

THE MEXICAN MINING CONCESSION—ITS FEATURES, REGULATION AND PRACTICE*

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Let me begin with a description of the Mexican mining concession. It is a governmental grant to individuals or corporations of the right to the beneficial use of the ore contained within a circumscribed area.¹ The concession is limited to those specific substances enumerated in its title. Let us keep this in mind as we discuss some of the other aspects of the mining concession in Mexico.

For a concession to be granted, the interested party must apply to the Director of Mines of the Ministry of National Patrimony.² If all requirements are met, a title corresponding to the requested rights will be granted. Because the objective of the concession is the beneficial use of ore bodies, certain obligations are placed on the concessionaire. The simple act of granting rights to holders of claims creates responsibilities which the holder must meet in order to keep the concession in force. The last part of the definition of a concession is that the rights granted extend only to the substances covered by the title. They cannot be applied to other minerals even though they may be found in the lot after the concession is granted. But these points will be discussed in greater detail later.

The power of the government to grant these rights is found in article 27 of the Mexican Constitution. Two of the sections within this article are particularly relevant to our discussion. Paragraph 4 of this article states:

The Nation owns all natural resources of the continental shelf and the submarine shelf of the islands; all the minerals or substances in veins, layers, masses or beds which form deposits that differ from the components of the ground, such as minerals from which metals and metalloids used for industrial purposes are extracted; the deposits of precious stones, rock salt, and deposits of salt formed by the sea water; the products derived from decomposition of rocks, when their exploitation would require underground work; the mineral or organic deposits of substances susceptible of being utilized as fertilizers; solid combustible minerals; petroleum and all hydrocarbons, solid, liquid

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¹ This description is taken from an unpublished paper entitled "The Mining Concession in Mexican Law" delivered by Mr. Jesus Corrales Gonzales, Director of the Public Registry of the Mining Department of Mexico, to a Seminar on Geology held in San Luis Potosi in October 1967.

² The authority and powers of the Ministry of National Patrimony are set forth in LEY DE SECRETARIAS Y DEPARTAMENTOS DE ESTADO art. 7 (D.O. Dec. 24, 1958). See also EDICIONES ANDRADE, CONSTITUCIÓN POLITICA MEXICO 372 (12th ed. 1964).

or gaseous; and the space above the national territory to the extent and within the terms fixed by international law.³

Paragraph 6 of the same article reads:

In both cases referred to in the two preceding paragraphs, [4 and 5] the ownership by the Nation is inalienable and not subject to prescription; the exploitation or beneficial use of the resources, by individuals or by corporations incorporated in accordance with Mexican laws, may only be accomplished through concessions granted by the executive under the rules and conditions established by law. The legal rules related to the exploitation or works of the minerals and substances referred to in paragraph 4, shall govern the execution and proof of what is carried out or should be carried out after they go into effect, regardless of the date of granting of the concessions, and, if violated will be the basis for cancellation. The Federal Government has the power to establish National Reserves and to abolish them. Such action will be by executive declaration pursuant to statutory authority . . .⁴

According to these constitutional provisions, the Mexican nation is the sole owner of the natural resources of the Continental Shelf and all other substances and minerals specifically mentioned. These are the only powers of the Mexican government relating to the granting of concessions and were established in order to provide an easy method through which it could vest title in private parties.

In order to grasp the implications of these definitions, we must now look to the public policy underlying the constitutional provisions which give the government the power to grant the mining concessions. It is appropriate to refer at this point to a statement made by Licenciado Oscar Morineau in his study *Real Rights and the Sub-Soil in Mexico (Los Derechos y el Sub Suelo de Mexico)*: "A thorough study of Article 27 and its history reveals that naked-ownership or full-ownership and ownership by the nation are one and the same."⁵ This principle has been criticized by many Mexican legal writers⁶ as well as some Justices of the Mexican Supreme Court.⁷ Morineau considers their objections to be un-

³ CONSTITUCIÓN art. 27, para. 4, in 4 DERECHOS DEL PUEBLO MEXICANO: MÉXICO A TRAVÉS DE SUS CONSTITUCIONES (RIGHTS OF THE MEXICAN PEOPLE: MEXICO THROUGH ITS CONSTITUTIONS) 571 (1967). Hereinafter, all citations to the Mexican Constitution will be to the particular section followed by the page number on which it may be found in *Derechos del Pueblo Mexicano*. For an English translation, see PAN AMERICAN UNION, CONSTITUTION OF MEXICO, 1917 at 8 (1968).

⁴ CONSTITUCIÓN art. 27, para. 6, *op. cit.* at 372.

⁵ O. MORINEAU, LOS DERECHOS REALES Y EL SUB SUELO EN MÉXICO (REAL RIGHTS AND THE SUB-SOIL IN MEXICO) (1948).

⁶ See, e.g., CLAUDIO SANGINES MEDINA, CURSO DE DERECHO MINERA (1940); ALBERTO VAZQUES DEL MERCADO, CONCESION MINERA Y DERECHOS REALES (1946); Trinidad García Aguirre, *Registro de Concesiones y Otros Actos en Materia de Minas, Petróleo y Aguas*, 1 REV. DERECHO Y JURISPRUDENCIA 337 (1930).

⁷ See *Compania Fundidora de Fierro y Acero de Monterrey, S.A. y Cerro del Mercado, S.A.*, 89 *Semanario (5th Series)* 796 (A.D. 2976/42) (1946), the landmark Mexican decision concerning the legal nature of the mining concession. Judge Emilio Pardo Aspe, joined by the President of the Court Vicente Santos Guajardo,

tenable because they ignore the principle of constitutional supremacy and purport to apply the constitution's basic rules through principles inconsistent with its underlying tenets. Moreover, he contends that these objections are illogical because they base the interpretation of the statute or rule of law upon something other than the statute or rule under consideration. Morineau points out that in the same constitutional provision the framers of the Constitution clearly established that,

[T]he Nation is the sole owner of the mining and oil subsoil, that this ownership cannot be subject to transfer by the government or by legislators and that, in the future, concessions cannot be granted but for the purpose of exploitation of the minerals contained in it without any transfer of ownership on behalf of the concessionaire.⁸

Whether there may be other valid interpretations of these constitutional provisions, I cannot explore at the present time. I will say, however, that after studying the statutes enacted since the adoption of the constitution, I believe that Morineau's point of view is absolutely correct.

If ownership of the subsoil cannot be removed from the National Patrimony, we may conclude that the rights granted through mining concessions are not rights in rem. Rather, they are administrative licenses to the concessionaires for the exploration and exploitation of ore bodies limited only by the various statutes and the terms of the concession. Regardless of the nature of the concessionaire's rights, we will see that there can be various forms of transactions to which he can be a party.

CONSTITUTIONAL AND STATUTORY FRAMEWORK OF CONCESSIONS

Scope of Concessions

Under article 1 of the mining law, mineral exploitation includes exploration, extraction and milling of mineral substances.⁹ Article 7, which establishes the scope of the concession, includes the right to do all kinds of work for exploitation and the right to dispose of all mineral products obtained from such works.¹⁰

The duration of the concession is for 25 years from the issuance of

argued that the rights created by mining concessions were personal in nature. Judge Agustín Mercado Alarcón concurred in the result on separate grounds. Judges Carlos I. Menéndez and Hilario Medina dissented arguing that article 27 of the Constitution continued the legal tradition of mining and that the concession was the property of its holder. See generally RAFAEL ROJINA VILLEGAS, DERECHO CIVIL MEXICANO (3d ed. 1954).

⁸ MORINEAU, *supra* note 5.

⁹ LEY REGLAMENTARIA DEL ARTICULO 27 CONSTITUCIONAL EN MATERIA DE EXPLOTACIÓN Y APROVECHAMIENTO DE RECURSOS MINERALES (Law Regulating Article 27 of the Constitution Relating to the Exploitation and Use of Mineral Resources) art. 1 (D.O. Feb. 6, 1961) in LEYES Y CÓDIGOS DE MÉXICO: LEGISLACIÓN MINERA 7 (1968). Hereinafter, all citations to *Ley Reglamentaria del Artículo 27 de la Constitución* will be to the particular article followed by the page number on which it may be found in *Legislación Minera*.

¹⁰ *Id.* art. 7, *op. cit.* at 9.

the title.¹¹ For concessions granted prior to the new mining law, this begins February 5, 1961, when the law became effective. Under the provisions of article 29 of the mining law, concessions may be renewed indefinitely if an application is made within three years prior to their expiration dates.¹² For the extension to be granted, the concessionaire must have complied with the relevant statutes and regulations, including the requirements regarding corporate capitalization.¹³

Additional limitations restrict the number and type of minerals which may be extracted under a concession. No more than eight different substances may be included within a single concession.¹⁴ The maximum size of a single lot is 500 hectares,¹⁵ with the maximum area which any single individual or corporation may hold dependent upon the minerals to be exploited.¹⁶

The concession does not include the ownership of the surface of the claim. Although it is possible for the concession and surface ownership to be in the same party, this occurs only rarely. Concessionaires do have the right, however, to ask for expropriation or occupancy of the surface by payment of indemnification.¹⁷ The amount of such land shall be limited to that necessary for offices, mills and facilities to be used in the exploitation.¹⁸

Another interesting feature of the new law is the recognition of co-existing concessions on the same lot held by different parties. For co-existing concessions to be granted, the later application must refer to dif-

¹¹ *Id.* art. 29, *op. cit.* at 20.

¹² *Id.*

¹³ REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTICULO 27 art. 116, § 2 in LEYES Y CÓDIGOS DE MÉXICO: LEGISLACIÓN MINERA 119 (1968). Hereinafter, all citations to *Reglamento de la Ley Reglamentaria* will be to the particular article followed by the page number on which it may be found in *Legislación Minera*.

¹⁴ LEY REGLAMENTARIA DEL ARTICULO 27 DE LA CONSTITUCIÓN art. 24, *op. cit.* at 18:

Applications for mining concessions can be made, and concessions given for a maximum of eight different substances. In the event the holder of a concession finds any other mineral which is not included in the title of the concession and of which he wishes to make use, he may request the Department of National Patrimony to include it in the same title except in the case of substances included within the National Reserves.

The presentation of an application for concession gives priority over later applications.

¹⁵ *Id.* art. 25, *op. cit.* at 18.

¹⁶ *Id.* art. 27, *op. cit.* at 19:

No individual or corporate concessionaire may have the right to exploit lots the total area of which exceeds the limits set out below . . . :

Coal	8,000 hectares
Sulfur, manganese, tin, sodium and potassium salts	4,000 hectares
Gold, silver, lead, copper, zinc, gypsum, baryta, fluorite, silice, iron, titanium, antimony, graphite, diatomite, fireclay, phosphorite, kaolin and bauxite	3,000 hectares

Mercury, tungsten, molybdena and any other mineral not mentioned	1,000 hectares
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Whenever concessions include minerals to which different areas are given, the total area will be computed separately for each group.

¹⁷ *Id.* art. 30, § I, *op. cit.* at 20.

¹⁸ *Id.* § Ia, *op. cit.* at 20.

ferent substances in different deposits than those covered in the earlier concession, and it must be possible to make the new exploitations without interfering with the earlier one. Moreover, the first concessionaire has a statutory preferential right to subsequently discovered minerals which, if exercised, would preclude the issuance of a co-existing concession.¹⁹

Limitations on Ownership

The exploitation of minerals can only be undertaken by qualified individuals or corporations through government concessions.²⁰ Article 14 spells out some of the requirements for obtaining concessions:

Only Mexican individuals and corporations incorporated in accordance with Mexican statutes and which have a Mexican majority interest shall have the right to obtain concessions referred to in this statute.

. . . .

The corresponding regulations shall determine the way to establish the majority Mexican interest.²¹

Related requirements for obtaining concessions are set forth in article 15:

The rights for mining exploitation shall not be transferred, either in whole or in part, to individuals, corporations, or foreign governments or to Mexican corporations in which foreign interests exceeds the percentages stated in Articles 14 and 76 of this statute. All acts or contracts which would be in violation of the provisions of this and the preceding article shall be null and void.²²

Also to be kept in mind is article 76 which provides that special concessions for the exploitation of National Reserves shall only be granted to Mexican individuals or qualified Mexican corporations. For a corporation to be eligible for special concessions, it must be incorporated under the laws of Mexico and a minimum of 66 percent of its capital stock must, at all times, be owned by Mexican nationals.²³

When the concession is within the "forbidden zone," the area within 100 kilometers of inland borders or 50 kilometers of the seacoast,²⁴ article 27 imposes additional limitations on corporate ownership.²⁵ Only those

¹⁹ *Id.* art. 12, *op. cit.* at 13.

²⁰ *Id.* art. 6, *op. cit.* at 9.

²¹ *Id.* art. 14, *op. cit.* at 15.

²² *Id.* art. 15, *op. cit.* at 15-16.

²³ *Id.* art. 76, *op. cit.* at 42.

²⁴ For a more detailed explanation of the forbidden zone and its historical antecedents, see Gutierrez *supra* at 270.

²⁵ CONSTITUCIÓN art. 27, § 1, *op. cit.* at 572:

Only Mexicans by birth or naturalization and Mexican companies have the right to acquire the ownership of lands, waters and their appurtenances, or to obtain concessions to develop mines, waters or combustible minerals in the Mexican Republic. The State may grant the same rights to aliens, provided they agree before the Ministry of Foreign Affairs to be considered Mexicans in respect to such property, and accordingly not to

corporations with 100 percent Mexican capital may be granted concessions in this area.

Mining corporations with a mixture of foreign and domestic capital give rise to other peculiarities of Mexican law. Such corporations must issue two series of stock, A and B, for Mexican and foreign interests, respectively. The shares issued to Mexicans may never have lesser rights than those issued to foreigners.²⁶ Series A stock must always be represented by registered certificates, but Series B need not be. The certificates must be of different colors to avoid confusion between the two and to facilitate enforcement of the nationality requirement.²⁷ Moreover, if the management of the corporation is to be directed by a single individual, he must be Mexican,²⁸ while if it is the responsibility of a board, a majority must be Mexican.²⁹

Up to this point we have seen how the main principles for mining are set forth in article 27 of the Mexican Constitution. It must also be noted that the power to legislate in connection with mining matters is reserved to the federal Congress and, hence, no state can legislate in the area.³⁰ In the exercise of this power, the Congress has enacted a most important set of regulations to the mining law.³¹ These regulations constitute the main body of law applicable to everyday mining activities in Mexico. We shall now examine some of the most important aspects of these activities.

ORDINARY CONCESSIONS

The 1961 mining law recognizes two types of concessions—ordinary³² and special.³³ Ordinary concessions are for the exploitation of minerals in areas not within the National Reserves. Examples are those granted to exploit gold, silver, copper, lead, zinc, mercury, fluorite and tungsten. These concessions can be granted to individuals or companies provided they meet the requirements as to nationality and capitalization.³⁴ Ap-

invoke the protection of their Governments in respect to the same, under penalty . . . of forfeiture to the Nation of property acquired by virtue thereof. Within a zone of one hundred kilometers along the frontiers, and of fifty kilometers along the sea coast, no alien shall under any conditions acquire direct ownership of lands and waters.

²⁶ REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTICULO 27 art. 26, § 5, *op. cit.* at 75.

²⁷ *Id.* art. 26, rule 1, § 1, *op. cit.* at 71-72.

²⁸ *Id.* art. 26, § 6, *op. cit.* at 75.

²⁹ *Id.*

³⁰ CONSTITUCIÓN art. 73, § 10, *op. cit.* at 639. For an English translation, see PAN AMERICAN UNION, *supra* note 3, at 27.

³¹ LEY REGLAMENTARIA DEL ARTÍCULO 27 CONSTITUCIONAL EN MATERIA DE EXPOTACION Y APROVECHAMIENTO DE RECURSOS MINERALES, (D.O. Feb. 5, 1961); REGLAMENTO EXPOTACIÓN DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 CONSTITUCIONAL (D.O. Dec. 7, 1966).

³² LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN ch. III, *op. cit.* at 18 *et seq.*

³³ *Id.* ch. IX, *op. cit.* at 42 *et seq.*

³⁴ *Id.* art. 14, *op. cit.* at 15.

plications must be filed with the Mining Agency which has jurisdiction over the municipality where the lot is located³⁵ and must contain detailed information regarding the claim.³⁶

After receipt of the application by the Mining Agency, the applicant has 240 days within which to make and deliver survey reports of the claim.³⁷ This report is sent to the Mining Bureau for study and if the statutory requirements have been met, and if the claim is located in available land, a favorable opinion is issued.³⁸ The applicant then has 60 days to prove that monuments have been erected on the claim and to pay the fee for issuance of the title.³⁹

An additional requirement must be met by corporate applicants. They must obtain a permit from the Ministry of Foreign Relations for every mining claim.⁴⁰ These permits usually take from eight to ten days to be granted. Subject to this procedure, the concession title is granted and recorded at the Public Registry of Mines.⁴¹ Eight to twelve months usually elapse from the filing of the application to the issuance of the concession permit.

SPECIAL CONCESSIONS

Chapter 9 of the Mining Law contains the provisions applicable to special concessions.⁴² Special concessions are required for the exploita-

³⁵ REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTICULO 27 art. 57, *op. cit.* at 91.

³⁶ *Id.* art. 59, *op. cit.* at 91-92:

Applications for mining concessions will . . . state:

I. In the case of an individual, the full name of the applicant, age, civil status, occupation, nationality, and address for the receipt of notification.

II. In the case of a corporation, its name, address for the receipt of notification, the number of its registration in the Public Mining Registry, and the name of its representative.

III. The location of the lot including the county and state or territory.

IV. The area of the lot.

V. The minerals to be exploited, specifically mentioning each of them.

VI. The name of the lot.

VII. Description of the starting point of the measurements of the lot, its location, data relative to its boundaries and location in the terrain in accordance with articles 61 and 62 of these regulations.

VIII. Adjacent claims which are within 100 meters of the lot to which the application refers.

IX. . . .

³⁷ *Id.* art. 68, *op. cit.* at 96.

³⁸ *Id.* art. 77, *op. cit.* at 99.

³⁹ *Id.* art. 78, §§ II & III, *op. cit.* at 99.

⁴⁰ *Id.* § 1, *op. cit.* at 99.

⁴¹ *Id.* art. 79, *op. cit.* at 100.

⁴² LEY REGLAMENTARIA DEL ARTICULO 27 DE LA CONSTITUCIÓN ch. IX, *op. cit.* at 42 *et seq.* *Id.* art. 72, *op. cit.*, 39-40:

The national mineral reserves will be composed of

I. Minerals that only the state may exploit.

II. Minerals essential to the industrial development of the country.

III. Minerals or zones which cannot be exploited.

tion of some minerals essential to Mexico's industrial development which have been included in the National Reserves by the Ministry of National Patrimony.⁴³ Special concessions must also be obtained for exploitation in specified areas of the country even though the minerals in question would not otherwise be included within the National Reserves.

The procedure for obtaining a special concession is understandably different from that used for an ordinary concession. The main features of this procedure will be described briefly. A request first must be made to the agency controlling the substance or area, asking for its waiver of rights to exploit it.⁴⁴ A notification of this request is then published in the daily government publication, the Official Gazette (*Diario Oficial*). On the 30th working day after publication, the substance or area is considered free for application.⁴⁵

The reserves referred to in section I can only be exploited by public mining entities through assignments.

The reserves referred to in section II can be exploited by public mining entities, through assignments by corporations having state participation or by individuals through the grant of special concessions.

The reserves referred to in section III will constitute the national mining reserves for the future supply of the country. These reserves cannot be exploited while they keep their condition as future supply.

Whenever justifiable, the Federal Executive, through the Department of National Patrimony, can remove from the national mining reserves minerals or zones which are a part of same or can change its classification within the groups referred to in the previous sections.

⁴³ Minerals included within the National Reserves would include substances, such as fissionable materials which are essential for industrial development of the country, *id.* art. 72, § II, *op. cit.* at 40; and other ores and specific substances which may not be exploited, *id.* § III, *op. cit.* at 40; except by the government or through special authorization. *Id.* § I, *op. cit.* at 40

Fissionable materials can only be exploited or purchased by governmental entities. *Id.* art. 76, para. 2, *op. cit.* at 42. See also *id.* art. 73, *op. cit.* at 41; LEY QUE CREA LA COMISION NACIONAL DE ENERGIA NUCLEAR (Law Creating the National Commission on Nuclear Energy) (D.O. Dec. 19, 1955) in LEYES Y CÓDIGOS DE MÉXICO: LEGISLACIÓN MINERA 562 (1968). Substances which are deemed essential for industrial development can be exploited by government entities, by companies with the participation of the government, or by private companies granted a special concession. LEY REGLAMENTARIA DEL ARTÍCULO 27 art. 72, para. 6, *op. cit.* at 41. Finally, those which cannot be exploited, either as substances or as zones, have been excluded from exploitation for the time being and set aside for the future development of the country. *Id.* para. 7, *op. cit.* at 41. Of course, the government through the Ministry of National Patrimony is able to release some of those substances or areas actually within National Reserves. *Id.* para. 8, *op. cit.* at 41.

⁴⁴ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 80, *op. cit.* at 43:

Whenever an interested party wishes to exploit, through special concession, minerals belonging to the National Reserves, mentioned in section II of Article 72, he will apply to the Department of the National Patrimony for a bid Whenever conditions of the [initial and secondary] bids are equal, the concession will be granted to the original applicant.

REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 art. 220 para. 4, *op. cit.* at 160:

In the case of article 80 of the law, the bids made will be evaluated by the Department and, once the most advantageous one has been determined, the [original] applicant for the bid will be given the opportunity to match conditions of the [winning] bid, in order to obtain the concession.

⁴⁵ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 80, *op. cit.* at 43.

The applicant must then petition the Mining Bureau asking for open bidding and the promulgation of rules to govern the bidding and award processes.⁴⁶ The petition is published in one of the Mexico City newspapers to give other interested parties the opportunity to contest the granting of the concession. Opposition must be filed within 30 days, and must include the reasons for opposition.⁴⁷

If no opposition has been filed, bids are opened and rules controlling the granting of the special concession are published allowing other parties to present offers within 30 days from the last publication.⁴⁸ It must be remembered that these applicants must have the legal capacity to obtain special concessions under the provisions of Article 76 of the law,⁴⁹ and Article 26 of the Regulations.⁵⁰ Bids must describe the proposed exploration, the geophysical and geological research involved, the size of the investment involved and, finally, the exploitation program to be undertaken if the exploration proves successful.⁵¹

Once the last 30-day period has elapsed, the Mining Bureau grants the concession to the applicant who has made the most attractive offer.⁵² If the party who requested the opening of the bidding is not granted the concession, he has a preferential right to make an offer equal to that which, according to the Mining Bureau, merited the special concession. If his program equals or betters the selected bid, the Bureau shall grant the concession in his favor.⁵³

Once the concessionaire is chosen, he is required to post a bond with the Ministry of National Patrimony to guarantee that he will fulfill his obligations under the proposed program.⁵⁴ The amount of the bond shall be at least 10 percent of the total amount of the investment required for exploitation,⁵⁵ and if he fails to meet his obligations, the concession will

⁴⁶ REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 art. 217, para. 1, *op. cit.* at 158.

⁴⁷ *Id.* para. 2, *op. cit.* at 158.

⁴⁸ *Id.* para. 3, *op. cit.* at 158.

⁴⁹ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 76, *op. cit.* at 42.

⁵⁰ REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 art. 26, *op. cit.* at 71.

⁵¹ *Id.* art. 218, *op. cit.* at 159.

⁵² REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 art. 220, *op. cit.* at 160.

⁵³ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 80, *op. cit.* at 43. See also REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 art. 220, para. 4, *op. cit.* at 160.

The original applicant's special preferential right could theoretically give rise to the practice of submitting an unrealistically low initial bid with the hope of either winning the concession with that bid or matching the winning bid of the competing applicants. In actuality, however, this practice has not developed because the government can refuse to award the concession to any of the applicants or require the forfeiture of the bond for unrealistically low bids.

⁵⁴ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 81, *op. cit.* at 43.

⁵⁵ REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 art. 217, para. 4, § 5, *op. cit.* at 158-59.

lapse and the bond will be forfeited.⁵⁶

CONCESSIONAIRE'S PRINCIPAL OBLIGATIONS

Any and all acts related to exploitation and treatment of minerals must comply with the requirements set forth in the Mining Law and its regulations.⁵⁷ Holders of concessions must refrain from surrendering information to anyone with regard to explorations requested by the Ministry of National Patrimony or by any governmental agency.⁵⁸ If an individual obtains concessions covering an area in excess of the maximum permitted, he must, within 5 years of the acquisition, file an application for the necessary reduction, unless the excess is acquired by means of purchase. Alternatively, he can elect to transfer the excess land to a qualified concessionaire.⁵⁹

The holders or beneficiaries of the concession must pay all taxes imposed on the mining activities.⁶⁰ There is, for example, an annual surface tax of 15 pesos for metallic ores⁶¹ and 8 pesos for non-metallic ores.⁶² An additional tax is imposed on the refining of certain ores, the rate of which varies with the specific ore in question.⁶³

Another obligation relates to the commencement of exploitation or the assessment work, the first proof of which must be filed within five years after the concession was granted. Thereafter, proof of assessment work must be made within 60 days following the end of three-year periods.⁶⁴ Claimholders must furnish all information requested by the Ministry of National Patrimony⁶⁵ as well as any related to discovery of substance deposits which are within the National Reserves.⁶⁶ Notice of any temporary suspension of exploitation and the reasons therefor must immediately be given to the Ministry.⁶⁷

The concessionaire must also carry out the exploitation without wasting economically usable minerals.⁶⁸ Moreover, he must maintain his

⁵⁶ *Id.* art. 221, *op. cit.* at 160-61.

⁵⁷ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 1, *op. cit.* at 7.

⁵⁸ *Id.* art. 16, para. 3, *op. cit.* at 16.

⁵⁹ *Id.* art. 28, *op. cit.* at 20.

⁶⁰ *Id.* art. 28, *op. cit.* at 25. See also LEY DE IMPUESTOS Y FOMENTO A LA MINERÍA (Tax and Mining Incentive Law) art. 2 (D.O. Dec. 31, 1955), in LEYES Y CÓDIGOS DE MÉXICO: LEGISLACIÓN MINERA 191-92 (1968). Hereinafter, all citations to *Ley de Impuestos y Fomento a la Minería* will be to the particular article followed by the page number on which it may be found in *Legislación Minería*. For an English translation, see FOREIGN TAX LAW ASSOCIATION, 2 MEXICO INCOME TAX SERVICE 902 (1969).

⁶¹ LEY DE IMPUESTOS Y FOMENTO A LA MINERÍA art. 4, *op. cit.* at 192.

⁶² *Id.* art. 5, *op. cit.* at 192.

⁶³ *Id.* art. 13, *op. cit.* at 194-98.

⁶⁴ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 45, §§ II & III, *op. cit.* at 25; *id.* art. 62, para. 3, *op. cit.* at 36.

⁶⁵ *Id.* art. 45, § IV, *op. cit.* at 25.

⁶⁶ *Id.* § VII, *op. cit.* at 26.

⁶⁷ *Id.* § VIII, *op. cit.* at 26.

⁶⁸ *Id.* § V, *op. cit.* at 26.

machinery and equipment properly⁶⁹ and must observe adequate safety procedures in mining facilities.⁷⁰ Personnel of the Ministry of National Patrimony must be assisted in their inspections⁷¹ and university students studying mining must be allowed to visit the mines.⁷²

When the concession is granted for substances within the National Reserves, there is an obligation to pay to the government a certain percentage of the net returns of the exploitation either in currency or in kind.⁷³ There is also an obligation to record at the Public Registry of Mines any facts which could affect the concession,⁷⁴ including transfers⁷⁵ of agreements or options to sell the rights granted by the concession,⁷⁶ any contracts relating to the exploitation of the minerals covered by the concession,⁷⁷ the creation of any easements on the concession lot,⁷⁸ and any expropriation of the lot.⁷⁹

CONTRACTS RELATING TO MINERAL RIGHTS: FORMALITIES AND RECORDATION

The most common contracts dealing with mining concession rights are the sales agreement or complete transfer of mining rights, the promise to sell these rights or grant options to acquire them and the exploration and exploitation agreement or lease agreement.

Sales Agreements

Through the sales agreement, the full transfer of the concession rights is made to a purchaser meeting the requirements of nationality and capacity.⁸⁰ The formalities which need be observed in this agreement will depend upon the sales price.⁸¹ If the price is below 500 pesos, the agreement can be private and signed before two witnesses. Sales involving higher prices, however, must be signed before a notary public.

There is no particular form which must be followed in such a contract,⁸² provided it includes the description of the lot involved in the con-

⁶⁹ *Id.* § VI, *op. cit.* at 26.

⁷⁰ *Id.* § X, *op. cit.* at 27.

⁷¹ *Id.* § XII, *op. cit.* at 27.

⁷² *Id.* § XIII, *op. cit.* at 27.

⁷³ *Id.* art. 82, *op. cit.* at 44.

⁷⁴ *Id.* art. 86, § III, *op. cit.* at 46.

⁷⁵ *Id.* § IV, *op. cit.* at 46.

⁷⁶ *Id.* § VI, *op. cit.* at 46.

⁷⁷ *Id.* § V, *op. cit.* at 46.

⁷⁸ *Id.* § VII, *op. cit.* at 46.

⁷⁹ *Id.*

⁸⁰ The sales agreement usually transfers all the rights of the concession. There can also be a conditional sale of rights through which actual transfer of ownership is postponed until conditions established in the agreement are fulfilled by the purchaser. CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIOS FEDERALES art. 2312, in LEYES Y CÓDIGOS DE MÉXICO: CÓDIGO CIVIL 403 (1970). Hereinafter, all citations to the *Código Civil* will be to the particular article followed by the page number on which it may be found in *Leyes y Códigos de México: Código Civil*.

⁸¹ *Id.* art. 2317, *op. cit.* at 403-04.

⁸² *Id.* art. 2316, *op. cit.* at 403.

cession. The seller, however, should always make sure that certain recitals appear in the sales agreement: (1) that all taxes relating to the lot are paid; (2) that he has delivered proof of all assessment work to the Mining Bureau within the requisite time period; and (3) that the concession is free of encumbrances and liens. In addition, a complete transcript of the data contained in the application, or in the concession title, should be incorporated in the agreement.

Options and Leases

The promise to sell⁸³ or option to acquire the concession rights only grants a right in favor of a possible purchaser for a certain length of time. The rules applied to the sales agreement also apply to this contract, although some apply only when and if the option is exercised. Usually the option is entered into in conjunction with a lease or exploration and exploitation agreement. In these situations the lessee can do all work concerned with exploring the mining lot and possibly exploit the mineral extracted from it. The rules of nationality and capacity also apply to the lessee or any beneficiary of the option.⁸⁴

Article 34 of the mining law regulations⁸⁵ imposes special requirements on option and lease agreements. The time limit cannot be less than 5 years nor greater than 20 years and in no event longer than the concession. The first five years of the contract must be compulsory for the lessor and optional for the lessee.⁸⁶ The agreement must allocate the various legal obligations and the concession title must be spelled out.⁸⁷ Royalties or compensation cannot be less than 2.5 percent nor more than 7.5 percent of the net returns from minerals extracted.⁸⁸ A minimum amount of production or a certain minimum annual royalty can be agreed upon but restrictions on maximum production cannot be imposed upon the lessee.⁸⁹

Although these are the most important types of contracts involving mineral rights, there are other agreements such as the allowance of easements, the creation of mining mortgages, mining pledges, trust agreements, service and supply contracts, and accessories and parts contracts which are frequently utilized by lending institutions. Immediately after their execution, these contracts must be recorded at the Public Registry of Mines.⁹⁰

⁸³ *Id.* arts. 224? 17, *op. cit.* at 392. See also LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 86, § VI, *op. cit.* at 46.

⁸⁴ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 8, para. 1, *op. cit.* at 10.

⁸⁵ REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 art. 34, *op. cit.* at 79.

⁸⁶ *Id.* § II, *op. cit.* at 79.

⁸⁷ *Id.* § IV, *op. cit.* at 80.

⁸⁸ *Id.* § III, *op. cit.* at 80.

⁸⁹ *Id.* § V, *op. cit.* at 80.

⁹⁰ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 86, *op. cit.* at 45.

The recording procedure is very simple and only involves the filing of an application, together with two copies of the agreement, with the Mining Bureau. The corresponding notice for payment of duties and one copy stamped with the recording data, will be issued within 30 to 40 days of filing. This does not mean, of course, that the rights covered by the agreement are not protected during this period because when registered their actual perfection dates retroactively from the filing of the application.⁹¹

MINING CORPORATIONS: INCORPORATION AND RECORDING

As is true for any incorporation, an application must be filed with the Ministry of Foreign Affairs in order to obtain the required permit.⁹² In the case of mining corporations, however, the applicant also must attach three copies of the proposed charter and by-laws, which will be sent to the Ministry of National Patrimony for review by its legal department. The opinion of the legal department is sent to the Ministry of Foreign Affairs, and if it is favorable, the Ministry of Foreign Affairs shall grant the permit to the applicant. If a negative opinion is rendered it will specify which parts of the proposed charter need to be modified. When a permit is granted, a notary public must effectuate the incorporation, but he need only transcribe in his records (*Protocolo*) the by-laws which have been approved by both ministries.⁹³

Foreigners and foreign companies who want to subscribe to any part of Series B shares, must appear before the notary with the proper business visa or else be represented by a duly empowered Mexican citizen.⁹⁴ The notarial deed containing the charter of incorporation shall be presented in court to obtain the decree ordering its recordation at the Registry of Commerce.⁹⁵ Thereafter it shall be presented to the Mining Bureau for recording in the General Book of Mining Corporations⁹⁶ and in the Book of Mexican Shareholders of Mining Companies.⁹⁷ In order to avoid rejec-

⁹¹ REGLAMENTO DE LA REGLAMENTARIA DE ARTÍCULO 27 art. 246, *op. cit.* at 168.

⁹² REGLAMENTO DE LA LEY ORGÁNICA DE LA FRACCIÓN I DEL ARTÍCULO 27 CONSTITUCIONAL (Regulation of the Organic Law of Section I of Article 27 of the Constitution), art. 2, in EDICIONES ANDRADE, EXTRANJERÍA TURISMO Y POBLACIÓN 251 (1964).

⁹³ The administrative procedure for obtaining a permit is set forth in a 1963 unpublished interdepartmental memorandum from the Dirección de Minas (Division of Mines) of the Department of National Patrimony to the Ministry of Foreign Affairs.

⁹⁴ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 26, para. 12, *op. cit.* at 74. See also LEY ORGÁNICA DE LA FRACCIÓN I DEL ARTÍCULO 27 CONSTITUCIONAL art. 2; REGLAMENTO DE LA ORGÁNICA DE LA FRACCIÓN I DEL ARTÍCULO 27 CONSTITUCIONAL art. 2; in EDICIONES ANDRADE, EXTRANJERÍA, TURISMO Y POBLACIÓN 248, 251 (1964).

⁹⁵ LEY GENERAL DE SOCIEDADES MERCANTILES art. 260, in LEYES Y CÓDIGOS DE MÉXICO: CÓDIGOS DE COMERCIO Y LEYES COMPLEMENTARIAS 227 (1970).

⁹⁶ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 86, § 1, *op. cit.* at 45; REGLAMENTO DE LA REGLAMENTARIA DE ARTÍCULO 27 art. 237, § 6, *op. cit.* at 165.

⁹⁷ REGLAMENTO DE LA REGLAMENTARIA DE ARTÍCULO 27 art. 32, *op. cit.* at 79.

tion of the application for incorporation by the various government departments, all the requirements including those dealing with the administration of the company, the existence of two different series of shares, and the corporate capital structure, must be fulfilled in the proposed charter.⁹⁸

THE MEXICANIZATION OF MINING ACTIVITIES

There has been a great deal of talk on this subject since the enactment of the new mining law in 1961. It is frequently said that Mexico nationalized the mining industry or that expropriation has been rampant in this area of the law. These statements are incorrect because Mexicanization has actually resulted, not from a governmental takeover, but from the limitations placed upon foreign investment capital at the creation of the corporate structure, and from incentives given to Mexican companies and businessmen willing to invest in mining.

The raising of sufficient Mexican capital to finance exploration has not been easily accomplished. Mexican investors, however, together with the government's help through the enactment of more attractive tax incentives, are moving toward this goal. The Mexican government has not pursued a greater degree of control of mining through nationalization. Rather, Mexicanization was selected by the government as the best policy for a country attempting to diversify its exports and the present mining law is a consequence of that program.

I have already mentioned the main features of Mexicanization as it relates to new ventures. Fifty-one or sixty-six percent of the capital stock must be owned by Mexicans⁹⁹ for a corporation to obtain ordinary¹⁰⁰ or special¹⁰¹ concessions, respectively. Moreover, to obtain land in the forbidden zone, the entire stock ownership must be in Mexican hands.¹⁰² In any event, Mexicans must control the management of all mining corporations.¹⁰³

⁹⁸ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 89, *op. cit.* at 46.

⁹⁹ For the ownership of stock to qualify as Mexican, it must be held by one of the following: (1) Mexican citizens; (2) Mexican corporations the articles of incorporation of which contain an exclusion of foreign shareholders; (3) Mexican corporations registered in the Book of Mexican Shareholders of Mining Companies at the Registry of Mines and which otherwise satisfy the capital structure requirements; (4) Mexican credit institutions regulated by the Banking Commission; and (5) Mexican corporations that prove to the satisfaction of the Ministry of National Patrimony that the majority of their capital stock is held by Mexicans, Mexican corporations with a majority Mexican interest, Mexican credit institutions or investment corporations. REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 art. 26, § 1a-c, *op. cit.* at 72.

¹⁰⁰ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 14, *op. cit.* at 15. See also REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 art. 26, § 1, rule 1, *op. cit.* at 72.

¹⁰¹ LEY REGLAMENTARIA DEL ARTÍCULO 27 DE LA CONSTITUCIÓN art. 76, *op. cit.* at 42. See also REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27 art. 26, § 1, rule 1, *op. cit.* at 72.

¹⁰² CONSTITUCIÓN art. 27, § 1, *op. cit.* at 572-73.

¹⁰³ REGLAMENTO DE LA LEY REGLAMENTARIA DEL ARTÍCULO 27, art. 26, § VI, *op. cit.* at 75.

Mexicanization could not be applied to those corporations already in existence and, in order to encourage their transformation, tax incentives were granted to companies which Mexicanized. These incentives are in three basic forms. If a corporation's capital structure satisfies the requirements of Mexicanization, it can receive a 50 percent reduction in its export and production taxes commencing in the fiscal year after an application is made.¹⁰⁴

A subsidy may also be granted to small mining operations which meet the capital structure requirements.¹⁰⁵ This so-called Rule 6 subsidy can amount to 50 to 75 percent of a mining company's export and production taxes.

Finally, Mexicanized companies have the opportunity to negotiate special tax agreements with the Ministry of Finance, which can include the elimination of export and production taxes as well a reduction of income taxes by 40 percent for five years.¹⁰⁶ In granting these special tax agreements, the Ministry considers the area where the concession is located, the difficulties involved in production, and the importance of the industry to the Mexican economy.

CONCLUSION

Mexico has made substantial changes in its legal system, providing encouragement for reductions of foreign participation and increases in Mexican investment. The policy towards foreign investments, however, cannot be based solely upon a desire to increase Mexican ownership of the basic industries. In some instances, there simply is not enough Mexican capital to develop a particular industry and foreign investment is in the best interests of the nation.

Mining is such an industry. The Mexican economy depends, to a large extent, upon the development of its natural resources. Yet, there is not sufficient Mexican capital to insure that development in the foreseeable future. Thus, foreign capital is needed, but the law requires that certain safeguards be followed to prevent foreign domination.

Foreign investors who are willing to comply with the Mexican regulations are welcome and will have their investments protected, not by the United States, but by the government of Mexico.

¹⁰⁴ LEY DE IMPUESTOS Y FOMENTO A LA MINERÍA, art. 52, para. 4-5, *op. cit.* at 210. For an English translation, see 2 MEXICO INCOME TAX SERVICE, *supra* note 60, at 918-19.

¹⁰⁵ LEY DE IMPUESTOS Y FOMENTO A LA MINERÍA arts. 67-69, *op. cit.* at 214-15. See 2 MEXICO INCOME TAX SERVICE, *supra* note 60, at 922-23.

¹⁰⁶ LEY DE IMPUESTOS Y FOMENTO A LA MINERÍA art. 56, para. 2, *op. cit.* at 211-12. See 2 MEXICO INCOME TAX SERVICE, *supra* note 60, at 920.

QUESTIONS AND ANSWERS

Question: You have indicated that milling and smelting are also regulated by the mining law. To what extent is participation in them restricted? Also, are new processes, other than milling and smelting, which have been or may be developed for extracting and refining ores regulated by the law?

Lic. Perez: The same restrictions which apply to exploration and extraction apply to milling and smelting, and the law refers to "any method" and thus would cover any newly developed process.

Question: With respect to new processes, there may be situations where American companies have the right to use certain processes by agreement, or to use patents under special restrictions, that preclude their entering into agreements to transfer that right to exploit the process or patent to another corporation, particularly to a Mexican corporation which is not controlled by the corporation that owns the patent right. Could there be a contractual arrangement between a Mexican corporation and an American corporation for the use of this type of a process? What kind of a contract would this be?

Lic. Perez: A contract which establishes a royalty for the use of a patent may be entered into, but the Mexican revenue authorities would strongly object to the establishment of a very high royalty in such an agreement because they would view it as a means for a potentially high level of export of Mexican capital coupled with a diminishing of the profits of the Mexican corporation to such an extent that there would be no significant amount of taxes paid in Mexico. Such contracts are scrutinized very carefully, and, if something smacks of evasion or an unreasonably high royalty it will not be acceptable as a deductible item of expense for the Mexican corporation.

Question: But is there a means by which these new processes can be used when the American company is not in a position to deliver control of operation of the process or is legally incapable of doing so and still wishes to mine in Mexico?

Lic. Perez: No. The company would have to find a way to deliver control of the operation to a Mexican corporation or it would not be able to use it in Mexico.

Question: If a concessionaire who does not meet the requirements for a special concession discovers an additional substance which is within the National Reserves, can application to extract the substance be made, or would the substance have to be left in the ground until the concessionaire relinquishes the concession?

Lic. Perez: The concessionaire would have only a preferential right, if he desired to assert it, in the procedure that I have described for com-

pliance with the National Reserve rules. He could participate in the open bidding procedure when it is opened by the Ministry of National Patrimony, and have the opportunity to match the best bid.

Question: What would be the practical problem if a mining company found a salable trace of an ore or substance other than one of the eight substances subject to a concession or one not listed in its concession? What sanctions would the mining company be subject to for recovering this substance? What controls the sale of such a metal when it is not within the concession?

Lic. Perez: The permissive nature of the regulations of the mining law leads me to believe that the government has the discretionary power to grant to the concessionaire the right to extract and make use of an additional substance found in the same lot. My opinion is that although theoretically you cannot change the intention of the mining law which restricts you to eight substances, in actual practice, the government would not try to stop the extraction of a ninth substance or of the extra substance found because it is in the best interest of the county to allow an exploitation under conditions of proven feasibility, especially when that exploitation is subject to taxation.

If a new substance is found and the concessionaire would prefer to have one of the previous substances replaced or cancelled in place of the new one, he could apply for and possibly obtain the replacement. He could not, however, include nine substances in the same concession for the law and regulations are unequivocal on the maximum number. I would say that there is an absolute restriction as to the number of substances that may be covered by the same title and in the same lot.

Question: Is there any kind of exploratory activity that can be done by a company that does not meet the requirements for a mining concession?

Lic. Perez: Since exploration work is part of the mining operation, a company which does not qualify cannot engage in mining exploration unless it does so under a contract with a company which has a mining concession.

Question: Is there any control or any obligation on the holder of the concession as to disposal of wastes or restoration of the land to its original condition once the mine has run out?

Lic. Perez: There is no regulation concerning the disposal of wastes of minerals, but the policy of the government is to urge companies to make the best effort to use the mineral waste. There is no requirement that the land be restored to its former state when a concession is expired or when no further work is required.

Question: Is there a depletion allowance under the mining law or Mexican law in general for mining concessions?

Lic. Perez: There is no depletion allowance because the government considers that the ore body is the property of the nation, and that thus one cannot claim a depletion of resources which are not his. What you spend in exploration, however, is considered a deductible expense.

Question: Can a foreigner inherit a concession or stock in a corporation holding a concession from a Mexican? If so, is there a time limit in which the foreigner must dispose of either the property or the stock or does the concession revert back to the state?

Lic. Perez: Yes, it may be inherited by a foreigner, but the foreigner has to dispose of it within two years or forfeit his inheritance.

Question: Are there any limitations on lending of money to mining companies? Are there any limitations as to the amount of a mining company's debt capital comparable to the limitations on equity capital?

Lic. Perez: There are no limitations on the amount of capital borrowed by mining companies or on the persons from whom it is borrowed.

Question: Is there such a thing as an exclusive supply contract for a mining company, where the total output is sold to one individual company?

Lic. Perez: There are no special restrictions on exclusive supply contracts. I know of one mining company in Sonora whose supply contract has been approved by the federal government. According to this contract, the producers are to sell 100 percent of their production to an American firm which also is the owner of 49 percent of the supplier's stock.

Question: The provisions of the first paragraph of Article 26 of the regulations provides that Mexican banking or mining institutions or investment companies are authorized to subscribe to Series A shares and to deliver such shares in trust to institutions authorized to act as trustees. If the settlor instructed the trustee to issue a certificate of participation which could be acquired by anyone, including foreigners, would it not be possible for foreigners to obtain control of mining companies?

Lic. Perez: Initially, it must be remembered that such a transaction is established by Article 26 of the regulations, not by the law itself. This means that if practices under such a rule tend to violate the spirit of the mining law, they will be invalidated. Secondly, credit institutions and trust companies are closely supervised by the banking commission and would be reticent about entering into such an arrangement. Thirdly, even if there were no provisions which could prevent you from acquiring de facto control of a Mexican mining corporation, you must weigh your decision against the risk of losing the tax subsidization and, eventually, even the mining concession itself. As I noted in my speech, the privileged tax status that follows Mexicanization is the *sine qua non* for a profitable operation.