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THE REGULATION OF SOLID FUELS AND MINING IN MEXICO

ABDON HERNÁNDEZ*

FOREWORD

This paper will provide an overview of the Mexican mining regulatory and policy framework applicable to mining activities. Although this paper will cover solid mineral fuels, it will not address nuclear fuels because they are radioactive minerals whose exploration and extraction are reserved exclusively to the State.¹

I. MEXICO: A MINING TRADITION

Mexico has a long standing tradition as a mining country. Since the pre-Columbian days, the Maya, Aztec, Mixtec and Zapotec cultures enjoyed well earned reputations as outstanding gold and silversmiths and their fame for their gold-crafting abilities extended throughout the region. Accordingly, the search for gold was a driving force behind the Spanish conquest of what are now Mexico and Peru. The conquest of Mexico cannot be fully understood without first considering the courageous endeavors of the Mexican miners. The miners moved along with the Spanish conquest, side by side with the armed forces, priests and missionaries, locating ore deposits, creating wealth, opening roads and making significant contributions to the creation of new cities, towns and villages of present-day Mexico. Wealth from mining was a key element in the construction of architectural jewels such as schools, cathedrals, hospitals and other civic monuments.

Today, Mexico continues to play a leading role in the worldwide mining economy. This is evidenced by the fact that in 1993, Mexico was the world's leading producer of silver, sodium sulfate and celestite; the second largest producer of bismuth, cadmium and mercury; third in antimony and fluor spar; fourth in arsenic and graphite; fifth in lead and sixth in zinc and manganese. In addition it is a world class producer of salt, barite, molybdenum, feldspar, gypsum, copper and sulphur.²

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1. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CONST.—POLITICAL CONSTITUTION OF THE UNITED MEXICAN STATES], arts. 27 ¶ 7, 28 ¶ 4 (10th ed. Delma Edition) (Mex.) [hereinafter MEXICAN CONSTITUTION]; *Ley Minera* [Mining Law], arts. 4(VII), 5(V), DIARIO OFICIAL DE LA FEDERACIÓN [OFFICIAL GAZETTE OF THE FEDERATION—hereinafter D.O.] (1975) (Mex.); *Ley de Inversión Extranjera* [Foreign Investment Law], art. 5(V), D.O. (1973) (Mex.).

2. 1993-94 CÁMARA MINERA DE MÉXICO INFORME ANUAL, at 12 (Mex.).

II. LEGISLATIVE EVOLUTION

The regulation of mining activity dates back to the sixteenth century colonial period of New Spain. Colonial mines in the Americas were incorporated in the royal patrimony as a result of the conquest. The *Cédula Real* issued by King Philip II of Spain, on December 9, 1526, asserted the dominion of the Spanish Crown over the mines in the Americas, which required a permit from royal authorities to exploit mines. As of that moment, the mines in the Americas were no longer freely worked, with the imposition to pay *el un quinto*, a fifth of all mining wealth, to the crown. Later, the principles of the *Ordenanzas del Nuevo Cuaderno* that were issued by King Philip II on August 22, 1584, were incorporated in the *Ordenanzas de Aranjuez* or promulgated by King Charles III on May 22, 1783. These ordinances provided that all the mines in the Americas were the property of the Crown by their nature and origin.³ Without segregating the mines from the royal patrimony, their possession could be granted by concession to the vassals of the Crown so that the mines could be sold or mining rights could be assigned.⁴ These concessions were contingent upon the payment of a mining tax to the royal treasury and upon the continued operation of the mining property, under penalty of cancellation of the concession in the event of failure to comply with either or both obligations.⁵

Upon Mexican independence in 1821, the royal mining legislation continued to be in effect until it was superseded in 1884 by the *Código de Minas de los Estados Unidos Mexicanos*, which, in turn, was replaced by the *Ley Minera de los Estados Unidos Mexicanos*, issued by President Porfirio Díaz. The *Código de Minas* conferred to the holder of a concession a perpetual right subject only to the payment of a property tax.⁶ In addition, it granted the landowner the unrestricted right to extract mineral fuels.⁷ This law was subsequently replaced by the *Ley Minera de los Estados Unidos Mexicanos* of 1909.⁸

As a result of the 1910 Revolution, the principles applicable to mining changed quite radically as reflected in the *Political Constitution of the United Mexican States*, adopted in 1917.⁹ Article 27 of the Mexican Constitution specifies that:

The nation has the eminent domain over all natural resources in the continental shelf and islands; of all minerals and substances in veins, strata, masses or beds which constitute deposits whose nature is distinct from the components of lands, such as ores of those from which

3. *Consejo de Recursos Minerales* [Council of Mining Appeals], 1 LEGISLACIÓN MINERA, art. I (1961) (Mex.).

4. *Id.* art. II.

5. *Id.* art. III.

6. *Id.* art. IV.

7. *Id.*

8. *Consejo de Recursos Minerales* [Council of Mining Appeals], 2 LEGISLACIÓN MINERA (1964) (Mex.).

9. D.O. (Feb. 5, 1917) (Mex.).

metals and metalloids used in industry are extracted, beds of precious stones, of rock salt and salt beds formed directly by marine waters;¹⁰

In addition, Article 27 of the Mexican Constitution provides that the eminent domain of the nation over its natural resources is not alienable or subject to acquisition. Thus, the exploitation and use of natural resources by Mexican individuals or Mexican corporate entities may only be done through concessions granted by the Federal Executive in accordance with the provisions, terms and conditions set forth in the law.¹¹

Pursuant to the constitutional provisions discussed above, a definitive Mining Law and Regulations was promulgated in 1930.¹² On February 6, 1961, the *Law Regulating Constitutional Article 27 on the Exploitation and Treatment of Mineral Resources* was enacted and its Regulations decreed on December 7, 1966.¹³ The salient feature of this Law was a mandatory minimum capital of 51% which would be controlled by Mexicans, under which the Mexican mining industry was forced to "Mexicanize."¹⁴

In December 1975,¹⁵ the *Law Regulating Constitutional Article 27 on Mining Matters* was published, with the enactment of the first set of regulations by November 30, 1976.¹⁶ The primary features of these Regulations were: a high degree of governmental intervention, an excess of procedural matters and requirements and the numerous permits needed for practically everything, from the transfer of mining company shares to the transfer of mining rights.¹⁷ From an investment point of view, the Regulations called for a minimum net Mexican capital participation of 51% for ordinary concessions and 66% for special concessions for National Mining Reserves.¹⁸ By law, coal together with sulfur, phosphorus, potassium and iron, were recognized as part of Mexico's National Mining Reserves.¹⁹

Although the 1976 Regulations were abrogated as of December 10, 1990,²⁰ new Regulations would come into effect and serve as a transition mechanism for a new economic environment and legal framework for Mexico.²¹ In particular, the 1990 Regulations were substantially more liberal, provided a clearer definition of the power of governmental au-

10. MEXICAN CONSTITUTION, *supra* note 1, art. 27 ¶ 4, D.O. (Feb. 5, 1917, last amended D.O. Jan. 20, 1960).

11. *Id.* ¶ 6, D.O. (Feb. 5, 1917, last amended D.O. Feb. 6, 1975).

12. D.O. (Aug. 7, 1930 and Oct. 18, 1930).

13. *Id.*

14. D.O. (Dec. 22, 1975).

15. *Id.*

16. D.O. (Nov. 30, 1976).

17. This includes the execution of any type of exploration and/or exploitation contract through highly discretionary powers not far removed from arbitrary powers.

18. *Mining Law, supra* note 1, art. 13.

19. *Id.* art. 71.

20. D.O. (Sept. 27, 1990).

21. *Programa Nacional de Modernización de la Minería 1990-1994 [National Mining Modernization Program]*, D.O. (June 7, 1990).

thorities, and went beyond the mining laws by eliminating some obligations and unnecessary procedures.²² Through the establishment of trust accounts, foreign investment was allowed to go up to 100%.²³

In June 1992,²⁴ the present Mining Law of Mexico was enacted, followed by the publication of its accompanying Regulations on March 29, 1993.²⁵ A brief overview of the economic and political factors which led to the adoption of the Mining Law and of current mining policies is necessary before addressing the Mining Law and its policies in detail.

III. FRAMEWORK FOR THE MEXICO OF THE NINETIES AND THE TWENTY-FIRST CENTURY

After twelve years of increasingly serious economic problems and severe inflation rates, President Miguel de la Madrid took the first step towards a profound transformation of Mexico's economic restructuring from a highly protected, closed economy to an open, globally aware economy. The transformation was furthered by joining the General Agreement on Trade and Tariffs (GATT) in 1986, such that Mexico engaged in a crucial step towards an internationalized economy.²⁶

During his presidential campaign, Carlos Salinas de Gortari spoke of the economic challenges to be faced by Mexico and outlined basic principles which would govern the economic policies of his Administration.²⁷ Salinas emphasized that: (i) the public sector would need to be redefined by accelerating the privatization of nonstrategic government-owned enterprises; (ii) the opening of the Mexican economy to international trade was an irreversible fact of life; (iii) Mexico could absorb greater inflows of foreign capital; (iv) the excessive regulatory activity would need to be eliminated to facilitate private enterprise; and (v) private investment would be the driving force of the Mexican economy.²⁸

The legislative and regulatory activity of the federal government has amply demonstrated a consistency between political speeches and action. Consequently, since the beginning of the Salinas Administration on December 1, 1988, Mexico has undergone profound economic changes through the stemming and reversal of highly inflationary trends left from the 1970s and 1980s. These changes allowed the country to reach one digit inflation in 1993;²⁹ through sound fiscal policies, strict budgetary control

22. *Editor's Note*: The author derived this conclusion from the 1976 Regulations which contained provisions not included in the 1990 Regulations.

23. *Editor's Note*: The author derived this conclusion from the abrogation of the 1975 Regulations which contained provisions not included in the 1990 Regulations.

24. D.O. (June 26, 1992).

25. D.O. (Mar. 29, 1993).

26. D.O. (Nov. 26, 1985).

27. President Carlos Salinas de Gortari, in *EL RETO ECONÓMICO* 161-80 (1988) (Mex.) (adding that without the committed participation of business, the consolidation of the productive base of Mexico would be impossible).

28. *Id.*

29. 1993 BANCO DE MÉXICO INFORME ANUAL, at 3, 181 (Mex.). After twenty-one years, Mexico's inflation rate was only 8% in 1993.

and structural economic changes.³⁰ The structural reorientation of the Mexican industrial sector, in turn, generate new jobs that allowed for technological improvements, emphasis on the export of manufactured goods and increased productivity without the need for subsidies or other forms of governmental support.³¹

Accordingly, new policies were adopted in the areas of foreign trade, foreign investment and the transfer of technology.³² As to foreign trade, the traditional approach of substituting for imports through protective legislation was replaced by the inflow of goods and services, which were readily obtainable in international markets, but not accessible to Mexico in the past. Along with its admission in to GATT, Mexico began to open its borders commercially and to promote the export of manufactured goods through reduced import tariffs. This opening resulted in greater productivity and allowed Mexican products to be competitive worldwide in price and quality.³³

In the area of technology transfer, new Regulations of the *Law on the Transfer of Technology* were enacted in 1990.³⁴ The purpose of this Law was to adopt functional changes in the existing technology transfer law and to simplify the application of the law by eliminating numerous obstacles that formerly limited the acquisition of technology.³⁵ However, both the Law on the Transfer of Technology and its accompanying Regulations were abrogated as of June 28, 1991, with the issuance of the *Law for the Development and Protection of Industrial Property*,³⁶ which eliminated both the need to register any technical assistance or license agreements and eliminated restrictions on terms and conditions once imposed on licensing agreements.

Politically sensitive subjects such as agrarian reform were now confronted with decisiveness. Agrarian reform was addressed by amending Article 27 of the Mexican Constitution and issuing a new agrarian law in early 1992,³⁷ which allows for full ownership of communal and *ejido*³⁸ land by the *ejidatarios*³⁹ and of farmland by corporate entities.⁴⁰

30. *Ley de Ingresos de la Federación* [Law of Federal Reserve], D.O. (Dec. 31, 1988, Dec. 28, 1989, Dec. 26, 1990, Dec. 20, 1991, Dec. 22, 1992, and Dec. 27, 1993) (Mex.); *Presupuesto de Egresos de la Federación* [Graduated Budget of the Federation], D.O. (Dec. 28, 1989, Dec. 29, 1989, Dec. 27, 1990, Dec. 24, 1991, Dec. 30, 1993 and Dec. 22, 1994) (Mex.).

31. *Plan Nacional de Desarrollo 1989-1994* [National Development Plan], D.O. (May 31, 1989) (Mex.) [hereinafter *National Development Plan*].

32. *Id.*

33. *Id.* at 33 (This policy has proven to be fruitful; case in point: out of total exports, the share of exports of manufactured goods, including *maquiladoras* has increased from 20% in 1983 to 80.4% in 1993.).

34. D.O. (Jan. 9, 1990).

35. *National Development Plan*, *supra* note 31.

36. D.O. (June 28, 1991).

37. D.O. (Feb. 26, 1992).

38. *Id.* arts. 9-11.

39. *Id.* arts. 48, 80, 82.

40. *Id.* art. 125.

As to foreign investment, the 1989 Regulations⁴¹ of the now abrogated *Law to Promote Mexican Investment and Promote Foreign Investment*⁴² allow for increased investment in Mexico. In addition, the enactment of the *Foreign Investment Law*⁴³ provides for simplicity and eliminates numerous administrative controls.⁴⁴ The new Law, in particular, encourages the kind of foreign investment that generates new employment, contributes to the technological development of the country, promotes tourism and exports and induces the decentralization of economic development.⁴⁵ In the field of mining, the new Law allows 100% foreign capital participation in the form of foreign subsidiaries incorporated in Mexico.⁴⁶ Mining activities are not included in any of the four sections of Article 7, which specifies activities subject to various limits of 10%, 25%, 30% and 40% established for foreign investment. Mexico's recent admission to the Organization for Economic Cooperation and Development (OECD)⁴⁷ is a recognition of the sacrifices and efforts made by the nation to achieve economic modernization.

IV. NATIONAL MINING MODERNIZATION PROGRAM

The 1989-1994 *National Development Plan*⁴⁸ outlined three goals in the field of mining: (i) the adequate availability of metallurgical materials for domestic consumption; (ii) the commercial strengthening of metallurgical export products abroad; and (iii) the integration of industrial processes to transform minerals and other mined material into products with greater economic value.⁴⁹

Consistent with the framework summarized above and the 1989-1994 *National Development Plan*, the *Secretario de Energía, Minas y Industria Paraestatal* (Ministry of Energy, Mines and State Industry, SEMIP) published the 1990-1994 *National Mining Modernization Program*⁵⁰ in June of 1990. The main chapters of this program include: (i) a commercial diagnosis of the Mexican mining industry; (ii) a series of objectives, strategies and goals; and (iii) a listing of objectives and courses of action for operating modernization programs. The third segment of the program includes operating programs for: (a) updating the regulatory framework

41. D.O. (May 16, 1989).

42. *Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera* [Law to Promote Mexican Investment and Regulate Foreign Investment], D.O. (Mar. 9, 1973) (Mex.).

43. D.O. (Dec. 27, 1993).

44. This conclusion arises from the 1973 Law to Promote Mexican Investment and Regulate Foreign Investment and its 1989 Regulations which included many provisions not included in the 1993 Foreign Investment Law.

45. *Exposición de Motivos de la Iniciativa de Ley de Inversiones Extranjeras* [Underlying Reasons of the Initiative for the Foreign Investment Law], D.O. (Nov. 1993) (Mex.).

46. *Foreign Investment Law*, *supra* note 1, arts. 5-7.

47. *Mexico's Admission to the Organization for Economic Cooperation and Development*, EL FINANCIERO, Mar. 25, 1994 (author's translation).

48. D.O. (May 31, 1989).

49. *National Mining Modernization Program*, *supra* note 21.

50. *Id.*

of the Mexican mining industry, and (b) an adjustment of the tax regulations for mining.⁵¹

V. THE NEW MINING LAW

On June 26, 1992, the new Mining Law was published⁵² and became effective on September 25, 1992.⁵³ The related Regulations were published on March 29, 1993,⁵⁴ and went in effect the following day.⁵⁵ The Mining Law and its Regulations are the product of laborious effort and varying points of view among private and official sectors in the Mexican mining industry.

The present Law has 59 articles while the 1975 Law had 109, and the present Regulations comprise 97 articles as compared with the 1976 Regulations which contained 300 articles. This complex legal achievement created a new set of legal provisions which address contemporary concerns and are easier to understand, without the unnecessary language and requirements.⁵⁶

This analysis of the present Mining Law will be divided into seven main areas: (a) mineral substances; (b) role of governmental agencies; (c) concessions and allotments; (d) mineral reserves; (e) mining contracts and bidding processes; (f) treatment plants; and (g) mining companies and foreign investment.

A. Mineral Substances

The Mining Law clearly defines which elements, substances and minerals are subject to its provisions, including ferrous and non-ferrous industrial and precious metals, products derived from the decomposition of rocks (whose extraction is mainly done through underground mining), non-metallic minerals, rare-earth metals, mineral gems, rock salt, mineral and certain organic materials which may be used as fertilizers,⁵⁷ and, finally, the following solid mineral fuels: anthracite, mineral coal, lignite, and peat,⁵⁸ and other such fuels as may be determined by Federal Executive Decree.⁵⁹

Expressly excluded from the application of the Law are petroleum and any form of hydrocarbon,⁶⁰ radioactive minerals,⁶¹ substances in suspen-

51. *Editor's Note*: For an outline of objectives for the *National Modernization Program 1990-1994*, see Appendix A of this article.

52. *Mining Law*, *supra* note 1, D.O. (June 26, 1992) and *Reglamento de la Ley Minera* [Related Regulations of the Mining Law], D.O. (Mar. 29, 1993) (Mex.).

53. *Mining Law*, *supra* note 1, at First Transitory Article.

54. D.O. (Mar. 29, 1993).

55. *Related Regulations of the Mining Law*, *supra* note 52, at First Transitory Article.

56. Requirements, which in practice, had demonstrated to be superfluous.

57. *Mining Law*, *supra* note 1, art. 4(I-VII).

58. *Id.* art. 4(VIII).

59. *Id.* art. 4(IX).

60. *Id.* art. 5(I) (in either phase: solid, liquid or gas).

61. MEXICAN CONSTITUTION, *supra* note 1; *Mining Law*, *supra* note 1; *Foreign Investment Law*, *supra* note 1 (whose exploration and exploitation are reserved exclusively for the Mexican federal government).

sion or dissolved in underground water,⁶² products from the decomposition of the rocks which are extracted from open pit works⁶³ and salts from salines in interior drainage basins.⁶⁴

Under the present system, any holder of a concession may explore and extract any substance covered by the law found within the area of that concession. The new Law eliminates the restrictive limit of the prior law to eight different substances per concession. Finally, the rules applicable to coal, sulphur, phosphorus, potassium, and iron have changed such that they are no longer part of the National Mining Reserves system and are free for exploration and exploitation by individuals or corporations through normal concessions.⁶⁵

B. Role of Governmental Agencies

Under the new Mining Law, the *Comisión de Fomento Minero* (Mining Development Commission), which used to be responsible for providing financial support and technical assistance to small and medium scale mining companies, has been dissolved.⁶⁶ In reality, the Mining Development Commission had itself, by competing with private enterprise, become a mining entrepreneur and creator of mining companies.

The new Mining Law maintains the Mineral Resources Council (MRC), but clearly specifies that the MRC's main responsibility is to direct the evaluation of Mexico's geological resources and to provide technical assistance to Mexico's mines.⁶⁷ Although it may conduct certain geological exploration projects, the MRC is precluded from exploration for commercial purposes.⁶⁸

C. Concessions and "Allotments"

The new Mining Law examines two types of mining concessions: exploration and exploitation concessions.⁶⁹ Exploration concessions are granted for a six-year period,⁷⁰ whereas exploitation concessions have a fifty-year term, which may be renewed for another fifty-year period provided that the concession holder did not incur a justified cause for the cancellation of the concession, and that the renewal is requested within five years from its original expiration date.⁷¹ There is neither a limit in the area covered by a concession nor in the total area under the control of a

62. Provided that these substances do not come from a mineral deposit different from the components of the ground, rocks used for construction or the manufacture of construction materials.

63. *Mining Law*, *supra* note 1, art. 5(V).

64. *Id.* art. 5(III-VI).

65. *Id.* art. 4(I-III).

66. *Id.* at Fifth Transitory Article.

67. *Id.* art. 9.

68. *Id.* The exploration that the MRC may carry out is through a system of allotments (*asignaciones*).

69. *Id.* art. 10.

70. *Id.* art. 15.

71. *Id.*

concession holder.⁷² The exploration concessionaire's right to the area covered by an exploitation concession is clearly defined, provided that the concessionaire has not incurred a justified cause for its cancellation.⁷³ Under the new Mining Law, it is now possible, under a bidding process, to even obtain concessions on the continental shelf and seabed.⁷⁴

The new Mining Law establishes a clear link with existing Mexican environmental legislation in two ways: cleaner operations and restricted mining activity in protected natural areas.⁷⁵ Specifically, under the new Mining Law, concession holders must either make a minimum investment or work assessment.⁷⁶ Providing proof of a minimum work assessment or investment has been greatly simplified by the Law in areas covered by concessions.⁷⁷ In addition, the SEMIP has the authority to temporarily reduce the minimum work assessment or investment obligations if the price or demand for a specific mineral is low.⁷⁸ The reasons for cancellation or annulment of concessions are clearly defined and are not left to arbitrary decision-making by the Mexican government.⁷⁹

Allotments to the MRC have a validity of six years, after which the MRC must leave the area by itself, integrate it into the bidding process,⁸⁰ or incorporate it to the National Mineral Reserves system.⁸¹

D. Mineral Reserves

National Mineral Reserves⁸² are created by a special decree of the Federal Executive for reasons of public interest or to satisfy any future resource needs of Mexico,⁸³ based on a proven public interest and provided that the mineral potential of the area is determined by semi-detailed exploration.⁸⁴ Thus, concessions by the MRC for further exploration are precluded for geographical areas within a National Mineral Reserve.

Certain geographical areas within a National Mineral Reserve may be disincorporated by federal executive decree if reasons for the area's initial incorporation change.⁸⁵ Upon disincorporation, an area may either be declared a free area or be subject to the bidding process outlined in the Mining Law.⁸⁶

72. Resulting from the deletion of provisions equal or equivalent to Articles 34 and 35 of the 1975 Law, which specified limits.

73. *Mining Law*, *supra* note 1, art. 15.

74. *Id.* art. 13.

75. *Id.* arts. 7(I, IV), 20.

76. *Id.* arts. 27-30; *Related Regulations of the Mining Law*, *supra* note 52, arts. 53-54.

77. *Mining Law*, *supra* note 1, arts. 27-32; *Related Regulations of the Mining Law*, *supra* note 52, arts. 53-60.

78. *Mining Law*, *supra* note 1, art. 32.

79. *Id.* art. 42.

80. *Id.* art. 16.

81. *Id.*

82. *Id.* ch. VIII (for discussion of Mineral Reserves Policy).

83. *Id.* art. 13.

84. *Id.*

85. *Id.* art. 17.

86. *Id.*

E. Mining Contracts and Bidding Process

Mining contracts relating to exploration, partnerships (*asociación en participación*), or leases are no longer subject to the SEMIP's prior approval, but must be recorded by the Public Mining Registry.⁸⁷ On the other hand, the new Mining Law contemplates a bidding process for two different purposes: the execution of exploration contracts and the granting of concessions.⁸⁸

The bidding process for the execution of exploration contracts applies to MRC allotments for an area which is neither being declared free nor incorporated into Mineral Reserves and whose six-year term is about to terminate.⁸⁹ These contracts convey a preferential right, to the contracting party, to obtain a concession over the area involved.⁹⁰ Other bidding processes apply to the granting of exploration concessions on the continental shelf and seabed⁹¹ and the granting of concessions in areas disincorporated from the Mineral Reserves.⁹²

The new Mining Law requires that those awarded a bid for exploration contracts and for concessions in areas released from reserves must make a semi-annual finder's fee payment or a discovery premium of not less than 1% or more than 3% of the invoice value for the smelter returns of minerals obtained during the term of the exploration concession and any subsequent concession.⁹³

F. Treatment Plants

Since 1930, Mexican mining legislation has regulated treatment plant concessions for the operation of mills, smelters and refineries, where the resulting treatment fees were subject to the prior approval of the Mexican government.⁹⁴ Although the new Mining Law eliminates these concessions, treatment activities are still subject to the provisions of this Law.⁹⁵ Currently, individuals or corporations operating treatment plants must give notice to SEMIP of their operations, and comply with applicable environmental legislation and receive minerals or concentrates from third parties in amounts of up to 15% of the plant's capacity.⁹⁶ Treatment fees are no longer subject to prior governmental approval; but they are determined under commercial conditions based on supply and demand.

87. *Id.* art. 46(VI).

88. *Id.* arts. 16(II), 17(II).

89. *Mining Law*, *supra* note 1, art. 16(II); *Related Regulations of the Mining Law*, *supra* note 52, arts. 27-30.

90. *Mining Law*, *supra* note 1, at Tenth Transitory Article.

91. *Id.* art. 13.

92. *Id.* art. 17(II).

93. *Id.* art. 35.

94. 1930 *Mining Law*, arts. 33-41; 1961 *Mining Law*, arts. 150-173; 1975 *Mining Law*, arts. 56-64.

95. *Mining Law*, *supra* note 1, art. 37.

96. *Id.*

G. Mining Companies and Foreign Investment

Mining concessions may be granted to Mexican citizens, *ejidos* and agrarian communities and companies incorporated under the laws of Mexico.⁹⁷ While previous mining legislation subjected mining companies to numerous rules, requirements and prior approval regarding bylaws, transfer of shares, citizenship of directors and chief executive officers, the present Law has abolished all of these requirements and merely requires that: (i) mining companies be incorporated under the laws of Mexico;⁹⁸ (ii) their corporate purposes include the exploration or exploitation of minerals or substances subject to the new Mining Law; and (iii) their corporate domicile be within the Mexican Republic.⁹⁹

As to foreign investment, the 1975 Mining Law limited foreign investment to 49% for companies dedicated to the exploration and exploitation of minerals under ordinary concessions and to 34% in the case of placer gold, coal and iron.¹⁰⁰ In addition, the new Mining Law defers all matters regarding the foreign purchasing of Mexican Mining Company stock options to the applicable provisions of the 1993 Foreign Investment Law.¹⁰¹

Also, under the 1993 Foreign Investment Law, foreign investors may hold up to 100% in capital stock of Mexican mining companies without a permit or prior governmental approval.¹⁰² Mining companies controlled by foreign shareholders are entitled to obtain mining concessions and the requisite surface land for their operations. However, if a foreign investor tries to acquire, directly or indirectly, more than 49% of the capital stock of an existing company, and if the total value of that company's assets exceeds a set amount determined yearly under the Foreign Investment Law, then the foreign investor must obtain prior approval of the *Comisión Nacional de Inversiones Extranjeras* (National Foreign Investment Commission).¹⁰³

Regarding trusts, the new Mining Law expressly authorizes Mexican financial institutions, as trustees, to subscribe and acquire shares of equity participation in Mexican mining companies¹⁰⁴ without the need for prior approval by the government.¹⁰⁵ The 1973 Foreign Investment Law limited foreign investment within mining companies to 49% for ordinary con-

97. *Id.* art. 10.

98. MEXICAN CONSTITUTION, *supra* note 1, art. 27 ¶ 6; *Mining Law*, *supra* note 1, art. 11 ¶ 1.

99. *Mining Law*, *supra* note 1, art. 11(I-III).

100. *Mining Law*, *supra* note 1, art. 34 (The 1975 Mining Law dictated that in the event of renewal of exploitation concessions, foreign investment had to decrease to 40% for dedicated companies and 25% in the case of placer material.).

101. See *Foreign Investment Law*, *supra* note 1.

102. *Id.*

103. *Foreign Investment Law*, *supra* note 1, art. 9 (For 1994, the amount was set around \$27 million.). *Id.* at Tenth Transitory Article. At the exchange rate in early 1995 of around 6 pesos per dollar, it equals U.S. \$14,167,000.

104. *Mining Law*, *supra* note 1, art. 11; *Related Regulations of the Mining Law*, *supra* note 52, arts. 72(I), 73.

105. *Id.*

cessions and 34% for special concessions.¹⁰⁶ Therefore, trusts were utilized so that foreign investors could achieve 100% control. With the enactment of the 1993 Foreign Investment Law and the elimination of limits on foreign investment in mining activities by the government, the need for foreign investors to use trusts as a means for completely holding 100% of a Mexican mining company has become moot.

VI. MINERAL RESERVES POLICY

Mexico constitutes a total area of approximately 1,963,677 square kilometers.¹⁰⁷ Although reliable data is not available, it is said by members of the board of directors of the Mining Industry Chamber of Mexico and officers of the Bureau of Mines that only 15% of this total area has been explored. These members and officers also contend that only 60% of the national territory has the adequate geological conditions for the existence of ore deposits and that only 4% of the national territory has been fully explored for ore deposits. In any case, the area available for future additional geological exploration reaches gigantic proportions. In the past, further exploration of areas with mining potential had been discouraged either by the hoarding of large idle acreage by individuals or corporate entities for speculative purposes, or by designating extensive areas as National Mineral Reserves,¹⁰⁸ where exploration and exploitation was restricted to government agencies and, under very limited cases, to private enterprise under contracts. Consistent with the National Mining Modernization Program's objectives and the enactment of the 1990 Mining Regulations, the obstacle of the once large area designated as National Mineral Reserves is currently being reduced in area to reasonable levels.¹⁰⁹ Since 1992, no new mining reserves have been created, and since 1988, 96% of the area covered by National Mineral Reserves at the beginning of the Salinas Administration has been released.¹¹⁰

VII. FISCAL POLICY FOR THE MINING INDUSTRY

The Mining Industry's taxation system has been used not only as a source of revenue for the Mexican government, but also as a mechanism

106. *Foreign Investment Law*, *supra* note 1, art. 5 ¶ a.

107. PANORAMA DE MÉXICO, 7 PRESIDENCIA DE LA REPÚBLICA (1988) (Mex.).

108. National Mining Reserves are extensive areas which invariably include coal.

109. *Memoria Institucional 1988-1994—Dirección General de Minas [Institutional Memoirs 1988-1994—General Mine Administration]* [hereinafter *Institutional Memoirs*], Ministry of Energy, Mines and Paraestatal Industry (SEIMP) 20-21 (Nov. 1994) (press release) (Mex.).

110. From 1988 through 1994, 5,180,635.4 hectares have been released, as well as 2,278,563.5 hectares covered by "allotments." In addition, 2.3 million hectares have been released as a result of voluntary reductions by concessionaires and 3.8 million hectares have been freed as a result of cancellation and rejection of concessions. *Institutional Memoirs*, *supra* note 109. As of July 31, 1994, only about 500,000 hectares were within National Mineral Reserves, while more than 9 million hectares were covered by exploration and exploitation concessions. *Id.* at 19.

to implement other non-fiscal aspects of mining policy.¹¹¹ Thus, by the late 1950s, all majority and wholly foreign-owned mining companies had to bear a very heavy tax burden, while a more benign taxation scheme was applied to mining companies with 51% or more Mexican ownership.¹¹² As a result, taxation was used to induce the "Mexicanization" of foreign-owned mining companies.¹¹³

In addition to the past general taxation system applicable to all business entities, two specific duties (*derechos*) were applicable to the mining industry in Mexico: the mine production tax and the mining concession's tax.¹¹⁴ The mine production tax was a percentage¹¹⁵ as high as 7% of an official posted price of a produced metal or mineral. The mining concessions tax is an amount per hectare covered by mining concessions.¹¹⁶

By 1989, the mine production tax was creating a hardship which adversely affected many mining companies in Mexico and, coupled with the depressed prices of metals, the tax would have led to the eventual shutdown of numerous mining operations. Pursuant to a course of action contemplated in the Mining Modernization Program,¹¹⁷ the tax system was revised. The original plan was for a gradual yearly decrease until total elimination of the tax over a three-year period. However, due to the prevailing low international prices of precious and industrial metals, the mine production tax was eliminated completely as of January 1, 1991.¹¹⁸

As to the mining concession's tax, and consistent with the objectives of the Mining Modernization Program to discourage the hoarding of idle mining claims and encourage the allocation of funds for exploration and mining, this tax had been increasing since 1989.¹¹⁹ The tax rate is different for exploration concessions and for exploitation concessions. Since 1991, there is a tax adjustment based on increases in the Consumer Price Index for exploration concessions. The tax payable during the first year of an exploration concession is fairly low, considering that substantial acreage must be explored during the initial stages. Thereafter, the tax increases twice in two-year intervals to discourage hoarding.¹²⁰ Likewise, in the

111. *Exposición de Motivos de la Ley de Impuestos y Fomento de la Minería* [Underlying Reasons for the Law for the Taxation and Protection of Mines] and *Ley de Impuestos y Fomento a la Minería* [Law for the Taxation and Protection of Mines], art. 56, D.O. (Dec. 31, 1955) (Mex.) [hereinafter *Mine Tax Law*].

112. *Mine Tax Law*, *supra* note 111, art. 56.

113. *Id.* The *Mine Tax Law* granted a 50% tax reduction to "Mexicanized" mining companies.

114. *Ley Federal de Derechos* [Federal Law of Duties], arts. 262-74, D.O. (Dec. 31, 1981) (Mex.) [hereinafter *Duty Law*].

115. *Id.* art. 263.

116. *Id.*

117. See *National Mining Modernization Program*, *supra* note 21.

118. *Ley Federal de Derechos* [Federal Law of Duties], D.O. (Dec. 26, 1990) (amendments to this law eliminated the mine production tax) [hereinafter *Amended Duty Law*].

119. The aggregate increases from 1989 to 1992 were (i) 1,450.1% for exploration concessions; (ii) 2,158.1% for non-metallic minerals exploitation concessions; and (iii) 1,448.4% for metallic minerals exploitation concessions. Commencing January 1, 1993, the distinction between non-metallic and metallic minerals was thus eliminated.

120. *National Mining Modernization Program*, *supra* note 21, at § 3.5.

case of exploitation concessions, the rate is low for the first two years and then increases substantially for the third and fourth year and thereafter; thus the applicable rate is slightly higher.¹²¹

Federal tax legislation¹²² also provides a tax for each cubic meter of national waters obtained from underground sources, rivers or lakes used by any individual or corporation, including the water pumped from the mines but excluding brackish water.¹²³ In addition, a new duty is imposed on every cubic meter of water discharged onto Federal lands, basins, lakes or rivers.¹²⁴ The applicable rate also depends on the levels of suspended solids and of oxygen contained in the water.¹²⁵

VIII. ENVIRONMENTAL CONTROLS

Mexico is no exception to the worldwide trend of deep concern for the protection of the environment. The first environmental law in Mexico was promulgated in 1971,¹²⁶ which was replaced by a new law in 1982.¹²⁷ The General Law for Ecological Balance and Protection of the Environment (EBPEL)¹²⁸ is a comprehensive piece of legislation which addresses all aspects of environmental stewardship and of the conservation of natural resources. EBPEL has been the cornerstone of a new and complex structure of regulations, technical parameters and governmental actions.

EBPEL includes a specific chapter on exploration and exploitation of non-renewable resources,¹²⁹ as well as other restrictive provisions applicable to high risk industries.¹³⁰ EBPEL provides for temporary or permanent shutdown of industrial operations, including the possibility of cancellation of concessions, if a concession holder's activities are deemed highly pollutant.¹³¹

The 1988 Regulations¹³² regarding environmental impact assessment make it mandatory for individuals or corporations to file an environmental impact statement and to obtain governmental approval prior to explo-

121. *Amended Duty Law*, *supra* note 118, art. 263. The exploitation concessions rates are fixed in January and are adjusted in April, July and October. *Id.* art. 1 § 4. For the period of July 1 to September 30, 1994, the rates are (a) for exploration concessions: (i) year 1: N\$0.45; (ii) years 2-4: N\$1.39; (iii) years 5-6: N\$2.81; and (b) for exploitation concessions (i) years 1-2: N\$5.62; (ii) years 3-4: N\$11.24; and (iii) from year 5: N\$19.70 per hectare. CIRCULAR 54, CÁMERA MINERA DE MÉXICO, (1994).

122. *Duty Law*, *supra* note 114, arts. 223, 276-285.

123. *Id.* art. 222.

124. *Id.* art. 276.

125. The Mining Industry Chamber of Mexico, with the support of the Ministry of Energy, Mines and State Industry, is actively lobbying for the elimination of such taxes.

126. *Ley Federal para la Prevención y Control de la Contaminación Ambiental* [Federal Law for the Prevention and Control of Environmental Pollution], D.O. (Mar. 23, 1971) (Mex.).

127. *Ley Federal de Protección al Medio Ambiente* [Federal Law for the Protection of the Surrounding Environment], D.O. (Jan. 11, 1982) (Mex.) [hereinafter *Surrounding Environment Law*].

128. D.O. (Jan. 23, 1988).

129. *Id.* arts. 108-109.

130. *Surrounding Environment Law*, *supra* note 127, arts. 145-153.

131. *Id.* art. 172.

132. D.O. (June 7, 1988).

ration, extraction, and treatment of minerals and refining of metals.¹³³

On June 6, 1988,¹³⁴ the *Secretario de Desarrollo Urbano y Ecología*, (Ministry of Urban Development and Ecology), now the *Secretario de Desarrollo Social*, (Ministry of Social Development, SEDESOL), published a list of products and substances deemed as hazardous or toxic waste, including many of which are produced by the mining-metallurgical industry.¹³⁵ On November 25, 1988,¹³⁶ the Federal Executive issued regulations regarding hazardous waste materials and regulations for air pollution.¹³⁷ The regulations regarding hazardous waste materials provide for governmental approval of the storage, handling, transportation, recycling and final disposal of hazardous or toxic waste.¹³⁸ On March 28, 1990,¹³⁹ SEDESOL published a list of activities deemed dangerous because of the proximity to toxic materials which are produced, processed, handled, used, stored or disposed, including those chemicals or by-products that are used by the mining-metallurgical industry.¹⁴⁰

During the past two years, the Ministry has issued almost one hundred technical standards regarding the quality of water discharge, noise, gas and dust emissions, but not one addressing the concerns of the mining industry. The central environmental issues that today's Mexican mining industry must address are environmental impact assessments, protected natural areas, damming of metallic tailings, water discharge, materials handling and topsoil.

In conclusion, the protection of the environment can neither be ignored by individuals nor by the mining-metallurgical industry, and any mining project in Mexico has the social responsibility and legal obligation to consider the protection of the environment.

IX. AN AGENDA FOR THE FUTURE

To preserve and strengthen Mexico's international competitiveness, and to achieve the objectives of the Mining Modernization Program, whose purpose is to channel more governmental resources into mining, the Mexican Mining Industry will still need governmental support through:

- continuation of the efforts to further eliminate bureaucratic problems;
- tax incentives, such as depletion allowances, which promote further allocation of resources for exploration, which is essential not only for the growth of the mining activity but for its survival;
- incentives to recover or share investments in infrastructure, such as power lines and roads, which represent significant expenditures

133. *Id.*

134. D.O. (June 6, 1988).

135. *Id.*

136. D.O. (Nov. 25, 1988).

137. *Id.*

138. *Id.*

139. D.O. (Mar. 28, 1990).

140. *Id.*

required to open or expand mining units and which benefit the surrounding communities;

- the elimination of taxes for the use of water discharged from the mines; and
- the adoption of specific environmental standards for the mining industry, which seek an equitable balance between the need to protect the environment and the Mexico's need for increased mining activity.

Now that the North American Free Trade Agreement (NAFTA)¹⁴¹ has been ratified by the United States, Canada and Mexico, its effects will soon be felt, although its long range benefits obviously will take time. From the Mexican point of view, the market potential of the collective North American continent will offer expanded opportunities for export trade of raw mining products, especially those products with added value through further industrial processing. Likewise, NAFTA offers opportunities for the importation into Mexico of machinery and equipment for the mining industry, as well as mineral products that are not found in Mexico because of the country's geological characteristics.

X. CONCLUSIONS

Mexico has established new ground rules for its mining industry. They constitute a new regulatory frame, comparable to the worldwide trends in economic activity and, with cooperation, will lead the way toward new opportunities. These new rules will promote increased growth of the Mexican mining industry and maintain its leading role among the mining nations of the world as a reliable supplier of raw materials and intermediate products.

As of January 1991, direct foreign investment in Mexican mining amounted to U.S. \$486.5 million, which represented only 1.6% of all direct foreign investment in Mexico.¹⁴² Since the enactment of the new Mining Law, 135 new Mexican mining corporations have been recorded in the Public Mining Registry.¹⁴³ It is therefore evident that Mexico's doors are open to additional foreign investment in the field of mining. However, as it is often said in Mexico, "while foreign miners may have the know-how, Mexican miners have the know-who." Consequently, the Mexican Mining Industry looks forward to the possibility of strategic alliances and associations with foreign investors and capital in mining ventures which will benefit all parties.

141. D.O. (Dec. 20, 1993).

142. *Institutional Memoirs*, *supra* note 109.

143. *Id.*

APPENDIX A

OUTLINE OF OBJECTIVES FOR THE OPERATING PROGRAMS
AND COURSES OF ACTION OF *THE NATIONAL MINING
MODERNIZATION PROGRAM 1990-1994*.

A. The Operating Program for revising the regulatory frame stated as its objective: amending mining legislation for the needs of modernization, growth and diversification of mining; improving legal rights and compliance with existing mining obligations; and allowing for the strengthening of mining's contribution to the economic well-being of Mexico.¹⁴⁴

The courses of action outlined in the Program included among others:

1) Revising mining legislation, an action which would permit the entry of qualified new investors and eliminate speculation with mining concessions.

2) Revising and redefining the criteria for amending the classification of National Mining Reserves.

3) Simplifying regulatory procedures, which reduce the time required for various transactions and proceedings.

4) Establishing effective methods for the localization and identification of mining claims and for the notification of governmental resolutions affecting these claims.

5) Improving surveillance and assessment of mining projects during exploration and extraction.

6) Improving the systematic control of documents to improve expeditious processing of mining concession applications.

7) Creating efficient enforcement mechanisms to ensure full compliance with legal obligations.

8) Referencing the Public Mining Registry to improve the use of available information.

9) Furthering the decentralization of decisions, through the expansion and delegation of authority to regional and local agencies and offices of the Bureau of Mines.

B. The Operating Program for the improvement of mining taxation had defined its objective as an "inducement for the development of mining activity and the exploitation of mining zones, which eliminate idle mining claims."¹⁴⁵

The courses of action outlined in the Program, included:

1) Revising the tax burden for mining by making it comparable to taxation practices of other industries, at the domestic and international level, through the elimination of mine production taxes.

2) Revising the mining concessions tax for the use of public property, also known as the surface rights tax, by considering the minimum investment required for exploration and exploitation activities.

3) Revising other tax and fiscal burdens related to mining, by taking into consideration their characteristics and contributions.

144. *National Mining Modernization Program*, *supra* note 21, § 3.5.

145. *Id.* § 3.4.

