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Foreign Investment in Mining in Mexico.

Rodrigo Sanchez-Mejorada Velasco

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FOREIGN INVESTMENT IN MINING IN MEXICO

RODRIGO SÁNCHEZ-MEJORADA VELASCO*

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I. INTRODUCTION AND SCOPE

Mining is one of the oldest economic activities in Mexico: metals were mined before the arrival of the Spanish in 1521.¹ Mercantilist economic ideas, in vogue in Europe in the seventeenth and eighteenth centuries, stressed the accumulation of precious metals by states and saw the American² colonies primarily as providers of such metals.³

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1. See DICCIONARIO PORRÚA DE HISTORIA, BIOGRAFÍA Y GEOGRAFÍA DE MÉXICO 1497 (5th ed. 1986).

2. “American” is used to refer to the continent called America, not to the United States of America.

3. See LEWIS HANEY, HISTORY OF ECONOMIC THOUGHT 113, 119, 125 (4th ed. 1949).

These ideas made mining by far the most important activity⁴ in New Spain.⁵ Foreign (non-Mexican)⁶ individuals and companies have participated in mining activities since the consolidation of Mexico's independence from Spain in 1821,⁷ and continue to be active in Mexico to this day.

The conduct of many of these companies participating in the mining activities left much to be desired from a political point of view. The engagement of armed guards from the United States by Colonel William C. Greene to quell labor unrest in the Cananea copper mine in 1906 was widely perceived as an affront to Mexican sovereignty.⁸ In addition, the discriminatory practices carried out against Mexican employees by foreign companies, mainly from the United States and Great Britain, left a lasting negative impression of foreign mining companies in Mexico. Legislation implemented in 1961 reduced foreign participation in mining to a minority position,⁹ and that implemented in 1975 further developed Mexican control over mining activities.¹⁰ It is only since the enactment of new foreign investment regulations in 1989,¹¹ and especially new mining regulations in late 1990¹² that wider participation of foreigners in mining has been allowed.

4. *Id.*; see CARLOS SANCHEZ MEJORADA, NOTAS SOBRE LA EVOLUCION Y TENDENCIAS ACTUALES DEL DERECHO MINERO MEXICANO 7 (Publicaciones de la Academia Mexicana de Jurisprudencia y Legislación, 1944).

5. In its restricted sense, New Spain included the territories conquered by Hernán Cortés; in a broad sense it referred to the vice-kingdom of that name. See DICCIONARIO PORRÚA DE HISTORIA, BIOGRAFÍA Y GEOGRAFÍA DE MÉXICO 2068 (5th ed. 1986) (Nueva España).

6. Throughout this article, "foreign" means non-Mexican.

7. See DICCIONARIO PORRÚA DE HISTORIA, BIOGRAFÍA Y GEOGRAFÍA DE MÉXICO 1497 (5th ed. 1986) (Inversiones Extranjeras, en Mexico).

8. See *id.* at 475 (Cananea, Mineral).

9. See Ley Reglamentaria del Artículo 27 Constitucional en Materia de Explotación y Aprovechamiento de Recursos Minerales, D.O., Feb. 6, 1961, art. 14.

10. See Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera, D.O., Dec. 22, 1975. This law required that a majority of the capital of Mexican mining companies be Mexican in "net terms." See *infra* text discussion at § II D.1, "Pryamiding". This law also stipulated that the Chairman and General Manager should be Mexicans, and reduced foreign participation in companies with mines in the national mining reserves to thirty-four percent. See Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera, D.O., Dec. 22, 1975, arts. 12, 13.

11. See Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera 1989, D.O., May 16, 1989, *reprinted and translated in* DOING BUSINESS IN MEXICO pt. IV, app. A.3, A.4 (Michael W. Gordon ed., 1991).

12. See Reglamento de la Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera, D.O., Sept. 27, 1990.

The object of this article is to focus on the current legal provisions that regulate foreign investment in mining in Mexico. The article therefore does not engage in a historical review of foreign investment, nor does it deal with corporate, tax, labor, or other issues which are common to doing business in Mexico in any field of activity. This article also does not discuss mining legal issues which are common to Mexican and foreign investors or affect mining companies in general, regardless of the nationality of their shareholders.¹³

II. LEGAL FRAMEWORK

A. *The Mexican Constitution*

Article 27 of the Mexican Constitution¹⁴ (the Constitution) establishes that all mineral resources belong to the Mexican nation, and that their exploitation by individuals or corporations incorporated according to Mexican laws may only be carried out through concessions granted by the Federal Executive.¹⁵ These concessions may only be granted to Mexican individuals, to corporations incorporated according to Mexican laws, or to foreign individuals¹⁶ who agree to the so-called "Calvo clause."¹⁷

By means of the Calvo clause, foreigners agree before the Mexican

13. Reference is made throughout this article to "shareholders" even though Mexican commercial law provides for the existence of non-stock corporations which may participate in mining activities. Non-stock corporations, however, are very rarely used.

14. CONST. art 27 (Mexico) *reprinted in* DOING BUSINESS IN MEXICO pt. I, app. A-1 (Michael W. Gordon ed., 1991).

15. The Mexican Constitution, as that of the United States of America, provides for separate executive, legislative and judicial branches, and for federal and state spheres of jurisdiction. Mining is under federal jurisdiction, not only because mining concessions are issued by the Federal Executive, but also because Article 73, Section X of the Constitution grants to the Federal Congress the power to issue laws on mining. *See* CONST. art. 73, § X (Mexico) *reprinted in* DOING BUSINESS IN MEXICO pt. I, app. A-1 (Michael W. Gordon ed., 1991).

16. The relevant constitutional text reads as follows: "Only Mexicans by birth or by naturalization and Mexican corporations have the right . . . to obtain concessions for the exploitation of mines or waters. The State may grant the same right to foreigners as long as . . ." CONST. art 27 (Mexico) *reprinted in* DOING BUSINESS IN MEXICO pt. I, app. A-1 (Michael W. Gordon ed., 1991). "Foreigners" is deemed to refer only to foreign individuals. This is so because, when referring to Mexicans, the article specifically mentions corporations, but when referring to foreigners, corporations are not mentioned. Thus, foreign corporations are barred from holding concessions.

17. The Calvo clause is named after Argentinian diplomat Carlos Calvo. This clause forms a part of the permit given by the federal Ministry of Foreign Affairs (a part of the Federal Executive) to incorporate a company, and is included in the by-laws of all corporations which may have foreigners as shareholders. *See generally* DONALD R. SHEA, THE

federal government to consider themselves as Mexican nationals regarding their concessions. The foreigners, therefore, agree not to invoke the protection of their governments in regard to their concessions, under the penalty of losing the concessions in favor of the Mexican nation.¹⁸ At the constitutional level, then, only foreign corporations are excluded from holding mining concessions; however, the constitution does not exclude foreign individuals from holding concessions nor does it limit the participation of foreigners in the capital stock of Mexican corporations which may in turn hold concessions.

B. *The Mining Law*

The Regulatory Law of Constitutional Article 27 in Mining Matters (hereinafter the "mining law") was published in the Official Daily of the Federation¹⁹ December 22, 1975, abrogating the previous law which had been in effect since 1961.²⁰ The mining law is more restrictive than the Constitution in that it prohibits foreign individuals from holding mining concessions.²¹ The mining law limits the participation of foreigners, be they individuals or corporations, in Mexican mining companies to forty-nine percent of their capital stock, if the companies are to hold ordinary concessions,²² and thirty-four percent if they will hold special concessions in national mining reserves.²³ The min-

CALVO CLAUSE, A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY (1955) (discussing Calvo clause).

18. The foreigner's promise not to invoke the protection of his or her government does not preclude such government from providing protection as an act of sovereignty. This would not, strictly speaking, trigger the penalty.

19. See *Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera*, D.O., Dec. 22, 1975 (translated from "Diario Oficial de la Federación," the official journal of the Mexican Federal Executive, where all statutes of a general and mandatory nature must be published).

20. The 1961 law, which was in effect for fourteen years, abrogated the 1930 law, which is by far the longest-lived Mexican mining law of this century, even though important amendments were made in 1934 and 1943.

21. See CONST. art. 27 (Mexico) reprinted in *DOING BUSINESS IN MEXICO* pt. I, app. A-1 (Michael W. Gordon ed., 1991) (allowing foreign individuals to obtain concessions).

22. Ordinary concessions apply to all substances which are not part of the national mining reserves, and are granted based on a first filing basis. See *Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera*, D.O., Dec. 22, 1975, art. 32.

23. The national mining reserves are created by decree of the Federal Executive, and are made up of substances or zones which are set aside for future development, or of substances which may only be exploited by the federal government or by private parties through special concessions. These are granted based on a bidding procedure. See *Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera*, D.O., Dec. 22, 1975, arts. 72, 76.

ing law requires that a majority of the members of the board of directors of a mining company,²⁴ as well as its chairman²⁵ and chief executive officer, be Mexican nationals.²⁶

C. *The Foreign Investment Law and Its Regulations*

The Law to Promote Mexican Investment and to Regulate Foreign Investment, issued on February 26, 1973, (FIL)²⁷ sets the same limits on foreign investment in mining as the mining law and provides that foreign investment in areas that are regulated by a specific statute will be governed by such statute.²⁸ Given the existence of the mining law, the FIL is only of supplemental application with regards to those matters that the mining law does not cover.²⁹

1. Temporary Foreign Investment

The regulations³⁰ of the FIL, issued on May 15, 1989,³¹ allow one hundred percent participation of foreigners in mining by means of a

24. All future mention in this article to a "mining company" is to a Mexican mining company.

25. "Chairman" is translated from "presidente." In Mexico, the chairman of the board of directors is called the president of such board. The title of president of the company is not common and is usually equivalent to that of "director general" (managing director).

26. Requiring that a majority of the members of the board of directors be Mexican differs from the system followed by the Law to Promote Mexican Investment and to Regulate Foreign Investment which does not take into consideration the nationality of the boardmember but rather takes into consideration the nationality of the shareholders who appoint him or her.

27. See *Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, D.O., Mar. 9, 1973, reprinted and translated in *DOING BUSINESS IN MEXICO* pt. IV, app. 1, 2 (Michael W. Gordon ed., 1991).

28. *Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, D.O., Mar. 9, 1973, art. 5, reprinted and translated in *DOING BUSINESS IN MEXICO* pt. IV, app. 1, 2 (Michael W. Gordon ed., 1991). The regulations of the FIL allow forty-nine percent foreign investment in salt mining, but they are in error because salt is a part of the national mining reserves, and foreign participation is thus limited to thirty-four percent. The mining law prevails over this error.

29. The application of the FIL to mining consists mainly of the obligations of mining companies with foreign participation and obligations of the companies' foreign shareholders to register with the National Registry of Foreign Investment.

30. The president, as head of the Federal Executive, is empowered by Article 89 of the Constitution to issue rules to provide for the more exact observance of laws. See CONST. art. 89 (Mexico) reprinted in *DOING BUSINESS IN MEXICO* pt. I, app. A-1 (Michael W. Gordon ed., 1991). These rules are issued by the executive in the form of regulations which may not go beyond the stipulations of the law.

31. See *Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera* 1989, D.O., May 16, 1989, reprinted and translated in *DOING BUSINESS IN MEXICO* pt. IV, app. 3, 4 (Michael W. Gordon ed., 1991).

trust mechanism known as a “temporary foreign investment.”³² The shares which must be held by Mexicans (denominated by the mining law as series A shares)³³ are placed in trust with a Mexican bank³⁴ for the benefit of the foreign investor. Prior approval of the National Commission of Foreign Investments (NCFI)³⁵ is required, subject to the following terms and conditions:

- a. The mining company whose shares will be placed in trust must
 - i) be in an extremely unbalanced financial position as a result of indebtedness, mainly denominated in foreign currency acquired before May 17, 1989,³⁶ or as a result of a drastic reduction in its sales; or ii) require new capital investments to increase its production through the opening of new facilities or the manufacture of new lines of products³⁷ primarily for export, or to modernize or renovate its facilities or assets for the production of products in significant³⁸ volumes for export.
- b. Evidence must be submitted to the NCFI that sufficient efforts were made to interest Mexican investors in contributing equity to the mining company.

32. See Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera, D.O., May 16, 1989, arts. 23-26, *reprinted and translated in DOING BUSINESS IN MEXICO* pt. IV, app. 3, 4 (Michael W. Gordon ed., 1991).

33. The capital stock of mining corporations must be divided into series A shares, which must represent at least fifty-one percent of the capital and be subscribed only by Mexicans, and series B shares, which may not exceed forty-nine percent and may be subscribed by foreigners (other than foreign governments).

34. Only banks may act as trustees under the General Law of Credit Titles and Operations and the Law of Credit Institutions. See Ley de Instituciones de Crédito, D.O., July 18, 1990, arts. 2, 46; Ley General de Títulos y Operaciones de Crédito, D.O., Aug. 27, 1932, art. 350.

35. The National Commission of Foreign Investments (NCFI), provided for in Article 11 of the FIL, consists of the Secretaries of Government; Foreign Affairs; Treasury and Public Credit; Energy, Mines and Parastate Industry; Commerce and Industrial Promotion; Labor; and Programming and Budget. See Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera 1989, D.O., May 16, 1989, art. 11, *reprinted and translated in DOING BUSINESS IN MEXICO* pt. IV, app. 3, 4 (Michael W. Gordon ed., 1991). The NCFI issues a resolution and the authorization is actually granted by the Ministry of Commerce and Industrial Promotion.

36. This is the date on which the regulations of the FIL became effective (one day after their publication). See *infra* note 66, second sentence.

37. See Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera 1989, D.O., May 16, 1989, art. 1, *reprinted and translated in DOING BUSINESS IN MEXICO* pt. IV, app. 3, 4 (Michael W. Gordon ed., 1991) (defining new facilities and new lines of products).

38. No guidelines are given as to what constitutes “significant” exports, and the application of the law is thus left to the discretion of the NCFI.

- c. Mexican shareholders of the mining company must have waived their preferential rights, if any, to subscribe additional shares.
- d. Foreign investors must pay for their shares in cash or by offsetting debts of the company.
- e. The maximum term of the trust shall be twenty years.
- f. The procedure for the valuation and sale of the shares in trust must be included in the trust agreement.
- g. A technical committee³⁹ must be provided for by the trust agreement. This committee shall include one member appointed by the federal government and shall be empowered to instruct the trustee to sell the shares at the end of the trust or to sell the shares if they were not sold as provided for by the trust agreement.
- h. The foreign investor and the company must agree to a minimum performance regarding the balance of payments, investment program, and creation of jobs.⁴⁰

This trust mechanism in practice has been a failure with regards to mining as only one has been authorized and created as of November of 1991.⁴¹

2. Neutral Investment

The second mechanism provided for by the regulations of the FIL, denominated "neutral investment," also entails a trust which will

39. Under Article 80 of the Law of Credit Institutions, any trust agreement may provide for the existence of a technical committee of the trust. The function of the technical committee is to instruct the trustee regarding the management of the goods in trust, to the extent not provided by law or by the trust agreement. *See Ley de Instituciones de Crédito, D.O., July 18, 1990, art. 80.*

40. The balance of payments program is a forecast of the amounts of foreign exchange that will be generated by the corporation (through exports, foreign currency, loans received from abroad, equity, etc.) and that will be used by the corporation (such as remittance of dividends, repayment of foreign currency loans, imports, payment of royalties abroad, etc.). The investment program simply explains how the investment is to be funded (loans, equity, reinvestment of profits, etc.). Both programs, as well as the job creation program, should cover the current and the next three years. The corporation is expected to meet the programs, unless a justified cause intervenes. Unjustified lack of compliance may give rise to fines and, in theory, to the cancellation of the NCFI authorization.

41. The failure of this trust mechanism is supported by investigation performed by the author at the NCFI and Public Registry of Mining. The reasons for the failure are not clear. However, when comparing this trust with the exploitation trust discussed earlier, which has been successful, one can assume that foreign investors were discouraged by the need to go through an approval process and the amount and nature of the requirements.

hold series A shares of publicly traded mining companies. The trustee will issue certificates of participation⁴² over the trust. These certificates of participation grant their holders economic rights but no voting rights over the shares in trust.⁴³

Since the number of publicly traded mining companies is very small,⁴⁴ this trust has had very limited application. The prospects for a wider application are small because capitalizing a new mining company through the Mexican stock exchange is not an economically attractive alternative⁴⁵ and because the foreign investor has no management control over the company.⁴⁶

3. International Financial Development Institutions

The regulations of the FIL provide a third alternative which allows foreign investment in mining. This alternative provides that the regulations will not consider international financial development institutions⁴⁷ as foreign investors⁴⁸ as long as they agree to divest their shares within twenty years of acquiring them. This option is obvi-

42. Certificates of participation, regulated by Articles 228a to 228v of the General Law of Credit Titles and Operations, essentially give their holders a proportional right to the yield of the goods placed in trust and to the product of their sale. *See Ley General de Titulos y Operaciones de Credit*, D.O., Aug. 27, 1932, arts. 228a-228v.

43. *See Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera* 1989, D.O., May 16, 1989, arts. 13, 14, *reprinted and translated in DOING BUSINESS IN MEXICO* pt. IV, app. 3, 4 (Michael W. Gordon ed., 1991). Economic rights include the right to receive dividends, the proceeds from reductions of capital, and proceeds from the sale of the shares in trust. *Id.*

44. As of November 1991, there were five mining companies traded on the Mexican stock exchange: Industrias Peñoles, Corporación Industrial Sanluis, Empresas Frisco, Compañía Minera Autlán, and Grupo Industrial Minera México.

45. Price book value ratios as of November 28, 1991 were as follows: Peñoles, 0.59; Sanluis, 0.36; Frisco, 0.66; Autlán, 0.14; GIMM, 0.49.

46. Neutral investment is thus clearly geared for the stock market investor rather than for the businessman who wishes to pursue a mining venture in Mexico in which some degree of management control is normally desired.

47. General Resolution # 2, issued pursuant to the FIL, lists international financial development institutions from Japan, Finland, Germany, Sweden, Denmark, and Holland. It also lists the International Financial Corporation and the Interamerican Investment Corporation.

48. *See Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera* 1989, D.O., May 16, 1989, arts. 8, 9, *reprinted and translated in DOING BUSINESS IN MEXICO* pt. IV, app. 3, 4 (Michael W. Gordon ed., 1991). The fact that they are not considered as foreign investors does not mean that they qualify as Mexican investors; they are neutral in terms of their nationality.

ously also of very limited application as it only refers to a handful of foreign investors, all of them of a public nature.

D. *The Regulations of the Mining Law*

On September 27, 1990, the current regulations of the mining law (mining regulations) were published in the Official Journal of the Federation,⁴⁹ abrogating those issued on November 25, 1976.⁵⁰

The mining regulations allow wider foreign investment in two ways:

1. "Pyramiding"

Under the mining law, mining companies should be fifty-one percent Mexican (or sixty-six percent Mexican if they have special concessions in national mining reserves) "in net terms," and it is left to the mining regulations to define that concept.⁵¹ Under the previous regulations, to be fifty-one percent Mexican in net terms meant that the direct or indirect participation of Mexican individuals or Mexican companies where no foreigners could be shareholders had to be a minimum of fifty-one percent. Consequently, direct and indirect foreign participation could not exceed forty-nine percent. Under this rule, a Mexican company (mining or non-mining) that had forty-nine percent direct foreign participation could not hold shares of a mining company where foreigners held shares, because the net foreign participation in the second company would exceed forty-nine per cent (See figure 1).⁵²

The Mining Regulations now define "net terms" by simply requiring that foreign participation not exceed forty-nine percent (or thirty-four percent in the case of special concessions) in any company that directly or indirectly participates in a mining company.⁵³ Thus, the

49. See Reglamento de la Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera, D.O., Sept. 27, 1990.

50. Reglamento de la Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera, D.O., Nov. 29, 1976.

51. See Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera, D.O., Dec. 22, 1975, art. 12.

52. Reglamento de la Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera, D.O., Nov. 29, 1976, art. 14.

53. Reglamento de la Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera, D.O., Sept. 27, 1990, art. 104.

FIGURE 1. MEXICAN CAPITAL IN NET TERMS UNDER THE PREVIOUS REGULATIONS

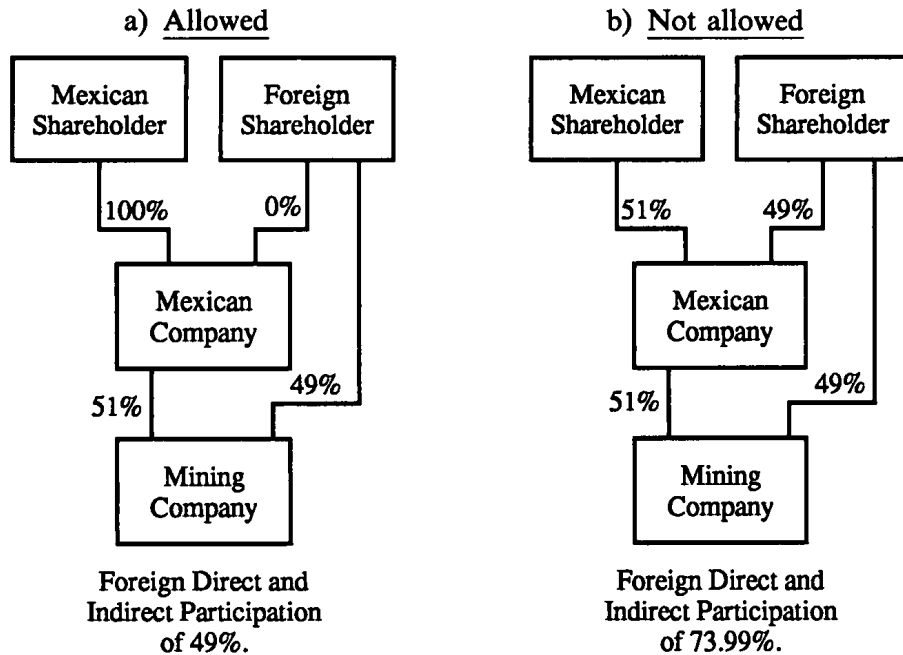
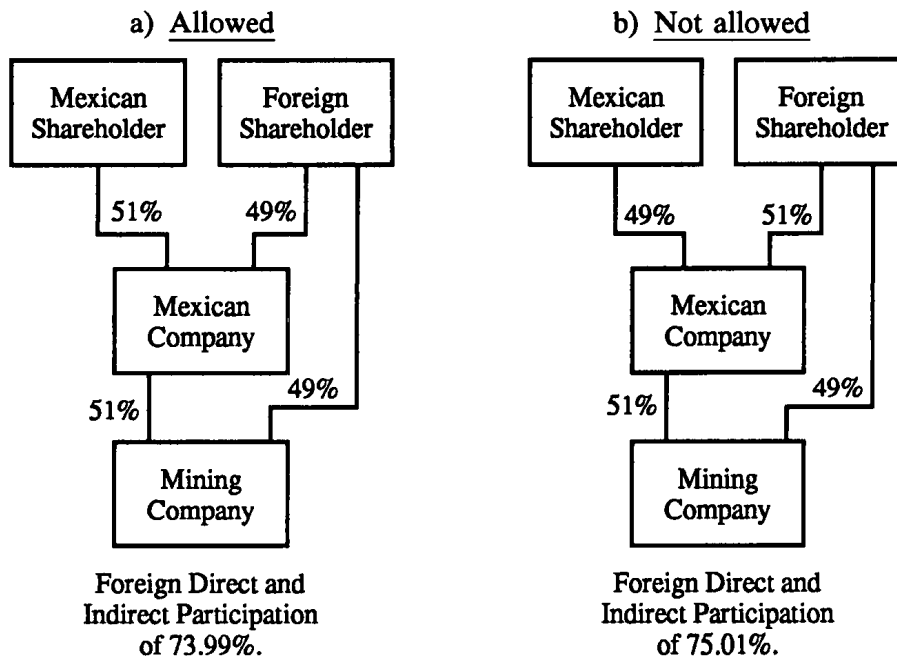


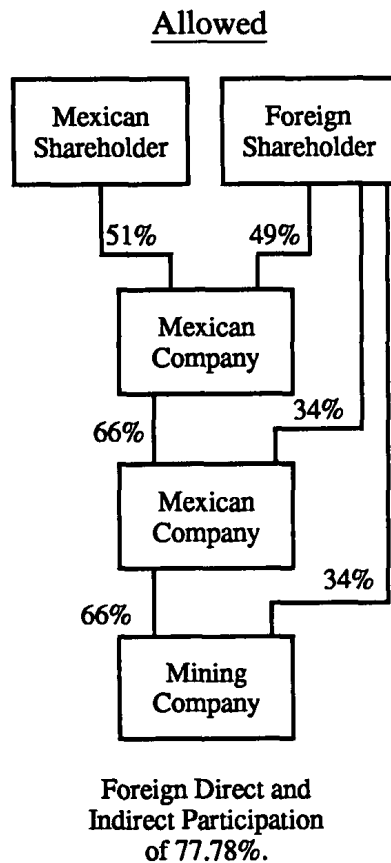
FIGURE 2. MEXICAN CAPITAL IN NET TERMS UNDER THE MINING REGULATIONS



shareholding situation described in the previous paragraph would be possible (See figure 2).

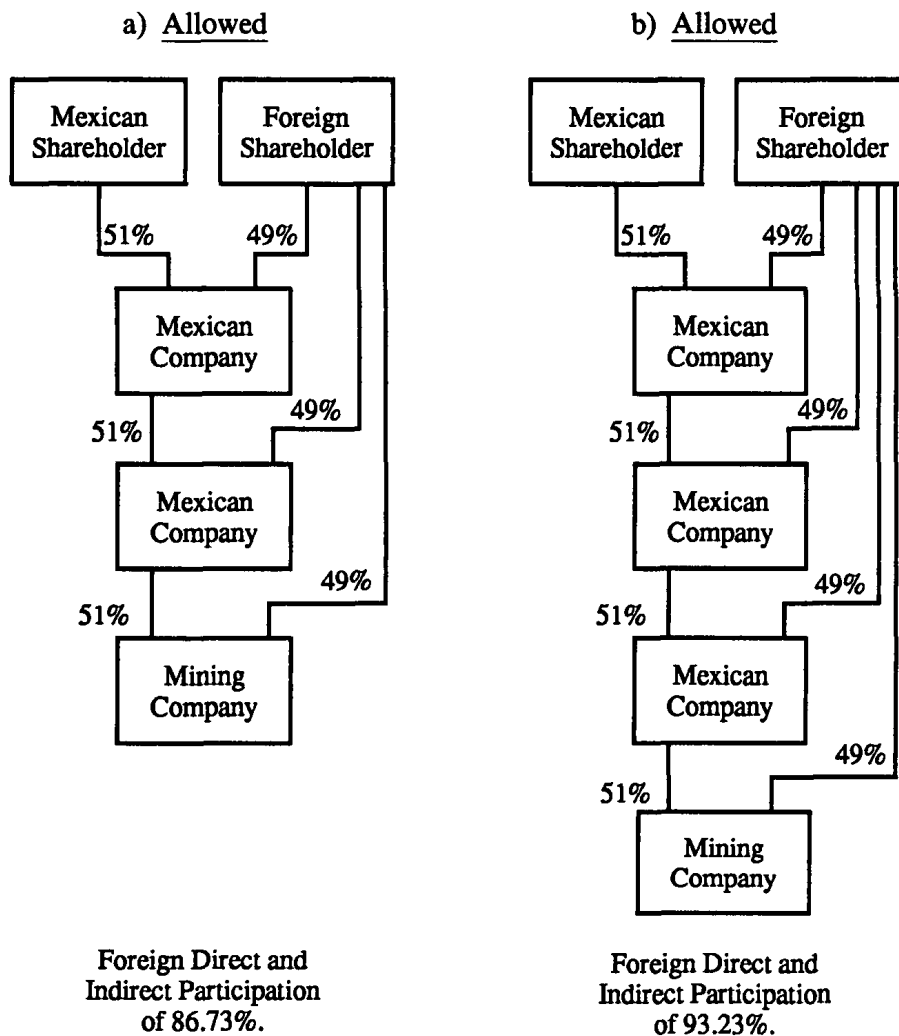
It should be noted that in the case of mining companies that will hold special concessions in national mining reserves, the limitation of thirty-four percent only applies to the first and second level foreign shareholders; shareholders at other levels may have up to forty-nine percent participation (See figure 3).

FIGURE 3. MEXICAN CAPITAL IN NET TERMS UNDER THE MINING REGULATION IN THE CASE OF SPECIAL CONCESSIONS



The structures described in figures 1(b), 2, 3, and 4 (below) are commonly called “pyramiding” because a “pyramid” of companies is built with foreign investors at each level. As additional layers of companies are added to the pyramid, direct and indirect foreign participation increases (See figure 4).

FIGURE 4. MEXICAN CAPITAL IN NET TERMS UNDER THE MINING REGULATIONS, ADDING LAYERS TO THE PYRAMID DESCRIBED IN FIGURE 2(A)



Now allowing pyramiding to exist is not, as is commonly thought, intended to give foreigners the possibility of having wider economic

participation in a mining company, but rather to facilitate joint ventures between mining companies that already have foreign participation and foreign investors.⁵⁴ Pyramiding is not an attractive option for the foreign investor who wishes to operate a mining company because the foreigner never acquires management control over the mining company. It may be attractive to a financial investor who is willing to leave management to the Mexican shareholders.

2. Exploration and Exploitation Trusts

A mechanism that does give control to the foreign investor is the use of trusts to hold series A shares. The mining regulations ratified the possibility of establishing the trusts called for by the regulations of the FIL, as discussed earlier,⁵⁵ and provided for two new trusts:

- a. The first trust is the so-called exploration trust in which series A shares are placed in trust with the trustee bank for the benefit of the foreign investor. An exploration trust has the following characteristics:⁵⁶
 - i. It may be established without any prior government approval.
 - ii. Its maximum duration is thirty years, counted from the date of execution of the trust agreement.⁵⁷
 - iii. The mining company which issued the series A shares in trust may only hold exploration concessions.

54. Assume that a Mexican mining company has eighty percent Mexican and twenty percent foreign shareholders, and that it wishes to enter into a joint venture with a foreign miner. The foreign miner wishes to hold a forty percent share participation in the new joint venture company (JOVECO), leaving the Mexican mining company holding sixty percent. Under the previous regulations this would be impossible because foreign participation in JOVECO would be fifty-two percent (forty percent directly, and twelve percent indirectly, the twelve percent resulting from the twenty percent foreign holding in the sixty percent of JOVECO held by the Mexican mining company). Under the mining regulations, JOVECO would be considered as Mexican in net terms.

55. See Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera 1989, D.O., May 16, 1989, arts. 13, 14, 23-26, *reprinted and translated in DOING BUSINESS IN MEXICO* pt. IV, apps. 3, 4 (Michael W. Gordon ed., 1991).

56. Reglamento de la Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera, D.O., Sept. 27, 1990, art. 106, § II.

57. Exploration concessions are valid for three years and only give the right to carry out exploration activities. Exploitation concessions, however, last for twenty-five years and enable their holders to put the mining property into production.

- iv. The trust agreement must be registered in the Public Registry of Mining.⁵⁸
- b. The second trust is the so-called "exploitation trust," which is subject to the following:⁵⁹
 - i. No government approval is needed to set it up.
 - ii. The mining company which issued the series A shares in trust must build a processing plant (or put back in service an existing one) with a capacity of more than one hundred tons per day, to process minerals extracted from the mines held by the mining company. Sales on a commercial basis may only start after the plant begins operation.
 - iii. The series A shares in trust must be sold to legally qualified buyers (i.e., Mexican individuals or Mexican companies in which foreigners do not participate in excess of forty-nine percent (thirty-four percent in the case of special concessions)) within twelve years of the start of mineral sales on a commercial scale. The trust agreement must stipulate that if the shares in trust are not sold within that period, the trustee will sell them within a year in the stock exchange if publicly traded, and by public bidding if not.
 - iv. The trust agreement must be registered in the Public Registry of Mining.

III. CONCERNS OF FOREIGN INVESTORS

As of November 1991 (eleven months after the mining regulations became effective),⁶⁰ three exploration and two exploitation trusts had been registered in the Public Registry of Mining, and three exploration trusts were in the process of being registered.⁶¹ This might lead one to think that they have failed to generate interest on the part of foreign investors. I do not believe this is the case.

There are two kinds of foreign companies that are coming to Mexico to pursue mining ventures. The first kind, mainly made up of

58. All acts affecting mining concessions and companies must be recorded in the Public Registry of Mining in order for them to be effective with regards to third parties.

59. Reglamento de la Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera, D.O., Sept. 27, 1990, art. 106, § III.

60. The Mining Regulations became effective on December 10, 1990.

61. These numbers were ascertained through research by the author at the Public Registry of Mining.

larger companies, is willing to set up a grass roots exploration effort. The second kind, consisting of medium and small companies, prefers to buy into an existing project, close to production or already in production, to generate a cash flow with which to fund further Mexican ventures, including exploration efforts. Since medium and small foreign mining companies tend to have less experience outside of their own borders, buying into an existing project gives them a chance to get their feet wet in Mexican mining and to quickly gain experience, unlike an exploration effort which might not yield an operating mine for many years. Since finding and evaluating an existing project takes time, it is not surprising that so few trusts have been established since the mining regulations came into effect. Foreign investors have voiced two concerns, however, that deal with the permanence of the changes introduced by the mining regulations and with the legal validity of the Regulations.

A. *Permanence of the Mining Regulations*

As explained above, the regulations (“reglamentos”) are an act of the president of Mexico, head of the Federal Executive,⁶² and are designed to implement laws passed by Congress. Regulations must be signed also by the cabinet minister(s) in charge of the area dealt with by the specific regulation.⁶³ To the extent that a cabinet minister is freely appointed by the president, it is really up to the latter to change a regulation; a change in a law, however, requires an act of Congress. Therefore, a change in a law is obviously more difficult to achieve, especially in cases where the president does not have full political control of Congress. A foreign investor would therefore be justified in feeling more comfortable if the changes were embedded in the mining law rather than in the mining regulations, but not to the point of feeling uncomfortable with changes in the mining regulations alone. In the first place, and most importantly, the Mexican Constitution prohibits retroactive application of laws.⁶⁴ Any change in the mining regulations (or in the mining law) adverse to foreign investors would not negatively affect those investors that had acquired any rights prior

62. See CONST. art. 89 (Mexico) reprinted in *DOING BUSINESS IN MEXICO* pt. I, app. A-1 (Michael W. Gordon ed., 1991). (empowering president to issue regulations).

63. CONST. art. 92 (Mexico) reprinted in *DOING BUSINESS IN MEXICO* pt. I, app. A-1 (Michael W. Gordon ed., 1991).

64. CONST. art. 14 (Mexico) reprinted in *DOING BUSINESS IN MEXICO* pt. I, app. A-1 (Michael W. Gordon ed., 1991).

to the adverse change. Secondly, current socio-political and economic changes not only in Mexico, but in the world in general, portend that any modifications would tend to further decrease restrictions against foreign investment rather than increase them. The North American Free Trade Agreement currently under negotiation among Mexico, the United States and Canada will, if approved, lower trade and investment barriers for nationals of those countries.⁶⁵ While the agreement may not lower existing restrictions on Canadian and United States investors in Mexican mining, it certainly will not raise them. Finally, the previous mining regulations were in force for fifteen years,⁶⁶ and the ones before them were in force for ten years.⁶⁷ The previous mining law regulated mining for fourteen years,⁶⁸ and the current one has regulated it for sixteen years.⁶⁹ These are all reasonable periods of time. My expectation is that the mining regulations will be in force until a new mining law is adopted by Congress, at which time new regulations will obviously be necessary to conform to the new law.

B. *Legality of the Regulations*

Some questions have been raised regarding the validity of certain provisions of the mining regulations, insofar as they allegedly go beyond the mining law's provisions. Specifically, and what concerns us, the validity of the trust mechanism has been questioned. Its critics claim that the trust is not allowable under the mining law and the FIL because a trustee is not an acceptable shareholder under the mining law, and the FIL prohibits giving control of a mining company to foreigners through a trust.

I take exception to both claims for the following reasons:

1. As stated above,⁷⁰ the FIL stipulates that when specific laws or

65. See Madero P. Antonio, *The North American Free Trade Agreement—a Mexican Perspective (Part II)*, N. AM. FREE TRADE BULL. (Sanchez-Mejorada, Velasco y Valencia, Mexico City, Mexico), Sept. 10, 1991, at 5.

66. The period of the effectiveness of the mining regulations was from December of 1976 to December of 1991. In almost all cases, the effective date of any law or regulation can be determined by looking at the first transitory article.

67. The period of effectiveness of the regulations was from January of 1967 to December of 1976.

68. The period of the effectiveness of the law was from February of 1961 to February of 1976.

69. The current law has been effective from February of 1976 to the present.

70. See *supra* text § II.C *The Foreign Investment Law and Its Regulations*.

regulations exist for a certain branch of activity, foreign investment will conform to the percentages and conditions that such laws or regulations may establish.⁷¹ If the mining regulations permit trusts over series A shares, the FIL has no bearing whatsoever on the subject.

2. The mining law, when listing the persons or entities that may validly hold series A shares,⁷² specifically mentions Mexican credit institutions (banks) which may validly hold the shares as long as they have the prior approval of the Ministry of the Treasury. Since this ministry is part of the Federal Executive, the president, who is head of the Federal Executive, in issuing the mining regulations, has granted the approval called for by the mining law. In response to the objection that trusts evade the purpose of the mining law, which is to keep mining under majority Mexican ownership, precedents exist which clearly show that trusts are legally accepted vehicles for holding property for the benefit of foreigners.⁷³

IV. OPERATION OF TRUSTS

Since no prior approval is necessary to establish an exploration or exploitation trust, their establishment simply requires that the trust agreement be negotiated and executed between the foreign investor as beneficiary of the trust⁷⁴ and the trustee bank,⁷⁵ and recorded at the Public Registry of Mining. Trust fees typically range between two percent and one half of one percent of the par value of the shares, with the percentage diminishing as the value of the shares increases.

If a mining company already exists, the owner of the series A shares will place them in trust.⁷⁶ In the alternative, the foreign inves-

71. See *Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, D.O., Mar. 9, 1973, art. 5, *reprinted and translated in DOING BUSINESS IN MEXICO* pt. IV, apps. 1, 2 (Michael W. Gordon ed., 1991).

72. See *Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera*, D.O., Dec. 22, 1975, art. 12, § I.

73. See *Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, D.O., Mar. 9, 1973, arts. 18-22, *reprinted and translated in DOING BUSINESS IN MEXICO* pt. IV, apps. 1, 2 (Michael W. Gordon ed., 1991). Articles 18 to 22 of the FIL provide for trusts to hold title over land located within fifty kilometers of the coast or one hundred kilometers of the borders. *Id.* Foreigners are forbidden by Article 27 of the Mexican Constitution to own land in these areas. See *CONST. art 27 (Mexico)* *reprinted in DOING BUSINESS IN MEXICO* pt. I, app. A-1 (Michael W. Gordon ed., 1991).

74. This is called "fideicomisario" in Spanish.

75. This is called "fiduciario" in Spanish.

76. The owner of the series A shares would be a party to the trust agreement at the outset

tor will place money in trust⁷⁷ and instruct the trustee to buy the series A shares, which will then become a part of the trust. If the company is to be incorporated, then the foreign investor will necessarily place money in trust.⁷⁸ The trustee will use the money to pay for the shares that it will subscribe upon incorporation. The series B shares are generally held directly by the foreign investor, but nothing precludes their also being put in trust if for any reason the foreign investor so desires.

While a technical committee is not indispensable, it is useful to have one, made up of two or more representatives of the foreign investor, to facilitate giving instructions to the trustee. The shares in trust must be voted by the bank as determined by the technical committee; it is possible to provide in the trust agreement that the trustee will simply issue a proxy to whomever the technical committee designates, thus avoiding the need for the bank to actually attend meetings and sign minutes. Any distribution made by the mining company to the shares in trust or deriving from the sale of the shares will be applied by the trustee as instructed by the technical committee. The shares must be sold to whomever and for the price, terms, and conditions that the committee designates.⁷⁹

It should be noted that in the case of exploitation trusts, the trust may run for more than twelve or thirteen years because this latter period is counted from the start of sales on a commercial scale. If, for example, a trust is established in year one and commercial sales start at the beginning of year five, the shares in trust should be sold to Mexicans before the start of year seventeen. If they are not sold, the trust will run until the trustee sells them, a period which must not exceed another year. Since the maximum term of trusts is thirty years,⁸⁰ and if the start of commercial sales were to take place for

but would then have no further bearing on the agreement. The owner would be the trustor, which is called "fideicomitente" in Spanish.

77. The foreign investor in this case would be both trustor and beneficiary.

78. The foreign investor in this case also would be both trustor and beneficiary.

79. The above assumes that the trust agreement gives ample powers to the technical committee and that none of the issues discussed are provided for in the trust agreement. If the latter were to be the case, the agreement would have to be modified to deviate from its instructions; since the bank is trying to provide a service to the foreign investor, it would probably agree to any modifications.

80. See *Ley General de Titulos y Operaciones de Credito*, D.O., Aug. 27, 1932, art. 359, § III. Trusts to support non-profit, scientific, or art museums may be for more than thirty years.

example, at the beginning of the twenty-second year of the exploitation trust, the shares would have to be sold to Mexicans within nine years, and not twelve, since there are only nine years in the remaining thirty year life of the trust.

V. CONCLUSION

The limitations placed on foreign investors in mining starting in 1961 were initially alleviated by the regulations of the FIL in mid-1989 and were further diminished by the mining regulations in late 1990. "Pyramiding" makes joint ventures easier to accomplish, and trusts, particularly the exploitation trust, allow a greater degree of direct participation by foreign investors in Mexican mining. Concerns of foreign investors regarding the validity and permanence of these changes are, while understandable, unfounded.