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"MEXICANIZATION:" A CASE OF CREEPING EXPROPRIATION

by

*Luis J. Creel, Jr.**

ON OCCASION, the Mexican Government has intervened in the economic affairs of that country by acting against alien property interests. Sometimes this has been done justifiably, through legitimate procedures; at other times, without convincing arguments or justification, procedures were used which were quite doubtful. On some occasions the taking of alien property can hardly be qualified as expropriation since the compensation provided for in the Constitution was not in fact paid.[1] In these cases outright confiscation might be the most adequate categorization.

The first series of measures concerned the expropriation in 1917 of agrarian properties belonging to aliens pursuant to article 27 of the new Constitution.[2] Years later, when the country was passing through a period of political and social stability, Mexico renewed its interventionist policy in the economic field. This time, however, a new system was devised and applied under the label of nationalization.[3] The state vested property rights in itself and exploited resources and enterprises directly.[4] On June 23, 1937, the nationalization of the most important railroad company was

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[1] FEDERAL CONST. OF MEXICO art. 27.

[2] *Id.* With the enactment in 1917 of the Federal Constitution, the Mexican Revolution of 1910 fulfilled one of its major objectives: the disintegration of large agrarian properties which until then had been concentrated in the hands of a few landlords. In order to achieve this goal it was necessary to change radically the concept of private property. It could no longer be considered an absolute and inviolable right and had to be replaced by a concept which would stress its social content and the need for its subservience to overriding public policy. Thus article 27 of the new Constitution provided that "the Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation in order to conserve them and to insure a more equitable distribution of public wealth." *See* P. ROUAIX, GENESIS DE LOS ARTICULOS 27 Y 130 DE LA CONSTITUCION POLITICA DE 1917 (1954). For a detailed analysis of expropriation of agrarian properties, see W. GORDON, THE EXPROPRIATION OF FOREIGN OWNED PROPERTY IN MEXICO 8-47 (1941).

[3] I. FOIGHEL, NATIONALIZATION: A STUDY IN THE PROTECTION OF ALIEN PROPERTY IN INTERNATIONAL LAW 15 (1957).

[4] This process of nationalization has been confused with other institutions. "[U]nfortunately there is no general agreement amongst learned authorities on public international law as to the legal distinction between nationalization and expropriation, or as to whether such a distinction can properly be made, . . ." Brandon, *Nationalization Before the United Nations*, in FIFTH INTERNATIONAL CONFERENCE OF THE LEGAL PROFESSION 38 (Int'l Bar Ass'n 1954). Despite these conflicting opinions and the evident confusion regarding the nature of both concepts, there seems to be an important distinction between the two. Expropriation refers to the procedure or method through which the property is taken, while nationalization refers to the fact that the expropriated property is to be used only by the state. In other words, once the expropriation is consummated, the interests—such as industries or real estate—pass to the state which then may take three different steps: (a) utilize the property for public works (as in the case of highways or parks); (b) reallocate the property to individuals or groups for their own use (this is the situation in land expropriation); or (c) retain the property—in the case of industries—and operate and manage it directly (as in the case of oil, electric power or railroad industries). It is only in the last case that one may properly speak of the concept of nationalization. Unfortunately in practice the term expropriation has not been used solely to define the procedure but also the subsequent steps taken by the government as described above. This has been the cause of the confusion.

decreed.[5] One year later, on March 18, 1938, President Lazaro Cardenas ended an intensive and continuous struggle between the foreign-owned oil companies and the Mexican Government by nationalizing the oil industry.[6]

The last case of nationalization involved the electric power industry. Here the government did not adopt expropriatory measures as it had in nationalizing the railroad and oil industries. Instead, in 1960, it bought, through peaceful agreements, the few remaining important foreign-owned electric power companies.[7]

Today the so-called policy of Mexicanization has replaced expropriation —or in some instances confiscation—and nationalization. It is the purpose of this Article to show that this current system of public intervention against private foreign interests encompasses the main features and produces the same effects as expropriation. However, since the process of Mexicanization is more subtle than outright expropriation, it might best be called a case of creeping expropriation.[8]

I. NATURE OF MEXICANIZATION

Definition and Historical Development. Mexicanization is a policy of a political and economic nature, directed against foreign-owned enterprises, compelling them to transfer at least fifty-one per cent of their corporate stock to Mexican nationals.[9] Since its inauguration in the early 1960's, the policy of Mexicanization has been applied in such a way as to bring about very significant results. However, the policy itself is not of recent creation but extends back into Mexican economic history. Unlike nationalization, in which the state takes over the use of the property for its direct exploitation, here the government does not have to acquire any property. In the case of Mexicanization the governmental intervention is only intended to force foreign owners of certain enterprises to relinquish the management of the company and to sell part of their ownership. The fifty-one per cent Mexican capital formula was conceived as early as 1925, although it was not known under the currently fashionable label of Mexicanization. The first attempt to put this idea into practice was a proposal in 1925 to limit the foreign ownership of the petroleum industry. This was to be done by restricting foreign investment to forty-nine per cent of the capital. How-

[5] Presidential Decree, published in DIARIO OFICIAL (June 24, 1937).

[6] The oil conflict began in 1914, when President Venustiano Carranza applied important measures to recover the oil—as national wealth—and to regulate the foreign-owned companies' operations in this industry. *See* A. BERMUDEZ, THE MEXICAN NATIONAL PETROLEUM INDUSTRY: A CASE STUDY IN NATIONALIZATION (Stanford Univ. 1963); R. GAITHER, EXPROPRIATION IN MEXICO: THE FACTS AND THE LAW (1940).

[7] Wionczek, *Electric Power: The Uneasy Partnership*, in PUBLIC POLICY AND PRIVATE ENTERPRISE 19, 90, 98 (R. Vernon ed. 1964).

[8] This term was used (not for the first time) by Senator Hickenlooper in his memorandum (containing the "Hickenlooper Amendment") to Congress. 109 CONG. REC. 21,774 (1963). *See also* Domke, *Foreign Nationalization: Some Aspects of Contemporary International Law*, in SELECTED READINGS ON PROTECTION BY LAW OF PRIVATE FOREIGN INVESTMENTS [hereinafter cited as SELECTED READINGS] 303, 309-10 (1964). *See* note 59 *infra*.

[9] A similar definition was formulated during the meetings of the Mexican-French Businessmen Committee held at Paris in October 1964. *See* MEXICAN-FRENCH BUSINESSMEN COMMITTEE, MINUTES 7 (Paris, Oct. 1964).

ever, since foreign interests refused to participate on this basis, the government was forced to abandon the project.[10]

The government, wishing to avoid a repetition of this experience, sought to enact preventive legislation. It began its program by passing the Land Law of 1925 which provided that companies with more than fifty-one per cent of their capital owned by foreigners could not hold land and that if such companies owned land at the time of the passage of the law, they would have to sell this land within a period of ten years.[11] Reaction to this law by foreign governments was immediate and severely critical. These governments argued that "their citizens might be forced to sell their land under disadvantageous circumstances, because of the time limit involved, and that the losses which might thus be sustained would amount to confiscation."[12]

In spite of this opposition the government continued implementation of its program by sporadically passing legislation which contained the same essential elements as the Land Law of 1925.[13] But it was not until 1947 that a comprehensive approach was adopted by the creation of the *Comision Intersecretarial* by Presidential decree.[14] It was designed to coordinate all the governmental efforts to enforce the applicable laws respecting domestic and foreign investment. This marked the most significant step taken by the government to establish an efficient method of dealing with foreign ownership pursuant to the policy of Mexicanization.[15]

The justification of this interference by the state against foreign private interests does not rest on the need of public control over certain industries, as in the case of the oil or the electric power industry. On the contrary, here the state is willing to permit the foreign-owned companies to remain within the sphere of private enterprise provided that ownership and

[10] J. DULLES, YESTERDAY IN MEXICO 157 (1961).

[11] With regard to Mexican companies which possess rural properties dedicated to agriculture, the permission [for a foreigner to acquire shares of the Mexican company] cannot be granted if after the acquisition, there remains in the hands of foreigners fifty per cent or more of the total interest in the company. [Land Law of 1925, *infra*, art. 3.]

Foreigners who owned, before this law went into effect, fifty per cent or more of the total interest of whatever type in companies owning rural properties devoted to agriculture, may retain them until their death, if they are real persons, or for ten years, if they are artificial persons. [Land Law of 1925, *infra*, art. 4.]

Ley Organica de la Fracción I del Artículo 27 de la Constitución, published in DIARIO OFICIAL (Jan. 21, 1926) [hereinafter referred to, and cited as, Land Law of 1925]. *See also* J. WHELESS, COMPENDIUM OF THE LAWS OF MEXICO 555-56 (1938).

[12] W. GORDON, *supra* note 2, at 39.

[13] Examples of this legislation are: *Reglamento de la Ley Organica de la Fracción I del Artículo 27 de la Constitución*, published in DIARIO OFICIAL (March 29, 1926); *Reglamento de la Ley de Aguas de Propiedad Nacional*, published in DIARIO OFICIAL (April 21, 1936). *See also* M. ANDRADE, LEY DE AGUAS Y SUS REGLAMENTOS CON DISPOSICIONES CONEXAS 41-112 (1940); J. WHELESS, *supra* note 11, at 559.

[14] *Acuerdo por el cual se crea una Comisión Intersecretarial para coordinar la aplicación de las disposiciones legales aplicables a inversión de capitales nacionales y extranjeros* (Executive agreement creating an Intersecretarial Commission to coordinate the application of legal provisions governing the investment of domestic and foreign capital), published in DIARIO OFICIAL (June 23, 1947). *See also* PAN AMERICAN UNION, A STATEMENT OF THE LAWS OF MEXICO [hereinafter cited as LAWS OF MEXICO] 28, 43, 44, 45 (1961).

[15] The *Comisión Intersecretarial* has ceased to function. However, during its life many important provisions were enacted regulating foreign investment in Mexico. The most relevant, for present purposes, were the specification of those economic activities which were to be subject to the Mexicanization limitation. *See* note 28 *infra*.

management of such companies will be transferred—in the amount prescribed by the respective laws—to Mexicans. The purpose of this policy, as stated by the government, is to prevent the foreign control of specified sectors of the Mexican economy.[16]

If an attempt is made to define the underlying philosophy behind this policy, probably it could be said that Mexico believes that control over businesses related to public utilities and natural resources should be vested in its nationals,[17] but it is dangerous to make any general statement since there are numerous cases of Mexicanization which cannot be so explained.

Methods of Implementation. In order to execute the policy in question, the government may adopt the coercive route, through legislative action, as in the case of the recent Mining Law,[18] or it may impose, through its executive branch, administrative measures such as tax incentives or import restrictions which will propitiate or accelerate the shift sought in the corporate ownership. Although this Article will focus on the problems arising by the adoption of the first method, it is important, in relation to the latter form, to note that due to the extraordinarily broad discretionary powers vested in the executive, the restrictive measures adopted by it regarding foreign investment in Mexico cannot in many instances be sanctioned by law.

Probably the best example of the abuse by the public administration of these powers is found in the field of tax relief under the provisions of the Law for the Development of New and Necessary Industries.[19] The misuse of the powers granted to the President by this law has resulted recently in a flat denial of these tax reliefs to businesses which, though qualified or subject to qualification as new and necessary industries under the law and entitled, therefore, to enjoy such relief, are carried on by controlling foreign investors.

Constitutionally, this application of the law by the executive can be severely criticized since it denies the equal protection of rights to foreigners and Mexicans granted by the Fundamental Law.[20] Nevertheless, this policy

[16] President Gustavo Diaz Ordaz' Annual Message to Congress (Sept. 1, 1966), *see* note 66 *infra*; *see also* H. VAZQUES, FOMENTO INDUSTRIAL EN MEXICO 34 (1966).

[17] Bustamente, *Introduction* to the Mining Law (1961), note 18 *infra*. *See also* Address by José Campillo Sainz, *Mexico y la Mexicanización de la Minería*, Mexican-North American Businessmen Committee Meeting, San Francisco, Calif., October 1965.

[18] *Ley Reglamentaria del Artículo 27 Constitucional en Materia de Explotación y Aprovechamiento de Recursos Minerales*, published in DIARIO OFICIAL (Feb. 6, 1961) [hereinafter referred to, and cited as, Mining Law]; *Reglamento de la Ley Reglamentaria del Artículo 27 Constitucional en Materia de Explotación y Aprovechamiento de Recursos Minerales*, published in DIARIO OFICIAL (Dec. 7, 1966) [hereinafter referred to, and cited as, Regulations, Mining Law]. *See also* LAWS OF MEXICO 127-44.

[19] *Ley de Fomento de Industrias Nuevas y Necesarias*, published in DIARIO OFICIAL (Jan. 4, 1955). Important comments about the provisions of these laws are found in LAWS OF MEXICO 97.

[20] FEDERAL CONST. OF MEXICO art. 1: "Every person in the United Mexican States shall enjoy the guarantees granted by this Constitution, which cannot be restricted or suspended except in such cases and under such conditions as are herein provided."

Id. art. 4: "No person can be prevented from engaging in the profession, industrial or commercial pursuit, or occupation of his choice, provided it is lawful . . . ."

Id. art. 33: "Foreigners are those who do not possess the qualifications set forth in Article 30. They are entitled to the guarantees granted by Chapter I, Title I, of the present Constitution . . . ."

Article 133 provides that all treaties made in accordance therewith by the President of the Re-

has been justified as a legitimate use of tax assistance to foster the development of Mexican industry with its own resources and not to grant great advantages to foreign capital, thereby jeopardizing the consolidation of Mexico's economy.[21] It is the result of a serious distortion of the government's role based upon a misuse of the legislative function. When Congress grants the executive such broad discretionary power, without adequate, prompt and effective protection by the courts, the rule of law does not govern state activity.[22]

In relation to the export and import duties, article 131 of the Constitution provides that:

> The executive may be empowered by the Congress of the Union to increase, decrease, or abolish tariff rates on imports and exports, that were imposed by the Congress itself, and to establish others; likewise to restrict and to prohibit the importation, exportation, or transit of articles, products and goods, when he deems this expedient for regulating foreign commerce, the economy of the country, the stability of domestic production, or for accomplishing any other purpose to the benefit of the Country . . . .[23]

The executive with the pretense of regulating foreign commerce, the economy of the country or the stability of domestic production, has levied taxes on imports of goods which are indispensable to the operation of foreign corporations or Mexican corporations with foreign shareholders to such a degree that it has made their subsistence economically impossible,[24] forcing them, therefore, to liquidate their companies[25] or to sell their capital to Mexicans.[26] In the latter case, the government achieves the Mexicanization of the enterprise.

Other cases which occur very frequently are those in which the foreign entrepreneurs doing business in Mexico ask the government to modify the tariff duties in order to protect their own production within the domestic market. Likewise, the foreigners may seek the reduction in export duties of their products in order to be able to compete on a profitable basis with other products in foreign markets. Usually the government replies to these

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public, with the approval of the Senate, shall be, together with the Constitution and the laws of the Congress, the supreme law of the land. In this respect, Mexico has concluded many treaties and has participated in various conventions regarding the alien status of individuals. Among the most important are the Havana Convention of 1928 (see article 5) and the Declaration of Human Rights approved on December 10, 1948, and accepted by Mexico as a member of the United Nations (see articles 2, 7, and 23).

[21] H. VAZQUES, FOMENTO INDUSTRIAL EN MEXICO 9, 10, 34, 74, 112, 116 (1966); Rodriguez, *La integración de la industria y el desarrollo económico, Investigación económica*, 18 UNIVERSIDAD NACIONAL AUTONOMA DE MEXICO 664 (1958).

[22] Equally broad discretionary powers are granted to the Mexican executive in the fields of customs, tariffs, and development of natural resources taxes. The latter include mining operations, forest products, fishing waters, and many others.

[23] FEDERAL CONST. OF MEXICO art. 131.

[24] INVESTING, LICENSING AND TRADING CONDITIONS ABROAD 375(b)(834) (Business Int'l ed. 1966).

[25] "One American automobile manufacturer [Studebaker-Packard Corp. of South Bend, Indiana] owner of a Mexican plant was forced to close its doors . . . ." This case was mentioned by Senator Hickenlooper in his comments on creeping expropriations. 109 CONG. REC. 21,774 (1963).

The Wall Street Journal, Sept. 21, 1962, at 1, col. 1, reported that "Production of . . . Swedish Volvos, assembled under contract at the plant, also is cut off." The reason for the shutdown, says the *Journal* is due to the cancellation by Mexico of licenses to import vehicle parts.

[26] "Some firms that fail to follow the Mexicanization path or to increase rapidly their use of local materials may suddenly discover that they can no longer import components or raw materials." Wall Street Journal, Sept. 21, 1962, at 10, col. 2.

petitions by conditioning the grant of the benefits on the transfer of fifty-one per cent of the foreigners' enterprises to Mexicans. "Although the foreign petitioners are not compelled to accept this condition, they must remember that neither is the government compelled to grant the favorable tariff."[27]

II. Legal Validity of the Mexicanization Measures

Mexicanization covers so many different types of industries that it was impossible to enact a general law. Therefore, the specific Mexicanization provisions are found in different laws. In order to determine whether Mexicanization is based on legal grounds and whether it is in accordance with the principles of international law as well as with the Mexican legal system, the coercive measures embodied in several laws must be analyzed. For a better understanding of the problem, it is necessary to distinguish two different situations:

(1) *When the law is in force before the foreigner acquires the ownership of the enterprise.* This would be the case, for example, if a foreigner wants to incorporate an enterprise or become a stockholder of a corporation already in operation in one of the following fields:[28]

I. Radio and television broadcasting;
II. Production, distribution and exhibition of motion pictures;
III. Marine, air, land, urban and interurban transportation;
IV. Fish hatcheries and fishing;
V. Publishing and publicity;
VI. Production, distribution and sale of aerated or non-aerated beverages;
VII. Manufacture and distribution of rubber products, fertilizers, insecticides, basic chemical products;
VIII. Agriculture;
IX. Mining, and some others.

In these fields, the foreigner should be perfectly aware of the limitations which are imposed upon his activities in Mexico.[29] Therefore if he persists in executing his investment plans, he is implicitly accepting such restrictions.

It may be contended that under international law this is discrimination against the foreigner and goes beyond the "international minimum stand-

[27] Mejorada, *Special Treatment by the Mexican Government of Foreign Owned Businesses and Investments*, in The Legal Aspects of Doing Business in Mexico 69, 78 (San Antonio Bar Ass'n 2d Ann. Law Inst. 1964).

[28] The list of activities in which foreign capital is regulated is not published in any official document. This list has been made by internal resolutions of the *Comisión Intersecretarial* and at present by the Legal Dept. of the Ministry of Foreign Affairs. *See* notes 15 *supra*, 29 *infra*.

[29] In exercise of the authority granted by the decree published in the Diario Oficial (June 23, 1947) the *Comisión Intersecretarial* has ruled that any enterprise doing one of the activities mentioned in the above first seven sections must have at least fifty-one per cent of its capital held by Mexicans. In relation to agricultural activities, a like requirement is imposed upon foreigners by the Land Law of 1925.

ard" recognized by all civilized nations.[30] Nevertheless, this argument cannot be accepted because almost all the countries of the world,[31] and the United Nations,[32] recognize that each state as a consequence of its sovereignty, may regulate and administer its natural resources and economy for

[30] The principle of "international minimum standards" provides that: "Aliens enjoy the same rights and are entitled to the same legal guarantees as are enjoyed by nationals, but these rights and guarantees shall in no case be less than the human rights and fundamental freedoms recognized and defined in contemporary international instruments." Amador, *Revised Draft on International Responsibility of the States for Injuries Caused in its Territory to the Person or Property of Aliens* (Article I, Chapter I, Title I), [1961] 2 Y.B. INT'L L. COMM'N 46, U.N. Doc. A/CN.4/101 (1961). This principle has been a guideline for many international courts and tribunals in deciding controversies brought before them. *See* the Morocco Case (Great Britain v. Spain), 2 U.N.R.I.A.A. 615, 640-42 (1924).

Two cases in which Mexico was a party were also decided according to this principle: B. E. Chattin Case (United States v. Mexico), Mexico and United States General Claims Commission, 4 U.N.R.I.A.A. 282, 295 (1927); T. Garcia and M. A. Garza Case (Mexico v. United States), Mexico and United States General Claims Commission, 4 U.N.R.I.A.A. 119, 121 (1926).

The principle is also found in various provisions of Sohn & Baxter, *Draft Convention on the International Responsibility of States for Injuries to Aliens* [hereinafter cited as *Draft Convention*] (draft No. 12 with explanatory notes, 1961), reprinted in SELECTED READINGS 957. *See id.* art. 3, § 2; art. 4, § 2; art. 5, § 1(b); art. 6, § (b); art. 7, § (k); art. 8 § (b); art. 9, § 2(c); art. 10, § 5(c); art. 11, § 2(b); art. 13, § 1(b).

See also A. ROTH, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS (1949); Dean, *The Economics of Dependability*, in PRIVATE INVESTORS ABROAD; RIGHTS AND DUTIES [hereinafter cited as PRIVATE INVESTORS ABROAD] 481, 505 (1965); Folsom, *The Taking by a State of the Property, Acquired Right, or Other Interests of a Foreign National When No Contract Is Involved*, in PRIVATE INVESTORS ABROAD 291, 301; Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 38 MICH. L. REV. 445 (1940); Williams, *International Law and the Property of Aliens*, 9 BRIT. Y.B. INT'L L. 1 (1928).

[31] I. FOIGHEL, NATIONALIZATION: A STUDY IN THE PROTECTION OF ALIEN PROPERTY IN INTERNATIONAL LAW 75 (1957); S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 134 (1953); M. KATZ & K. BREWSTER, INTERNATIONAL TRANSACTIONS AND RELATIONS 779 (1960); G. SCHWARZENBERGER, INTERNATIONAL LAW 100-85 (1957); M. WHITE, NATIONALIZATION OF FOREIGN PROPERTY 102 (1961); Jennings, *State Contracts in International Law*, in SELECTED READINGS 175, 196-97; McNair, *The Seizure of Property and Enterprises in Indonesia*, in SELECTED READINGS 573, 610.

[32] The question of the sovereign powers of the states was subject to discussion at the eighth session of the Human Rights Commission in 1952. A proposal made by the Government of Chile soliciting the inclusion in the two International Covenants of Human Rights of an article providing that "the right of the people to self-determination shall also include permanent sovereignty over their natural wealth and resources" [U.N. Doc. E/CN.4/L.24 (1952)] was adopted by the majority of members. U.N. Doc. E/CN.4/SR.260 (1952). *See also* the Resolution of the General Assembly, G.A. Res. 523, 6 U.N. GAOR Supp. 20, at 20, U.N. Doc. A/2119 (1952).

In the same year (1952), the General Assembly at its seventh session discussed this problem with reference to the Uruguayan draft resolution entitled "Right of each country to nationalize and freely exploit its natural wealth, as an essential factor of economic independence." U.N. Doc. A/C.2/L.165 (1952). After several amendments submitted by Bolivia, United States, Venezuela and India, the draft resolution was approved. G.A. Res. 626, 7 U.N. GAOR Supp. 7, at 15, U.N. Doc. A/2189 (1952). *See also* G.A. Res. 1314, 13 U.N. GAOR Supp. 18, at 27, U.N. Doc. A/4090 (1958).

On December 15, 1960, the General Assembly passed a resolution recommending that, "the sovereign right of every state to dispose of its wealth and its natural resources should be respected." G.A. Res. 1515, 15 U.N. GAOR Supp. 16, at 9, U.N. Doc. A/4684 (1960).

Two years later, in 1962, the General Assembly formally stated that:

> The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned.
>
> The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

G.A. Res. 1803, 17 U.N. GAOR Supp. 17, at 15, U.N. Doc. A/5217 (1962). *See* U.N., THE STATUS OF PERMANENT SOVEREIGNTY OVER NATURAL WEALTH AND RESOURCES (Sales No. 62(V)6 1962); Report of the Secretary-General submitted on Nov. 14, 1963, U.N. Doc. E/3840 (1964). *See also* Schwebel, *The Story of the United Nation's Declaration on Permanent Sovereignty Over Natural Resources*, in SELECTED READINGS 699-719.

the benefit and welfare of society, as long as the human rights of the persons affected are not violated and provided that if a violation is committed, adequate relief is granted.[33]

Since, in this case, the foreign investor has not acquired any rights before submitting himself to the laws of Mexico, there cannot be any deprivation of vested rights nor a violation of the same. Neither can it be said that such a violation exists when the foreigner enters into Mexico, because he is freely placing himself within the legal framework of the country and consequently accepting the conditions previously established in Mexico.

(2) *When the law is enacted after the foreigner has acquired the ownership of the enterprise.* This is the case of all the legal provisions recently adopted by the Mexican Government affecting the rights of foreigners acquired during the more liberal regimes. One of the most illustrative examples is the new Mining Law which provides that:

> Only Mexicans and companies formed pursuant to Mexican laws, the majority of whose capital has been subscribed by Mexicans, have the right to obtain the concessions referred to in this law. Foreign governments and sovereigns may for no reason acquire concessions or mining rights of any kind, nor may they be partners, associates or stockholders of mining companies.[34]

The regulations specify the method of verifying that the majority of the capital has been subscribed by Mexicans.[35] All foreign or Mexican corporations, a majority of whose shares are owned by foreign capital, which had acquired mining concessions before the enactment of the above-mentioned law, must comply within a period of twenty-five years with the capital ownership requirements in order to extend the life of the concessions.[36] Therefore, in order to accomplish this purpose a foreign owner of a concession must transfer his right within the twenty-five year period or in the alternative adopt Mexican nationality. Likewise the foreign shareholders who own a majority of the stock in a mining corporation must sell as many of their shares as necessary to place themselves in a minority status.

Whether the government may legally impose such measures upon foreigners' rights is the question to be resolved by this Article. In order to reach an accurate answer to this problem, it is necessary, first, to analyze the legal nature of the measures imposed, and secondly, to determine their validity in light of international law and the Mexican legal system.

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[33] Without entering into a detailed analysis in relation to the obligation to pay indemnity, it is enough to say that, although Mexico has refused to admit an international obligation to pay such compensation it has recognized that, according to the Mexican legal system, it is bound to comply with this requirement. Thus, Mexico stated before the United Nations that: "Although the relevant articles of the Mexican Constitution clearly show this country's full respect for the principle of nationalization subject to compensation and its prohibition of confiscation, this delegation is not in favor of any reference to safeguards regarding compensation." *See*, in this connection, FIFTH INTERNATIONAL CONFERENCE OF THE LEGAL PROFESSION, *supra* note 4, at 51. *See also* the diplomatic note sent on Aug. 3, 1938, by the Mexican Minister of Foreign Affairs, Mr. Eduardo Hay, to the American Ambassador at Mexico City, Mr. Josephus Daniels, in relation to the Mexican land expropriation, [1938] 5 FOREIGN REL. U.S. 679-84 (1952), 19 U.S. DEPT. OF STATE PRESS RELEASES 135-39 (1938). *See* note 63(b) *infra*.

[34] Mining Law, *supra* note 18, art. 14.

[35] Regulations, Mining Law, *supra* note 18, art. 26 requires, among other things, that the shares must be registered, bearing the owner's name.

[36] Mining Law art. 3 (transitory).

Legal Nature of the Measures Imposing Mexicanization. It is important to note that the present analysis is confined only to those measures affecting rights already acquired by foreigners.

Factual Background. The foreigner who proposes to carry on any kind of business in Mexico will have to fulfill certain requirements provided by the laws in force at that time.[37] He will have to obtain the necessary authorization to incorporate an enterprise,[38] and if he wants to exploit certain industries he will have to obtain the corresponding concession.

In any of these cases, if the foreigner complies with the stipulated conditions, he becomes entitled to various rights such as the right to undertake the activity during the specified period and to profit from the business' operations. These rights have been qualified as "vested rights" and should not only be recognized at all times by the government—which acts, in many cases, as a party in a contract concluded with the foreigner[39]—but should also be fully protected by the laws under which they were granted.

The problem arises when the government, ignoring the acquired rights of the foreigners, and in some cases its own contractual obligations, enacts laws which directly or indirectly obstruct the full enjoyment of such rights. As previously discussed, these laws, in the case of Mexicanization, impose upon aliens the obligation to transfer their rights to Mexicans.

Before entering into the analysis of the legal effects of such Mexicanization provisions, it first has to be determined if there is a contract between the state and the foreigner when the former grants a concession to the latter, and if said contract does exist, then the extent to which the state should be responsible for its breach.

Nature of a Concession. Notwithstanding the various opinions on this matter and the lack of harmony among them, the majority of the authors conclude that, first, a concession constitutes a contract between the state and the concessionaire and, secondly, that the rights granted through the concession are, for all legal effects, vested rights.

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[37] There is in Mexico no general law governing foreign investments as such. There are, instead, scattered provisions restricting or regulating this foreign capital. *See* LAWS OF MEXICO 28, 42, 43, 45, 57.

[38] According to the decree published in the DIARIO OFICIAL (July 7, 1944), *Decreto que establece la necesidad transitoria de obtener permiso para adquirir bienes, a extranjeros y sociedades mexicanas que tengan o tuvieren socios extranjeros* (Decree establishing a transitory obligation to obtain authorization to acquire assets, by foreigners and Mexican corporations which have or may have foreign shareholders), an application for a permit to incorporate or modify a Mexican company having foreign shareholders, must be made to the Secretariat of Foreign Affairs. These permits, if granted, always contain the provisions of the Calvo Clause, whereby the foreigners agree not to invoke the diplomatic protection of their government with respect to any property right which they may thereby acquire. *See also* LAWS OF MEXICO 28, 43, 44.

[39] The term "contract" is used here in a broad sense, covering quasi-contractual obligations also. The Committee on Nationalization of Property of the American Branch of the International Law Association stated that:

> A contract may be implied as well as express. Thus, if a state invites foreign investment pursuant to the terms of a given law, its right unilaterally to alter that law, in derogation of investment made in reliance upon it, is open to question. Not only may the principle set forth above govern such a situation, but the further principle of estoppel or *préclusion* may be applicable.

ILA Committee on Nationalization of Property, *Report*, in SELECTED READINGS 19, 33 n.20. *See* Sohn & Baxter, *Draft Convention*, art. 12, ¶ 1, explanatory note, at 80 (draft No. 12 with explanatory notes, 1961). *See also* Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572 (1960).

In regard to the first remark, it has been said that a concession is "usually a long and complex agreement granting the alien investor the right to engage in stated activities in the host country, and imposing upon it and the government a series of related rights and obligations."[40] Some authorities, finding in concessions the same essential characteristics which belong to contracts, state that "it does not appear possible either on logical grounds or in terms of policy to make a distinction between them."[41] This question has also been brought before international tribunals which have resolved it by clearly establishing the contractual character of concessions.[42]

In respect to the second conclusion, it has been frequently asserted that the rights of the concessionaire constitute vested rights.[43] This right of the concessionaire is recognized by both Mexican[44] and international courts.[45] At the latter level the most exhaustive opinion on this question is found in the award rendered by the tribunal in the arbitration between Saudi Arabia and the Arabian-American Oil Company.[46] In that case the tribunal said that "[a] mining concession necessarily operates a transfer of title, because it is only the right of ownership which gives a person the faculty to dispose of the thing by consuming it or by transforming its substance."[47] It was also noted that a concession "involves, first, a state act and, second, rights of ownership vested in the concessionaire."[48]

Breach of Contract by the State. The question arising here is the extent to which the state should be held liable for the breach of its contractual obligations. In other words, is it lawful for a state to invoke its sovereignty to justify laws which prima facie constitute a breach of the contract in which it participated as a party?

Although using different approaches and relying on dissimilar grounds, most of the writings in this field reach the same conclusion—"the taking of alien contractual rights by a state . . . is a breach of international law."[49]

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[40] D. VAGTS & H. STEINER, MATERIALS ON TRANS-NATIONAL LEGAL PROBLEMS 359 (1966-1967).

[41] *See* Sohn & Baxter, *Draft Convention*, *supra* note 39.

[42] *See* definition of concession given by the arbitral tribunal in the arbitration between Saudi Arabia and the Arabian-American Oil Co. (Aug. 23, 1958), 27 I.L.R. 117 (1963).

[43] Verdross, *Les Règles Internationales Concernant le Traitement des Etrangers*, 37 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 325, 364 (1931). *See also* McNair, *The General Principles of Law Recognized by Civilized Nations*, in SELECTED READINGS 69, 95.

[44] The following cases have been decided by the Mexican Supreme Court: Mexican Petroleum Co., 21 Semanario Judicial de la Federacion [Semanario] 1338 (1927); Tamiahua Petroleum Co., 10 Semanario 1189 (1922); International Petroleum Co., 10 Semanario 886 (1922); Texas Co. of Mexico, 9 Semanario 432 (1921).

[45] *See* German Interests in Polish Upper Silesia, [1926] P.C.I.J., ser. A, No. 7; German Settlers in Poland, [1923] P.C.I.J., ser. B, No. 6.

[46] 27 I.L.R. 117 (1963).

[47] *Id.* at 158.

[48] *Id.*

[49] ILA Committee on Nationalization of Property, *Report*, in SELECTED READINGS 19, 30. In Sohn & Baxter, *Draft Convention*, art. 12, ¶ 1(b), explanatory note, *supra* note 30, the following statement is made: "If the proper law of the contract or concession is the law of the state which is a party to the agreement, that state cannot be allowed to change its laws in order to obtain for its own advantage benefits which are owed to the alien who is a party to the agreement." *See also* Bourquin, *Arbitration and Economic Development Agreements*, in SELECTED READINGS 99, 105; Jennings, *State Contracts in International Law*, in SELECTED READINGS 175, 206; Ray, *Law Governing Contracts Between States and Foreign Nationals*, in SELECTED READINGS 453, 507-08.

The principle *pacta sunt servanda*, as a general rule of law found in all nations, is crucial in resolving this problem.[50] If a state has the power to enter into an agreement with a foreign investor, and does so, it cannot afterwards make unilateral alterations in the *lex contractus*.[51]

The fact that the state, besides being a party, is also a sovereign entity does not make the breach of the contract legal. Thus, if the termination is effected by the exercise of a sovereign power instead of claimed contractual rights, international responsibility of the state directly and immediately arises.[52] Therefore, as one author stated, concession agreements are "not vulnerable to the unilateral exercise of sovereign power destroying the fabric of public and private rights which they create."[53]

It is precisely the misuse of this sovereignty which makes the state liable before international law.[54] It is, in other words, the arbitrary breach of contract by the state which employs its sovereignty to defeat the expectations of the parties, which produces the international tort.[55] Many international judgments have been rendered holding the states liable for breaking their contractual obligations.[56]

It is very important to note, finally, that the breach of contract could occur not only through the noncompliance by the state with its obligations but also by means of enacting legislation which in itself violates the terms of the contract. Thus, one case stated that "there may be little difference between a government breaking unlawfully a contract with an alien, and a government causing legislation to be enacted which makes it impossible for it to comply with the contract."[57]

This latter form of breaking a contract is exactly the system utilized by the Mexican Government when by virtue of new legislation, it imposes its Mexicanization policy upon the foreign concessionaires. But, what is the precise effect produced on the foreigner's rights by the application of these Mexicanization measures? This is the question which now must be resolved.

Expropriatory Effects of Mexicanization. The foreigner as a consequence of the Mexicanization requirement becomes bound to perform a "forced

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[50] For a detailed study of this principle, see Wehberg, *Pacta Sunt Servanda*, in SELECTED READINGS 51-68.

[51] Verdross, *The Status of Foreign Private Interests Stemming from Economic Development Agreements with Arbitration Clauses*, in SELECTED READINGS 117, 135.

[52] Carlston, *Concession Agreements and Nationalization*, 52 AM. J. INT'L L. 260, 261 (1958).

[53] *Id.* at 279.

[54] Mann, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572, 575 (1960).

[55] Wadmond, *The Sanctity of Contract Between a Sovereign and a Foreign National*, in SELECTED READINGS 139, 142, 143, 152.

[56] M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1411 (1937); *see* the following cases: The El Triunfo Case (United States v. El Salvador), [1903] FOREIGN REL. U.S. 859; Turnbull, Manoa Co., and Orinoco Co. Cases (United States v. Venezuela), Venezuelan Arbitration of 1903, RALSTON REPORTS 200, 244 (1904); The National Iranian Oil Co. v. Sapphire Int'l Petroleum Ltd. (Iran v. Canada). For an analysis of the unpublished arbitral judgment delivered in National Iranian Oil Co. v. Sapphire Int'l Petroleum Ltd., *supra*, in 1963 by Mr. Justice Pierce Cavin, Judge of the Swiss Supreme Court, see Lalive, *Unilateral Alteration or Abrogation by Either Party to a Contract Between a State and a Foreign National*, in FOREIGN INVESTORS ABROAD 265, 268-71.

The United States Supreme Court has declared unconstitutional certain laws and resolutions of Congress overriding existing obligations of the state. *See* Perry v. United States, 294 U.S. 330, 331 (1935).

[57] Certain Norwegian Loans Case, [1957] I.C.J. 9, 37.

sale" of his rights which must be done within a limited period. If a comparative study is made between Mexicanization and expropriation, while certain procedural differences may be noted,[58] as far as their effects upon private property are concerned, there seems to be no essential difference.[59] Both expropriation and Mexicanization operate by means of state action to deprive the individual of his property.[60] In either case just compensation should be given; under the first system through a direct payment made by the government and in the latter by tender of the purchase price pursuant to the sale. The similarity of the two systems was declared by the Mexican Supreme Court of Justice when it stated that, "expropriation is equivalent to a forced sale."[61]

Effects of Mexicanization According to Principles of International Law and the Mexican Legal System. There is no provision in the Mexican Constitution regulating Mexicanization, nor is there any rule which could be indirectly applied to this system. However, since Mexicanization produces the same effect as expropriation, it seems reasonable to conclude that Mexicanization must comply with the same requirements as those imposed upon expropriation. The power of expropriation is expressly granted in the Mexican Constitution, but is limited by the following statement: "private property shall not be expropriated except for reasons of public use and subject to payment of indemnity."[62] The state therefore may take private property only if these two conditions are fulfilled.[63]

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[58] The main difference is that while in expropriation the property is taken directly by the state and the persons affected can be nationals or foreigners, in "Mexicanization" the property does not have to be transferred to the state but is almost always acquired by Mexican individuals and the only persons deprived of the property are foreigners.

[59] Due, precisely, to this likeness in the effects produced, between "Mexicanization" and expropriation, the former has been labeled as a case of "creeping expropriation." *See* in this respect: Sohn & Baxter, *Draft Convention*, art. 10, § 3(a), *supra* note 30; definition of expropriation in the International Development Act, 22 U.S.C. § 429 (1961); Folsom, *The Taking by a State of the Property, Acquired Right, or Other Interest of a Foreign National When No Contract is Involved*, in PRIVATE INVESTORS ABROAD 291, 304; Lalive, *Unilateral Alteration or Abrogration by Either Party to a Contract Between a State and a Foreign National*, in PRIVATE INVESTORS ABROAD 265, 268; Vagts & Steiner, *The Scope of Protection: Indirect or "Creeping Expropriation,"* in MATERIALS ON TRANS-NATIONAL LEGAL PROBLEMS 350 (1966-1967); Wadmond, *Summary: The Rights and Duties of Foreigners in the Conduct of Industrial and Commercial Operations Abroad*, in PRIVATE INVESTORS ABROAD 515, 523; Hickenlooper, *Some Recent Instances of Threats of Creeping Expropriation*, 109 CONG. REC. 21,774 (1963); Comment, *Avoiding Expropriation Loss*, 79 HARV. L. REV. 1666 (1966).

[60] The Committee on Nationalization of Property of the American Bar Association, when using the word "taking" as a substitute for the term expropriation explained that this concept of "taking" should not be construed literally. It, said the Committee, "may well involve lesser measures which have the effect in whole or in part, of an appropriation or destruction by the State of alien interests in property and contract" such as, "compulsory sale of its [the company's] stock." ILA Committee on Nationalization of Property, *Report*, in SELECTED READINGS 19, 21-22.

[61] *See* the case of Julio Luján, 4 Semanario 918, 927 (1919).

[62] FEDERAL CONST. OF MEXICO art. 27.

[63] The compliance with these requirements is also imposed upon states by international law.

(a) *Public Utility.* The rule that the state may only deprive an alien of his private property when the "public interest" demands it is an old and fundamental principle of international law, accepted by most civilized nations. See in this respect, the CONSTITUTIONS of: ARGENTINA, art. 38; BELGIUM, art. 2; BRAZIL, art. 141; BOLIVIA, art. 17; BURMA, art. 23(4); CAMBODIA, art. 7; COSTA RICA, art. 41; ETHIOPIA, art. 27; FINLAND, art. 6; GREECE, art. 17; GUATEMALA, art. 92; INDIA, art. 31(2); ITALY, arts. 42, 43; JAPAN, art. 29(3); LUXEMBOURG, art. 16; MONACO, art. 9; PERU, art. 31; PHILIPPINES, art. (iii); PORTUGAL, art. 49; SPAIN, art. 32; SWEDEN, art. 16; SWITZERLAND, art. 22; UNITED STATES, amend. V; THAILAND, art. 29.

Does the Mexicanization procedure comply with these requirements? There is no doubt that it fulfills the first one, *i.e.*, the existence of public use or utility. This fact is accepted not only by the Mexican private enterprise[64] but also by the judicial branch of the government[65] whose opinion

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Hugo Grotius formulated this principle in the seventeenth century, H. GROTIUS, DE JURE BELLI AC PACIS 179 (W. Whewell transl. 1853). *See also* G. SCELLE, PRECIS DE DROIT DES GENS 113-15 (1934).

The following statement is found in Sohn & Baxter, *Draft Convention*, art. 10, explanatory note, *supra* note 30:

> International Law similarly recognizes the power of a state to take the property of an alien but subject to several important limitations. The first of these is an obligation to pay compensation for the property taken . . . .
>
> The other general limitation imposed by International Law on the taking of property of aliens is that the taking must be for a *public purpose*. (Emphasis added.)

International courts and tribunals have invariably affirmed this principle. *See* Portuguese-German Arbitration, 2 U.N.R.I.A.A. 1035, 1039 (1930); M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1411 (1937). *See also* Walter Fletcher Smith Claim, 2 U.N.R.I.A.A. 913 (1929); Chorzow Factory, [1928] P.C.I.J., ser. A, No. 17; Oscar Chinn, [1927] P.C.I.J., ser. A/B, No. 63; German Interests in Polish Upper Silesia, [1926] P.C.I.J., ser. A, No. 7. This principle was finally adopted by the United Nations in 1962, when the General Assembly resolved that, "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of *public utility*, security or the National interest . . . ." G.A. Res. 1803, 17 U.N. GAOR Supp. 17, at 15, U.N. Doc. A/5217 (1962) (emphasis added).

(b) *Payment of Compensation.* It is precisely the payment of compensation that makes legal the "taking" of the foreigner's property. Otherwise, it would be confiscation. The prohibition of confiscating private property is contained in almost all national constitutions. Some examples are found in the CONSTITUTIONS of: ARGENTINA, art. 38; BRAZIL, art. 31; CHINA, art. 15; DENMARK, art. 73(c); DOMINICAN REPUBLIC, art. 6; ECUADOR, art. 183; FINLAND, art. 6; HAITI, art. 15; IRAQ, art. 10; JORDAN, art. 12; KOREA, art. 15; LEBANON, art. 15; LUXEMBOURG, art. 16; NETHERLANDS, art. 4; PERU, art. 29; SYRIA, art. 23; TURKEY, art. 73; URUGUAY, art. 35. Some countries, mainly those in Latin America, deny an international obligation to pay compensation. They argue that this obligation only arises from their own local laws. Note 33 *supra*. *See* Goldenberg Case (Germany v. Rumania), 2 U.N.R.I.A.A. 901, 909 (1928); Sohn & Baxter, *Draft Convention*, art. 10, explanatory note, *supra* note 30; A. VERDROSS, VOLKERRECHT 289 (1955); Hyde, *Compensation for Expropriations*, 33 AM. J. INT'L L. 108, 112 (1939); S. Guka Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863 (1961). The requirement of compensation is also provided in the Resolution adopted, on Dec. 14, 1962, by the General Assembly of the United Nations, G.A. Res. 1803, 17 U.N. GAOR Supp. 17, at 15, U.N. Doc A/5217 (1962).

(c) *Who decides about the existence of Public Interest?* The Mexican Government answered this question in the following terms: "The grounds of public interest may be determined by every state at its own discretion, with such latitude as conditions, social and of every other kind, may require in each case." Note of the Mexican Minister of Foreign Affairs, Mr. Eduardo Hay, to the British Government, CMD. No. 5785, at 4-5 (1938). This principle as stated by Mexico, has been accepted by some international tribunals. *See* the dissenting opinion of Judge Levi Carneiro, in the Anglo-Iran Oil Case, [1952] I.C.J. 93, 159; Norwegian Shipowners' Claims (Norway v. United States), 1 U.N.R.I.A.A. 307-45 (1922); Home Frontier Missionary Soc'y (United States v. Great Britain), 6 U.N.R.I.A.A. 42-43 (1920); James Pugh (Great Britain for Irish Free State v. Panama), 3 U.N.R.I.A.A. 1439-47 (1933); Poggioli Case (Italy v. Venezuela), Venezuelan Arbitrations of 1903, RALSTON REPORTS 847, 863-70 (1904); Faber Case (Germany v. Venezuela), Venezuelan Arbitrations of 1903, RALSTON REPORTS 600, 626 (1904).

[64] *See* Miranda, *Foreign Investments and Operation in Mexico*, 2 ARIZ. L. REV. 187, 195 (1960).

[65] The Mexican Supreme Court has taken an important shift in its interpretation of the concept "public utility." *See* note 63(c) *supra*. When the first cases involving this concept were brought before the court, it expressly declared that "public utility" exists only when "the thing expropriated passes to the benefit and ownership of the community, and not simply to individuals." Julio Luján, 4 Semanario 918 (1919). However, according to the later opinions the criteria of the tribunal has been broadened. At the present time there is no doubt that the transfer of foreign property to Mexicans, for the purpose of Mexicanizing an enterprise, is considered an act which is for the benefit of the community, falling, therefore, within the framework of "public utility." For the trend followed by the Court in this respect, see the "amparos" (injunctions) brought before it by Carlos Certucha, 45 Semanario 4892 (1935); Guadalupe Escandón de Escandón, 45 Semanario 4797 (1935); Eloísa Terán, 44 Semanario 3237 (1935); José de Jesús Conzáles Bretón, 39 Semanario 1811 (1933); Dionisio García Llorente, 37 Semanario 1957 (1933); Manuel Guillén, 34 Semanario 2730 (1932); Sucesión de Miguel Ahumada, 8 Semanario 170 (1921); Enriqueta Vargas Viuda de Flores, 6 Semanario 78 (1920); Julio Luján, 4 Semanario 918 (1919).

is obviously supported by the executive's policy.[66]

In relation to the second condition, *i.e.*, the payment of compensation, many important issues arise. First there is a general principle of law which provides that states have the obligation to pay "adequate" or "fair" compensation for the property taken.[67] However, paradoxically, the application of this principle has been the cause of numerous controversies and the question of the quantum of compensation to be paid is likely to be the subject of greatest disagreement,[68] especially when the property taken is intangible as in the case of Mexicanization. Where the foreigner is not only deprived of the corporate stock—property which already involves several intangible values—but also of the control and direction of the corporation,[69] the problem is more vexatious because of the difficulty in determin-

[66] President Gustavo Diaz Ordaz in his Annual Message to Congress (Sept. 1, 1966) stated:

> Those who would like to open the door to foreign investments without limit or protection forget that through our economic development we strive to consolidate national independence as quickly as possible. We seek a development with independence and social well-being.
>
> Finally, with reference to direct foreign investment, we propose that they be *associated* in minority partnership with national capital. . . .
>
> Far from granting preferential treatment, we try to limit their fields of activity by proposing exclusiveness of the Nation in basic industries and requiring *a majority of Mexican capital* in certain secondary industries, closely linked with basic industries. (Emphasis added.)

[67] This is the term used by the Permanent Court of International Justice. *See* Chorzow Factory, [1928] P.C.I.J., ser. A, No. 17; Jennings, *State Contracts in International Law*, in SELECTED READINGS 175. *See also* Sohn & Baxter, *Draft Convention*, art. 10, *supra* note 30, and note 80 *infra*; E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 184 (1916); P. CARUGNO, L'ESPROPRIAZIONE PER PUBBLICA UTILITA 50 (1962); G. FRAGA, DERECHO ADMINISTRATIVO 513-14 (1960); A. ROJAS, DERECHO ADMINISTRATIVO 635 (1959); G. SCELLE, PRECIS DE DROIT DE GENS 113 (1934); A. VERDROSS, VOLKERRECHT 289-90 (1955); Kissam & Leach, *Sovereign Expropriation of Property and Abrogation of Concession Contracts*, in SELECTED READINGS 353, 375, 405; Bullington, *Problem of International Law in the Mexican Constitution of 1917*, 21 AM. J. INT'L L. 685 (1927); Hyde, *Permanent Sovereignty over Natural Wealth and Resources*, 50 AM. J. INT'L L. 854, 856 (1956); Hyde, *Compensation for Expropriations*, 33 AM. J. INT'L L. 108, 112 (1939); Rubin, *Nationalization and Compensation: A Comparative Approach*, 17 U. CHI. L. REV. 458-59 (1950).

The Supreme Court of Mexico categorically stated: "[T]he indemnification, second requirement for the expropriation, consists in a certain amount of money which is the value of the expropriated property and the redress for the different damages caused by the expropriation." Haas Hermanos y cia, 56 Semanario 1166, 1169 (1938).

The international tribunals have also affirmed this principle. De Sabla Claim, [1933-1934] Ann. Dig. 241 (No. 7) (United States-Panama Claims Commission); Chorzow Factory, [1928] P.C.I.J. ser. A, No. 17; Norwegian Shipowners' Claims (Norway v. United States), 1 U.N.R.I.A.A. 307 (1922).

For a detailed study of the requirement of "promptness" in the payment of compensation, see C. Guevara, Expropriation Without Prompt Compensation Under International Law, 1963 (S.J.D. dissertation, Harvard Law School).

[68] Lalive, *The Doctrine of Acquired Rights*, in PRIVATE INVESTORS ABROAD 145, 197.

[69] A much disputed issue arising here is the right of the state to interfere with the free use by the alien of his property, namely, interference in the control and management of the enterprise. Without analyzing in detail the different legal angles of this problem it is enough to submit here that, as a general rule, this kind of state intervention has been condemned as an expropriatory measure.

The United States Agency for International Development gives several examples of a state's interferences against individuals' rights, which it has classified as cases of expropriation. One of these examples is the "substantial interference in an investor's right of participation in the affairs of the enterprise, *e.g.*, the government decrees that the managerial control over the enterprise shall thereafter be in the hands of some person or body other than that duly chosen by the owners of the enterprise . . . ." AID, SPECIFIC RISK INVESTMENT GUARANTY HANDBOOK (rev. ed. October 1965).

Section 620(e) of the Foreign Assistance Act, the so-called Hickenlooper Amendment, provides that the President shall suspend assistance to any country whose government "expropriates or other-

ing what factors should be included in the proper valuation of said compensation.

According to international law "the fair market value" of the property, at the time and place of the taking, is the amount which should be paid as indemnity.[70] However, it must be observed that this standard is deficient in two essential respects; first, the concept is vague[71] and under the circumstances it may be "a meaningless inquiry,"[72] and secondly, it is solely applicable to tangible property and fails, as in the case of an investment interest in a going business, to take account of substantial intangible values[73] such as, prospective earnings,[74] good will, going concern, concession value, and some others.

For present purposes, the standard adopted by international law will have to be sufficient. In accordance with this standard, an analysis of the Mexicanization cases will be made, to determine if in those situations the proper compensation is paid. For this purpose it is necessary to distinguish two different hypotheses:

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wise seizes ownership or *control* of property so owned." 22 U.S.C. §§ 2370(e)(1) (1962) (emphasis added).

In accordance with the Committee on Nationalization of Property, the interference with the "company's managerial prerogatives" constitutes a taking equivalent to expropriation. ILA, Committee on Nationalization of Property, *Report*, in SELECTED READINGS 19, 22.

See Sohn & Baxter, *Draft Convention*, art. 10, § 3(a), and explanatory note, *supra* note 30.

[70] Sohn & Baxter, *Draft Convention*, art. 10, § Z(b), and explanatory note, *supra* note 30; H. FITZGIBBONS, COMPENSATION FOR INTANGIBLE ELEMENTS OF VALUE OF EXPROPRIATED PROPERTY UNDER INTERNATIONAL LAW 3 (1963); I. FOIGHEL, NATIONALIZATION: A STUDY IN THE PROTECTION OF ALIEN PROPERTY IN INTERNATIONAL LAW 116 (1957).

[71] What constitutes a "fair market value?" What criteria should be adopted for its determination: the prevailing market price for the same or similar assets? the book value? its original price? These and many other questions still unresolved, make the concept of "fair market value" obscure and imprecise.

[72] D. VAGTS & H. STEINER, MATERIALS IN TRANS-NATIONAL LEGAL PROBLEMS 315 (1966-1967).

[73] "In the case of the nationalization of an enterprise operating pursuant to an unexpired concession agreement, it is clear that compensation at the market price of its stock is not adequate and fair. This measure clearly eliminates from payment a significant element of damages." Olmstead, *Nationalization of Foreign Property Interests, Particularly Those Subject to Agreements with the State*, 32 N.Y.U.L. REV. 1122-33 (1957).

"For compensation can never be truly adequate unless the foreign national is granted the benefits of its contract as though there had been no breach, and it had been permitted to perform to the end of the term of the contract." Wadmond, *The Sanctity of Contract Between a Sovereign and a Foreign National*, in SELECTED READINGS 139, 172.

"[T]he foreign contractor . . . is entitled to the profits he would have earned had not his contract rights been taken." ILA Committee on Nationalization of Property, *Report*, in SELECTED READINGS 34.

For an interesting foreign investor's view with respect to expropriation of his enterprises, see George W. Ray, Jr.'s article in which he states the following: "Well, I assure you, that, in the case of a going concern, there is no such thing as adequate compensation . . . ." Ray, *Law and the Perfecting Process: World Needs and the Development of Law*, in PRIVATE INVESTORS ABROAD 1, 63.

See also Sohn & Baxter, *Draft Convention*, arts. 32, 34, *supra* note 30; Schwebel, *Speculations on Specific Performance of a Contract Between a State and a Foreign National*, in PRIVATE INVESTORS ABROAD 201, 207.

A very illustrative example of this problem is the case of the nationalization of the Suez Canal, in which Colonel Nasser, after declaring the "taking" by the state of the Canal, announced that compensation was to be made to the Universal Suez Maritime Canal Co. on the basis of the value of the shares traded in the Paris Stock Market the day prior to the nationalization. The shares' price at this time (July 25, 1956) was not reflecting their real value. The hostile policy of Egypt toward Great Britain and the United States had already brought about a reduction in the value of such assets. For comments on this case see Crawford, *Negotiated Settlements: Anglo-Iranian Oil Company and Suez Canal Cases*, in PRIVATE INVESTORS ABROAD 427, 433-38.

[74] Wadmond, *The Sanctity of Contract Between a Sovereign and a Foreign National*, in SELECTED READINGS 139, 172-73.

(a) *When the foreigner, although pressed by the legal provision requiring him to Mexicanize his enterprise is still able to reach a convenient agreement whereby he sells his shares to Mexicans at a "non-sacrificed price."*[75] In this case the foreigner receives what he considers a satisfactory price for his assets. He freely fixes the value of his property and therefore he cannot later claim that the consideration was inadequate. Consequently the constitutional requirement is fully satisfied, and so is the corresponding principle of international law.

(b) *When the foreigner is not able, within the limited period, to sell his shares at a fair price and is compelled, therefore, to relinquish them at a "sacrificed value."* All foreign entrepreneurs who are obliged by new laws to Mexicanize their enterprises within a specific period of time, will find that, as the deadline approaches, it will be more difficult for them to sell their shares at a satisfactory price.[76] Two typical situations may arise: first, if the foreigner conserves his shares until the end of the legal period, there will be a point at which he will have to sell the shares at a very low price or forfeit them in favor of the nation; and, secondly, sometimes even if the foreigner wants to sell his stock as soon as the law permits him to do so, he might find that there is not enough domestic capital to reach the price fixed by him,[77] or that even if such capital does exist, many potential buyers, aware that the foreigner will have to transfer the shares sooner or later, will rather wait than pay him the amount he is seeking at that precise time.

These special circumstances arising by reason of the Mexicanization laws undoubtedly place the foreigner in a very discriminatory and indefensible position. He is forced against his will to make a sale whereby he is relinquishing his property at a price significantly inferior to its real value.[78] This forced transaction, therefore, despite its having a legal color, is really a confiscatory measure.[79] The foreigner is deprived of his property without

[75] This is what occurred in the two most recent cases of Mexicanization:

Asarco: American Smelting and Refining Co. concluded, in 1965, a voluntary agreement with a group of Mexican entrepreneurs, headed by Mr. Bruno Pagliai, whereby the company retained forty-nine per cent of the capital stock of its subsidiary, Asarco Mexicana, S.A., and sold—at a negotiated price—the rest to the Mexican group.

Panam: Azufrera Panamericana, S.A. de C.V. is a Mexican corporation that was wholly owned by Panamerican Sulphur Co. The parent corporation has retained thirty-four per cent of Azufrera Panamericana's stock. The remaining shares have been divided between Nacional Financiera S.A. (a government financial corporation) which has acquired forty-three per cent and Mexican individuals who hold twenty-three per cent. In this case, the foreign shareholders had to transfer more than fifty-one per cent of their shares to Mexicans to comply with the Mining Law of 1961, which provides, in article 76, that in the case of *national mining reserves* (sulphur falls within this category) sixty-six per cent of the concessionaire's stock capital must be held by Mexicans. *See* THE ECONOMIST 496 (Oct. 29-Nov. 4, 1966).

[76] "Under Mexican decrees requiring sale of a majority of shares to Mexicans by a particular date, American companies are finding it extremely difficult to obtain buyers from Mexican investors willing to pay prices for the stock." Senator Hickenlooper, 109 CONG. REC. 21,774 (1963).

A foreign shareholder of a mining enterprise, trying to comply with the Mexicanization requirement stated: "We looked all over town for a bank, an insurance company or an investment group to sell to, and nobody would touch us." Wall Street Journal, Sept. 21, 1962, at 10, col. 2.

[77] "Lack of Mexican capital has been a major deterrent to the government's drive to promote Mexican control." Wall Street Journal, Sept. 21, 1962, at 10, col. 2.

[78] This type of state intervention against the full use of private property has been severely condemned. Sohn & Baxter, *Draft Convention*, art. 10, § 3, explanatory note, *supra* note 30.

[79] Adriaanse defines confiscation as "any governmental action by which private property is seized without compensation, no matter in what form or under what name." P. ADRIAANSE, CONFISCATION IN PRIVATE INTERNATIONAL LAW 8 (1956).

receiving adequate compensation.[80]

Such interference with private property not only lacks the support of international law[81] but it is expressly prohibited by the Mexican Constitution which categorically provides that "*confiscation* of property and any other unusual or extreme penalties are prohibited."[82]

In order to have a complete view of all the problems which may arise as a consequence of the enactment of laws providing for Mexicanization, it is necessary to answer a remaining question: can the government legally apply, in a retroactive form, laws curtailing rights already vested in foreigners?

In answering this question the Mexican Supreme Court has stated "that non-retroactivity is not of the essence of law."[83] The Court explained its statement in the following terms: "[I]n the case of the law which governs property rights without providing exclusively for its prospective application, there is nothing to prevent the Court from giving it a retroactive effect. The law may be given a retroactive effect if the legislator has so intended."[84]

The Court then stated that "law governs past acts when the public interest requires their immediate application, because there cannot be any vested rights superior to the greatest amelioration of the State."[85] Based on this principle, the Court then elaborated its own rule in these terms:

> When the legislator finds himself faced with simple interests invoked by individuals, he may suppress such individual rights and sacrifice them for the benefit of the Public Community. . . .

The following statement is relevant to this problem: "Where a nation appropriates private property without the offering or granting of adequate compensation to the owner, the act is confiscatory and not one of expropriation." E. RE, FOREIGN CONFISCATION IN ANGLO-AMERICAN LAW 1, 12 (1951).

[80] "To the extent that alien interests are taken without the payment of prompt, *adequate*, and effective compensation, there is confiscation, public seizure of private rights which, in essence, does not differ from that private seizure of private rights that the legal systems of all civilized societies prohibit." ILA Committee on Nationalization of Property, *Report*, in SELECTED READINGS 25 (emphasis added).

[81] Article XVII, § 2 of the Universal Declaration of Human Rights (1950) establishes that "No one shall be arbitrarily deprived of his property." Sohn & Baxter, *Draft Convention*, art. 10, § 2, explanatory note, *supra* note 30, contains the following comment: "On the assumption that all other requirements of law have been met, the taking of title to or the use of property of an alien becomes wrongful *only if the necessary compensation is not paid*." (Emphasis added.)

This principle, says the Committee on Nationalization of Property, is "embedded in international law in substance and in terms." ILA Committee on Nationalization of Property, *Report*, in SELECTED READINGS 26. "[T]he state must respect the rights acquired by a concessionaire and should not trespass against the privileges and immunities conceded in its grant," Habachy, *Content of Sovereignty*, in PRIVATE INVESTORS ABROAD 89, 119. McDouglas & Olmstead, *Brief Amicus Curiae in the Supreme Court of the United States in the Case of Banco Nacional de Cuba v. Peter L.F. Sabbatino and Others*, in SELECTED READINGS 721, 740-41. *See* the diplomatic note sent by Secretary of State Hull to the Mexican Ambassador on July 21, 1938, [1938] 5 FOREIGN REL. U.S. 674-84, 696-702 (1952), 19 U.S. DEPT. OF STATE PRESS RELEASES 135-39 (1938); "[E]xpropriation without compensation is contrary to international law," Anglo-Iranian Oil Co. v. Jaffrate, 20 I.L.R. 316, 328 (Supreme Court, Aden 1953). This principle is also affirmed in Lena Goldfields Ltd. arbitration. *See* Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government*, 36 CORNELL L.Q. 31, 42, 51 (1950-1951). For a discussion of the principle of "adequate compensation" for expropriation see note 67 *supra*.

[82] FEDERAL CONST. OF MEXICO art. 22 (emphasis added).

[83] Cia Mexicana de Petroleo "El Aguila" S.A. y Coags., 62 Semanario 3021 (1939).

[84] *Id.* at 3147, 3148.

[85] *Id.* at 3149.

> In the sense, we set as a general rule that law controls actions in the past when its purpose involves a Public Concern and has before it only private interests. This maxim is founded in the substance of a civil society. The individuals by the very fact of membership in society should sacrifice their private interest in favor of the general welfare; otherwise society will not be possible; society is nothing other than the supremacy of public over private interests.[86]

Without entering into the consideration of the underlying philosophy behind this opinion and its various legal aspects—an analysis which exceeds the limits of this Article—it is enough to say that according to international law two basic principles must be respected by all nations: protection of acquired rights[87] and non-retroactivity of the law.[88] These principles, which are intimately related,[89] express a deep-rooted need of permanence, security and justice which is sought by all civilized states.[90] Mexico has expressly adopted them. Thus, its Federal Constitution provides that:

> No law shall be given retroactive effect to the detriment of any person whatsoever.
>
> No person shall be deprived of life, liberty, property, possessions or rights without a trial by a duly created Court in which the essential formalities of procedure are observed and in accordance with laws *issued prior* to the act.[91]

Although it may be concluded that, in accordance with the principles above-mentioned, no law abridging rights previously acquired may be enacted, it must be remembered that in the specific case of Mexicanization the measures thus imposed are exempted from such prohibition due to the fact that their application is based on the concept of public utility and, therefore, are justified under article 27 of the Constitution of Mexico,[92]

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[86] Opinion granted on Dec. 2, 1939, in the appeal brought before the Supreme Court by the foreign oil companies (Cia Mexicana de Petroleo "El Aguila," S.A. y Coags.) against the decision of the district court considering lawful the expropriatory measures imposed by the Mexican state. 62 Semanario 3021, 3149, 3150 (1939). For an analysis of this opinion see J. ASENSI, LA EXPROPIACION EN EL DERECHO MEXICANO 67-193 (1941).

[87] "The principle of respect for acquired rights is one of the fundamental principles both of public international law and of the municipal law of most civilized States." Arbitral award, rendered on Aug. 23, 1958 in the arbitration between Saudi Arabia and the Arabian-American Oil Co., 27 I.L.R. 117, 205 (1963). *See also* Case of German Interests in Polish Upper Silesia, [1926] P.C.I.J., ser. A, No. 7, at 22-24; Case of German Settlers in Poland, [1923] P.C.I.J., ser. B, No. 6, at 36; Norwegian Shipowners' Claims (Norway v. United States), 1 U.N.R.I.A.A. 309 (1922); Case of Expropriated Religious Properties in Portugal, 1 U.N.R.I.A.A. 9 (1920); J. ROUSSEAU, PRINCIPES GENERAUX DU DROIT INTERNATIONAL 95 (1944).

[88] In the opinion of the International Law Commission, treaties, prima facie, have no retrospective effect. *See* comments of James F. Hogg during the Fifty-Ninth Annual Meeting of the American Society of International Law, [1965] AM. SOC'Y INT'L L., PROCEEDINGS 26.

The European Commission of Human Rights in its decision of July 15, 1965, established that the convention and protocol in accordance "with the generally recognized rules of International Law" can only govern "facts subsequent to their entry into force." [1965] EUR. CONV. ON HUMAN RIGHTS Y.B. 272 (application No. 2095/63).

In the earlier De Becker v. Belgium Case, the Commission had already affirmed the principle of "no-retroactivity," [1958-1959] EUR. CONV. ON HUMAN RIGHTS Y.B. 214 (application No. 214/56).

[89] "In this connection the principle of respect for vested rights appears, so to say, as the other side of the principle of nonretroactivity of laws." Jennings, *State Contracts in International Law*, in SELECTED READINGS 175, 203.

[90] Lalive, *The Doctrine of Acquired Rights*, in PRIVATE INVESTORS ABROAD 145, 155.

[91] FEDERAL CONST. OF MEXICO art. 14 (emphasis added).

[92] *Id.* art. 27.

as well as the principle of international law which permits the expropriation of private property, provided adequate compensation is paid.

Mexicanization, the current policy of the Mexican Government, may be executed by means of administrative or legislative action. In the former case, it is the executive who through the imposition of extraordinarily broad discretionary powers forces, sometimes unconstitutionally, the foreigners to effect the transfer sought. In relation to the legislative method, the validity of the laws providing for Mexicanization depends on different situations. Hence, if the law is in force before the foreigner acquires the ownership of the enterprise, since there are no rights already "vested" in the foreign investor nor a previous contract concluded with the state, there cannot be a violation of international law and the law would be in harmony with the constitutional requirements of Mexico's Fundamental Law. If, on the other hand, the law is enacted after the foreigner has acquired such rights, then the effects of these statutes are exactly the same as those produced by an expropriatory decree; that is, the deprivation of private property. Based on this conclusion, the validity of the Mexicanization measures in this case will depend upon the payment of adequate compensation as required by both international law and the Mexican Constitution. No problem arises when the foreigner who is forced to transfer his shares is able to sell them at a satisfactory price. On the other hand, if the foreigner is not able to reach such an agreement and has to relinquish his shares at a "sacrificed value," then he suffers a loss in his property which should be relieved by the state; otherwise, the measure will be confiscatory and, as such, unlawful.

Many questions remain unanswered: the way in which the government should secure to the foreigners the payment of this adequate compensation; the form in which the valuation of the property taken should be made; the system which should be followed to grant relief in case the state fails to comply with its obligation; the remedies which should be available to the foreigner in these areas; and many others. These are important problems which must be resolved in order to achieve the legality and justice sought by every free society.