

Summer 1970

Nationalism as a Factor in Legislation Restricting Foreign Investment: Extractive Industries in Mexico

Ira B. Zinman
Indiana University School of Law

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>

 Part of the [Banking and Finance Law Commons](#), [Commercial Law Commons](#), and the [Comparative and Foreign Law Commons](#)

Recommended Citation

Zinman, Ira B. (1970) "Nationalism as a Factor in Legislation Restricting Foreign Investment: Extractive Industries in Mexico," *Indiana Law Journal*: Vol. 45 : Iss. 4 , Article 7.
Available at: <https://www.repository.law.indiana.edu/ilj/vol45/iss4/7>

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.

*NATIONALISM AS A FACTOR IN LEGISLATION RESTRICTING FOREIGN INVESTMENT: EXTRACTIVE INDUSTRIES IN MEXICO

In response to the continued growth of international business investment many nations have established legal barriers which limit the scope of foreign operations within their jurisdiction.¹ While it has been suggested that the laws governing foreign capital are a reflection of unique factors in each nation's development² there is one force, nationalism, which to some degree always plays a role in influencing the passage of legislation operating as a legal constraint upon foreign enterprise. The use of such restrictive legislation requires that each nation balance the need for outside capital and technology to stimulate domestic economic development against the placation of nationalistic pressures. These pressures are most acutely expressed whenever nations hosting significant amounts of foreign capital in extractive industries feel the need to protect scarce natural resources from exploitation.

This paper provides an historical analysis of Mexican mining legislation which, due to long involvement³ with foreign investment in domestic resources, has developed into a highly advanced system which accommodates the need for economic growth with the nationalistic desire to prevent exploitation by foreigners. Arguably, the evolutionary development experienced in the passage of successive Mexican mining laws is indicative of the trial and error process facing other nations which only recently have begun to design foreign investment codes.

THE HISTORICAL PERSPECTIVE

The relevant history begins with the dictatorial regime of Porfirio Díaz. In 1884, the Díaz government revised mineral legislation by passing the Code of Mining which provided that surface salt deposits, salt and fresh water, surface and underground petroleum, gas wells, and springs of hot and medicinal waters would be the exclusive property of the

* Nationalism as used in this study must be understood as the claim for control of a country's resources principally by its nationals.

1. See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 74 (1968).

2. "It is difficult to state why any particular nation passes such legislation, for the manner in which foreign enterprise is treated under the laws of any given country discloses a good deal about the economic, political, and historical development of that country." Batiza, *Current Attitudes on Mexico's Treatment of the Foreign Enterprise*, 17 *RUTGERS L. REV.* 365 (1963).

3. Mexico's relations with "outsiders" in this area began in 1559 when the King of Spain declared royal ownership of gold, silver, and mercury mines. See Barker, *Mexican Mining Concessions*, 5 *SO. CAL. L. REV.* 1 (1931).

surface owner.⁴ The new law, like many Diaz programs, was intended to attract foreign investment by easing the way for the exploitation of surface and subsoil minerals.⁵ After 1884 the influx of foreign capital steadily increased.⁶ According to available estimates about two-thirds of the nation's total investment, exclusive of agriculture and handicrafts, came from foreigners.⁷ Capital investment from the United States, for example, grew from 200 million dollars in 1897 to 1,100 million dollars in 1911, while French investment increased from 100 million dollars in 1902 to about 400 million dollars in 1911, and British investment expanded from 164 million dollars in 1880 to over 300 million dollars in 1911.⁸ The feeling in Mexico was that foreign capital began extensively to dominate the economic life of the people. At this time "the history of Mexican economic development [was seen as] a long, often sordid, story of exploitation. . . ."⁹ The exploitation of labor, the "crude, coarse arrogance of the North Americans, the utter disdain in which they held their Mexican colleagues and co-workers, and their persistent refusal to absorb even in the smallest way, a part of Mexican culture" were all resented.¹⁰ In addition while commerce fared well Mexico's poor which constituted almost ninety per cent of the population saw itself as "sinking into a condition of poverty and wretchedness."¹¹

The ensuing revolution of 1910 was characterized by a growing spirit of nationalism and an antagonism for foreign interests whose success had been contemporaneous with a decline in the economic welfare of the peasant class.¹² Diaz's policies "overlooked too many of the social and political aspirations of the middle and lower classes to endure when confronted by popular revolution."¹³ It was resentment of the environment created by the foreign entrepreneur which figured strongly in national revolutionary slogans such as "Mexico for Mexicans." The

4. Black, *Ownership of the Minerals Underlying the Bancos Along the Rio Grande*, 37 TEX. L. REV. 52 (1958).

5. M. BERNSTEIN, *THE MEXICAN MINING INDUSTRY 1890-1950*, at 18 (1964).

6. R. VERNON, *THE DILEMMA OF MEXICO'S DEVELOPMENT* 42-43 (1963).

7. *Id.*

8. *Id.*

9. Note, *Foreign Investment in Mexico: The Emergency Decree of 1944*, 39 TUL. L. REV. 539 (1965).

10. See, J. MADDOX, *POINT IV ON MEXICO* 4 (1957).

11. F. DUNN, *THE DIPLOMATIC PROTECTION OF AMERICANS IN MEXICO* 307 (1933). For a more detailed description of Mexican attitudes toward foreign investment in extractive industries, see, R. VERNON, *HOW LATIN AMERICA VIEWS THE U.S. INVESTOR* 95-117 (1966) and H. CLINE, *THE UNITED STATES AND MEXICO* 183 (1953).

12. See F. DUNN, *supra* note 11, at 309.

13. Bradenburg, *A Contribution to the Theory of Entrepreneur and Economic Development: The Case of Mexico*, 7 INTERAMERICAN ECONOMIC AFFAIRS, Vol. XVI, No. 3 (1963).

Constitution of 1917 was undoubtedly a most significant outcome of the 1910 revolution and the following years of strife. The new Constitution proclaimed an "intense economic nationalism and the social responsibility of private property to the welfare of the country."¹⁴ Within the 1917 Constitution article 27 is the most important and basic provision concerning foreign mineral investment:¹⁵

There is vested in the Nation the direct ownership of the natural resources . . . all minerals or substances . . . 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; . . . and all 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 . . . 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 rules and conditions which the laws may establish.

Only Mexicans by birth or naturalization and Mexican companies may acquire ownership of land, water and their appurtenances, or obtain licenses to exploit mines or waters. The state may grant such right to aliens, provided they agree before the Secretariat of Foreign Relations to be considered with regard to these assets as nationals and not to invoke the protection of their governments in matters related to such assets, under penalty of forfeiting in favor of the Nation assets acquired thereby if they breach the agreement. . . .

The Mexican government intended article 27 to clearly assert Mexican control over land and foreign investment in natural resources. The special importance of this article is that it has been the impetus for later political and legislative policy.

Mining legislation implementing article 27 was not passed until 1926.¹⁶ The Law of Mineral Industries reaffirmed the pronouncements of the 1917 Constitution by declaring direct ownership of all minerals

14. Hevbel, *The Political Aspects of Doing Business in Mexico*, DOING BUSINESS IN MEXICO 7 (1967).

15. MEX. CONST. art. 27, as amended, D.O., Jan. 20, 1960.

16. Law of Mineral Industries, D.O., May 3, 1926.

in the soil and subsoil by the nation (art. 2). The 1926 law created four types of mining concessions and one concession for processing plants (chapters IV, V, VII). Concessions were given limited life spans. Exploratory concessions had a maximum life of five years (art. 57) while a concession for exploitation was valid for thirty years with a possibility of renewal (art. 36). Under the 1926 law, there was no surface tax on concessions. Although the law was the first significant attempt to implement article 27, it was strongly criticized on the ground that it did not meet the needs of an expanding mining industry.¹⁷ As a result it was specifically repealed in 1930.

The Mining Law of 1930¹⁸ encouraged future industrial growth in which more domestic control over natural resources was to be emphasized. The 1930 legislation provided for the continued use of two types of ordinary mining concessions; one for exploration and the other for exploitation. The exploration concession had a limited life of two years and only one such concession could be held at a time (arts. 20, 24). Concessions for exploitation, on the other hand, could be issued without limit to any single party and were perpetual so long as the concessionaire paid the surface tax and met the other requirements of the act (art. 25). Mexicans or Mexican companies could acquire either concession. Foreigners as well could obtain concessions by compliance with article 27 of the Constitution and some additional formalities (art. 6) Despite the progressive nature of the Mining Law of 1930¹⁹ it was entirely repealed by the New Mining Law of 1961. The abrogation of the 1930 law, it has been suggested,²⁰ was not due to any failure to meet the needs of the mining industry, but was a result of radical changes in government policy caused by a desire to meet the political objectives of "Mexicanization." Whereas the 1930 legislation was concerned only with development of the mineral industry itself, later events created a situation in which emphasis was placed on defining the industry's role in terms of a national policy aimed at the social and economic betterment of the Mexican people.²¹

President Lázaro Cárdenas contemporaneously with his election in 1935 announced policies²² which stimulated a new wave of Mexican

17. Verity, *Mineral Law of Mexico*, 2 AM. L. OF MINING 785 (1969).

18. Mining Law of 1930, D.O., Aug. 7, 1930.

19. Miranda, *Legal and Economic Aspects of Foreign Investments in Mexico*, 25 TEX B.J. 865 (1962).

20. See VERITY, *supra* note 17, at 788.

21. See M. WIONCZEK, *EL NACIONALISMO Y LA INVERSION EXTRANJERA* (1967). The author states that the passage of the new law was "but a logical extension of a new strategy of economic development in which the policy of exploitation of natural resources ought to play a different role than it has been assigned in the past." *Id.* at 241.

22. These policies were in conformity with an attitude of reform previously ex-

nationalism. The new President declared that outside capital in Mexican resources should be prepared to reinvest profits and aid in Mexican social and economic development.²³ New policies were initiated to benefit Mexican labor and to discriminate against foreign employees, especially the managerial class. "Xenophobia became part of Mexican thought, and anti-foreign actions were hailed as a crusade against modern conquistadores."²⁴ Organized Mexican labor bargained for better health standards, conditions and wages.²⁵ In response to the stubborn refusal of some foreign firms to negotiate terms, as well as to fears of dominance by foreign capital, President Cárdenas began unprecedented expropriation of oil and railroad properties in 1938.²⁶ To the common people Cárdenas was a hero. "After 1938 the whole internal spirit of Mexico changed. The latent inferiority complex so widespread among Mexicans gave way to satisfaction and pride."²⁷ By the end of the 1930's the government had begun to create a role for the public sector in advancing Mexican economic growth. Government policy would constitute a check on exploitation by foreign capital and assure that Mexican interests shared in the economic benefits derived from domestic natural resources.²⁸

World War II created conditions which required Mexico to pass important legislation concerning the activities of aliens. The Suspension of Guarantees Decree,²⁹ issued on June 1, 1942, gave the President wide power to deal with situations which would arise as a result of the war. Pursuant to that decree the Emergency Decree of 1944³⁰ was issued. The preamble stated that absent regulation, increased foreign funds would be put into investments of a transient nature that would neither give due consideration to Mexican participation nor to Mexican economic development and stability. In order to prevent political chaos and economic depression, and to channel excess capital into more stable investments the

pressed by Cárdenas' predecessors. Presidents Plutarco Elias Calles (1924-28), Emilio Portes Gil (1928-30), and Abelardo L. Rodríguez (1930-34).

23. See Wall St. J., April 1, 1970, p. 1, col. 1. H. CLINE, *THE UNITED STATES AND MEXICO* 238 (1953). Current Mexican presidential candidate Luis Echeverría Álvarez, as evidence of the current vitality of this policy, is quoted as saying that foreign investments "will be welcome as long as they are complementary to national capital. National capital ought to be developed. But this is not sufficient. We need a complementary contribution of foreign capital that will have all kinds of guarantees on the condition that it contributes to healthy economic national development."

24. See H. CLINE, *supra* note 23, at 238.

25. *Id.*

26. *Id.*

27. *Id.*

28. Public utilities also came under government regulation, see, Wionczek, *Electric Power: The Uneasy Partnership*, PUBLIC POLICY AND PRIVATE ENTERPRISE IN MEXICO 107 (R. Vernon ed. 1964).

29. Decree of June 1, 1942, D.O., June 2, 1942.

30. Decree of June 6, 1944, D.O., June 7, 1944.

Emergency Decree provided several stipulations. Foreign investors and Mexican companies with foreign participating ownership were required to receive permission from the Secretary of Foreign Relations before buying, controlling, or acquiring the majority of stock in any company engaged in industry, mining, agriculture, cattle, timber, purchase and exploitation of either agricultural or urban land, including the subdivision or urbanization of such land.³¹ The Secretary's authorization would also be required when foreign interests sought concessions in mines, waters and mineral fuels.³² His permission was also needed to modify the charter or the capital structure of any company having foreign participation.³³ The Secretary of Foreign Relations was granted the power to impose conditions on his authorization,³⁴ such as requiring Mexican companies having alien shareholders to show, in an easily verifiable manner, that at least fifty-one per cent of the equity was held by Mexicans.³⁵ This particular stipulation is important and is often referred to as the "Mexicanization" provision.

When the war ended all constitutional rights were re-established by decree passed by the Mexican Congress on September 28, 1945.³⁶ Statutes of temporary character issued to combat the war's effect on the nation were to be abrogated.³⁷ Article 6 of the post war decree stated, however, that laws which authorized the Republic to intervene in the economic life of the country were not to be abrogated. The Secretary of Foreign Relations continued to enforce the Emergency Decree of 1944 on the authority of article 6. This contradiction between article 6 and the policy of the post war decree caused much confusion in Mexico and abroad concerning the extent of the Secretary's powers.³⁸ Taking note of the confusion the post war administration apparently wished to formulate a clear statement of policy on foreign investment. An Intersecretariat Commission was formed to study and coordinate legal provisions applicable to foreign investment. The results of the Commission's study do not appear to have been of significant value.³⁹ A major reason for this

31. *Id.* § 1 (last paragraph).

32. *Id.*

33. *Id.* § 2.

34. *Id.* § 3.

35. *Id.* § 3(111) (a) & (b).

36. Decree of Sept. 28, 1945, D.O., Dec. 28, 1945.

37. *Id.* § 5.

38. Suit was brought in the case of *Quimica Industrial de Monterey, S.A.*, Suprema Corte de Justicia de Mexico (Segunda Sala), Sept. 20, 1962, 66 SEMENARIO JUDICIAL: Sexta Epoca 25 (1963) to decide the question of the extent of the Secretary's powers. The question, however, was not laid to rest because in Mexico binding precedent is not established until the cases have been decided in the same way by the high court. See Note, *Foreign Investment in Mexico: The Emergency Decree of 1944*, 39 TUL. L. REV. 539 (1965).

39. See 39 TUL. L. REV., *supra* note 38, at 556.

failure was the reluctance of President Miguel Alemán's (1946-52) subsequent administration to issue a policy statement enforcing the potentially powerful Decree of 1944. In fact, after assuming office, President Alemán stated that the "Mexicanization" provision limiting foreign capital to forty-nine per cent ownership in the listed industries⁴⁰ was only a device to be used by the Secretary of Foreign Relations in exceptional cases. This limitation of the Secretary's power under the "Mexicanization" clause indicated a liberal government policy toward foreign investment and was responsive to Mexico's need to bolster the domestic economy by attracting outside capital.

The post World War II period, under President Alemán's government, although dampened by monetary problems and devaluation, was characterized by continued public and private investment. Yet while industry and commerce continued to grow, the largely foreign-owned⁴¹ mining sector lagged behind except for a short period during the Korean War.⁴² Prices fell after the Korean War and the industry suffered from labor problems, increased transportation costs and especially high taxes. Although mining accounted for only about four per cent of the gross national product its share of taxes amounted to between ten and fifteen per cent of federal income.⁴³ In addition to an income tax there was a dividend tax, an excess profits tax, import duties and a production tax.⁴⁴ If investment and growth in the mining industry were to be realistic economic goals reformation of the burdening tax structure was a necessity.

The opportunities for investment in the mining industry became even less appealing over the next ten years. President Adolfo Ruiz Cortines (1952-58), President Alemán's successor, faced with a post-Korean war slump and a worsening balance of payments, brought in a more conservative attitude of restraint on public spending and fiscal policy.⁴⁵ Foreign investment continued to grow in spite of mixed feelings among Mexicans about its presence.⁴⁶ These negative attitudes were

40. This list included: radio stations, movies, transportation, fisheries and fish culture, canning, publishing, advertising soft drinks, bottling of fruit juices, rubber products, basic chemical products, petroleum derivatives, fertilizers, insecticides, agriculture and mining.

41. Navarro, *Una Política Minera Mexicana*, 20 INVESTIGACION ECONOMICA 835, 837-42 (1960).

42. See note 5 *supra*, at 236.

43. Bogert, *Mexicanization: Its Impact on the Mining Industry of Mexico*, 25 MINING WORLD 12-15, No. 3 (1963).

44. Gumpel & Margáin, *Taxation in Mexico* (WORLD TAX SERIES 1957).

45. A. BOHRISCH, LA POLITICA MEXICANA SOBRE INVERSIONES EXTRANJERAS 108 (1968).

46. *Id.* at 110.

primarily a result of the adverse pressure foreign assembly plants brought to bear upon the country's balance of payments. During the Cortines administration Mexico's large business groups began to align themselves against foreign investment. Many factors contributed to this change in Mexican attitudes, but basically foreign investment bore the blame for a drop in living standards and heightened public concern over economic problems.⁴⁷ The most fervent anti-foreign group was the National Chamber of Industry in Transformation (CNIT). The CNIT organization worked hard to influence Mexico's ruling political party which had in the past heeded advice from business groups.⁴⁸ In 1953, at its second congress, CNIT lashed out against foreign private investment and initiated an energetic campaign against those Mexicans who favored foreign capital.

From the beginning of the Mateos administration in 1958 until 1961 a combination of events created even more of a damper on foreign and domestic investor spirit. In the last days of the Cortines administration the government in collaboration with the incoming Mateos administration amended article 27 of the Constitution to confer upon *Petroleos Mexicanos*, a government-owned company, the exclusive rights to establish and direct the petro-chemical industry. The exclusion of foreign capital in this industry caused the voicing of consternation in publications sympathetic to foreign interests.⁴⁹ Such governmental limitation of outside investment, especially from American sources, was further stimulated by political upheaval over the Cuban situation. After Castro's expropriation of American commercial properties, Washington put pressure on the Mexican government to help isolate Cuba politically and economically. This American pressure created tensions in Mexico which caused a schism between the political forces of the left and the right.⁵⁰ General Mexican support for the leftists, who sympathized with Cuba, was reflected in the administration's position, Mateos announced that the government's policy was to be "on the extreme left within the Constitution."⁵¹ In order to further appease political and nationalist groups the government hastened secret negotiations for the purchase of all foreign-owned electrical utilities.

47. See note 13 *supra*, at 41.

48. See note 6 *supra*, at 131, 189.

49. See note 21 *supra*, at 238. This amendment to the Constitution discussed here was published in the D.O. on Jan. 20, 1960, just less than one year before the decree giving exclusive rights to the state to conduct, transform, distribute and supply electric power used for public service; published in D.O., Dec. 29, 1960. These two amendments and other events, coming so close together caused much concern among investors as will be seen in later discussion.

50. See note 21 *supra*, at 242.

51. See note 6 *supra*, at 135.

By September, 1960 all electrical companies, apparently eager to sell out,⁵² were nationalized. This purchase brought a favorable, almost frenzied, reaction from the entire spectrum of Mexican political groups.⁵³ The threat of Mexico becoming a socialist state alarmed those who had capital invested there.

Although response to Mateos' nationalization policy was evidence of wide anti-foreign sentiment it was not nearly as disparaging to foreign and conservative Mexican investors and the passage of the New Mining Law of 1961.⁵⁴ Given the political tone of the late fifties and 1960, and the shift in attitudes of business organizations against foreign capital, the passage of the new law was inappropriately timed for meeting the needs of the mining industry. While the mining industry, long burdened by a heavy taxation policy, required fiscal reforms to encourage investor participation, the 1961 act represents a nationalistic declaration of independence from the foreign manner of operation in Mexico. Its preamble suggests the stance taken by the act:⁵⁵

This continued oppressive domination of mining activity and refining by foreign interest represents an anomaly in a nation that has affirmed its dominion over the subsoil. The measure, taken in 1961, in spite of the fact that it respects interests now established, exercises pressure in order to give Mexicans the majority interest in the foreign mining companies, limiting the exploratory concessions and the tariffs of those so constituted.

Foreign capital was still ostensibly welcome in Mexico, but only in accord with the policy of economic development first enunciated in the Constitution of 1917. Investor response to the 1961 enactment was immediate. Between 1961 and 1962 about 200 million dollars in private capital left the country.⁵⁶ Investor reactions had heavy negative overtones with accusations of "nationalization," "more government control" and "delayed expropriation."⁵⁷

The 1961 law is meant to encourage Mexican participation in the mining industry. Toward this end, it changes the 1930 enactment by redefining who may own mineral concessions. Under the 1961 law

52. See note 28 *supra*, at 93.

53. *Id.* at 92.

54. New Mining Law of 1961, D.O., Feb. 7, 1961.

55. Author's literal translation from the Spanish.

56. See note 21 *supra*, at 271.

57. See, *Mexico Tightens Grip on U.S. Companies*, BUSINESS WEEK, Mar. 4, 1961, and Bogert, *Mexicanization: Its Impact on the Mining Industry of Mexico*, 25 MINING WORLD, no. 3, p. 14 (1963).

exploitation and utilization of mineral resources may be carried out by (1) the state, through public mining entities (art. 17);⁵⁸ (2) companies with state participation (art. 5);⁵⁹ (3) private persons either natural or juridic. Within the third category a significant change from prior legislation pertains to participation of foreigners in mining operations. The new law stipulates that concessions may only be obtained by Mexicans or Mexican companies in which a majority of the capital is subscribed by Mexicans (art. 14). Foreign governments and sovereigns may not under any circumstances acquire concessions or mining rights of any kind, nor may they be partners, associates, or stockholders of mining enterprises (art. 14). Concessions under the new law have a life of twenty-five years yet may be extended upon application (art. 29, reg. 116). Titles issued under prior legislation continue in force, but are limited in life to twenty-five years and may be renewed only in accordance with the provisions of the new law (transitory art. 3).

Earlier discussion of the problems of achieving growth in the mining industry focused upon the government's tax policy. The taxes on mining had, it has been suggested,⁶⁰ represented the most serious obstacle to the development of this important industry. In attempting to resolve this situation the new law offered tax incentives to foreign firms that would "Mexicanize" by adopting the provisions of the 1961 enactment. Articles 52 and 56 of the Law of Taxes and Promotion of the Mining Industries⁶¹ were amended to allow a fifty per cent reduction in federal production and export taxes for Mexicanized firms. Despite the fact that to receive this reduction it was necessary to pay the entire tax and then apply for a rebate,⁶² reduced taxes⁶³ in these two areas could have been of significant

58. The ability of the state to participate in mining operations was not a part of the 1930 mineral legislation. Establishment of a public mining entity requires congressional enactment proposed by the Federal Executive. Law of Feb. 6, 1961, Mining Law of 1961, [1961] D.O. 1.

59. Mining companies with state participation are established whenever the Federal Executive feels their creation is desirable for the development of the mining industry. Such companies have variable capital with Series A, B and C Certificates. Series A is nontransferable and 51 per cent must be subscribed by the federal government. Series B may be owned by Mexicans or Mexican companies whose capital is at least 66 per cent owned by Mexicans. Series C may be subscribed by anyone except sovereigns and governments. Law of February 6, 1961, Mining Law of 1961, [1961] D.O. 1.

60. See the paper in regard to mining taxes presented by the Mining Chamber of Mexico to the Fourth National Congress of Industrialists in March 1957, published in Spanish and English.

61. Decree to Amend articles 52 and 56 of the Law on Taxes and promotion of the Mining Industry, D.O., Feb. 6, 1961.

62. *Id.*

63. Companies qualifying for the fifty per cent reduction would then be entitled to further negotiate with the Minister of Finance for greater decreases in production and export taxes were they required in certain instances.

value to mining companies. The significance of the export and production taxes in terms of cost to the mining industry is clear. Export taxes create the heaviest burden on the industry since the greater part of all metals and minerals mined except for coal, iron, copper and petroleum is exported.⁶⁴ Production taxes are levied on all metals and minerals. A value is established for each product depending on whether it is refined metal, impure bars, precipitate, concentrates or crude ore (art. 13). The production tax rate scale varies from 0.34 per cent to 20.6 per cent of the assigned value.⁶⁵ Together export and production taxes amount to approximately one-third of the gross revenue received for nearly all metals and minerals exported.⁶⁶

The expected encouragement for "Mexicanization" of the mining industry, due to the lessening of the tax burden, did not occur. Mexican investors, to begin with, were skeptical about investing in the mining industry where they could only hope for about a seven per cent rate of return whereas less risky ventures were available with expected returns of up to fifteen per cent.⁶⁷ Foreign groups were also reluctant to invest funds in risky mining ventures while holding a less than majority forty-nine per cent capital interest. The mining industry itself was faltering badly because of low prices for principal metals in the international markets and the high cost of operation. Companies were ceasing operations and tonnage production was dropping to the lowest levels in fifteen years.⁶⁸ No less discouraging was the fact that nearly three years after the effective date of the law allowing the reductions, administrative barriers had prevented all Mexican or Mexicanized companies from receiving the tax rebate.⁶⁹

In response to the industry's problems the government announced, in 1963, plans to give it increased subsidies and more tax benefits.⁷⁰ The tax structure was made more attractive in the hope of increasing foreign investment in the industry. It further initiated a program to facilitate the "Mexicanization" of firms to enable them to receive the tax benefits under the new law. Under a plan established by the Ministry of Treasury, foreign firms that were unable to find Mexican buyers for their

64. See note 17 *supra*, at 834.11.

65. *Id.* at 834.13.

66. See *Panencia Central Sobre la Industria Minera*, METALURGICA 9. Presented by the National Mining Chamber to the Consejo de Planeacion Economica Y Social in the Federal District, June 11, 1958. This percentage remained approximately the same in 1962. See note 17 *supra*, at 834.11.

67. See THE ECONOMIST INTELLIGENCE UNIT LIMITED ON MEXICO at 10 (Sept. 1963) and COMERCIO EXTERIOR at 198-99 (April 1962).

68. CAMARA MINERA DE MEXICO, XXVI Assembly at 4, 5, 6, 21, 22 (1963).

69. See note 17 *supra*, at 834.12.

70. Fiscal Stimulants to the Mining Industry, D.O., May 22, 1963.

stock could apply to the Minister of Finance to put fifty-one per cent of their capital shares into an irrevocable trust.⁷¹ The stock was then to be made available for sale to Mexicans at a price previously negotiated between the government and the foreign company.⁷² Upon completion of the trust contract the firm was immediately entitled to apply for the fifty per cent tax reductions.⁷³

In spite of these extensive governmental efforts to help the industry, by fiscal measures and the trust plan, capitalists did not react favorably. Some investors felt that not enough was being done to stimulate development,⁷⁴ while others felt that the state was interfering too much in the private sector.⁷⁵ Thus in many respects the New Mining Law of 1961 failed to stimulate the mining industry. It failed to attract Mexican investment with foreign participation because it created administrative road blocks to quick receipt of tax rebates and misunderstandings as to the government's economic goals.⁷⁶ The attempt to create an economy of public control over private investment seemingly lacked a basic plan and thus led to great uncertainty.⁷⁷ It may have been possible to eliminate some of the uncertainty created by the new law had the parties better understood each others goals and aspirations.

For the purposes of perceiving nationalism's role in influencing restrictive legislation the following statement by José Campillo, former president of the Mexican Mining Chamber, should put the concept of a "nationalism"⁷⁸ in its proper context.

The purpose of Mexicanization that the law pursues is a consequence of the economic belief of our country that its nationals ought to extensively participate in the profitable use of their own resources. . . I think also that the intervention of Mexican capital will serve to lessen tensions and critical attitudes in our industry . . . and will result in greater convenience and stability to outside investments that desire to unite in a cooperative effort with local capital to give stimulus to the economic progress of our nation.

71. INTERNATIONAL COMMERCE, Aug. 26, 1963, p. 28; Aug. 19, 1963, p. 10.

72. Trust Regulations art. 4 D.O., July 20, 1963. After the eighth year of existence of the trust, the Secretary of Finance or the entrustors may request adjustments in the sale price of the shares.

73. *Id.* art. 9.

74. INTERNATIONAL COMMERCE, Aug. 26, 1963, at 28.

75. See note 43 *supra*, at 15.

76. THE ECONOMIST INTELLIGENCE UNIT ON MEXICO at 3 (Nov. 1966) and CAMARA MINERA DE MEXICO, XXXI Assembly at 3 (1968).

77. See note 13 *supra*, at 3 and ECONOMIST INTELLIGENCE ON MEXICO at 11 (May 1966).

78. CAMARA MINERA DE MEXICO, XXIV Assembly at 3 (1961).

These goals of the Mexican government expressed in the 1961 enactment were actually an extension of objectives established in the Constitution of 1917. They represent an attempt to encourage foreign investment in a profitable cooperative venture through which domestic economic growth can be achieved. The private entrepreneur, however, may have been misled because each presidential administration seemed to give its own interpretation to the enforcement of national policies expressed in the 1917 Constitution. The government could have eased uncertainties surrounding the passage of the New Mining Law of 1961 by better analyzing investor psychology at the time and thereby realizing that misapprehension existed. To achieve greater understanding between the parties the administration could have then proceeded by first clearly defining its objectives to the investing public. As the situation evolved, however, investors generally felt that the attitude of certain officials was discouraging and that the regulations of the 1961 law were too restrictive.⁷⁹ Economic growth through increased investment in mining surely could not have resulted under these circumstances.

In spite of the fact that the government's intentions were unclear, investors could have predicted the inevitability of restraint upon foreign investment activity. The increasing nationalistic spirit evident in the late nineteen fifties and 1960 should have forewarned the foreign investor that his position was fast losing stability in Mexico and a new restrictive law to regulate the mining industry should not have come as a great surprise. By being more attentive to the pressure put upon the government by Mexican business and political groups the private investor should have foreseen the forthcoming legislative changes.

The new administration of President Gustavo Diaz Ordáz (1964-70) immediately began to work towards creating a more attractive market for investors. To achieve this end new regulations governing the 1961 law were passed repealing those of 1962.⁸⁰ An important modification adopted by the new program effected the export and production tax reduction. Prior to the change the tax was paid first and a fifty per cent rebate as returned upon application. Under the new fiscal measure there was an automatic fifty per cent reduction in export and production taxes in minerals, metals and metallic compounds originating in Mexican or Mexicanized firms.⁸¹ Large amounts of tax revenue, the refund of which were previously subject to wide administrative discretion,⁸² were thus

79. U.S. DEP'T OF THE INTERIOR, MINERAL YEARBOOK 1965, AREA REPORTS: INTERNATIONAL, MINERAL INDUSTRY IN MEXICO 1 (1965).

80. Regulations of New Mining Law of 1961, D.O., Dec. 7, 1966, at 1.

81. *Id.* at 3.

82. *Id.*

free from deposit with the government. Mexico witnessed a long crisis in its prime mining industry before arriving at much-needed reforms. Since that time the government's attitude has been quite favorable toward foreign investors and new guidelines are more clearly expressed to the public.⁸³

CONCLUSION

As a consequence of a series of historical events Mexico has achieved a high level of sophistication in its legal attitudes towards foreign capitalists. The Revolution of 1910 was the first major expression of nationalism. The Constitution of 1917 reaffirmed the nation's intention to control the subsoil wealth for the benefit of the Mexican people. Later presidential administrations repeatedly expressed the need for Mexican participation "in the profitable use of their own resources. . . ." Heightened periods of nationalistic tension reoccurred when domestic economic growth slowed and when the nation's balance of payments worsened. Nationalistic groups like CNIT seemed to be active almost constantly in denouncing the foreigner. The government turned, however, from the harsh means of controlling outside capital by expropriation in 1938 to more sophisticated legal and administrative restraints and guidelines.

Countries that host significant amounts of international capital in crucial national resources are likely to experience similar periods of evolutionary development as did Mexico. For example, the recent Peruvian expropriation of foreign-owned oil properties might be viewed as similar to the Mexican expropriation of 1938; foreign investors, seeing the tide of nationalistic sentiment swept in with Peru's new government, might have been forewarned of events which followed. Whether Peru will turn to less drastic measures in the future is a question for time to answer.⁸⁴

Not all nations will react alike to foreign investment but legal restraints are certainly a likely course. Although any single piece of legislation is caused by complex historical and contemporary elements, a recognition of the role of nationalism as a countervailing factor in determining the ultimate character of investment restraints can aid foreign in-

83. CAMARA MINERA DE MEXICO, XXXI Assembly at 5 (1968) and SEMI-MONTHLY DIGEST OF THE MEXICAN CHAMBER OF COMMERCE OF THE U.S., INC. at 1 (Aug. 1, 1969).

84. For an example of legislation in use by several African nations respective to foreign investment see Mitchell, *Foreign Investment Legislation in Africa*, FINANCE AND DEVELOPMENT QUARTERLY, No. 1, 1970, at 7. Under most of these investment codes, negotiations between the foreign investor and the nation are ad hoc and investment provisions are often subject to much administrative discretion. As administrations change officials may feel the need to treat foreign investors differently depending upon economic development needs versus the need to achieve nationalistic goals.

vestors and their advisors in understanding and evaluating what will likely be the environment abroad in the future.

IRA B. ZINMAN