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## Fundamentals of Doing Business with Mexico: After the Exchange Control.

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**FUNDAMENTALS OF DOING BUSINESS WITH MEXICO:  
AFTER THE EXCHANGE CONTROL**

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**I. INTRODUCTION: SCOPE AND BACKGROUND**

On September 1, 1982, the international business community witnessed the enactment of two measures which affected both the financial structure and the legal framework within which trade and investment with Mexico has been conducted during the past decades. The first decreed the expropriation of the private Mexican banking institutions,<sup>1</sup> and the second, more important in redefining future international trade policy with Mexico, decreed a generalized exchange control for foreign currency.<sup>2</sup>

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1. Decree Establishing the Nationalization of Private Banks, 374:1 DIARIO OFICIAL [D.O.] 3 (Mex.) (Sept. 1, 1982) (Decreto que establece la nacionalización de la banca privada).

2. Decree Establishing the Generalized Control of Exchange, 374:1 D.O. 5 (Sept. 1, 1982) (Decreto que establece el control generalizado de cambios) (effective September 1,

The Mexican economy experienced tremendous growth during the four years preceding these two enactments, 1977-1981.<sup>3</sup> The yearly average GNP growth rate was 8.5% in real terms; four million new jobs were created; per capita income grew 25% in real terms; capital formation rose from 22.4% to 29.5% of the GNP;<sup>4</sup> and oil production went from 1,085,000 barrels per day to 2,585,000 barrels per day.<sup>5</sup> This growth was primarily financed internally by the printing of money<sup>6</sup> and externally by growing oil exports<sup>7</sup> and heavy borrowing abroad.<sup>8</sup>

The drop in international oil prices (which resulted in a smaller influx of foreign currency) and the surge in interest rates to unprecedented levels,<sup>9</sup> coupled with the enormous demand for imports generated by the high growth rate (which caused a larger outflow of foreign currency), put severe pressure on the balance of payments of Mexico. More importantly, the persistent expansion of the amount of money in circulation without an equivalent increase in available goods and services caused the peso to lose value to the point where prices increased 125% during the four year pe-

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1982) [hereinafter referred to as GCE].

3. For a more thorough coverage of the tax and economic incentives given by the Mexican government, see Sánchez-Mejorada, *Legal Aspects of Doing Business with Mexico, Tax and Economic Considerations*, memoir to San Antonio Bar Ass'n (May 1982).

4. See Letter of Intent of November 10, 1982, signed by the Mexican government and the International Monetary Fund, 17:6123 EL HERALDO DE MEXICO 13A (Nov. 11, 1982).

5. See THE BRITISH PETROLEUM CO., STATISTICAL REVIEW OF WORLD ENERGY, 981, reprinted in BANCO DE MEXICO, 42:46 EL MERCADO DE VALORES 1184 (Nov. 15, 1982).

6. See BANCO DE MEXICO, 120 INDICADORES ECONOMICOS 7 (Nov. 1982). The amount of peso bills and coins in circulation were Mex\$79,900,000,000 at the end 1976; Mex\$88,600,000,000 at the end of 1977; Mex\$114,800,000,000 at the end of 1978; Mex\$149,600,000,000 at the end of 1979; Mex\$194,700,000,000 at the end of 1980; Mex\$281,800,000,000 at the end of 1981; and Mex\$338,100,000,000 as of August of 1982. *Id.*

7. Statistical Annex of the Presidential Sixth Government Report, BANCO DE MEXICO, 42:44 EL MERCADO DE VALORES 1126 (Nov. 13, 1982). Crude oil exports were US\$540,000,000 in 1976, US\$998,000,000 in 1977, US\$1,774,000,000 in 1978, US\$3,756,000,000 in 1979, US\$9,429,000,000 in 1980, and US\$13,305,000,000 in 1981. *Id.*

8. The Mexican public sector owed to non-Mexican lending institutions approximately US\$19,600,000,000 in 1976, US\$26,265,000,000 in 1978, and US\$60,800,000,000 in July, 1982. The private sector owed approximately US\$7,152,000,000 in 1978 and US\$15,200,000,000 in July, 1982. See INFORME ANUAL DEL BANCO DE MEXICO (1977); R. Suarez, *La Deuda Externa de Mexico, 1:1 PERFILES ECONOMICOS* (2a epoca) (May 1982); Lopez Portillo, *Sixth Government Report of September 1, 1982*, BANCO DE MEXICO, 42:36 EL MERCADO DE VALORES 921 (Sept. 6, 1982).

9. Address by Jose Lopez Portillo, Speech to General Assembly of the United Nations, BANCO DE MEXICO, 42:40 EL MERCADO DE VALORES 1017 (Oct. 4, 1982).

riod 1977-1981.<sup>10</sup> One of the few goods that did not experience such a price increase was foreign currency. The United States dollar, for example, could be bought for Mex\$22.74 at the end of 1977 and for Mex\$26.23 at the end of 1981<sup>11</sup> for a price increase of only 15%. Since the inflation rates suffered by Mexico's main trading partners were much smaller, foreign goods and travel became more attractive to Mexicans (which meant a larger outflow of foreign currency), and Mexican goods and travel became more expensive for foreigners (which caused a smaller influx of foreign currency) and resulted in further damage to the balance of payments. Many Mexicans took advantage of the overvalued peso and protected themselves from the erosion of value not only by purchasing much cheaper goods and services in the United States, but by investing in real estate in Florida, Texas, and other border states.<sup>12</sup>

The Mexican government took corrective action in February of 1982 by devaluing the peso from Mex\$26.86 to Mex\$46.80,<sup>13</sup> and again in August of 1982 from Mex\$49.05 to approximately Mex\$100.00.<sup>14</sup> A series of additional measures were taken during August as a prelude to the total foreign currency exchange controls imposed in September, 1982, when the free convertibility of the peso into foreign currency was eliminated.<sup>15</sup> The most important of these measures was the presidential decree of August 16, 1982, which established that foreign currency denominated deposits in

10. See BANCO DE MEXICO, 120 INDICADORES ECONOMICOS 42 (Nov. 1982). The national consumer general price index was 85.1 in 1977, 100 in 1978, 118.2 in 1979, 149.3 in 1980, and 191.1 in 1981. It was 382.9 as of November, 1982.

11. See BANCO DE MEXICO, 116 INDICADORES ECONOMICOS 62 (July 1982).

12. The Mexican government estimates that Mexicans hold real estate in the United States worth approximately US\$25,000,000,000, of which US\$8,500,000,000 was actually paid as down payments, the difference remaining outstanding. See Lopez Portillo, *Sixth Government Report of September 1, 1982*, BANCO DE MEXICO, 42:36 EL MERCADO DE VALORES 922 (Sept. 6, 1982).

13. Rates quoted by Banco Nacional de Mexico, S.A. on February 17 and 26, 1982. In United States dollars this represents a drop from \$0.0372301 to \$0.0213675, respectively.

14. Rates quoted by Banco Nacional de Mexico, S.A. on August 5, 1982, and thereafter. In United States dollars this represents a drop from \$0.0203874 to \$0.01, respectively. On August 19, 1982, the exchange rate peaked at Mex\$130 for US\$1.

15. Free convertibility of the peso refers to the right of the holder to convert or "change" currency freely into other currencies. See *DICTIONARY OF BUSINESS ENGLISH* at 124 (Longman York Press 1982).

Mexican banks, the so-called Mexdollars, could be returned to their owners only in pesos.<sup>16</sup>

The expropriation of private Mexican banks by the Mexican government was, according to the government, "in the public interest, [thus] . . . assuring that the internal financial system will act with more adherence to national economic policy."<sup>17</sup> Few were convinced, however, as banks were already heavily regulated by the Bank of Mexico,<sup>18</sup> the central government bank, the Ministry of the Treasury, and the National Banking and Insurance Commission.<sup>19</sup> The bank expropriation was seen mainly as a political ploy by the President of Mexico to save his image and to shift blame for the crisis.<sup>20</sup> Whatever the reasons, a constitutional amendment has been adopted by Congress and ratified by enough state legislatures to give constitutional authority to state ownership of the banks,<sup>21</sup> thus ensuring that the measure is politically almost irreversible.

Although additional regulations are expected to be enacted, the

16. See Decree to Provide for the Correct Application of Article 8 of the Currency Act of the United Mexican States, 377:35 D.O. 6 (Aug. 18, 1982) (Decreto para proveer ala debida observancia del articulo 8 de la Ley Monetaria de los Estados Unidos Mexicanos). "Mexdollars" refers to foreign currency, mostly in United States dollars, deposited in Mexican banks, which by virtue of the foregoing decree lost free convertibility. Upon withdrawal by the depositor, the bank was directed to tender not the kind of currency deposited plus interest, if applicable, but the equivalent in pesos at the rate of exchange in effect on the date of withdrawal, as determined by Banco de Mexico. For a definition of Banco de Mexico, see *infra* note 18 and accompanying text. The free convertibility of the peso was partially re-established by the new administration of President Miguel de la Madrid by Decree of December 13, 1982, which continues in force as of the date of this article. See Exchange Control Decree, 375:30 D.O. 4 (Dec. 13, 1982) (Decreto para proveer a la debida observancia del articulo 8 de la Ley Montaria de los Estados Unidos Mexicanos) [hereinafter referred to as ECD].

17. See Letter of Intent of November 10, 1982, signed by the Mexican government and the International Monetary Fund, 17:6123 EL HERALDO DE MEXICO 13A (Nov. 11, 1982).

18. Banco de Mexico, Mexico's central bank, acts as a "banker's bank," with similar functions and authority as that vested in the Federal Reserve System.

19. Translated herein as Banco de Mexico, Secretaria de Hacienda y Credito Publico, Comision Nacional Bancaria y de Seguros. For regulatory powers of these agencies, see Organic Act of the Federal Public Administration, 339:42 D.O. 2 (Dec. 29, 1976) (Ley Organica de la Administracion Publica Federal) (as amended); Organic Act of the Bank of Mexico, 126:17 D.O. 35 (May 31, 1941) (Ley Organica del Banco de Mexico) (as amended); Credit Institutions and Auxiliary Organizations Act, 126:17 D.O. 1 (May 31, 1941) (Ley Organica de la Administracion Publica Federal) (as amended).

20. Bus. Wk. September 13, 1982, at 80; THE ECONOMIST, Sept. 4, 1982, at 34, 80.

21. See Decree of November 16, 1982, 375:13 D.O. 7 (Nov. 17, 1982) (Decreto de reformas a los articulos 28, 73 fracción x y 123 apartado "B" de la constitución Politca de los Estados Unidos Mexicanos).

scope and purpose of this article is to examine and provide the international business advisor with the latest elements available to determine the law in the aftermath of the Generalized Control of Exchange Decree (GCE), Exchange Control Decree (ECD), and regulations that followed<sup>22</sup> as it affects business and legal strategies of foreign concerns doing business with Mexico.

## II. ENGAGING IN COMMERCE WITH MEXICO

### A. *The "Doing Business With" Concept*

A word of caution at the outset. The boundaries of distinguishing between "doing business with" or "doing business in" a certain country are somewhat artificial. "Doing business with" generally suggests engaging in international trade by means of transactions entered into by the different parties, either directly from their corresponding home offices, or through agents, mediators, or distributors. The term "doing business in" contemplates an additional step by the foreign concern through the establishment of a physical presence in the host country where it wishes to regularly engage in commercial activities.

These concepts, however, can only be given their full meaning through an examination of the applicable legislation of both the home and host country. The most important legislation which needs examination is the private law of the host country that establishes commercial qualification requirements, in conjunction with the tax laws providing the definition of a permanent establishment of foreign concerns in the host country. Hence, to adequately shape the concept of "doing business with Mexico," it is essential to examine both Mexican business and tax law.

The cornerstone of Mexican business law is the near century old Commercial Code (COMC),<sup>23</sup> a federal statute which, because of its obsolescence, has been superseded in many specialized areas by

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22. See *infra* note 104 and accompanying text. This article contains data available up to March 1, 1983.

23. See Commercial Code, Vol. I at 1 (Andrade ed. 1976) (Codigo de Comercio) (as amended) [hereinafter referred to as COMC]. Originally, COMC was designed to regulate substantive and objective commercial law in a comprehensive manner, including navigation and maritime commerce.

subsequent legislation.<sup>24</sup> Unlike the United States system, it has been generally accepted that only the Mexican federal congress may legislate in the field of commerce.<sup>25</sup> Hence, Mexican federal legislation preempts any attempt by state legislatures to regulate the field.<sup>26</sup> The Civil Code for the Federal District,<sup>27</sup> however, supplements and fills the gaps left by COMC and other specialized commercial enactments.<sup>28</sup>

The basic premise found in COMC is that foreign businesses or merchants may freely engage in commercial activities with Mexico, subject to both treaty provisions with their respective nations and Mexican legislation establishing the limits of alien's rights.<sup>29</sup> Foreign businesses or merchants, however, may not engage in commercial activities in Mexico, i.e., may not "do business in" Mexico, unless qualified to do so.<sup>30</sup> The query of what constitutes "doing

24. See Act for the Control and Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks of 1982, 370:6 D.O. 15 (Jan. 11, 1982) (*Ley para el Control y Registro de la Transferencia de Tecnologia y el Uso y Explotacion de Patentes y Marcas*) [hereinafter referred to as TTA]; Inventions and Trademarks Act of 1976, 334:27 D.O. 7 (Feb. 10, 1976) (*Ley de Invencciones y Marcas*); Act to Promote Mexican Investment and Regulate Foreign Investment of 1972, 317:7 D.O. 5 (Mar. 9, 1973) (*Ley para Promover la Inversion Mexicana y Regular la Inversion Extranjera*) [hereinafter referred to as FIA]; Navigation and Maritime Commerce Act of 1963, 261:17 D.O. 1 (Nov. 21, 1963) (*Ley de Navegacion y Comercio Maritimo*); General Business Entities Act of 1934, 85:30 D.O. 593 (Aug. 4, 1934) (*Ley General de Sociedades Mercantiles*) [hereinafter referred to as GBEA]; General Negotiable Instruments and Credit Operations Act of 1932, 73:50 D.O. 1 (Aug. 27, 1932) (*Ley General de Titulos y Operaciones de Credito*).

25. See UNITED MEX. STATES CONST. art. 73, §§ IX, X. Article 73 section IX provides that "Congress is empowered . . . to impede any restrictions from being imposed on interstate commerce." Section X provides that "Congress is empowered . . . to legislate in the Republic on matters of . . . Commerce." For a differing opinion, see Velasco, *Las Facultades del Gobierno Federal en Materia Economica*, 13:73 REVISTA JUS. 183-205 (Aug. 1944), to which the authors adhere.

26. An exception is recognized where the state legislatures promulgate administrative ordinances that are municipal in character. See Organic Act for the Federal District, art. 17, § XIII, reprinted in 159 OFFICIAL GAZETTE 31 (Jan. 1, 1979).

27. *Codigo Civil para el Distrito Federal en Materia Comun, y para Toda la Republica en Materia Federal* (Porrúa ed. 1982).

28. See *id.* art. 1; COMC, arts. 1-2 (Andrade ed. 1976); *supra* note 24 and accompanying text.

29. See COMC, arts. 13, 24 (Andrade ed. 1976).

30. See GBEA, 85:30 D.O. 593, art. 251 (Aug. 4, 1934). The Third Chamber of the Mexican Supreme Court in the *United States Land & Lumber Co.* case further elaborated on this point as follows:

The exposition des motifs of the General Business Entities Act, in dealing with foreign companies, established the difference between those pretending to engage in commerce "in" Mexico and those only concerned with undertaking the defense of

business in" Mexico is answered by COMC and the General Business Entities Act of 1934 (GBEA),<sup>31</sup> by the application of a twofold test: does the business entity (1) execute commercial transactions (2) regularly or continuously, i.e., display habit or course of performance. The objective element of the test, execution of commercial transactions, is found in COMC,<sup>32</sup> which contains a list of twenty-three different acts, contracts, or transactions that are deemed commercial in nature, plus a catch-all category. The subjective element of the test, habit, involves an analysis of the type and scope of operations the foreign concern is engaged in, in order to determine whether said foreign concern is, as a matter of course, "habitually" conducting business as if it had an establishment, branch, or office in Mexican territory.<sup>33</sup>

Where a foreign company is found to be regularly engaging in commercial activities in Mexico as a matter of course, it will be legally considered to be "doing business in" Mexico. The company must then be qualified by registering its charter and bylaws in the Public Registry of Commerce, previous authorization granted by the Ministry of Commerce and Industrial Promotion. The latter authorization may be acquired by showing: (1) due incorporation pursuant to law, and (2) that no clause or agreement governing its existence is contrary to Mexican law or public order. Foreign concerns registered to do business in Mexico must establish themselves or an agency or branch in Mexican territory.<sup>34</sup> Failure to

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their rights before Mexican authorities. In the first case, it is necessary for them to comply with the formalities and requirements set forth by Article 251 [GBEA], whereas in the second case, it is only required that they be duly incorporated pursuant to the laws of their state, according to Article 250 [GBEA]. To credit a foreign company's due incorporation, a certificate issued by the Mexican Consulate or diplomatic representative with jurisdiction, must be obtained . . .

4 Appendix to the Federal Judicial Weekly at 1072 (1917-1975), Third Chamber of the Supreme Court.

31. See GBEA, 85:30 D.O. 593 (Aug. 4, 1934); *infra* notes 32-33 and accompanying text.

32. See COMC, art. 75 (Andrade ed. 1976).

33. This habit element is primarily based on a comparison of the wording of article 3 section III, article 13, and article 14 of COMC. Article 3 section III provides that "the following are deemed to be by law merchants: . . . foreign companies, their branches or offices, that within Mexican territory *execute commercial transactions* . . ." Article 13 provides that "Aliens may *freely engage* in commerce . . ." Finally, article 15 provides that "companies duly incorporated abroad *established* in the Republic or having in it a branch or office, may *engage in commerce* . . ." (all emphasis added).

34. See GBEA, 85:30 D.O. 593, art. 251, §§ I-II (Aug. 4, 1934) (Porrua ed. 1982). A foreign company who wishes to "do business in" Mexico may obviously elect to do so

qualify risks not only potentially voiding of the transactions entered into by the foreign concern if challenged in Mexican courts,<sup>35</sup> but more importantly, risks treatment of the foreign concern as an "irregular entity" thereby triggering the imposition of unlimited personal liability on the officers, active directors, or shareholders as regards their dealings in Mexican territory.<sup>36</sup>

It is important not to confuse qualification by registration in the Public Registry of Commerce with registration in the Roll of Suppliers of the Federal Public Administration. The latter merely enables a foreign concern to supply the Mexican federal government and its companies with their products or services, without passing judgment on the business status of the foreign concern under the law merchant or under tax laws.<sup>37</sup>

At the other end of the spectrum, the Income Tax Act (ITL),<sup>38</sup> in structuring the taxation of income derived by foreign businesses from a source within Mexican territory, incorporates a new element: the permanent establishment for tax purposes.<sup>39</sup> ITL provides that foreign concerns will be deemed to be conducting business from a permanent establishment in Mexican territory when said foreign concern: (1) has a place of business in Mexico; (2) acts or transacts business in Mexico through a person or entity empowered to execute on behalf of the principal contracts aimed at fulfilling its entrepreneurial activities in Mexico;<sup>40</sup> (3) allows the agent

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through a wholly or partly owned Mexican corporation. See FIA, 317:7 D.O. 5, art. 2 (Mar. 9, 1973).

35. See GBEA, 85:30 D.O. 593, art. 251, ¶ 2 (Aug. 4, 1934) (Porrúa ed. 1981). Article 251, paragraph two provides: "Foreign companies may only engage in commerce as of their registration in the [commercial] Registry . . ." See Código Civil para el Distrito Federal en Materia Común, y para Toda la República en Materia Federal (Porrúa ed. 1982). Article 8 GBEA provides: "Acts executed against the tenor of prohibitive laws or laws of public interest shall be void, except in those cases where law provides otherwise."

36. See GBEA, 85:30 D.O. 593, art. 2, ¶ 5 (Aug. 4, 1934) (Porrúa ed. 1982). Paragraph five provides: "Those who enter into agreements in a representative capacity or as agents of an irregular corporation shall be subsidiary, jointly and severally liable of the fulfillment thereof to third parties, without prejudice of the criminal liability in which they may have incurred should said third parties' interests be damaged." *Id.*

37. See Act of Acquisitions, Leases, and Warehouses of the Federal Public Administration, 357:41 D.O. 17, arts. 26-27 (Dec. 31, 1979) (*Ley Sobre Adquisiciones, Arrendamientos y Almacenes de la Administración Pública Federal*).

38. Income Tax Act, 369:42 D.O. 1 (Dec. 31, 1981) (*Ley del Impuesto Sobre la Renta*) [hereinafter referred to as ITL].

39. See *id.* art. 2.

40. This does not include independent representatives. See *id.* art. 2.

to have inventory in his possession to be delivered on behalf of the principal, regardless of whether or not a place of business of the principal exists in Mexican territory; (4) participates in a partnership or joint venture;<sup>41</sup> or (5) constructs, installs, maintains, assembles, or conducts inspection services on non-movables, but a permanent establishment shall be deemed to exist only when said services have a duration of more than 365 calendar days.<sup>42</sup>

As can be seen, foreign concerns can be deemed to be "doing business in" Mexico from the point of view of either commercial or tax law, or both. "Doing business in" Mexico under commercial law necessarily entails the existence of a permanent establishment under tax law and is thus also "doing business in" Mexico from the tax standpoint. The existence of a permanent establishment for tax purposes, however, does not a fortiori involve a presence in Mexico under law merchant.<sup>43</sup>

## B. Trade Vehicles

A foreign concern doing business with Mexico from its home office that does not wish to establish a presence in Mexico has three basic commercial vehicles available. First, the company may schedule trips to Mexico for a sales agent. Second, the concern may appoint an individual or company in Mexico to help sell its goods as a commercial mediator. Finally, a distributor within Mexico with limited authority may be appointed.

### 1. Sales Agent

The Immigration Act (IA)<sup>44</sup> provides for the terms and condi-

41. This includes partnerships or joint ventures formed exclusively among non-resident foreign partners if the partner in charge conducts said business in the same manner as a non-resident foreign concern would with a permanent establishment in Mexican territory. *See id.* art. 2.

42. Activities such as the use of installations by aliens, solely for the purpose of warehousing or exhibition of goods, or as purchasing or information offices, but not sales offices, or for the purpose of engaging in preliminary negotiations, distribution of promotional materials, obtaining information and engaging in scientific research, shall not be considered or constitute the creation of a permanent establishment. *See id.* art. 3.

43. At this point it is important to note that the generation of revenues within Mexico or another foreign country by a United States based company will involve tax consequences in the United States. *See generally* Hammer, *Tax Considerations of the International Business Venture*, 6 N.C.J. INT'L L. & COM. REG. 259, 265 (1981).

44. Immigration Act, 322:4 D.O. 1 (Jan. 7, 1974) (Ley General de Poblacion) [hereinaf-

tions upon which foreigners may enter Mexico. For our purposes, the basic premise of the IA is that upon admittance into Mexican territory an alien is bound to strictly comply with the conditions set forth in the particular entry permit issued to him. The alien may only engage in such activities, whether commercial, scientific, or otherwise, as authorized by the Ministry of Internal Affairs. Failure to comply with the IA or regulations thereunder carries penalties ranging from the basic imposition of a fine or deportation to a felony charge.<sup>45</sup>

Generally, a sales agent would be classified as a non-immigrant.<sup>46</sup> Non-immigrants are admitted into Mexico for temporary and limited stay periods and do not acquire rights to residency.

"Visitor" status is the typical sub-classification applicable to the non-immigrant alien sales agent.<sup>47</sup> A Visitor may be authorized by the Ministry of Internal Affairs to engage in a remunerated or non-remunerated activity, commercial or otherwise, always of a very specific and temporary nature. An initial stay period of six months is granted subject to only one extension. Two additional extensions may be granted, however, if the Visitor shows he will either bring or receive from abroad sufficient funds to cover expenses during his authorized stay.<sup>48</sup>

A second sub-classification of non-immigrants, although not specifically provided for by IA or regulations thereunder, is commonly known as the Business Visa. The Ministry of Internal Affairs has authorized Mexican consulates to issue "Modified Tourist Visas" for up to six months, although usually issued for a thirty day duration, with multiple entry privileges for business purposes.<sup>49</sup> Under

ter referred to as IA].

45. *See id.* arts. 64, 99, 120. Secretaria de Gobernacion is herein translated as Ministry of Internal Affairs.

46. *See id.* art. 42. Non-immigrants are aliens authorized by the Ministry of Internal Affairs to enter and remain in Mexico temporarily. *See id.* art. 42. Immigrants are aliens who legally enter Mexico with the purpose of establishing residence as authorized by the Ministry of Internal Affairs until permanent residence ("Inmigrado") status is obtained. *See id.* art. 44. The Ministry of Internal Affairs, on a case by case basis, determines the limitations and conditions to which an alien's stay is subject. *See id.* art. 34.

47. *See id.* art. 42, § III.

48. *See id.* art. 47; IA Regulations, 339:13 D.O. 1, art. 99 (Nov. 17, 1976) (Reglamento de la Ley General de Poblacion).

49. *See* C. Valencia, *Mexican Legislation on Technology Transfer*, SAN ANTONIO BAR ASS'N SEMINAR ON LEGAL ASPECTS OF DOING BUSINESS WITH MEXICO (May 1982), which includes a discussion of this subject.

no circumstances should a sales agent enter Mexican territory as a non-immigrant tourist<sup>50</sup> when the underlying purpose of his trip is to visit customers or prospective customers, take orders, engage in preliminary contract negotiations, or conduct public relations immediately connected with the furtherance of his principal's business activities in the country.<sup>51</sup>

Thus, the IA restricts the feasible migratory sub-classifications a foreign concern's sales agent may apply for to essentially two: non-immigrant Visitor and non-immigrant Business Visa. In addition, once the activities envisioned are disclosed in the corresponding application, the immigration authorities may discretionally limit the scope of activities the sales agent may perform within Mexican territory.<sup>52</sup>

To avoid the tax consequences inherent in being deemed to be doing business in Mexico and having a permanent establishment,<sup>53</sup> the sales agent should not establish a place of business<sup>54</sup> unless it is used only to warehouse or exhibit the principal's products, gather information, or engage in activities which by nature are preliminary or auxiliary for the principal.<sup>55</sup> Obviously, the products to be exhibited or promoted would be only temporarily imported and

50. Tourists are non-immigrant aliens who temporarily enter Mexico solely for recreational, tourist, or health purposes, or to engage in art, sports, or cultural activities, provided, however, these activities are not remunerated or lucrative.

51. See IA, 322:4 D.O. 1, art. 42, § I (Jan. 7, 1974).

52. See *id.* Article 37 of IA provides for seven basic negative criteria which the Ministry of Internal Affairs may take into consideration to deny an alien's application to enter the country or change migratory status. Those criteria are: (1) absence of international reciprocity with the country of origin; (2) preservation of the national demographic equilibrium; (3) satisfaction of the applicable quotas; (4) when deemed contrary to the national economic interest; (5) behavior record of applicant while in Mexico or in his country of origin; (6) when the applicant has failed to comply with the IA, or regulations thereunder; or (7) when the applicant is physically or mentally ill.

53. Note that the tax consequences of the decision whether to have a permanent establishment in Mexico must also be examined under United States tax laws. See generally Hammer, *Tax Considerations of the International Business Venture*, 6 N.C.J. INT'L L. & COM. REG. 259, 265 (1981).

54. Some practitioners go so far as to advise the foreign concern not to vest its sales agent with powers to execute contracts because a strictly literal interpretation of article 2 of ITL would result in a permanent establishment being created as consequence of the sales agent's exercising his authority in Mexico. See ITL, 369:42 D.O. 1, art. 2, § (b) (Dec. 31, 1981). The authors, however, consider the above interpretation in error, though it has never been tested in court.

55. See *id.* art. 3. These preliminary or auxiliary activities include advertisement, information gathering, and research and preparation of loan placements.

may not be sold in Mexico.

## 2. Commercial Mediator

The appointment of a commercial mediator or intermediary implies the existence of a limited agency with certain substantive changes.<sup>56</sup> It is unimportant whether the agreement is entered into pursuant to either Mexican law or, e.g., the laws of the State of Texas.<sup>57</sup> Again, what is of paramount importance is the structure of the agreement and the extent of the authority vested in the agent, in order to stay within the category of "doing business with" and not be deemed "doing business in" Mexico.

The mediator should be vested with limited authority. First and foremost, he shall only act as a commercial mediator<sup>58</sup> to promote, solicit, and negotiate the sale of the principal's products. The power of the mediator to execute contracts is virtually non-existent, for the limited agent acting as a commercial intermediary may only, on his own behalf, furnish the prospective client or purchaser with technical or manufacturing information, pricing, payment policies, order processing, and ancillary services. The principal, usually abroad, maintains authority to accept the purchase orders made by the Mexican customer and, in general, determines the policy to be followed in the acceptance of the different offers the principal receives from the agent.<sup>59</sup>

Hence, the commercial mediator essentially acts as a showcase, correspondent, and forwarder of orders, and in certain cases accepts payments for the foreign concern. The fee for the commercial

56. See *infra* notes 58-68 and accompanying text.

57. Pursuant to article 15 of the Civil Code for the Federal District, agreements such as one of commercial mediation, duly executed abroad, are valid and enforceable in Mexican Territory.

58. "Mediacion Mercantil" is a contract by which one of the parties undertakes the obligation to pay the mediator a fee in consideration for services rendered consisting in the execution of a commercial transaction on the former's behalf. See *DICCIONARIO DE DERECHO*, De Pina, Mex. (Porrua ed. 1970).

59. The typical agreement between the commercial mediator and principal would contain the following clause: "The Mediator will forward all orders for products to the Company for review and approval. All contracts relating to orders for Products delivered by the Representative to the Company will be deemed finally accepted when executed by a duly authorized and elected officer of the Company . . . The Company may accept those orders delivered by the Representative based upon quotations still in effect, if the order is from a customer otherwise acceptable to the Company, at the Company's sole discretion."

mediator may consist of a straight commission on orders accepted or a retainer plus commission.<sup>60</sup>

It is customary to advise the commercial mediator to refrain from using the name and logo of the principal in his offices, on his business cards, or on the letterhead of his correspondence. This will avoid even the appearance of impropriety and insure that the mediation agreement is not a sham transaction which disguises a representative office of the principal who is not qualified to do business in Mexico.<sup>61</sup> In addition, it will frustrate any possible future claim alleging "transfer" of goodwill or trade name to the mediator.<sup>62</sup>

The mediation agreement, usually executed for a limited duration of one year and subject to extension, should provide for the following provisions: (1) a covenant to keep the principal's business confidential,<sup>63</sup> (2) a required accounting by the mediator,<sup>64</sup> (3) return of all principal's property,<sup>65</sup> and (4) notice of similar products on the market.<sup>66</sup> Finally, the agreement should contain a clause providing for choice of law and jurisdiction,<sup>67</sup> or for arbitration<sup>68</sup>

60. Income received by the commercial mediator would be taxed as an "entrepreneurial activity." See ITL, 369:42 D.O. 1, art. 107 (Dec. 31, 1982). No Tax Liability attaches against the principal. See *id.* art. 111.

61. The typical wording of the clause in the commercial mediation agreement would read: "The Mediator makes the following representations, warranties, and covenants to the Company . . . . The Mediator will not engage in any activity which would cause the company to be deemed to be engaging in business in the Territory, in violation of Article 24 of [COMC], Article 251 of [GBEA], or having a permanent establishment pursuant to Article 2 of [ITL], as amended."

62. In this regard, article 179 of ITL protects trade names regardless of whether they are registered or not. Thus, a commercial mediator's use of his principal's trade name could be protected by ITL if the principal is not effectively using the trade name within the same geographical area as the mediator.

63. The covenant should provide that all records pertaining to prices, quotations and customers, and any information disclosed by principal to mediator regarding specifications and technology of the line of products currently being offered or to be introduced into the market in the future, shall be treated by the representative as if it were confidential property of the principal.

64. This accounting will include a settlement of accounts regarding commissions due or to arise out of orders being processed and ultimately accepted by principal abroad.

65. The prompt return to principal of property includes all catalogs, samples, technological information (patented or unpatented), and price lists issued by principal and in possession of the mediator.

66. The obligation should be imposed on the mediator to promptly inform the principal of the appearance in the market of products similar to the ones entrusted to him for his promotion under the agreement.

67. The following clause is suggested: "This Agreement shall be governed by the laws of

where the issues more likely to be controverted are of such technical or specialized nature that expertise of the impartial compositeur in a certain field is deemed to be of paramount importance.

### 3. Distributor

As a third alternative, a distributorship agreement provides the foreign concern with the opportunity to further develop sales and offer adequate service through a Mexican company or individual without actually engaging in business in Mexico through a permanent establishment.<sup>69</sup>

The advantage gained in the offering of a qualified service through a distributor often involves, however, the foreign entity's disclosure to the distributor of existing technology and improvements regarding the products by means of brochures, catalogues, instructions, or otherwise. The foreign company may also have to disclose operation and supervision services, techniques, or train distributor's personnel to adequately cover warranty and service operations. The above concepts may bring the distribution agreement under the Act for the Control and Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks (TTA),<sup>70</sup> which provides that transfers of technology transactions<sup>71</sup> to be effective in Mexico must be filed for examina-

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\_\_\_\_\_. Any and all controversies that arise out of the interpretation or performance of this Agreement shall be submitted to the jurisdiction of United States courts or of Mexican courts at the election of the plaintiff. Both parties expressly waive any other rights they may have to different venue by virtue of their nationality, place of residence, domicile or any other personal or real circumstance of like nature."

68. See Valencia, *The International Sale of Natural Gas: The Pemex-Border Gas, Inc. Contract*, 17 *TEX. INT'L. L.J.* 25, 29 (1982), for comments on a particular arbitration clause utilizing the Rules of Conciliation and Arbitration of the International Chamber of Commerce and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by both Mexico and the United States. See also Nattier, *Handling Disputes Outside the Inter-American and the United Nations Conventions*, 1981 *A.B.A. CURRENT LEGAL ASPECTS OF DOING BUSINESS IN LATIN AMERICA* at 129; Siqueiros, *The Changing American Attitudes Regarding the Enforcement of Foreign Arbitral Awards: Mexico's Experience*, 1981 *A.B.A. CURRENT LEGAL ASPECTS OF DOING BUSINESS IN LATIN AMERICA* at 118.

69. See *supra* notes 54-55 and accompanying text.

70. TTA, 370:6 D.O. 15 (Jan. 11, 1982). For a more ample coverage of TTA, see C. Valencia, *Mexican Legislation on Technology Transfer*, *SAN ANTONIO BAR ASS'N SEMINAR ON LEGAL ASPECTS OF DOING BUSINESS WITH MEXICO* (May 1982).

71. Pursuant to TTA, article 2, the following transactions shall be deemed a transfer of technology and therefore subject to the Act: (1) every contract, agreement, or act referring

tion and registration in the National Registry for the Transfer of Technology.<sup>72</sup>

The National Registry for the Transfer of Technology, a part of the Ministry of Commerce and Industrial Promotion, is charged with the duty to undertake the legal, economic, and technical analysis of the transfer of technology transactions submitted for registration.<sup>73</sup>

The Ministry may reject registration of the distributorship agreement if the agreement contains, or fails to include where appropriate, the following covenants or clauses: (1) where seller or supplier is allowed to regulate or intervene, directly or indirectly, in the administration of the distributor or recipient of the technology;<sup>74</sup> (2) where the technology supplier is granted free of charge the patents, trademarks, innovations, or improvements obtained by the recipient, except where reciprocity or benefit to the distributor is conceded in the exchange of information;<sup>75</sup> (3) where limitations are imposed on technological research or development of the distributor;<sup>76</sup> (4) where equipment, tools, parts, or raw materials

to the concession or authorization for the use or exploitation of trademarks; (2) the concession or authorization for the use or exploitation of patents of invention, improvements, or certificates of invention; (3) the concession or authorization for the use or exploitation of engineering models and industrial designs; (4) the conveyance of trademarks or patents; (5) the concession or authorization for the use or exploitation of tradenames; (6) the supply of technical knowledge by means of plans, diagrams, models, instructions, formulae, specifications, formation, and training of personnel, and other similar methods; (7) technical assistance in whatever form given; (8) provision of basic or detailed engineering; (9) business administration or operation services; (10) consultant, advisory, and supervisory services, when performed by foreign individuals or entities or their subsidiaries regardless of their domicile; (11) the concession of copyrights which involve industrial exploitation; or (12) computer programs. See TTA, 370:6 D.O. 15, art. 2 (Jan. 11, 1982).

72. See *id.* art. 2.

73. See *id.* arts. 1, 14. Note that pursuant to TTA article 5, the duty to file for registration falls equally on foreign suppliers or sellers and national recipients or purchasers. The corresponding application form accompanied with the documents containing the transfer of technology transaction must be filed with the Ministry within 60 business days from their date of execution or amendment. The Ministry has 90 business days to either reject the application or order registration. Upon expiration of this 90 day period, and in the absence of any action on the part of the Ministry, the transaction shall be recorded *ex officio* in the Registry. In the event the application is rejected, any one of the parties affected by such adverse decision may apply for reconsideration. If the transfer of technology transaction is timely filed for registration, the registration will be retroactive to the date of execution; otherwise registration will become effective as of the date of filing. See *id.* art. 5.

74. See *id.* art. 15, § 1.

75. See *id.* art. 15, § 2.

76. See *id.* art. 15, § 3.

must be obtained solely from a certain source, while alternative sources exist either in the national or international markets;<sup>77</sup> (5) where the export of the goods or services produced by the distributor is prohibited or restricted in a manner contrary to the national interest;<sup>78</sup> (6) where the use of complementary technology is prohibited;<sup>79</sup> (7) where the distributor is bound to permanently employ personnel specified by the supplier;<sup>80</sup> (8) where the distributor undertakes to keep secret the technical information provided by the supplier beyond the life of the transaction or other term provided for by law;<sup>81</sup> (9) where the supplier does not expressly assume liability in the event of infringement of industrial property rights of third parties;<sup>82</sup> (10) where the supplier does not guarantee the quality and results of the technology;<sup>83</sup> (11) where the purpose is the transfer of foreign technology already available in Mexico;<sup>84</sup> (12) where the price or consideration to be paid by the distributor is not proportionate to the technology being acquired or constitutes an unwarranted burden on either the national economy or the distributor;<sup>85</sup> (13) where the contract is of excessive duration;<sup>86</sup> or (14) where the resolution of claims that may arise out of the agreement is submitted to foreign courts, except where national technology is being exported or there is express submission to private international arbitration. This last prohibition is satisfied only if the arbitrator applies Mexican substantive law to solve the controversy and the international conventions on the subject matter

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77. *See id.* art. 15, § 4.

78. *See id.* art. 15, § 5. The term "national interest" has not been clearly defined by the Mexican courts. The terms "national interest," "public interest," and "social interest," among others, however, have been consistently used by the federal legislature in an effort to equate same with the concept of "public order," which in constitutional "Amparo" litigation would result in the federal courts refusal to grant injunction barring execution or suspending the effects of an act of the government affecting the interest of the petitioner. *See In re Autobuses Xonacatlan, S.A. de C.V.*, First Court of the First Circuit, No. 6 Appendix to the Federal Judiciary Weekly, at 92 (1917-1975).

79. *See* TTA 370:6 D.O. 15, art. 15, § 6 (Jan. 11, 1982).

80. *See id.* art. 15, § 8.

81. *See id.* art. 15, § 11.

82. *See id.* art. 15, § 12.

83. *See id.* art. 15, § 13.

84. *See id.* art. 16, § 1.

85. *See id.* art. 16, § 2.

86. *See id.* art. 16, § 3. In no event may said period exceed ten compulsory years for the recipient.

adopted by Mexico are observed.<sup>87</sup>

In considering the above impediments, the Ministry is vested with ample discretion and may grant registration, conflicts notwithstanding, when in the particular circumstances the transaction would benefit the country.<sup>88</sup> Distributorship agreements or their amendments involving a transfer of technology transaction that are either not recorded in Registry or whose registration has been denied or cancelled are null and void and may not be enforced by any authority, nor may their execution be claimed in Mexican courts.<sup>89</sup>

Obtaining the registration record is a condition precedent to enjoy the benefits, incentives, aids, or advantages provided for in the corresponding federal plans and programs or in other Mexican laws or regulations.<sup>90</sup> These programs may allow the establishment or expansion of industrial facilities or commercial centers in the border areas and duty free zones of the country.<sup>91</sup>

The distributorship agreement may be deemed not to be or constitute a transfer of technology transaction, thus outside the scope of TTA, if its scope is restricted to include only "specific" technology issues, such as the entry into Mexico of seller's technicians to work on the installation of factories or machinery or to carry out repairs on distributor's premises; providing the distributor with designs, catalogues, or general advice acquired in conjunction with the machinery or equipment purchased, provided it does not create the obligation to make future payments; or providing the technical instruction or training conducted in schools, personnel training centers, or by the distributor to its workers.<sup>92</sup>

Once the distributor determines, or the Registry determines when a preliminary opinion has been requested,<sup>93</sup> that a proposed

87. *See id.* art. 16, § 4.

88. *See id.* art. 17.

89. *See id.* art. 11.

90. *See id.* art. 6. In addition to the applicable fines, a strong incentive to obtain registration of the agreement is provided for by ITL, 369:42 D.O. 1, art. 24 (Dec. 31, 1981). Section XI of article 24 allows the Mexican concern to deduct payments made abroad pursuant to a duly registered agreement.

91. Traditionally, economically depressed areas are favored by the Mexican government in order to develop industrial infrastructure.

92. *See* TTA, 370:6 D.O. 15, art. 3 (Jan. 11, 1982).

93. *See* TTA Regulations, 375:19 D.O. 13, art. 11 (Nov. 25, 1982) (Reglamentos de la Ley Para el Control y Registro de la Transferencia de Tecnología y el Uso y Explotación de Patentes y Marcas).

draft of a distributorship agreement does not constitute a transfer of technology transaction, the final step in the drafting should be to obtain reassurance that the "doing business with" basic check list previously discussed is satisfied: a distributor may not appear as or be authorized to act as an attorney-in-fact of the foreign seller, but shall only function as a wholesaler-retailer of foreign merchandise to individual customers in a territory, without authority to bind the foreign company.

### III. EXCHANGE CONTROL RESTRICTIONS

#### A. *The Generalized Exchange Control Decree*

On September 1, 1982, the Decree Establishing the Generalized Control of Exchange (GCE)<sup>94</sup> was enacted, which paralyzed all currency exchange transactions.

According to the Exposition des Motifs of GCE:<sup>95</sup>

1. The economic recession prevalent worldwide had caused Mexico a serious dilemma, due to the severe contraction of the international markets for Mexican exports, as well as the reduced availability and higher cost of financing;

2. Mexico's federal government had failed to achieve success in the implementation of austerity measures;

3. Mexico had been adversely affected by the devaluation beyond any reasonable proportion of the peso;

4. Consequently, it was in the public interest to regulate the influx and outflow of foreign currency in order to eliminate currency transactions of a speculative nature—the prime cause of the flight of capital abroad [sic]—in order to rationalize the currency exchange through the establishment of a system of preferences in accord with national priorities.

Even though GCE was short-lived,<sup>96</sup> its most important provisions will be examined below because they constitute a clear exam-

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94. GCE, 374:1 D.O. 5 (Sept. 1, 1982).

95. "Considerandos" is translated herein as Exposition des Motifs.

96. GCE was abrogated by the Second Transitional Provision of the ECD, 375:30 D.O. 4 (Dec. 13, 1982) (effective December 20, 1982). A transitional provision forms part of the statute to which it pertains. The scope and purpose, however, is to regulate the effectiveness of the new statute as it relates to factual situations that precede it. A transitional provision also regulates the passing from one statute to another.

ple of the typical provisions of a generalized foreign currency exchange control, vis-a-vis a system which allows for free convertibility such as the one that existed before September 1, 1982, or of partial convertibility, such as the one currently in force. The applicable provisions of GCE follow:

1. Import-export currency transactions could only be carried out by, for the account of, or by order of, Mexico's Central Bank.<sup>97</sup>

2. Foreign currency would not constitute legal tender in the United Mexican States. Satisfaction of obligations in foreign currency contracted in the Mexican Republic or abroad, to be satisfied within Mexico, shall only be satisfied by tendering the equivalent in national currency at the rate of exchange in effect at the time and place payment is made, as determined by the Central Bank.<sup>98</sup>

3. All banks were prohibited from carrying savings or investment accounts, or to execute loan transactions in foreign currencies, except for basic checking account operations with in-bond or assembly plants, diplomatic, and international representations.<sup>99</sup>

4. Foreign currency earned by Mexican business entities, corporations, persons, or resident aliens, regardless of the source of income, was to be exchanged with the Central Bank upon its receipt.<sup>100</sup>

5. The Decree established two basic rates of exchange to purchase foreign currency in order to satisfy obligations—preferential and ordinary. In applying these exchange rates, the following priorities were employed:<sup>101</sup>

(i) obligations arising out of transactions entered into by the agencies of the federal government;

(ii) obligations of entities owned by the federal government, in the order specified by the Ministry of the Treasury;

(iii) dues of the Mexican government to international bodies, and salaries to pay the personnel of the Mexican foreign service;

(iv) obligations of Mexican banks and auxiliary organizations, in-

97. See GCE, 374:1 D.O. 5, art. 1 (Sept. 1, 1982).

98. See *id.* art. 3.

99. See *id.* arts. 4, 12.

100. See *id.* art. 5, ¶ 3.

101. See *id.* art. 8. It is important to note that these priorities are ranked in order of quality of the claim, not the order or time it was presented. Hence one with a low priority claim could literally wait years for satisfaction, regardless of when presented. The establishment of special rates, different from the basic ones, was also contemplated. See *id.* art. 7.

cluding insurance and bonding companies;

(v) obligations arising from the importation of foodstuffs and other basic goods such as intermediate goods and basic capital goods;

(vi) obligations arising out of the importation of intermediate and capital goods for the operation of the existing industrial plants in accordance with the objectives and priorities prescribed in the national plans of development;

(vii) obligations arising out of the importation of intermediate and capital goods and equipment, required for the industrial and economic expansion of the country according to the objectives and priorities set forth in the national plans of development;

(viii) obligations contracted by private companies with foreign financial institutions, before the date in which GCE is to be in force;

(ix) obligations entered into by private business entities and considered necessary in border strips and duty free perimeters;

(x) royalties and other payments to be made abroad by Mexican companies with foreign investment or by foreign companies operating in the country, up to those amounts authorized by the National Foreign Investment Commission;

(xi) business, work, health, or travel expenses of individuals; and

(xii) tourist travel expenses of individuals.

6. Obligation to file reports regarding the amounts of foreign currency imported and exported from Mexico by aliens.

7. Elimination of all bank deposits in foreign currency at maturity.<sup>102</sup>

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102. *See id.* Third Transitional Provision. Discussion of the different theories and grounds to challenge the constitutionality or legality of GCE and ECD falls beyond the scope and purpose of this article. Nevertheless, the case of the so-called Mexdollars deserves a comment. The Third Transitional Provision of GCE and Article 8 of the Currency Act of the United Mexican States, 1 COMC 595-604/7 (Andrade ed. 1976), provides:

Foreign currency shall not constitute legal tender in the Republic, except in those cases where law expressly determines otherwise. Obligations of payment in foreign currency contracted in Mexican territory or abroad, shall be discharged by tendering the equivalent in national currency at the rate of exchange in effect on the date and place payment is made.

*Id.* Article 8 of the Currency Act is substantially identical to the Third Transitional Provision of GCE. Article 267 of the General Negotiable Instruments and Credit Operations Act, 1 COMC 567 (Andrade ed. 1976), provides: "Deposit of a specified sum of money in national currency of foreign coins or currency, transfers title to the [bank] and obligates same to restore the sum deposited in the same kind . . . ." Article 267 of the General Negotiable

### B. *The Exchange Control Decree*

On December 13, 1982, President Miguel de la Madrid issued the Exchange Control Decree (ECD), which became effective on December 20, 1982.<sup>103</sup> GCE and most of the regulations, resolutions, and memoranda based on it, were superseded by ECD.<sup>104</sup>

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Instruments and Credit Operations Act supersedes article 8 of the Currency Act (a) by reason of the civil law maxim "lex posteriori derogat lex priori" (a later statute takes away the effect of a prior one) and (b) because a specialized provision prevails as against a general provision. By the same token, the General Negotiable Instrument and Credit Operations Act cannot be amended or superseded by a decree enacted by the executive because of the supremacy of law principle.

103. See ECD, 375:30 D.O. 4 (Dec. 13, 1982).

104. Thirty-four different resolutions, decrees, and regulations were issued during the last weeks of the Lopez Portillo's administration between September 8 and November 30, 1982. Among the most important, issued in the haste and confusion which characterized the administration of the Mexican monetary policy at that time, are the following: Main provisions regarding the exchange control issued by the Central Bank to all banking institutions by means of telex-memoranda, 374:12 D.O. 8 (Nov. 16, 1982) and 374:31 D.O. 2 (Oct. 15, 1982) (principales disposiciones sobre control de cambios, giradas por el Banco de Mexico mediante telex-circulara todas las instituciones de credito del pais); National Foreign Investment Commission Resolution numbers 18 and 19, 374:28 D.O. 5, 7 (Oct. 11, 1982) (Resoluciones numeros 18 y 19 de la comisión Nacional de Inversiones Extranjeras); Resolution providing for the registration of sums due foreign suppliers, 374:27 D.O. 12 (Oct. 8, 1982) (Acuerdo que establece el registro de adeudos a favor de proveedores extranjeros); Resolution providing for the registration of those companies with foreign capital investment to effect payment of dividends abroad, 374:19 D.O. 6 (Sept. 28, 1982) (circular sobre el registro para el pago con divisas de dividendos al exterior de empresas con capital extranjero); Resolution providing for the registration of monies and royalties payable abroad, 374:18 D.O. 17 (Sept. 27, 1982) (circular sobre el registro para el pago con divisas de regalías y compromisos al exterior); Resolution providing for the registration of monies payable abroad arising out of different commitments, 374:18 D.O. 15 (Sept. 27, 1982) (Circular sobre el registro para pagos con divisas al exterior derivados de diversos compromisos); Imports which entitle the importer to purchase foreign currency at the preferential rate of exchange, list number 1, 374:12 D.O. 4 (Sept. 17, 1982) (Acuerdo que determina los productos para cuya importación podrán otorgarse autorizaciones para adquirir divisas al tipo de cambio preferencial - Lista numero 1); Resolution requiring an import permit for the importation of all commodities specified in the General Import Tax Act Tariff, until December 31, 1983, 374:12 D.O. 3 (Sept. 17, 1982) (Acuerdo que sujeta al requisito de permiso previo por parte de la Secretaria de Comercio la importación de todas las mercancías comprendidas en la Tarifa del Impuesto General de Importación, incluyendo la importación que de dichas mercancías se realice a las Zonas Libres del País, con las excepciones que se indican, hasta el 31 de diciembre de 1983); General Rules for the Exchange Control, 374:10 D.O. 2 (Sept. 14, 1982) (Reglas Generales para el Control de Cambios); Resolution requiring an import permit for importation of national or foreign currency, until December 31, 1983, 374:8 D.O. 30 (Sept. 10, 1982) (Acuerdo que sujeta al requisito previo por parte de la Secretaria de Comercio la importación de las mercancías que se indican incluyendo las que se realicen en las zonas libres del país, hasta el 31 de diciembre de 1983); Resolution establishing restrictions to the exportation of gold, 374:6 D.O. 7 (Sept. 8, 1982) (Acuerdo que establece restricciones

The Exposition des Motifs of ECD cites the most important reasons to implement ECD:<sup>105</sup>

1. That from the date the exchange control restrictions set forth in GCE were first implemented, the administration envisioned they would have to be modified in order to readapt them to Mexico's changing economic needs;

2. That the exchange control should constitute as small an obstacle as possible in the performance of international commercial transactions;

3. That it is highly undesirable to maintain in effect provisions that are being consistently violated;

4. That experience had demonstrated the impracticability and high administrative costs of attempting to implement a tight control of the influx of foreign currency into Mexico;

5. That exports must be promoted;

6. That the promotion of Mexico's good name in the international financial community and the performance of the renegotiation of Mexico's indebtedness would be facilitated if a share of the foreign currency that enters the country is applied precisely to servicing such foreign debt;

7. That it was convenient to protect private businesses against exchange losses, which could cause a downfall in production and unemployment; and

8. That the rates of exchange must respond to economic realism.

The regulatory scheme of ECD provides for three rates to govern currency exchange in Mexico. The first is the "special" rate of exchange. This rate, controlled by the Central Bank, applies to the satisfaction of debts payable in Mexican territory in foreign currency, arising out of transactions entered into in Mexican territory or abroad prior to December 20, 1982. The debt shall be satisfied by tendering the equivalent in national currency at the special rate in effect on the date of payment.<sup>106</sup>

The second rate is the "controlled" rate of exchange. Also set by the Central Bank, the controlled rate applies to the purchase of

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a la exportacion del oro).

105. See ECD, 375:30 D.O. 4, 5 (Dec. 13, 1982).

106. See *id.* Third Transitional Provision. The special rate has had a daily increase of Mex\$0.14, the purpose being to have this rate equal, in the long run, the free market rate of exchange mentioned below. See *infra* notes 107-116 and accompanying text.

foreign currency for the satisfaction of obligations of payment arising out of the following transactions:<sup>107</sup>

1. Exports of commodities;<sup>108</sup>
2. Payments made by assembly (in-bond) plants, corresponding to salaries, wages, rents, purchase of goods and services of national origin, except fixed assets;<sup>109</sup>
3. Principal and interest, and such other accessories as the Central Bank may determine, corresponding to financing in foreign currency payable abroad by the federal government and its agencies, or private businesses established in Mexico, to foreign financial entities and Mexican banks, contracted for or drawn after December 20, 1982;<sup>110</sup>
4. Satisfaction of business or financial debts payable abroad, arising out of transactions entered into in Mexican territory or abroad prior to December 20, 1982; provided, however, the indebtedness is registered with the Ministry of Commerce and Industrial Development, or with the Ministry of the Treasury in the case of financial debts;<sup>111</sup>
5. Importation of commodities and related verifiable expenses as determined by the Ministry of Commerce and Industrial Development as well as credit, if any, extended by the suppliers of same;<sup>112</sup>
6. Expenses pertaining to the Mexican foreign service and Mexico's membership fees and contributions due to international bodies;<sup>113</sup> and
7. Other transactions which the Ministry of Finance may determine from time to time using general rules when considering their importance to the national economy or in conjunction with those set forth above.<sup>114</sup>

Obligations of payment in foreign currency entered into after ECD became effective, in Mexican territory or abroad, to be paid

107. See ECD, Third Transitional Provision, 375:30 D.O. 4, art. 2 (Dec. 13, 1982). The controlled rate has also suffered a daily increase of Mex\$0.13.

108. See *id.* art. 2, § (a). The Ministry of Commerce and Industrial Development, in previous consultation with the Central Bank, may exempt the exportation of certain commodities from the controlled market due to value, nature, or immigration considerations.

109. See *id.* art. 2, § (b).

110. See *id.* art. 2, § (c).

111. See *id.* Fourth Transitional Provision.

112. See *id.* art. 2, § (d).

113. See *id.* art. 2, § (e).

114. See *id.* art. 2, § (f).

within Mexico shall be satisfied by tendering the equivalent in national currency at the controlled rate of exchange. This is also determined by the Central Bank at the rate in force on the date payment is made.<sup>115</sup>

The third rate is the "free market" foreign currency exchange rate, which applies to all other transactions not considered in the controlled or special market rates.<sup>116</sup>

ECD eliminated the restrictions imposed by GCE on the purchase, sale, possession, or transfer of foreign currency.<sup>117</sup> Finally, the Ministry of the Treasury and the Ministry of Commerce and Industrial Development shall issue such complementary rules as deemed necessary to achieve compliance with ECD.<sup>118</sup>

115. *See id.* art. 12. The Central Bank may, however, make certain exceptions and determine that a different rate shall apply by considering the nature of creditor's commitments to debtor.

116. *See id.* art. 9.

117. *See id.* art. 9; *id.* Second Transitional Provision.

118. *See id.* art. 11. Among the most important that have been published are: Complementary rules of exchange control applicable to studies abroad, 376:27 D.O. 2 (Feb. 8, 1983) (Reglas complementarias de control de cambios relativas a estudios en el extranjero); Resolution which establishes those expenses related to imports and exports for ECD purposes, 376:14 D.O. 5 (Jan 20, 1983) (Acuerdo que establece los gastos asociados a la importacion y exportacion para los efectos del decreto de control de cambios); Complementary Rules of Exchange Control Applicable to Exports, 375:44 D.O. 35 (Dec. 31, 1982) (Reglas Complementarias de Control de Cambios Aplicables a la Exportacion); Resolution providing for the registration of exporters' indebtedness due foreign suppliers, 375:35 D.O. 27 (Dec. 20, 1982) (Acuerdo que establece el registro de adeudos a favor de proveedores extranjeros); Resolution which excludes from the controlled market of foreign currency those exports therein mentioned, including exports affected from the duty free zones of the country, 375:35 D.O. 26 (Dec. 20, 1982) (Acuerdo que exceptua del mercado controlado de divisas las exportaciones de las mercancías que se indican, incluyendo las que se realicen desde las zonas libres del país); Resolution establishing the requirement of an import permit to be issued by the Ministry of Commerce and Industrial Promotion to effect imports of all merchandise included in the General Import Tax Act Tariff including imports of same to duty free zones, until December 31, 1983, 375:35 D.O. 24 (Dec. 20, 1982) (Acuerdo que sujeta al requisito de permiso previo por parte de la Secretaria de Comercio la importacion de todas las mercancías comprendidas en todas las fracciones arancelarias de las Tarifa del Impuesto General de Importacion, incluyendo la importacion que de dichas mercancías se realice a las zonas libres del país, con las excepciones que se indican, hasta el 31 de diciembre de 1983); Resolution determining those commodities which import is subjected to the controlled market rate of exchange, 375:35 D.O. 10 (Dec. 20, 1982) (Acuerdo que determina las mercancías cuya importacion queda comprendida en el mercado controlado de divisas, incluyendo la que se realice a las zonas libres del país); Complementary Rules of Exchange Control applicable to Exports, 375:35 D.O. 2 (Dec. 20, 1982) (Reglas Complementarias de Control de Cambios Aplicables a la Exportacion).

#### IV. CONCLUSION

In structuring the business and legal strategies to be followed by a foreign concern planning to "do business with" Mexico, Mexican commercial and tax laws should be carefully considered. Three basic vehicles appear as feasible options to conduct business with Mexico, none of which would be deemed to constitute the creation of a permanent establishment in Mexican territory or to be conducting business in Mexico without having qualified to do so. The exchange control measures, as currently being implemented by the Mexican government, pose new elements which should be taken into consideration by foreign businesses conducting or planning to engage in international trade with Mexico.