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Exploitation of Natural Resources and Environmental Concerns

Jose A. Santos

roller coaster ride. One never knows what is going to happen, but one thing is certain: something unexpected will happen in at least one of the countries in Latin America with whom a company is dealing. It is not like dealing with Ohio and Indiana. Unfortunately, not everyone who attempts to engage in International business is sufficiently aware of the fact that it is a different world.

II. EXPLOITATION OF NATURAL RESOURCES AND ENVIRONMENTAL CONCERNS

A. *Resurgence of Mining Operations and Legal Reform*

MODERATOR — JOSE A. SANTOS:

We are fortunate to have four outstanding speakers to discuss mining operations and the latest legal reforms in Argentina, Chile, Brazil, and Mexico. The first speaker is Pablo Rueda, who is with the Argentine firm of Marval, O'Farrell and Mairal. For the past three years, Mr. Rueda has headed the firm's New York office and is presently assisting foreign mining companies seeking to invest in Argentina. Argentina's law is fairly new, the latest reform came with the help of the InterAmerican and the World banks on the infrastructure side. Our second speaker is Jose Maria Eyzaguirre B. who is a partner with Claro y Cia in Chile. Mr. Eyzaguirre B. was admitted to the bar in both Chile and New York. He was formerly an associate with Sherman and Sterling in New York. He has significant experience in the mining area, and as is well-known, Chile has had a fairly well developed mining sector for a number of years. Our third panel member is Antonio Carlos Goncalves, a partner with Pinheiro Neto-Advogados. He has been in charge of their office in Brasilia since 1974 when it opened. He has broad expertise in civil, commercial, economic, and private international areas at the preventive and litigation levels. He works with the higher courts as well as with the Federal Supreme Court in Brazil. Mr. Goncalves is experienced in mining law, including the organization of mining companies, authorization for developing mining activities, preparation of assignment and transfer of mining rights, and lease of ore agreements. He also assists financial institutions such as the Brazilian Financial Appeal Council. Mr. Goncalves is a member of the Brazilian Bar Association and the Brazilian Mining Institute. He graduated from Sao Paolo Law School of Pontificia Univesidade Católica where he received his Bachelor in Law in 1972 and from Fundacão Alvares Penteado where he received a Bachelor of Accounting in 1966. Our last speaker is Fausto C. Miranda, a senior partner with Miranda, Estavillo y Hernandez in Mexico City. The firm works on a multitude of Latin American legal matters, with a particular emphasis on oil mining, maritime, and environmental law. Mr. Miranda received his B.A.

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from the German College Alexander Von Humboldt, a law degree from the University of Mexico, and an M.B.A. from the University of the Americas in Mexico City. He is a trustee at large of the Rocky Mountain Mineral Law Foundation and has written several articles, including *Exploring for Minerals in Mexico: An Overview of the Legal Considerations*, part of the proceedings of the 27th Rocky Mountain Mineral Law Institute, and *Mining Law and Regulations of Mexico*, which was published in 1993 by the Rocky Mountain Mineral Law Foundation.

1. Argentina

PABLO RUEDA:

I am going to speak about what is happening in the mining industry in Argentina from a legal perspective. In addition to legal reforms in our mining code, a new tax incentive scheme was enacted in Argentina in 1993. The most important reason why foreign mining companies are looking to Argentina today is the change in the legal environment. First, for the past thirteen years, Argentina has had a stable constitutional government. There have been two different presidents coming from two different parties, the last being elected in 1994. Another very important change has been the opening of the economy to foreign investment. This was done by placing foreign investors on an equal footing with local investors. Foreign investment in Argentina does not require any kind of prior approval from the government. Argentina does not limit profit remittances abroad, either by establishing time limits that the investment must remain in Argentina or limits on the amount that can be remitted abroad. Capital repratriations also are not limited. Dividends, profit remittances, and capital repatriations are not subject to any kind of withholding tax. Finally, in this area, it is important to mention that Argentina is eligible for Overseas Private Investment Corporation and Multilateral Investment Guaranty Agency (MIGA) financing facilities.

Another important issue for foreign investors is foreign currency regulations. Argentina lifted its exchange controls over foreign currency in 1989. Now, foreign exchange may be freely bought and sold, and transferred in and out of the country. In 1991, Argentina enacted a law establishing the convertibility of the local currency into U.S. dollars at the rate of one peso equals one U.S. dollar. This is an obligation of the Central Bank to convert local currency into U.S. dollars. The law also establishes that at all times, the gold and foreign currency reserves of the Central Bank shall not be less than the Argentine currency in circulation plus deposits of financial institutions at the Central Bank. This law, coupled with the resulting economic policy, has resulted in a less than 10% yearly inflation rate for the last three years and an inflation rate of only 1.8% for 1995.

Argentina has a federal political structure similar to that of the United

States. The primary statute governing mining is the Mining Code, originally enacted in 1886, but radically reformed in 1993 to adapt its provisions to the requirements of modern mining operations. The enactment of procedural regulations to enforce the federal code is vested in each provincial legislature. Each province creates and regulates its own mining authority to deal with registration of mining properties and compliance with mining regulations. Regarding jurisdiction, the court that hears disputes on mining rights is the court where the mine is located. If it is located in a province, then the provincial courts have jurisdiction. If it is located on federal land, then the federal courts have jurisdiction. An environmental regime was recently established by a special mining environmental law not yet in effect. It is a federal law and delegates its enforcement authority to the National Mining Secretary (NMS), a federal agency, in coordination with the environmental agencies and enforcement mining authorities.

The Mining Code relegates mines into three classes. The first class is a special class targeted by foreign investors. It includes most of the metals, such as gold, copper, and silver, certain fuel, precious stones, and others. Mining concessions granted by the government, whether provincial or federal, are freely transferrable and mortgageable at the time the exploration concession is granted. The concession is irrevocable and lasts until the deposits and reserves are exhausted. Mining concession titles are regulated by the same civil laws that apply to surface real estate.

Prior to the commencement of any exploration in Argentina, a company must obtain an exploration concession from the government. If exploring on provincial lands, the permit is granted by provincial authorities; if located on federal lands, it is issued by the federal government. The exploration application must include, together with other requirements, the boundaries of the territory requested for exploration, a minimum program of the work to be performed, and the equipment and machinery to be utilized.

What rights does the concession grant? The concession grants the right to explore and eventually, obtain an exploitation concession to work any deposit of any mineral, not restricted by the Code, found during the exploration. It is not limited to those minerals included in the exploration petition. This right is exclusive; this means that if the surface landowner or another third party discovers ore within the boundaries of the concession, the discovery is owned by the exploration concession holder and not by the third-party discoverer. Each exploration concession may include up to twenty exploration units. Each exploration unit covers five hundred hectares or 1235.5 acres. Explorers may request up to twenty exploration concessions but not more than 400 exploration units per province. If there are overlapping exploration petitions, they will be considered by the mining authority according to their filing date. Concessions of one exploration unit last 150 days. For each additional exploration unit, the term is extended by 50 days.

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Three hundred days after the commencement of the exploration concession, half of the territory granted for exploration must be released. Seven hundred days after the commencement of the exploration concession, half of the remaining territory subject to exploration concession again must be released.

If you want explore for minerals in Argentina, you must pay a one-time fee of US$400 per exploration unit. The fee is paid at the time of the filing of the application. If the concession petitioned is rejected by the government, the fee will be reimbursed to the applicant in proportion to the amount of area rejected. If you are lucky enough to make a discovery during the course of the exploration, it must be registered with the mining authority. You also must provide samples of the discovery. Upon registration, the concession holder is entitled to request up to double the territory to which he is entitled to exploit. Within one hundred days, which may be extended to two hundred days, the direction, thickness, inclination, and type of ore must be determined in order to set the final limits of the exploitation concession. When this term has lapsed, the discoverer must file a petition with the mining authority, and publications are made. Notices are given to neighboring miners and other surface landowners related to the mines so that they can challenge the claim if they so wish. Finally, the mine is delimited, and the miner must proceed to stake the mine. The delimitation diligence, once approved and recorded, constitutes the title to the mine.

The mining exploitation units are 328 yards by 219 yards. Any discoverer has the right to exploit thirty adjoining or separated mining units of the discovered seam. Mining companies of two or three shareholders are entitled to twenty additional exploitation units, and mining companies of four or more shareholders are entitled to forty additional exploitation units. This makes a maximum of seventy exploitation units per exploitation concession. For each mining exploitation unit, the miner has to pay an annual fee of US$80 per exploitation unit. Investments may not be less than 300 times the annual fee and must be done over a five-year period. If the concession group has more than one exploitation unit, then these fees and minimum investments increase in proportion to the number of units requested.

The Argentine government offers a number of incentives for mining investments under the Mining Code. The first important tax exemption is a five-year exemption from all federal, provincial, and municipal taxes, present or future, on the exploitation, revenue, and property of the mine, as well as the products, facilities, machinery, and equipment related to the exploitation. However, exploitation fees, utility charges, and the local stamp taxes are excluded from this exemption. Another part of the mining code extends the payment of exploitation fees for three years from the time of granting the concession.

In addition to these exemptions, in 1993, a new federal law was enacted providing additional tax incentives and promotional structures. The first

important benefit granted by the law is a thirty-year period of tax stability on taxes in force at the time of the filing of the feasibility report on the project. This means that the miner cannot have his aggregate tax burden increased because of recidivism or enactment of new taxes, federal, municipal, or provincial. The law also provides that if, instead of recidivism or enactment of new taxes, taxes are abrogated or rates are decreased, the new rate will apply in favor of the miner. However, this tax stability does not include foreign exchange conversion rates, export-related tax reimbursements by the government, or value-added tax, which is subject to another regime.

Concerning income tax, the law provides that miners who are registered under the law may deduct 100% of the costs incurred in prospecting and in work for determining the project's feasibility from their income tax statements each year. The law also establishes accelerated depreciation benefits in favor of registered miners. The benefits include a three-year depreciation period for investments on civil works to provide the mining infrastructure that can be depreciated 60% during the first year in which the investment is made and 20% during each of the following two years. Investment in the acquisition of machinery, vehicles, equipment, and installations not included in civil works and infrastructure are depreciated over three years by one-third each year. The law also allows tax-free capitalization of increases on the appraisal of mineral reserves of up to 50% of the appraisal. The Mining Code provides that miners registered under the law may import duty-free capital groups and other groups that are required to fulfill exploitation of the mine and are listed by the mining authority. And finally, the law establishes a cap on the royalties that the provinces can charge of up to 3% of the price of the extracted ores at the mine. An additional law has granted a value-added tax benefit to miners by providing government reimbursement of the value-added tax payment of the miner to suppliers, either local or international, from importing goods into Argentina.

I would like to add a brief comment on environmental considerations of mining in Argentina. First, miners registered under this new tax law for mining must allocate funds to a special account in order to guarantee the preservation of the environmental condition of the concession territory. These funds are income tax deductible up to an amount equivalent to 5% of the extraction and production operating costs. In addition, as of February 24, 1996, a new mining environmental law will be in effect that establishes strict liability provisions, jointly and several, on mining rights holders and persons exploring and exploiting mining operations. The law will require miners to file an environmental impact report on the mining project before they begin mining activities. The report must be updated every two years, based upon the results obtained from its implementation and the new conditions to which the operation is subject.

Finally, as of yet, the law does not provide guidelines on the environ-

mental standards that miners should follow when operating in Argentina. The definition of these standards is delegated by law to the regulatory agency and further regulations. The definition of the environmental standard to which miners must comply when exploiting mines in Argentina is on the 1996 political agenda of the mining regulatory agency and is a major issue in our mining law today.

2. Chile

JOSE MARIA EYZAGUIRRE B.:

Chile is a mining country; mines are a major natural resource of our country. Chile has a mining code. Mining is regulated by the Chilean Constitution under what is termed the mining culture. Basically, under Chilean law, all mines belong to the government. However, that does not mean that you cannot have private ownership. This system has been in effect for four centuries, originating under the Spanish system where private ownership was granted by the Crown. It does work, however, and fairly well. Basically, the government controls ownership, and private citizens, both foreigners or nationals, obtain a mining concession and the property rights, which are secured under the Constitution. Private citizens cannot be deprived of their concession; they acquire ownership of every piece of mineral that is mined out of their concession. It does not differ very much from owning the mine outright.

Concessions are of two types. There is an exploration concession, which gives you two rights. First, it gives you the right to explore along the lines that you specify when you request the concession. There is no restriction on the land that you may request for exploration purposes, although the size of each exploration concession is limited. A single applicant can apply and obtain an unlimited number of contiguous concessions. Second, there is an exploitation concession, which gives you the right to exploit the mine within the boundaries of the concession and appropriate the minerals therein.

An exploration concession is granted for two years and can be extended for an additional two years. The term of an exploitation concession is indefinite, until you have mined the last piece of mineral that you were supposed to find within the boundaries of the concession. Concessions are granted by a judicial decision, rendered by a competent judge in the context of a nonlitigious proceeding filed with the court. In Chile, the judiciary is an independent body, and basically, no administrative agency of the government has a say as to who receives a concession. Anyone may apply, whether a foreigner or a national, for a concession. A publication containing a copy of the registration must be made to ensure that there are no third-party rights involved, and then the concession is granted. It is as simple as that. That is perhaps why the mining industry has grown so quickly over the past

twenty years.

An annual royalty must be paid to the government for each exploration or exploitation concession. The royalty is not terribly expensive, but if the project contains many concessions, covering a large area, it could be expensive if the property were not mined. The purpose of the royalty is to ensure that the land will be mined and that the community as a whole will benefit from the concessions. An exploration concession is relatively inexpensive, but if you claim more than a few thousand hectares, it can be expensive. An exploitation concession is five times more expensive. Otherwise, there are no special fees for mining property in my country.

You need to be fully cognizant of the environmental regulations in Chile. The mining industry is a major polluter and is subject to environmental controls. Environmental regulation, however, is still at a primitive stage in Chile. An environmental act was enacted approximately one year ago. The regulations are being completed and quite likely will come into full force by the end of this year. An environmental report must be prepared before you carry forward with a project. Basically, it determines what the impact will be on the community. In addition, all mining companies, particularly those from the United States, who carry on business in Chile must comply with each and every requirement under U.S. law in connection with their mining properties in Chile.

Let us take a hypothetical situation where a U.S. company, whose name is Kopper, Inc., wishes to invest in Chile. It has a number of questions regarding a project of this nature. The first is: could it, as a foreign company, purchase or develop a mining property situated in Chile? The answer is yes. Is there any difference in the treatment of foreign or Chilean companies? No. Kopper will be treated just like any individual Chilean citizen or company. Will Kopper receive any assurance? Yes, Kopper will get an investment contract that is signed by the Republic of Chile and binds not only the executive branch, but also the Congress. Therefore, if you do not receive equal treatment, you have legal recourse.

May Kopper bring foreign currency into Chile for the purpose of paying for the mine or for developing a mining project that Kopper has assumed? For the most part, Chile welcomes foreign currency. However, Chile is swimming in foreign currency, for one reason or another, and the Central Bank has implemented certain restrictions on foreign financing. Can Kopper get its investment back? Yes, but with one restriction. However, I think as the region becomes more open, Chile will certainly have to do away with the restriction. You can take profits out at any time without any restriction. Capital, however, must stay in Chile for at least one year. In reality, this is not a restriction when it comes to mining projects, because mining projects are designed to run for more than ten years. This restriction has been in force in Chile since 1934. When it was enacted, it was extremely attractive.

However, it is currently viewed as being an unattractive restriction. Argentina does not have it. Peru basically has abolished all restrictions on foreign investments of this nature, and the same is being done throughout the region. Therefore, Chile will need to follow suit.

What are the principles that control and govern foreign investment in Chile? Four principles underlie foreign investment control. First, everyone can enter into a foreign exchange contract without restriction. This has been true for a number of years and is becoming more and more the trend throughout the region. The second principle is that we have two foreign exchange markets in Chile. There is the formal market, which is the market composed of banks and certain exchange entities. And, there is the informal market, which is composed of everyone else, and is an unregulated market.

The third principle is that the Central Bank of Chile may impose restrictions on the formal market, that is, on the bank market. For example, prior approval is required for federal transactions, such as loan transactions. An investment of any nature, including mining investments, needs the approval of the Foreign Investment Committee. However, in Chile, I do not know of any transaction that has not been approved. But the requirement is still in place and will remain in place. Apparently, the requirement was going to be removed, but after the Mexican crisis, it was reaffirmed by the authorities who thought that sometimes when an economy is too dependent on foreign investments, it may become too volatile. Sometimes, soft restrictions of this nature prove useful. Additionally, certain transactions must take place in the formal market. This allows the Central Bank to know what is going on. This requirement applies to loans. Loans must be converted into pesos at a rate agreed to by the converting bank and the foreign investor. It is clearly unregulated, but must be converted into pesos. The same applies to foreign investments. The fourth principle is that all transactions required to be performed in the formal market cannot be effected outside of that market, either in pesos or in goods.

How can Kopper get its investments and profits back to the United States, the country of origin? Profits can be returned by purchasing foreign currency with the pesos obtained and then taking them out of Chile. It is as simple as that. The proceeds of an export project, paid in foreign currency, may be brought back into Chile and converted into pesos or left out of Chile in foreign currency.

One of the main features of a project finance structure is that typically you finance a project on its own. You do not need additional security from the shareholder. This is achieved with the export proceeds that are left in a special account, for a specified amount of time over which the secure interest is granted to the lender bank.

Are there any regulations restricting foreign financing? What if I decide to finance not only with securities, but also with loans? The Central Bank

believes that Chile has too much foreign currency within the country, and that this disrupts the economy, driving inflation up and the foreign exchange down. Chile has a restriction requiring that a deposit must be made with the Central Bank for one year and be equal to 30% of the loan. If you loan US$1 million in Chile, US$300,000 is locked in for a year; otherwise, you are required to pay a flat fee of 10% on the US$300,000. So, out of a US$1 million loan, US$30,000 is a reasonable cost when it comes to financing a project in Chile.

Finally, what kind of rights, if any, does Kopper have if something comes up? If for example, Kopper is expropriated? If at any time, either a foreign or national company is expropriated, you have the right to be paid in full for the present value of the project, before it is taken over by government. This right is secured not only in the investment contract with the republics within Chile but also under the Chilean Constitution.

3. Brazil

ANTONIO CARLOS GONÇALVES:

Brazil has had various economic plans targeting the end of inflation. In the short term, these plans created an environment for slashing inflation. However, they all suffered from the same drawback of focusing only on the first phase of the solution: low inflation for a limited period of time, which would serve as a transition until long-lasting reforms could be definitively implemented. Nonetheless, this economic plan puts Brazil squarely on the right path. Inflationary indices have been substantially reduced when compared with indices for the last few years. The administration is aware that the effective elimination of inflation depends on structural reforms, in addition to changes in our Constitution, essential for giving the private sector in Brazil more space.

Laws 9249 and 9250, enacted in December 26, 1995, were an important step toward tax reform and the creation of a fair tax system. By enacting these two laws, the Brazilian government seeks to simplify the tax system, thereby making tax collection easier and curbing tax evasion to increase tax revenues, in addition to eliminating indexation of the economy and strengthening the current economic plan.

The privatization process has been defined by law, and this is a great step forward. Along these same lines, the privatization of Companhia Vale do Rio Doce is well under way and will inevitably lend considerable impetus to the domestic market as a result of the participation of foreign companies. Additionally, the Concession Law, recently approved by Congress, paves the way for the private sector to participate in areas previously restricted to the state, mainly generation, transmission, and distribution of electric energy. This is one of the most important legal developments in recent times and is

in keeping with the targeted modernization of our economy. This law is quite flexible, establishing an adequate base for private sector investment, both domestic and foreign.

As to the Brazilian Constitution, there have been substantive changes with the effect of equalizing all Brazilian companies, regardless of whether they are controlled domestically or from abroad. This is a change of real consequence for the mining sector in Brazil because foreign investors now can control a mining company formed in Brazil, along with its day-to-day mining operations. Consequently, the influx of foreign mining entities into Brazil has increased appreciably.

Another important constitutional amendment allows the Brazilian government to contract state-owned or private enterprises to carry out activities that formerly could be performed only by the state. These activities include prospecting and mining of petroleum and natural gas deposits; refining of domestic or foreign petroleum; import and export of domestic crude oil or basic derivatives from petroleum produced in Brazil; and transportation by pipeline of crude oil, derivatives, and natural gas from any provenance. Although still a federal government monopoly, these activities now may be developed by state- or privately-owned companies on conditions to be set forth pursuant to the law. The law provides for the guaranteed supply of petroleum products throughout Brazil, the contracting conditions, and the structure and duties of the entity charged with regulating the federal government monopoly.

These changes in Brazilian law were made by the administration in light of the urgent need to adopt measures targeting globalization of the economy, now a consummate fact, not only by opening up the Brazilian market to the world, but also by seeking out definitive solutions for any problems encountered along the way. Now that these important changes are in place, Brazil is in a position to receive funding for new projects; receive transfers of technology for production, management, and marketing; find acceptance abroad for products manufactured in Brazil; and find domestic acceptance for foreign companies wishing to enter the Brazilian market. Brazil is seeking not only to bring itself in line with the most modern economies, but also to prepare itself for the twenty-first century.

Mining activities in Brazil are basically governed by the Mining Code, Law 227, enacted in February 1967. A body of specific law also exists on other mining activities. Brazil considers mineral resources to be a public asset, as do a number of other countries. For purposes of exploration or commercial use, all deposits and mineral resources are considered to be a property distinct from that of the soil. These mineral resources can only be prospected and mined with authorization and concession from the federal government. The concessionaire is entitled to the mining output.

As provided for in the Mining Code, the legal regimes for the develop-

ment of mineral substances in Brazil are the concession, authorization, licensing, *garimpeira* (alluvial) mining permit, and monopoly regimes. The concession regime entails a group of coordinated operations targeting industrial use of an ore deposit, from extraction to processing of useful mineral substances. The concession is granted by an ordinance issued by the Minister of State for Mines and Energy, to whom the President of Brazil has delegated this authority.

The authorization regime entails execution of the work needed to define a deposit, including appraisal and determination of the economic use to which it will be put. This authorization is granted in the form of a mineral prospecting permit issued by the Director of the Brazilian Department of Mines (DNPM). The licensing regime entails use of mineral substances intended for immediate use in civil construction, clays that go into red tile ceramics, and dolomitic limestone, used to treat the soil for agricultural purposes. This regime requires not only that a specific license be obtained from the local authorities, but also that it be registered with the DNPM.

The *garimpeira* (alluvial) mining permit regime entails the immediate use of a deposit that due to its nature, size, site, and economic use can be developed without any preliminary prospecting. In this case, a permit from the Director of the DNPM must be given to a Brazilian citizen or *garimpeiros* cooperative that is authorized to operate as a mining company. A *garimpeira* permit will be granted for up to five years and may, at the DNPM's discretion, be renewed. The permit is only granted for an area of 50 *hectares* except when granted to cooperatives. The following minerals can be mined under this regime: (I) gold, diamonds, cassiterite, columbite, tantalite, and wolframite, only in their alluvial, elluvial, and colluvial forms; and (II) sheelite, rutile, quartz, beryl, muscovite, espodumenium, lepidolite, other gemstones, feldspar, mica, and others to be specified by the DNPM. The *garimpeira* mining regime involves mining only in the areas set aside for this purpose. These areas, usually located in the hinterlands, are known as *garimpeira* mining reserves. According to data published in a 1993 U.S. trade magazine, gold prospecting in Brazil has plummeted since 1988, as most alluvial areas are being exhausted. As a result, Brazil is increasingly dependent upon the formal mining carried out by mining companies through techniques for prospecting for primary minerals.

The monopoly regime refers to direct or indirect mining activities performed by the federal government pursuant to the law. The Brazilian Federal Constitution bestows on the federal government a monopoly on prospecting, mining, enriching, reprocessing, manufacturing, and commercial use of nuclear minerals and derivatives. The federal government also has a monopoly on prospecting and mining of petroleum, natural gas, and other liquid hydrocarbon deposits; refining of Brazilian or foreign petroleum; import and export of petroleum byproducts; and maritime transport of

Brazilian or foreign crude oil and derivatives manufactured in Brazil, as well as pipeline transport of crude oil, byproducts, and natural gas of any provenance. The Brazilian government may contract state-owned or private companies to carry out these activities.

As in other countries, with some variations, Brazilian laws also classify deposits into classes of mineral substances. The Brazilian mineral regulations limit the areas eligible for prospecting purposes according to their classification. The Minister of State of Mines and Energy may authorize areas as large as 10,000 *hectares* for the mining of certain classes, provided that such works are carried out in the hinterlands or other regions of remote access, and that substantial investments and state-of-the-art techniques are employed. Prospecting and mining of mineral resources within indigenous reserves are conditioned upon approval of the Brazilian congress, after consulting the indigenous communities affected. These communities will be entitled to a participation in the mining output.

Of the five legal regimes for the development of mineral substances, the most widely used in Brazil are the authorization and concession regimes, targeting exploration (prospecting) works in the first phase and commercial use of the mining output (mining) in the second phase. Upon filing an application for a mineral prospecting authorization with the DNPM, the individual or corporate applicant becomes entitled to priority status over the area in which they intend to carry out mining activities for economic use on a technical basis.

The Brazilian mining regulations set out a time table for prospecting. The mineral prospecting authorization is valid for three years and may be renewed at the DNPM's discretion. At the end of the first eighteen months, the holder of an authorized area of more than 50,000 *hectares* in the aggregate must advise the DNPM of the waiver of at least fifty percent of the original authorized area, as a condition for the mineral prospecting validity in its third year. Alternately, the holder can submit to the DNPM a technical justification to maintain the whole or more than fifty percent of the authorized area during the third licensed year.

The holder of a mineral prospecting authorization must start prospecting within sixty days of publication of the corresponding permit in the *Official Gazette* of the federal executive, in accordance with the prospecting plan approved by the DNPM. The holder can only interrupt prospecting with a showing of good cause. Failure to meet these and other obligations will entail sanctions ranging from a warning to the cancellation of the authorization. Additionally, DNPM must be promptly advised of commencement, interruption, or recommencement of prospecting work, as well as of the finding of other mineral substances qualifying for commercial use that were not set forth in the mineral prospecting authorization.

As prospecting work comes to an end, the title holder must provide the

DNPM with a final prospecting report, which may be approved if the existence of an economically and technically feasible deposit is evidenced, or not approved if a deposit cannot be properly evaluated in view of insufficient prospecting work or technical deficiencies in the report, or shelved if there is no proven deposit fit for commercial use on a technical basis. Approval or shelving of a final prospecting report will stand for an official acknowledgment that the area was properly prospected. The title holder will have one year after approval of the final prospecting report to either apply for the corresponding mining concession or offer the report to third parties.

Except in the event of *force majeure*, the DNPM requires holders of mining concession to commence work within six months of the publication of the corresponding concession in the *Official Gazette*. They also are required to file a report each year on their mining activities. Mining activities may be developed until the exhaustion of the deposit, provided that the concessionaire complies with the provisions of the mining laws, which do not set out a time frame for economic exploitation of ore deposits. A variety of obligations must be met by the concessionaires, such as promptly advising the DNPM of any other mineral substance found in the deposit that was not included in the corresponding ordinance. Commercial use of this unlisted mineral substance will be subject to an addendum to the mining ordinance. Prospecting authorizations and mining concessions are personal instruments that may only be assigned to those who can make use of these ordinances pursuant to applicable law. Applications for prospecting authorizations also may be transferred under these conditions.

As stated previously, mineral resources are a public asset. Drawing a distinction between the owners of the land (surface) and of the subsoil, Brazilian laws ensure a participation in the mining output by the federal government, federal district, states, and municipalities, in addition to the owner of the land on which the deposit is located. The participation of the federal government, federal district, states, and municipalities in any mining output takes the form of a pecuniary consideration for the mineral resources extracted for commercial use within their territories. Different rates apply on the net sales of the mining output after the final beneficiation stage before industrial transformation of minerals. *Garimpeiros* are exempt from these contributions.

According to Brazilian laws, landowners are entitled to a fee and indemnity during the prospecting phase and a participation in the mining output after the deposit is put to commercial use. This right has developed because, in most cases, the holder of a mineral prospecting authorization is not the owner of the area to be prospected. The titleholder may carry out mineral prospecting works on third-party lands if the landowners are paid a fee for occupation of the land and for any losses and damages resulting from

the prospecting works. This fee is not the same as a land lease, as the former only reimburses the landowner or squatter for the loss of income caused by the mineral prospecting works. If the landowner and the holder of the prospecting authorization do not come to an agreement as to access to the area to be prospected, then the DNPM will forward a copy of the authorization to the courts of the judicial district where the area is located. These courts must then arbitrate the fee and indemnity that the titleholder must pay to the landowner.

The owner of the land where mines are located also is entitled to a share in the mining output, which is calculated at fifty percent of the amount paid by the concessionaire to the federal, state, municipal, and federal district authorities for the commercial use of the deposit.

Individuals may apply for mineral prospecting, but not for mining concessions. Only mining companies can hold mining concessions. In order to qualify for a mining concession, the company must be organized in any corporate form that is recognized by Brazilian law, with its principal place of business and management in Brazil. It also must be primarily established for the prospecting and commercial use of mineral deposits within the Brazilian territory. Companies must apply for the DNPM's approval to operate as a mining company.

A bill is currently under consideration in Congress with suggested changes in certain provisions of the mining code, such as:

> (1) The mineral prospecting permit may be waived without prejudice to compliance of the Mining Code obligations by its holder; the effects of such permit waivers will be effective on the date of the corresponding application to the DNPM. The respective area will be released on the date that the governmental act acknowledging the waiver is published in the *Official Gazette*.
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> (2) The prospecting permit will be valid for a period of one to three years, at the DNPM's discretion, with due regard for the features of the intended mineral prospecting and its area. Extensions will be permitted at the DNPM's discretion.
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> (3) If a deposit is considered technically and economically unfeasible for mining purposes on a temporary basis, the DNPM may grant successive validity periods for the applicant until the deposit becomes technically and economically feasible or offer the area to third parties that wish to mine the existing deposit.
>
> (4) The subsoil limits for a deposit will be the vertical plan coinciding with the perimeter of the area described in the corresponding prospecting authorization or mining concessions. Limits in horizontal plans may be established on an exceptional basis.

Brazilian laws currently establish rigid deadlines for the development of prospecting and mining works. This sometimes obliges the holders of the concession rights to mine a deposit under adverse market conditions. The granting by the DNPM of successive extensions for the holder of a mining right until the mining deposit becomes technically and economically feasible is a breakthrough in Brazilian mining regulations. If this provision is approved, Brazil will hold a type of working deposit portfolio. The establishment of limits for mineral deposits in a horizontal plan, even on an exceptional basis, is unprecedented. As the bill under consideration makes no provision as to the procedures for establishment of these horizontal limits, we believe that this matter will be treated on a case-by-case basis.

Foreign capital in Brazil is governed by Law 4131, the Foreign Capital Law, and Law 4390. According to Law 4131, foreign capital is any goods, machinery, and equipment that come into Brazil without initial disbursement of foreign exchange and are intended for the production of goods and services. This includes any funds brought into Brazil to be used in economic activities, if they belong to individuals or companies resident or headquartered abroad.

There are two official exchange markets in Brazil; both are subject to Central Bank regulation and operate at floating exchange rates. First is the commercial/financial floating exchange rate market, which is reserved basically for trade-related transactions (import/export), foreign currency investments in Brazil, foreign currency loans to residents of Brazil, and transactions involving remittances abroad subject to preliminary approval by Brazilian monetary authorities. Second is the tourism floating exchange rate market, which was initially developed for the tourism industry, but was later expanded. While both markets operate at floating rates negotiated between parties, the key distinction between them is that the commercial/financial exchange market is restricted to transactions that in certain cases require preliminary approval from the Brazilian monetary authorities, whereas the tourism exchange market is open to transactions that do not require any approval from Brazilian monetary authorities. Exchange transactions are effected by means of exchange contracts and may be divided into transactions entailing the entry of foreign exchange and transactions entailing an outflow of exchange.

Foreign capital should be registered with the Central Bank of Brazil, which will issue a Certificate of Registration reflecting the amount invested. The registration of foreign capital is required when the commercial/financial exchange rate is to be used for the remittance of profits abroad, the repatriation of capital, and the registration of reinvestment of profits. Funds will always be registered in the currency that actually entered Brazil. No preliminary official authorization is required for investment in currency. We

have currency investments, investment by conversion of foreign credits, and investment by import goods without exchange cover.

There are no restrictions on profit distribution and remittance abroad, which in 1995 was subject to 15% withholding income tax. Law 9249 eliminated taxation on distribution of profits and dividends calculated on the basis of the results ascertained as of January 1996. As a result, these profits and dividends are no longer subject to 15% withholding income tax and are not computed into the income tax calculation base of the beneficiary, either individuals or corporate entities, domiciled in Brazil or abroad.

According to the Foreign Capital Law, reinvestments are profits made by companies established in Brazil and assigned to persons or companies resident or domiciled abroad, which have been reinvested in the company that produced them or in another sector of the domestic economy. Foreign capital registered with the Central Bank may be repatriated to its country of origin at any time without authorization. Returns in excess of the registered amount will be considered capital gains for the foreign investor and thus, are subject to 15% withholding income tax. Remittance of funds abroad in foreign currency using the commercial/financial exchange rate is restricted when the funds are not registered with the Central Bank, since the remittance of profits, repatriation of capital, and registration of reinvestment are all based on the amount of foreign investment registered.

The equity owned in a Brazilian company by a foreign investor may be sold, assigned, or otherwise transferred abroad, with no tax implications in Brazil, irrespective of the price paid. The foreign purchaser will be entitled to register capital in the same amount as the registration previously held by the selling company, once again regardless of the price paid for the investment abroad. Application must be made to the Central Bank for issuance of a new certificate of registration reflecting the change in foreign investor, which is essential to allow the new investor to remit/reinvest profits and to repatriate capital.

Mining activities in Brazil are taxable by the tax on distribution of goods and services, the import duty, and the export duty. The tax on the distribution of goods and services is noncumulative and is paid for each transaction involving distribution of goods or services at the same rate as was previously paid by the same company or other Brazilian state or the federal district. The triggering event is the distribution of goods and rendering of services involving interstate and intermunicipal transport and communications. In this specific case, the goods can correspond to anything new or used that can be moved, including livestock as well as minerals. The tax varies from one Brazilian state to another, depending on the essentiality of the goods and services involved. The basic rates are 18% for intrastate transactions, 12% for interstate transactions, and 13% for exports.

Any product that uses minerals as a raw material in its manufacture must

pay a tax on the manufactured products. The transaction giving rise to the merchandise's leaving the plant is taxed, and the rates vary depending on the product's degree of essentiality. The average rate is approximately 10%. Trading in gold, when defined as a financial asset or exchange instrument, is considered a credit transaction and is subject to the 1% tax on financial transactions. Brazilian companies, including mining companies, are subject to a 15% income tax and a 10% surplus tax on the income portion that exceeds R$240.000,00. The results obtained by mining companies abroad are taxed in Brazil. Companies in Brazil are subject to a social contribution on profits of 8%, a social security contribution of 2% on billings, and a profit participation program contribution of 0.65% on billings. Mining companies have challenged in court the payment of social contributions in light of the objective immunity granted to them by the Brazilian Constitution, which sets out that no taxes in addition to the tax on distribution of goods and services, the import duty, and the export duty would be assessed on mining activities. A final position on this issue is yet to be reached.

Brazilian environmental law establishes that mining activities are subject to licensing, an environmental impact study; and the recovery of degraded areas. Depending on the particular phase of the mining project, a prior license, an installation license, and operation license must be obtained. The prior license should be obtained in the planning phase, when a study on the potential environmental impact must be carried out and a report prepared. The environmental impact report must be submitted to the appropriate environmental agency for approval. Granting of a mining concession hinges on the issuance of an installation license by the appropriate environmental agency. The operation license is issued after the mining concession has been granted, provided the environmental control plan has already been satisfactorily implemented. In addition to administrative sanctions, an infractor will be held liable civilly for any damage caused to the environment and for indemnifying the adversely affected party or remedying the damage and criminally, being subject even to loss of freedom.

In closing, in 1994 and 1995, the Brazilian economy underwent various changes. It adopted several measures and implemented the Economic Stabilization Plan. In 1994, inflation was slashed, enabling the Brazilian economy to grow. The gross domestic product grew 5.67%, its largest expansion since 1987, reaching R$361 billion. The Brazilian privatization program also brought in US$1.97 billion, resulting from privatization of nine companies and from minority shareholdings and share surplus of companies already privatized. Foreign investments in Brazil in 1994 reached US$8.1 billion, a 31.8% increase when compared to 1993. Based on these figures and considering Brazil's dimensions with 8.5 million square kilometers and its population of over 150 million inhabitants, with formal and informal economies that trade approximately US$600 billion per year, Brazil is placing

itself in line with the most modern economies and getting prepared for the twenty-first century.

4. Mexico

FAUSTO C. MIRANDA:

In Mexico, the Mining Law of 1992 indicates that foreign investment in mining must comply with the rules governing foreign investment in other areas. Foreign investment in Mexico is subject to the dispositions of the Foreign Investment Law, which does not include the mining industry as an area where foreign capital is limited to a designated percentage. The Mining Law states that the exploration and the exploitation of the minerals may only be carried out by Mexican individuals, *ejidos*[3] and "agrarian communities,"[4] as well as by companies organized under Mexican Laws, whose corporate purpose refers to the exploration or exploitation of mineral substances and who are domiciled in the Mexican United States. While foreign individuals may not hold mining concessions, foreign investment, whether by individuals or by legal entities, may participate 100% in the Mexican mining industry. This refers to foreign capital participation in the incorporation of new mining companies, which may own 100% of the capital. Foreigners also may acquire up to 49% of existing companies without a permit. As a general rule, the acquisition by foreign investors of more than 49% of an existing mining company requires a permit from the Foreign Investment Commission when the value of the assets of the company exceeds approximately US$11 million.

However, under the North American Free Trade Agreement (NAFTA), the opening of direct, 100% foreign capital participation of investors from Canada and the United States in the acquisition of existing Mexican mining companies does not require a permit from the National Commission of Foreign Investments. The participation is subject to the following conditions: the value of the assets cannot exceed (1) US$25 million for the three-year period beginning on the date of entry into force of NAFTA, that is, 1994, 1995, and 1996, or (2) US$50 million for the two-year period beginning three years after the date of entry into force, that is, 1997 and 1998.

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3. *Ejido* is a nucleus of population with legal capacity and private patrimony, which owns land granted by the government or which it acquires under other legal forms. Under the 1992 Agrarian Law, the *ejido* may now resolve that its members turn into private property their corresponding parcels.

4. Agrarian communities are a nucleus of population making communal life, whose existence and land occupied have been recognized by a court of law, thus acquiring legal capacity and ownership over the occupied land. The essential difference between an *ejido* and an "agrarian community" is that the former is granted the land and the latter is recognized as to its rights over its land. Agrarian communities may adopt the *ejido* form and turn their private parcels into private properties.

After the fifth anniversary of the effective date of NAFTA, 1999, North American capital will be able to acquire more than 49% of existing mining companies without prior approval of the Foreign Investment Commission. The thresholds of US$25 million up to US$50 million beginning in 1995 are adjusted annually for cumulative inflation, based on the implicit price deflator for U.S. gross domestic product.

Mexico does not have exchange controls. Business entities may open checking bank accounts in Mexican currency and in U.S. dollars. Likewise, business entities may open bank accounts in the countries and in the currencies they deem pertinent. The official currency in Mexico is the Mexican Peso, accounting records for tax purposes are kept in Pesos and taxes are quoted and paid in Pesos.

Mining is regulated by paragraphs four and six of Article 27 of the Mexican Constitution,[5] which establish the direct domain of the nation over mineral resources and that only Mexican nationals and Mexican legal entities, that is, legal entities organized under Mexican law, may obtain concessions for their exploitation. In addition, the Mining Law regulates the exploration,

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5. CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, art. 27, ¶¶ 4 & 6.

It corresponds to the Nation, the direct domain *of all natural resources of the continental platform and submarine shelves of the islands; of all minerals or substances which* in veins, layers, masses or deposits *constitute deposits whose nature is different from the components of the ground,* such as the minerals from which metals and metalloids used in industry are extracted; the deposits or precious stones, rock salt and the salines formed directly by marine waters; the products derived from the decomposition of the rocks, when their exploitation requires underground works; the mineral or organic deposits of materials capable of being utilized as fertilizers; combustible solid minerals; petroleum and all solid, liquid or gaseous hydrocarbons; and, of the space located over the national territory in the extension and terms fixed by international law.

. . . .

In the cases referred to in the . . . preceding paragraph[], *the domain of the Nation is inalienable and imprescriptible, and the exploitation, the use or the utilization of the resources referred to, by individuals or entities constituted in accordance with Mexican laws may only be carried out by means of concessions granted by the Federal Executive* in accordance with the rules and conditions set forth in the laws. *The legal dispositions relative to the works or labors of exploitation of the minerals and substances . . . shall regulate the execution and proof or work carried out* or to be carried out from their effective date, independently of the date of issuance of the concessions, and the *nonobservance thereof shall cause the cancellation of these.* The Federal Government has the authority of establishing national reserves and to abolish same. The corresponding declarations shall be made by the Executive in the cases and conditions provided by the laws. With regard to oil and the solid, liquid or gaseous hydrocarbons or of radioactive minerals, neither concessions or contracts shall be granted nor shall subsist those which may have been granted, and the Nation shall carry out the exploitation of these products in the terms set forth in the respective regulatory law.

Id.

Florida Journal of International Law, Vol. 11, Iss. 1 [1996], Art. 3

exploitation, and beneficiation of the minerals or substances found in veins, strata, masses, or deposits that constitute deposits of a nature different to those of the components of the ground.

The Mining Law is of public order or of Federal application, and only laws of a Federal nature may impose contributions to exploration, exploitation, and beneficiation activities. Mining has preference over any other use or utilization of the land. A concession is not required for the beneficiation of minerals. From the text of the Mining Law, it is clear that exploration, exploitation, and beneficiation are within the exclusive scope of the private sector. The participation of the government in mining is limited to applying the legal dispositions, fostering the mining industry, and cooperating in the discovery of the location of mineral resources.

The only governmental entity that participates in mining is the Council of Mineral Resources (CRM), whose function is limited to exploring the minerals; only the private sector may carry out their exploitation. The CRM has to apply for exploration allotments following the same requirements of those for an exploration concession, and prior to expiration of the allotments, which have a duration of six years and are not renewable, the CRM must call for public biddings or the allotment will be cancelled. Occasionally, areas explored by the CRM may be declared under very stringent requirements, as Mineral Reserves, exclusively by means of a decree of the Federal Executive. The authority directly responsible for the application of the Mining Law is the Ministry of Commerce and Industrial Development. There are other authorities, such as the Ministry of the Environment, Natural Resources, and Fisheries. Also, there are other ministries, including federal, state, and municipal authorities, that are responsible for the application of other dispositions impacting mining, such as the environment, labor, tax, explosives, and communications.

For years, Mexican legal scholars have debated the question of whether mining concessions are personal or real rights. Mining concessions are administrative acts, which have characteristics of both a personal and a real right. Mining concessions may be defined as an administrative act that gives the right to explore, exploit, and appropriate minerals within the mining lots covered by them, without implying property rights over the surface, and with characteristics of personal and of real rights. Mining concessions are a personal right vis-a-vis their issuer, given that the federal government has the obligation of issuing a mining concession when an applicant complies with the legal requirements for their issuance and for their conversion from an exploration to an exploitation concession, again, after complying with the legal requirements. Further, the federal government has the obligation to permit the concessionaire to explore and exploit the mining lot covered by the concession, as well as to dispose of the mineral products obtained as a consequence of the works carried out during the concession's duration.

Concessions are real rights vis-à-vis erga omnes, as the concessionaire may exercise ownership rights and use, enjoy, and dispose of concessions while observing the relevant legal requirements. Title owners may mortgage the rights derived from their mining concession, assign them totally or partially as in the case of exploration and exploitation agreements, inherit them, or oppose invasion of their mineral rights.

Mining exploration and exploitation concessions grant the rights to:

(1) carry out exploration or exploitation works within the mining lots covered by them;
(2) dispose of the minerals produced from such mining lots as a consequence of the mining work performed during the term of the concession;
(3) dispose of the dumps within the surface covered by the concession, unless they derive from another concession in effect;
(4) obtain by expropriation, temporary occupation, or creation of easement over the necessary surface to carry out exploration, exploitation, and beneficiation works, as well as to constitute dumps, tailings, dross and slag;
(5) use water from the mines for the exploration and exploitation, the beneficiation of minerals or substances obtained, and the domestic use of the personnel employed on the mine;
(6) to obtain concession over the water for uses other than those above (preferred right);
(7) transfer title to the concession of the rights mentioned in (1) to (5) above, to those legally capable of holding mining concessions, except with respect to mining concessions granted on Mexican marine zones, submarine subbase of the islands, keys, reefs, seabeds, and the subsoil of the exclusive economic zone;
(8) reduce, divide, and identify the surface of the mining lots covered by the mining concession, or unify such surfaces with other adjacent concessions;
(9) waive the right to their concessions and the rights derived therefrom;
(10) group two or more concessions for the purposes of proving exploration or exploitation works and render statistical, technical, and accounting reports;
(11) request administrative corrections or duplicates of their titles; and
(12) replace mining exploration concessions by one or more mining exploitation concessions and obtain extension of the term of exploitation concessions for an additional fifty-year period, if requested within the five-year period prior to expiration.

Mining exploration and exploitation concessions require that the concessionaires (1) carry out and prove exploration or exploitation works under the terms and conditions of the Mining Law; (2) pay the mining duties set forth in the Federal Duties Law and file them with the Ministry; (3) file immediate notice to the Ministry of the radioactive minerals discovered during exploration, exploitation, or beneficiating works; (4) observe the general dispositions and the specific technical norms applicable to the mining and metallurgical industry in the areas of safety, ecological balance, and environmental protection; (5) not remove permanent pillars, timbering, and all necessary installations for the stability and safety of the mines; (6) keep in the same place, and in good condition, the monument or signal that indicates the location of the starting point; (7) file with the Ministry of Commerce and Industrial Development the statistical, technical, and accounting reports in the terms and conditions provided for in the Regulations; and (8) allow the personnel commissioned by the Ministry to carry out inspection visits. The Mining Law sets forth the causes of cancellation of mining concession, in all cases respecting the due process of law.

Exploration concessions have a duration of six years and are not renewable. Among the rights they confer is that of applying for an exploitation concession at any time, before the six-year period ends. The exploitation concession must be granted if the legal requirements have been met. There are no limitations as to the surface covered by a concession or the number of concessions held by a concessionaire. Exploration concessions do not grant a right over the surface. Concessionaires do not pay royalties to the government for the exploration of the mining lots that cover the concession.

As to fees, there are duties on filings for services of the General Direction of Mines and of the Public Registry of Mining, annual surface taxes and minimum annual investments in mining works. Surface taxes for exploration, as well as for exploitation concessions, are based on the life of the concession, and they are payable semiannually. Holders of mining concessions, either exploration or exploitation, pay taxes biannually for each hectare or portion covered by their mining concessions. For exploration concessions they are paid during the first year in effect at a rate of US$0.70, from the second to the fourth year at US$2.00, and from the fifth year at US$4.00. For exploitation concessions are paid at a rate of US$9.00 during the first and second year in effect, US$17.00 from the third to the fourth year, and US$30.00 from the fifth year. When a concession covers a period of less than six months, payment is made proportionally. Mining duties are paid biannually in the months of January and July of each year. The July payment is adjusted to the year's inflation. In addition, a copy of payment

must be filed with the Ministry in February and August of each year.

Concessionaires are obligated to make minimum annual investments in exploration works carried out during the calendar year. When the period to be "proved" is less than one year, the amounts listed below are divided by 12 and multiplied by the applicable number of months. If the period is 90 days or less, no "proof" of works is filed. Filings are in May of each year. The minimum annual investments are based on the number of hectares covered by the exploration concession or by a grouping of exploration concessions. According to the 1993 Regulations to the Mining Law, the amount should be updated annually, based on the variation of the price index as published in the Official Daily of the Federation.

Owners of an exploration concession may apply, at any time, for one or more exploitation concessions over the surface covered by their exploration concession. While the exploitation concession is issued, they may exploit minerals under the exploration concession. Exploitation concessions have a duration of fifty years and may be extended for equal terms, if the owners request it, within the five years prior to the expiration of their duration. Exploitation concessions must be issued if the owners have complied with the requirements of law. There are no limitations as to the surface of each concession nor as to the number of concessions that may be held by a concessionaire. Exploitation concessions, as exploration concessions, do not grant a right over the surface. Concessionaires do not pay royalties to the government for the extraction and disposal of minerals.

When assigning the rights derived from the concession, the parties may agree for the assignor to receive from the assignee a royalty freely agreed upon as to time and amount, such as a royalty on net smelter returns. If the concession is acquired from the CRM, under bidding as set forth in the Mining Law and Regulations, a royalty is paid to the CRM; the royalty may not be less than 1% nor more than 3% of the invoice value of net smelter returns.

There are fees on filings for services with the General Direction of Mines and of the Public Registry of Mining. The surface taxes are the same as those for exploration concessions. Concessionaires are obligated to minimum annual investment or value of minerals produced in the case of exploitation works carried out during the calendar year. The minimum annual investment or value of minerals produced in the case of exploitation concessions must at least equal the amount resulting from multiplying the quantity in the table set forth below, by the number of hectares within the lot. For the first year's investment it is calculated from the date of recording of the concession in the Public Registry of Mining.

Proof or works must be filed during May of each year. According to the 1993 Regulations to the Mining Law, the amount of the minimum investment should be updated annually, based on the variation of the price index as

published in the Official Daily of the Federation. The holders of exploration and exploitation concessions may group two or more of their exploration concessions and two or more of their exploitation concessions for the purpose of "proof" of works. The grouping of concessions is permitted, both when they are contiguous concessions and when they constitute a mining or metallurgic unit from a technical or management standpoint.

The investments that are acceptable, both in exploration and exploitation concessions, include, but are not limited to: (1) direct mining works, such as ditches, wells, trenches, tunnels, and anything that contributes to the geological knowledge of the mining lot or to the cubication[6] of reserves; (2) drilling; (3) topographical, photogrametric, and geodesic surveys; (4) geological, geophysical, and geochemical surveys; (5) physico-chemical analysis; (6) metallurgical tests; (7) development and rehabilitation of mining works; (8) acquisition, leasing, and maintenance of drilling and of development of mining works equipment; (9) acquisition, leasing, and maintenance of physico-chemical and metallurgical research laboratories equipment; (10) acquisition, leasing, and maintenance of vehicles for work and transportation of personnel; (11) work and equipment related to safety, prevention of environmental contamination, or reclamation; (12) installation of warehousing, office, workshop, camping, housing, and labor service facilities; (13) acquisition, leasing, construction, maintenance of works and equipment related to access roads, generation and conduction of electricity, extraction, piping and storage of water, and general infrastructure; and (14) acquisition, lease, and installation of equipment for beneficiation operations and tailings dams.

In case of mining exploitation concessions, in addition to the above, accepted investments include: acquisition, leasing, and maintenance of equipment for mining, hauling, and general mine services; acquisition, leasing, installation, and maintenance equipment for beneficiating facilities and tailing dams; and production of economic minerals, based on invoice value or smelter returns.

The Mining Industry is subject to the same income tax regime and tariffs as all other business entities. There are no tax incentives per se, however, there is special treatment of certain items in the income tax law itself and in tax treaties. We will refer to tax issues from the standpoint of U.S. and Canadian investors, making reference to the income tax law and to the tax treaties Mexico has with the United States and Canada. Mexico has bilateral tax treaties to avoid double taxation and prevent tax evasion on taxes on income with several countries all over the world. One major tax issue, which is not an income tax issue but nonetheless is important, is nonpayment of

6. Determination of volume of mineral reserves.

surface taxes, which is a cause of cancellation of mining concessions. Concessionaires who do not pay these taxes within the sixty days following notice of noncompliance will have their concessions cancelled. Also, it is important to note that under the Asset Tax Law, which is a minimum tax of 1.8% per annum, no tax is caused during the preoperating stage or during the two ensuing years from the initiation of operations. The asset tax is creditable against the income tax payable.

It is important to remember that the corporate income tax is thirty-four percent. There is no dividend tax on dividends deriving from after income tax retained earnings. Mining companies have the option of taking the preoperating exploration expenses into an asset account and thereafter amortizing it at the rate of 10% per annum, or deducting the exploration expenses in the year incurred. This option may be exercised for each project. The carry forward of operating losses is ten years. Outside of Mexico City, Guadalajara, Monterrey, and their areas of influence, the income tax law gives the option of an immediate depreciation deduction at rates of (1) 74% instead of 5% for constructions; (2) 78% instead of 10% for machinery and equipment for the first process in the obtainment of metals and railroad cars; (3) 85% instead of 10% for production of electric energy and for its distribution in the mine's operating and ancillary constructions, including housing for labor and personnel, and on all other machinery and equipment, except office furniture and equipment, automobiles, buses, cargo trucks, hauling tractors, tractor trucks, towing cars, and airplanes, which have depreciation rates of 10% and 25%; and (4) 94% instead of 34% for electronic computing equipment and peripheral equipment.

From the standpoint of payments abroad, both under the Mexican income tax law and under Mexico's treaties with the United States and Canada, there are tax issues of which one should be aware. If the source of income in Mexico is from a lease of movable goods, the Mexican tax applicable to a nonresident is 21% under the treaty with Canada, but 10% under the treaty with the United States. If the source of income is from the sale of stock and securities, the Mexican tax will be 20% on gross income or 30% on gain under the U.S. treaty, except there is no tax on the transfer of an entity of the United States. However, under the treaty with Canada only stock of real estate entities is taxed. Interest paid to foreign financial entities or banks is taxed at 15% as a general rule. It is 4.9%, however, if the entities or banks reside in a country that has a tax treaty with Mexico to protect against double taxation, such as the United States. Interest paid to foreign suppliers of machinery and equipment or to finance their acquisition or for inventories and marketing is taxed at 21% as a general rule. However, this is reduced to 10% if the beneficiary resides in a country that has a tax treaty with Mexico. All other interest is taxed at 35% except that under the treaty with Canada and the United States the taxes to nonresidents may not exceed 15%.

The interest portion on financial leases is taxed at 15% as a general rule, except it is 10% if the beneficiary resides in a country with which Mexico has a treaty to avoid double taxation. Royalties on technical assistance, transfer of technology, use of drawings, models, plans, formulae process, and industrial and scientific equipment, as well as copyrights, are taxed at 15%, except under the treaties with Canada and the United States where it is 10%. The rate for the use of patents or improvements is 35% except under the treaties with Canada and the United States, where it is only 10%.

Now, let us turn to mining and environmental concerns. The most important federal legal provisions on environmental matters are found in the Constitution. In addition, there are the General Law on Ecological Balance and Protection to the Environment (GLEBPE) and the General Regulations to the GLEBPE, as well as regulations on environmental impact, atmospheric, water, and noise pollution, hazardous wastes, and sea pollution on discharges. Ecological matters also are covered by international treaties. There are local laws on ecological balance and protection of the environment in all of the states of Mexico. The Mining Law and Regulations in several dispositions require compliance with the environmental laws and regulations. Other federal laws that are applicable to the mining industry include the federal health law; the forestry law; the general law on human settlements; the law on national waters; the law of the sea; and the law on public works as they refer to the CRM.

At the federal level, the key regulatory and enforcing authorities on ecological and environmental matters are the Ministry of the Environment, Natural Resources, and Fisheries; the National Institute of Ecology; and the Federal Attorney General for the Protection of the Environment. The Ministry of the Environment is responsible for dictating and conducting the general policies on ecology and for the application of the GLEBPE. The National Institute of Ecology dictates the scientific and technical norms or rules on environmental matters. The Attorney General for the Protection of the Environment conducts inspections and determines administrative sanctions.

Mining is subject to the legal dispositions on ecological equilibrium and protection of the environment. For exploration activities, if the interested party considers that the environmental impact of its exploration will neither cause ecological disequilibrium nor surpass the limits and conditions set forth in the regulations to protect the environment then, prior to initiating exploration, a preventive report is filed with the Ministry of the Environment. Preventive reports must contain the general data of the applicant or of the person who prepared the project or the corresponding preventive studies; a description of the intended works; and a description of the substances or products to be used in the carrying out of the projected works and of those that will be generated by such work, including atmospheric emissions,

discharge of residual waters, and the nature of the waste generated, including the processes for their final disposal. If the information furnished is not sufficient, the Ministry may request additional information. Thereafter, it analyzes the preventive report and determines if an environmental impact statement has to be filed.

If it is determined that an environmental impact statement needs to be filed, it may have one of three modalities. It may be general, intermediate, or specific in nature. If the interested party considers that the works to be carried out cause or could cause ecological disequilibrium or surpass the limits and conditions of the ecological norms, the impact statement is general. It must contain, at least: (1) data of the interested party; (2) description of the works from the location of the extraction areas, as well as location of ancillary installations such as crushers, mill, tailings, ponds, other installations, housing, and hospitals; the surface required for the foregoing; exploitation and construction of facilities programs; mineral extraction volumes; investments to be made; natural resources to be used during development as well as in normal operations; a program for handling of waste, during construction as well as during production; and a program for abandonment of the area or for closing down; (3) general aspects of the natural and socioeconomic characteristics of the area where operations will take place; (4) relationship with the norms and regulations on zoning, when applicable; (5) identification and description of environmental impacts caused by the mining works at their different stages; and (6) steps to prevent and to mitigate identified environmental impacts at each stage.

If after studying the general statement the Ministry concludes that it is necessary to request an intermediate or a specific environmental impact statement, it will do so. These documents can be requested at any time. The intermediate and specific impact statements require more detailed information. The intermediate impact statement must provide more detailed information regarding items (2) to (3) in the general statement, plus a description of the possible environmental scenario to be changed by the works, as well as the necessary adjustments to the steps to prevent and mitigate damage to the environment.

The specific environmental impact statement must contain (1) a detailed description of the works and their justification, from initiation of works up to closing down of the operations, furnishing in much more detail the information of item (2) above; (2) a description of the environmental scenario prior to the initiation of the works; (3) analysis and determination of the present and projected quality of the environmental components in the area where it is intended to carry out the works, at their different stages; (4) identification and evaluation of the environmental impact to be caused by the works at their different stages; (5) determination of the possible environmental scenario resulting from the carrying out of the works, including changes

in the quality of the environmental agents; (6) description of the preventive and mitigating steps to reduce adverse environmental impact at each of the different stages of the works; and (7) a program for the recuperation and restoration of the impacted area, upon closing down the operations.

B. *Electrification Efforts in the Region: Characteristics of the Regional Power Market*

MODERATOR — BRUCE PETERSON:

Gregory Hazle is Project Director for ESI Energy, Inc. He has direct responsibility for managing the development of specific projects. He is currently involved in a number of international and domestic project opportunities. Previously, he was a financial analyst for Florida Power and Light (FPL). In that capacity he managed a group of financial analysts who provided financial consulting services to management and to other departments at FPL. These responsibilities included direct participation in the negotiation and evaluation of purchased power contracts being considered by the utility. While at FPL, he also provided consulting services on behalf of ESI to the Pakistan Electric Utility on privatization. He holds a BSC in Chemical Engineering from the University of the West Indies and an MBA in Finance from the University of Miami. He has had a wealth of experience in power project financing from which we will benefit.

GREGORY M. HAZLE:

The focus of international investment opportunities in privately owned utilities has shifted from Asia to South America. Currently, Brazil presents the most opportunities for investment, surpassing even India and China. Among the top twenty-five private power markets are Mexico, Argentina, Venezuela, and Colombia. In most of Latin America, the legislative and regulatory frameworks for private power are still under development. In many respects, the pricing mechanism for power in the region is more advanced than the regulated price of power that is the dominant pricing mechanism in the United States. Consider a country like Haiti, where you have six million people sharing a hundred megawatts of installed capacity with absolutely no regulatory framework or rational pricing framework. This is not a monolithic region in terms of the state of development of the power industry.

The scope of private power opportunities varies, depending on the country. In most cases, the beginning element of private corporate participation is the opportunity to purchase existing generating units. In addition, in some countries, for example Jamaica, they actually have started privatization of new generating units. Although the government continues to own the existing utilities, all new power plants are being built by

independent owners. The privatization of distribution and transmissions systems, which are the lines transmitting the power from the generating unit to the endusers, also is taking place. In many instances, this takes the form of regional distribution companies. In cases where large transmission grids are required to interconnect sources of power within the demand areas, those transmission grids also are being offered to private owners. It is fair to say that the countries that have aggressively pursued privatization, such as Chile and Argentina, generally have been success stories in terms of eliminating shortages of power, reducing the price of power, and encouraging foreign investment in the power sector.

Let me speak briefly on the strategy employed by Florida Power and Light for pursuing opportunities in the region. Florida Power and Light (FPL) should be fairly well known to people who are from Florida. We are the fourth largest investor owned utility in the United States and the largest in Florida, serving approximately six million people with an installed generating capacity of between 15,000 and 20,000 megawatts. ESI Energy was formed in 1985 as the unregulated subsidiary of FPL. Since that time, it has developed or become involved in approximately thirty projects, all in the United States, but outside of Florida. One of the unique aspects of our portfolio of independent power projects is the diversity of technologies and fuels that those projects consume. Not only do we own and operate projects that burn conventional fuels, such as fossil fuels and natural gas, but we also have a number of projects, a significant portion of our portfolio in fact, that are renewable energy projects, such as geothermal, wind power, and solar power.

In terms of our strategy for international development, one must recognize that the business is being pursued by a broad variety of companies such as utility subsidiaries and the subsidiaries of equipment suppliers. In many instances, and certainly in the case of the utility subsidiaries, they are neophytes at international activities. In many instances, inexperience shows in terms of the risks that are being taken by some companies. ESI's first strategy is to be very conservative or cautious, recognizing that there is a lot that we have yet to learn. There are a great number of risks in international development that companies used to operating in the United States have not encountered. ESI is focusing on Latin America and the Caribbean as opposed to Hong Kong or Singapore. We are focusing on a region in which we believe we have some strength because of our geographic location. We employ many nationals from the region in our workforce. For example, I am from Jamaica, and there are a number of people within the FPL family who are from Latin America and the Caribbean. FPL also enjoys a strong reputation in the region because of the work it has done with other utilities in the region.

Another aspect that is to our advantage is our experience in renewable

energy projects. We believe that ultimately countries will want to take advantage of their indigenous renewable resources, and that ESI is uniquely qualified to help them develop those resources. An additional important aspect of our approach is local participation. This is one way of mitigating problems that are encountered when negotiating the unknown in each country.

Another element of our strategy is to maximize the degree to which we utilize nonrecourse project financing. We focus on power generation opportunities as opposed to transmission and distribution projects. In the power generation sector, you can isolate risks that are associated with the endusers and their ability to pay, as opposed to selling your power to a utility company who is then responsible for distributing it to the endusers.

We are willing to undertake projects that provide power to either utility or industrial customers. For example, we are looking at projects where the primary user of the product, electricity, would be a mining company or power plant, which either has an existing facility that it is willing to sell or requires new capacities. Our conservative and cautious approach is not necessarily the same approach that a great many of our colleagues in the business are taking. One of the reasons we can afford to take this approach is, unlike some of our competitors, particularly utility subsidiaries, FPL is still growing within the United States. We are not looking at the international market as our only source of potential growth. ESI, because of its willingness to undertake renewable energy and other exotic projects in the United States, still has many domestic opportunities, whereas other companies that are more confined to traditional or conventional technologies do not have many domestic opportunities.

ESI/FPL are involved in a number of Caribbean, South American, and Central American countries. We recently started projects in Ecuador. One of our most recent attempts at participating in the regional market has been in Chile, where we lost a bid on the privatization of a 600-mega watt, coal-fired, existing generation plant in the north of Chile. Chile is a country that we believe is central to our regional strategy. Our chairman, who came from a mining company and has had great success in Chile, insists that Chile must be the centerpiece, or at the very least, an important component of our international portfolio. Therefore, I am currently working on other project opportunities in Chile, including projects associated with new gas pipelines that are being proposed to deliver gas from Argentina to Santiago.

One country where I have spent a great deal of time with limited success is Haiti. There is a great need there, and there also was great momentum because of the political situation and the commitment not only of the United States but of the entire world to support the emergence of democracy in Haiti. This includes some badly needed infrastructure requirements. We continue to work on the development of a power project there. We anticipate

that by the middle of this year we may be commencing the installation of twenty megawatts of new, oil-fired power in Haiti.

Finally, I would like to briefly discuss some of the legal and regulatory issues that we have had to confront. The degree of completion of the various regulatory and legal frameworks in Latin America is one of the common problems we encounter. The excitement surrounding Brazil began because a law was passed that allows private ownership of generating facilities. Bear in mind that many of these cultures consider electric generating assets to be strategic political assets. Very often they are the primary employer in these countries, and most certainly, they have a security aspect to them. Nevertheless, the new law is only the beginning of the framework required in order to have a sustainable private power industry. You still need a process whereby power is set on a rational basis, and where you eliminate impediments to foreign ownership. Countries like Costa Rica and Mexico still have limitations on private ownership of utility assets. There are penalties associated with foreign exchange transfers. In many instances, you have a tax penalty that discriminates against foreign ownership. These penalties often result from the imperfection of our tax code in the United States. The U.S. tax code is designed, conceptually, to eliminate double taxation on profits earned overseas, but the tax code does not work as intended. Invariably, U.S. capital is not competitive with non-U.S. capital because of the tax burden.

In some cases, you have unclear environmental regulations and for a power project, this is of great importance. As was my experience in Haiti, problems also occur when there is unclear allocation of jurisdictional responsibility. In Haiti, nothing happened unless the President of Haiti approved it. There was no governmental entity, ministry, or agency that could make a decision without presidential authority and approval. And then the President's decision had to be submitted to the Congress. In order to attract capital into the portfolio it is imperative to have a regulatory framework that allocates risks to the elements of the society or the participants in the project who can best bear those risks.

Another problem we have had is in the use of local counsel. Invariably, and particularly in a few of the smaller countries, local lawyers have a very limited knowledge of project finance issues, which is at the core of what we are trying to do. In many cases, there is a great degree of politicization of large local law firms. Each law firm has a political connection, and if you pick the wrong one, your corner, as we say in Jamaica, is very dark. You must know all about the local law firms, more than just their legal credentials. The role of the local members of the international development agencies, for example, the local IDB or World Bank representatives, sometimes creates problems. In most countries, if you are unable to get the support of the World Bank, either through their lending or guarantee

programs, the project cannot be done. Furthermore, in some countries, although it is theoretically possible to proceed without their involvement, quite often the development agencies are unwilling to permit this unless they are involved. This is because they have enjoyed control over the utility sector and decisions made in that sector for a long time and do not want to give up that power. Many of you have read of the problems that one of our U.S. development companies had in India with regard to a contract that it held that was repudiated. The problem began when, at the request of the Indian government, the World Bank wrote a critique on the project. Apparently, the report was negative enough to allow the government of India or elements of the government to repudiate the contract although it already had been signed. Of course, these development agencies are completely above the law, that is, you cannot sue them. So, that is an ironic and problematic issue that we encounter in dealing with these very influential agencies.

III. CIVIL LAW COMPARISONS

INTRODUCTION — JOSE A. SANTOS:

This morning's program will begin with Professor Keith Rosen. Professor Rosen is well known to many of us in this hemisphere. He has been with the University of Miami for a number of years. Currently, he runs the foreign law student LL.M. program and is the advisor to the *InterAmerican Law Review* at the University of Miami. Professor Rosen is widely recognized as a Latin American and comparative law specialist.

Because his insight into the region is probably unparalleled, he is a frequent lecturer, a prolific writer, and an excellent researcher. He is widely sought out as an expert witness in various international matters. One could say he educates the judiciary on a frequent basis. Professor Rosen will be the moderator for the civil law comparison program this morning.

MODERATOR — KEITH ROSEN:

We have a very interesting panel to compare the common law and the civil law traditions. First, I intend to give an overview. After a brief introduction to the major differences between the civil law and common law traditions, a historical perspective will be provided by Raul Lozano Merino from Peru. He will be giving it in Spanish, and we will have a simultaneous translation. This will be followed by a presentation by Antonio Estefan on contract formation in commercial relationships. Dr. Estefan has a J.D., a LL.M., and a S.J.B. from the national autonomous university in Mexico. He also attended Harvard Law School, earning a LL.M. with a specialty in international taxation. He currently practices law in the firm of Estefan & Asociados, covering the area of international finance in Mexico. Next, Ariel