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The Regulation of Foreign Business in Mexico: Recent Legislation in Historical Perspective

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COMMENT

The Regulation of Foreign Business in Mexico: Recent Legislation in Historical Perspective

I. Introduction

Any foreigner who attempts to do business in Mexico will immediately encounter a legal system which treats the outsider as both a partner and an adversary. The foreigner will find that Mexican legislation limits the avenues of investment which are open to outsiders,[1] constrains the sale of technology or the operation of franchising agreements,[2] and prohibits foreign investment in specified industries.[3] To some foreign observers, these restrictions on doing business in Mexico seem to be nothing more than an expression of irrational nationalism; moreover, critics have argued that the laws of Mexico are actually detrimental to the country's self interest.[4] To understand how such legislation was born and to appreciate the flexibility with which it is administered, one must place these laws in an historical context. In addition, one should analyze the political pressures which affect their execution. Foreign business interests can operate profitably in Mexico; however, they must operate so as to benefit the development of the Mexican nation.[5]

For three centuries, from the time that Cortes landed in 1519 until the independence wars of the nineteenth century, the Spanish maintained a mercantile empire by monopolizing trade relations with their Mexican colony and extracting silver from its soils. Spanish policy was intended to benefit the European monarch, without regard to the devel-

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[1] See Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera (Law on the Promotion of Mexican Investment and the Regulation of Foreign Investment), Diario Oficial [D.O.] (Official Daily of Mexico) (Mar. 9, 1973), reprinted in 12 Int'l Legal Materials 643 (1973) (English translation) [hereinafter cited as Investment Law].

[Editor's note: Diario Oficiál, which publishes the official texts of such materials as the Constitution, laws and regulations of Mexico, will be citd as D.O. throughout the remainder of this article.]

[2] See Ley Sobre el Registro de la Transferencia de Technologia y el Uso y Explotación de Patentes y Marcas (Law on the Transfer of Technology and the Use and Exploitation of Patents and Trademarks), D.O. (Dec. 30, 1972), reprinted in 12 Int'l Legal Materials 421 (1973) (English Translation) [hereinafter cited as Technology Transfer Law].

[3] See Investment Law, supra note 1, art. 4.

[4] See generally Lacey, Technology and Industrial Property Licensing in Latin America: A Legislative Revolution, 6 Int'l Law. 388, 403-05 (1972), for a discussion of Mexico's approach to the regulation of the payment of royalties and technical fees.

[5] See, e.g., id. at 405.

opment of Mexico.[6] The independence movement of the nineteenth century freed Mexico from European rule; yet, Mexico even now has failed to overcome its heritage of colonialism.[7]

Mexican efforts to develop their nation during the early years of this century exacerbated the country's dependence upon foreigners. Before the Revolution of 1910, foreign interests controlled the most productive industries in the country and owned huge areas of the national territory.[8] When the Great Depression ravaged the Mexican economy, the local authorities began to assert a nationalistic aversion to foreign enterprises. In 1938, the movement to achieve economic independence culminated in the expropriation of the assets of foreign oil companies operating in Mexico.[9]

In the past ten years, social scientists throughout Latin America have led the call for a new international economic order, arguing that third world countries should overcome their dependency on the developed world.[10] The political program of the "dependency theorists" is clearcut—pace the industrialization cf Latin America so that domestic needs are served first, reshape the terms of trade for commodity exports by forming producer organizations, and force foreign investors to share more of their profits and their technologies with their hosts through domestic legislation. Although virtually all of the Latin American nations have enacted some sort of legislation intended to control foreign capital, Mexico has been especially thorough and vehement in its attempts to eliminate foreign influence in its domestic economy and to restructure its trade relations with the developed nations.

The Mexican legislature has codified a series of ad hoc administrative procedures which developed out of efforts to achieve economic independence. These laws have explicit purposes. The Law on the Transfer of Technology and the Use and Exploitation of Patents and Trademarks (1972)[11] is an effort to limit the types of technology being purchased by Mexican buyers and thereby eliminate the acquisition of obsolete technologies and the payment of unnecessary royalties. The Law to Promote

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6 D. Cosío Villegas, I. Bernal, A. Toscano, L. Gonzáles & E. Blanquel, A Compact History of Mexico 60-62 (2d ed. 1975) [hereinafter cited as D. Cosío Villegas].

7 Many Latin American economies continue to be oriented toward production for foreign markets rather than for domestic consumption. See generally S. Stein & B. Stein, The Colonial Heritage of Latin America (1970), for insights into Latin American economic history from 1500 to 1900.

8 See F. Brandenburg, The Making of Modern Mexico 37-42 (1964); J. Bazant, A Concise History of Mexico 108-16 (1977).

9 Other countries in Latin America took similar actions in the following decades, culminating with the takeover of all foreign property in Cuba during the Castro regime. For an account of the Mexican oil expropriation, see P. Sigmund, Multinationals in Latin America 55-73 (1980).

10 Some of the better known works of dependency theory include: Furtado, Economic Development of Latin America: A Survey from Colonial Times to the Cuban Revolution (1970); O. Sunkel, El Subdesarrollo y la Teoria del Desarrollo (1971); F. Cardoso & E. Faletto, Dependencia & Desarrolo en America Latina (1969).

11 Technology Transfer Law, supra note 2.

Mexican Investment and Regulate Foreign Investment (1973)[12] is an attempt to reduce foreign domination of the capital markets in Mexico and to promote the "Mexicanization" of existing industries. Finally, the Law of Inventions and Trademarks (1976)[13] is intended to encourage the use of Mexican trademarks by those companies manufacturing in Mexico. The government's goal in all of these measures is to assure the maximum possible reward for Mexico in all dealings with foreigners.

Despite these new laws, U.S. trade with Mexico is booming. The United States now supplies two-thirds of Mexico's imports[14] and U.S. investors account for three-fourths of all the direct foreign investment in the country.[15] Mexico has been able to gain foreign exchange easily from the sale of oil, and her international credit rating has soared.[16] During 1979, Mexico received the third largest loan on record ($2.5 billion) from a consortium of sixty-six worldwide banks, marking the first time in history that the country has been able to get access to international money markets on favorable terms.[17]

Because Mexico is a major market for the United States, it is of crucial importance that lawyers who deal with Mexican trade legislation have an understanding of why Mexico has passed laws that limit foreign access to its markets. Moreover, the administration of Mexican trade legislation has an obvious effect on the terms of trade for any U.S. firm doing business with the Mexicans.

The first section of this comment will provide some basic information on the economic development of Mexico and the historical background for the current laws regarding foreign enterprises. It will conclude with an analysis of Mexican trade policy and with an overview of the current opportunities for trade with Mexico. The second section will discuss the recent law on foreign investment and trade, focusing on how those laws have been administered and how they will affect foreign businesses. The conclusion will highlight the importance of an historical perspective in understanding Mexico's revolutionary legislation.

II. Economic Development in Mexico—The Revolution Past and Present

Mexico is a land of extreme economic and social contrasts. According to most standards of economic development, Mexico should be con-

[12] Investment Law, supra note 1.

[13] Ley de Invenciones y Marcas (Law of Inventions and Trademarks), D.O. (Feb. 10, 1976), selected provisions reprinted in 2 Offner's Int'l Trademark Serv. 1592 (2d ed. Fieldston) (English translation) [hereinafter cited as Trademark Law].

[14] Economic Growth Likely to Slow to 5 Percent in 1982; Policies of New President May Affect Economy, Market, Bus. Am. 22, 23 (Jan. 11, 1982) [hereinafter cited as Economic Growth].

[15] Discovering Mexico Again, Bus. Week 70, 72 (Oct. 1, 1979).

[16] Street, Mexico's Economic Development Plan, 80 Current Hist. 374, 374 (1981).

[17] Frontier of the 80s—Mexico, Bus. Week 23, 27 (Nov. 5, 1979) (special advertising section).

sidered a successfully developed nation: sixty-four percent of the population lives in urban areas,[18] eighty-four percent of the people are literate,[19] and per capita income in 1980 was approximately $2,100.[20] Furthermore, since 1938, the gross national product has grown at an annual rate of not less than five percent (discounted for inflation),[21] and the growth rate for 1980 was 8.3%.[22] In addition to these social and economic achievements, Mexico has shown great political stability. Although Latin America has a tradition of violent politics, Mexico has had an orderly transition of government since 1920 without experiencing any intervention by the armed forces.[23] Such a record should place Mexico in the vanguard of developing nations.

Nevertheless, Mexico has failed to distribute the benefits of economic development to many of its citizens. The rural poor still live in extreme misery, without access to sanitary water, adequate housing, medical care, electricity, or nutritious food.[24] Those who flee the countryside often end up in urban slums. Thirty-two percent of the families in Mexico in 1977 received only the minimum income necessary to purchase their economic necessities, and fourteen and a half percent received less than the minimum.[25] Moreover, the disparity between the rich and the poor has worsened in the past twenty years. In 1958 the richest five percent of Mexican families had an aggregate income twenty-two times as great as the poorest ten percent; in 1977 the richest five percent had twenty-five times as much income as the poorest ten percent.[26]

The economic situation of the poor will not be improved easily. Estimates of the number of underemployed run as high as forty percent or more of the work force,[27] and the country has one of the fastest growing populations in the world. Currently at 70 million, the population is expected to reach 100 million by the year 2000 if a 1972 governmental program of family planning results in a declining rate of population growth.[28] The overcrowded capital, Mexico City, already houses thirty-five percent of the republic's industry and seventy percent of its serv-

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18 González Casanova, The Economic Development of Mexico, Sci. Am., Sept. 1980, at 192, 195.

19 Id. at 202.

20 Id.

21 Id. at 192.

22 Economic Growth, supra note 14, at 23.

23 See D. Cosío Villegas, supra note 6, at 143-45.

24 The author worked in a rural community in Glascala where these problems existed. For sociological statistics, see González Casanova, supra note 18, at 202.

25 Id.

26 Id.

27 M. Olizar, Guide to the Mexican Markets 1976-77, at 35 (9th ed. 1976). Underemployed persons are those persons who are working but are unable to support themselves.

28 González Casanova, supra note 18, at 194. If the historical rate of population growth continues, however, Mexico will have more than 132 million inhabitants in the year 2000. Id.

ices.[29] Clearly, a large proportion of the Mexican people have not shared in the bounty of economic development. Huge areas of the country remain in an economically undeveloped and depressed condition.[30]

Why has Mexico developed in such an uneven fashion? The answer to that question is necessarily complex; the pre-Conquest social structure, the Spanish colonial influence, and the expansion of the world economy have all influenced Mexico's history. Many Mexicans blame their maladies on a single source: the avaricious foreigner. Foreigners have invaded Mexico militarily, and they have profited from the natural resources of the country through their business ventures. During the nineteenth century Mexico struggled through foreign invasions by both France and the United States, and lost one-third of its national territory to its northern neighbor.[31] Additionally, from 1876 until 1910, the country was opened officially to foreign investors because the leadership of Mexico believed that external capital and foreign technological expertise was crucial to the improvement of the country.[32] During this era, the dictatorship of Porfirio Diaz, Mexico was crisscrossed by railroads and telegraph lines. Oil, textile, and steel industries were initiated, and sugar production boomed. Foreigners controlled the assets and reaped the profits from these activities. By 1910, one-seventh of the nation's land and one-half of her total assets were in foreign hands.[33] One percent of the country's inhabitants (foreigners and local landlords) owned ninety-seven percent of the land, while ninety-six percent of the population held two percent of the land.[34]

The result of this maldistribution of wealth was the world's first twentieth century revolution.[35] Rival factions, led by Pancho Villa, Emiliano Zapata, and Venustiano Carranza, struggled for power in a violent chaos which led to the death of one in every ten Mexicans.[36] The eventual victors were the Constitutionalists led by Carranza. They rallied around the Constitution of 1917[37]—a document drawn up by a group of radical intellectuals and approved by a constituent assembly of

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[29] Centro de Estudios del Sector Privido, Analysis de la Potencialidad Economica del Area Metropolitana xiii (1970).

[30] For an analysis of the government's attempts to remedy this situation, see J. Wilkie, The Mexican Revolution: Federal Expenditure and Social Change Since 1910 (2d. rev. ed. 1970).

[31] For an excellent account of U.S.-Mexican relations, see H. Cline, The United States and Mexico (1969).

[32] See C. Reynolds, The Mexican Economy 200 (1970); J. Herget & J. Camil, An Introduction to the Mexican Legal System 13 (1978).

[33] Comment, "Pobre México, Tan Lejos de Dios y Tan Cerca de Los Estados Unidos"—Mexican Foreign Investment Regulation, 2 L. & Soc. Order 280, 282 (1972).

[34] González Casanova, supra note 18, at 195.

[35] Revolution in Mexico: Years of Upheaval, 1910-1940, at 3 (J. Wilkie & A. Michaels ed. 1969).

[36] See C. Cumberland, Mexico: The Struggle for Modernity 235-45 (1968); J. Wilkie, supra note 30, at 24.

[37] Constitución Politica de los Estados Unidos Mexicanos (Mex.), reprinted in 10 Constitutions of the Countries of the World (A. Blaustein & G. Flanz ed. 1982) (1977 O.A.S. translation) [hereinafter cited as Constitution].

Carranza supporters.[38] This Constitution remains the supreme law of the land in Mexico.

However, there are ironies in the Revolution's success. The Revolution did not quash foreign influence in the country; instead, foreigners increased their control over the export industries of Mexico (agriculture, mining, and oil), while small, local businesses languished.[39] Moreover, land reform, which had been the rallying call of the Zapatista faction and the foremost goal of the revolutionary program, was barely attempted until 1934.[40]

The Revolution did have a major impact on the course of Mexican history. One long-lasting result of the Revolution has been the ideological commitment of the Mexican government to social change. The Constitution of 1917 is a truly radical document. Among its features are declarations of the government's right to control subsoil property in Mexico and the workers' right to organize.[41] The Constitution also establishes a republican form of government led by a President who serves a six-year term and cannot succeed himself. The Mexican Chief Executive has rather extraordinary powers—he can propose changes in the laws and veto legislation; he can create law by official decree; he has vast powers of appointment; and he can control budgetary and commercial decisions.[42]

For the past fifty-three years the President has come from a single political party, the Party of the Institutionalized Revolution (PRI). This party dominates all elections in Mexico. PRI is an incorporative organization, granting concessions to the opposition from the left and the right in order to represent all sectors of society.[43] PRI maintains a monopoly position in Mexican politics through a sophisticated manipulation of the political symbols and rhetoric of the Revolution, a selective use of repression, and a system of political compromises.[44]

The leaders of PRI have attempted to foster economic development by relying on the economic elite in the private sector; at the same time, however, they have maintained a commitment to social justice.[45] The result of this development policy has been a mixed economy in which both private and public sectors participate. The government has intervened in the marketplace whenever it has chosen to guide the nation toward social equity by manipulating the economy. Government inter-

[38] See C. Cumberland, supra note 36, at 262-69.

[39] See C. Reynolds, supra note 32, at 203.

[40] See J. Wilkie, supra note 30, at 76, for a summary of land redistribution during the presidency of Cárdenas, 1934-1940.

[41] Constitution, supra note 37, art. 27 (amended 1960, 1975) (subsoil); id. art. 123, § XVI (right to organize).

[42] See Comment, supra note 33, at 289-90; C. Reynolds, supra note 32, at 203.

[43] González Casanova, supra note 18, at 192.

[44] Id.

[45] See generally R. Vernon, The Dilemma of Mexico's Development (1963).

vention has been most noticeable in the regulation of foreign businesses operating in Mexico.

The present laws regarding foreign enterprises in Mexico have developed over the past fifty years. Before 1930, the Mexican government treated private capital—both foreign and domestic—with deference. Mexican presidents wished to avoid both the wrath of the United States government[46] and the possibility of a clash with social elites.[47] Trade policy was not coordinated with the desire for economic development; it consisted of a system of ineffective tariffs designed to protect local industries and produce federal revenues.[48] However, under the regime of President Lázaro Cárdenas (1934-1940), the government began to forge a cohesive program of economic development. Massive social programs were initiated. Land was finally distributed to the people who actually farmed it.[49] A government development bank, the National Financiera, was founded to finance vital industries which private developers refused to fund.[50] The most memorable action of the Cárdenas administration was the expropriation of foreign oil holdings on March 18, 1938, a day still celebrated in Mexico as the beginning of economic independence.[51] When the British and American-owned oil companies refused to negotiate with Mexican workers regarding their demands for more input into management decisions and greater salaries, the government seized the oil wells.[52] After the oil takeover, the government created a monopoly oil company owned by the state (PEMEX) to pump, process, and distribute petroleum.[53]

The creation of a state-owned oil company is indicative of the type of action the Mexican government has taken in order to protect vital industries from foreign domination. The policy of PRI has been to support government intervention in the domestic private sector when that intervention is socially necessary. From the Cárdenas administration until the present, public sector investment has represented at least forty percent of total investment, except for 1955-1961, when it was thirty percent.[54]

On the other hand, PRI has not attempted to eradicate the private

[46] See C. Reynolds, supra note 32, at 203-04.

[47] See González Casanova, supra note 18, at 200.

[48] Nacional Financiera, La Política Industrial, in I La Economía Mexicana: Análisis por Sectores y Distribucíon 194-96 (L. Solís ed. 1973) [hereinafter cited as Nacional Financiera].

[49] J. Wilkie, supra note 30, at 76.

[50] Bus. Int'l Corp., Organizing for Latin American Operations (1962) (Research Report No. 20).

[51] Id. at 9.

[52] See P. Sigmund, supra note 9, at 56-57.

[53] See Latin American Division, U.S. Dep't of Commerce, "Twenty Questions"—A "Mexico Workshop" Handout Covering Issues Most Frequently Raised by New-to-the-Market Suppliers 8 (1980) (describing registration procedures for foreign suppliers desiring to do business with Mexican governmental agencies) (copy available in office of N.C.J. Int'l L. & Com. Reg.) [hereinafter cited as Twenty Questions].

[54] See González Casanova, supra note 18, at 196.

sector within the country, nor have they attempted to ban foreign investment. Rather they have sought to control the use of capital so that it benefits public policy. A cornerstone of that policy has been to change Mexico from an agricultural society into an industrial nation. Through a rather unorthodox trade policy the government has implemented a successful program of import substitution. In other words, the government has established a nucleus of industries producing non-durable consumer goods in order to substitute local products for imported foreign products.[55] The novelty of the Mexican plan for import substitution was that it created protectionist barriers to importation of goods while relying on the importation of foreign capital and manufacturing skills as a key to industrialization.[56] The PRI leadership has attempted to lure the capital and technology of foreigners without relinquishing control of the economy to outsiders. This model of industrialization via import substitution has had a significant impact on laws regarding foreign enterprises in Mexico.

When the government of Mexico embarked on the import substitution policy it found itself in a dilemma. The government needed a legal system which would guarantee foreign investment while, at the same time, controlling it. The militant actions of the Cárdenas administration in the late 1930's scared foreign investors away from the country, while the depression simultaneously reduced Mexico's export earnings. With neither private nor public funds available for the stimulation of industry, Mexico was left with a stagnating economy.[57]

The succeeding administration of Avila Camacho and the advent of World War II brought a tremendous reversal in Mexican industrialization. By negotiating a settlement with the expropriated oil firms, the new president reassured skeptical foreign investors. When World War II disrupted production abroad and cut off imports, the stage was set for a new flood of foreign capital to establish manufacturing industries in the country.[58] Local production of goods skyrocketed. Thus, between 1940 and 1950 Mexico experienced a huge influx of foreign money and technology.[59]

Because of their revolutionary heritage, government officials were already aware of the need to control foreign ownership of assets within the nation. Therefore, they made tentative moves to guarantee that industrialization would serve Mexican needs. On June 29, 1944, President Avila Camacho issued a decree which authorized the executive branch to limit foreign ownership of Mexican corporations to forty-nine percent of

[55] See generally C. Reynolds, supra note 32, at 215-30; see R. Vernon, supra note 45, at 182.

[56] See C. Reynolds, supra note 32, at 251-54, for a discussion of Mexico's program of import substitution.

[57] Id. at 208-09.

[58] See Comment, supra note 33, at 292.

[59] See C. Reynolds, supra note 32, at 239.

the investment capital.[60] Although not immediately enforced, this law did establish a precedent for the "Mexicanization" of import substitution industries. Later, legislation was passed to enable the Mexican President to establish tariff rates, control imports, and regulate foreign trade.[61] The Mexican government thus assumed effective control over foreign influence in the economy.

After 1940, the trade policy of Mexico was selectively protectionist. During this period the government has used two main weapons to protect the domestic economy: import licensing and tariffs. Import licensing was a regulatory scheme first introduced in 1940, but not widely used until 1947.[62] To get a license or permit to bring goods into the country, the importer had to show that the imported products could not be produced in Mexico. The price of producing goods domestically was not a factor in licensing decisions until 1966.[63] This scheme of import restriction has been a basic feature of Mexican commercial policy from 1954 until the present.[64] In 1981, eighty-three percent of the total value of goods coming into Mexico entered under a license from the government.[65] The effect of this import licensing system is to establish quotas on the sale of goods to Mexican consumers from foreign sources.

Tariffs are the second means used to protect domestic industry. The government levied tariffs in order to make imported goods less appealing to the Mexican consumer. From 1930 until 1950 tariff levels remained low compared to those in other Latin American nations. An exception was luxury goods which met a duty of 100 percent.[66] This sort of tariff policy was unusual for a country undergoing import substitution because such nations usually erect high tariff barriers against nearly all imports.

A further anomaly in Mexican protectionism was the fact that the government put no controls on foreign exchange or the repatriation of profits. Both these policies had the effect of maintaining a free flow of trade with the United States, a flow which was furthered by the bilateral reduction of tariffs in 1942.[67] Mexican commercial policies pleased foreign entrepreneurs, especially U.S. firms, and had the effect of encouraging foreigners to underwrite the creation of manufacturing enterprises in Mexico.[68]

Two other PRI policies aided the drive for import substitution. First, the government maintained the stability of the peso against the

60 See Comment, supra note 33, at 294.

61 See Ley Reglamentaria del Parafo Segundo del Articulo 131 de la Constitución Politica de los Estado Unidos Mexicanos (Regulations for the Second Paragraph of Article 131 of the Mexican Constitution), D.O. (Jan. 5, 1981).

62 H. Wright, Foreign Enterprise in Mexico 168 (1971).

63 Id. at 169.

64 See C. Reynolds, supra note 32, at 209; see also Economic Growth, supra note 13, at 23.

65 Economic Growth, supra note 13, at 23.

66 See H. Wright, supra note 62, at 167; C. Reynolds, supra note 32, at 168.

67 See generally C. Reynolds, supra note 32, at 220-30.

68 Id.

dollar for twenty-two years, 1954-1976, thus relieving investors' concerns about the devaluation of their earnings.[69] Second, the government granted huge tax subsidies to manufacturers, almost indiscriminately before 1950,[70] and later with more discretion, in a conscious effort to aid development under the 1954 Law for the Development of New and Necessary Industries.[71] Warmed by these added benefits, foreign corporations returned to the Mexican market.

By the early 1960's, Mexico's leading economists began to argue that the country was entering a new developmental phase and that new consumer commercial policies were needed.[72] Light industries in Mexico were producing successfully because imports of consumer goods had diminished drastically; but Mexico's trade deficit was increasing as exports had declined also.[73] The inefficiency of local industries, that were developed in a hothouse atmosphere of protectionism, resulted in products which were non-competitive on international markets.[74]

Economic critics offered a series of suggestions to deal with the new developmental phase. They argued that Mexico's protectionist controls should be lifted, the export of manufactured goods should be promoted, industry in Mexico should be decentralized, and the government should create more public sector corporations in low-profit, socially necessary industries.[75]

The government took steps during the 1960's to respond in each of these areas. First, it relaxed import licensing requirements to force more efficient management of domestic industries. The Mexican state also granted open-ended import licenses to allow an importer to bring in goods under a series of transactions rather than seeking a license for each transaction. The authorities reduced the waiting period for a license in some cases by making an expedited license possible.[76] They began to grant tax subsidies to businesses which would move into underdeveloped areas.[77] Furthermore, the federal government bankrolled and then operated a number of vital industries as state agencies: a food processing and distribution corporation (CONASUPO),[78] a national producer of fertilizer (FERTIMEX), a Mexican electric utility (CFE), and a steel and

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69 See González Casanova, supra note 18, at 204.

70 H. Wright, supra note 62, at 181.

71 Ley Para el Fomento de las Industrias Nuevas y Necesarias (Law for the Development of New and Necessary Industries), D.O. (Dec. 31, 1954).

72 Balassa, La Industrialización y El Comercio Exterior: Análisis y Proposiciones, in La Sociedad Mexicana: Presente y Futuro 33 (M. Wionczek ed. 2d ed. 1974) [hereinafter cited as Balassa].

73 See R. Vernon, supra note 45, at 180, 182.

74 See C. Reynolds, supra note 32, 213-15.

75 Balassa, supra note 72, at 34; Bueno, Las Perspectivas de la Politica de Desarrollo Industrial en México, 17 Comercio Exterior 891 (1967).

76 H. Wright, supra note 62, at 169.

77 Bus. Int'l Corp., supra note 50, at 11.

78 Nacional Financiera, supra note 48, at 196.

iron manufacturer (SIDERMEX).[79] The laws regarding tax subsidies were tightened so that only the most worthwhile industries benefitted.[80] And finally the government began to promote the "Mexicanization" of industry by encouraging foreigners to share their investment risk with the private sector in Mexico. The Secretariat of Industry and Commerce promoted "Mexicanization" by offering special treatment to those enterprises with a majority of Mexican capital,[81] while the Secretariat of Foreign Relations began to demand the "Mexicanization" of new investment in important categories of industry-air transport, shipping, rubber manufacture, mining, broadcasting, fishing, and soft drink sales.[82]

The paradox of industrialization for a developing nation is that progress in creating new domestic industries increases the country's dependence upon foreign trade. A nation like Mexico cannot rely upon its fledgling domestic market to pay for the costs of industrialization, especially after consumer goods industries have been established, leaving the domestic production of heavy machinery as the next goal. Thus, developing countries must either sell more abroad or borrow extensively in order to finance continued development.[83]

In Mexico, the situation is further complicated by the fact that the government has been committed to social change since 1910. PRI has been continually under pressure to redistribute the benefits of industrialization and to reject foreign domination—difficult tasks in a society where aggregate saving is necessary in order to underwrite the costs of development, and foreign capital and technology are necessary before modernization can proceed. After 1970, it became apparent that Mexico would have difficulty resolving the conundrum of continued development. In that year, Luis Echeverría, a PRI candidate who was widely perceived as a champion of increased social spending, was elected President of the Republic. Echeverría moved to distribute more land to the peasants of Mexico, to increase social services for the poor, and to free Mexico from its dependence on foreign capital and technology.[84] Under the Echeverría administration a legislative revolution occurred when the legislature enacted laws restricting the trade and investment opportunities for foreigners.[85] The new statutes, which will be discussed below, codified administrative policies born during the decades of import substitution.

The Echeverría administration did not seek to reject foreign assist-

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[79] See Twenty Questions, supra note 53, at 8.

[80] H. Wright, supra note 62, at 181-82.

[81] See Comment, supra note 30, at 286-87.

[82] Bus. Int'l Corp., supra note 50, at 12.

[83] See R. Vernon, supra note 45, at 186.

[84] For a critical view of Echeverría's economic policies, see Who's In Charge Here?, Economist, Dec. 4, 1976, at 14.

[85] See supra text accompanying notes 11-13.

ance in developing the country but instead attempted to use foreign capital for nationalistic goals. However, by 1976 Mexico found itself in a financial crisis. Scholars disagree as to whether the social spending of the Echeverría government was a critical factor in bringing Mexico's problems to a head or whether the worldwide recession following the oil embargo of 1973 was more important. But the scholars agree that the Mexican economy was in deep trouble:[86] a deficit of less than $1 billion in 1972 had quadrupled by 1975,[87] inflation had doubled within a year, domestic purchasing had decreased, and unemployment had risen drastically.[88]

On August 31, 1976, the government devalued the peso by almost 100 percent and allowed it to float on the world market. Within a year and a half the economy began to grow again and, spurred by the news that major oil strikes had been made in southeastern Mexico, investment increased. Mexican exports were boosted by the devaluation and began to show a steady growth.[89]

President López Portillo, who took office in 1976, reversed the policies of the previous administration by slashing social spending, decreasing state intervention in the economy, and courting foreign investment.[90] In March, 1979, the Chief Executive unveiled a Global Development Plan for Mexico. The plan demonstrates Mexico's desire to work in conjunction with foreigners in order to develop the nation.[91] Part of the program, the National Industrial Development Plan (NDIP), is intended to make Mexico an exporter of industrial goods.[92] Under the NDIP, the Mexican government offers a supply of cheap energy and a variety of tax subsidies to foreign businesses. In order to qualify for the subsidies, a foreign business must increase employment in underdeveloped areas of the country or produce goods for export abroad.[93] The NDIP also calls for predetermined limits on oil production as a means of slowing inflation and reserving domestic supplies. Although the administration has already eased these production limits, it is clear that Mexico's development model is to be Japan, not Saudi Arabia; therefore, oil sales will be carefully paced, and industrialization will be funded with exports in addition to oil.[94]

What does this program mean for U.S. business opportunities in Mexico? The export trade is booming. Foodstuffs have been one of the primary imports in the last five years. Although Mexico's land reform placated the rural poor, it has left the country unable to feed itself. Since

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86 See C. Tello, La Política Económica en México 1970-76 (3d ed. 1979).
87 Street, supra note 16, at 375.
88 González Casanova, supra note 17, at 204.
89 See id.
90 Id.
91 See Street, supra note 16, at 376-77.
92 Flanigan, Mexico's Drive to Industrialize: The Strategy, Forbes 42, 42 (Oct. 29, 1979).
93 See Street, supra note 16, at 376.
94 See id. at 377; Flanigan, supra note 92, at 42.

the population is growing at an unparalleled rate, the country must now import food to feed its citizens. During 1980 Mexico spent over $2 billion buying food in the United States.[95]

Overshadowing the demand for food imports will be the thirst for heavy machinery and other capital goods (representing a $2.5 billion market in 1978).[96] Although agribusiness is taking over in some sections of the country, the NDIP does not seek to modernize local agriculture rapidly; instead it concentrates on industrial development.[97] Among the products most in demand will be petroleum processing equipment and petrochemical technology; turbines, boilers, and carburetors; printing and graphics equipment; furniture manufacturing machinery; equipment for the electric utility and communications industries; computer technologies; and precision instruments.[98]

Both the private sector and the government will be heavy purchasers. While the government will rely on a domestic oligopoly of private sector enterprises to build up many industries,[99] the NDIP also allocates $27 billion for public sector investment (primarily in food processing and oil production) during 1980-82.[100]

U.S. investors, as well as suppliers, will find fertile ground south of the border. The policy of the López Portillo administration has been to increase the supply of capital available for developmental projects by encouraging foreign investment.[101] This policy is likely to continue under the new administration which will take office in December 1982. The PRI candidate for president, Miguel de la Madrid Hurtado, has a long career of service with the Bank of Mexico and has served as the Secretary of Planning and Budget since 1979.[102] In that position he was one of the major architects of Mexico's ambitious Global Development Plan. Thus, his election would seem to assure a continuity in government economic policy over the next six years.[103]

The astute Mexican observer will recognize that the legal rules for foreign entrepreneurs, suppliers, and investors require cooperation with

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95 Street, supra note 16, at 375.

96 See Price Waterhouse & Co., Information Guide for Those Doing Business in Mexico 13 (Oct. 1979).

97 See González Casanova, supra note 18, at 204.

98 Price Waterhouse & Co., supra note 96, at 11; Changes in Mexico Extend to Imports Affecting U.S. Suppliers, Comm. Am. 25, 25 (Aug. 29, 1977); Mexico, A Major Market for U.S. Products, Bus. Am. 3, 7 (June 16, 1980).

Firms located in North Carolina are already exporting to Mexico successfully. Among the exports from the Tarheel State are textile machinery, tractors, buses, auto parts, switching gears, grains, and precision measurement devices. Telephone interview with Gordon McRoberts, Director of International Marketing, International Division, North Carolina Department of Commerce, Raleigh, N.C. (Nov. 11, 1980).

99 See Flanigan, supra note 92, at 42, 44.

100 Tower, Mexico: Third-Ranking U.S. Partner Shows Economic Strength, Bus. Am. 51, 51 (July 28, 1980).

101 See Flanigan, supra note 92, at 44.

102 Economic Growth, supra note 14, at 23.

103 Id.

the Mexican authorities as they administer an economy in which public and private enterprise are carefully controlled. Because of its increased oil revenues, Mexico is now bargaining from a position of strength. The legislation passed during the 1970's has become particularly important. Foreign business interests must learn to operate within this new set of legal constraints.

III. Legal Constraints on Foreigners doing Business in Mexico

Given the recent legislation in Mexico pertaining to foreign business, one might think that the motto of the PRI administration has become, "Seller, Entrepreneur, Investor—Beware!" Export firms, which wish to sell products within the country find themselves confronting a variety of new tariff barriers as well as the traditional importation permit process. Foreign businesses which seek to license a technology in Mexico or market a patent or trademark will encounter new legislation limiting their ability to do so. Similarly, foreigners who invest in the country will be immediately affected by the recent laws regarding foreign investment. Nevertheless, it is still possible to embark upon profitable business ventures in Mexico.

IV. Exporting to Mexico

Mexican officials view the control of importation as a key to the efficient modernization of the country and, for that reason, the Mexican government has steadfastly refused to make international treaty commitments which would inhibit its ability to curb imports.[104] One of the hottest debates in the López Portillo administration was over Mexico's position vis-à-vis the General Agreement on Tariffs and Trade (GATT). Those in favor of entry into GATT argued that failure to join the organization would subject Mexico to discriminatory treatment under the 1974 U.S. Trade Act[105] (and similar legislation in other nations). Those opposed to entry feared increased economic competition and unemployment if tariffs were reduced to allow increased importation of foreign goods.[106] On March 18, 1980, the President announced his decision; Mexico would reject GATT.[107] Because recent commercial policy in Mexico relied heavily on tariff barriers, the decision was not

[104] Mexico entered into a reciprocal trade agreement with the United States in 1942 which provided for no tariff increases and no quantitative controls on certain products, but this agreement terminated in 1950. Mexico did, however, become a member of the Latin American Free Trade Association in 1960. H. Wright, supra note 62, at 165-66.

[105] Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified in scattered sections of 5, 19, 26, 31 U.S.C.). Section 404 of the Act, however, provides that the President may by proclamation extend nondiscriminatory treatment to the products of a foreign country which has entered into a bilateral commercial agreement with the U.S. Id. § 404. Thus, under the Act, entry into GATT is not a prerequisite to favorable U.S. treatment.

[106] See Mixed Feelings About Free Trade, Economist, Nov. 10, 1979, at 86-87.

[107] See Mexico: Staying Sheltered, Economist, Mar. 22, 1980, at 70.

unexpected.[108]

Those exporting to Mexico should note that Mexico's tariff policy has now been shaped to suit the needs of the country under its Global Development Plan. In 1974, the Mexican government revamped its customs evaluation system and simplified the existing tariff schedule in order to streamline the process for fixing customs duties.[109] Tariffs are assigned on the fair market value of the goods when they reach the Mexican border.[110] The levies on imports where equivalent goods are already produced in Mexico may run as high as seventy-five percent of the fair market value of the goods as the government wants to encourage Mexican purchasers to buy local products. Industrial raw materials and heavy machinery may enter the country at substantially reduced tariff levels because these products are considered necessary to the furtherance of local industries.[111]

Additionally, the foreign exporter may qualify for selective reductions of tariffs on specific goods. The Mexican government has lowered import duties on the following classes of goods in order to stimulate economic growth: a) machinery used to manufacture products for export, b) machinery imported by small "Mexicanized" companies, c) imports destined for the production of capital goods, and d) modern equipment which may be used to make autos.[112] Subsidies are also available for imports headed to the fishing industry, the in-bond assembly plants on the border with the United States, and the cement industry.[113] On the other hand, goods being imported into Mexico are subject to an export development surcharge, a customs improvement fee, and a value added tax.[114] Obviously, an exporter attempting to enter the Mexican market should solicit the aid of a licensed customs broker.

Enterprises exporting to Mexico should also be aware of the requirements for import permits which originated during past decades of import substitution. In order to import certain goods, Mexican purchasers must apply for, and be granted, licenses from the Secretariat of Commerce.[115] Although approximately seventy percent of the 7500 tariff items do not require licenses, the most important articles of trade do require them.[116] In 1981, eighty-three percent of the total value of goods entering Mexico were imported pursuant to a license granted by the Mexican government.[117] Import licenses are denied for items already made in Mexico or

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108 But see id. for a contrary view.

109 Price Waterhouse & Co., supra note 96, at 49.

110 Twenty Questions, supra note 53, at 22.

111 See id. at 12.

112 Id.

113 Id.

114 Id. at 22-24.

115 Id. at 24.

116 Id. at 25.

117 Economic Growth, supra note 14, at 23.

for consumer goods that do not benefit national development.[118] The government also has established quotas for some classes of goods, such as computers, in order to restrain indiscriminate spending abroad.[119] Furthermore, the government sometimes allocates import quotas to those firms who promise to establish manufacturing facilities in Mexico.[120]

Foreign sellers should be aware of marketing practices within Mexico. Most foreign products are sold through nation-wide distributors located in Mexico City. These distributors normally will seek an exclusive right to market the product within the country.[121] The seller's initial commitment to the distributor should be carefully limited as to time, so that the seller may terminate the relationship without incurring penalties under Mexico's labor laws.[122] Many Mexican firms, especially those buying big ticket items, prefer to deal directly with the foreign seller; however, local contacts in Mexico are often crucial to sales.[123] If the foreign supplier hires an agent within the country, that agent becomes an employee of the foreigner, and the foreign supplier, as an employer, is subject to the labor laws of Mexico.[124] Any distributors or agents selling to a state agency or government-owned corporation must register with the Secretariat of Commerce and with the purchasing department of the state organization involved. Registration is not required for sales to the private sector.[125]

Foreign firms exporting to Mexico must consider marketing practices, customs duties, and the import licensing process. In each of these areas the Mexican government has intervened in the sales process in order to guard Mexico's foreign exchange reserve and insure that it is spent in a manner beneficial to the nation.

V. Licensing Agreements

A foreign enterprise that wishes to license or sell technology, patents, trademarks, or designs in Mexico must recognize that it is trading with the Mexican government as well as a Mexican commercial partner. During the 1960's, U.S. trade brochures recommended licensing as a preferred form of doing business in Mexico because there were no restrictions on a foreigner's ability to enter the licensing contract.[126] Mexican authorities have re-examined this open-door attitude toward licensing agreements. An increasing disenchantment with import substi-

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[118] Id.
[119] Id.
[120] Id.
[121] Twenty Questions, supra note 53, at 7.
[122] See Ley Federal de Trabajo (Federal Labor Law), arts. 162, 285, 287, 289, D.O. (Apr. 1, 1970) [hereinafter cited as Federal Labor Law]; see also S. Methodist Univ., Doing Business in Mexico §25.02 (1980).
[123] See Twenty Questions, supra note 53, at 7.
[124] Federal Labor Law, supra note 122, art. 285.
[125] Twenty Questions, supra note 53, at 8-9.
[126] Bus. Int'l Corp., supra note 50, at 27.

tution as a means of developing heavy industry has forced authorities to analyze the costs and benefits of acquiring foreign technology with no strings attached. Miguel Wionczek, a prominent Mexican economist, did a study for the United Nations which concluded that Mexico and other developing countries were paying too much for the industrial property rights they received, were acquiring obsolete technologies, and were merely perpetuating the underdevelopment of their own economies.[127] Other critics of third world "dependency," like Gerardo Bueno, reached similar conclusions,[128] as did a further study by the United Nations Committee on Trade and Development.[129]

In 1972, the Mexican Congress reacted to these studies by passing a Law on the Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks (Technology Transfer Law).[130] César Sepulveda, former Commission of Patents in Mexico and professor of Industrial Property Law at the National University, explained the motivation behind the measure:

> Through this Law, the Government intends to achieve the following objectives: to ensure that no major or unjustified remittances substantially affecting the balance of payments are made to foreign countries in the form of royalties; to ascertain the real content of the technology transferred from abroad to Mexico and to determine whether alternative technology can be obtained which would be more recent and sophisticated and cheaper or more in accord with needs of the country's economic and social development; to prevent a rise in the price of many products as a result of the employment of famous foreign trademarks, for the use of which large amounts are paid without any introduction of technology; and lastly, to draw up an inventory or catalog of existing technology for consultation and evaluation.
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> An additional, indirect objective is to ascertain the role of technology in the field of foreign investment in Mexico—by determining the proportion of foreign capital in the enterprises receiving technology. A further collateral objective is to prevent fraud on the internal revenue authorities—to ensure that income declared as royalties by a supplier of technology does not in fact come under different fiscal categories subject to higher tax or another type of control.[131]

To accomplish these purposes, the statute established a National Registry of Transfer of Technology within the Ministry of Patrimony and Industrial Development wherein all acts, agreements, or contracts

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[127] M. Wionczek, Arrangements for the Transfer of Operative Technology to Developing Countries—Case Study of Mexico, 44 U.N. ESCOR Annex 3 (Agenda Item 6), U.N. Doc. E/4452/Add.3 (1968).

[128] See Bueno, supra note 75.

[129] Transfer of Technology: Policies Relating to Technology of the Countries of the Andean Pact, 3 U.N. UNCTAD (Agenda Item 19), U.N. Doc. TD/107 (1971). See also The Role of Patents in the Transfer of Technology to Developing Countries, 37 U.N. ESCOR (Agenda Item 13), U.N. Doc. E/3861/Rev.1 (1964); Camp & Mann, Regulating the Transfer of Technology: The Mexican Experience, Col. J. World Bus., Summer 1975, at 110, 119.

[130] Technology Transfer Law, supra note 2.

[131] Sepúlveda, Mexican Law on the Registration of the Transfer of Technology, 13 Indust. Prop. 32, 32 (1974).

regarding the use of patents, trademarks, industrial models, inventions, technical know-how, or business and administrative services must be registered within 60 days of their execution.[132] Failure to register such contracts renders them unenforceable.[133] The duty to register the contract falls upon parties or beneficiaries who are Mexican individuals or corporations, foreigners or foreign entities established in Mexico, and branches or agencies of foreign entities established in Mexico.[134]

The heart of the Technology Transfer Law lies in Article 7, which empowers the Ministry to deny registration and thereby render null and void any agreement which contains certain prohibited clauses.[135] Absolutely prohibited are contracts which: a) attempt to transfer a technology already freely available in Mexico; b) require the licensee to "grant-back" to the licensor any improvements in the technology; c) limit the recipient's research and development; d) prohibit the exportation of goods or services produced by the licensee in a manner contrary to the national interest; e) extend the term of the licensing agreement for an excessively long period—with ten years as an ultimate limit; or f) make interpretation or performance of the contract subject to decision by a foreign court.[136] The Ministry will also deny registration if the royalties are excessive, if the foreigner attempts to intervene in the management of a local enterprise, or if the agreement contains "tying features," which are defined as requirements that the licensee must deal exclusively with a single source for the purchase of equipment and raw materials or for the sale of items manufactured with the technology.[137] Furthermore, the Ministry will refuse registration if the contract contains production limitations, sets minimum prices for the sale of the goods produced, or compels the licensee to use foreign personnel.[138]

After examining the literal provisions of the Technology Transfer Law, a foreign firm might consider licensing in Mexico to be unattractive. However, the administration of any statute is critical to its effects on the business community, and this is especially true in Mexico where the executive authorities have extraordinary powers.[139] A study of the

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[132] Technology Transfer Law, supra note 2, arts. 1, 2, 4.

[133] Id. art. 6.

[134] Id. art. 3.

[135] Id. art. 7.

[136] Id. Such prohibited clauses were common in Mexican licensing agreements before the Technology Transfer Law became effective. One survey in 1969 showed that 97% of the contracts surveyed had restrictions on exports by the licensee. Barrett, The Role of Patents in the Sale of Technology in Mexico, 22 Am. J. Comp. L. 230, 260-61 (1974).

By eliminating excessive royalty payments, officials of the Secretary of Industry and Commerce of Mexico estimated savings to Mexican licensees of $350 million from 1973 to 1976. Perez Vargas, Major Innovations Regarding Trade and Service Marks in the Newly Revised Mexican Law on Inventions and Marks—A Mexican Perspective, 66 Trademark Rep. 188, 192 (1976).

[137] Technology Transfer Law, supra note 2, art. 7.

[138] Id.

[139] See Camp & Mann, supra note 129, at 117.

records in the Registry for the first two years of the Law's existence revealed that the most common reasons for contract nullification were: a) unjustified contract prices, royalty remittance, and tying features, b) unreasonable length of contractual obligation or output restrictions, and c) restrictions on exportation or research and development, including grant-back clauses.[140]

Moreover, in December 1974, the Ministry itself distributed an unpublished "Summary of the General Criteria for the Application of the Law on the Registration of the Transfer of Technology and the Use of Patents and Trademarks." This Summary contained an extensive discussion of the Ministry's criteria for determining the appropriate compensation for a license.[141] The Ministry will first analyze the total flow of payments under the agreement, adding to the initial contract price an estimate of the royalties which will be due, plus any other remittances.[142] This figure will then be compared to total flow figures from comparable contracts in both Mexico and abroad.[143] The Summary notes that a distinction will be drawn between the various types of licensing agreements. No royalty will be allowed if the licensee is a majority-owned subsidiary of the licensor,[144] whereas royalties of approximately one precent of net sales will be permitted if the licensor has no equity ownership in the license.[145] Technical assistance agreements must be limited in duration and cannot exceed the period necessary for the licensee to absorb the technology.[146] Finally, higher remittance rates may be permissible if the technology is one of particular importance to the nation.[147]

The Summary also addressed other provisions of the Technology Transfer Law and, in many cases, mitigated its harsh provisions. For example, contracts prohibiting export sales will be registered if the licensor is precluded from granting export rights by the laws of its own domicile, or if the licensor has previously granted exclusive marketing rights under another licensing agreement, or if the export limitations will not prevent the Mexican licensee from entering markets that are adequate to satisfy the licensee's export capacity, e.g., the American continents.[148] Licensing agreements may also be approved, despite tying provisions, where the licensor is the only entity capable of providing or purchasing

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[140] Id. at 111.

[141] The "Summary" is cited and discussed extensively in Hyde & Ramírez de la Corte, Mexico's New Transfer of Technology and Foreign Investment Laws—To What Extent Have the Rules Changed?, 10 Int'l Law. 231, 235-38 (1976).

[142] Id. at 235-36.

[143] Id. at 236.

[144] Id.

[145] Id.

[146] Id.

[147] See id., stating that certain industries such as chemicals, electronics, pharmaceuticals and telecommunication have been allowed higher percentage rates than the usual fee of 3% or less of net sales.

[148] Id. at 237.

the "tied in" materials or services.[149] Mandatory temporary employment of foreign personnel by the licensee is acceptable as a provision if the licensor agrees to train Mexicans to ultimately fill the positions.[150] While forum stipulation clauses or choice of law clauses which specify a non-Mexican forum are fatal to the agreement, a failure to specify the applicable law or forum will not be. Clauses stipulating arbitration are allowed.[151]

Foreign firms contemplating licensing agreements must consider whether or not the payoff from the contract will justify the possibility that trade secrets will be lost in the process, and must measure their own research and development expenses as a part of the price for their technology.[152] This is particularly important because the Summary demands an outright sale of technologies which have not been patented.[153]

One provision in the Summary, requiring unpatented technologies to be sold to a licensee, was later enacted into law in another piece of nationalistic Mexican legislation, the 1976 Law of Inventions and Trademarks.[154] Since the passage of this act, some foreign critics have charged that Mexico intends to confiscate trade secrets and expropriate the goodwill associated with well-known foreign products.[155] On the other hand, the politicians who passed the measure see it as a legitimate means of facilitating the creation of Mexican trademarks and promoting their acceptance in both the domestic and international markets. The politicians further argue that the act will stimulate the development of new inventions within Mexico.[156]

Undoubtedly the Law on Inventions and Trademarks shatters the traditional protection extended to inventors and entrepreneurs under U.S. legislation on industrial property rights.[157] The law contains the following innovations: a) it obliges a patent holder to exploit his patent within three years after its registration or else face the revocation or the obligatory licensing of the patent;[158] b) it enumerates an entire realm of nonpatentable inventions—including vegetable varieties, alloys, chemical products, pharmaceutical products, devices relating to nuclear energy

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149 Id.

150 Id.

151 Id. at 237-38.

152 A business contemplating a licensing agreement in Mexico should submit the proposed contract to the Registry to see if it meets with the approval of the administrators. Such a procedure is commonly used. Camp & Mann, supra note 129, at 118-19.

153 Hyde & Ramírez de la Corte, supra note 141, at 251.

154 Trademark Law, supra note 13.

155 See, e.g., Lanahan, Trademarks in Mexico—A United States Perspective, 66 Trademark Rep. 205, 219-20 (1976).

156 See Perez Vargas, supra note 136, at 199; James, Linking Foreign with Mexican Trademarks: Boon or Bane? 8 Ca. West. Int'l L.J. 43, 49 (1978).

157 See 15 U.S.C. §§ 1051-1127 (1976) (Trade-Marks); 35 U.S.C. §§ 1-376 (1976 & Supp. IV 1980) (Patents).

158 Trademark Law, supra note 13, art. 41.

or defense, and anti-pollution equipment;[159] c) it creates a new category for the protection of industrial property, the Certificate of Invention, which allows the holder to license his non-patentable invention, but obligates him to provide interested third parties with enough information to use the invention;[160] d) it limits trademark protection to a five year period and trademark renewals to five years at a time;[161] e) it provides for the compulsory licensing of trademarks[162] and the forfeiture of unused marks;[163] f) it extends the list of names and designs which cannot be used as trademarks.[164] Although these are innovative measures, the most controversial feature of the Trademark Law is Article 127 which provides that a trademark registered in a foreign nation may not be used in Mexico unless it is linked with a Mexican trademark of equal visibility.[165] Under regulations issued to clarify this article, the owner has one year following the registration of a trademark licensing agreement to link his foreign mark with a Mexican trademark.[166]

Once again, the manner in which this Trademark Law is administered will determine its effect on foreign business interests. Because of the controversy surrounding Article 127, the Ministry of Patrimony suspended its effective date until December 29, 1981, and has also decided to allow trademark holders to apply for further postponements on a case by case basis.

A foreigner contemplating a potential licensing agreement in Mexico must be aware of the manner in which the Mexican authorities have restricted the transfer of technology and the use of patents and trademarks. Although the laws in these areas are explicitly intended to control foreign influence in Mexican markets, the Mexican government has developed a pragmatic attitude toward their execution in order to attract technologies necessary for economic development.

VI. Direct Foreign Investment in Mexico

For those foreign firms that wish to benefit from the future expansion of the Mexican economy, direct investment in the country affords another type of business opportunity. However, in this area too, Mexico has limited the options for foreigners. In 1973, the Mexican Congress enacted the Law to Promote Mexican Investment and Foreign Investment.[167] Perhaps more than any of the other laws previously discussed, this Investment Law bears the marks of Mexico's revolutionary past.

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159 Id. art. 10.

160 Id. arts. 65-80.

161 Id. art. 112.

162 Id. art. 132.

163 Id. art. 117.

164 Id. art. 147; see also id. art. 91.

165 Id. art. 127.

166 See Reglamento de la Ley de Invenciones y Marcas (Regulations for the Law of Inventions and Trademarks), D.O. (Feb. 20, 1981).

167 Investment Law, supra note 1.

With its passage, the banner of economic independence was raised once again, as it had been during the 1938 oil expropriation.[168] The Investment Law is intended to promote the "Mexicanization" of industry and to force foreign capital into a role which complements the actions of private Mexican investors.[169] Under the Investment Law, foreigners, foreign corporations, and domestic corporations with a majority of foreign capital must agree to be treated as Mexican nationals before they can own any property in the nation.[170] Although this provision is a replication of Article 27 of the Mexican Constitution[171] its enactment in statutory form demonstrates the legislature's intent to "Mexicanize" foreign investment.

Other sections of the Investment Law are equally nationalistic. The law reserves participation in certain economic activities, such as petroleum production, the generation of electricity, and the railroads to the Mexican government.[172] Other activities, including radio and television, transportation, and forestry are reserved for corporations wholly-owned by Mexican citizens.[173] Yet the most significant feature of the investment law is Article 8, which states that, without authorization of the Mexican government, the maximum foreign investment in the capital of any enterprise may not exceed twenty-five percent of the total capital or over forty-nine percent of the fixed assets, and that a foreign investor may not have, by any means, the ability to control the management of the enterprise.[174] The government has administered this law by declaring that all acquisitions of stock and all incorporations involving foreigners must be registered in the National Commission on Foreign Investment to make investment decisions in the national interest.[175] Foreign businesses which were majority-owned by foreigners before the passage of the law may continue to operate in Mexico; however, if such businesses intend to expand a product line, then theoretically they must "Mexicanize."[176]

As with the Technology Transfer Law, the strict provisions of the Investment Law have been relaxed in a series of administrative rulings by the Commission. For example, border assembly industries may routinely operate with one hundred percent foreign capital.[177] Furthermore, the administrators have taken a pragmatic approach in individual

[168] See supra text accompanying notes 49-53.

[169] Gomez-Palacio, Defining "New Lines of Products" Under Mexico's Foreign Investment Law, 8 Ca. West. Int'l L.J. 74, 79-80 (1978).

[170] Investment Law, supra note 1, art. 3.

[171] Constitution, supra note 37, art. 27, § I (amended 1960). See also Rangel Medina, Significant Innovations of the New Mexican Law on Inventions and Trademarks, 7 Ga. J. Int'l Comp. L. 5, 16 (1977); Hyde & Ramírez de la Corte, supra note 141, at 238.

[172] Investment Law, supra note 1, art. 4.

[173] Id.

[174] Id. art. 8.

[175] Id. art. 11.

[176] See Hyde & Ramírez de la Corte, supra note 141, at 249.

[177] Id. at 246.

cases, as evidenced by a 1976 agreement which allows IBM to manufacture typewriters at a wholly owned subsidiary in Guadalajara.[178] Analysis of the decisions made by the Commission between 1973 and 1976 found that seventy-six percent of rulings were favorable to foreign investors,[179] despite the fact that this was the most "radical" period of the Echeverría administration. Significantly, the Commission has interpreted Article 8 of the Investment Law as requiring its authorization for any increase whatsoever in foreign ownership beyond twenty-five percent of the stock or forty-nine percent of the fixed assets of the Mexican company.[180]

For those foreigners who are willing to work within the confines of the Investment Law, the rewards may be substantial. Mexicans have especially favored joint ventures in recent years.[181] Existing foreign owned industries can "Mexicanize" within three to four weeks by filing the proper documents with the Secretariat of Foreign Affairs, the Foreign Investment Registry and the Secretariat of Commerce.[182] This Mexicanization allows a corporation a variety of benefits under the National Industrial Development Plan:[183] a reduction in energy prices for decentralized enterprises,[184] tax credits for undertakings in high priority fields such as petrochemicals and construction.[185] The Commission has not developed rigid guidelines to determine whether a company is "Mexicanized." Critical factors include the percentage of equity held by outsiders, the use of Mexican source materials in the business, the number of Mexican workers employed and the amount they are paid, and the company's record of compliance with the 1972 Technology Transfer Law and the 1976 Law on Trademarks.[186]

Thus, although the Mexican authorities have shown a renewed interest in using the nationalistic legislation of the Echeverría years to limit the role of foreigners who would attempt to control their economy, they have also demonstrated a flexible attitude toward the administration of the laws.

VII. Conclusion

A lawyer attempting to represent a company doing business in Mexico should be aware of the public policy which has shaped Mexican trade legislation and should understand the manner in which that legislation is administered. Mexico has not rejected the capitalist model of develop-

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178 Id. at 249 n.73.
179 Id. at 248.
180 Id. at 250.
181 See Twenty Questions, supra note 53, at 2, 7.
182 Id. at 17.
183 Id. at 13-14.
184 Id. at 13.
185 Id.
186 Id. at 14.

ment, but neither has it abandoned its ideological commitment to social change. In part, the Mexican Revolution was a reaction to foreign domination of the local economy. As a consequence of its historical experience, the Mexican government has attempted to create a nation which will be free of foreign control. Mexican trade legislation is indicative of this public policy. The predominant party in Mexico has always been revolutionary in name, and a hallmark of its creed has been economic independence. The Government has chosen different means of pursuing this goal: the expropriation of oil wells,[187] the drive for import substitution through tariff barriers and import licensing,[188] the prohibition of direct investment in selected industries,[189] the "Mexicanization" of local companies,[190] the restriction of technology transfers,[191] and the modification of patent and trademark protection.[192] Mexican law thus reflects the government's revolutionary intent and its desire to alter the nation's dependent relationship with the developed world.

Those who represent foreign businesses in Mexico will find that the PRI government has a pragmatic attitude toward the administration of the law. The Mexican authorities recognize that they must have access to foreign technology in order to build their own industrial base and that they must be able to export Mexican products in order to finance domestic enterprises. Moreover, they welcome foreign investors who will work in conjunction with the private sector in Mexico.

Critics of the Mexican legal system have attacked the country's legislative revolution for various, often contradictory, reasons. Counsel for multinational corporations have argued that Mexico is now making irrational demands of foreign companies and that, in the long run, the country will suffer.[193] According to this line of argument, Mexican laws on the transfer of technology and foreign investment will damage the future of the nation because they will compel foreign businesses to reject opportunities in the Mexican marketplace. Since the country must have new technologies and new capital inputs in order to advance, these xenophobic statutes can only harm the Mexican people.

On the other hand, Mexican social scientists, like Pablo Gonzáles Casanova, have asserted that precisely the opposite is true.[194] While the legislation appears to impose controls on foreign business, Gonzáles Casanova argues it has failed miserably. The Mexican state, according to his analysis, is unable to achieve its social objectives within an economy con-

[187] See supra text accompanying note 51.

[188] See supra text accompanying notes 62-66, 115-20.

[189] See supra text accompanying note 172.

[190] See supra text accompanying note 176.

[191] See supra text accompanying notes 130 & 131.

[192] See supra text accompanying notes 157-66.

[193] But see Lacey, supra note 4, at 406, for a generally favorable evaluation of Mexico's transfer of technology laws, when compared to legislation in other Latin American countries.

[194] See González Casanova, supra note 18.

trolled by "foreign and Mexican monopolistic capital."[195] As a result, the Mexican government talks about assuring the economic independence of the nation, but it continually fails in its efforts to alter the fundamental inequities in the society.

The leaders of Mexico are naturally caught in the center of this debate. This review of Mexican trade legislation demonstrates the tension which has long existed in official policy, a tension between the need to modernize the nation by using foreign capital and the desire to assert complete autonomy from foreign control.

As Mexico enters the 1980's, the government has gained new leverage in its struggle to comply with the heritage of the Revolution. The Mexican authorities have been concerned with foreign domination since the days of the independence movements in the nineteenth century, and they have been especially concerned with the overwhelming influence of the United States. Now that Mexico has obtained new economic power as an oil exporter, one would expect that the government will demand to be treated with new respect. The past President of Mexico, José López Portillo, made just that point in an interview with a U.S. newspaperman when he asserted, "We do not want to deal unjustly with the United States; we just want the United States to deal justly with us."[196] What remains to be seen is whether or not the legislative revolution against foreign domination will enable the Mexican authorities to achieve an economic independence that benefits the Mexican people.

—Stewart W. Fisher

[Editor's Note: As this article goes to press, the López Portillo administration has nationalized domestic banks and renewed controls on the exchange rate for pesos. Negotiations are underway to renegotiate Mexico's international debts, and the economic picture for Mexico appears gloomy in the short-run. Nevertheless, the recent actions by the Mexican government are yet another indication of that government's commitment to controlling Mexican development from within.]

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195 Id. at 200.

196 Quoted in Lanahan, supra note 155, at 207.