

MEXICO'S FOREIGN INVESTMENT REGULATIONS OF 1998

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TABLE OF ACRONYMS

Acronyms	Spanish	English Translation
L.I.E.	<i>Ley de Inversión Extranjera</i>	Foreign Investment Act
SRE	<i>Secretaría de Relaciones Exteriores</i>	Secretariat of Foreign Affairs
INEGI	<i>Instituto Nacional de Estadística, Geografía e Informática</i>	National Institute of Statistics, Geography and Informatics
SHCP	<i>Secretaría de Hacienda y Crédito Público</i>	Secretariat of Finance and Public Credit
SECOFI	<i>Secretaría de Comercio y Fomento Industrial</i>	Secretariat of Commerce and Industrial Development
DFI	***	Direct Foreign Investment
APPRIS	<i>Acuerdos para la Promoción y Protección Recíproca de las Inversiones</i>	Agreements for the Promotion and Reciprocal Protection of Investments
EEZ	***	Exclusive Economic Zone
CFE	<i>Comisión Federal de Electricidad</i>	Federal Commission of Electricity
NAFTA	***	North American Free Trade

Acronyms	Spanish	English Translation
		Agreement

FREQUENTLY ASKED QUESTIONS

1. *Why should U.S. legal practitioners and international investors become familiar with Mexico's 1998 Foreign Investment Regulations?*

Familiarity with Mexico's Foreign Investment Regulations is important because the 1998 Foreign Investment Regulations (*Reglamento de la Ley de Inversión Extranjera y del Registro Nacional de Inversiones Extranjeras* or 1998 Regulations) are a necessary tool for implementing the Foreign Investment Act of 1993 (*Ley de Inversión Extranjera* or L.I.E.) which establishes the current legal regime that governs all foreign investment activities in Mexico. No implementation of the 1993 L.I.E. can take place without the 1998 Regulations. The Regulations interpret, detail, expand and complement the L.I.E. provisions. The 1998 Regulations are very similar to U.S. regulations. The 1998 Regulations may not oppose or contradict in any manner the substantive provisions of the 1993 L.I.E. without running the risk of being declared unconstitutional.¹ Consequently, the 1998 Regulations must be in complete symmetry with the content of the 1993 L.I.E. The Regulations establish rules and principles designed to limit the discretion of Mexican federal authorities in interpreting the provisions of the 1993 L.I.E.² Thus, the 1998 Regulations are designed to set clear and precise administrative rules which must be complied with by federal authorities in the process of interpreting the Foreign Investment Act of 1993, as amended in 1996. The 1998 Regulations explicitly carve out specific exceptions to the different types of investment statutorily established by the 1993 L.I.E., as amended in 1996.³ All of these exceptions were created by the 1998 Regulations to liberalize foreign

¹ Cf. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution] art. 89 (Mex.) (specifying that the regulations provide for the law's exact observance).

² See *id.*

³ Cf. "Reglamento de la Ley de Inversión Extranjera y del Registro Nacional de Inversiones Extranjeras," D.O., 8 de septiembre de 1998 [hereinafter "Reglamento de la L.I.E.," D.O., 8 de septiembre de 1998] (See *infra* note 12 for an example).

investment requirements to favor foreign investors.⁴ The Regulations have opened up more areas of the Mexican economy to foreign investment. This represents a positive development.

2. *Who is subject to the application of these L.I.E. Regulations?*

The Regulations apply, on one hand, to the government officials of the Secretariat of Commerce and Industrial Development (*Secretaría de Comercio y Fomento Industrial* or SECOFI), who are in charge of enforcing the regulations.⁵ These rules are intended to limit and curb the ample discretion these authorities previously had.⁶ On the other hand, the 1998 Regulations apply to foreign investors in Mexico, whether major transnational corporations, such as Apple Computer, Inc., Coca-Cola Company, Deere & Company (John Deere), IBM Corporation, DaimlerChrysler, Ford Motor Company, McDonald's Corporation, PepsiCo, Inc., Tricon Global Restaurants, Inc. (Taco Bell, KFC, and Pizza Hut) or a modest U.S. retiree.⁷ It should be mentioned that, in addition, the Regulations govern in detail the rendering of professional services by public notaries (*notarios públicos*) and public brokers (*fedatarios públicos*).⁸ When these semi-officials incur any irregularities in rendering their professional services, the 1998 Regulations, as well as the L.I.E., impose severe penalties, independent of other sanctions that may also apply under other applicable laws.⁹

3. *Article 27, paragraph I, of Mexico's Federal Constitution expressly provides: "Under no circumstances may foreigners*

⁴ See generally *id.* (See *infra* note 15 for a discussion of *transitorio tercero* of the 1998 L.I.E. Regulations, which liberalizes the definition of foreign investment to favor foreign investors).

⁵ See "Ley de Inversión Extranjera," art. 24, D.O., 27 de diciembre de 1993 (setting up the framework of the National Foreign Investment Commission [Comisión Nacional de Inversiones Extranjeras], which will be run by SECOFI) [hereinafter 1993 L.I.E.]. For the text in English, see Mexico: Foreign Investment Act of 1993, Dec. 27, 1993, 22 I.L.M. 207 (1994).

⁶ See 1 MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS 22 (Jorge A. Vargas ed., 1998) [hereinafter MEXICAN LAW TREATISE] (discussing the discretion authorities previously had in interpreting the L.I.E.).

⁷ See generally "Reglamento de la L.I.E.," D.O., 8 de septiembre de 1998.

⁸ See "Reglamento de la L.I.E.," art. 4, D.O., 8 de septiembre de 1998.

⁹ See 1993 L.I.E., *supra* note 5, art. 39.

*acquire ownership of lands and waters within a strip of one hundred kilometers along the borders and fifty kilometers along the coastline.*¹⁰ However, Article 10A of the Foreign Investment Act, as amended in 1996, allows foreign investors and foreign legal entities established under Mexican Law “to acquire the ownership of immovable assets located in this Restricted Zone.” Isn’t this provision contrary to the constitutional mandate? How can this inconsistency be explained?

No federal authority has given a formal or official explanation to clarify this apparent inconsistency. However, it seems that the government of Mexico, pursuant to the L.I.E. and principally for practical reasons, authorizes foreign investors to have direct ownership of immovable assets located in the Restricted Zone subject to two conditions: 1) that the asset in question be destined to a “Nonresidential use”; and 2) that the foreign investor formally enters into the *Convenio* referred to in Article 29, paragraph I of the Constitution (Calvo Clause).¹¹ A “Nonresidential use” means a commercial or industrial use involving a considerable investment, generally quantified in millions of dollars.¹² Examples of these uses include the construction of industrial parks, hotels, motels, shopping centers, ports, marinas or restaurants. Since these uses generally generate hundreds of thousands of permanent jobs for Mexican nationals, the federal government decided to allow foreign investors to have direct ownership of such assets.¹³ From time to time, foreign dignitaries from developed countries, which have substantial investments in Mexico, have suggested that this legal ambiguity should be erased altogether by amending the Mexican constitution to reflect the current practice.¹⁴

¹⁰ All translations by the author, unless otherwise noted.

¹¹ See 1993 L.I.E., *supra* note 5, art. 10.

¹² See “Reglamento de la L.I.E.,” art. 5, D.O., 8 de septiembre de 1998 (defining nonresidential uses as including, but not being limited to: time shares; mixed residential and commercial developments; residential developments acquired by credit institutions to recover debts; developments acquired by companies for their corporate purpose; or, generally, real estate devoted to commercial, industrial, agricultural, ranching, fishing, lumber, or service-related activities).

¹³ See generally *id.*

¹⁴ See Alejandra Mayorga and Norberto López, *Clima de Incertidumbre Entre los Inversionistas de Canadá*, EL EXCELSIOR, Oct. 8, 1997 (quoting the President of the Canadian Chamber of Commerce in Mexico complaining of the “lack of clarity” in the L.I.E.).

4. *Do foreign individuals who permanently reside in Mexico as “Inmigrados” receive any special consideration regarding their investments in that country?*

The 1998 L.I.E. Regulations provide that investments made by *inmigrados* in any of the activities enunciated in the Transitory Articles (*Artículos Transitorios*) of the Foreign Investment Act, are to be considered Mexican investments.¹⁵ Under article 52 of Mexico’s General Population Act (*Ley General de Población*), *Inmigrados* are foreigners who entered Mexico lawfully with the purpose of establishing permanent residency and have remained in that status in Mexico for five consecutive years.¹⁶

5. *Who in Mexico has the capacity to determine whether an immovable asset is physically located within or without the Restricted Zone?*

Pursuant to article 6 of the 1998 Regulations, the Secretariat of Foreign Affairs (*Secretaría de Relaciones Exteriores* or SRE) is the federal agency statutorily empowered to determine whether a piece of real estate is within the Restricted Zone.¹⁷ This official determination is to be made once the SRE consults with the National Institute of Statistics, Geography and Informatics (*Instituto Nacional de Estadística, Geografía e Informática* or INEGI).¹⁸ The Secretariat of Finance and Public Credit (*Secretaría de Hacienda y Crédito Público* or SHCP), through INEGI, published the first listing of municipalities and delegations located totally out of the Restricted Zone established by Article 27, paragraph I of the Mexican constitution.¹⁹

¹⁵ See “Reglamento de la L.I.E.,” transitorio tercero, D.O., 8 de septiembre de 1998; 1993 L.I.E., *supra* note 5, transitorio sexto, septimo, and octavo (providing that investment by *inmigrados* in land-based transport, automotive equipment and accessories, and the selling of software packages is Mexican investment).

¹⁶ See “Ley General de Población,” art. 52–53, D.O., 7 de enero de 1974.

¹⁷ See 1993 L.I.E., *supra* note 5, art. 6.

¹⁸ See *id.*

¹⁹ See “Primera Lista de Municipios y Delegaciones Totalmente Ubicados Fuera de la Zona Restringida que Señala la Fracción I del Artículo 27 Constitucional,” D.O., 21 de mayo de 1997.

I. INTRODUCTION

Since the Regulations to the 1973 L.I.E. were enacted in 1989, Mexico has continued to make considerable progress towards the formulation of a modern, flexible and open legal regime that favors foreign investment and promotes international trade. Examples of this progressive trend are the 1993 L.I.E.—which virtually reproduced the principles and the legal philosophy of the 1989 Regulations—in particular, the recent publication on September 8, 1998 of the new Regulations to the 1993 Act.

Although the enactment of the 1998 Regulations had been eagerly awaited since 1993 when the L.I.E. first appeared,²⁰ financial and political factors, especially Mexico's economic crisis in 1994 and 1995 and the financial instability that adversely affected the international financial arena in 1997, such as, the drastic lowering of the international oil prices and the global financial volatility that emerged first in Asia and then in Russia and Brazil, understandably delayed the drafting process and the eventual publication of these Regulations.

In accordance with Mexico's legal system, the 1998 Regulations were formulated by the federal executive branch through SECOFI.²¹ The objective and purpose of the 1998 Regulations closely parallels the goals and scope of U.S. regulations, namely: they are administrative enactments designed to interpret, clarify, detail and expand the language of the 1993 L.I.E.²² From a constitutional viewpoint, regulations must neither oppose nor contradict the tenor of the federal statute from which they are derived.²³

In recent years, the federal executive in Mexico has been utilizing the enactment of administrative regulations as a legal mechanism to curb, limit and define with some precision the powers of federal agencies and authorities.²⁴ In

²⁰ The L.I.E. was first published in the *Diario Oficial* of December 27, 1993 (D.O., 27 de diciembre de 1993) and then amended by presidential decree (D.O., 24 de diciembre de 1996). Until the 1998 L.I.E. Regulations were enacted, the 1989 Regulations continued to apply to, and clarify the provisions of the L.I.E. of 1993.

²¹ See 1 MEXICAN LAW TREATISE, *supra* note 6, at 21-22.

²² See *id.* at 22.

²³ Cf. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution] art. 89 (Mex.) (stating that regulations provide for the law's exact observance).

²⁴ See 1 MEXICAN LAW TREATISE, *supra* note 6, at 22 (discussing the discretion authorities previously had in interpreting the L.I.E.).

other words, regulations are intended to limit the exercise of discretionary powers by federal agencies and authorities.

Mexico's former president, Ernesto Zedillo Ponce de Leon, in his "State of the Union Address" at the opening of the Mexican Congress on September 1, 1999, stated:

Advancements have been made in eliminating barriers and unnecessary regulations to direct foreign investment, through the adjustment of the applicable legal framework. In particular, the Regulations of the Foreign Investment Act and the National Registry of Foreign Investments, promulgated on September 8, 1998, facilitate the application of the corresponding Act, to provide more legal safety, certainty and transparency in the transactions conducted by national and foreign investors.²⁵

According to this address, foreign investment reached approximately \$22.6 billion in 1996; \$17.9 billion in 1997; and \$11.5 billion in 1998.²⁶ During the first fiscal period of 1999, foreign investment in Mexico amounted to approximately \$4.2 billion.²⁷ Out of the 1999 total, 38.1% was made in investment portfolios and 61.9% in direct foreign investment (DFI).²⁸

During the first quarter of 1999, DFI amounted to approximately \$5.5 billion.²⁹ Out of this total, 68.5% originated in the United States and Canada; 25.2% from the

²⁵ See Ernesto Zedillo Ponce de León, Quinto Informe de Gobierno at 309 (Sept. 1, 1999) The State of the Union address is actually two separate documents: a transcript of the speech and a written report. All citations are to the written report.

²⁶ See *id.* at 306.

²⁷ See *id.*

²⁸ See *id.* at 314. DFI includes these three sources: (a) the investment movements reported to Mexico's National Registry of Foreign Investments (*Registro Nacional de Inversiones Extranjeras* or *Registro*) up to June 30, 1999; (b) the value of temporary importations by assembly plants (*maquiladoras*) during the first trimester of 1999; and (c) an estimate of inter-company accounts which have not yet been reported to the *Registro*, as well as the reinvestment of profits during the same trimester. These figures may increase in the future as long as the process of reporting projects already implemented continues to take place, even when these projects have not been formally reported to the *Registro*. See *id.* at 315.

²⁹ See Comunicado de Prensa [Press Release], SECOFI, Informe Estadístico Sobre el Comportamiento de la Inversión Extranjera Directa en México (Aug. 22, 1999) [hereinafter *Comportamiento*] available at <http://www.secofi.gob.mx/html/BoletinesD.asp?NumBoletin=746&CveIdioma=1>.

European Union; 2.2% from Japan and the remaining 4.1% from other countries.³⁰ Considering the economic destination of the DFI, the manufacturing industry received approximately \$4.3 billion (78.3%); the service industry approximately \$623 million (11.4%); trade approximately \$423 million (7.9%); mining approximately \$98 million (1.8%); and agriculture approximately \$33 million (0.6%).³¹

For decades, Mexico has relied upon the modernization and streamlining of its applicable legal regime as a means of attracting foreign investment.³² However, given the intense international competition encountered by developing countries to receive steady flows of international capital, Mexico is currently engaged in a new and vigorous diplomatic effort designed to attract foreign investments by signing free trade agreements and, more recently, by entering into specific bilateral agreements which promote and protect foreign investments.³³

As expressed by Dr. Herminio Blanco Mendoza, Secretary of SECOFI, the negotiation of commercial agreements with other nations is allowing Mexico to enlarge the market of Mexican companies and to reduce their costs so they will have access to raw materials and machinery of higher quality and lower prices.³⁴ Thus, free trade agreements are transforming Mexico into an unparalleled platform for domestic and foreign companies to invest and export to other countries.

Dr. Mendoza has stated that:

NAFTA has allowed Mexico to increase its exports to the United States up to 174%, slightly passing the then existing \$20 billion dollar level in the first semester of 1993 up to \$56 billion dollars during the same period in 1999.

During the first five years of NAFTA, Mexico's agricultural exports to the U.S. increased over 70%, reaching over \$5.5 billion dollars in 1998. This

³⁰ See Ernesto Zedillo Ponce de León, Quinto Informe de Gobierno (Sept. 1, 1999).

³¹ See *id.*

³² See 1 MEXICAN LAW TREATISE, *supra* note 6, at 106-07.

³³ See Dr. Herminio Blanco Mendoza, Análisis del Quinto Informe de Gobierno ante las Comisiones Unidas de la Cámara de Senadores (Sept. 21, 1995) [hereinafter Análisis].

³⁴ See *id.*

growth is superior to that accomplished by Australia, New Zealand and the European Union.³⁵

Mexico has also negotiated a free trade agreement with the European Union.³⁶ After a series of seven successful round meetings on anti-trust, intellectual property, safeguards, technical standards, sanitary and phytosanitary measures and settlement of disputes,³⁷ the treaty was signed on March 23, 2000 in Lisbon and went into effect on July 1, 2000.³⁸

Regarding the Agreements for the Promotion and Reciprocal Protection of Investments (*Acuerdos para la Promoción y Protección Recíproca de las Inversiones* or APPRIS), the Mexican Senate has already given its approval³⁹ to the bilateral agreements already entered into with Spain, Switzerland, Argentina, Austria, the Netherlands, Germany and the Luxembourg-Belgian Union.⁴⁰ In September of 1999, the Senate had under its consideration the agreements signed with France, Finland and Uruguay.⁴¹ At the same time, the SECOFI negotiated similar agreements with Italy, Denmark, Sweden and Japan.⁴²

Given the novelty regarding the content, interpretation and enforcement of these international agreements—with no precedence whatsoever in the legal or diplomatic history of Mexico—there is no doubt that the special bilateral legal regime they have established is likely to generate a very close scrutiny by both domestic and international observers in the near future.

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See* Oficina de Vocero, Presidencia de la República, Tratado de Libre Comercio con La Unión Europea, *available at* <http://www.presidencia.gob.mx/pages/tlcue.html> (last visited Oct. 21, 2000).

³⁹ Unlike the U.S. Senate, which may give its advice and consent to international treaties (U.S. CONST. Art. II, § 2, cl. 2), the federal constitution of Mexico empowers the Senate with the exclusive power “to approve the international treaties and diplomatic conventions entered into by the Executive.” *See* CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution] art. 76 (Mex.) (emphasis added).

⁴⁰ *See* Análisis, *supra* note 33.

⁴¹ *See id.*

⁴² *See id.*

Finally, it should be recalled that foreign investment in Mexico is also governed by the provisions of Chapter 11 of the NAFTA.⁴³

II. CONTENT OF THE FOREIGN INVESTMENT REGULATIONS OF 1998

The 1998 Regulations to the Foreign Investment Law and the National Registry of Foreign Investment were enacted by presidential decree on September 8, 1998.⁴⁴ With a single exception, these Regulations entered into force on October 6, 1998, twenty business days after its publication in the *Diario Oficial de la Federación*.⁴⁵

The current 1998 Regulations, consisting of forty-nine articles and six transitory provisions, repealed the 1989 Regulations, as well as any contrary administrative provisions.⁴⁶

In general, the Regulations are divided into the following seven parts (*títulos*): 1) General provisions; 2) Acquisition of Immovable Assets, Exploitation of Mines and Waters, and Real Estate Trust Contracts (*Fideicomisos*); 3) Companies; 4) Investment by Foreign Legal Entities; 5) Neutral Investment; 6) The National Commission of Foreign Investment, the *Comisión*; and 7) The National Registry of Foreign Investments, the *Registro*.⁴⁷

From a legal perspective, it should be evident that the 1998 Regulations continue to advance the policy of modernizing Mexico's foreign investment regime by liberalizing the access to and the participation of, foreign investment in recently opened areas of the Mexican economy. The policy attempts to place the Mexican regulatory regime in closer symmetry with the latest trends that prevail in the international legal and financial arenas today.

⁴³ North American Free Trade Agreement (NAFTA), 19 U.S.C. § 3301 (1994).

⁴⁴ See "Reglamento de la L.I.E.," D.O., 8 de septiembre de 1998.

⁴⁵ See *id.* The only part of the 1998 L.I.E. Regulations that did not enter into force on October 6, 1998 involved an alternate method of informing the SRE of any major changes in a foreign corporation, such as the formation of a new corporation, changing the name or social purpose of the corporation, liquidation, merger or a split of the corporation. This provision went into force six months after publication in the *Diario Oficial de la Federación*. "Reglamento de la L.I.E.," transitorio segundo and art. 8, D.O., 8 de septiembre de 1998.

⁴⁶ See "Reglamento de la L.I.E.," transitorio segundo, D.O., 8 de septiembre de 1998.

⁴⁷ See "Reglamento de la L.I.E.," D.O., 8 de septiembre de 1998.

III. GENERAL PROVISIONS

Mexico's Foreign Investment Act of 1993 imposes a number of outright prohibitions and specific legal restrictions on foreign investment.⁴⁸ In general, these are:

Foreign investors are prohibited from investing in a number of important economic areas of the Mexican economy which are exclusively reserved for the Mexican government.

These areas are officially characterized as "strategic" and include:

- a) oil,
- b) nuclear energy,
- c) radioactive minerals,
- d) satellite communications,
- e) telegraph,
- f) radiotelegraphic services,
- g) postal services,
- h) issuance of paper money,
- i) minting of money and
- j) "any other activity explicitly mentioned by the applicable legal provisions."⁴⁹

Certain economic activities and enterprises are exclusively reserved to Mexican citizens and Mexican companies with an Exclusion of Foreigners Clause.

These activities include:

- a) national land transportation for passengers, tourism and cargo, not including messenger and package-delivery services;
- b) retail gasoline sales and liquefied petroleum gas;
- c) radio broadcasting services and other services in radio and television, other than cable television;
- d) credit unions;
- e) development banking institutions, in conformity with pertinent laws; and
- f) rendering of professional and technical services explicitly mentioned by the applicable legal provisions.⁵⁰

⁴⁸ For a discussion of activities reserved to the government, see 1 MEXICAN LAW TREATISE, *supra* note 6, at 129-30; for a discussion of activities reserved to Mexican nationals, see *id.* at 130-132.

⁴⁹ See 1993 L.I.E., *supra* note 5, art. 5.

⁵⁰ See *id.* art. 6.

Foreign investment in certain activities is limited to maximum percentages of 10%, 25% and 49%.⁵¹

The activity limited to up to 10% FDI is:

- a) cooperatives (i.e., Sociedades cooperativas de producción).⁵²

Those activities limited to up to 25% are:

- a) national air transportation,
- b) air taxi transportation and
- c) specialized air transport.⁵³

Those activities limited to up to 49% are:

- a) corporations controlling financial groups,
- b) credit institutions of multiple banking services,
- c) stock market offices,
- d) stock market experts,
- e) insurance institutions,
- f) bond institutions,
- g) money exchange houses,
- h) general deposit warehouses,
- i) financial leasing offices,
- j) financial factoring corporations,
- k) financial corporations of a limited purpose (referred to in article 103 of the General Credit Institutions Act (Ley General de Instituciones de Crédito),
- l) corporations referred to in article 12 of the Stock Market Act (Ley del Mercado de Valores),
- m) representative shares of fixed capital of investment corporations,
- n) operating corporations of investment corporations,
- o) companies administering retirement funds,
- p) manufacturing and commercialization of explosives, firearms, cartridges, ammunition and fireworks, not including the acquisition and utilization of explosives for industrial and extractive activities, nor for the

⁵¹ See *id.* art. 7. The 1993 L.I.E. was amended by presidential decree in 1996, see “Decreto por el que se reforman, adicionan, y derogan diversas disposiciones de la Ley Federal de Procedimiento Administrativo, de la Ley Federal sobre Metrología y Normalización; de la Ley Minera; de la Ley de Inversión Extranjera; de la ley General de Sociedades Mercantiles y del Código Civil para el Distrito Federal en Materia común, y para toda la República en Materia Federal,” D.O., 24 de diciembre de 1996 [hereinafter 1996 Amendment].

⁵² See 1993 L.I.E., *supra* note 5, art. 7, amended by 1996 Amendment, *supra* note 51

⁵³ See *id.*

manufacturing for explosive mixtures for the use in said activities,

- q) printing and publication of newspapers to be circulated exclusively within the Mexican territory,
- r) series "T" shares of corporations holding property in agricultural, livestock and forestry lands,
- s) freshwater and coastal fishing and fishing in the Exclusive Economic Zone (EEZ), not including aquaculture,
- t) comprehensive port management,
- u) pilotage port services for vessels engaged in inland navigation, in accordance with the applicable Act,
- v) shipping companies engaged in the commercial operation of vessels in inland and coasting-trade navigation, with the exception of tourism cruises and the exploitation of dredges and shipping artifacts for the construction, conservation and operation of ports,
- w) supply of fuel and lubricants for vessels, aircraft and railroad equipment and
- x) companies holding concessions pursuant to articles 11 and 12 of the Federal Communications Act (*Ley Federal de Telecomunicaciones*).⁵⁴

Finally, there are certain economic activities which require a favorable and express resolution by the National Commission of Foreign Investments (*Comisión*) to participate in a larger percentage than the statutorily authorized maximum of 49%.

These activities include:

- a) port services to vessels engaged in internal navigation operations, such as towing barges, anchorage and lighterage,
- b) shipping companies engaged in the utilization of vessels exclusively for high seas operations (*tráfico de altura*),
- c) companies holding concessions or permits for public service airports,
- d) private services for pre-school education, elementary, junior high, high school, college, university and combinations thereof,
- e) legal services,
- f) companies providing credit information,

⁵⁴ *See id.*

- g) securities rating institutions,
- h) insurance brokers,
- i) cellular telephones,
- j) construction of pipelines for transporting oil and its derivatives,
- k) drilling of oil and gas wells and
- l) construction, operation and exploitation of railroad tracks serving as general means of communication (vía general de comunicación) and the rendering of public service railroad transport.⁵⁵

IV. LEGAL DEFINITIONS AND EXCEPTIONS

A. *Legal Definitions*

Title I of the 1998 Foreign Investment Regulations provides the definitions of several basic concepts in the area of foreign investment, such as “reserved activities,” “activities with a specific regulation,” “foreign capital majority,” “foreign investment participation in the ‘social capital’ of a company” and NACOFI’s “General Resolutions.”⁵⁶

B. *Exceptions to the 1993 L.I.E. made by the 1998 Regulations*

The 1998 Regulations carve out certain exceptions to the language of the 1993 L.I.E. in articles 2, 3 and 4.

In relation with L.I.E.’s article 5, paragraph I, which enumerates those economic activities exclusively reserved for the government of Mexico, the Regulations exclude “activities

⁵⁵ See 1993 L.I.E., *supra* note 5, art. 8; see also, 1996 amendment, *supra* note 51.

⁵⁶ These terms are defined as follows:

“reserved activities,” those activities listed in articles 5 and 6 of the 1993 FIA;

“activities with a specific regulation,” those subject to the 1993 FIA maximum limits of foreign percentile participation;

“foreign capital majority,” foreign investment participation in excess of 49%;

“foreign investment participation in the ‘social capital’ of a company,” the percentage participation of foreign investors in the capitalization of a company, including participation in land trusts, but excluding ‘neutral’ investments;

“General Resolutions,” those criteria that NACOFI may issue concerning the application of the law and regulations.

See “Reglamento de la L.I.E.,” art. 1, D.O., 8 de septiembre de 1998.

regarding the transport, storage and distribution of [natural] gas different than liquified gas from oil”, as provided by the Reglamentary Act of Article 27 of the Constitution in the Area of Oil.⁵⁷

Pursuant to L.I.E.’s article 5, paragraph III, the following five activities are excluded:

- a) generation of electric energy for self-consumption, co-generation or small production;
- b) generation of electric energy produced by independent contractors for sale to the Federal Commission of Electricity (Comisión Federal de Electricidad or CFE);
- c) generation of electric energy for its export, derived from the co-generation, independent production and small production;
- d) importation of electric energy by individuals or legal entities, destined exclusively to self-consumption for own uses; and
- e) generation of electric energy destined to an emergency use derived from interruptions in the public service of electric energy.⁵⁸

Regarding L.I.E.’s article 8, paragraph X, which requires an express and favorable resolution by the Comisión for foreign investment to participate in a larger percentage than the maximum of 49% statutorily established, in the area of construction of pipelines for transporting oil and its derivatives, the 1998 Regulations exclude “the construction, operation and ownership of pipelines (ducts), installations and equipment relative to the transport and distribution of natural gas,” as provided by the Reglamentary Act of Article 27 of the Constitution in the Area of Oil.⁵⁹

As part of the “strategic areas” exclusively reserved to the Mexican state, L.I.E.’s article 5, paragraph II, includes basic petrochemicals. The 1998 Regulations clarify what should be understood to be basic petrochemicals, namely: a) ethane; b)

⁵⁷ See “Reglamento de la L.I.E.,” art. 2, D.O., 8 de septiembre de 1998. The oil and gas law referred to in this section of the 1998 L.I.E. Regulations is the Reglamentary Act of Article 27 of the Constitution in the Area of Oil. See “Ley Reglamentaria del Artículo 27 Constitucional en el Ramo del Petróleo,” D.O., 29 de noviembre de 1958 [hereinafter Oil Regulations of 1958].

⁵⁸ See “Reglamento de la L.I.E.,” art. 2, D.O., 8 de septiembre de 1998. The electricity law referred to in this section of the 1998 regulations is the Public Service Energy Act. See “Ley del Servicio Público de Energía Eléctrica,” D.O., 22 de diciembre de 1975.

⁵⁹ See “Reglamento de la L.I.E.,” D.O., 8 de septiembre de 1998; *see also* Oil Regulations of 1958, *supra* note 57.

propane; c) butanes; d) pentanes; e) hexane; f) heptane; g) raw materials to produce (Negro de humo); h) naftas; and i) methane, when obtained from hydrocarbons in deposits within Mexico's national territory and when used as raw material in petrochemical industrial processes.⁶⁰

The 1998 Regulations also clarify what should be understood by "Series T shares," referred to in L.I.E.'s article 7, paragraph III, subparagraph (r): series T shares are shares which exclusively represent capital consisting of agricultural, livestock or forestry lands, or capital destined to the acquisition of said lands, as provided by the Agrarian Act (Ley Agraria).⁶¹

L.I.E.'s article 9, in fine, provides that a favorable resolution by the Comisión is required for Mexican companies in which foreign investment seeks to participate, directly or indirectly, in a larger proportion than 49% of its capital stock.⁶² The Regulations provide that this participation regime applies to (i) the acquisition of shares or social parts of companies already established and (ii) companies which do not engage in the conduct of "Reserved Activities"⁶³ or "Activities Subject to a Specific Regulation."⁶⁴ In any of these cases, the total value of the capital and assets shall be the value of the capital and assets as determined by generally accepted accounting principles at the date of filing of the corresponding application.⁶⁵ The Comisión is to determine the percentage of foreign investment by means of a General Resolution.⁶⁶

The 1998 Regulations impose specific duties upon public notaries and officially authorized public brokers to ascertain that requisite official permits and authorizations have been properly obtained from the competent authorities when such notaries and brokers are involved in formalizing any legal acts, such as, contracts, bylaws, acts of incorporation, fideicomisos (trusts) and escrituras públicas, especially in

⁶⁰ *ee* "Reglamento de la L.I.E.," art. 2, para. II, D.O., 8 de septiembre de 1998; *Ley Agraria*, D.O., 26 de febrero de 1992.

⁶¹ *See* "Reglamento de la L.I.E.," art. 2 para. III, D.O. 8 de septiembre de 1998.

⁶² *See* 1993 L.I.E., *supra* note 5, art. 9.

⁶³ *See* "Reglamento de la L.I.E.," arts. 5-6, D.O. 8 de septiembre de 1998.

⁶⁴ *See id.* arts. 7, 9.

⁶⁵ *See* "Reglamento de la L.I.E.," art. 3, para. II, D.O., 8 de septiembre de 1998.

⁶⁶ *See id.*

relation with L.I.E.'s articles 10A, 11, 15, 16 and 17.⁶⁷ In most cases, the authorities involved are SECOFI, the Comisión, SRE and SHCP in acts pertaining to the acquisition of immovable assets, fideicomisos, establishment of companies, their bylaws and other such actions.⁶⁸

V. ACQUISITION OF IMMOVABLE ASSETS

A. *In the Restricted Zone*

The most striking amendment made to the 1993 L.I.E. by the presidential decree of December 24, 1996, was to allow foreign investors "to acquire the ownership of immovable assets located in the Restricted Zone, with a purpose to conduct nonresidential activities."⁶⁹ Foreign investors must report such acquisition to the SRE within sixty working days after the acquisition took place.⁷⁰

In other words, foreign investors are finally recognized as legally capable of acquiring the direct ownership of immovable assets located in a strip of sixty-four miles (100 km.) along the Mexican borders and thirty-two miles (50 km.) along Mexico's coastlines,⁷¹ provided the immovable assets are to be destined to a commercial, industrial or tourism activity (nonresidential activities).⁷²

The evident reason behind this drastic change of policy by the government of Mexico was eminently an economic one. Foreign investors must have felt uneasy investing considerable sums of money—in many cases tens of millions of dollars—constructing luxurious hotels, restaurants, marinas, condos and individual homes facing the ocean on beach front properties, or modern and technologically advanced industrial parks or *maquiladora* centers along the border of the United States, with only the beneficiary use of

⁶⁷ See "Reglamento de la L.I.E.," arts. 10–17, D.O. 8 de septiembre de 1998.

⁶⁸ See *id.*

⁶⁹ See 1993 L.I.E., *supra* note 5, art. 10, para. I, *amended by* 1996 Amendment, *supra* note 51.

⁷⁰ See *id.*

⁷¹ See CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution] Art. 27, para. I. There is a constitutional prohibition against foreigners owning land in this restricted zone. See *id.* Originally known as the "Prohibited Zone," since 1989 this strip of land has been called the "Restricted Zone."

⁷² See "Reglamento de la L.I.E.," art. 5, D.O. 8 de septiembre de 1998.

such property resulting from a real estate trust contract valid for thirty years, or, since 1993, for fifty years, rather than having fee simple title to the property.⁷³ Furthermore, other developing countries in Central and South America and in Asia, do not impose this prohibition.⁷⁴ Additionally, direct foreign investment brings thousands of permanent jobs to Mexico, which needs about one million new jobs every year to satisfy the demands of its growing population.⁷⁵ In addition, these flows of foreign capital may bring leading technologies, modern accounting and managerial practices and new training programs.⁷⁶

A change in policy was required. Permitting foreign investors to directly own immovable assets in Mexico's Restricted Zone could no longer wait. Accordingly, it was included in the 1998 Regulations.

In these cases, foreign investors must still enter into a special and important formal agreement⁷⁷ with the SRE—known as a *Convenio*, referred to in Article 27, paragraph I, of the Mexican constitution—whereby the foreigner, whether an individual or a legal entity, expressly agrees: (1) to be considered as a Mexican national regarding the property in question; (2) not to invoke the protection of his/her government with respect to such property; (3) under penalty of forfeiting to the government of Mexico the property object of the agreement if the agreement is violated.⁷⁸

⁷³ See 1993 L.I.E., *supra* note 5, arts. 5–8.

⁷⁴ *But see* DOING BUSINESS IN PERU 101 (Beatriz Boza ed., 1993) (stating that Peru has its own restricted zone of fifty kilometers from the borders in which foreigners cannot own land in any manner); *but cf.* FOREIGN BUSINESS IN BRAZIL: A PRACTICAL LAW GUIDE 171–72, (Instituto Brasileiro de Direito Transnacional). (1976) (stating that Brazil allows direct ownership of land by foreigners, but restricts the amount of land that they can own).

⁷⁵ See Humberto Ortiz Moreno, *Euforia Financiera Tras los Comicios*, LA JORNADA, July 9, 1997. In an interview, the president of *Centro de Estudios Económicos del Sector Privado*, a consulting group for the private industry, admits that it will not be possible to generate in 1997 the one million jobs that Mexico demands annually. *See id.*

⁷⁶ See 1 MEXICAN LAW TREATISE, *supra* note 6, at 194–96. There are over two thousand foreign manufacturing plants in Mexico, called *maquiladoras*, the goals of which, among other things, is to facilitate technology transfer. *See id.*

⁷⁷ For a sample of this agreement, also known as “*Permiso Artículo 27 Constitucional*.” See 1 MEXICAN LAW TREATISE, *supra* note 6, at 366–68.

⁷⁸ See CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution] art. 27, para. I. This *Convenio* or *Permiso* is also known throughout Latin America as the Calvo Clause. See 1 MEXICAN LAW TREATISE, *supra* note 6, at 361.

This change of policy is quite significant. Since 1917, when Mexico's federal constitution was promulgated, Article 27, paragraph I prohibits foreigners from having direct ownership of immovable assets located within Mexico's Restricted Zone. The Mexican constitution provides:

Article 27, paragraph I Only Mexicans by birth or by naturalization and Mexican commercial societies [*i.e.*, companies] have the right to acquire ownership of lands, waters and their accessions, or to obtain concessions for the exploitation of mines and waters. *The State may grant the same right to foreigners, provided they agree before the Secretariat of Foreign Affairs [SRE] to consider themselves as [Mexican] nationals with respect to said properties and not to invoke the protection of their government in matters relating thereto; under penalty, in case of violation of the agreement, of forfeiting the benefit of the Nation the properties they had acquired by virtue of said agreement. Under no circumstances may foreigners acquire ownership of lands or waters within a strip of one hundred kilometers [64 miles] along the [international] borders and fifty kilometers [32 miles] along the coastline.*⁷⁹

It is unquestionable that the 1993 L.I.E., as amended in 1996, clearly contradicts Article 27, paragraph I, of the federal constitution. Legally, it then can be asserted that L.I.E.'s amended provisions allowing foreigners to have the direct ownership of immovable assets in the Restricted Zone are unconstitutional. However, attacking L.I.E.'s constitutionality would bring disastrous consequences for foreign investors and for the Mexican economy.⁸⁰

Therefore, a more pragmatic legal interpretation should be applied in this case. The 1993 L.I.E. by no means constitutes an isolated legal phenomenon. It is a federal statute that liberalizes, rather than restricts, foreign investment; a modern and flexible act which was enacted with the specific purpose of attracting foreign investment to

⁷⁹ See CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution] art. 27, para. I.

⁸⁰ Direct foreign investment in Mexico amounted to 3.1 billion dollars in the first three months of 2000 and exceeded seventy billion dollars for the years 1994 to 1999 combined, with over 70% of this investment going to the manufacturing sector, whose plants are heavily concentrated near the US-Mexican border. See *Inversión Extranjera*, MOMENTO ECONÓMICO, Vol. 6, Ejemplar 4 & 6 (Apr. and June 2000), available at <http://www.iiec.unam.mx/>.

Mexico and promoting Mexico in the international business and financial arenas.⁸¹ L.I.E.'s 1996 amendments clearly advanced the liberalization of Mexico's foreign investment regime even further and this trend was again enhanced by the 1998 Regulations.⁸² It can be expected that in the near future, probably during Mexico's new presidential administration, both the domestic and international forces will combine to produce a new legal regime which will facilitate, promote and welcome foreign investment in all areas of the Mexican economy.

In addition to the Mexican constitutional law questions which have been raised regarding the apparent discrepancy between Article 27, paragraph I of the federal constitution, on one hand, and the 1993 L.I.E., as amended in 1996, and its 1998 Regulations, on the other, scholars have raised serious issues regarding the validity of the *Convenio* that foreign investors must enter into with the SRE.⁸³

In a nutshell, it is believed that this *Convenio* is contrary to well-recognized international law principles. It is not legally valid for a U.S. citizen, for example, to enter into an agreement with the government of a third country, formally agreeing, *inter alia*, that it is not going to invoke the legal, diplomatic and political protection of the U.S. government.⁸⁴ This individual right is inherent to the notions of nationality and citizenship and cannot be renounced or rejected by a U.S. citizen.⁸⁵ According to the view espoused in the Restatement of Foreign Relations Law, an individual or a company cannot waive its rights because those rights are not theirs to waive.⁸⁶

⁸¹ See 1993 L.I.E., *supra* note 5, art. 1.

⁸² As discussed earlier, the most dramatic example of the liberalization brought by the 1996 amendment is the relaxation of the obstacles to land ownership in the Restricted Zone. See 1993 L.I.E., *supra* note 5, art. 10, para. I; amended by 1996 Amendment, *supra* note 51.

⁸³ The Calvo clause has been criticized as an attempt by countries to shield themselves from international law by forcing the application of their own laws on international disputes. See Justine Daly, *Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens?: Foreign Investment and the Calvo Clause in Mexico after the NAFTA*, 25 ST. MARY'S L.J. 1147, 1167 (1994); see also Paul E. Mason, *The Corporate Counsel's View: International Commercial Arbitration*, 49 DISP. RESOL. J. 22 (1994) (discussing the erosion of the Calvo doctrine in Latin America).

⁸⁴ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 (g) (1986).

⁸⁵ See *id.*

⁸⁶ See *id.*

B. Residential and Nonresidential Activities

L.I.E.'s article 10 introduced the current terminology of "Residential Activities" and "Nonresidential Activities," to indicate the use given to an immovable asset located in the Restricted Zone.⁸⁷ Article 5 of the 1998 Regulations clarifies the meaning of these activities.

1. Residential Activities.

An immovable asset for a residential purpose is that one used exclusively as a dwelling by its owner or by third parties, pursuant to article 5 of the Regulations.⁸⁸

It should be noted that "Residential Activities" tend to be associated with foreign individuals who retire to Mexico⁸⁹ or those who have a "weekend home" in that country.⁹⁰ The investment made by the foreign individual is relatively modest, usually just a condominium or a beach house. Mexico's legal system does not allow such a foreign person to have the direct ownership of the immovable asset in question but only its beneficiary use through a fifty-year real estate trust contract, commonly referred to in Mexico as a *fideicomiso*.⁹¹

Legally, the limited situation of the foreign individual involved in a "Residential Activity" is in stark contrast with the benefits accruing to a major foreign investor, usually a corporation or other legal entity, who invests substantial sums of money in "Nonresidential Activities," such as hotels, marinas, restaurants, bars, warehouses or commercial centers. The 1993 L.I.E., as amended in 1996, and the 1998

⁸⁷ See 1993 L.I.E., *supra* note 5, art. 10; in the 1989 Regulations, the "Nonresidential Activities" were more explicitly referred to as "Industrial or Tourism Activities. See "Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera," D.O., 16 de mayo de 1989, arts. 17 and 19. [hereinafter 1989 Reglamento para Promover] *available at* <http://www.natlaw.com> (copies provided by the National Law Center for Inter-American Free Trade).

⁸⁸ See "Reglamento de la L.I.E.," art. 5, D.O., 8 de septiembre de 1998.

⁸⁹ See *id.* (defining "nonresidential activities"); according to the U.S. Department of State, over a half million American citizens live in Mexico. See Bureau of Western Hemisphere Affairs, Background Notes: Mexico, August 1999, DEPT OF STATE (1999) *available at* http://www.state.gov/www/background_notes/mexico_0899_bgn.html.

⁹⁰ See "Reglamento de la L.I.E.," art. 5, D.O., 8 de septiembre de 1998 (defining "nonresidential activities").

⁹¹ For a discussion of *fideicomisos*, see 1 MEXICAN LAW TREATISE, *supra* note 6, at 351.

Regulations, as explained earlier, allow this foreign company to have the direct ownership of the immovable asset in the Restricted Zone.

2. *Nonresidential Activities*

Immovable assets destined to “Nonresidential Activities” are:

- a) those subject to a time share (tiempo compartido);
- b) those destined to some industrial, commercial or tourism activity, and which may be utilized simultaneously for a residential purpose;
- c) those acquired by credit institutions, financial brokers and credit auxiliary organizations, repossessed to recoup debts in their favor,
- d) those utilized by legal entities to fulfill its social objective (objeto social) which may consist in the alienation, urbanization, construction, lotification and all other activities inherent in the development of immovable projects until they are commercialized or sold to third parties; and
- e) in general, immovable assets destined to commercial, industrial, agricultural, livestock, fishing, forestry and of rendering of services.⁹²

If a question of doubt arises, the SRE shall render an opinion within ten working days.⁹³ If the ten days elapse and there is no opinion, it will be deemed that the immovable asset in question is for “nonresidential activities.”⁹⁴

Given the geographic configuration of Mexico, a considerable amount of the country falls within the Restricted Zone.⁹⁵ Determining whether a piece of real estate

⁹² See “Reglamento de la L.I.E.,” art. 5, D.O., 8 de septiembre de 1998. Article 5 of the 1998 Regulations provides that this list is only “exemplary but not restrictive.” See *id.*

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ Mexico has 4,301 kilometers (km) of borders, multiplying that distance times the 100 km width of the restricted zone yields roughly 430,000 kilometers square (km²) of restricted territory. Mexico also has 11,122 km of coastline that accounts for approximately 550,000 km² of restricted area. These 980,000 km² of restricted land constitute roughly over 40% of Mexico’s total continental land area of 1.96 million km². See Instituto Nacional de Estadística, Geografía, e Informática, *Land Area, Borders, Coastlines and Exclusive Economic Zone*, available at <http://www.inegi.gob.mx/territorio/ingles/extterri/frontera.html> (accessed Sept. 10, 2000). The Baja California peninsula is a narrow stretch of land between 40–240 km wide and thus a large portion of it falls within the restricted zone. See Baja California, Encyclopedia Britannica,

is located within the Restricted Zone may present difficulties. The 1998 Regulations provide that the SRE is to make the final determination, after consulting with the INEGI.⁹⁶

As amended in 1996, L.I.E.'s article 10 provides that foreign investors may acquire ownership over immovable assets located in the Restricted Zone when said assets are destined to "Nonresidential Activities."⁹⁷ In these cases, foreigners should report the acquisition of the real estate in question to the SRE within sixty working days after the property is legally transferred.⁹⁸

In their report to the SRE, foreigners must provide the following information:

- a) the location and description of the asset;
- b) clear and precise description of the uses intended for the asset; and
- c) copy of the public instrument (escritura pública) governing the transaction.⁹⁹

C. Acquisition of Immovable Assets Outside the Restricted Zone

As amended in 1996, the L.I.E.'s article 10A governs the acquisition of immovable assets located outside the Restricted Zone by foreign individuals and foreign legal entities.¹⁰⁰ It is important to point out that, according to article 8 of the 1998 Regulations, foreign individuals and foreign legal entities are legally recognized that they "may accede to the dominion of immovable assets located outside the Restricted Zone, or to obtain *concessions for the exploitation of waters* in [Mexico's] national territory."¹⁰¹

at <http://www.brittanica.com/bcom/eb/article/3/0,5716,11983+1+11893,00.html?query=baja%20california> (last visited Oct. 21, 2000).

⁹⁶ See "Reglamento de la L.I.E.," art. 6, D.O., 8 de septiembre de 1998.

⁹⁷ See 1996 Amendment, *supra* note 51, art. 10.

⁹⁸ See *id.*

⁹⁹ See "Reglamento de la L.I.E.," art. 7, D.O., 8 de septiembre de 1998.

¹⁰⁰ See 1996 Amendment, *supra* note 51, art. 10A. Article 10A details how foreign individuals and foreign legal entities may obtain "concessions for the exploration and exploitation of mines and waters in [Mexico's] national territory." See *id.*

¹⁰¹ See "Reglamento de la L.I.E.," art. 8, D.O., 8 de septiembre de 1998 (emphasis added). Notice the discrepancy of the 1998 Regulations with the language of L.I.E., article 10A (as amended in 1996), which is reproduced in the text corresponding to footnote 98.

In order to acquire immovable assets outside the Restricted Zone, or obtain concessions for the exploitation of waters, all foreigners must:

- a) agree in writing, before the SRE, to the Convenio referred to in Article 27, paragraph I, of the federal constitution, detailing the form and percentage of their investment in the property.¹⁰² When this Convenio is entered into through the applicant's attorney-in-fact, this legal representative must be in possession of either: (a) a special power of attorney making specific reference to the content of the Convenio, or (b) a general power of attorney for acts of ownership.¹⁰³
- b) prove the applicant's legal capacity to engage in such a transaction.¹⁰⁴ Foreign individuals must prove their legal entry and stay in Mexico and the immigration status, which, in accordance with the immigration laws, permits the foreigner to engage in such a legal transaction.¹⁰⁵ Foreign legal entities must prove their legal existence under Mexican law through the submission of the documents enumerated in article 21 of the 1998 Regulations¹⁰⁶ or through the submission of a copy of the authorization referred to in article 17 of the 1993 L.I.E., as amended in 1996.¹⁰⁷

¹⁰² See CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution] art. 27 (Mex.).

¹⁰³ See "Reglamento de la L.I.E.," art. 8, D.O., 8 de septiembre de 1998. For a discussion of a Mexican power of attorney for acts of ownership, see 1 MEXICAN LAW TREATISE, *supra* note 6, at 75.

¹⁰⁴ See "Reglamento de la L.I.E.," art. 8, D.O., 24 de diciembre de 1996.

¹⁰⁵ See *id.*

¹⁰⁶ See "Reglamento de la L.I.E.," art. 21, D.O., 8 de septiembre de 1998. In general, the documents consist of the following: a) the act of incorporation of the legal entity (a company) and the corresponding bylaws; b) a valid power of attorney, formally extended by a notary public; and c) a valid, current and official receipt that the legal entity in question has paid the applicable taxes, as required by Mexico's tax laws. See *id.*

¹⁰⁷ See 1993 L.I.E., *supra* note 5, art. 17, amended by 1996 Amendment, *supra* note 51. This is an official "Authorization" issued by the SRE, acknowledging that the foreign legal entity "is to conduct habitual acts of commerce" in Mexico or that these private legal entities, regarding their "existence, capacity to exercise rights and assume obligations, operation, realization, dissolution, liquidation and fusion," are "governed by the laws of the place where they are incorporated," as mandated by Article 2,736 of the Civil Code of the Federal District (*Código Civil para el Distrito Federal en Materia Común, y para toda la República en Materia Federal*). See C.C.D.F., art. 2,736 (1996).

- c) ensure that all of these documents are translated into Spanish by a duly authorized certified translator (perito traductor autorizado por el Tribunal Superior de Justicia) if written in another language.¹⁰⁸ In addition, they must be “legalized” before a Mexican Consul or, when applicable, comply with the corresponding Apostille requirements,¹⁰⁹ which are controlled by the Convention Abolishing the Requirement of Legalization for Foreign Public Documents.¹¹⁰
- d) Attach, when appropriate, a blueprint with the area, measurements, metes and bounds of the immovable asset in question;¹¹¹ and
- e) Pay the applicable taxes according to the tax laws.¹¹²

When the immovable asset to be acquired is found in a municipality that is located *in its entirety* outside the Restricted Zone, or when a concession is to be obtained for the exploitation of mines and waters in Mexico’s national territory, the corresponding permit is deemed to be granted if the SRE does not publish a denial in the *Diario Oficial de la Federación* within five working days after the application is filed.¹¹³ When the immovable asset in question is found in a municipality that is *partially located* within the Restricted Zone, the SRE is to render a technical opinion within thirty working days following the date of the application.¹¹⁴ The L.I.E., as amended in 1996, provides that the INEGI is to publish a current listing of both types of municipalities in the *Diario Oficial de la Federación* (a publication similar to the U.S. Federal Register).¹¹⁵

¹⁰⁸ See “Reglamento de la L.I.E.,” art. 8, D.O., 24 de diciembre de 1996.

¹⁰⁹ These *Apostille* requirements are published in the Act of Administrative Procedures (*Ley Federal de Procedimientos Administrativos*) of August 4, 1994; see L.F.P.A., art. 19 (1994), available at <http://www.cddhcu.gob.mx/leyinfo/>.

¹¹⁰ Convention Abolishing the Requirement of Legalization for Foreign Public Documents, *opened for signature* Oct. 5, 1961, 33 U.S.T. 883, 527 U.N.T.S. 189.

¹¹¹ See “Reglamento de la L.I.E.,” art. 8, D.O., 24 de diciembre de 1996.

¹¹² See “Reglamento de la L.I.E.,” art. 8, D.O., 8 de septiembre de 1998.

¹¹³ See 1993 L.I.E., *supra* note 5, art. 10A, *amended by* 1996 Amendment, *supra* note 51.

¹¹⁴ See *id.*

¹¹⁵ See *id.*

D. *Fideicomisos over Immovable Assets in the Restricted Zone*

Under Mexican law,

[A *fideicomiso*] is a trust contract that allows a U.S. citizen [or any other individual foreigner in Mexico] to have the beneficiary right of a piece of coastal real estate for a period of fifty years. A Mexican citizen with a beautiful piece of property in Puerto Vallarta, for example, agrees to grant “beneficiary rights” to a U.S. citizen, who pays the Mexican an agreed price for that piece of real estate. Since the U.S. citizen cannot be the “direct owner” of such real estate because of a constitutional prohibition [Article 27, paragraph I of the Mexican constitution], the U.S. citizen pays the Mexican national to be able to have only the “beneficiary rights” of said property, utilizing the services of a Mexican bank who has been expressly authorized by the SRE to transact this kind of trust contract. The Mexican national receives the agreed price for his/her coastal property, the U.S. citizen enjoys the place for fifty years, and the Mexican bank, who holds the legal title of that property, charges the U.S. citizen for services rendered in this respect.¹¹⁶

1. *Permit Needed from the SRE*

The 1998 Regulations require that the applications submitted to authorized banking institutions to execute *fideicomiso* contracts and obtain the corresponding permit. Once the foreigner in question has entered into the Article 27 *Convenio*, the application permit must contain the following information:

- a) name and nationality of the trustors (fideicomitentes);
- b) name of the banking institution acting as a fiduciary;
- c) name and nationality of the beneficiaries (fideicomisarios) and, when appropriate, second beneficiaries and substitute beneficiaries;
- d) duration of the *fideicomiso*;
- e) use to be given to the immovable asset;
- f) description, location and area of the immovable asset in question;

¹¹⁶ See 1 MEXICAN LAW TREATISE, *supra* note 6, at 354.

- g) distance [in meters] of the immovable asset from the Federal Maritime Land Zone.¹¹⁷

Whether involving foreign individuals or foreign legal entities, the SRE shall grant the corresponding permits referred to in article 11 of the L.I.E., when the application provides the information listed above and when the real estate object of the *fideicomiso* is destined to:

- a) industrial parks and industrial land developments;
- b) hotels and motels;
- c) industrial shells;
- d) commercial centers;
- e) research centers;
- f) tourism developments, provided they do not include immovables destined to “Residential Activities;”
- g) marinas for tourism purposes;
- h) docks and industrial and commercial installations established therein; and
- i) establishments geared towards the production, transformation, packing, conservation, transport or storage of agricultural, livestock, forestry and fishing products.¹¹⁸

2. *Specific Conditions with which Fideicomiso Contracts Must Comply*

Article 11 of the 1998 Regulations enumerates the conditions that apply to *fideicomiso* contracts in relation to article 11 of the L.I.E. 1993:

- a) The escritura pública must include verbatim the Convenio (also known as the Calvo Clause) referred to in article 27 of the Mexican constitution.¹¹⁹
- b) During the *fideicomiso*’s legal existence, the fiduciary institution must hold the title of the immovable assets object of the contract, which must not grant realty rights over said asset but only beneficiary rights to the beneficiary(ies) (*fideicomisarios*).¹²⁰
- c) The fiduciary institution in question must submit to the SRE, no later than April of each year, a report of

¹¹⁷ See “Reglamento de la L.I.E.,” art. 9, D.O., 8 de septiembre de 1998.

¹¹⁸ See *id.* art. 10.

¹¹⁹ See CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [Constitution] art. 27 (Mex.). For the three essential components of the *Convenio*, see *supra* note 78.

¹²⁰ See “Reglamento de la L.I.E.,” art. 11, para. II, D.O., 8 de septiembre de 1998.

fideicomisos authorized in cases of fiduciary substitution, as well as the designation of substitute beneficiaries or cession of beneficiary rights in favor of individuals or legal entities, or of Mexican companies with an Admission of Foreigners Clause, when the assets in question are destined to “Residential Activities.”¹²¹

- d) The beneficiaries are legally obligated to report to the fiduciary institution on the compliance of the fideicomiso’s goals.¹²² This institution is in turn obligated to report to the SRE on this matter, when required to do so, provided there are reasons that suggest noncompliance with the conditions under which the SRE’s permit was granted.¹²³

In case of noncompliance, or of violation of any of the conditions established by the corresponding permit, the fiduciary institution shall have a period of sixty working days to mend or correct the irregularities from the date of reporting the irregularities to the SRE.¹²⁴ In case of omission, paragraph 7 below shall apply.

- e) The fiduciary institution must obtain a prior permit from the SRE regarding the expansion of the substance of the fideicomiso, and any changes in its objectives.¹²⁵
- f) The fiduciary institution must formally agree to report the termination of the fideicomiso to the SRE within forty working days following the date of termination.¹²⁶
- g) The parties in the contract must agree to terminate the fideicomiso at the request of the SRE, within a period of 180 days from the date of the request, in cases of noncompliance or violation of any of the conditions established in the corresponding permit.¹²⁷

Permits referred to in article 11 of the 1993 L.I.E. do not excuse noncompliance with the plans and programs of urban

¹²¹ See *id.* para. III.

¹²² See *id.* para. IV.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.* para. V.

¹²⁶ See *id.* para. VI.

¹²⁷ See *id.* para. VII.

development and ecological ordering of the place where the asset is located, nor of the criteria of sustainable development policies.¹²⁸

E. Crucial Role Played by the SRE

In recent years, the SRE has been playing an increasingly important and supervisory role regarding *fideicomisos*. The SRE's official activities are not only exercised over the Mexican banking institutions who must be expressly authorized by the SRE to render services as fiduciaries in *fideicomiso* contracts and other legal transactions, but also over the foreign beneficiaries, whether individuals or legal entities.¹²⁹

Thus, article 13 of the 1996 amended version of the 1993 L.I.E. provides that the SRE "may verify at any time" the compliance of the conditions under which the SRE's corresponding permits were extended and "the submission and veracity of the information" provided by the applicants.¹³⁰

In general, the SRE's supervisory functions are conducted to ensure that the Mexican fiduciary institutions are performing their functions properly and efficiently, in compliance with the applicable laws. In addition, the SRE keeps detailed information as to the number, type of activities, size, geographical location, objectives, substitute beneficiaries, etc., of each *fideicomiso* transaction, paying particular attention to the names and nationalities of foreign beneficiaries, whether these are foreign individuals, foreign legal entities or Mexican legal entities with foreign investment.¹³¹

No doubt, the information thus gathered by the SRE, jointly with similar information obtained from other federal agencies, such as, SECOFI, SHCP, INEGI and the *Comisión*, may eventually be utilized for tax purposes, including the application of bilateral agreements that Mexico has entered with a considerable and growing number of countries—including the United States and Canada—on double taxation

¹²⁸ See *id.*

¹²⁹ See "Reglamento de la L.I.E.," art. 10, D.O., 8 de septiembre de 1998.

¹³⁰ See 1993 L.I.E., *supra* note 5, art. 13, D.O., amended by 1996 Amendment, *supra* note 51.

¹³¹ See "Reglamento de la L.I.E.," art. 9–11, D.O., 8 de septiembre de 1998.

and on the exchange of information to investigate possible tax evasions.¹³²

Finally, it should also be recalled that according to the 1993 L.I.E., the SRE has ample and exclusive discretion to decide whether a permit for the establishment of a given *fideicomiso* may or may not be granted.¹³³ In deciding this matter, the L.I.E. provides that the SRE is to grant these permits “taking into consideration the economic and social benefit that the conduct of these operations produces for the [Mexican] nation.”¹³⁴

F. *Fideicomiso Extensions*

Originally, *fideicomisos* were created for a period of thirty years.¹³⁵ The 1989 Regulations added for the first time in Mexico’s legislative history on foreign investment, that this period may be extendable under certain conditions.¹³⁶ Article 13 of the 1993 L.I.E. extended the *fideicomisos* period, specifying that *fideicomisos* may be valid “for a maximum period of fifty years,” clarifying that “this period may be extended at the request of the interested party.”¹³⁷

The 1998 Regulations explain that, the interested parties, through fiduciary institutions, should apply to the SRE for an extension of the *fideicomiso* within ninety working days prior to the termination of the respective contract.¹³⁸ Interestingly, the Regulations state that the extension shall be granted provided that the original conditions imposed by the SRE remain in place and are being complied with.¹³⁹

¹³² See Agreement for the Exchange of Information With Respect to Taxes, November 9, 1989, U.S.-Mex., Hein’s No. KAV 2491; Convention Between Canada and the United Mexican States for the Exchange of Information With Respect to Taxes, March 16, 1990, Can.-Mex., available at LEXIS, Int’l Bureau of Fiscal Documentation Tax Treaties Library.

¹³³ See 1993 L.I.E., *supra* note 5, art. 10A, amended by 1996 Amendment, *supra* note 51.

¹³⁴ See *id.* art. 14.

¹³⁵ See Jorge A. Vargas, *Mexico’s Legal Revolution: An Appraisal of Its Recent Constitutional Changes, 1988–1995*, 25 GA. J. INT’L & COMP. L. 497, 534 (1996).

¹³⁶ See *id.*

¹³⁷ See 1993 L.I.E., *supra* note 5, art. 13, amended by 1996 Amendment, *supra* note 51.

¹³⁸ See “Reglamento de la L.I.E.,” art. 12, D.O., 8 de septiembre de 1998.

¹³⁹ See *id.*

VI. COMMERCIAL COMPANIES

Under Mexican law, permission from the SRE is required for the establishment of companies anywhere in Mexico.¹⁴⁰ The SRE must also issue a permit so that already established companies may change their commercial names.¹⁴¹

For foreign investment purposes, companies in Mexico may be divided into two large categories: 1) companies with an *exclusion* of foreigners clause, prohibiting any foreign investment; and 2) companies with an *admission* of foreigners clause, allowing foreign investors to participate.¹⁴²

The SRE must give its permission when a company substitutes its clause excluding foreigners for one admitting foreigners.¹⁴³ The company in question must apply to the SRE for a permit within the following thirty days after the modification takes place.¹⁴⁴ Furthermore, if the company has direct ownership of immovable assets within the Restricted Zone destined to “nonresidential activities,” that company must report the modification to the SRE within thirty days after the change takes place.¹⁴⁵

The 1998 Regulations establish specific obligations for companies admitting foreigners or for changing their commercial name.¹⁴⁶ These obligations principally consist of a series of administrative requirements that must be satisfied within certain deadlines.¹⁴⁷ For example, companies admitting foreign investors, must enter into the Article 27, paragraph I *Convenio*, which must be reproduced *verbatim* in the corresponding company’s bylaws.¹⁴⁸ This *Convenio* applies to all foreign investors (shareholders), current or future, who contract with the SRE to be considered as Mexican nationals regarding:

¹⁴⁰ See 1993 L.I.E., *supra* note 5, art. 15, amended by 1996 Amendment, *supra* note 51.

¹⁴¹ See *id.*, art. 16. For a discussion of Mexican companies, see 1 MEXICAN LAW TREATISE, *supra* note 6, at 231–75.

¹⁴² See generally “Reglamento de la L.I.E.,” D.O., 8 de septiembre de 1998.

¹⁴³ See 1993 L.I.E., *supra* note 5, art. 16, amended by 1996 Amendment, *supra* note 51.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See “Reglamento de la L.I.E.,” arts. 16–18, D.O., 8 de septiembre de 1998.

¹⁴⁷ See *id.*

¹⁴⁸ See “Reglamento de la L.I.E.,” art. 14, D.O., 8 de septiembre de 1998.

- a) shares, social parts (*partes sociales*) or rights acquired by said companies;
- b) assets, rights, concessions, participation or legally controlled interests by said companies; and
- c) rights and obligations derived from the contracts in which said companies are a party.¹⁴⁹

Furthermore, the *Convenio* must include a formal renunciation not to invoke the protection of their respective governments under penalty, in case of violation, of forfeiting the rights and assets to the benefit of the Mexican nation.¹⁵⁰

Once the SRE issues the corresponding permits for the establishment of a company or for the change of the commercial name, these permits become canceled if they are not picked up by the interested parties within twenty working days after issuance.¹⁵¹ When the interested parties retrieve these permits on time, they have ninety working days from the date the permits were issued by the SRE to appear before a notary public or a public broker to execute the corresponding legal document reflecting the new situation.¹⁵² If the permits are not used within the ninety-day period, they become cancelled.¹⁵³ The 1998 Regulations also require companies and other legal entities to report to the SRE any liquidation, mergers or spin-offs within one month of taking effect.¹⁵⁴

The L.I.E., as amended in 1996, requires foreign legal entities “who intend to undertake habitually acts of commerce in the Republic of Mexico,” and those governed by Article 2,736 of the Civil Code for the Federal District (*Código Civil para el Distrito Federal*), to obtain a special authorization from the SECOFI.¹⁵⁵ This authorization is to be granted if the following requirements are complied with:

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *See* “Reglamento de la L.I.E.,” art. 16, D.O., 8 de septiembre de 1998.

¹⁵² *See id.*, art. 17.

¹⁵³ *See id.*

¹⁵⁴ *See* “Reglamento de la L.I.E.,” art. 18, D.O., 8 de septiembre de 1998. This requirement is deemed to be met if the company in question has already reported the change to the Secretariat of the Treasury and Public Credit (*Secretaría de Hacienda y Crédito Público* or SHCP), who must then transfer this information to the SRE within three months. *See id.*

¹⁵⁵ *See* 1993 L.I.E., *supra* note 5, art. 17, *amended by* 1996 Amendment, *supra* note 51. Article 2,736 of the Civil Code for the Federal District governs local representatives who act as agents of foreign entities or persons. *See* C.C.D.F., art. 2,736 (1996).

- a) the legal entities prove that they are established in accordance with the laws of their country;
- b) the act of incorporation, the by-laws and other important corporate documents are not contrary to the principles of public order established by the Mexican laws;
- c) the foreign legal entity has already established an agency or a branch in Mexico, or has a legal representative who is legally liable for any contracted obligations, domiciled in the place where commercial transactions take place.¹⁵⁶

The applications that comply with all the requirements are to be granted by SECOFI within fifteen working days of the date of application.¹⁵⁷ If there is no official answer after this period of time has elapsed, the application is deemed to be approved.¹⁵⁸

VII. NEUTRAL INVESTMENT BY FOREIGN LEGAL BUSINESS ENTITIES

“Neutral Investment” is a peculiar concept introduced in Mexico by the 1989 L.I.E. Regulations. The concept has been expanded somewhat by the 1993 L.I.E.¹⁵⁹ and is now detailed by the 1998 Regulations.¹⁶⁰ In general, “Neutral Investment” is the amount of capital SECOFI authorizes a foreign investor to contribute through a fiduciary institution or an international development institution (*sociedad financiera internacional para el desarrollo*) which is not included as part of the calculations to determine the foreign ownership interests in a Mexican business entity.¹⁶¹

¹⁵⁶ See 1993 L.I.E., *supra* note 5, art. 17A, amended by 1996 Amendment, *supra* note 51.

¹⁵⁷ See 1993 L.I.E. *supra* note 5, art. 17A.

¹⁵⁸ See *id.* See also “Reglamento de la L.I.E.” art. 21, D.O., 8 de septiembre de 1998 (describing the information and documents that the foreign legal entity must include in its application to SECOFI. These documents are the same as those described in *supra* note 106).

¹⁵⁹ Article 18 of the 1993 L.I.E. defines “neutral investment” as that “invested in Mexican companies or in authorized fideicomisos...[whose amount of capital] is not taken into account [by the Mexican government] in calculating the percentage of foreign investment in the capital stock of Mexican companies.” See 1993 L.I.E., *supra* note 5, art. 18.

¹⁶⁰ See “Reglamento de la L.I.E.,” tit. 5, D.O., 8 de septiembre de 1998.

¹⁶¹ For a more detailed definition, see 1 MEXICAN LAW TREATISE, *supra* note 6 at 148.

The 1998 Regulations provide that foreign legal business entities both to be established and to operate commercially in Mexico must first obtain an “authorization” from SECOFI.¹⁶² The corresponding application must include this information:

- a) general identification of the applicant;
- b) description of the economic activity intended to take place in Mexico;
- c) act of incorporation or any other official legal document proving the establishment and incorporation of a Mexican business entity, as well as its bylaws;
- d) valid and appropriate power of attorney extended by a notary public;
- e) valid, current and official receipt that the legal entity in question has duly paid the applicable taxes, as required by Mexico’s tax laws.¹⁶³

All the documents must be submitted in original and a copy; duly legalized and translated into Spanish when needed.¹⁶⁴ After these documents are formally reviewed by SECOFI, then the originals shall be sent back and the copies retained for SECOFI’s file.¹⁶⁵

Article 19 of the 1993 L.I.E. provides that SECOFI may authorize “fiduciary institutions to issue neutral investment instruments which shall only entitle the holder to pecuniary rights in a company and, in some cases, to limited corporate rights without granting their holders voting rights in the company’s General Ordinary Assemblies.”¹⁶⁶ In these cases, SECOFI must authorize the establishment or modification of any *fideicomisos* with neutral investments, as well as transfers of shares, regardless of the activity by the company interested in following this avenue.¹⁶⁷ To obtain this authorization, both fiduciary institutions and trustor companies (*sociedades fideicomitentes*) must submit (in original and one copy):

- a) written application detailing the identification of the fiduciary institution and, when appropriate, the economic activity and share structure of the

¹⁶² See 1993 L.I.E., *supra* note 5, art. 17.

¹⁶³ See “Reglamento de la L.I.E.,” art. 21, D.O., 8 de septiembre de 1998.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See 1993 L.I.E., *supra* note 5, art. 19.

¹⁶⁷ See “Reglamento de la L.I.E.,” art. 22, D.O., 8 de septiembre de 1998.

company which intends to transfer its shares to the fideicomiso assets (patrimonio fideicometido);

- b) draft of the fideicomiso contract or, when pertinent, of the modifications intended to be made to a previously authorized fideicomiso; and
- c) the corresponding tax receipt.¹⁶⁸

According to the 1993 L.I.E., foreign investment may be made in capital stock with no voting rights or with limited corporate rights; however, for this investment to be considered “Neutral Investment,” SECOFI’s prior and express authorization must be obtained and, when applicable, authorization from the National Securities Commission (*Comisión Nacional de Valores*).¹⁶⁹ In this regard, the 1998 Regulations provide that legal business companies already established or to be established, independently of their commercial activities, must obtain a previous authorization from SECOFI to be able to issue that special series of shares considered “Neutral Investment.”¹⁷⁰ To obtain this authorization, applicant legal entities must submit (in original and one copy):

- a) written application detailing the general identification data, of a corporate nature and of the economic activity to take place in Mexico;
- b) valid, current and official receipt that the legal entity in question has duly paid the applicable taxes, as required by Mexico’s tax laws.¹⁷¹

Under the 1998 Regulations, international financial development institutions are foreign legal entities whose purpose mainly consists of promoting the economic and social development of developing countries through contributions of capital of temporary risk, granting of preferential financing or technical support of different types.¹⁷²

To be able to make “Neutral Investment” capital contributions to Mexican legal entities, as provided by article 22 of the L.I.E., the institutions must first be officially recognized by the *Comisión*.¹⁷³ To obtain recognition, foreign legal entities must submit the following:

¹⁶⁸ *See id.*

¹⁶⁹ *See* 1993 L.I.E., *supra* note 5, art. 20.

¹⁷⁰ *See* “Reglamento de la L.I.E.,” art. 23, D.O., 8 de septiembre de 1998.

¹⁷¹ *See id.*

¹⁷² *See id.* art. 24.

¹⁷³ *See id.* art. 25.

- a) a duly filled out questionnaire (original and one copy) with the applicant's general identification data and corporate information;
- b) act of incorporation, minute, certificate or any other formal legal document proving its establishment, and the corresponding by-laws;
- c) financial reports covering the last fiscal exercise, when said international entity is at least one year old; and
- d) financial reports projecting its activities into the next three years, in the case the international entity has been in existence for one year or less.¹⁷⁴

All the documents must be submitted in original and a copy; duly legalized and translated into Spanish when needed.¹⁷⁵ The Regulations reiterate that international legal entities of this kind must first obtain a favorable resolution of the *Comisión* to participate in the capital of Mexican business entities who are engaged in "Reserved Activities" or "Activities with Specific Regulations."¹⁷⁶

VIII. THE *COMISIÓN*, THE NATIONAL COMMISSION OF FOREIGN INVESTMENTS

For decades, since its creation in 1973, the *Comisión* has been a pivotal entity in formulating, authorizing and reviewing Mexico's legal regime applicable to foreign investment.¹⁷⁷ This official and multi-institutional body is the architect of the technical and complex set of policies that govern foreign investment, the official interpreter of any statutory provisions in this key area of the Mexican economy¹⁷⁸—in particular the L.I.E. of 1993, its amendments in 1996 and the current 1998 Regulations—and the federal

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* See also 1993 L.I.E., *supra* note 5, art. 5–9 (listing the activities reserved exclusively for the State and Mexican companies).

¹⁷⁷ See 1 MEXICAN LAW TREATISE, *supra* note 6, at 113–114.

¹⁷⁸ See "Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera," arts. 11–17, D.O., 9 de marzo de 1973. Rather than relying upon the interpretations rendered by Mexico's federal court system, Mexico relies exclusively on the official and administrative opinions (formally known as the "General Resolutions" of the *Comisión*) rendered by the executive power through the *Comisión* and SECOFI. In large part this is due to the centralist system which is controlled by the executive power in that country.

body that adjusts and molds these statutory provisions into the Mexican economic, legal and political arenas.¹⁷⁹

Pursuant to the 1993 L.I.E., the *Comisión* is composed of representatives from nine federal agencies and is presided over by SECOFI's secretary.¹⁸⁰ Its formal functions include:

- a) issuing policy guidelines on foreign investment matters and to design mechanisms to promote investment in Mexico;
- b) deciding through SECOFI, on the appropriateness and, when pertinent, on the terms and conditions of the participation of foreign investment in the activities and acquisitions under a specific regulation, pursuant to articles 8 and 9 of the L.I.E.;
- c) acting as the organ of compulsory consultation on foreign investment matters for agencies and entities of the Federal Public Administration;
- d) establishing the criteria and requirements for the application of the substantive and regulatory provisions on foreign investment, through the issuance of "General Resolutions;"¹⁸¹ and
- e) any other pertaining to it in accordance with the L.I.E.¹⁸²

The *Comisión* operates through a working executive secretary and a committee of representatives.¹⁸³ This committee is composed of public servants of each of the federal agencies who form the *Comisión* and who have only the powers delegated by the *Comisión*.¹⁸⁴

The 1998 Regulations detail that the *Comisión's* executive secretary is to be designated by the president of the *Comisión*.¹⁸⁵ Members of the committee of representatives must be undersecretaries or serve in an equivalent position.¹⁸⁶

Matters submitted for consideration to the *Comisión* are to be resolved either in a session of the *Comisión's* members, or through a written opinion of each of these members or those who compose the committee of representatives, within

¹⁷⁹ 1 MEXICAN LAW TREATISE, *supra* note 6, at 116-18.

¹⁸⁰ *See* 1993 L.I.E., *supra* note 5, arts. 23-24.

¹⁸¹ *See id.* art. 26.

¹⁸² *See* 1993 L.I.E., *supra* note 5, art. 24.

¹⁸³ *See id.*

¹⁸⁴ *See id.* art. 25.

¹⁸⁵ *See id.* art. 26.

¹⁸⁶ *See* "Reglamento de la L.I.E.," art. 26, D.O., 8 de septiembre de 1998.

five working days.¹⁸⁷ If no opinions (votes) or objections are given during this period, the matter is deemed to have received a favorable vote.¹⁸⁸ The *Comisión's* technical secretary must send to each member of the *Comisión*, a written report on the resolutions submitted to their consideration within seven days following the date of adoption of the resolutions.¹⁸⁹

The meetings of the *Comisión* may be convoked by its president or by its executive secretary; members of the committee of representatives, or by the technical secretary.¹⁹⁰

For the *Comisión* to resolve matters submitted to its consideration, applicants must submit to the *Comisión* executive secretary:

- a) a written application (original and one copy) describing the major aspects of the project, as well as the applicant's general information data;
- b) a questionnaire (original and one copy) detailing the type of project to be developed and specific information demonstrating the project's benefits for the Mexican economy;
- c) when the applicant is an individual, current resume or condensed biodata of foreign investor;
- d) when the applicant is a foreign legal entity, an annual report or financial reports duly audited of the last fiscal exercise;
- e) If the applicant is an already established Mexican business legal entity, act of incorporation and duly audited fiscal reports of the last fiscal exercise;
- f) when a branch (*Sucursal*) is intended to be established in Mexico, the act of incorporation and bylaws of the foreign legal entity; and
- g) official receipt proving payment of the applicable taxes.¹⁹¹

All the documents must be submitted in original and a copy, duly legalized and translated into Spanish when needed.¹⁹²

¹⁸⁷ *See id.* art. 27

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See id.* art. 28 (detailing the form and manner of convoking the meetings, requirements for reaching quorum, voting, formal reports, deadlines, etc.).

¹⁹¹ *See id.* art. 29.

¹⁹² *See id.*

IX. THE *REGISTRO*, THE NATIONAL REGISTRY OF FOREIGN INVESTMENTS

Since the very first legal regime on foreign investment was consolidated, applied and restricted in Mexico in 1973, as reflected in the provisions of the first *Ley de Inversión Extranjera*, a *Registro Nacional de Inversiones Extranjeras* (National Registry of Foreign Investments or “*Registro*”)—conceived originally as an official mechanism to supervise, control and especially restrict foreign investment in that country—has been an essential part of Mexico’s legal system.

Contrary to the policy adhered to by most developing countries, which is clearly designed to attract, promote and protect foreign investment, Mexico’s policy in this area continues to adhere to very traditionalist ideas. Although in recent years this policy has developed, reflecting more modern, flexible trends. This shift has been especially designed to promote foreign investment. However, many key areas of the Mexican economy continue to be exclusively reserved for the government of Mexico and otherwise excluded from foreign investment participation.¹⁹³

According to the 1993 L.I.E., the *Registro* is not open to the public.¹⁹⁴ The following categories of companies and investments are recorded in the *Registro*:

- a) mexican companies with foreign investment participation;
- b) foreign individuals or foreign legal entities that routinely conduct acts of commerce in Mexico, as well as subsidiaries of foreign investors established in that country; and
- c) fideicomisos of capital stock or corporate shares over immovable assets and “Neutral Investment” by virtue of which rights are created in favor of foreign investment.¹⁹⁵

The *Registro* originates from SECOFI and is under the direction of the executive secretary of the *Comisión*.¹⁹⁶ With respect to inscriptions, notices, reports and special comments provided by the 1998 Regulations, the *Comisión* is divided into three sections:

First Section: Of individuals and foreign legal entities;

¹⁹³ See 1993 L.I.E., *supra* note 5, arts. 5–6.

¹⁹⁴ See *id.* art. 31.

¹⁹⁵ See *id.* arts. 31–32.

¹⁹⁶ See “Reglamento de la L.I.E.,” art. 30, D.O., 8 de septiembre de 1998.

Second Section: Of Mexican legal business entities; and
Third Section: Of fideicomisos.¹⁹⁷

The 1998 Regulations provide in great detail the manner in which the inscriptions at the *Registro* are to take place, such as, the requirements, documents to be enclosed, payment of taxes, and deadlines,¹⁹⁸ whether they apply to: 1) registration of individuals; 2) registration of foreign legal entities; or 3) registration of Mexican business entities.¹⁹⁹

Regarding the registration of *fideicomisos*, the 1998 Regulations detail the specific obligations pertaining to the fiduciary institutions in this respect.²⁰⁰ The 1998 Regulations also impose a number of provisions detailing the manner in which individuals, foreign legal entities and Mexican legal business entities are obligated to renew their registration every year.²⁰¹

The 1998 Regulations also impose a number of detailed and specific obligations upon public notaries and public brokers regarding the inscription in the *Registro* of numerous legal transactions that they are formally required to perform under Mexican law.²⁰² Severe sanctions are imposed to these semi-official functionaries when they do not comply with what is provided by the applicable laws.²⁰³

X. CONCLUSIONS

Since the enactment of the 1989 Regulations, Mexico's legal regime has become more modern and flexible, more efficient and promotional, clearer and in closer symmetry with global economic trends. These progressive policies are reflected in the *Ley de Inversión Extranjera* and its amendments in 1996 and, now in the 1998 Regulations.

¹⁹⁷ See *id.* art. 31.

¹⁹⁸ See *id.* art. 38.

¹⁹⁹ See *id.* art. 35.

²⁰⁰ See *id.* arts. 41–42. To obtain the registration of the *fideicomisos* and maintain current the information presented to the *registro*, the fiduciary institutions should provide the date of the celebration of the *fideicomiso*, the identification, data and residence of the fiduciary institution and of the fiduciary delegate; the name of the persons authorized by the fiduciary to hear and receive notifications, and the data to determine nationality, origin, value, and general characteristics of the investment made in the country through the *fideicomiso*, as well as the general data of the *fideicomiso* contract. See *id.*

²⁰¹ See *id.* art. 43 (requiring that registration be renewed during the first seven months of the calendar year).

²⁰² See *id.* at arts. 44–45.

²⁰³ See 1993 L.I.E., *supra* note 5, arts. 37–39.

The 1998 Regulations to Mexico's Foreign Investment Law and the National Registry of Foreign Investments were enacted by the Federal Executive through the SECOFI to clarify, detail and interpret Mexico's complex regulations on foreign investment.²⁰⁴ Their main objective is to ease and expedite foreign investment in Mexico.

As reported by Mexico's former president in his "State of the Union Address" on September 1, 1999, the country has been committed in recent years to a strategy of diversifying its international trade through a growing number of important free trade agreements, such as the one that was recently negotiated with the European Union and went into effect on July 1, 2000.²⁰⁵

In addition, for the first time in its legal and diplomatic history, Mexico is also engaged in a vigorous initiative to negotiate a considerable number of Agreements for the Promotion and Reciprocal Protection of Investments (APPRIS).²⁰⁶ The Mexican Senate has already approved agreements with Spain, Switzerland, Austria, the Netherlands, Germany and the Luxembourg-Belgian Union, and is expected to approve a few more, including one with Japan.²⁰⁷

The proliferation of these free trade agreements and the APPRIS is, no doubt, one of the most progressive steps Mexico has ever taken. The results to be generated by these agreements are expected to produce a profound impact in the important and dynamic area of foreign investment. It is hoped that the political and legal philosophies that triggered this unprecedented international development will move Mexico to reflect this progressive trend by adopting more liberal and less complicated legal regulations on foreign investment in the near future.

²⁰⁴ See 1993 L.I.E., *supra* note 5; see also "Reglamento de la L.I.E.," D.O., 8 de septiembre de 1998.

²⁰⁵ See Ernesto Zedillo Ponce de León, Presidente de los Estados Unidos Mexicanos, Consideraciones sobre el avance social, económico, y político de la nación, 1 de septiembre de 1999. See also *supra* note 38 and the accompanying text.

²⁰⁶ See *Análisis*, *supra* note 33.

²⁰⁷ See *id.*; see also Tratado de Libre Comercio: Búsqueda de TLC con Japón – crecimiento económico del TLC, 6 MOMENTO ECONÓMICO 6, (junio de 2000), at <http://www.iiec.unam.mx/mensajer/2000/v6-06/secext.html> (last visited Oct. 21, 2000).