

## Comments

### Evaluating a Developing Institution: Mexicanization of Mining

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Prior to 1961, American commentators considered the Mexican mining law to be "one of the superior mining law systems of the world."<sup>1</sup> It was so attractive to foreigners and local capital was so scarce that the mining industry became dominated by foreigners.<sup>2</sup> In 1961, in response to this domination, the Mexican government took steps to reassert Mexican ownership and control. The Mining Law of 1961 Mexicanized the mining industry by requiring that Mexican citizens own at least 51 percent of the stock of Mexican mining corporations.<sup>3</sup> It also provided tax relief to the mining industry and implemented a greater degree of governmental control over mineral exploitation. This comment will examine and evaluate the adoption, implementation, and effectiveness of that mining law.

The effectiveness of the institution of Mexicanization is a function of the extent to which it fulfilled the "needs" of Mexico. As used in this analysis, "need" or "needs" refer to the requirement for an institution, whether or not it is recognized by a demand, aspiration, expectation, or propensity.<sup>4</sup> An economic need, of course, implies that the required in-

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1. Verity, *Mineral Law of Mexico*, in 2 AMERICAN LAW OF MINING § 834.28 (Rocky Mt. Min. Law Found. ed. 1970).

2. H. WRIGHT, FOREIGN ENTERPRISE IN MEXICO: LAWS AND POLICIES 133 (1971).

3. LEY REGLAMENTARIA DEL ARTÍCULO 27 CONSTITUCIONAL EN MATERIA DE EXPLOTACIÓN Y APROVECHAMIENTO DE RECURSOS MINERALES (D.O. Feb. 6, 1961) [hereinafter cited as Mining Law of 1961]. See also REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 CONSTITUCIONAL EN MATERIA DE EXPLOTACIÓN Y APROVECHAMIENTO DE RECURSOS MINERALES (D.O. Feb. 28, 1962) [hereinafter cited as Regulations of 1962]. See Browning, *Historic Basis of Mexican Mining Law*, 7 INTER-AM. L. REV. 1 (1965), for a discussion of these regulations.

4. Certain premises and definitions essential to an understanding of this comment are based on an extensive written study of legal reform in Costa Rica. See Kozolchyk, *Toward a Theory on Law in Economic Development: The Costa Rican—USAID-ROCAP Law Reform Project*, 1971 L. & Soc. ORDER No. 4, suggesting that evaluation of the effectiveness of the institutions within a legal system

stitution have economic purpose. The need may stem from extrinsic factors, such as a declining international metal market, which may not be reflected as a demand. For example, if international demand for minerals is increasing and there is declining production in the mining industry of a country, there may be a need for an institution to encourage production and exportation of minerals whether or not demands are presented for such an institution.

The term legal institution is used to refer to a concept or an attitude which is reflected in written or unwritten rules of behavior which, as a part of a process of economic development, have been impressed with economic purpose. Rules of law are restraints on economic action which may be normative, that is, found in the text of the law, or cultural, meaning that the restraints are a product of the way the rule was enacted, implemented, or enforced.

Accepting the premise that a responsive legal system is one which recognizes demands, aspirations, expectations, and propensities and applies laws in a manner that satisfies socioeconomic needs, the ultimate objective of this comment is to evaluate whether enactment and administration of the Mining Law of 1961 has effectively satisfied the socioeconomic needs for developing the Mexican mining industry. Specific objects are to determine what socioeconomic demands led to Mexicanization, to appraise the political process which perceived and attempted to implement the demands as normative institutions, and to evaluate the effects of Mexicanization on the development of the Mexican mining industry since 1961. In making this evaluation, emphasis will be placed on empirical data gathered from interviews with those affected by the law.<sup>5</sup> While it is

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depends, among other factors, on whether the lawmaker's expressed or implied aims are consistent with social demands, aspirations, expectations, and propensities. The following definitions are applicable. A demand is an articulated claim for legal action which is being actively pressed by an organized social group. An aspiration, like a demand, is a desire for legal action, but unlike a demand it is either unarticulated or only vaguely articulated, and it is not pressed by an organized group. An expectation is an aspiration that can be described by relating the desired results in terms of time, quantity, or quantifiable quality. A propensity is an attitude which could become a demand, expectation, or aspiration once the group is exposed to proper stimuli.

5. Ideally, gathering empirical data for evaluation of an institution would be satisfied by interviewing members of social groups expressing demands, politicians enacting normative institutions, administrators implementing and enforcing institutions, and persons who must adapt their actions to satisfy new legal requirements. Although no interviews of governmental officials were conducted, some interviews were conducted with other persons knowledgeable about mining in Mexico. See note 65 *infra*. A survey questionnaire was used in these interviews which included the following questions: What social groups sought Mexicanization in 1961 and how were their demands articulated? What were the unexpressed goals of Mexicanization? Was local capital available to provide its share of Mexicanization? Why was 66 percent local capital required for national reserve minerals as opposed to say 75 percent? What economic factors and administrative procedures were considered by legislators before enactment of Mexicanization? What devious or evasive practices of the Law take place? Has the Law affected exploration or exploitation in any measurable way? Is the Law valid as a prototype for other developing countries?

acknowledged that the information obtained may be somewhat incomplete on some phases of the legislative process, it is believed that this analysis will facilitate an understanding of the problems involved in enacting the Mining Law of 1961, and it is hoped that it will serve as the foundation for more complete study in the future.

### HISTORICAL DEVELOPMENT OF MINING LAWS

Because local capital was largely insufficient, Mexico historically has looked to foreign investors to develop its mineral resources. The Mexican governments have vacillated in their policies, however, at times encouraging foreign investment and at other times seeking to protect natural resources by controlling development. Despite short-term fluctuations, however, the dominant trend has been toward increased governmental control over foreign exploitation.

The first wave of foreign mineral exploitation came with the Spanish conquest of Mexico in 1521.<sup>6</sup> Because it needed mineral revenues to repay debts in Europe, the Spanish Crown openly encouraged mining development by financially assisting miners in obtaining supplies.<sup>7</sup> This policy changed little for the next 150 years. During the 1770's, however, the scarcity of capital and the aleatory nature of mining made financiers hesitant to grant credit for mining ventures. When credit was extended, exorbitant interest rates were charged. Consequently, the miners petitioned the Crown for a system which would permit them to develop mineral resources without harassment from creditors.<sup>8</sup>

These demands led to the promulgation of the *Ordenanzas of 1783*, essentially the first mining law of Mexico.<sup>9</sup> In addition to encouraging mining through a scheme whereby developers could avoid imprisonment and still satisfy their creditors,<sup>10</sup> an important feature of the law was its adoption of the regalian theory of mineral ownership.<sup>11</sup> Under this theory a miner could acquire a concession by paying a royalty to the government, the government retaining title to the land. Although abrogated nearly 100 years later in another attempt to encourage foreign investment, the regalian theory was reinstituted as a constitutional mandate and was the basis of the Mining Law of 1961.<sup>12</sup>

Although mining activity increased in size and importance at the beginning of the 19th century, foreign investment was discouraged by the

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6. M. BERNSTEIN, *THE MEXICAN MINING INDUSTRY 1890-1950*, at 8 (1964).

7. *Id.* at 9.

8. *Id.* at 11.

9. Verity, *supra* note 1, at 776.

10. *Id.* at 776-78.

11. The regalian doctrine of mineral rights originated in 1265 when King Alphonse of Spain issued a decree that all land belonged to the King and that his subjects could use the land only by royal grant. E. PRIETO, *LEGAL PROBLEMS ON HARD MINERAL OPERATIONS IN MEXICO* 3 (1967).

12. *Id.*

destruction of mines during the War of Independence from 1810 to 1821.<sup>13</sup> In 1823, however, the lack of local capital forced the new government to ease prohibitions against foreign ownership so that foreigners would rehabilitate old mines. Foreign influence again gained a foothold in Mexican mineral exploitation.<sup>14</sup>

From 1824 until the beginning of the 30-year reign of General Porfirio Diaz in 1876, political instability and fluctuating mining policies were obstacles to mining development. After Diaz established political and economic stability, however, scarcity of Mexican capital again caused the government to encourage foreign investment.<sup>15</sup>

The extent to which the government was willing to use various devices to attract foreign capital was reflected in the abandonment of the regalian theory of mineral ownership in the Mining Code of 1884.<sup>16</sup> This encouraged foreign investment by permitting ownership of certain subsurface minerals, notably oil and coal.<sup>17</sup> Additional incentives were established several years later through tax exemptions and lower transportation rates for exported minerals.<sup>18</sup> The decline of international silver prices in the 1890's necessitated even greater mining incentives, so the Mining Law of 1892 allowed the miners additional tax exemptions<sup>19</sup> and permitted them to retain land without completing assessment work.<sup>20</sup>

The large influx of foreign capital which resulted from these incentives was met with hostility by Mexican nationalists.<sup>21</sup> In 1907, a committee established to review mining legislation suggested changing the Mining Law of 1892 to exert more direct control over foreigners by returning to the regalian theory and limiting foreign concessions.<sup>22</sup> Foreign investors and Mexican mining interests dependent upon foreign investment attacked this suggestion. Debates ensued, but the xenophobic element could not

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13. M. BERNSTEIN, *supra* note 6, at 12.

14. British, German, and American investors acquired scores of mines under this policy. *Id.* at 13.

15. H. WRIGHT, *supra* note 2, at 53.

16. M. BERNSTEIN, *supra* note 6, at 18.

17. E. PRIETO, *supra* note 11, at 6.

18. M. BERNSTEIN, *supra* note 6, at 19.

19. *Id.*

20. *Id.* at 7. Assessment work refers to a minimum dollar value of improvements that must be made to maintain continued rights in a concession. As applied to the Mining Law of 1961, payment of surface tax is also required. Verity, *supra* note 1, at 809.

21. Though foreign interests in mining were distributed among French, British, and American investors, by 1911 United States capital accounted for at least 60 percent of the total investment in mining. H. WRIGHT, *supra* note 2, at 55. This fact not only contributed to the general anti-foreign nationalistic attitude reflected in slogans such as "Mexico for the Mexicans," but also created a favoritism for European investment on the part of some governmental officials. *Id.* at 60. The anti-foreign attitude is demonstrated not only by landholders who disliked foreign encroachment on agricultural lands and therefore opposed encouraging foreign mining interests, M. BERNSTEIN, *supra* note 6, at 81, but also by local mine employees who went on strike to protest favored positions given to foreign employees, H. WRIGHT, *supra* note 2, at 60-61.

22. M. BERNSTEIN, *supra* note 6, at 78-79.

generate sufficient support to reinstitute governmental controls over foreign investors, and the miners were unable to expand the open exploitation policy of the Diaz regime. As a result, the Mining Law of 1909 contained no fundamental changes from the earlier law.<sup>23</sup> The conflicting interests preceding the Mining Law of 1909 foreshadowed the problems of present day mining legislation, however.

The overthrow of the Diaz dictatorship during the Revolution of 1910 handicapped foreign mining interests. By 1916 the new government required foreigners to renounce their right to legal protection from their native governments in order to obtain new mining concessions,<sup>24</sup> and assessment work again was required.<sup>25</sup> A year later the regalian doctrine of land ownership was reinstituted in Article 27 of the Constitution of 1917.<sup>26</sup>

23. See *id.* at 78-83; Verity, *supra* note 1, at 781.

24. Known as the "Calvo Clause," the requirement that foreigners renounce their right to the legal protection of their native government regarding locally acquired property was later incorporated into the Constitution of 1917. The purpose of the doctrine was to insure that foreign investors would exercise no legal rights greater than those of Mexican citizens. *Id.* at 9, 12. See note 26 *infra*. See generally C. FENWICK, *INTERNATIONAL LAW* 341-43 (1965); Gutierrez, *Investment in Real Property in Mexico: An Overview of Constitutional and Statutory Restrictions*, 12 ARIZ. L. REV. 270 (1970).

25. E. PRIETO, *supra* note 11, at 9.

26. *Id.* at 10, 12. Article 27, as it relates to mining, is translated as follows:

There is vested in the Nation the direct ownership of the natural resources of the continental platform and the submarine shelves of the islands; all minerals or substances which in veins, layers, masses or beds, constitute deposits whose nature is different from the components of the lands, such as minerals from which are extracted metals and metalloids utilized in industry; the deposits of precious stones, rock salt, and the saline deposits formed directly by marine waters; products derived from the decomposition of rocks when their exploitation requires underground work, mineral or organic deposits of materials capable of being utilized as fertilizers; combustible solid minerals; petroleum and all of the solid, liquid, or gaseous hydrocarbons; and the space over national territory, in the extent and terms which may be fixed by International Law.

In the cases referred to . . . , the ownership by the Nation is inalienable and imprescriptible; and the exploitation, use, or utilization of the resources . . . by individuals, or organizations constituted in accordance with Mexican laws, may be realized only by means of concessions granted by the federal executive branch, in conformity with the rules and conditions which the laws may establish. The legal standards relevant to works or labors of exploitation of the minerals and substances referred to . . . shall govern the performance and proof of that which may be effected or should be effected from the date of issuance, independently of the date of granting the concessions, and noncompliance shall be grounds for cancellation of them. The federal government has the power to establish and abolish national reserves. The corresponding resolutions shall be made by the Executive in the cases and conditions which the laws may provide. With regard to petroleum and the solid, liquid, or gaseous hydrocarbons, neither concessions nor contracts shall be issued and neither shall there be continued those which may have been granted; and the Nation shall carry out the exploitation of these products in the terms established by the applicable regulatory law. . . .

The regulations shall specify the standards applicable to concessions granted prior to the present law.

The legal capacity to acquire ownership of lands and waters of the Nation shall be governed by the following provisions:

I. Only Mexicans by birth or by naturalization and Mexican com-

Political instability during the new government's consolidation period and opposition from the mining industry prevented immediate implementation of the concepts of Article 27. After Alvaro Obregón's conciliatory attitude toward mining from 1920 until 1924, however, the administration of President Plutarco Calles from 1924 to 1928 was marked by insurgent nationalism.<sup>27</sup> Calles realized that the increased demand for metal created by the World War I industrial expansion meant that miners could withstand higher taxes and would present less opposition to a stricter mining code. Prompted by the desire to retain profits in the country and increase Mexican participation in the expanding world mineral market, a new mining law was enacted. The Law of Mineral Industries passed in 1926 emphasized the government's intent to adhere to the concepts of Article 27 since the law prohibited ownership in fee of subsurface minerals and gave concessionaires only a contract with the government to exploit minerals.<sup>28</sup> This law was short-lived, however, since depletion of known reserves<sup>29</sup> and discontinuance of Mexican mining operations which were unable to compete with foreign companies caused small Mexican industrialists to demand a more favorable exploitation policy.<sup>30</sup> In 1930 another mining law was enacted.

Although the Mining Law of 1930 adopted technical requirements, such as eliminating size limitations on concessions, which were designed to encourage investment in mining, the law failed to help the Mexican miner

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panies have the right to acquire the ownership of lands, waters and their accessions or to obtain concessions of exploitation of mines or waters. The government may grant the same right to foreigners, provided they agree before the Ministry of Relations to consider themselves nationals with respect to the said properties and, for that reason, not to invoke the protection of their governments as regards the properties, under the penalty, in case of failure to comply with the agreement, of forfeiting to the Nation the property which may have been acquired by virtue of the same. Under no circumstances may foreigners acquire direct ownership over lands and waters . . . within a strip of one hundred kilometers in width extending along the borders and of fifty in width along the shores. Verity, *supra* note 1, at 782.

Although foreign investors in mining and petroleum were disturbed by practically all aspects of Article 27, the only major change that created international controversy was that coal and petroleum deposits which had become the property of surface owners under the Mining Law of 1884 were returned to state ownership. E. PRIETO, *supra* note 11, at 12. As exemplified by Article 27, however, it is an inescapable conclusion that the drafters of the Constitution of 1917 wanted a government in which national authority was predominant. Kelso, *A Developing Democracy*, in *SIX FACES OF MEXICO* 161, 169 (R. Ewing ed. 1966).

27. M. BERNSTEIN, *supra* note 6, at 149.

28. See Verity, *supra* note 1, at 784 for salient technical features of the law. Conceptually the change in the law that a concessionaire had only a contract with the government to exploit minerals, not a deed or right to the subsoil minerals, was contrary to British and American tradition. Since ownership of minerals in fee was thought to have been accepted by Mexico in the Mining Code of 1884, this change in the 1925 law caused adverse reaction by foreign interests. E. PRIETO, *supra* note 11, at 13-14.

29. E. PRIETO, *supra* note 11, at 14.

30. M. BERNSTEIN, *supra* note 6, at 165.

overcome adverse world metal markets.<sup>31</sup> Consequently, in 1934 nationalistic feelings generated amendments to the mining law which reinstituted size limitations and established a system of national mineral reserves.<sup>32</sup> As amended, this law remained the basis of mining development until Mexicanization in 1961.

It has been claimed that because the Mining Law of 1930 was a superior mining law,<sup>33</sup> its repeal in 1961 was "a result not of any failure to meet the needs of the mining industry" but a change in government policy structured to achieve political objectives.<sup>34</sup> The proliferation of mining laws enacted through 1930 certainly supports the position that the Mexican legal system was prone to enacting laws favoring the political pressures of the moment without full investigation of the long-term impact on mining development. Nationalistic governments desiring to control foreign participation in mining increased taxes and restricted the size of concessions. Governments favoring foreign participation, on the other hand, allowed outright ownership of minerals and eliminated concession size limitations. The historical perspective reveals the presence of a responsive legal system only in the sense that demands voiced by political leaders or mining interests were quickly translated into short-lived legislative enactments. There seemed to be little analysis of the alternatives which might have yielded a comprehensive plan for mining development. Even when there were debates, the laws merely satisfied the stronger political faction, and invariably they were changed when a new regime took office.

The multitude of changes in the mining laws suggests that the legal system was failing to satisfy the long-term socioeconomic needs of the country. Previous laws seemed to have stressed technical factors such as limited concession sizes and uniform location procedures.<sup>35</sup> If the effectiveness of a mining law is to be measured by how well it implemented such technical features, then there would be no reason to examine the long-term rationale underlying the law of 1961. On the other hand, if the law stemmed from a need for a greater degree of governmental control over the mining industry, then its effectiveness must be measured by its success in satisfying that need.

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31. E. PRIETO, *supra* note 11, at 14. See also Verity, *supra* note 1, at 786, for other aspects of the law.

32. E. PRIETO, *supra* note 11, at 15. The national reserve system originally implemented in 1934 was retained in the Mining Law of 1961. Essentially, the provision allows the government to designate either minerals or mining zones composed of (1) minerals that only the state can exploit, (2) minerals essential to industrial development which can be exploited only under special concessions to private, public, or joint operations, and (3) minerals that cannot be exploited until a later time. H. WRIGHT, *supra* note 2, at 135; Perez, *The Mexican Mining Concession—Its Features, Regulations and Practice*, 12 ARIZ. L. REV. 356, 362 n.42 (1970). See also Verity, *supra* note 1, at §§ 13.33-45.

33. Verity, *supra* note 1, at 786.

34. *Id.* at 788.

35. Verity, *A Comparative Study of the Mineral, Oil, and Gas Laws of the United States and Mexico*, 6 ROCKY MT. MIN. L. INST. 435, 468 (1961).

## PRECEDENTS FROM OTHER INDUSTRIES AFFECTING MINING

With only slight variations the trend has been from open encouragement of foreign investment by Diaz to the anti-foreign attitudes of the 20th century. The antipathy toward foreign investors and the nationalistic demands for self-assertion were paralleled in other industries between 1930 and 1960. The first overt move by the Mexican government to protect the nation from foreign economic domination came with the expropriation of foreign oil companies in 1938.<sup>36</sup> Despite the nationalistic attitudes of his regime and his dislike of foreign investors, some historians claim that the expropriation by President Lázaro Cárdenas was not premeditated,<sup>37</sup> but resulted from the failure of the oil companies to satisfy an order of the Supreme Court of Mexico to raise wages as demanded by petroleum workers.<sup>38</sup> Whether premeditated or not, the takeover was criticized as unconstitutional.<sup>39</sup> Considering the lack of viable alternatives and the desire to prevent foreigners from avoiding Mexican laws by invoking the protection of their own laws, the expropriation was not surprising.<sup>40</sup>

The impact of the oil expropriation was to drive deeper the wedge, first noticed in 1907, between foreign investors and the nationalistic Mexicans typified by small manufacturers. The effect of the anti-foreign attitude is illustrated by the fact that foreign investment in Mexico declined from over 50 percent of all investment in Mexico to only 15 percent between the Diaz era<sup>41</sup> and the Cárdenas era which ended in 1940.<sup>42</sup>

Petróleos Mexicanos (Pemex), created as a governmental enterprise, has developed successfully the oil and gas industries since 1938.<sup>43</sup> Hence, despite the adverse reaction of foreign private enterprise to the oil expropriation, the Mexican government learned from the experience that it could operate and control a major industrial activity.

After President Manuel Avila Camacho took office in 1940, Mexico engaged in serious attempts to industrialize. With foreign countries seeking products such as textiles and chemicals and with World War II stimulating industrialization, the attitude toward foreign investment was

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36. S. Adler, Legal Aspects of Limitations on Foreign Participation in Mexican Companies 13 (unpublished thesis submitted to Professor Boris Kozolchyk at Southern Methodist University, June 1962) [copy on file at the University of Arizona College of Law Library].

37. H. WRIGHT, *supra* note 2, at 70. See generally STANDARD OIL CO. (N.J.), CONFISCATION OR EXPROPRIATION? (undated); GOVERNMENT OF MEXICO, THE TRUE FACTS ABOUT THE EXPROPRIATION OF THE OIL COMPANIES' PROPERTIES IN MEXICO (1940); STANDARD OIL CO. (N.J.), THE REPLY TO MEXICO (1940).

38. H. WRIGHT, *supra* note 2, at 68-70.

39. See Woolsey, *The Expropriation of Oil Properties by Mexico*, 32 AM. J. INT'L L. 519 (1938).

40. Adler, *supra* note 36, at 17. See also text & note 24 *supra*.

41. H. WRIGHT, *supra* note 2, at 53.

42. *Id.* at 70.

43. Cf. F. BRANDENBURG, THE MAKING OF MODERN MEXICO 271-75 (1964); H. WRIGHT, *supra* note 2, at 126-28.



again receptive.<sup>44</sup> In 1944, however, Avila Camacho exercised his war-time emergency powers to prevent the foreign control which he thought would result from the large influx of capital. He decreed that Mexican citizens must own at least 51 percent of the stock in industrial, agricultural, livestock, and forestry activities.<sup>45</sup> Although Mexicanization was not applied initially to mining,<sup>46</sup> its application in these other areas provided administrative experience in securing the capital structure requirement which served as a prototype for postwar extensions of Mexicanization.

After taking office in 1946, President Miguel Alemán encouraged foreign investment as had no government since Díaz.<sup>47</sup> The increase of annual foreign investment from an average of 8 percent of all investment in the country from 1939 to 1950 to 12 percent during the 1950's caused another shift in policy.<sup>48</sup> Nationalistic industrialists sought to limit participation of foreign capital. Government economists feared a slowdown in the rate of industrial development and desired to quell investment in processing operations and to stimulate import substitution by greater use of domestically produced intermediate materials.<sup>49</sup> Thus, when Adolfo Lopez Mateos assumed the presidency in 1958, he began reducing the amount of foreign investment in the country in order to eliminate foreign control of industrial development.<sup>50</sup>

Lopez Mateos' first major step was the nationalization of the electric power industry in 1960.<sup>51</sup> Though the economic situation surrounding electric utilities differed from the 1938 oil expropriation in that electric companies wanted the government to purchase the industry, the transaction represented a movement toward eliminating foreign control of Mexican

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44. WRIGHT, *supra* note 2, at 71.

45. Graving, *Ground Rules for Foreign Investment*, in BUSINESS/MEXICO 49, 51 (G. Blake ed. 1968); H. WRIGHT, *supra* note 2, at 102. Though the constitutionality of laws requiring Mexicanization is doubtful, Adler, *supra* note 36, at 19, in practice there is no question that Mexicanization is applied. Graving, *supra*, at 51.

46. Verity, *supra* note 1, at 774. As applied to industries other than mining, an administrative process is provided whereby governmental approval must be obtained for incorporation of companies with foreign capital. The Ministry of Foreign Relations has discretionary power to enforce laws applicable to specified industries and to set the percent of foreign capital required if not prescribed by law. The general requirements of Mexicanization, in addition to the percentage requirements, are that: (1) transfer of control of stock must be approved by the Ministry, (2) "Calvo Clause" requirements must be followed by incorporated companies, and (3) a majority of the directors of incorporated companies must be Mexican. See generally H. WRIGHT, *supra* note 2, at 97-101.

47. H. WRIGHT, *supra* note 2, at 73.

48. *Id.* at 78.

49. *Id.* See generally Prebisch, *The System and the Social Structure of Latin America*, in LATIN AMERICAN RADICALISM 29 (I. Horwitz ed. 1969).

50. H. WRIGHT, *supra* note 2, at 80.

51. *Id.* The takeover by the government of electrical utilities is referred to as "nationalization" since the government paid a fair price at the time of takeover. This is contrary to the "expropriation" of oil interests in 1938 since in that transaction not only did the government take over what was thought to be a vested right to subsoil interests, but also payment to the companies did not occur until several years later. *Id.* at 71-83.

industries.<sup>52</sup> Popular slogans, such as "Land 1910, Petroleum 1938, and Electrical Power 1960," and public debates motivated public support against foreign domination.<sup>53</sup> Foreign apprehension that mining would be the next industry to be overtaken was not unfounded.

#### ENACTMENT OF MEXICANIZATION

The Mexicanization of the mining industry resulted from factors quite different from those that caused the nationalization of the petroleum and electric utility industries. The Mining Law of 1930 was technically sound, local capital was still scarce,<sup>54</sup> and the mining industry had no desire to be overtaken. The Mexicanization which nonetheless occurred may best be understood by an examination of the political, economic, and social attitudes of the Mateos administration.

The legislative process in Mexico is controlled by the President acting with the support of the dominant Institutional Revolutionary Party (PRI).<sup>55</sup> Even though many social and economic groups are represented in the PRI, their influence on decision making appears slight.<sup>56</sup> The inherent power of the President in directing legislation from within closed circles suggests that the political process may fail to insure full consideration of all the needs of Mexican development.<sup>57</sup>

Political needs influencing mining legislation may best be analyzed by focusing on the fear of foreign domination, national pride in industrial accomplishments, and the desire for economic self-determination. As has been seen, the Mexican attitude toward foreign investment changed considerably during the 20th century. The xenophobia and the desire to retain land ownership for the people which were reflected in Article 27 of the Constitution and the Mining Law of 1930 were moderated somewhat as the nation industrialized. During the 1940's and early 1950's, for example, small manufacturers sought maximum protection from foreign investment, but by the late 1950's they were becoming less vocal in their opposition because their opportunities to associate with foreign companies were increasing.<sup>58</sup> During the same period, however, larger industrialists lost enthusiasm for foreign participation due to increasing self-confidence in their ability to meet investment demands.<sup>59</sup>

By the 1960's the government faced several problems. It was frustrated because foreign investors had failed to use Mexican nationals in

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52. *Id.* at 81-83.

53. Underwood, *The Debated Role of Foreign Investment in Mexico*, in *BUSINESS/MEXICO* 42, 44 (G. Blake ed. 1968).

54. Browning, *supra* note 3, at 27.

55. Kelso, *supra* note 26, at 161. See generally F. BRANDENBURG, *supra* note 43, at 142-50; R. SCOTT, *MEXICAN GOVERNMENT IN TRANSITION*, 145-96 (1959).

56. Kelso, *supra* note 26, at 173; R. SCOTT, *supra* note 55, at 172.

57. Kelso, *supra* note 26, at 178.

58. H. WRIGHT, *supra* note 2, at 153-55.

59. *Id.*

managerial positions in the mining industry.<sup>60</sup> It was discouraged with its failure to encourage foreign companies to adopt an attitude of assistance toward internal industrial expansion.<sup>61</sup> Further, it was fearful that the mining industry was depleting irreplaceable natural resources.<sup>62</sup> Pride in the fact that development in other industries had come primarily through Mexican ingenuity fostered a governmental demand that Mexican investors participate in mining operations. This demand had patriotic appeal, for no Mexican would deny that he would prefer having Mexican mineral wealth developed by fellow citizens rather than by foreign exploiters. Clearly, some control over the mining industry was required to alleviate these frustrations and satisfy nationalistic demands.<sup>63</sup>

The government's desire to control the policy behind mineral development was openly acknowledged by government officials.<sup>64</sup> The trend toward an active governmental role in industrial operations was demonstrated by the management of the oil industry and the nationalization of the electrical utilities. The regalian theory of mineral ownership embodied in the Constitution of 1917 provided further incentive for extending this trend into mining.<sup>65</sup> Even though the Constitution of 1917 specif-

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60. Browning, *supra* note 3, at 8-9.

61. Miranda, *The Mining Law of Mexico*, 14 ROCKY MT. MIN. L. INST. 227, 282-84 (1968).

62. *Id.* See also Bustamante, *Ley Reglamentaria Del Artículo 27 Constitucional En Materia De Explotación y Aprovechamiento De Recursos Minerales*, in LEGISLACIÓN MINERA MEXICANA 409 (Consejo de Recursos Naturales nio Renovables ed. 1964). These Motives to the law indicate that it was the government's position, generally, that governmental officials should have larger responsibility in conducting matters affecting mineral development.

63. As used herein, governmental control of an industry refers to the degree of governmental involvement in operating and setting policies surrounding the industry. It may or may not include operational control of the industry which involves possessory rights such as whether to develop product A as opposed to product B or whether profits should be reinvested or distributed to shareholders. Governmental control of mining has been limited since involvement concerns only matters such as determining the length of concessions and setting capital structure requirements for company charters. Governmental control of the oil and electrical industries has been greater since it includes not only general policy considerations but also operational control of these industries. Since control is a matter of degree, it must be considered in context depending upon the industry concerned and the amount of governmental involvement.

64. Browning, *supra* note 3, at 9. Though in 1963 the Secretary of National Properties expressed the view that the government had no desire to go into the mining business, he acknowledged that at least one reason for this position was that the government already had the ability to control the mining industry through issuance of concessions. *Id.*

65. Interview with George F. Leaming, research analyst, College of Business and Public Administration, University of Arizona, in Tucson, Arizona, Dec. 8, 1970 [hereinafter cited as Leaming Interview]; Interview with Erasmo Lozano R., Attorney at Law, in Cananea, Sonora, Mexico, Nov. 26, 1970 (Before entering private practice where he now represents mining and corporate interests, Lic. Lozano was a partner in the well known firm of Baker, Botts, Miranda, Santamolina and Steta.) [hereinafter cited as Lozano Interview]; Interview with J. Rubin Velasco, geologist, in Cananea, Sonora, Mexico, Nov. 26, 1970 [hereinafter cited as Velasco Interview]; Interview with Victor H. Verity, attorney at law, in Tucson, Arizona, Nov. 13, 1970 & Dec. 11, 1970 [hereinafter cited as Verity Interview]. The general attitude expressed by those interviewed was that the government felt responsible for controlling mineral development. Reasons for this attitude were

ically adopted the theory, which suggested that the government should receive the benefit of natural resources for its citizens, the policy fluctuations of previous administrators, practically speaking, allowed foreign owners to exercise operational control over and to profit from mineral exploitation. This foreign control predominated notwithstanding the fact that the federal government exercised limited control through its tax powers. By early 1960, fear of continued foreign domination, national pride in related accomplishments, and governmental self-determination were manifested in demands which sought foreign capital only when complementary to participation by Mexican citizens.<sup>66</sup>

During the 1940's and 1950's, the economic development of mining was outpaced by other Mexican industries.<sup>67</sup> Before World War II, mining contributed as much as 10 percent of the gross national product, but by the mid-1950's its contribution was reduced to 2½ percent.<sup>68</sup> While government programs from the 1940's to the mid-1950's sought to stimulate other sectors of the economy, the mining industry was over-taxed and under-assisted. Foreign companies controlled most mining operations,<sup>69</sup> and there was no new investment in the mining industry.<sup>70</sup> Demands voiced by Mexican mining operators for tax reductions and other incentives went unanswered.<sup>71</sup> Government economists concerned with encouraging import substitution industries<sup>72</sup> failed to stimulate the development of Mexican sources of supportive raw materials for those same industries.

Furthermore, conflicting policies and a lack of coordination within the government inhibited formulation of a definite mining policy. The Ministry of Finance desired mining tax proceeds to finance industrialization, and advocated exploitation.<sup>73</sup> The Ministry of Economy, however, took a conservationist attitude because it was controlled by domestic industries whose interests opposed foreign development.<sup>74</sup> If the government were to assume a directive role in mining as it had in other industries, a coordinated program was required of government officials.

Considering the demands expressed in the 1960's, the most obvious alternatives for mining legislation were nationalization, a system of tax re-

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related to the philosophy of governmental ownership of mineral resources stemming from the regalian doctrine (Lozano & Verity Interviews) as well as to the fear of exhaustion of valuable minerals (Verity Interview).

66. H. WRIGHT, *supra* note 2, at 54.

67. M. BERNSTEIN, *supra* note 6, at 238.

68. *Id.*

69. Browning, *supra* note 3, at 5.

70. M. BERNSTEIN, *supra* note 6, at 250. See also COMBINED MEXICAN WORKING PARTY, *THE ECONOMIC DEVELOPMENT OF MEXICO* 42 (1953).

71. M. BERNSTEIN, *supra* note 6, at 252.

72. H. WRIGHT, *supra* note 2, at 73-76.

73. Wionczek, *Foreign-Owned Export-Oriented Enclaves in a Rapidly Industrializing Economy: Sulphur Mining in Mexico*, in *FOREIGN INVESTMENT IN THE PETROLEUM AND MINERAL INDUSTRIES* 264, 285 (R. Mikesell ed. 1971).

74. *Id.*

lief, or Mexicanization. Neither the government nor a majority of the Mexican business community favored nationalization.<sup>75</sup> Though mining groups had long been demanding tax relief, the supposed disadvantage of this solution was that it failed to satisfy nationalistic demands or "Mexican pride and drive."<sup>76</sup> While governmental desire to exercise some degree of control over the industry was paramount, there was a willingness to grant tax relief if some control were achieved. The mining industry may have had serious misgivings about Mexicanization, but opposition after the government had decided to Mexicanize would have been futile and might well have generated reprisals.<sup>77</sup> Consequently, the law was adopted without noticeable opposition.<sup>78</sup> The absence of vocal opposition, however, may indicate that the needs of all segments of the Mexican community were not considered when the law was enacted and that alternatives to Mexicanization, which might have accommodated unexpressed long- and short-term needs, were doomed to failure.

#### THE MINING LAW OF 1961

The Mining Law of 1961 was designed to Mexicanize the mining industry, permit government exploitation of certain minerals, provide for more effective government control of resources, limit concessions previously granted to 25 years, and limit the area exploitable by each concessionaire.<sup>79</sup> Other objectives indicated in the Motives to the Law<sup>80</sup> included the enforcement of the regalian theory of mineral ownership and the conservation of natural resources to preserve the national wealth. The law also sought to use Mexican raw materials to assist the development of other sectors of the economy<sup>81</sup> and to further the policy that progress is best accomplished through Mexican citizens and corporations.

Implicit in the needs of the Mexican people were other unarticulated goals. The new law was to encourage development of the mineral in-

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75. Miranda, *supra* note 61, at 285. Reasons suggested for the decision against nationalization are: the unavailability of capital to enter the field (an international loan was obtained to nationalize electrical utilities in 1960), and the desire to avoid international condemnation as had occurred after the oil expropriation in 1938. Leaming Interview, *supra* note 65.

76. Miranda, *supra* note 61, at 285. Interview responses indicated that economic needs by themselves were secondary to nationalistic spirit. Lozano and Velasco Interviews, *supra* note 65. It should be noted, however, that the same day the Mining Law was published the Mining Tax Law was amended to provide an automatic 50 percent export and production tax for Mexicanized companies. Miranda, *supra* note 61, at 303.

77. Lozano & Velasco Interviews, *supra* note 65. Those interviewed doubted that any Mexican would oppose a law that was designed to give Mexican land back to Mexicans. The nationalistic appeal for Mexicanization was too strong; opposition would have been political suicide.

78. E. PRIETO, *supra* note 11, at 17. A group appointed by the Mining Chamber of Mexico to study the new law voiced some opinions that local and foreign investment should be encouraged by incentives. *Id.*

79. Verity, *supra* note 1, at 789.

80. Bustamante, *supra* note 62, at 409-15.

81. See H. WRIGHT, *supra* note 2, at 73-76, where it is implied that mining development would have to support integration of import substitution industries.

dustry while at the same time protecting valuable minerals from unwarranted foreign exploitation.<sup>82</sup> More importantly, it was to allow Mexicans greater control over other areas of industrial development and permit them to share in a greater portion of the profits from mineral activities, thereby enhancing Mexico's overall standard of living<sup>83</sup> and accumulating a national body of capital.<sup>84</sup>

Under the Mining Law of 1961, only Mexican citizens or Mexicanized companies can acquire mining concessions.<sup>85</sup> Companies organized prior to the Mining Law of 1961 have 25 years either to comply with Mexicanization requirements or to forfeit their concessions.<sup>86</sup> To begin a new mining operation with foreign capital, approval must be obtained from the Ministries of Foreign Relations, National Property, and Industry and Finance.<sup>87</sup> In the case of ordinary concessions, Mexican citizens must own 51 percent of the shares of the corporation, and for special concessions in natural reserves 66 percent ownership is required.<sup>88</sup> To facilitate enforcement of these requirements, companies with both Mexican and foreign shareholders must maintain a registry of shareholders.<sup>89</sup> The Ministry of Property has discretion to cancel company concessions upon proving a violation of Mexicanization requirements, and penalties for falsifying data in reports to that Ministry or for simulating or falsifying share ownership include fines and imprisonment.<sup>90</sup> Regulations enacted to implement the Mining Law provide that Mexicanized companies shall receive automatic tax relief.<sup>91</sup>

#### PRECEDENTS AFFECTING IMPLEMENTATION OF MEXICANIZATION OF MINING

The Mexicanization of the mining industry was influenced by a variety of factors. The administrative experience gained from the Mexicanization of other industries eased the transitional difficulties, for example. The inability of Mexican investors to meet the necessary capital requirements was an obvious impediment, however. Moreover, Mexicanization

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82. Browning, *supra* note 3, at 8.

83. Savignac, *The Mexican Economy Today*, 14 ARIZ. REVIEW 2 (Jan. 1968).

84. Pagliai, *The Mining Industry in Mexico*, in SEMINAR ON DOING BUSINESS IN MEXICO 6, 11 (1967).

85. Mining Law of 1961, *supra* note 3, at art. 14. Portions of the Mining Law of 1961 and the Regulations of 1962, *supra* note 3, are translated in Verity, *supra* note 1, at 818-23. See note 26 *supra*.

86. Mining Law of 1961, *supra* note 3, at Transitory art. 3.

87. Regulations of 1962, *supra* note 3, at art. 26.

88. *Id.* Special concessions are required for national reserve minerals while ordinary concessions cover all other minerals. See generally Verity, *supra* note 1.

89. *Id.*

90. Mining Law of 1961, *supra* note 3, at art. 109. Fines from 400 pesos (ca. \$32) to 100,000 pesos (ca. \$8,000) and imprisonment from six months to five years may be imposed. Verity, *supra* note 1, at 805.

91. DECRETO QUE REFORMA LOS ARTICULOS 52 Y 56 DE LA LEY DE IMPUESTOS Y FOMENTO A LA MINERÍA (D.O. Feb. 6, 1961) [hereinafter cited as Tax Decree of 1961].

operated against a background of other legal incentives, disincentives, and regulations promulgated to satisfy demands unaccounted for in the law. All of these factors contributed to the process of implementation.

President Avila Camacho's decree of 1944 had provided the Ministry of Foreign Relations with experience in securing Mexican participation in other industries.<sup>92</sup> The practice of the Ministry was to examine the application for incorporation of a new company in these industries and to issue a permit if it was in an unrestricted industry.<sup>93</sup> Except for 12 general rulings between 1947 and 1953, however, few guidelines on the granting of permits had been issued by 1960.<sup>94</sup> In practice, the Ministry did not hold public hearings on policy decisions, nor did it give notice of additions to the list of restricted industries or attempt to consider the merits of each application for incorporation.<sup>95</sup>

Administrative agencies made arbitrary decisions which often appeared to be beyond the statutory intent. Despite the fact that there was no statutory requirement to apply Mexicanization retroactively, the Ministry of Foreign Relations, for example, imposed Mexicanization requirements on industries upon the application for charter amendments even where the original charter had been issued before the industry became subject to Mexicanization.<sup>96</sup> Another example of arbitrariness indicating the governmental desire to preserve natural resources was the response of a government economist to petitions for reduction of export and production taxes.<sup>97</sup> By destroying their profit potential, the tax forced the closure of operating graphite mines. Answering a miner's request for reconsideration of the tax, the economist indicated that no help could be given, reasoning that the graphite could remain in the soil until Mexican industry required its exploitation. This attitude is particularly ironic because not only does Mexico have an abundant supply of graphite but also nearly all of its annual graphite requirements could be produced by a single mine in less than a month. The official's ignorance of the facts and his emotional attitude regarding preservation of natural resources suggest the difficulties to be overcome in dealing with bureaucratic arbitrariness.

Despite arbitrary decisions, some statutes were loosely enforced and some administrative rulings were not enforced at all. For example, although Mexicanization in other industries required that 51 percent of the shares be owned locally, the Ministry permitted the use of bearer shares

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92. Browning, *supra* note 3, at 12 n.64.

93. H. WRIGHT, *supra* note 2, at 103. Restricted industries are those requiring participation by Mexican investors. By 1960 majority Mexican ownership could be required by the Ministry for the broadcasting, motion picture, air transportation, maritime and land transportation, fishing, carbonated beverage, publishing and advertising, rubber shipping, fruit juice bottling, and agricultural and forestry industries. *Id.* at 105-06.

94. *Id.* at 104; Verity Interview, *supra* note 65.

95. H. WRIGHT, *supra* note 2, at 106.

96. *Id.* at 107.

97. Verity Interview, *supra* note 65.

when, in order to insure proper Mexican participation, only registered shares should have been allowed.<sup>98</sup> Such administrative action could defeat the goal of a Mexicanized industry since bearer shares could be purchased and voted by foreigners. Notwithstanding an interministerial commission ruling that permitted the acquisition of real property by corporations which were exempt from Mexicanization, the Ministry of Foreign Relations often required Mexicanization before permitting a corporation to acquire real property.<sup>99</sup> Regardless of the literal wording of a statute or ruling, there appeared to be no way of determining the implications of the law until one dealt directly with the administrators.

One further aspect of Mexicanization of other industries should be considered. When Mexican ownership of 51 percent of the shares of a corporation was first required in 1944, it appeared to be no disincentive since foreigners continued their investments. Since 1944, Mexicanization of other industries appeared to have been successful. Of course, whether actual control by a majority of Mexican citizens was attained is questionable because of possible ineffective or purposively lax administrative enforcement. It appears that the Mexicanization formula of dissimilar industries was applied to the mining industry before a complete analysis of the economic characteristics of that industry had been made, which would seem to be indicative of an unresponsive legal system. Simply because local investors had the desire and capital to invest in industries such as fishing, transportation, and agriculture, does not mean that they would have been able to invest in mining.

#### IMPLEMENTATION OF MEXICANIZATION OF MINING

It is not surprising that administrative arbitrariness was also present in the implementation of the Mining Law of 1961. In order to incorporate a Mexicanized company, for example, the Ministry of Foreign Relations required that applications for charters recite certain phrases contained in the law.<sup>100</sup> Even though restating those phrases served no acknowledged purpose, the Ministry invoked its discretionary authority and conditioned charter approval on inclusion of the restatement.

The test of the success of implementation, however, must focus on the public's receptiveness to the law and ability to invest in mining activities. Though local business promoters invested in other industries in increasing degrees in the 1960's,<sup>101</sup> they expected high immediate returns on capital.<sup>102</sup> Initial costs of investing in mining operations are extremely

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98. H. WRIGHT, *supra* note 2, at 106-07.

99. *Id.* at 107.

100. Lozano Interview, *supra* note 65.

101. See generally Underwood, *supra* note 53.

102. Browning, *supra* note 3, at 7; Lozano Interview, *supra* note 65. Return on savings, for example, runs 10 percent and bonds pay 12 percent. Mexican investors therefore want 15-20 percent return on equity capital. Bogert, *Mexicana-*



high,<sup>103</sup> however, and the probability of successful exploration and productive operations is very low.<sup>104</sup> Since foreign capital traditionally controlled most, if not all, large mining operations,<sup>105</sup> substantial local investment was required to attain majority interests in these operations. Taking account of the local investor's high return expectations and of the vast capital required for mining operations, realistic evaluation by the government should have indicated that local capital was simply unavailable to provide majority ownership in the mining industry.

Assuming the ability of local investors to overcome a portion of their capital deficiencies, however, partial diversification of ownership among local citizens of previously foreign-dominated operations could have beneficial economic effects. If local citizens own a portion of a mining company, for example, expropriation is less likely. This is an incentive to foreign investors who are attracted to countries where there is predictability in government policy.<sup>106</sup> Joint ownership of traditionally foreign-owned company may help to bring company goals into harmony with local economic policy, thereby resulting in political benefits. Additionally, returning profits to local citizens may quell anti-foreign attitudes of economic exploitation. The net result of joint participation may be that both local citizens and foreign investors will benefit from increased profits equally distributed.

#### *Normative Incentives and Disincentives Affecting Implementation*

The Mining Law of 1961 uses both incentives and disincentives to implement Mexicanization. Requiring 66 percent Mexican control for mining development in national reserves is a disincentive to foreign investment. The foreign investor not only assumes the risk entailed in not having control of a company but also must find 15 percent more Mexican capital than is required for ordinary concessions. Though the requirement has the advantage of protecting natural resources from depletion, it also has the effect of discouraging new exploration because private companies fear that explored areas may be made a national reserve.<sup>107</sup> This effect is a disincentive to incorporating a new Mexicanized corporation since the foreign investor, who actually puts up nearly *all* the capital

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*tion: Its Impact on the Mining Industry of Mexico*, 25 MINING WORLD 15 (March 1963).

103. Bogert, *supra* note 102, at 12-15; Browning, *supra* note 54, at 7; Verity Interview, *supra* note 65.

104. Verity Interview, *supra* note 65. Mr. Verity suggests that even after selection of an exploitation target chances are as low as one in ninety-nine that exploration will result in successful mining exploitation. *Id.*

105. Miranda, *supra* note 61, at 282. See text & note 138 *infra*.

106. Verity Interview, *supra* note 65. Prior to Mexicanization of mining, uncertainty of what action the government would take regarding the industry was a disincentive to foreign investment. Certainty in implementation of the law, even if somewhat economically disadvantageous, is an incentive to the foreign investor. *Id.*

107. E. PRIETO, *supra* note 11, at 29.

for a new operation,<sup>108</sup> must assume the total risk of unsuccessful discovery while being relegated to a 34 percent interest in the profits that may accrue.

The penalty provisions of the law can be both an incentive and a disincentive to Mexicanization. If a foreign company decides to Mexicanize, the penalties are an incentive to obey the letter of the law.<sup>109</sup> Arbitrary administrative implementation creates the problem for the foreign investor of being unable to forecast whether his actions will be considered legal. For example, government agencies could take several approaches if Mexicanization is attained by registering shares in the names of Mexican strawmen who are mere agents of a foreign investor. Even though the use of strawmen is considered fraudulent, the government could conclude that since the strawman is Mexican, no penalty should be imposed. On the other hand, it could decide that since the strawman is an agent, the foreign investor should be fined or imprisoned. If the government sets no standard and determines arbitrarily what sanction to impose, the law is uncertain. The result is that if government agencies either arbitrarily or strictly enforce methods by which Mexicanization can be attained, foreign mining investors may be discouraged from investing by the fear of criminal penalty. On the other hand, if enforcement is loose, implementation of Mexicanization will not be accomplished.

Tax relief was an important incentive for encouraging operating mining companies to Mexicanize.<sup>110</sup> In addition to the Tax Decree of 1961, tax assistance was provided in 1963.<sup>111</sup> In order to stimulate mining and to encourage Mexicanization,<sup>112</sup> all Mexicanized companies were able to negotiate with the Ministry of Finance for production and export tax reductions of up to 75 percent.<sup>113</sup> Small and medium sized mining companies received an automatic 75 percent reduction.<sup>114</sup> Companies establishing new mines or engaging in exploration work also could receive small reductions in income taxes.<sup>115</sup> One indication of the impact of these incentives was that by 1968 at least 90 percent of the mining companies in 1961 had Mexicanized.<sup>116</sup> Yearly averages of concessions issued under the Mining Law of 1961, however, were less than those issued under either of the two previous mining laws.<sup>117</sup> This fact may indicate that the

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108. Verity Interview, *supra* note 65.

109. See text & note 90 *supra*.

110. See generally Perez, *supra* note 32.

111. ACUERDO RELATIVO LOS ESTÍMULOS FISCALES PARA LA MINERÍA (D.O. May 22, 1963) [hereinafter cited as Fiscal Stimulants of 1963]. See Browning, *supra* note 3, for a discussion of this Stimulant.

112. See generally Browning, *supra* note 3, at 28.

113. Fiscal Stimulants of 1963, *supra* note 111, at rule 2a.

114. Monthly federal receipt for a small company is 100,000 pesos (ca. \$8,000), and for a medium-sized company it is 250,000 pesos (ca. \$20,000). *Id.* at rules 5a, 6a.

115. *Id.* at rules 10a, 11a.

116. Miranda, *supra* note 61, at 297.

117. *Id.*

Mining Law of 1961 was less effective in encouraging new mineral development than were the previous laws. It is not clear whether the lack of new development was caused by external factors in the world mineral market, the brevity of the testing period for the 1961 law compared to previous laws, the normative requirements of Mexicanization, the national reserve policy as implemented in the mining law, or possible strict implementation of Mexicanization by government agencies. It is clear that although tax incentives may have encouraged Mexicanization of many companies existing in 1961, no effective incentives were given to encourage new mineral development.

Existing foreign companies unable to find sufficient local investment capital to satisfy Mexicanization requirements were permitted to obtain tax relief by putting shares into a trust fund as provided by decree in 1963.<sup>118</sup> Companies were allowed, upon approval of the Minister of Finance, to have a Mexican trustee hold and vote shares of stock until purchasers were found.<sup>119</sup> Though drafted as an incentive to assist Mexicanization, trust agreements initially received a mixed reaction from the mining industry<sup>120</sup> and ultimately failed to encourage companies to Mexicanize.<sup>121</sup> The attempt to encourage the use of trust agreements suggests that the government realized that immediate 51 percent participation by Mexican capital was an unrealistic goal. The fact that tax benefits were allowed for companies putting shares in trust suggests that the government was more interested in achieving a degree of control over companies than it was in receiving tax revenue. That the trusts were utilized infrequently suggests that the goals of Mexicanization were not affected by the use of trust agreements and that the trust concept was adopted without consideration of whether mining companies would be receptive to that technique.

The use of this multiplicity of written laws and regulations by the legislature to provide incentives for Mexicanization and to alleviate unforeseen problems in the Mining Law of 1961 suggests that automatic compliance with the letter of the law was not expected and that the political impact of the mining laws and regulations was deemed more important than actual goal achievement. Continuous enactment of supplemental laws and regulations to satisfy immediate demands also implies that full consideration was not given to long term goals in the original law.

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118. DECRETO QUE REFORMA LOS ARTÍCULOS CUARTO Y NOVENO TRANSITORIOS DEL REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 CONSTITUCIONAL EN MATERIA DE EXPLOTACIÓN Y APROVECHAMIENTO DE RECURSOS MINERALES (D.O. July 13, 1963). See also Browning, *supra* note 3, at 29.

119. REGLAMENTO REFERENTE A LOS ESTÍMULOS Y FRANQUICIAS FISCALES A LAS EMPRESAS COMPRENDIDAS EN EL ARTÍCULO 40. TRANSITORIO, REFORMADO, DEL REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 CONSTITUCIONAL EN MATERIA DE EXPLOTACIÓN Y APROVECHAMIENTO DE RECURSOS MINERALES (D.O. July 20, 1963). See Browning, *supra* note 3, for a discussion of this regulation.

120. Browning, *supra* note 3, at 30.

121. Verity Interview, *supra* note 65.

The foregoing analysis leads to the following conclusions. A proliferation of many laws as incentives must properly account for cultural institutions which will affect them or the laws will be unpredictable and their implementation unstable. Unnecessary delays in implementation result when administrators continually must relearn implementation procedures. Persons directly affected by the ever-changing regulations are dissuaded from compliance by the history of short-lived laws and by the possibility that more advantageous incentives will be forthcoming. The ultimate result is that a normative institution may play only a small role in obtaining the consequences it was designed to secure.

### *Cultural Institutions Affecting Implementation*

In addition to the requirements of the mining law and the underlying regulations, certain cultural institutions affected implementation of Mexicanization. These institutions were manifested in the actions of administrative agencies, attorneys, and mining companies.

Though some believe that the administrative implementation of the Decree of 1944 offered little information that could be applied directly to Mexicanization of mining,<sup>122</sup> the Ministry of Foreign Relations did have experience in providing some of the same checks for other Mexicanized industries prior to 1961 as it provided for the mining industry under the 1961 law. Incorporation of a mining company having foreign capital requires approval from several agencies of the government.<sup>123</sup> The tax incentive provisions and the system of national reserves added to the administrative burden and required additional guidelines and training of new personnel. While loosely structured Mexicanization laws for other industries may have provided impetus for explicit requirements in mining,<sup>124</sup> there was an apparent tendency to reapply some requirements without thorough investigation of the possible consequences. Additionally, there were some delays in the

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122. Lozano Interview, *supra* note 65.

123. The overall responsibility for implementing the Mining Law rests with the Ministry of Property, and this Ministry must give final approval for incorporation. Briefly, the method of incorporating a company includes (1) submitting a proposed charter and obtaining a permit to incorporate the company from the Ministry of Foreign Relations (This ministry obtains advice from the Ministry of Property, the Ministry of Finance, and the Ministry of Commerce and Industry before giving approval.); (2) recording the permit to incorporate with the notary public within 90 days and then executing a charter of incorporation before the notary; (3) obtaining a court order approving the charter; (4) recording the charter in the civil court of the domicile of the company; (5) recording the charter in the Public Registry of Commerce; (6) filing the charter with the Mining Public Registry of the Ministry of National Property for recording in the General Book of Mining Corporations and in the Book of Mexican Shareholders of Mining Companies. Mainero, *Mining in Mexico*, 4 CAL. W.L. REV. 287, 297 (1968); Perez, *supra* note 32, at 368; Lozano Interview, *supra* note 65. The dual recording in step (6) is designed to allow the Ministry to trace ownership of shares to insure that foreign participation in mining operations does not exceed specific percentages. Miranda, *supra* note 61, at 300. See generally Miranda, *Foreign Investment and Operation in Mexico*, 2 ARIZ. L. REV. 187 (1960), for a description of Mexican corporations.

124. Lozano Interview, *supra* note 65.

administrative process which hindered mining.<sup>125</sup> Such delays are exemplified by the fact that as late as 1965 Mexicanized companies had not received tax reductions.<sup>126</sup>

The complexity of the administrative process requires that investors rely on someone who knows both the requirements of the law and the intricacies of administrative machinery.<sup>127</sup> A Mexican attorney's contact with governmental officials, for example, often results in speedier approval of a client's charter application since the attorney may clarify immediately questions which are raised by government officials.<sup>128</sup> Reliance on attorneys by government officials and clients, however, demonstrates a cultural institution which might hinder implementation of the letter or the spirit of the law.<sup>129</sup>

Extensive reliance on attorneys, however, may increase the possibility of evasion of the laws. Should a notary accept an attorney's word that shareholders are Mexican without proof, the requirement of Mexican control may be avoided.<sup>130</sup> If, as it is suggested of some Latin American legislators,<sup>131</sup> the law was enacted by those who expected that the notaries would not require proof of Mexican citizenship, then the letter of the law requiring 51 percent Mexican ownership could be avoided although the spirit of the law might not be.

This reliance on Mexican attorneys by both government officials and foreign investors may permit further simulation when the intent of laws

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125. See generally Miranda, *supra* note 61, at 306.

126. See Browning, *supra* note 3, at 16, which suggests that the reason Mexicanized companies had not received tax reductions was administrative delay in processing applications.

127. Velasco & Verity Interviews, *supra* note 65.

128. It is a common practice, for example, for attorneys in outlying areas to have associates in Mexico City hand-carry charter applications between administrative agencies to expedite the process. Lozano Interview, *supra* note 65.

129. Lic. Lozano suggests that it would be contrary to the letter and to the spirit of the law to recommend, for example, that strawmen be used to satisfy Mexican shareholder requirements. Lozano Interview, *supra* note 65. Other attorneys who have foreign clients willing to take the risk may be induced to use strawmen, however. If there are conflicting views on what is contrary to the spirit of the law, an attorney may rationalize use of simulations without moral apprehension. The net result is that reliance by both clients and governmental officials on persons in the legal profession demonstrates a cultural institution which might either assist or hinder implementation of the spirit of the law.

130. Though the present practice is for the notary to require proof of citizenship upon application for a charter, there are indications that some notaries will accept the word of attorneys that applicants are Mexican citizens without physical proof. This may be of no avail, however, since registration of the charter could be denied by the Mining Registry. Lozano Interview, *supra* note 65. See also Gutierrez, *supra* note 24, at 277, wherein the importance of the role of the Mexican notary is discussed.

131. See generally Kozolchyk, *Law and the Credit Structure in Latin America*, 7 VA. J. INT'L L. 1, 33 (1967), wherein it is suggested that Latin American legislators sometimes enact laws which they know may not be followed. This trait of the Latin American which brings about simulations is distinguished from the many ingenious tactics used by attorneys in the United States to reduce the amount of taxation for a client, for example, since the use of simulations is not intentionally built into statutes in the United States.

are not clear. Even though an attorney may know that strawmen are being used by a foreigner, for example, there may be a question whether the particular relationship is contrary to the law. Is it contrary to the spirit of Mexicanization for a foreign investor and a Mexican shareholder to enter a contract whereby the Mexican agrees to pay the value of a share from profits earned over a long-term period? Since attorneys are used as intermediaries between officials and clients, an attorney's attitude on a particular question may influence whether the law will be simulated. Although reliance on attorneys is required by the complexity of the administrative process, it can perpetuate the use of simulations, legitimate or otherwise.<sup>132</sup>

The requirement that mining companies report discrepancies in shareholder citizenship requirements to the Ministry of Property suggests an inclination to expect compliance with the letter of the law through the fear of criminal penalty. Mining companies are required to make numerous economic, geological, and exploratory reports to the government which are subject to review by the Ministry of Property.<sup>133</sup> Upon discovery of a simulation of citizenship requirements, the company is subject to a penalty. Hence, one mechanism for enforcement of the mining law comes from within Mexicanized companies. Majority control may shift to foreigners, however, if the company is willing to risk penalties by falsifying reports, or if it is mistaken in investigation of shareholders' citizenship. Of course, this method of enforcement permits additional possibilities of simulation if companies persuade governmental officials to overlook falsifications as simple mistakes, thereby decreasing the imposition of heavy fines or imprisonment.

The effect of those several institutions on implementation of the mining law demonstrates the importance of being aware of group attitudes when enacting legislation. Had there been no prior administrative experience in implementing Mexicanization-type laws, delays might have been longer, thereby creating greater disincentives to Mexicanization of mining. If Mexican attorneys had not functioned as intermediaries between clients and government officials, additional delays in incorporating may have been more of a disincentive to foreign investors. In fear of criminal penalty provided no incentive to file required reports, the letter of the law could have been avoided. All of these factors are important considerations in determining whether the Mining Law of 1961 was effective in attaining its desired goals.

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132. See Graving, *supra* note 45, at 52. Simulations are legitimate or illegitimate devices used to avoid compliance with the law. A legitimate device is not automatically illegal though it may be frowned upon by governmental authorities. For example, when trust funds were allowed, they were a simulation since they satisfied the 51 percent requirement when actually Mexican citizens did not own 51 percent of the stock. Illegitimate simulations are illegal.

133. Browning, *supra* note 3, at 19. See also Verity, *supra* note 1, at 804.

## EFFECTIVENESS OF MEXICANIZATION

In spite of some initial objection to the Mining Law of 1961 by the Mining Chamber of Mexico, the political reaction to Mexicanization was generally favorable. The mining industry objected to the size limitations on concessions and the reporting requirements,<sup>134</sup> and some foreign investors claimed that the law was simply a deferred expropriation.<sup>135</sup> Foreign investors were encouraged by promised tax reductions, however, and ultimately accepted Mexicanization with far less opposition than was manifested by the oil companies during the oil expropriation of 1938.<sup>136</sup> Foreign mining companies also considered the investment climate in Mexico more stable as a result of Mexicanization since the government's commitment to Mexicanization eliminated the fear that it would take more drastic steps to control mining activities.<sup>137</sup> Finally, Mexicanization appealed to Mexican nationalists who were encouraged by the idea that mining would be controlled to some degree by Mexican citizens.<sup>138</sup>

Even with these favorable attitudes, difficulties arose that decreased the effectiveness of Mexicanization. There simply was not enough local capital to pay fair prices for existing foreign operations.<sup>139</sup> As a result, local investors and concessionaires could obtain majority ownership of stock with far less capital than 51 percent participation would suppose, but that does not mean that the goal of control by Mexican citizens actually was obtained.<sup>140</sup> A second difficulty was that local investors preferred participation in industries which were safer and promised higher returns than mining.<sup>141</sup> Also, the possibility of loss of operational control to Mexican citizens was discouraging to foreign investors who desired final authority over company activities. Finally, processing of applications caused delays in tax benefits, and arbitrary decisions by government agencies implementing the law caused foreign concern over whether particular methods of acquiring Mexican shareholder participation would meet with later disapproval.<sup>142</sup>

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134. E. PRIETO, *supra* note 11, at 19.

135. Browning, *supra* note 3, at 27.

136. Lozano Interview, *supra* note 65.

137. Verity Interview, *supra* note 65.

138. Lozano Interview, *supra* note 65.

139. Verity Interview, *supra* note 65. See also Browning, *supra* note 3, at 27; Perez, *supra* note 32, at 370.

140. Verity Interview, *supra* note 65. For example, assuming assets of a foreign company were worth \$50,000, the company would allow \$10,000 local capital to claim 51 percent ownership. To begin a new operation, foreign investors would have to put up the full price of exploration and allow local majority ownership simply because Mexican citizens assisted by obtaining the concession. *Id.* Thus, a Mexican miner who had a concession might benefit since foreign investors would expend capital to develop the concession and then give the Mexican majority control of the operation.

141. See note 104 *supra*.

142. Those interviewed stressed that there is a lack of administrative directives to assist in complying with the written law and regulations. Apparently, the method of knowing what will satisfy governmental administrators simply comes from trial, error, and experience. Lozano & Verity Interviews, *supra* note 65.

In order to take advantage of the incentives offered by Mexicanization, foreign investors have relied on simulations. Though the degree of use of simulations is difficult to determine, they are quite prevalent in mining since it is very difficult to find Mexican capital willing to participate in risky mining ventures.<sup>143</sup> Strawmen, trust funding, and pyramiding are the simulations most often mentioned regarding mining.

The use of strawmen, as discussed earlier, is considered fraudulent and if discovered may result in loss of investment and criminal penalty.<sup>144</sup> Though there are variations of the strawman technique, its use can be illustrated by the situation where foreigners put shares in a Mexicanized company in the name of a Mexican friend or in-law. Control over the friend's disposition of the shares is unsecured, of course, and the foreign investor runs the risk of betrayal by an ungrateful colleague. That risk can be minimized by giving shares to a large number of friends, thereby increasing the probability of having enough influence to maintain majority control.

It is nearly impossible to detect strawmen. Even upon detection, however, penalty may be avoided due to the cultural institution of loose or arbitrary administrative enforcement. Just as governmental officials "winked at the use of Mexican citizens as dummy stockholders"<sup>145</sup> when implementing Mexicanization of other industries, there are indications that they have done the same for mining.<sup>146</sup> Even though there have been administrative threats of strict sanctions for such transactions, this simulation is an important and necessary cultural institution because Mexican mining needs foreign investment and few foreigners would be willing to invest without strawmen.<sup>147</sup>

The strawmen technique demonstrates several needs affecting the enforcement of Mexicanization. The tendency of government officials to ignore the use of strawmen makes enforcement of the normative institution of Mexicanization difficult. The willingness to use strawmen reflects the foreign investor's expectation that potential profits make the risk of penalty for using the simulation worthwhile. If it is assumed that government officials do know when a corporation has strawmen, then the government is relying on the cultural institution or arbitrary enforcement to maintain control of mineral resources. This control is achieved because foreigners using strawmen put themselves in an illegal position. Should the foreigner discover minerals required for internal economic development, or should a foreign company oppose governmental policy, government officials could enforce penalties against the investor who was risking the use of illegal devices. If the legislators in fact realized that control of mining would be

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143. Verity Interview, *supra* note 65.

144. Graving, *supra* note 45, at 52-53.

145. M. BERNSTEIN, *supra* note 6, at 253.

146. Lozano, Velasco & Verity Interviews, *supra* note 65.

147. Verity Interview, *supra* note 65.



gained through using the cultural institution of arbitrary enforcement, the need was either for an institution to control administrators so that normative institutions would be enforced when economic or political conditions so dictated, or for a normative institution other than Mexicanization. If arbitrary enforcement was intended as the method of control it would tend to indicate that the enactors of the law did not in fact believe that the normative requirement of majority Mexican ownership would be accomplished. This would suggest that the economic need for foreign capital coexisted with the patriotic desire merely to profess control by Mexican citizens. From the standpoint of the foreign investor, to encourage foreign participation of even minority ownership there should be a system to permit foreign investors to obtain 49 percent of the shares of a company without being subjected to arbitrary penalty when unable to find sufficient local investment capital.

If, on the other hand, strawmen are undetectable by administrators, even reliance on the cultural institution of arbitrary administrative enforcement could not have effected control of mining. It would be impossible to satisfy demands for the control of mining through the normative institution of Mexicanization since control could be avoided by using strawmen. The need would be for an institution other than Mexicanization to effect control. In the undetectable strawmen situation, whether enactors of the law expected enforcement through governmental agencies or whether they believed enforcement would be impossible, enactment of the normative institution of Mexicanization was not responsive to the demand for majority ownership by Mexicans. By failing to recognize the difficulty in implementing the capital requirements announced in the law, the legislators were simply unaware or impervious to cultural institutions in the Mexican society.

As indicated earlier,<sup>148</sup> although trusts were sanctioned for a time as a normative institution foreign investors used them infrequently. The use of trust funds to satisfy Mexicanization was at times only tacitly approved by government officials. It was, therefore, a legal simulation.<sup>149</sup> The disadvantage of the trust fund for a foreign investor was that control of a company rested in one local trust institution. Since this amounted to an outward, though legal, loss of control, investors may have been dissuaded from relying on the trust since they could simulate Mexicanization more effectively by using other methods. Another reason investors may have been dissuaded from using trusts was that the government appeared at times to have disapproved this technique of attaining Mexicanization.<sup>150</sup> The indecisiveness of the government toward trusts created uncertainty for the foreign investor who did not know whether to rely

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148. See text & notes 118-21 *supra*.

149. Graving, *supra* note 45, at 53.

150. Verity Interview, *supra* note 65.

on the trust. The government's attitude demonstrated vagueness and indefiniteness and gave rise to a need for an institution which would be explicit in sanctioning or disapproving trust funds. If the trust had been properly institutionalized, foreign investors might have been prone to use the technique, thereby assisting the government in implementing its goal of control of mining. Continued fluctuations in governmental policy, however, discouraged use of trusts and encouraged foreign investors to continue seeking other simulations, such as the use of strawmen.

The use of holding companies to permit pyramiding is a simulation which in practice is disallowed.<sup>151</sup> Pyramiding occurs when a Mexicanized company acquires Mexican-owned stock in another Mexicanized company. Since the acquiring company has foreign shareholders, the acquired company's Mexicanized shares purchased by the acquiring company will be owned by fewer than 51 percent Mexican citizens.<sup>152</sup> The detection of pyramided companies is possible through a registry system, but government agencies have neglected to enforce Mexicanization of other industries by the registry method.<sup>153</sup> Pyramiding with respect to mining can be prevented more vigorously, however, since the mining law itself clearly defines registry requirements.<sup>154</sup> Hence, the technique of pyramiding appears to be used less frequently by mining investors.<sup>155</sup>

The use of bearer stocks, which provided a means of simulation for Mexicanization of other industries, has been reduced by use of two series of shares required by the mining law.<sup>156</sup> The percentage of each series of shares is set in a corporation's charter and foreigners may acquire only a particular series of shares.<sup>157</sup> Therefore, avoidance of the law is possible only if a foreigner represents himself as a Mexican and then purchases from the series designated for Mexican ownership. Use of two series of shares exemplifies the ability of the legal system to adopt a law to curtail certain simulations which occurred in other industries when only bearer shares were used. Elimination of bearer shares in mining is significant since a simulation which was possible in other industries was prevented by a normative institution.

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151. Graving, *supra* note 45, at 53; Lozano Interview, *supra* note 65.

152. Pyramiding is best illustrated by example. Company A by charter requires 51 percent Mexican ownership. Shares of Company B, also required to have 51 percent Mexican ownership, are owned by Company A. Assuming Company A owns 25 percent of Company B's Mexican-owned stock, total foreign participation in Company B would be 61.25 percent (49 percent for that allowed in Company B plus 49 percent of 25 percent owned by Company A).

153. In implementing the Decree of 1944, the Ministry of Foreign Relations often felt it was not worthwhile to "pierce the corporate veil of the first holding company." Graving, *supra* note 45, at 53.

154. Graving, *supra* note 45, at 53; Lozano Interview, *supra* note 65.

155. Lozano Interview, *supra* note 65.

156. Graving, *supra* note 45, at 53.

157. Miranda, *supra* note 61, at 301-02.

## EFFECTIVENESS OF THE LEGAL PROCESS

The effectiveness of the legal process in enacting and implementing Mexicanization also must be evaluated in light of factors external to socioeconomic needs. From 1962 until 1967 the United Nations conducted a mineral survey of Mexico to assist Mexico's declining mining industry.<sup>158</sup> Acknowledging that Mexico is richly endowed with minerals, the survey concluded that while the country possessed insufficient funds to carry out significant exploitation, "the Mexican mining industry has a promising future."<sup>159</sup> Numerous other studies have found that, compared to other developing countries, Mexico is in a favorable position to increase mineral development.<sup>160</sup> Furthermore, in the context of political stability, economic security, and labor relations, Mexico enjoys advantages not shared by many mining nations in the world.<sup>161</sup>

Mexicanization of mining also should be evaluated in relation to other normative institutions which were reflected in the Mining Law of 1961, the most important of which is tax incentives.<sup>162</sup> Because the mining industry was overtaxed prior to enactment of the Mining Law of 1961, it is fair to conclude that the government attained Mexicanization substantially by enacting a normative institution in response to demands presented by the mining industry. Tax incentives, nationalistic appeal, and the ability of the government to legislate from within closed circles combined to repress criticism of Mexicanization. Although it is obvious that tax incentives could have been instituted without Mexicanization, doing that in 1961 would have meant the rejection of those who wished to reacquire natural resources. Furthermore, it would have implied failure on the part of the government to implement constitutional goals.<sup>163</sup> Though Mexicanization proceeded better than mining personnel expected in the sense that most foreign companies apparently complied with the shareholder requirements,<sup>164</sup> the tax incentives were so closely tied to demands of miners that in retrospect the results hardly could have been otherwise.

It cannot be implied from the apparent accomplishment of Mexicanization that all of the goals of the mining law were realized in fact. The

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158. PARTICIPATING AND EXECUTING AGENCY FOR THE UNITED NATIONS DEVELOPMENT PROGRAM, SURVEY OF METALLIC MINERAL DEPOSITS IN MEXICO 4-5 (1969) [hereinafter cited as U.N. SURVEY]. Stagnation of the mining industry is indicated by the fact that only two major mineral discoveries have been made since the 1940's. *Id.*

159. *Id.* at 63.

160. *Why Australia's Climate for Mining Ranks High on the International List of Nations*, ENGINEERING & MINING J., Nov. 1970, at 197. See also Pagliai, *supra* note 84, at 13; Terrones, *New Trends for Mining Investment in Mexico*, in PROCEEDINGS OF THE COUNCIL OF ECON. OF THE AM. INST. OF MINING, METALLURGICAL, AND PETROLEUM ENGINEERS, INC. 363 (W. Vogely ed. 1966).

161. Terrones, *supra* note 160, at 364-67.

162. Tax relief provided for after enactment of the Mining Law of 1961 is listed as a primary incentive adding to Mexico's favorable investment climate. Terrones, *supra* note 160, at 364.

163. See note 26 *supra*.

164. Bogert, *supra* note 102, at 14.

control of resources by the government was effected as much through cultural institutions reflected in administrative implementation as through normative institutions in the mining law. Recall, for example, that enforcement of the law against such simulations as strawmen, trust funds, and pyramiding has been shown to depend on the ability of government agencies to detect such techniques and their desire to enforce the letter and spirit of the law. Although tax incentives were normative institutions which provided encouragement to Mexicanize, other laws such as national reserve requirements and penalty provisions neither encouraged Mexicanization nor discouraged the use of simulations. Though the national reserves system was a normative institution which permitted a greater degree of government control over selected minerals, it was arbitrary administrative procedures which allowed the government to control mining activities in general. Arbitrary procedures created a disincentive to foreign investment. Had it not been for tax incentives, disincentives may have prolonged foreign operational control of existing Mexican mining operations.

Implied within Mexicanization is the idea that Mexican shareholders eventually would be able to control the destiny of mining operations for the benefit of Mexican citizens. This supposition may be true only in theory. For example, Mexican businessmen with capital to invest may have interests more closely aligned with foreign companies than with governmental economic objectives.<sup>165</sup> Similarly, strawmen may be more inclined to rubber-stamp than to oppose foreign desires. Practically speaking, in either instance the Mexican citizen may have no more operational control or benefit after Mexicanization of mining than he did before it.<sup>166</sup> Of course some Mexican citizens do profit by way of receiving returns on capital investment, but that does not imply a fair or equitable distribution of benefits to noninvestors in Mexico.<sup>167</sup> While nationalistic appeal had come from many segments of the social structure, direct economic benefit reached few.

Finally, the Mining Law of 1961 was no particular incentive to increasing new private development in the mining industry. Since 1961 very few major foreign investors have entered the Mexican mining industry.<sup>168</sup> The request of the government for United Nations support in exploration indicates governmental recognition of the hardships of mining operations.<sup>169</sup> Despite the fact that Mexico welcomes foreign capital in partici-

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165. Verity Interview, *supra* note 65.

166. This is not to imply that Mexican and foreign aims necessarily will be contradictory. Since 1961, for example, Mexico's ability to use more mineral products has resulted in absorption of more mining products internally. Terrones, *supra* note 160, at 327. Economically speaking, this result would have occurred regardless of whether Mexicans or foreigners controlled mining companies.

167. Lozano Interview, *supra* note 65. See Eigo & Weaver, *Penoles Properties Become Part of the First Mexicanized Mining Company*, 162 *ENGIN'G & MIN. J.* Aug. 1961, at 80, suggesting that it was the large industrialists in Mexico who benefited directly from Mexicanization.

168. Verity Interview, *supra* note 65.

169. U.N. SURVEY, *supra* note 158, at 6.

pation with local investment,<sup>170</sup> the government has failed to stimulate active private investment in new exploration.

### MEXICANIZATION: A PROTOTYPE?

It is unrealistic to suggest that 51 percent ownership of mining industries should be incorporated into the mining law of other developing countries. An evaluation of Mexicanization of mining, however, does provide criteria to be considered if a program similar to Mexicanization becomes a legislative possibility in another country.

As demonstrated in this comment, the natural occurrence of resources, availability of local capital, degree of desired and actual foreign participation, potential conflicts with existing normative institutions, behavioral traits of government officials which influence law enforcement, and the susceptibility of foreign needs to normative incentives are some of the important factors which should be considered in analyzing a program comparable to Mexicanization. For example, a nation with few known mineral resources hardly could expect to entice foreign investors to explore for new minerals. Furthermore, if local capital is available for investment, such a fact may be an incentive to investment by foreigners who would expect certain economic advantages to accrue from enterprises with local citizens. In this regard, the subject country may find the expansion of foreign operations more readily acceptable, both politically and socially. Realistically appraising the limitations of local capital, however, may result in requiring less than 51 percent local participation.

If the previous laws of a nation granted title to concessions in fee and if there is substantial foreign participation in an industry, requiring local participation may result in international political condemnation, economic sanction, or disincentives to investment in other industries. If the local populace exhibits a propensity to enforce normative institutions strictly, investors may find the requirements of law too harsh and simulations too risky to effectuate joint participation. And if foreign investors are satisfied with profits under an existing tax system, different incentives would be required to encourage acceptance of a program based on Mexicanization.

### CONCLUSIONS

It appears from available data that the Mexican legal system was responsive to some demands and aspirations but not to others. Consequently, some needs were not incorporated into the Mining Law of 1961, and others were ignored. The demand by miners for tax relief brought about a normative institution which was the primary incentive to Mexicanization. Mexicanization was achieved on its face as a rider to these tax

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170. Verity, *supra* note 1, at 773.

benefits. Though the cultural institution of administrative arbitrariness was a disincentive to the foreign investor who was given little guidance in how to Mexicanize legally, this same cultural institution provided a means of satisfying nationalistic demands to control natural resources. Local participation by private investors in the mining industry was not assured, however, since simulations provided loopholes to avoid the stated requirements. Capital structure was altered only to the degree that local capital was available for investment. Anticipated benefits did not accrue to the citizenry since profits went to comparatively few Mexicans. An appreciable amount of new exploration by either local or foreign capital was not achieved, partly because of the inherent risks in mining operations and partly because of the disincentives resulting from governmental control of national reserves.

A more responsive legal system would have accounted for existing factors, such as the actual availability of capital, and for cultural institutions, such as arbitrary administrative enforcement, in molding a law concerning mineral development. Consideration of the demands of interested groups regarding long-term and short-term goals may have resulted in legislation providing a formula different from Mexicanization. Development of new mining operations could have been encouraged. Incentives could have been suggested which would have provided systems other than the trust system, which was ineffective. A law could have been enacted to provide lesser, more realistic control over the mining industry instead of the uncertain governmental and operational control that resulted because of simulations, and the law might still have satisfied nationalistic demands and distributed profits more equitably.