

# SOME CONSIDERATIONS AS TO THE NEW MEXICAN FOREIGN INVESTMENT LAW

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## INTRODUCTION

México has been experiencing dramatic legal changes since the last year of the de la Madrid administration<sup>2</sup> Through the present Salinas administration. One reason is the implementation of NAFTA: another reason is the effort to remove any possible barrier that could affect México's new open market policy. As evidence of this new policy, aside from NAFTA, México is lobbying to become part of different commercial blocks such as **(i)** the so-called group of three (México, Colombia and Venezuela); **(ii)** Central American countries; **(iii)** MERCOSUR countries (Argentina, Brazil, Uruguay and Paraguay); and **(iv)** the Pacific Rim.

## THE NEW FOREIGN INVESTMENT LAW ("FIL")

The new FIL shows the first change in its defensive name from the Law to Promote Mexican Investment and to Regulate Foreign Investment ("1973 FIL") to the Foreign Investment Law. The FIL went into effect in late December 1993,<sup>3</sup> replacing **(i)** the 1973 FIL;<sup>4</sup> **(ii)** the Organic Act of Section 1, Article 27 of the Constitution;<sup>5</sup> and **(iii)** the Act establishing the transitory need to obtain permits for the acquisition of goods by foreigners and for the incorporation or modification of Mexican corporations having or which may have foreign partners.<sup>6</sup> The

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<sup>2</sup> With President Miguel de la Madrid, in 1983, México began the process of reforming its import substitution-oriented economy to an open market economy by opening up to foreign competition. "In 1984 the de la Madrid Administration issued Guidelines for Foreign Investment and its Promotional Objectives." See J. Hayden Kepner, Jr. *México's New Foreign Investment Regulations: A legal Analysis*. 18 Syracuse J. Int'l. L. & Com. 41, 46 (1992). Also under his administration. On August 24, 1986, México joined the General Agreement on Tariffs and Trade ("GATT").

<sup>3</sup> See *Mex. Ley de Inversión Extranjera* [hereinafter cited as "FIL"], pub'd in the *Diario Oficial* ("D.O.") Dec. 27, 1993. (Santamarina y Steta trans., 1994). The Mexican Congress has the power to enact laws to promote Mexican investment and regulate foreign investment. See *Constitución Política de los Estados Unidos Mexicanos* [hereinafter cited as "Mex. Const."] pub'd in D.O. Feb. 5, 1917 art. 73 (XXIX-F) (Doing business in México trans., 1991).

<sup>4</sup> See *Mex. Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera* (Law to Promote Mexican Investment and to Regulate Foreign Investment) [hereinafter cited as "1973 FIL"], pub'd in D.O. Mar. 9, 1973 (Doing Business in México trans., 1991). For discussion and analysis of the 1973 fil, see Ewell E. Murphy, Jr., *Echeverrián Wall: Two Perspectives on Foreign Investment and Licensing in México*, 17 Tex. Int'l L.J. 135, 137-139, 148 - 149 (1982).

<sup>5</sup> See *Mex. Ley Orgánica de la Fracción I del Artículo 27 Constitucional* (Organic Act of Section 1 Article 27 of the Constitution), pub'd in D.O. Jan 21, 1926.

<sup>6</sup> See *Mex. Decreto que establece la necesidad transitoria de obtener permiso para adquisición de bienes a extranjeros y para la constitución o modificación de sociedades mexicanas que tengan o tuvieren socios extranjeros*, pub'd in D.O. July 7, 1944.

Regulation to the Law to Promote Mexican Investment and to Regulate Foreign Investment<sup>7</sup> (“1989 FIL Regulation”) continues in effect so long as it does not contradict the FIL and until such time as the new regulation is issued under the FIL.<sup>8</sup>

The primary purposes for promulgating a new FIL were **(i)** to raise to the level of law the proceedings and rules established in the 1989 FIL Regulation, which has facilitated the participation of foreign investment in México,<sup>9</sup> **(ii)** to establish a foreign investment legal system not only for the purposes of NAFTA but also for international foreign investment standards in order to give legal security to investors who bring their capital to México,<sup>10</sup> and **(iii)** to establish clear rules to channel international capital into productive activities.<sup>11</sup>

The FIL does not give any special treatment to NAFTA investors since México also needs to attract foreign investment from countries other than NAFTA countries. In general, México tries to support its current economic model of development based on free trade and openness to foreign investment.<sup>12</sup> Nevertheless, NAFTA investors will enjoy the dispute settlement mechanism, the remittance provisions and other privileges, such as the possibility of opening wholly-owned bank subsidiaries in México while other foreign banks will be unable to do so.

The FIL, as its predecessor, contemplates the same economic activities, which could be subject to specific regulations. Nevertheless, the FIL did not consider the 49% foreign investment-51% national investment general rule contemplated by article 5 of the 1973 FIL.<sup>13</sup> However, foreign investors still have to prepare analysis if their investments are within the activities reserved for Mexicans or they are subject to specific percentages. In these categories, the FIL establishes the following activities:

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<sup>7</sup> See *Mex. Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera* (Regulation of the Law to Promote Mexican Investment and to Regulate Foreign Investment) [hereinafter referred as “1989 FIL Regulation”], *pub’d in* D.O. May 16, 1989.

<sup>8</sup> Also, the FIL repealed articles 46 and 47 of the Federal Weapons and Explosives Law and all the legal, regulatory and administrative provisions of a general nature contrary to the FIL. See FIL *supra* note 3 arts. First, second – fourth transitorios.

<sup>9</sup> Clearly, the 1989 FIL Regulation in some cases exceeds the scope of the 1973 FIL; in other cases, it ignores or violates it. These inconsistencies labeled the 1989 FIL Regulation as unconstitutional, since only the congress may amend or repeal laws. As a result, the necessity to raise the procedures and rules that were at first established in a Regulation instead of a law (maybe because the Salinas administration could have been accused of selling out the country) became a priority. For an overview of the inconsistencies of the 1989 FIL Regulation and the FIL, see Kepner *supra* note 2 at 57 – 67; Jorge Camil. *México’s 1989 Foreign Investment Regulations: the Cornerstone of a New Economic Model*. 12 Hous. J. Int’l L. 1 – 22 (1989).

<sup>10</sup> Statistics from the International Monetary Fund in 1991 demonstrated that México was positioned as the eighth nation receiving direct foreign investment at a world level and the first in the group of developing countries. The United States and Canada have participated with 65% of the foreign investment accrued during the Salinas Administration. The European union with 19%. Latin American countries with approximately 8% and the members of the Pacific Rim with more than 2%. Furthermore, according to the Commerce Department of the United States, in the 1989-91 period, México climbed from the seventh to the second position in the general table of countries receiving investment from the U.S. See FIL, *supra* note 3 at V – VI (statement of purpose).

<sup>11</sup> The FIL establishes that its purpose is to determine the rules for the channeling of foreign investment into the country and to promote its contribution to the national development. *Id.* Art. 1.

<sup>12</sup> See Miguel Jauregui Rojas, *A New Era: The Regulation of Investment in México*, 1 U.S.- Mex. L. J. 41, 41 (1993).

<sup>13</sup> Article 5 of the 1973 FIL dictated that in cases where legal provisions or regulations do not specify a given percentage, foreign investment may hold no more than 49% of the capital of corporations provided it is not empowered, by any title, to determine the management of the corporation. The National Commission of Foreign Investment. (“The commission”) had the authority to evaluate exemptions to this general rule. See 1973 FIL *supra* note 4 art. 5.

**A. Reserved Activities for the State.** The Mexican Constitution, article 28 (IV), establishes the so-called strategic areas which are exclusively reserved for the state, and of course, represent the areas most resistant to liberalization.<sup>14</sup> Moreover, the constitution and the FIL dictate that further activities set forth in the laws issued by Congress should also be considered strategic areas. As a result, investors will have to observe the applicable law related to their investment activity in order to see if their activity is not subject to specific regulations.<sup>15</sup>

**B. Reserved Activities and Corporations for the Mexicans or Mexican Corporations with Foreigners' Exclusion Clause.**<sup>16</sup> In these activities<sup>17</sup> Foreign Investors cannot participate directly, through trust, agreements, partnership or corporate agreements, pyramiding structures, or other mechanisms granting control or participation. They can only participate through neutral investment.<sup>18</sup>

The FIL eliminates the following activities as reserved activities and corporations for Mexicans. **(i)** domestic air and maritime transportation; **(ii)** exploitation of forestry resources; and **(iii)** cable television.

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<sup>14</sup> The promotion of foreign investment is not established in the Mexican Constitution. The Constitution grants no preferential rights to foreigners, taking a defensive position regarding foreigners. See Ignacio Gómez Palacio. *The New Regulation on Foreign Investment in México: A Difficult Task*, 12 Hous. J. Int'l L. 253. 255 – 256 (1990). See also Mex. Const. *supra* note 3 arts. 27(I). 28, 32.

<sup>15</sup> The strategic areas established in the Constitution and the FIL are: **(i)** the coinage of money; **(ii)** the mails; **(iii)** telegraph; **(iv)** radiotelegraphy; **(v)** satellite communications; **(vi)** the issuance of paper money by one single bank; **(vii)** petroleum and other hydrocarbons; **(viii)** basic petrochemicals; **(ix)** radioactive minerals and the generation of nuclear energy; **(x)** electricity; **(xi)** railroads; and **(xii)** the control, supervision and surveillance of ports, airports and heliports. See Mex. Const. *supra* note 3 art. 28 (IV); FIL *supra* note 3 art. 5 (XIV).

<sup>16</sup> According to the Nationality Law, corporations are considered Mexican if **(i)** they have been incorporated pursuant to Mexican laws and **(ii)** they have established domicile in the Mexican Republic. See *Mex. Ley de Nacionalidad (Nationality Law)*. Pub'd in D.O. June 21, 1993, art 9.

<sup>17</sup> Activities such as **(i)** National passenger ground transportation, tourism and loading transportation, not including courier and packaged goods service; **(ii)** retail trade of gasoline and liquefied petroleum gas; **(iii)** radio broadcasting services and other radio and television services, other than cable television; **(iv)** credit unions; **(v)** development banking institutions, in terms of the law on the matter; **(vi)** the rendering of professional and technical services expressly set forth by the applicable legal provisions; and **(vii)** international ground transportation of passengers, tourism and loading between points of the Mexican territory and the administrative service of bus stations for passengers and auxiliary services. See FIL *supra* note 3 arts. 6, sixth transitory.

<sup>18</sup> Neutral investment is to be understood as an investment made by a foreign investor in a Mexican corporation whose share participation will grant said investor only patrimonial rights (dividends, redemption of the investment and participation in the liquidation), because they do not have corporate rights, that is, voting rights or participation in the administrative body of the corporation. It is called neutral investment by the FIL since it is not computed as part of the foreign investment percentage in the capital stock of Mexican corporations. *Id.* Art. 18. Originally, the neutral investment implementation is carried out through the formation of a trust company whose objective is the acquisition of said shares; the trust company, upon instruction of the trustor, shall grant the foreign investor the corresponding rights of beneficiary (certificates of participation). Despite the fact that the original concept of neutral investment clearly grants only monetary rights to the investor, now the FIL establishes the possibility that the Secretary of Commerce and Industrial Development (“SECOFI”) may grant limited corporate rights. *Id.* Art. 19. Moreover, the 1989 FIL Regulation establishes that the neutral investment mechanism can be used only by companies registered on the stock market excluding small and medium-size companies which are not listed on the stock market from the benefits of this mechanism. The FIL extends the benefits of receiving resources from abroad through this mechanism to Mexican corporations which are not listed in the stock market. As a result, small and medium industry will be able to use this financing mechanism, which allows Mexican corporations to carry out their projects of expansion or financial structuring, without the Mexican investors losing control of the corporations in which they participate. *Id.* Art. 18; 1989 FIL Regulation *supra* note 7 art. 13.

**C. Activities and Acquisitions with Specific Restrictions.** The FIL increases the activities and corporations that are subject to specific percentages.<sup>19</sup> Percentages of foreign participation run from 10%, 25%, 30%, and 49%. The 1973 FIL and the 1989 FIL Regulation did not allow direct foreign investment in domestic air transportation. Right now, for instance, foreign airlines could invest up to 25% in either Mexicana or Aeroméxico. Also, foreign investment can participate up to 49% in telecommunication companies such as Teléfonos de México.<sup>20</sup>

**D. Activities and Corporations that Can Exceed the Maximum Percentage through Favorable Resolution.** Today, the FIL dictates in which economic activities or corporations the foreign investment can exceed the maximum percentage through a favorable resolution from the National Commission of Foreign Investment (“the Commission”). They include **(i)** port services to the ships to carry out their interior navigation operations, such as towing, rope grip and lighterage; **(ii)** shipping companies dedicated to the exploitation of ships exclusively in foreign commerce; **(iii)** administration of airline terminals; **(iv)** private services of pre-school, elementary, junior high, high school, college and combined education; **(v)** legal services; **(vi)** credit information corporations; **(vii)** securities rating institutions; **(viii)** insurance agents; **(ix)** cellular telephony; **(x)** construction of pipelines for the transportation of oil and derivative products; **(xi)** drilling of oil and gas wells; and **(xii)** the construction industry and public works.<sup>21</sup>

In an effort to terminate any discretionary faculty and to simplify applicable criteria that the Commission shall observe in granting favorable resolutions, article 5 of the 1973 FIL, refers to the Commission’s power to decide on the increase of the percentage of foreign capital participation when, in its judgment, it benefits the nation’s economic interest; and the 17 criteria that were established in order to grant favorable resolution in article 13 of the 1973 FIL, were not included in the FIL. Instead, the FIL dictates that the importance of foreign investment for México is only to reduce the requirements established in its article 29. Today, the Commission, upon resolving and application, shall impose only requirements that do not distort international trade and, in general, will take into account the following criteria: **(i)** impact on employment and training of workers, **(ii)** technical contribution, **(iii)** compliance with environmental laws and **(iv)**

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<sup>19</sup> The activities and corporations are **(i)** up to 10% in production cooperatives; **(ii)** up to 25% in domestic air transportation, airbus transportation (“aerotaxis”), and specialized air transportation; **(iii)** up to 30% in holding companies of financial grounds; multiple banking credit institutions; brokerage firms and stock market specialists; **(iv)** up to 49% in insurance companies; bonding companies; money exchange offices; general warehouses; leasing companies; factoring companies; limited scope financial institutions referred to in article 103 section IV, of the Credit Institutions Law; corporations referred to in article 12 Bis of the Stock Market Law; shares representing the fixed capital of investment companies and corporations operating investment companies; manufacturing and commercialization of explosives, weapons, cartridges, ammunition and fireworks not including the acquisition and use of explosives for industrial and extractive activities, nor the elaboration of explosive compounds for consumption of said activities; printing and publication of newspapers for exclusive circulation in the national territory; series “T” shares of corporations having agricultural, cattle and forest lands in property; cable television; basic telephone services; fresh water, coastal fishing and in the exclusive economic zone, without including aquaculture; integral ports administration; port pilot services for ships for interior navigation and coastal sailing, with the exception of tourist cruises and the exploitation of dredges and naval devices for port construction, conservation and operation; services related to the railroad sector consisting in passenger services, maintenance and rehabilitation of railroads, clearance, traction and hauling equipment repair workshops, organization and commercialization of unitary trains, operation of loading interior and railroad telecommunications terminals; supply of fuel lubricants for ships, aircrafts and railroad telecommunications terminals; supply of fuel lubricants for ships, aircrafts and railroad equipment; and the manufacturing and assembling activities of parts, equipment and accessories for the automotive industry and the rendering of video-text and switching services in packages. See FIL *supra* note 3 arts. 7, seventh, eight transitories.

<sup>20</sup> *México Relaxes Foreign Investment Curbs*, Papers-C, Jan 6, 1994, available in WESTLAW, Papers-C File.

<sup>21</sup> See FIL *supra* note 3 arts. 8, ninth transitory.

the contribution to increased competition of the nation's productivity plan. The FIL also provides that any application that is not resolved in a term of 45 working days from the date of presentation shall be considered approved.<sup>22</sup>

The integration of the Commission was increased in order to give participation to more Secretariats as to the general policy applicable to foreign investment. Also, any authorities having competence over the matters to be dealt with at the meeting of the Commission may be invited to participate. The new Secretariats are **(i)** Social Development; **(ii)** communications and Transportation; and **(iii)** Tourism.<sup>23</sup> In general, the Commission has to establish the policy in foreign investment matters, resolve the participation terms and conditions of foreign investment and establish criteria for the application of legal provisions on the matter.<sup>24</sup>

In case a foreign investor wants to participate in a Mexican corporation in a proportion higher than 49%, directly or indirectly, he will need a favorable resolution from the commission if the total value of the assets of the relevant corporation exceeds the sum to be annually determined by the Commission.<sup>25</sup>

**E. Restricted Zone.** Article 27 (I) of the Constitution is designed to exert control over one of the troubled aspects of the nation's economy. This article dictates that only Mexicans by birth or naturalization and Mexican corporations have the right to acquire ownership of land. Water and their easements or to obtain concessions for the exploitation of mines or water. The Mexican state may grant the same rights to foreigners through the so-called "Calvo clause." Under the Calvo clause, foreigners must consider themselves as nationals and agree not to invoke the protection of their governments. In case of noncompliance with the Calvo clause, they may have to forfeit the property they have acquired to the nation. Foreigners cannot directly acquire real estate in the restricted zone, which includes all land within 100 kilometers of Mexican borders and 50 kilometers from its beaches.<sup>26</sup>

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<sup>22</sup> Some authors believe that in the requirement that foreign investment complement national investment and not displace national corporations was found the promotion of Mexican investment. "The Commission must always protect the local entrepreneur, considering foreign investment as complementary, and not the basic investment form for the development of the economy". See Gómez Palacio, *supra* note 14 at 258. the 1989 FIL Regulation previously reduced the 17 criteria to only 5, 13. *But see* 1989 FIL Regulation *supra* note 7 art. 82.

<sup>23</sup> The resto of the Secretariats are **(i)** the Interior; **(ii)** Foreign Affairs; **(iii)** Finance and Public Credit; **(iv)** commerce and Industrial Development; **(v)** Labor and Social Welfare; and **(vi)** Energy, Mines and Governmental Industry. See FIL *supra* note 3 art. 23; 1973 FIL *supra* note 4 art. 80.

<sup>24</sup> See FIL *supra* note 3 art. 26.

<sup>25</sup> *Id.* Art. 9.

<sup>26</sup> See Mex. Consti. *Supra* note 3 art. 27(I). The nationalistic perspective of the Mexican Constitution is a product of its history. Mexican history shows economic exploitation, intervention and colonialization by foreigners. These events led the constitutional Congress to lay the foundation for México's strong anti-foreigner Constitution drafted in 1917. Later, more rules were added to article 27 of the Constitution. "[R]egulations to fraction I of article 27, enacted in 1925, limited foreign equity ownership to a maximum of fifty percent. This enactment limited foreign equity in Mexican businesses, and consequently made majority ownership by any foreigner illegal. Generally the idea was to limit foreign ownership by making the controls more and more detailed and restrictive. Thus, México began to use regulations to its Constitution as a tool for implementing further control over foreign involvement." See Jesús Silva & Richard K. Dunn. *A Free Trade Agreement Between the United States and Mexico: The Right Choice*, 27 San Diego L. Rev. 937, 952 (1990). In 1971 President Echeverría authorized the Ministry of Foreign Affairs to issue permits to credit institutions to act as fiduciaries for foreigners in the ownership of real estate in the restricted zone. "The main considerations for limiting complete foreign ownership were the attitudes of the original Constitutional congress to defend the country's sovereignty, and the federal government's unavoidable duty to preserve the integrity of the nation's territory." *Id.* At 952-953.

Despite the prohibition in the Constitution, the FIL now establishes that Mexican corporations with foreign exclusion clauses can acquire real property directly in the restricted zone in any economic activity, as long as **(i)** the foreign investors have agreed to the Calvo clause conditions; **(ii)** the real estate is acquired for nonresidential purposes; and **(iii)** the acquisition is recorded before the Ministry of Foreign Affairs.

Also, it is now possible for Mexican corporations, without foreign exclusion clauses, and foreign individuals or corporations to indirectly acquire real estate for residential purposes in the restricted zone through trust.<sup>27</sup>

The 1973 FIL established in its article 18 that the only way to obtain real property in the restricted zone was through the trust mechanism. The Ministry of Foreign Affairs was empowered to grant authorization to credit institutions as fiduciaries in the domain of real estate destined for *industrial* and *tourist* activities. As can be seen, the FIL not only allows to acquire direct real property through Mexican subsidiaries in *any economic activity* (tourism the trust mechanism for residential purposes).<sup>28</sup>

The likely arguments present to the Mexican Congress for establishing these new rules for the restricted zone could have been that during the last three decades, a great deal of foreign investment has been allocated in the restricted zone through the form of trust and complicated stock ownership schemes. As a result, the uncertainty of not having clear title to land scared many potential investors away. Article 27 (I) of the Constitution expressly restrict investment to only Mexicans or Mexican corporations but it does not prohibit Mexican corporations with foreign exclusion clauses.

The approval of the Ministry of Foreign Affairs is required for foreign investors or corporations to acquire beneficial rights to land under a trust in the restricted zone. However, fiduciaries are not required to obtain authorization of the acquisition of property outside the restricted zone, even when the beneficiary is a foreign individual or corporation.<sup>29</sup>

The Ministry of Foreign Affairs shall grant authorization considering the requirements of the FIL Applications shall be resolved within 30 working days following the date of their presentation. Real estate for nonresidential purposes shall be resolved within 15 working days; otherwise, the corresponding permit or registration shall be deemed approved.<sup>30</sup>

Them term of the trust was increased. Now, it is fifty years and is renewable at the request of the interested party. The trusts that were granted pursuant to the 1973 FIL will obtain all the benefits established in Chapter II Title II of the FIL.<sup>31</sup>

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<sup>27</sup> See FIL *supra* note 3 art. 10.

<sup>28</sup> *Id.* 1973 FIL *supra* note 4 art. 18; 1989 FIL Regulation *supra* note 7 art. 12.

<sup>29</sup> See FIL *supra* note 3 art. 11.

<sup>30</sup> *Id.* Art. 14.

<sup>31</sup> *Id.* Arts. 13, eleventh transitory; 1973 FIL *supra* note 4 art. 20. The 1989 FIL Regulation, “while not guaranteeing full perpetual ownership of land, do broeaden and liberalize the earlier trust provisions . . . Under the 1989 [FIL] Regulation, previous trust and any future trusts can be renewed automatically for additional periods of thirty years . . . The ability to add thirty years to an ownership interest [could] allay some of the insecurities past investors have had of committing capital to México’s border and coastal areas.” See Silva & Dunn, *supra* note 26 at 963.

**F. Corporations.** In case a foreign investor wants to participate in any existing Mexican corporation in a proportion higher than 49%, directly or indirectly, he will need a favorable resolution from the Commission as long as the total value of the assets of the relevant corporation exceeds the sum to be annually determined by the Commission. As of the date of the new FIL, article tenth transitory dictates that until the Commission establishes the sum of the total value of the assets, the amount of \$85 million new pesos is hereby determined.<sup>32</sup> In granting favorable resolution, the Commission will have to apply the rules established in article 29 mentioned above.

The FIL did not contemplate the restrictions established in articles 8 and 9 of the 1973 FIL in which a preferential option to Mexicans was granted in the acquisition of established corporations or of their control and the requirement to obtain authorization from the corresponding Secretariat, according to the branch of economic activity involved.<sup>33</sup>

Furthermore, the FIL does not allow the Commission discretionary powers to decide on the expansion of established foreign investment to manufacture new product lines, enter into new economic activities or open new facilities.<sup>34</sup>

A permit from the Ministry of Foreign Affairs is required for **(i)** the incorporation of corporations and **(ii)** the change of their corporate name or modification of the foreigners' exclusion clause for a foreigners' admission clause.<sup>35</sup>

In order for foreign corporations to carry out acts of commerce in México, authorization from SECOFI needs to be obtained for subsequent recording with the Public Registry of Commerce. Applications must be granted within 15 working days following the date of their presentation.<sup>36</sup>

Furthermore, Mexican corporations with participation of foreign individuals or corporations, branches of foreign investors and trusts with foreign beneficiaries shall be registered with the Registry of Foreign Investments.<sup>37</sup>

In the economic activities or corporations which are not expressly regulated in the sections mentioned above, or in the corresponding applicable law to the economic activity where the capital will be invested, foreigners may participate in investments or make acquisitions in general without limitations. In this way, the FIL represents a substantial liberalization for the participation of foreign investment in different economic activities.<sup>38</sup>

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<sup>32</sup> See FIL *supra* note 3 arts. 9, tenth transitory.

<sup>33</sup> See 1973 FIL *supra* note 4 arts. 8-9.

<sup>34</sup> Article 12 of the 1973 FIL established that the Commission is empowered to **(i)** decide on foreign investment that intends to be undertaken in business enterprises established, or to be established, in México or in new business enterprises; and **(ii)** decide on the participation of foreign investment existing in México in new fields of economic activity or in new production lines. *Id.* Art. 12 (III) – (IV).

<sup>35</sup> See FIL *supra* note 3 art. 15-16.

<sup>36</sup> *Id.* Art. 17.

<sup>37</sup> *Id.* Arts. 31-32 Registration must contain the information established in article 33 and must be renewed annually by completing and filing an economic financial questionnaire.

<sup>38</sup> For those economic activities or corporations that do not have a specific restriction in the FIL, the six requirements established in article 5 of the 1989 FIL Regulation are no longer needed. See 1989 FIL Regulation *supra* note 7 arts. 5. sixth transitory.

## THE NORTH AMERICAN FREE TRADE AGREEMENT (“NAFTA”)

NAFTA defines investment in a broad way to assure favorable treatment for most related activities.<sup>39</sup> In the Mexican case, under chapter 11 the following investors and investments will be protected: **(i)** investors from United States and Canada; **(ii)** investments made by the investors from the United States or Canada; and **(iii)** investments made by corporations which are controlled by investors from non-NAFTA countries, as long as the corporations have been incorporated in the United States or Canada and they carry out economic activities in such countries. For instance, the investments made by Volkswagen of México in the United States and Canada are protected by chapter 11; nevertheless, the direct investments made by Volkswagen of Germany are not protected. As a result, chapter 11 is not exclusively reserved to NAFTA investors.<sup>40</sup>

Basically, chapter 11 and its corresponding annexes dictate the following rules:

**A. National Treatment.** NAFTA requires the application of national treatment to NAFTA’s investors. A NAFTA country shall deal no less favorably with investors from another party than its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investment.<sup>41</sup> In México, national treatment is granted to foreign investors in almost all economic activities and corporations with the exception of those economic activities reserved for the state, Mexican corporations, those economic activities where the FIL dictates specific percentages of foreign investment, or those economic activities that need favorable resolution from the Commission to exceed the percentage. If we consider that México excluded from chapter 11 the economic activities and corporations mentioned above, as well as the fact that the FIL did not consider any preferential rights for Mexicans, such as in the acquisition of already existing Mexican corporations, it could be said that the FIL establishes the national treatment principle. However, if we consider the provisions of the FIL, the first analysis that a foreign investor has to make is to determine whether the economic activity or corporation in which he wants to invest is or is not subject to a special regulation. In this way, the national treatment concept is not completely applicable by the FIL since a foreign investor first will have to observe the exception and then the general rule.

**B. Most favored Nation Treatment (“MFNT”).**<sup>42</sup> The new FIL does not establish this principle. Nevertheless, according to the constitutional supremacy clause established in article 133, which, by the way, is very similar to its counterpart in the United States Constitution, in article VI, the MFNT will have to be observed.<sup>43</sup>

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<sup>39</sup> See North American Free Trade Agreement [hereinafter cited as “NAFTA”] *pub’d in* D.O. Dec. 20, 1993. art. 1139.

<sup>40</sup> See Fernando Heftye Etienne, *El Capítulo de Inversión del Tratado de Libre Comercio*, Universidad Iberoamericana [hereinafter cited as “Iberoamericana”], 29, 33 (1993).

<sup>41</sup> See NAFTA *supra* note 39 art. 1102.

<sup>42</sup> “Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment.” *Id.* Art. 1103.

<sup>43</sup> Article 133 of the Mexican Constitution reads as follows: “The Constitution, the laws of the congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the State, shall be the Supreme Law throughout the Union. The judges of each State shall conform to the said Constitution, the law, and treaties, notwithstanding any contradictory provisions that may appear in the Constitution or laws of the States.” See Mex. Const. *supra* note 3 art. 133.

Also, NAFTA establishes a minimum standard of treatment which will be in accordance with international law.<sup>44</sup>

**C. Performance Requirements.** A whole list of prohibitions of performance requirements as condition for investment is established.<sup>45</sup> This prohibition applies to non-NAFTA countries as well. “Thus, México and Canada no longer can require any investor to export to the United States, to limit imports of components from the U.S. or to by components from a domestically-owned supplier instead of a U.S.-owned firm.”<sup>46</sup> As mentioned above, the FIL did not consider the discretionary powers of the Commission established in article 5 and the 17 criteria set forth in article 13 of the 1973 FIL.

**D. Expropriation and Compensation.** Part of the implemented legislation was to amend the Expropriation Law. The new amendments dictate that compensation shall be equivalent to the fair market value and shall be paid within one year following the expropriation declaration in national territory, without prejudice that the payment of the compensation can be settled in kind.<sup>47</sup>

**E. Dispute Settlement.** This is the first time México has committed itself to resolve foreign investment disputes through the arbitration mechanism.<sup>48</sup> The first step in a dispute between an investor and a NAFTA country is consultation and negotiation. If the parties involved in the dispute do not reach a settlement, the investor will have the option to choose as a forum for resolution the host country’s national courts, administrative tribunals or international arbitration.<sup>49</sup>

**F. Remittances.** Not only México but also the United States and Canada committed themselves not to impose any kind of barriers to the remittance of capital abroad, except when **(i)** the host country has problems with its balance of payment and the program is approved by the International Monetary Fund; **(ii)** the corporation declares bankruptcy; or **(iii)** the corporation or the investor has to comply with a judicial order.<sup>50</sup>

**G. Openness in Economic Activities.** México excluded from chapter 11 the strategic areas reserved for the state,<sup>51</sup> the economic activities and corporations reserved for Mexicans or subject to specific percentage or to the approval of the Commission in order to exceed the percentage established in the FIL. As it has been mentioned, México has eliminated the 49% foreign investment-51% national investment rule; therefore, for any economic activity or corporation that is not established in the categories mentioned above, the foreign investment shall participate freely in the potential to perform in new economic activities. Furthermore, México will

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<sup>44</sup> See NAFTA *supra* note 39 art. 1105.

<sup>45</sup> Among other things. The list includes mandatory exports of **(i)** a given level of percentage of goods or services; **(ii)** minimum domestic content; **(iii)** preferences for domestic sourcing; **(iv)** production process; **(v)** transfers of technology. *Id.* Art. 1106. See also Jauregui Rojas, *supra* note 12 at 49.

<sup>46</sup> See Jauregui Rojas *supra* note 12 at 49.

<sup>47</sup> See Mex. *Ley de Expropiación* (Expropriation Law) *pub'd in* D.O. Dec. 22, 1993. Arts. 3-5, 9-10, 20-21; NAFTA *supra* note 39 art. 1110.

<sup>48</sup> See Heftye Etienne *supra* note 40 at 38.

<sup>49</sup> See NAFTA *supra* note 39 arts. 1115-1138. See also Jauregui Rojas *supra* note 12 at 50.

<sup>50</sup> At the beginning of the 1990s, México abrogated the Exchange Control Law. See NAFTA *supra* note 39 art. 1109.

<sup>51</sup> The strategic areas that are reserved for the Mexican state were maintained by México under NAFTA. However, if México decides to open such areas to the private sector, México will be able to establish limits in the percentage of the participation of the foreign investment without violating NAFTA. See Heftye Etienne, *supra* note 40 at 33.

deregulate certain economic activities to foreign investment through the years. Among these activities the FIL dictates:

- **In the reserved activities for Mexican.** Foreign investment in international ground transportation of passengers, tourism and loading between points of the Mexican territory and the administrative service of bus stations for passengers and auxiliary services will be permitted in up to 49% of the capital stock of a Mexican corporation in two years, up to 51% in seven years, and up to 100% in ten years;<sup>52</sup>

- **In the activities and acquisitions with specific restrictions.** In the manufacturing and assembling activities of parts, equipment and accessories for the automobile industry, foreign investment can participate up to 49% in the capital stock of Mexican corporations. However, on January 1, 1999, investment can be increased to 100%.<sup>53</sup> In the rendering of video-text and switching services in packages, foreign investment can participate up to 49%. But, on July 1, 1995, foreign investment can be increase to 100%,<sup>54</sup> and

- **Activities and corporations that can exceed the percentage through favorable resolution.** Corporations engaged in the construction industry and public works building and installation can have up to a 49% foreign investment at the moment. However, on January 1, 1999, foreign investment can be increased to 100% of the capital stock of Mexican corporations.<sup>55</sup>

In the economic activities and corporations immediately above mentioned foreign investors will not need authorization from the Commission.

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<sup>52</sup> See FIL *supra* note 3 art. Sixth transitory.

<sup>53</sup> The participation of foreign investment in this activity was increased from 40% to 49%. *Id.* Art. Seventh transitory; 1973 FIL *supra* note 4 art. 5(c).

<sup>54</sup> See FIL *supra* note 3 art. eighth transitory.

<sup>55</sup> *Id.* Art. Ninth transitory.