dominion over land and water in a strip 100 kilometers from the borders and fifty kilometers from the seashores.<sup>14</sup> Foreign persons must also agree to the Calvo Clause, which requires foreigners to consider themselves nationals, and forbids them to invoke the protection of their governments when acquiring dominion over land or water outside the territory delineated above.<sup>15</sup> Article thirty-two provides that "Mexicans will be preferred to foreigners, in equal circumstances, and for all types of concessions and for all jobs, appointments or commissions from the Government, in which the capacity of national is not indispensable."<sup>16</sup> Occupations where national status is indispensable include the army, police or public security forces, marines, and air force.<sup>17</sup>

The Constitution also grants the legislature the power to prescribe laws regulating foreign investment. It permits Congress to "issue laws for the purpose of promoting Mexican investment . . . [and] regulate foreign investment,"<sup>18</sup> but the phrase "for the purpose of," is strictly construed. Reflecting this policy, as well as historical, political, and economic reasons, the Mexican law in this area, the Foreign Investment Law (FIL),<sup>19</sup> is in fact literally named "Law to Promote Mexican Investment and to Regulate Foreign Investment." It contains numerous defensive and regulatory measures with regard to foreign investment: article five of the FIL, states the 51-49% general rule for Mexican and foreign

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12. Article 32 establishes the general principle of preference for Mexicans: "Under equal circumstances, Mexicans will be preferred versus foreigners, for all kinds of concessions and for all jobs, appointments and Government commissions." MEX. CONST. art. 32.

13. Article 33 states: "The Executive of the Union holds the exclusive authority to force the exit from national territory, immediately and without previous trial, with regard to any foreigner whose stay it may deem inconvenient." MEX. CONST. art. 33, ¶ 1.

14. MEX. CONST. art. 27, ¶ 9, § I.

15. *Id.*

16. MEX. CONST. art. 32, ¶ I.

17. *Id.*, ¶ 2.

18. MEX. CONST. art. 73, § XXIX-F.

19. *Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, D.O., Mar. 9, 1973 [hereinafter FIL].

capital investment, stimulating joint ventures at the time of incorporation;<sup>20</sup> article four exclusively reserves certain areas for the Mexican government and domestic investors;<sup>21</sup> article eight requires approval from the National Foreign Investment Commission (NFIC or Commission) when foreign investors wish to acquire Mexican going concerns;<sup>22</sup> and, article twelve grants the Commission discretionary authority to decide on the expansion of existing foreign investment.<sup>23</sup>

The Commission, which consists of seven Cabinet members and an Executive Secretary appointed by the President of the Republic, holds these and other discretionary powers.<sup>24</sup> However, these powers must be exercised pursuant to FIL's article thirteen that delineates the economic

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20. Article five provides: "In cases where legal provisions or regulations do not specify a given percentage, foreign investment may hold up to 49% of the capital of business enterprises provided it is not empowered, by any title, to control the management of the business enterprise. The National Commission on Foreign Investment may decide on the increase or reduction of the percentage to which the preceding paragraph refers when it judges this to be in the interest of the country's economy, and it may establish the conditions under which foreign investment will be accepted in specific cases." FIL, *id.*, art. 5.

21. Article four of the FIL states:

The following activities are reserved exclusively for the Government: (a) Petroleum and other hydrocarbons, (b) Basic petrochemicals, (c) Exploitation of radioactive minerals and the generation of nuclear energy, (d) Mining, in cases covered by the Law relating thereto, (e) Electricity, (f) Railroads, (g) Telegraphic and wireless communications, and (h) Other activities established in specific laws. The following activities are reserved exclusively for Mexicans or for Mexican companies with an exclusion of foreigners clause: (a) Radio and Television, (b) Urban and interurban automotive transportation and transportation on federal highways, (c) Domestic air and maritime transportation, (d) Exploitation of forestry resources, (e) Gas distribution, and (f) Other activities established in specific laws, or in regulations issued by the Executive Branch of the Federal Government.

FIL, *supra* note 18, art. 4.

22. Article eight provides:

Authorization by the corresponding Ministry, according to the economic activity involved, shall be required where one or more of the individuals or companies to which Article 2 refers, in one or several actions, or a succession of actions, acquires or acquires more than 25% of the capital, over 49% of the fixed assets of a business enterprise. The leasing of a business enterprise, or of essential assets required for its functioning, shall be considered equivalent to the acquisition of assets. Also requiring authorization are acts by which the administration of a business enterprise is acquired by foreign investors, or by which foreign investment is empowered, by any title, to determine the management of the business enterprise. The authorization to which this Article refers shall be granted when convenient to the country's interest, following a decision of the National Commission on Foreign Investment. Actions undertaken without such authorization shall be null and void.

FIL, *supra* note 18, art. 8.

23. Regarding expansion regulation, article twelve of the FIL states:

The National Commission on Foreign Investment shall have the following powers: . . . III. To decide on proposed foreign investment in business enterprises established or to be established, in Mexico, or in new business enterprises; IV. To decide on the participation of foreign investment existing in Mexico in new fields of economic activity or in new product lines . . .

FIL, *supra* note 18, art. 12.

24. FIL, *supra* note 18, art. 11.

criteria to be followed, among which is the requirement that the foreign investment complement national investment and not displace national business enterprises.<sup>25</sup> It is precisely here, where the FIL's promotion of Mexican investment can be found. The Commission must always protect the local entrepreneur, considering foreign investment as complementary, and not the basic investment form for the development of the economy.

The above provisions of the Mexican Constitution and the FIL evidence a foreign policy which has been in force for many years, born under different economic circumstances, but still in full force and effect—the encouragement and promotion of Mexican domestic investment, and the regulation of foreign investment.

### III. THE PRESIDENT'S CAPACITY TO ISSUE REGULATIONS

The President's authority to issue regulations is granted by Article eighty-nine, Paragraph I, of the Mexican Constitution.<sup>26</sup> However, the scope of the regulations is necessarily limited to the scope of the underlying law. Separation of powers, a governing concept fundamental to the Constitution, requires that the President carry out acts that provide for the exact observance of the law issued by the Legislative Power. Presidential acts cannot contradict those of the legislature, since such an excess would be considered overreaching by the Executive Power. Consequently, the act would be considered a breach of the Constitutional regime.

The President's capacity to issue regulations is recognized in Mexico's constitutional history,<sup>27</sup> doctrine,<sup>28</sup> and court decisions. The

25. FIL's article thirteen provides: "In order to determine the advisability of authorizing foreign investment and to establish the percentages and conditions by which it shall be governed, the Commission shall take into account the following criteria and characteristics of the investment . . ." For a list of the economic criteria used, see FIL, *supra* note 18, art. 13.

26. This provision grants the president the power to "promulgate and execute the laws issued by the Congress of the Union, providing in the administrative sphere to its exact observance." This has been interpreted as the "power to enact general rules in the form of regulations (reglamentos). Regulations have the purpose of explaining and supplying detailed rules for the application of specific laws, and most statutes are supplemented in this manner." H. WRIGHT, *FOREIGN ENTERPRISE IN MEXICO*, 16 (1971).

27. *Acta Constitutiva de la Federacion* art. 16 (1824), reprinted in T. RAMIREZ, *LEYES FUNDAMENTALES DE MEXICO 1808-1893*, at 156 (1983) [hereinafter RAMIREZ]; *CONSTITUCIÓN FEDERAL DE LOS ESTADOS UNIDOS MEXICANOS* art. 110 (1824), RAMIREZ at 182; *Leyes Constitucionales Cuarta* art. 17, § I (1836), RAMIREZ at 225; *Las Bases Orgánicas De La Republica Mexicana* art. 85, § IV (1843), RAMIREZ at 418; MEX. CONST. art. 85, § I, RAMIREZ at 621; MEX. CONST. art. 89, § I.

28. For a discussion of the Executive's authority to issue regulations, see J. CARPIZO, *ESTUDIOS CONSTITUCIONALES* 333 (1980); M. DE MADRID HURTADO, *ESTUDIOS DE DERECHO CONSTITUCIONAL* 244-45 (1981); G. FRAGA, *DERECHO ADMINISTRATIVO* 120-40 (1952).

Supreme Court has indicated that regulations must develop and complement the law, as well as avoid contravention of the law:

Article 89, paragraph I of our main Law, confers [upon] the President of the Republic three capacities: a) That of promulgating the laws issued by the Congress of the Union; b) That of executing said laws; and c) That of providing in the administrative sphere its exact observance, i.e., the regulatory capacity. This last capacity allows the Executive to issue general and abstract provisions, whose purpose is the execution of the Law, *developing and complementing* [emphasis added] in detail the provisions included in the legislation issued by the Congress of the Union . . . [The regulation] is an alternate norm that has its measure and justification in the law . . . [T]he regulation provides the general and abstract media, that must be used to apply the law to concrete cases.<sup>29</sup>

#### IV. THE NEW FOREIGN INVESTMENT LAW REGULATION

The New Foreign Investment Law Regulation (FIL Regulation)<sup>30</sup> hardly promotes foreign investment, since it is not a vehicle for granting incentives such as tax breaks, cost reductions in energy or land, or the like. The benefits granted by the FIL Regulation to foreign investors, basically lie in deregulation.

The Regulation accords foreigners broad investment opportunities by eliminating the need for prior authorization by the NFIC, the governing body empowered to carry out the FIL policies. A cornerstone provision, article five of the FIL Regulation, grants the foreign investor the right to establish a 100 percent foreign owned enterprise in Mexico, without first obtaining prior approval from the NFIC.<sup>31</sup>

However, while enhancing foreign investment opportunities and eliminating the NFIC approval requirement, article five of the FIL Regulation directly contravenes the FIL's article five and one of its above discussed primary purposes—the promotion and protection of Mexican

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29. *Tesis 404*, Apéndice al Semanario Judicial de la Federación, Tercera Parte 709 (Segunda Sala 1985).

30. *Reglamento de la Ley para Promover la Inversión Mexicana Y Regular la Inversión Extranjera*, D.O., May 16, 1989 [hereinafter FIL Reg.]. For a discussion of the FIL Reg., see I. GÓMEZ-PALACIO, *LEY DE INVERSIÓN EXTRANJERA Y SU REGLAMENTO COMENTADOS* (1989).

31. Art. five of the FIL Regulation provides as follows: "For purposes of the provisions of Section (d) of Article 5 of the Law, foreign investors may participate in any proportion in the capital stock of a corporation, in the act of its incorporation for the performance of activities not included in the classification, and will not require therefore the authorization of the Ministry, provided that: . . . [article five of the regulation then states the requirements]." FIL Regulation, *supra* note 30, art. 5. For an analysis of the FIL and FIL Regulation provisions, see GÓMEZ PALACIO, *supra* note 30.

investment. The 100 percent ownership clause, along with other provisions of the Regulation, contradict the FIL<sup>32</sup> and other laws enacted by

32. The FIL Regulation Article 5, considered to contradict the FIL's art. five, establishes a privilege for the foreign investor to incorporate and operate an enterprise in Mexico, without having to secure the authorization from the National Foreign Investment Commission, as long as it complies with set conditions and requirements and the activity is not listed in the included classification. FIL Regulation art. five, provides:

For purposes of the provisions of Section (d) of article five of the Law, foreign investors may participate in any proportion in the capital stock of a corporation, in the act of its incorporation for the performance of activities not included in the Classification, and will not require therefore the authorization of the Ministry, provided that:

- I. They invest an amount in fixed assets destined for economic activities, appropriate for the corporation in its pre-operational period, not to exceed that established from time to time by the Ministry, for updating purposes.
- II. The investments referred to in the preceding fraction are made with financial resources proceeding from abroad, obtained as capital contributions by partners or shareholders, or through financing granted by foreign entities or by credit institutions with resources obtained abroad. If the partners or shareholders of the company being incorporated are foreign investors already established in this country, that they may make said investments with resources proceeding from their own patrimony. That the minimum amount of paid-in capital stock be equivalent to 20% of the total investment of fixed assets at the end of the pre-operational period.
- III. That the company so incorporated locates the industrial establishments they require for performance of their industrial or manufacturing activities, outside the geographical zones of greatest industrial concentration and subject to controlled growth, as said zones are defined by the corresponding administrative provisions.
- IV. That the company so incorporated maintains, as minimum results during the first three years of its operations, a position of equilibrium in its balance of foreign currency. A company will be deemed to have initiated its operations on the date of its obtaining of the first revenue from the commercial sale of its products or from the rendering of its services.
- V. That the company so incorporated will generate permanent jobs and establish sustained programs of training, capacitation and personal development for their workmen, in accordance with the applicable legislation.
- VI. That the company so incorporated is to make use of adequate technology and to observe all legal provisions in matters of ecology. A foreign investor will be deemed to have agreed with the requisites established in this article, by the sole fact of his acquisition of a share in a company incorporated in accordance with the regime established by this Article.

The reference to the FIL's Section (d) of article five is deemed contrary to the FIL's intent, that starting in article four lists the possibility of foreign investment participation starting from 0% up to 100%, (the latter through the National Foreign Investment Commission's authorization). Section (d) of article five refers to other laws and regulations providing for a foreign investment participation of less than 49%, aside from those listed in Sections (a), (b) and (c). The FIL's article five in this matter provides:

Foreign investment shall be permitted in the activities of business enterprises listed below, in the following capital percentages: (a) Exploitation and use of minerals. Concessions may not be granted or transferred to foreign individuals or corporate bodies. Foreign investment in companies operating in this area may hold up to 49% in the case of exploitation and use of substances subject to ordinary concessions, and 34% in the case of special concessions for the exploitation of national mining reserves; (b) Secondary petrochemicals: 40%; (c) Manufacture of automotive components: 40%; and (d) Those established in specific laws or regulations issued by the Executive Power.

Contradicting the FIL's art. eight, the Sixth Transitory article of the FIL Regulation provides:

During the three years next following the date of entry into force hereof, foreign

investors may acquire shares of corporations, notwithstanding that, as a result of such acquisition, the aggregate participation of foreign investment in the capital stock of said corporation shall exceed, the proportion of 49% thereof, *provided*, that said acquiring foreign investors agree to comply with the following requisites: (a) To invest in new fixed assets a minimum amount equivalent to 30% of the net value of the fixed assets shown in the returns filed with the Ministry of Finance and Public Credit for the most recent fiscal years; (b) That the paid-in capital stock as of the date of acquisition of such shares is to be increased by an amount equivalent to 20% of said additional investment in fixed assets; (c) That results of equilibrium in the balance of foreign currency of the corporation in which investment is made, will be attained during the three years next following such acquisition of the shares thereof, and (d) To comply as pertinent with the requisites established in fractions I, second paragraph of II, III, V, and VI of Article five. The agreement of said foreign investor shall be deemed represented in the manner described in the final paragraph of article five.

Again exceeding their authority, articles 28 and 29 of the FIL Regulation provide a procedure that avoids the National Foreign Investment Commission's authorization requirements established in FIL's art. 12-III and IV. Article 28 provides:

A foreign investor intending to open and operate any new industrial, commercial or services establishment will require authorization of the Ministry, except in the following cases:

- I. With respect to new establishments: (a) When opened and operated by any of the corporations referred to in Article six; (b) When opened and operated by a corporation not so referred to, if the foreign investors of the latter agree to: (i) Invest in fixed assets for the new establishment a minimum amount equivalent to 10% of the net value of the fixed assets shown in the returns filed with the Ministry of Finance and Public Credit for the most recent fiscal year; (ii) Increase the paid-in capital stock, as of the date of opening of the new establishment, by an amount equivalent to 20% of the additional investment in fixed assets; (iii) That such new establishment will obtain results of equilibrium in its balance of foreign currency during the first three years of its operation; and (iv) Comply as pertinent with the requisites established in fractions I, II, paragraph second, III, V and VI of Article five. The foreign investor will be deemed to have represented its agreement in the manner described in the final paragraph of article five; (c) When operated by merging corporations.
- II. In cases of relocation of an industrial establishment, provided, that no such relocation is performed within or towards a geographical zone of greater industrial concentration and subject to controlled growth, as said zones are defined in the corresponding administrative provisions.

Article 29 provides:

The authorization of the Ministry will be required for any foreign investment intended in a new field of economic activity or a new product line, except in the following cases:

- I. If the foreign investors agree: (a) To invest in fixed assets in the terms described in subsection i of section b of fraction I of article 28; (b) That the paid-in capital stock, as of the date of initiation of the new product line or the new field of economic activity, will be increased by an amount equivalent to 20% of the additional investment in fixed assets; (c) That results of equilibrium in the balance of foreign currency will be obtained during the first three years of operation of said product line or said new field of economic activity; (d) That the requisites established in fractions I, II, second paragraph, III, V and VI of article five be complied with as pertinent. The foreign investor will be deemed to have represented its agreement in the manner described in the final paragraph of article five.
- II. In the case of any of the corporation referred to in article six.
- III. In cases of merger of corporations.

For an analysis of these provisions of the FIL and FIL Regulation, see GÓMEZ-PALACIO,

the legislature.<sup>33</sup> However, because the FIL and other laws were approved and enacted by the legislature, they are superior to the FIL Regulation. Therefore, the FIL Regulation's provisions which contradict the FIL and other laws enacted by Congress appear to be technically illegal and unconstitutional.<sup>34</sup>

These contradictions cause legal insecurity among foreign investors seeking to benefit from the Regulations. This insecurity arises from potential plaintiff-investors, both Mexican and established foreign investors, bringing suit under the FIL for due protection of their investment. In addition to arguing the contradictions created by a given set of provisions, as mentioned above, they will emphasize the main criteria set by the FIL, that existing Mexican entrepreneurs not be displaced, and that foreign investment be complementary to Mexico's national economy. Competitors, therefore, can be a very effective police.

Apart from these critical aspects of the FIL Regulation, the Regulation generally contributes to a better application and understanding of the FIL. The Regulation develops and complements the FIL by modifying the following areas: the definition of "foreign investor," "domicile," "restricted zone," "new field of economic activity," "new lines of products," and "new establishment;"<sup>35</sup> the procedure established for the granting of authorizations by the Ministry of Commerce and Industrial Development;<sup>36</sup> in the case of foreign residents, the concept of "connection with foreign centers of economic decision,"<sup>37</sup> the meaning of "use and utilization of trusted real estate,"<sup>38</sup> "establishment,"<sup>39</sup> the clause of foreign exclusion,<sup>40</sup> and the Calvo Clause,<sup>41</sup> certain authorization requirements established by other regulations, which were issued by the

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*supra* note 30. It is relevant here to point out FIL's article 28 provides the penalty for the foreign investor breaching the FIL:

Action undertaken in violation of the provisions of this law, and actions that, though required to be registered in the National Registry of Foreign Investment are not so registered, shall be null and void and shall therefore have no validity before any authority. In addition, offenders shall be fined by the corresponding Government Ministry or Department up to the value of the operation. The fine will be up to 100,000 pesos in those cases where the amount of the violation cannot be determined.

33. For example, article 36 of the Regulation allows Mexican companies to acquire real estate outside of the forbidden zone (100 kilometers from the borders and 50 kilometers from the seashores) without authorization from the Ministry of Foreign Affairs, while article 27 of the Constitution requires such authorization. FIL Reg., *supra* note 30, art. 36.

34. The FIL states: "action undertaken in violation of the provisions of this law . . . shall be null and void and shall therefore have no validity before any authority." FIL, *supra* note 18, art. 28.

35. FIL Reg., *supra* note 30, art. 1.

36. *Id.*, art. 2.

37. *Id.*, art. 4.

38. *Id.*, art. 18.

39. *Id.*, art. 27.

40. *Id.*, art. 30.

41. *Id.*, art. 31.

Ministry of Foreign Affairs,<sup>42</sup> and the organization and operation of the National Foreign Investment Registry.<sup>43</sup>

## V. OUTLOOK FOR THE FUTURE

Enough has been said about the strength of Mexico's Executive Power, all based in hard reality.<sup>44</sup> This power must be taken into account, as a key element, when investing in Mexico. The new regulations clearly indicate that Mexico's President wishes and welcomes new foreign investment, in spite of the legal contradictions that might be found by attorneys and legal researchers, some with over magnified glasses and well polished spectacles, at times servicing their Mexican or established foreign clients.

The current political arena may not encourage Mr. Salinas to initiate a bill before Congress to amend the FIL, and possibly the Mexican Constitution. However, a year or two down the road, the possibility may very well be there. If so, the aggressive foreign investor defendants may find themselves winners, when the suit is considered without *materia*, or subject matter, since the provisions considered breached will by then be repealed by Mexico's Congress. Legal counsel therefore may be found overridden by aggressive business decisions, that may or may not be considered knowledgeable and wise in the future. Looking back a *toro pasado* (after the bull has passed the cape) will provide the right answer.

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42. *Id.*, arts. 33, 36.

43. *Id.*, arts. 42-79.

44. Alan Riding observes:

During his six year term, then, the President dominates not only the state but also the public life of the nation: he controls Congress, the judiciary and state governors as well as the ruling party and the huge bureaucracy, he determines economic policy and foreign affairs and he is treated with solemn reverence by the media. The projection of this power in turn wraps each President in an almost imperial aura. He travels everywhere surrounded by a court of acolytes and an army of bodyguards, he is bombarded constantly with flattery and his personal whims become indistinguishable with public policy. "What time is it?" asks the President, according to an old joke that has the ring of truth. "Whatever time you say it is, Mr. President." Hardly surprisingly, several Mexican Presidents have become intoxicated by power while in office and greatly disturbed when it evaporated on the day they stepped down . . . The President sits atop the pyramid, but his real job is to balance what he perceives to be the "national interest" with the need to maintain strong supporting pillars beneath him. He is the powerful referee who can interpret the rules, but he must make sure that the teams keep playing the game. His effectiveness as a negotiator, persuader and arbiter is therefore more important than his popularity as a politician.

A. RIDING, *supra* note 5 at 66-67. For further reading on U.S.-Mexico relationships, see: R. ROETT, *MEXICO AND THE UNITED STATES: MANAGING THE RELATIONSHIP* (1988), *BILATERAL COMM'N ON THE FUTURE OF UNITED STATES-MEXICAN RELATIONS, THE CHALLENGE OF INTERDEPENDENCE: MEXICO AND THE UNITED STATES: REPORT OF THE BILATERAL COMM'N ON THE FUTURE OF UNITED STATES-MEXICAN RELATIONS* (1988).