Doing Business in Mexico: A Practical Legal Analysis

Robert J. Radway

Doing Business in Mexico: A Practical Legal Analysis

ROBERT J. RADWAY*

I. The Foundation and Its Main Pillars

Four areas of Mexican law are particularly significant to foreign companies doing business in Mexico. These laws are the Foreign Investment Law,[1] the Transfer of Technology and Inventions and Trademarks Laws,[2] the *Maquiladora* or In-Bond Assembly Program,[3] and the recently issued Incentive Program for Industrial Development.[4] Periodic modification of these laws, perhaps as a result of changing economic conditions or otherwise, results in generally flexible application to continue to permit United States and other foreign business to engage in profitable business operations in Mexico. Current economic and social conditions in that country would appear to call for increased flexibility and occasional exemption from "Mexicanization" rules, with a continued emphasis on and trend towards joint ventures with majority Mexican partners, and continued loosening of import restrictions to permit huge expenditures of the foreign exchange from oil revenues for capital goods and technology to feed the massive industrial expansion.

*Mr. Radway practices law in New York City.

[1]Law to Promote Mexican Investment and Regulate Foreign Investment, DIARIO OFFICIAL [D.O.] March 9, 1973. [hereinafter cited as Foreign Investment Law].

[2]Law on the Registration of Transfer of Technology and the Use and Exploitation of Patents and Trademarks, D.O., Dec. 30, 1972; Law on Inventions and Trademarks, D.O. Feb. 10, 1976 [hereinafter cited as Industrial Property Code].

[3]Programa Nacional Fronteriza, Address by Minister Campos Salas, Ministry of Industry and Commerce (Aug. 1965).

[4]The program was established by a series of four Federal Executive Decrees: Feb. 2, 1979 (Decree which estabishes geographical zones for the execution of the Program of Incentives for the Territorial Deconcentration of Industrial Activities as anticipated in the national Plan of Urban Development); March 6, 1979 (Decree that establishes Fiscal Incentives for the Development of Employment and Investment in Industrial Activities); March 9, 1979 (Agreement that establishes the Fiscal Incentives for the Development of Employment and Investment in Industrial Activities); March 19, 1979 (Decree that orders the execution of the National Plan of Industrial Development and establishes the bases for its fulfillment).

II. History of Foreign Investment in Mexico

The Foreign Investment Law, actually the "Law to Promote Mexican Investment and to Regulate Foreign Investment," became effective May 8, 1973. The name suggests the trend established in the Mexican Constitution in 1917 but unrealized until shortly after the nationalization of the petroleum industry by President Cardenas in 1938. By the early 1940s, the emphasis was on attempting to direct foreign capital into the production of goods and services for internal consumption and not merely for export. This was partly due to the effects of World War II and a drastic reduction of imports under those circumstances. On June 29, 1944, an emergency decree regulating foreign flight capital during the war years granted authority to the Ministry of Foreign Relations to authorize, limit or condition foreign investment. All foreign investment was required to be registered, and received a permit upon entering the country in order to prevent capital from coming in, displacing Mexican capital, and departing after the war, leaving Mexican investors on the sidelines and devastating the infrastructure. The Ministry of Foreign Relations' broad powers to decide on a case-by-case basis the merits of each transaction involving new foreign investment has continued to the present day.

In 1959 the Administration adopted the policy that the firms producing raw materials should be in a minority position with a majority Mexican partner. This was a sign of developments which were to unfold over the next two decades. In 1960 the electric power companies were nationalized with no significant disruption to foreign investment. The need for import substitution gave impetus to the economic doctrines of the 1960s. By the mid-1960s, the Administration continued the strong emphasis on mixed investments with a majority of Mexican capital.

In July 1970 an important decree was promulgated which prohibited foreign investment in certain well-established and important economic activities. It reserved five sectors to the State and eight others to companies wholly-owned by Mexicans. The sectors closed to foreign investment were electricity, banks, insurance companies and related financial services, and all the areas previously reserved for majority Mexican ownership such as communications, transportation, fishing, and the like. This merely ratified the practice which had developed informally, since these areas were already dominated by Mexican firms. But this decree also extended the requirement of majority Mexican ownership to steel, cement, glass, fertilizers, cellulose, aluminum mining, chemicals and rubber. In some cases, such as steel, this formalized what had already been achieved. In other cases, however, this was to strongly affect new investments. Moreover, since these restrictions applied to expansion programs of existing companies, they represented a strong incentive for such companies to seek local partners. This resulted in several large United States firms selling majority control to Mexican groups in the early to mid-1970s.

Two later decrees also formalized previous practice. A decree in February 1971 reserved the basic petrochemical industry to the State, and required 60 percent Mexican ownership for companies processing secondary petrochemicals. In mining companies, 66 percent Mexican ownership was required. A subsequent decree in October 1972 established the requirement for 60 percent Mexican ownership in companies manufacturing automobile parts.

III. The Foreign Investment Law

Many take the position that the new Foreign Investment Law of 1973 for the most part merely restated practices which had been evolving for a number of years. One of the main provisions of this law was the establishment of the Foreign Investment Commission comprised of the representatives of seven relevant ministries and an Executive Secretary to supervise the ongoing affairs of the Commission. The objectives of this law were to promote national investment, control and regulate foreign investment, and stimulate a fair and balanced development, consolidating the economic independence of the country. The law defines what a foreign investment is, and then states that all foreign investment performed in connection with the capital of the enterprise, for the acquisition of property and in the operations to which the law refers, is subject to the provisions of the law. The law includes a provision (traditionally referred to as a "Calvo clause") which subjects the foreign investor to the same standard of treatment as a national investor, and obliges the foreign investor to agree not to invoke the protection of its own government in the event of a dispute concerning the investment.

The economic activities governed by the law are characterized in four classes:

1. Those reserved to the State[5]:
   (a) hydrocarbons and basic petrochemicals;
   (b) exploitation of radioactive minerals and generation of nuclear energy;
   (c) mining as referred to in the relevant mining law;
   (d) public utilities (for example, electricity, railroads, and radiotelegraph communications).
2. Those reserved to Mexican corporations with provisions in their charters excluding foreigners (a foreign exclusion clause)[6]:
   (a) radio and television broadcasting companies;
   (b) transportation (including urban, interurban, and federal roads; automotive transportation; national air; and maritime);
   (c) forestry exploitation;
   (d) gas distribution;
   (e) any others stipulated by specific law or regulation.

[5]Foreign Investment Law, *supra* note 1, art. 4.
[6]*Id.* art. 4.

3. Those in which foreign capital may participate as specified[7]:
   (a) exploitation and utilization of mineral substances;
      (1) ordinary concessions, 49 percent maximum;
      (2) special concessions for national mining reserves, 34 percent maximum;
   (b) secondary petrochemicals, 40 percent;
   (c) manufacture of automobile vehicle components, 40 percent;
   (d) others prescribed in specific laws or regulations.
4. Those that are unspecified permit foreign investment up to 49 percent, provided the capital does not have the power of management of the enterprise.[8]

The law reiterated the provision existing since the Constitution of 1917 (Article 27) that foreigners and foreign corporations, along with Mexican corporations with foreign participation, were prohibited from acquiring direct ownership of land and water within a strip 100 kilometers along the border and fifty kilometers along the coastal frontiers. A decree of April 29, 1971, however, sanctioned the acquisition of property within the prohibited zone by foreigners through the means of trusts (*fideicomisos*) for a term of not more than thirty years, as being consistent with both the Constitution and Mexico's economic development. This replaced the *prestanombre* or strawman system designed to accomplish the same result by holding title in someone else's name. The 1971 provision is continued in the Foreign Investment Law.

Foreign acquisitions of Mexican interests of more than 25 percent of the capital or more than 49 percent of the fixed assets of established enterprises require approval from the Commission. In addition, the Commission must approve expansion to new economic activity, or new lines of products by existing enterprises with foreign participation. These provisions caused considerable confusion and controversy at the outset, and this controversial area was later defined into three issues:

1. New establishments;
2. New economic activity;
3. New lines of products.

These issues all involve the activities of foreign investors who were in business in Mexico before the effective date of the law. It does not require much imagination to envision a situation where an ongoing business desires to add a line of products, to change the application of one process from *X* to *Y* (or merely to add *Y* as a second application), or the straightforward matter of expansion of its production and distribution facilities. Subsequently, Resolution No. 8 was issued as a ruling by the Commission, giving blanket authorization for a new establishment if, and only if, the new establishment was created exclusively for administration or warehousing purposes (not the nor-

[7] *Id.* art. 5.
[8] *Id.* art. 5.

mal or ordinary manner of the company's activities) and providing that the Commission receive the necessary administrative information. Any factory, plant, shop, business, store, office, warehouse, storage facilities, or administrative offices, whether referred to as a branch, agency, or any other designation and regardless of whether it was owned or leased, fell within the approval requirements of the law, unless it qualified for the blanket authorization mentioned above.

With respect to new fields of economic activity and new lines of products, the Commission issued Resolution No. 16 in September 1977 which also attempted to clarify some of the controversy and confusion surrounding those issues. Other resolutions issued by the Commission attempted to clarify such items as: relocation of commercial, industrial, and services establishments;[9] closing of new establishments;[10] transfer of shares between investors belonging to the same group;[11] and acquisitions of more than 25 percent of the capital by foreign investors.[12] In all of the resolutions it was made clear by the Commission that the same general criteria would be considered in determining whether the particular transaction required approval of the Commission. The criteria was generally similar to that set forth in the law itself, which listed seventeen items to be considered by the Commission.[13] In summary, they include strong policy guidelines on the part of a developing country to attempt to stimulate its social and economic development, promote exports, produce indigenous technology, decentralize industry, create more jobs and raise the skill of the work force, and stabilize the balance of payments.

The law provided the usual penalties for failure to register the investment, including the characterization of the agreement as null and void, the withholding of the right by the subsidiary to pay dividends to the foreign parent (denying tax deductibility to such payments), and providing fines and prison sentences for anyone who violated or cooperated in the violation of these laws. One final important provision of the law was that the *Maquiladoras* were excluded from the ownership restrictions set forth in the laws, although they still could not own the land outright. This will be referred to later.[14]

IV. Laws Affecting Transfer of Technology

An equally important pillar in this foundation affects the transfer of badly needed technology into Mexico. Many studies have been conducted by international (United Nations) agencies as well as by certain governments, including the Mexican government, the results of which indicate that a considerable number of abuses have been committed by the use of licensing

[9]Commission Resolution [Comm'n Res.] 15.
[10]Comm'n Res. 12.
[11]Comm'n Res. 13.
[12]Comm'n Res. 11.
[13]*Supra* note 1, art. 9.
[14]*See* Part V *infra*.

agreements for many years. Since the development of indigenous technology is essential to the economic and social development of the country, determinations were made to attempt to introduce regulations and control systems to minimize the abuses and begin the process of reducing dependency on foreign technology in the long run. One of the objectives of the Law on Transfer of Technology is the attempt to obtain unrestricted use of the technology, as opposed to a limited right to use it for a limited period of time. The objectives which the Technology Transfer Law attempted to accomplish were also served by the introduction of a new Industrial Property Code three years thereafter.

The Transfer of Technology Law

The Law on the Registration of Transfer of Technology and the Use and Exploitation of Patents and Trademarks became effective on January 29, 1973.[15] The two major provisions of this law include the identification or definition of the acts or agreements which are the object of the law, and the establishment of a comprehensive list of "restrictive" clauses which, if included, would require denial of registration.

On the other hand, the law identified and defined the types of transactions which it required to be registerd under the newly created National Registry of the Transfer of Technology (NRTT):

(a) licenses for the use and exploitation of trademarks;
(b) licenses for the exploitation of patents of invention, improvements, industrial designs and drawings;
(c) supply of know-how by means of plans, diagrams, designs, instructions, formulae, models, specifications, training or qualification of personnel, and other methods;
(d) provision of basic and detail engineering for plant installations or for the manufacture of products;
(e) technical assistance in any form;
(f) services of administration and operation of companies (management contracts or administrative contracts).

The second major thrust of this law was the definition of the so-called prohibited clauses, some requiring mandatory (per se) denial of registration and others allowing a certain degree of flexibility and negotiations between the parties and the Registry. Those requiring mandatory denial were as follows:

(a) where the technology was identified as being freely available in Mexico;
(b) where the license agreement contained an exclusive grantback obligation;

[15]Industrial Property Code, note 2 *supra*.

(c) where the agreement placed limitations on the research and development activity of the recipient;
(d) where the agreement placed limitations on exports of the product;
(e) where the agreement was for an excessive term (the maximum allowed was ten years);
(f) where the applicable law or jurisdictions provided within the law were not Mexican.

For the other clauses listed, the law essentially creates a presumption of restrictiveness, thus requiring denial of the agreement unless the party presenting the agreement could establish to the satisfaction of the Ministry that the agreement was in the best interest of the country. In other words, these provisions were negotiable:

(a) where the royalty or fee was deemed to be excessive (royalty ranges evolved over a period of time based on the product category or industrial sector);
(b) where the supplier was permitted to intervene in the management of the recipient or his technology (this category became increasingly important after two or three years of the NRTT's existence).
(c) where the recipient was obliged to acquire tools, equipment, or raw materials from a specified source, usually the supplier (the traditional tie-in clause);
(d) where the use of complementary technology was prohibited;
(e) where the output was sold exclusively to the supplier;
(f) where the agreement required the recipient to use the supplier's personnel;
(g) where the agreement imposed production, volume, or sales price limits on the recipient; and
(h) where the agreement required sales representation by the supplier in Mexico.

The agreements which contained these latter (negotiable) provisions were for the most part approved when the supplier alone or the recipient and supplier jointly were able to establish to the Registry one of the following: that the fee or royalty was justified by the unique nature of the technology, or the tie-in or other nominal restriction was in fact a protection to the recipient by assuring him a guaranteed source of supply at a guaranteed level of quality, or where the guaranteed availability of the supplier's personnel would assure the satisfactory practice of the process or the patent, or would provide the necessary technical assistance to assist the recipient in starting up his operation.

Exceptions were made in the law for the entrance of technicians for emergency or other related situations, or the installation and repair teams that are common to the start-up of a new plant. These transactions were not required to be registered.

And finally, this law provided, like the Foreign Investment Law, an exception for the *Maquiladora* plants.

The Law on Inventions and Trademarks

This new Industrial Property Code became effective on February 10, 1976[16] and replaced the previous Industrial Property Code which had been effective since 1943. The law contains some important provisions regarding patents and trademarks. With respect to inventions (patents), it created a Certificate of Invention patterned after the Soviet model, granting fewer rights than a traditional patent. It reduced the duration of the term of a patent to ten years (now counted from date of grant instead of filing date, leaving a net reduction of two to three years), and established that same term for the Certificate of Invention. It reduced the fields of patentable subject matter, eliminating pharmaceuticals, beverages and foodstuffs, fertilizers, herbicides and pesticides, among others. Finally, it introduced the requirement that patents must be "worked" within three years or be subject to the compulsory licensing and/or forfeiture requirements for public policy reasons. It is, of course, too early to analyze whether or not the potentially serious effects of this last provision will be enforced. Mexican government studies had indicated that a very high percentage of patents in these target areas, particularly pharmaceuticals and the food and beverage categories, were owned by foreigners and were not being used or "worked." The response from the pharmaceutical industry on the latter point generally points out that the prior Mexican patent legislation prohibited the patenting of a product in that industry, and extended protection only to the process used in its production. As a result, these companies were forced to patent the process that was intended, and every other conceivable alternative, in order to protect the compound or product involved. This obviously resulted in a significant amount of patent applications which were granted but never used.

In addition, the law contains some controversial provisions regarding trademarks. The terms were reduced to five years from date of filing, but unlimited renewals were granted. The law requires the trademark to be effectively used or "worked" within three years from the date of issue, or be subject to cancellation. The law included extensive Proof of Use criteria, which were augmented with subsequent regulations issued in October 1976 and later in 1978. Finally the law provided for compulsory licensing of trademarks for public interest reasons.

The most controversial provision affecting trademarks was the requirement established in this law to link foreign trademarks which were used on products manufactured in Mexico with an equally prominent original (new) Mexican mark. The law generated so much controversy, however, and there were so many meetings betwen various Mexican (and foreign) groups and Mexican government officials, that the government eventually issued a decree in December 1978 extending the deadline for compliance until the end of 1979. That decree also provided that additional extensions could be issued by

[16] *Id.*

the Ministry as it deemed appropriate. The prevailing opinion of Mexican attorneys and business executives seemed to be that the government intended to ameliorate the effects of this law, since it appeared to have potentially counterproductive implications.

Reduced Foreign Payments

Before the Mexican Registry (NRTT) was merged into the Foreign Investment Office, officials published figures indicating there had been a savings in royalty payments of approximately (United States) $500 million in the five-year period the law had been in effect. This amounts to a tremendous savings or reduction in the burden of foreign exchange for the country.

Analysis of other statistics published by the Registry indicated the seven most common reasons for denial of registration of technology transfer agreements in those early years were as follows:

1. Royalty rates too high	85% +
2. Output and price restrictions	39%
3. Unreasonable terms	38%
4. Foreign courts and law	23%
5. Management intervention	22%
6. Grantback requirements	21%
7. Export restrictions	17%

It is known, however, that many of the agreements that were rejected on the first presentation were renegotiated when their provisions were modified, and the majority of them were subsequently accepted with terms believed to be more acceptable to Mexico.

The meaning of all this was clear. There was increased government intervention in the negotiations in order to attempt to equalize the bargaining power and to strengthen the local industries. One wonders whether the Mexican private sector was ever asked whether it in fact wanted State intervention to help it accomplish these objectives.

V. *Maquiladora* or In-Bond Assembly Programs

The third major pillar of this foundation was a law passed in 1965,[17] with multiple objectives. One of the primary objectives, when government planners foresaw severe population increases for the next couple of decades, and thus substantial requirements for job creation, was a need to improve border conditions on the Mexican side of the United States border. This may have been triggered by the end of the United States *bracero* program and the need to provide jobs for those formerly employed Mexican workers clustered near the borders.

The idea was to authorize the creation of assembly plants by United States manufacturers where there existed an abundance of labor at lower costs,

[17] *Programa Nacional Fronteriza*, note 3 *supra*.

accessibility of transportation, and the application of certain United States laws,[18] which provided special treatment for certain products exported into the United States from a foreign country which contain substantial United States content and related considerations. Materials shipped from the United States to Mexico entered the country in bond (bonded warehouses) on arrival. The materials were processed and returned to the exporting country, in this case the United States. This permitted United States companies to compete with imports to the United States from countries like Hong Kong, Japan and Taiwan. These products have also been competing successfully in the United States export market. Many of the plants that were established under the program have sister plants on the United States side of the border owned by the same parent company.

There were no Mexican import or export duties imposed on these materials. A four percent sales tax was applied to all Mexican components assembled and re-exported with the product, and state taxes varied from three to five percent in the different Mexican states.

In 1972, a resolution was passed amending this law and providing certain modifications to streamline this very successful program. Assembly plants were permitted to be located anywhere within the country, not just in the border areas. Special rules were provided for the importation and bonding. The materials were shipped from the United States into bond on arrival, but since 1972 bonding could be arranged on an annual basis. A series of forms were provided for the necessary authorizations. Owners of assembly plants could also request permission for a small pecentage of their products to be sold in the domestic Mexican market, assuming certain conditions were met.

Certain general criteria were of course considered prior to the establishment of an assembly plant by a United States company. First, of course, was the question of site selection. Secondly, the analysis included examination of the benefits of adopting a sister plant approach. Next it was necessary to verify the product content and identify any special rules governing import to the United States (such as explosives). Finally, the analysis involved the traditional examination of how or in what form the firm would incorporate in Mexico. Would it be through a wholly owned foreign corporation? Or would the arrangement lend itself better to a branch of the foreign corporation, or possibly a proprietorship? Leasing of the plant was an alternative examined and adopted by some, and that also could be arranged through a branch or a subsidiary. Those that established subsidiaries, despite rules permitting 100 percent ownership, frequently considered the possibility of a joint venture.

The law of course required the company to register as an assembly plant operation and provided for a series of approvals for the necessary operations to be performed. Among others, this included authorizations and arrangement for the bonds to be posted and for the various permits and licenses to import and export.

[18]TSUS 806.3, 807.

VI. Industrial Development Program

In February and March 1979 the Mexican government issued its new Incentive Program for Industrial Development through a series of four decrees.[19] The general objectives of the program clearly identify it as the fourth pillar of the legal foundation, and early results indicate a direct interrelationship with the Foreign Investment, Technology Transfer and *Maquiladora* policies.

The law sets forth the national plan for industrial development of the country. It creates a National Commission of Industrial Development, an inter-ministerial commision (like the Foreign Investment Commission) authorized to facilitate the implementation of the expressed goals. Although Mexico has had previous industrial promotion laws, this appears to be the first time that such a coordinated set of fiscal and other incentives has been introduced in order to stimulate the specific accomplishment of defined segments of a broad national plan.

Those goals include reaching full employment by the end of the century; reorienting production toward basic consumer goods (durable and nondurable); developing high-productivity industrial sectors capable of exporting and more efficiently substituting imports; decentralizing to the extent possible the concentration of economic activity by channeling investments toward the coasts, border zones and other localities outside the three major industrial zones (Mexico City, Guadalajara and Monterrey); and generally improving the integration (especially vertical) of the industrial sector to make better use of the country's natural resources (adding more value in the processing thereof) and develop a strong, competitive capital goods sector. Included is a desire to improve the productive efficiency of the agricultural sector, including foodstuffs and agricultural equipment.

The tools provided by this plan, which has identified short- (one-year), medium- (1979-82) and long-term goals (1990), include differential rates for industrial energy (discounts up to 30 percent for natural gas, residual fuel oil and electric power by locating plants in various designated zones) and discounts of 30 pecent off prices of important basic petrochemical products when new facilities comply with requirements to export a minimum of 25 percent of product for at least three years.

Another tool is a fiscal (tax) incentive arrangement designed to promote and stimulate investment in priority activities (especially capital goods), deconcentrate industrial production by locating in priority zones, and increase employment. A series of tax and investment credits are available for qualifying investments.

Job creation credits and favorable accounting treatment in specified cases, and more attractive financing for qualifying firms are other incentives offered under this comprehensive plan.

A clearly defined goal to strengthen small and medium-size companies emerges from careful analysis of the plan, consistent with the belief that such

[19] *See* note 4 supra.

firms are more labor intensive, and with the desire to correct some oligopolistic imbalances which the government apparently assumes to be harmful. Depending on the actual effect on companies of this size, this effort may support the stated goal of increasing the efficiency of industrial integration in basic and secondary industrial sectors and consumer and agricultural sectors.

Among the priority zones identified are those rich in raw materials where adjacent processing industries can be developed. Other zones designated as priority include Pacific and Gulf Coast port locations which will facilitate growth by easing handling of imports essential for industrialization, and promote the transportation and export of manufactured goods. Areas clustered along parts of the natural gas distribution network where infrastructural conditions favor building plants are also priority zones. Some coastal and border areas that are designated as priorities also gain benefits under other laws and incentive policies, such as the *Maquiladora* program.

The catch is that these incentives are only offered to "Mexican" investors which are so defined under the Foreign Investment Law. What this means is that the Mexican government wants foreigners to come to Mexico and set up a new plant, participate in the rapidly growing market, and create new jobs to employ the expanding work force, but they want the foreigner to enter in a minority equity position with a majority Mexican partner. They want the foreign capital and technology as a complement and supplement to indigenous resources.

The Mexican government, through the Ministry of Patrimony and Industrial Development and other cooperating ministries, has already shown its determination to implement this plan. In addition to the Customs Assessment Law[20] which was designed to increase efficiency of tariff policy and improve processing of imports by modifying the tariff and import licensing system, the Ministry has given favorable treatment to applications for registration of foreign investments and technology to firms meeting some of the objectives of the Industrial Development Plan.

VII. Joint Ventures

It should be clear by now that the trend of the law and policy in Mexico, beginning with the Revolution of 1910 and the Constitution of 1917, has been to encourage the participation of foreign capital blended with and supplementary to Mexican capital. Thus, joint ventures are the favored mode for encouraging foreign participation in the economic and social development of the Republic.

United States companies, however, have traditionally resisted the idea of foreign investment without retaining both majority equity and control. Recent trends in Mexico, Brazil and other Latin American countries, as well as elsewhere, have raised familiar questions with each opportunity that is presented.

[20] Customs Assessment Law (effective July 1979).

No discussion of joint ventures should start off without emphasizing the importance of the selection of the partner. This is not a legal matter, but all of the laws, rules, regulations and policies of the government are clearly secondary to the selection of a joint venture partner who shares your interests virtually across the board. A critical aspect of the Foreign Investment and other laws is how these laws are interpreted and applied. This depends to a great extent on the people who are in office and the currently prevailing political pressures. It is therefore important to understand their backgrounds and what has influenced their thinking.

This is one of the essential elements that one's local partner will provide. He must know the overall local environment and maintain a constant contact with changing events and changing personalities. It is very likely that he is monitoring all of the necessary elements and people for his pre-existing interests and other operations. In other words, his feet are already in the fire.

Another element that one's local partner can provide is the ability to adapt the technology to the prevailing conditions in his country. It has been stated previously that one of the major objectives of the Mexican government is to create indigenous technology. Among other things, this means there is recognition that the marketplace and the infrastructure prevailing in Mexico differ from those in the United States. The capital equipment, techniques, and even products which are effective here are not necessarily effective in Mexico. The mentality of labor-intensive operations prevails for the most part throughout Mexico, but has long since disappeared from the scene in this country. As a result, many of the designs and much of the experience and know-how incorporated in American products and processes are capital intensive due to long-prevailing high costs of labor. In Mexico, therefore, equivalent parts of the product or process could be substituted without sacrificing performance criteria or quality, and thereby more jobs would be created and locally available resources would be utilized. This arrangement has been proven successful in Mexico, Brazil and other intermediate-stage developing countries, and should not be overlooked.

It has been stated by leading industrialists who have been involved in successful joint ventures in Mexico that some of the prerequisites for their beneficial results have included the necessary long-term affinity, which begins with appropriate attitudes on the part of each partner, and the development of mutual trust. The objectives of each partner are fully discussed at the outset before the deal is struck, and it is established that the objectives of each are consistent. Then the local partner capitalizes on his position in the country to seek and select the top- and middle-level management talent which the operation will require.

The subject of management and control is capable of a more attractive solution in Mexico than in other developing countries. The bylaws of the joint company may contain the necessary protection for the minority shareholder. Generally, different requirements are provided for two types of meetings contemplated in these kinds of shareholder agreements in Mexico. The ordinary meeting requires the presence of 50 percent of the voting shareholders, and the extraordinary meeting requires 75 percent. The latter type of meeting deals generally with the following kinds of issues:

(a) increase or reduction of capital;
(b) transformation by merger, acquisition, and the like;
(c) changes in purposes or objectives of the company;
(d) addition of new product lines;
(e) other major policy decisions.

The question of technical assistance fees should be agreed upon by the parties beforehand. The chairman of the board of a major Mexican industrial group stated his opinion that technology should not be utilized as a capital contribution because it limits the flexibility of the negotiations. He cited an example of a recent difficulty in a joint venture arrangement where the problems were simplified by separating the technology from the capital. In the course of his experience, the fees for technology and technical assistance had frequently been the basis of problems arising between the joint venture partners.

VIII. Stock Offerings

It has also been suggested that a company can Mexicanize its existing investment by offering shares publicly on the securities market, thereby diluting the control of national investors. This has been an increasingly favored approach the last few years. However, there have been reports of several situations where public offerings were prevented by government policy because of unfavorable circumstances prevailing in particular cases. This possibility will be more attractive as the Mexican capital market strengthens and expands in the future.

In addition, at least four major Mexican financial groups or institutions are known to have become increasingly active in financing joint ventures recently and have issued statements of their interest in continuing this trend. These include SOMEX, NAFINSA, BANAMEX and BANCOMER, of which NAFINSA and SOMEX are government and the others private. Other Mexican investment banks and financial institutions are becoming more active and reforms in capital market rules are being discussed.

IX. Other Considerations and Conclusion

Two other aspects will be mentioned in passing, as they are considered important enough to be included at this point. Late in 1978, the government decided to reduce the requirements for import licenses of a number of products. There appears to be a trend of removing some protection from inefficient Mexican producers to improve the quality of production, decrease prices, and generally improve competitive efficiency to prepare them for competition in international markets. This may be a combined result of "Chicago school" economic thinking and Mexico's decision to negotiate with the GATT for possible membership.[21]

It appears that a tax system will be replacing the import licensing system over the next few years. In this context a value-added tax was enacted and became effective on January 1, 1980. Beginning at that date, the value-added tax (VAT) replaced the commercial revenues tax and seventeen other taxes, including taxes on the resale of oil and lubricants, cement production, rubber tires and inner tubes, forestry exploitation, the fishing industry and others. VAT is to be applied to property transfers, services (except from professionals), property rentals, and importation of goods and services. Exports are exempt from VAT and the exporter may request a refund of the tax to be passed on to him by his suppliers, which refund may be up to ten percent of the value of the exported goods and services.

Finally, a word will be mentioned about naturalization and immigration. The General Population Law of 1947 as amended and regulated established the classification of foreigners—resident or entering Mexico. The three classifications are non-immigrant (*no inmigrante*), permanent resident alien (*inmigrado*), and immigrant (*inmigrante*). The latter two provide for residency of some duration, while the former is intended for temporary visits. The immigrant visa can lead to permanent resident alien status, but has been increasingly more difficult to obtain in recent years as the Government prefers not to add foreigners to their permanent working force. This is understandable in view of the priority given to job creation to absorb the expanding work force. The Labor Law has traditionally permitted a ratio of one foreigner with a work force of ten Mexicans under specified conditions. Obviously here, as throughout the legal structure, the emphasis is on reducing the number of foreigners required in the operation, while training and upgrading the skills of the nationals. The objective is for Mexicans to be trained to assume all of the responsibilities of running any given Mexican operation.

Throughout this summary one may infer a strong trend toward Mexicanization or nationalization of foreign industry by the Mexican Government. This summary is meant to provide a background and a context within which it could be better understood. Another way to look at it is that "nationalism" is another word for "patriotism," depending on which side of the table you are sitting.

---

[21]On March 18, 1980, the forty-second anniversary of nationalization of the Mexican oil industry, the President announced that it was "not a timely moment for Mexico to enter that trading system." The internal debate within Mexico had been long and more public than any other significant debate in recent memory. The President stated publicly that the GATT safeguard codes raised concern to Mexico in relation to the global energy plan that the country had proposed at the United Nations. Other Mexican officials suggested that joining the GATT would dilute the superior bargaining power which petroleum has bestowed upon the country. In any event, Mexico clearly has reserved the right to take a second look at a more opportune time.

Bibliography

Soberanis, *Legal Aspects Concerning the Technology Transfer Process in Mexico* 7 GA. J. INT'L L. 17 (1977).

AMERICAN CHAMBER OF COMMERCE OF MEXICO, QUARTERLY ECONOMIC REPORT: INDUSTRIAL INCENTIVE PROGRAM DECREES 35 (1979).

Brinsmade, *Mexican Law—An Outline and Bibliography of English Source Materials Relating to Certain Aspects Thereof,* 7 INT'L LAW. 560 (1973).

Camp & Magnon, *Recent Developments Under the Mexican Foreign Investment Law and the Law Regulating the Transfer of Technology,* 8 LAW. AMERICAS. 1 (1976).

Gordon, *The Joint Venture as an Institution for Mexican Development: A Legislative History,* 1978 ARIZ. ST. L.J. (1979).

Hyde & Ramirez 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 (1976).

Inman & Ortiz Tirado, *A Mexican Dividend: Las Maquiladoras,* 9 INT'L LAW. 431 (1975).

Lacey & Sierra de la Garza, *Mexico—Are the Rules Really Changing?,* 7 INT'L LAW. 560 (1973).

H. Wright, FOREIGN ENTERPRISE IN MEXICO: LAWS AND POLICIES. (1971).