MINING INVESTMENT IN BRAZIL, PERU, AND MEXICO: A PRACTICAL METHODOLOGY

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Mexico, Peru, and Brazil are replete with natural resources.1 Of

1 The bulk of untapped resources in these countries is well documented. The economy of Brazil, for example, is based primarily on natural resources. Significantly, Brazil has many of the largest iron ore deposits on the globe. PRICE WATERHOUSE, DOING BUSINESS IN BRAZIL 6 (1980) [hereinafter cited as PRICE WATERHOUSE, BRAZIL]. In fact, the overall amount of resources known to be located in Brazil in the mid-1970's was described as "huge," and further exploration continues to unearth new mineral deposits. T. WEIL, J. BLACK, H. BLUSTEIN, K. JOHNSTON, D. MCMORRIS, AREA HANDBOOK FOR BRAZIL 329 (3d ed. 1975) [hereinafter cited as T. WEIL]; see U.S. DEPARTMENT OF STATE, COUNTRIES OF THE WORLD AND THEIR LEADERS 263 (5th ed. 1979). Other plentiful resources include: nickel, tin, chromite, bauxite, beryllium, copper, lead, tungsten, and zinc. U.S. DEPARTMENT OF STATE, supra, at 262.

Importantly, oil and gas deposits have yet to be discovered in major quantities. See PRICE WATERHOUSE, BRAZIL, supra, at 6. The search for petroleum reserves is significant because Brazil's monthly expenditures for oil exceed $300,000,000. U.S. DEPARTMENT OF STATE, supra, at 263.

A similar situation exists in Peru. Peru is blessed with abundant resources; yet the development of resource related industries and investment therein has not been dramatic. See PERU, A COUNTRY STUDY 113 (R. Nyrop, 3d ed. 1981) [hereinafter cited as R. Nyrop]. Regarding petroleum, Peru is one of the few countries that has the capacity to be "self-sufficient in oil." PRICE WATERHOUSE, DOING BUSINESS IN PERU 7 (1979) [hereinafter cited as PRICE WATERHOUSE, PERU]. In addition, newly discovered oil reserves should generate $80-$100 million in export revenues. Id. at 7. Forecasts for the mining industry are equally optimistic. The recent discovery and development of sizable copper mines is expected to benefit substantially Peru's economy. Other minerals found in Peru include lead, zinc, silver, iron ore, bismuth, cadmium, tin, gold, antimony, tungsten, manganese, selenium, letterrim, and mercury. U.S. DEPARTMENT OF STATE, supra, at 824. The Mining sector accounts for about 54% of total exports, id., and the petroleum industry accounts for about seven percent. See R. Nyrop, supra, at xv.

Mexico is also endowed with vast resource wealth. The country is best known for its substantial oil fields. Discoveries of extensive oil fields in southeastern Mexico and in the Gulf of Mexico permitted Mexico to become self sufficient in oil and to become a major exporter of petroleum. PRICE WATERHOUSE, DOING BUSINESS IN MEXICO 8-9 (1981) [hereinafter cited as PRICE WATERHOUSE, MEXICO]. Mexico's other natural resources are well diversified. The country is a leading producer of sulphur, lead, and zinc and is the world's largest silver
those resources, minerals are one key that may help each nation attain a vibrant economy.² Presently, a trend exists toward increasing foreign investment opportunities in Mexico, Peru, and Brazil.³ Thus, foreign mining ventures which are planned properly theoretically should be lucrative. In Mexico, recent governmental leadership has openly accepted investments of foreign capital, except in fields reserved for Mexican nationals.⁴ Current relations between Peru and the United States are, for the first time since the early 1970's,⁵ conducive to foreign investment. That investment is primarily concentrated in mining.⁶ Brazil, however, was and remains the Latin American country most open to United States private investment.⁷

² See supra note 1; see also Stateman's Y.B. 1980/1981 855, 984 (J. Paxton ed. 1980) [hereinafter cited as J. Paxton]; Price Waterhouse, Brazil, supra note 1, at 9; Price Waterhouse, Peru, supra note 1, at 7; Price Waterhouse, Mexico, supra note 1, at 10. But see R. Nyrop, supra note 1, at 113, 117, 119 (explaining that in Peru the development of the mining industry did not progress as quickly as expected and that mining did not increase ratably with Peru's gross domestic product during the early 1970's).


⁴ Price Waterhouse, Mexico, supra note 1, at 16.

⁵ Until recently, investment in Peru was truly a gamble as a result of a coup conducted on October 3, 1968 in Lima. On that day a group of generals and colonels of the Peruvian armed forces arrested President Belaunde and exiled him. R. Nyrop, supra note 1, at 39. The revolution was prompted by nationalistic fervor stemming from an agreement between the Belaunde government and the International Petroleum Company of Great Britain (IPC). Id. at 38. The revolutionary forces alleged that the agreement gave currency concessions to the IPC enabling it to obtain excessive profitability. See id. Shortly after the military takeover, significant changes in Peruvian business structure were implemented. For example, workers received participation in ownership and management of the companies in which they were employed. General Industries Law, Decree-Law No. 18,350 (1970), reprinted in BNA, Peru, supra note 2, at A-3. Mining, for example, was one such industry. General Mining Law, Decree No. 18,880 (1971), reprinted in BNA, Peru, supra note 2, at A-3. Moreover, the state nationalized private sector industries. Decree Law No. 19,453 (1972), reprinted in BNA, Peru, supra note 2, at A-3.

⁶ U.S. Department of State, supra note 1, at 825. Investment is concentrated equally in petroleum.

⁷ Sloan, Political Environment for Investments in Latin America, 1 Hous. J. Int'l L. 1, 6 (1978). Brazil, however, is very selective regarding the foreign investments it encourages. Id. Brazil seeks investors that will contribute to its long term economic development. Price Waterhouse, Brazil, supra note 1, at 9. The current government strongly favors technological development. Id.
I. THE HISTORICAL AND POLITICAL BACKGROUND OF FOREIGN INVESTMENT

The confluence of traditional legal doctrines, politics, and economics shaped Latin America’s attitude toward foreign investment especially in Mexico, Peru, and Brazil. Two traditional legal doctrines relevant to mining investment relate to subsoil rights and conflict of laws. Subsoil rights are deemed to belong to the nation. This concept evolved from the tradition in Spanish law that all rights to elements of the subsurface inhered in the king. Such a legal attitude has practical significance for a foreign investor. Specifically it precludes an investor from purchasing real property speculatively in the hope of obtaining a mineral laden tract.

Questions regarding the applicability of relevant law are settled usually in Latin American countries by the Calvo doctrine. The Calvo doctrine contains two essential principles:

1. Sovereign States, begin free and independent, enjoy the right, on the basis of equality, to freedom from interference by other States, either through force or diplomacy; and
2. although aliens should be accorded equal treatment with nationals, they are not entitled to rights and privileges not accorded nations and therefore must seek redress for grievances exclusively in local courts.

In short, the first principle ensures nonintervention of foreign nations in Latin American business; the second principle ensures that foreign investors are beholden to the host country’s laws, without recourse to their own governments when involved in a dispute with a Latin American government. In essence, the Calvo doctrine em-

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* Price Waterhouse, Brazil, supra note 1, at 1. For a review of Brazilian, Mexican, and Peruvian laws exemplifying this view, see infra notes 81-88 and accompanying text.
* Sloan, supra note 7, at 1. The rights now inhere to the nation as a natural outgrowth of the nationalistic movements that spawned the independence of Latin American nations from Spain. See id. at 3-4.
* See id. at 1-2. The doctrine developed from the writings of Carlos Calvo, an Argentine diplomat and legal scholar. A. Goldbert & Y. Nun, Latin American Laws and Institutions 321 (1982). The doctrine gained acceptance because Latin America feared “unrestricted diplomatic intervention in their internal affairs.” Id. (quoting in part Gess, Permanent Sovereignty Over Natural Resources, 13 I.C.L.Q. 398, 414 (1964)).
* Id.
* Sloan, supra note 7, at 1. The rationale behind this equal treatment provision was stated succinctly: “[A] foreigner who voluntarily moves to a country which is not his own, in search of a personal benefit, accepts in advance, together with the advantages which he is
bodies the ambivalence that traditionally pervaded the Latin American attitude toward United States investment. That ambivalence resulted from Latin America's fragmented political culture. Historically, Latin American countries were underdeveloped and in need of capital, yet frequently United States investors, which were tied to the government, exploited Latin America. As a result, some Latin Americans viewed the United States government and hence, United States corporations, as "imperialists." Thus, two attitudes now predominate Latin American thinking concerning United States investment. On one hand, some groups favor United States investment, viewing it as a safer mechanism to secure capital than taxation. On the other hand, many Latin American political leaders perceive economic nationalism and the resulting conflict with foreign firms as "the cheapest and quickest means to buy legitimacy. . . ."

This ideological backdrop in conjunction with each nation's historical attitude and current political view must be considered strongly by United States companies in their investment decisions. Of the three nations that this article considers, Brazil exhibits the most stable historical and political climate for investment. Brazil's political history reveals a preference for compromise rather than violence "manifesting itself through significant constitutional stability and legality throughout its history." Major political changes evolved gradually, rather than through bursts of chaotic

going to enjoy, the risk to which he may find himself exposed." W. Bishop, Jr., International Law Cases and Materials 854 (3d ed. 1971) (quoting a Letter from Mexican Ambassador Hay to United States Ambassador (Aug. 3, 1938)). While this doctrine is well established in Latin American law, at least one scholar believes that it may be sidestepped contractually by inserting into contracts a provision stipulating that potential disputes may be settled through international arbitration. G. Aksen, Address at Vanderbilt University Law School, Symposium of International Civil Litigation, conducted by Vand. J. Transnat'L L. (Mar. 13, 1983).

See generally Sloan, supra note 7, at 6.

One such investor was the United Fruit Company. Id. at 8.

Latin Americans frequently do not distinguish between the United States government and United States corporations. Id. The Marxist perspective, which is strong in many Latin American countries, strongly affected Latin American foreign investment ideology. According to the Marxist view, the "government is merely an executive committee for United States corporations." Id. Interestingly, European countries are not viewed in the same light. See id.

Id.

Id. at 3.

Id.

T. Weil, supra note 1, at 3.

For example, the attainment of independence in 1872 and the transformation from a
violence, and after a brief period of unrest in the late 1960's and early 1970's, a stable investment environment developed. The attitude of the current Brazilian government toward United States investment may be characterized as "open, frank, and direct." While investment opportunities in Brazil are encouraging, Brazilian labor has not expressed outwardly a clear position concerning foreign investment and management. "It would appear, however, that the most acceptable method is foreign investment coupled with national management." Brazilian controlled joint ventures clearly curry favor with the present political regime.

Mexico is also an attractive nation in which to invest, although perhaps not to the same extent as Brazil. While Mexico basically has been stable, escaping major political violence for the last forty years, its economy was and continues to be a source of concern.
The government is unwilling to take steps to slow inflation, which it fears would simultaneously slow the economy and raise the level of unemployment. Spiraling inflation increases the risk of losing investment capital significantly. Insurance against such loss, however, is available to some extent from United States governmental agencies. Historically, Mexico exhibited certain disdain for United States investment operations. The expropriation of foreign operations in Mexico is well documented, and the continuance of a nationalistic attitude concerning control of industry remanifested itself through recent legislation. This legislation mandated majority Mexican ownership in all new investments except those not categorized as being in the national interest. Apart from the historical fears, which for some time inhibited United States investment, the current political attitude toward United States investment may be characterized as one of acceptance but not of encouragement. Indeed, Mexico has sought "to diversify away from economic interdependence with the United States." Its proximity to the United States, however, precludes that option. The Mexican government recognizes that substantial private capital investments are needed to stimulate employment and industrial

Mexico continues to achieve "a measure of representative democracy under an oligarchy." Id. Opposition parties to the current government are small and ineffective. U.S. DEPARTMENT OF STATE, supra note 1, at 706.

30 Price Waterhouse, Mexico, supra note 1, at 16.
31 See generally W. Gordon, The Expropriation of Foreign-Owned Property in Mexico (1976). The representation and nationalization of the railroads in 1937 and the petroleum legislation were the culmination of the 1917 revolution. The impetus behind the nationalization was Lazaro Cardenas, a revolutionary fighter who assumed the presidency in 1934. To the masses, he symbolized the implementation of the most revolutionary clauses of the Constitution of 1917, and his expropriation measures were a part of his "national socialism" program. J. Ryan, supra note 29, at 80-81. Those expropriations resulted in the loss of millions of United States dollars.

32 Law for the Promotion of Mexican Investment (Ley Para Promover la Inversion Mexicana y Regular la Inversion Extranjera) 317 D.O.S., Mar. 9, 1973, reprinted and translated in MEXICAN FOREIGN INVESTMENT AND TRANSFER OF TECHNOLOGY LAWS (CCH) (1973). The law was designed "to promote Mexican investment and to regulate foreign investment to stimulate a just and balanced development and to consolidate the economic independence of the country." Id. art. 1.

33 See id. art. 4. Industries deemed to be in the national interest include: (1) petroleum, (2) petrochemicals, (3) exploitation of radioactive minerals, (4) mining, (5) railroads, (6) telephone and telegraph, and (7) other activities determined statutorily. Id.

34 See J. Ryan, supra note 29, at 410.
35 Murphy, Jr., The Echeverrian Wall: Two Perspectives on Foreign Investment and Licensing in Mexico, 17 Tex. Int'l L.J. 135, 146 (1982).
36 Id.
growth, yet tax and other incentives are unavailable to companies that are not controlled by Mexicans. The attitude of organized labor in Mexico does not wholly reflect the nationalistic posture. Organized labor does not officially oppose United States investment. In fact, labor may even prefer to deal with companies possessing large amounts of foreign capital, believing that such companies are more amenable to collective bargaining.

From a historical perspective, investment opportunities in Peru present a riddle, if not a gamble. For that reason, a decision to invest in Peru must be calculated. Throughout this century, Peruvian governments vacillated between constitutional civilian and extra-constitutional military regimes. Despite this uncertainty, a long history of United States investment in Peru exists, especially in the mining sector. In fact, by the 1960's to 1970's foreign enterprises dominated Peru's overall economy. This disproportionate economic balance, in conjunction with a changing Latin American attitude regarding foreign investment, led to political unrest and a rash of expropriations. With the subsiding of internal unrest, a more liberalized political attitude regarding foreign investment

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37 See Price Waterhouse, Mexico, supra note 1, at 17.
38 Id. at 16.
39 Id. at 18.
41 A. Goldberg & Y. Nun, supra note 10, at 347.
42 Id. The expropriations resulted from revolutionary zeal reacting to a socio-economic system that was smitten by rigidity and stratification. R. Nyrop, supra note 1, at xx. In 1968 a military junta led by General Juan Velasco Alvarado seized power intending to revolutionize society. He instituted a five year plan of development stressing reorientation of capital from agriculture to industry, expropriation of large estates, and land distribution to the peasants. U.S. Department of State, supra note 1, at 822. During the early 1970's, the Velasco government nationalized staggering numbers of industrial and commercial firms, and by 1975 those enterprises accounted for the nation's complete production of fertilizer, fishmeal, petroleum, and steel. R. Nyrop, supra note 1, at xx. Moreover, nationalized firms dominated the mining and metal refining industries. Id. President Velasco fell into disfavor when many of his reform plans did not comport with rising expectations. U.S. Department of State, supra note 1, at 822-23. He was replaced by General Francisco Bermudez in 1975, at which time the military chiefs "engineered" Velasco's retirement. R. Nyrop, supra note 1, at xxii. Bermudez instituted an austerity program to cope with other reform programs that usurped Peru's monetary resources. U.S. Department of State, supra note 1, at 823. During this "austerity program" severe national discontent arose leading to widespread demonstrations and a declaration of emergency. Id. The state of emergency was lifted in 1977 and the government became devoted to more pragmatic programs. Id. In 1980, Fernando Belaunde Terry was inaugurated as president while the armed forces relinquished control. Ironically, Belaunde was president when the military seized power in 1968. R. Nyrop, supra note 1, at xix.
developed. The current government "welcomes and needs foreign investment and technology" and in fact actively attempts to attract foreign investment. From the United States perspective, the opportunity to invest in Peru is now more appealing than it has been in over a decade. "No major outstanding expropriations exist to impede normal economic relations between the United States and Peru." Moreover, Peru recently liberalized its law concerning remittance of foreign profits. Twenty percent of the foreign capital may now be remitted abroad annually. Finally, the attitude of the Peruvian labor force is favorable to foreign investment, perceiving it as a way to remedy underdevelopment.

A review of Mexico, Peru, and Brazil concerning the availability of resources, the need for development, and the history of foreign investment in those nations reveals, on one hand, a potential "gold mine" for pragmatic investors and, on the other hand, a potential "Pandora's Box" for the unwary. It is an understatement to posit that the mineral resources of each country are vast. The mere availability of resources, however, should not determine any investment decision. Indeed, the current law regarding foreign investment in these nations cannot be read in a vacuum. The history of foreign investment, the current political climate, and the stability of governmental leadership must also enter into any investment decision. For these reasons, investment in the mining industry of Mexico, Brazil, and Peru is an attractive, yet enigmatic, "...

See Price Waterhouse, Peru, supra note 1, at 11.

U.S. Department of State, supra note 1, at 82. See generally U.S. and Peru Reach Agreement on Marcona Mining Co. Issue, 75 DEPT. ST. BULL. 487, 488 (1975).

Price Waterhouse, Peru, supra note 1, at 11. This measure comports with the current policy of the Andean Common Market (ANCOM). Id. ANCOM is comprised of Columbia, Chile, Peru, Ecuador, Bolivia, and Venezuela. Ryerson, Legal Problems of Investment in the Andean Market, 1 HOUSE J. INT'L L. 29 (1978). ANCOM's policy is grounded in the belief that "central planning is a precondition of balanced trade and equitable growth." Id. In accord with that goal, ANCOM established "minimum restrictive standards" regarding foreign investment. Id. at 30. For a review of those restrictions, see id. at 30-33.

Ryerson, supra note 45, at 31; Price Waterhouse, Peru, supra note 1, at 11.

Price Waterhouse, Peru, supra note 1, at 11.

This is an understatement. When investing in Latin America even the simplest principle of contract law may be ignored. As one scholar stated:

the major difficulty between the United States and Latin America is the fact that Latin American governments sometimes feel free and sometimes compelled, to constantly shift the terms of agreement with United States corporations. A long-term agreement with one government may not be removed by a succeeding one. . . . The terms of the agreement in the Latin American environment cannot be set for a long time.

Sloan, supra note 7, at 2.
II. AN OVERVIEW OF THE FEDERAL MINING LEGISLATION of Brazil, Mexico and Peru

A. General Provisions

One clue in solving the investment riddle lies obviously in the codified mining laws of each country. The mining industries of Brazil, Mexico, and Peru are governed by specific mining codes which must be read in conjunction with their tax and business organization statutes. In each nation the regulation of mining rests primarily with governmental or administrative agencies. In Brazil, the federal government administers mineral resources, mineral production, and the distribution, trade, and consumption of mineral products. Mining activities are directed by the Ministry of Mines and Energy, which coordinates the policy of the mining sector, studies and proposes measures to stimulate development of the mining industry, and plans and coordinates the execution of geological studies.
Mexico's mining sector is controlled similarly. The Secretariat of National Properties has broad powers to regulate the mining industry.\(^4\) The Secretariat advises the federal executive on all aspects of the mining sector and promotes the organization of mining enterprises with state participation.\(^5\) Moreover, the Secretariat is empowered to intervene in the "direction, management and financial and administrative supervision of public mining entities and [other] mining enterprises with state participation."\(^6\) A second federal administrative entity, the Mining Development Commission (Comision de Fomento Minero), was established generally to foster the development of the Mexican mining industry.\(^7\) Its powers and obligations are of broad range by necessity.\(^8\) The Commis-

functions. Decree 75,468 (Mar. 11, 1975)(Brazil)(Diario Oficial of Mar. 14, 1975), discussed in OAS-Brazil, supra note 50, at 5. The organizations and their functions are:

The Superior Mining Council (Conselho Superior de Minas):
1) Coordinates policy of the mining sector under supervision of the minister of state;

The Executive Group of the Mining Industry (Grupo Executive da Industrria Mineracao):
1) Studies and proposes changes in the mining industry,
2) analyzes projects of the industry,
3) considers requests for the granting of incentives;

The National Department of Mineral Production (Departamento Nacional da Producao Mineral):
1) Plans and executes geological studies on the national territory,
2) supervises the fiscal control of the mining industry.

Id.\(^9\)


\(^5\) Id.

\(^6\) Id. The Secretariat has other ancillary powers including:
1) determining the federal mining policy and promoting the industrialization of the mining sector;
2) rendering official opinions concerning the mining sector;
3) advising the Ministry of Finance and Public Credit regarding mineral taxation;
4) establishing production quotas;
5) issuing tariffs;
6) conducting inspection visits to mining sites;
7) observing topography to obtain data on mineral deposits in a general area;
8) verifying compliance with legal obligations.

Id. at 14-15.

\(^7\) Id. art. 90, at 15.

\(^8\) The Commission is responsible for the following operations:
1) The exploitation of mines, either directly or through contracts with persons or entities;
2) The purchasing, selling, and merchandising of all minerals;
3) The establishment of loan systems for miners;
4) The leasing and selling of mining implements;
5) The granting of refactionary loans to miners;
6) The granting of advances in connection with mining promotion agreements or
tion also acts as a "service agency to private industry and individuals engaged in mining. . . ." Other federal administrative agencies include the Council on Nonrenewable Natural Resources, the Board of Mineral Resources, the Nacional Financiera, and the Nonmetallic Minerals Trust.

The Peruvian mining sector is also regulated intensively by the state, though in a manner significantly different from that of Mexico and Brazil. In Peru, the General Mining Law confers "special

on the value of minerals;
7) The acquisition, installation and operation of plants for concentration, treatment, smelting and refining of metals and minerals, as well as their processing or industrialization;
8) Technical and administrative assistance to miners or companies requesting it;
9) The management of mining and metallurgical companies, or businesses, as well as enterprises which market or process mining products;
10) Promoting the establishment of mining companies and enterprises related to mining, as well as mining and metallurgical marketing or processing companies;
11) The acquisition under any title and the subscription and sale of shares representing the capital stock of mining or related companies, as well as enterprises which market or process metallurgical products;
12) The negotiation and acquisition of credits and loans in general; the issuance, acceptance, endorsement and negotiation of credit instruments, the granting of guaranteeing of obligations acquired by third parties;
13) Supervising. . .the assistance granted to miners according to the law. . .;
14) Acting as trustee in mining and metallurgical enterprises.

**Id.** art. 90, at 16-17.

For this reason, investors should be aware that the Commissioner has branch offices in Satillo, Torreon, Chihuahua, Hermosillo, Durango, Guadalajara, Zacotecas, Urapan, and Coatzacoal. OAS-Mexico, supra note 50, at 17.

This agency was organized pursuant to Organic Law of Dec. 30, 1957 (Mexico), discussed in OAS-Mexico, supra note 50, at 17-18. The Council is a consultative body for the "federal executive in matters pertaining to all questions of a technical or legal nature affecting the national mining policy which includes planning activity designed to promote companies utilizing non-renewable natural resources." **Id.**

The Board was organized pursuant to Mining Law of 1975, art. 95 (Mexico) discussed in OAS-Mexico, supra note 50, at 18-19. Its primary duties include: (1) advising the Ministry of National Properties as to which areas should be included in National Mining resources; (2) providing advice regarding majority state participation companies and on special concessions; (3) acting as a consultative body regarding problems related to mineral resources; and (4) preparing studies on the mining industry. **Id.**

The Nacional Financiera is not tied to the mining sector but has made loans to mining industries. OAS-Mexico, supra note 50, at 19.

The Trust (Minerales no Metalicos Mexicanos) was established by Acuerdo of Oct. 30, 1974 (Diario Oficial of Nov. 1, 1984), discussed in OAS-Mexico, supra note 50, at 19. The Trust was designed to "improve, expand, and develop the exploration, exploitation, financing and marketing of nonmetallic metals." **Id.** at 19-20. From the investor's point of view, this agency's utility lies in its responsibility for providing technical assistance to concession-holders. See **id.** at 20.

General Mining Law, Decree No. 18,880, El Peruano (June 9, 1971), modified in part by Decree-Law No. 22,197 (May 30, 1978), discussed in OAS-Peru, supra note 50, at 16. The
rights" on the state to control mining. Pursuant to the General Mining Law, the state may deem certain territories to be exempt from non-state claims or concessions for a period of up to five years to facilitate national development and exploration of that territory. Marketing and refining of minerals are also exclusively within the state's domain. The Peruvian Mining Company (Empresa Minero del Peru) is the primary entity through which the state regulates, monopolizes, and otherwise dominates the mining industry. Its responsibilities are broad and include managing the state's role in the mining sector, representing the state in the formation and management of associate state mining companies, marketing mineral products, carrying out mining advancing programs, and furthering scientific research and development. Minero del Peru is an entity with which the foreign investor must be intimately familiar; it is authorized to lend exploration services in areas conceded to third parties and “[to] form companies for mining activities in concessions granted to individuals.” The Central Peruvian Mining Company (Centromin-Peru) is an autonomous state-owned “arm” of Minero del Peru to which a great deal

General Mining Law governs all activities “related to the use of mineral and fossil matter contained in the soil and subsoil of the National territory, including the sea, continental shelfland and sea bottom.” OAS-Peru, supra note 50, at 5-6. It does not govern petroleum extraction. Id. at 6.

Specifically, the executive branch has this duty. Id. at 18-19.


The Peruvian Mining Company was created by Decree-Law 18,225 (1970) and is governed currently by Decree-Law 20,035, El Peruano (May 30, 1973). Minero Peru is a decentralized public agency. It has a juridical personality in international law. OAS-Peru, supra note 50, at 17. Organizationally, it is governed by a board of directors and divided into the following six branches: (1) government, (2) control, (3) executive, (4) advisory, (5) operative, and (6) support organs. Id. Moreover, Minero Peru is the state’s mining monopoly. R. Nyrop, supra note 1, at 46.

Minero Peru also is beholden for the professional and technical development of its workers. Decree-Law 20,035, discussed in OAS-Peru, supra note 50, at 20. Moreover, it may contract for studies, consultations, or supervision subject to certain conditions, and it may freely enter into other contracts enabling it to meet its goals. See id. art. 23.

Executive approval is required. Id.

For an outline of Minero Peru’s responsibilities and powers, see OAS-Peru, supra note 50, at 19-22.
of the state's managerial responsibilities are delegated. The state also participates directly in private aspects of the mining industry via associated state mining enterprises and special mining enterprises. The associated state mining enterprises (Empresas Estatales Mineros, A Sociadas) are entities in which the state jointly holds at least twenty-five percent of the capital together with Peruvian nationals. Special mining enterprises are entities in which the state participates with a twenty-five percent minimum capital investment with foreign, or national and foreign, persons. These enterprises are not part of the private sector.

In conclusion, a review of the regulatory methods utilized by Mexico, Brazil, and Peru to control their mining industries reveals much common ground. First, state control is extensive if not ubiquitous. Second, the technological and economical development of the mining sector is also entrusted to the state. To the investor this means that any rulings or releases by national regulatory agencies offer invaluable predictions and insights as to whether a specific mining venture may enter the market and succeed. For this reason, the investor should familiarize himself thoroughly with each country's regulatory bodies, their composition, and their attitudes before making an investment decision.

B. Ownership of the Minerals

Mineral ownership in Mexico, Peru, and Brazil is accorded to the state. This right of ownership is imbedded in the Mexican

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74 See Decree-Law 21,117, El Peruano (Mar. 19, 1975), discussed in OAS-Peru, supra note 50, at 22.
75 See OAS-Peru, supra note 50, at 23.
76 Id.
77 Id.
78 This analysis is an essential aspect of the investment decision as there is virtually no case law in these nations regarding decisions concerning the procurement of concessions and their continued utilization. Moreover, obtainment of concessions frequently is discretionary. Discussion with Professor Igor Kavass, at Vanderbilt University Law School, Nashville, TN (Mar. 22, 1983).
79 See supra note 8 and accompanying text. This differs radically from the United States, where at common law the surface owner was deemed to own the subsurface as well. See, e.g., Clinchfield Coal Corp. v. Compton, 148 Va. 437, 139 S.E. 308 (1927). Moreover, even lands reserved by the United States federal government as "valuable for minerals", see 30 U.S.C. § 2 (1976), may be acquired by private individuals. See United States v. Coleman, 39 U.S. 599, reh'g denied, 391 U.S. 961 (1968). A possible explanation for this difference in attitude between the United States and its South American neighbors is that conferring mineral ownership upon the king impedes the free alienability of land. "Free alienability" is a public policy goal that is recognized consistently by the United States courts.
constitution and reiterated in its Civil Code. Similarly in Peru, the General Mining Law stipulates that minerals are the “inalienable and imprescriptible property of the state regardless of the nature of the substances that they contain.” Finally, Brazil also has adopted this nationalistic doctrine. Its revised Mineral Code classifies subsoil rights as within the public domain. This enactment in Brazil is significant because it abolished the preferential right of a surface owner to exploit mineral resources under his property. Article 84 of the Brazilian Mining Code deems “mineral deposits to be real property distinct from the ground in which it is located,” and provides further that surface ownership does not include ownership of underlying mineral deposits. From the investor’s perspective, the concept of national ownership is significant. First, it deprives investors of the opportunity to make acquisitions of raw land for speculative purposes. Second, Brazil’s enactment of its new Mineral Code, which deprives the surface owner of his preferential right to mine, is indicative of the prevailing trend in Latin American countries toward protecting fervently any economical “edge” they may possess in an attempt to foster development.

C. Obtaining a Mining Concession

As minerals are owned by the state in Mexico, Brazil, and Peru, they may be exploited only upon the granting of a concession by

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80 Constitucion Politica de los Estados Unidos Mexicanase art. 27, para. 4 (Mex.), discussed in OAS-Mexico, supra note 50, at 5-6. Paragraph four provides:

It corresponds to the Nationa, 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 lands, such as the minerals from which metals and metaloids used in industry are extracted; the deposits of precious stones, rock salt and the salines formed directed 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.

Id.

81 The Mexican Civil Code provides: “The owner of land is not the owner of the mineral or substances mentioned in the fourth paragraph of Article 27 of the Political Constitution of the United Mexican States. . . .” Mexican Civil Code, tit. 4, art. 838.

82 General Mining Law, Decree No. 18,880, discussed in OAS-Peru, supra note 50, at 5.

83 Decree-Law 227 (Feb. 28, 1967), discussed in OAS-Brazil, supra note 50, at 5.

84 T. Weil, supra note 1, at 286.

85 OAS-Brazil, supra note 50, at 5.

86 Decree-Law 227 (Feb. 28, 1967). Id. at 6.
decrees of the federal government.

1. Mining Concessions in Brazil

Brazil defines exploitations (lavra) of minerals as "coordinated operations to obtain an industrial utilization of a [mineral] deposit." To obtain a concession, two threshold requirements must be met. First, the concession must qualify as a "mining enterprise"

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87 Before a concession or exploitation begins, it is necessary to obtain an exploration license (pesquisa). Exploration is the work required to identify a deposit, estimate its value, and determine the economic feasibility of exploitation. Decree-Law 227, art. 14 (Feb. 28, 1967) (Brazil), discussed in OAS-Brazil, supra note 50, at 10. An application for exploration is granted solely to a "Brazilian natural or juridical person or [a] mining enterprise." Id. Two copies of the application must be submitted to the Ministry of Mines and Energy and contain the following information:

1) identification of the applicant including name, nationality, domicile, and if a juridical person, a copy of the authorization to act as mining enterprise;
2) an indication of the substances to be explored, a description of the area to be mined, and the names of adjacent surface land holders;
3) a scale map of the geographical features of the area to be mined; and
4) a working plan including source and availability of capital.

Id. art. 16, amended by Law 6,403 (Dec. 15, 1976) (Brazil).

Once approved the applicant has 30 days in which to pay the required fee. Applicants are approved subject to the following conditions:

1. The title is personal and is transmissible only in case of necessary heirs or surviving spouse, or in commercial succession if the successor meets certain of the Code requirements;
2. The authorization is valid for two years, renewable for one additional year if justification for continuance is shown and a new fee is paid;
3. Prospecting may not be conducted outside the authorized area;
4. Prospecting in river beds, navigable rivers, lakes, and the continental shelf is authorized only if this will not prejudice navigation and is in observance of regulations of competent authorities;
5. Prospecting in areas near fortifications, railways, water supplies, public thoroughfares, and parks is subject to permission by pertinent authorities;
6. The rights of third parties must be respected and the title holder is responsible for damages without liability of the government for restrictions due to such rights;
7. Mineral substances extracted during prospecting may be removed from the areas only for analyses and tests but sale of commercial quantities may be authorized under specific conditions;
8. When work is concluded a detailed report must be submitted on the mineral reserve of the deposit, quality of the ore or mineral substance, and feasibility of exploitation in accordance with specified standards. This report is required regardless of the results of exploration.

Id.

Once the exploration license is granted, its holder must begin to prospect within 10 days. A final report of exploration must be submitted to the Ministry of Mines and Energy upon completion of exploration. If that report is approved, the license holder has one year to apply for a concession. OAS-Brazil, supra note 50, at 12.

88 Decree-Law 227, art. 30, discussed in OAS-Brazil, supra note 50, at 13.
A "mining enterprise" is "any firm or company organized and domiciled in Brazil, regardless of its legal form, which has among its objectives the utilization of mineral deposits within the country." Thus, in Brazil the foreign investor may not mine through a branch of a United States business entity. The mining enterprise may be composed of nationals or foreigners, and natural persons or legal entities. Second, before federal authorization is granted, the deposit must be appropriately prospected and approved by the Department of Mineral Production. The Department of Mineral Production forwards the concession request to the Ministry of Mines and Energy for final approval. The request must contain the following information: (1) a certificate of registration in the register of commerce, (2) a description of the mineral deposits to be exploited, (3) a description of the mining field's location and indications of neighboring exploration areas, (4) a graphic definition of the area to be mined, (5) reference to any required easements, (6) a working plan for the exploitation including a description of processing installations, and (7) proof of sufficient capital to work the mine.

Procedurally, many loops must be passed through before a concession is granted in Brazil. First, a working plan must be submit-
ted in duplicate, detailing the mining methods and scale of production. Additionally, the request for a concession must be accompanied by several documents relating to the business entity." When authorization to exploit is received from the Department of Mineral Production, it must be recorded in the register of commerce as must any changes in the contract or bylaws of the mining entity. Subsequent to authorization, title to the concession is transferred from the government by a decree signed by the president, which must be recorded with the Department of Mineral Production. An application may be rejected when the concession is deemed to be "prejudicial to the public good" or would "compromise interests considered greater than the exploitation."

a. Rights and Obligations of the Concessionaire in Brazil

The Mining Code imposes sixteen basic obligations upon the concessionaire. These obligations may be categorized broadly as procedural, waste preventive, and reporting. The rights af-

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98 These documents are:
(1) In the case of an individual firm, an authenticated photostat copy of the entry in the register of commerce maintained by the Ministry of Industry and Commerce;
(2) In the case of a partnership, a photostat or duplicate copy of the company contract and proof of its registration in the register of commerce;
(3) In the case of a corporation, the page from the Diario Oficial in which its instrument of organization is published.

Id. at 20. Where a foreign legal entity is involved, proof must be submitted of its legal personality including translations of its instrument of organization, by-laws and a statement providing that it is legally organized according to the laws of the foreign nation. Id.

99 Id. at 20.

100 More specifically, title (posse de jazida) is actually conferred within 90 days following the decree's publication in the Diario Oficial. Id. at 14; see supra note 95. The boundaries of the tract must be marked before title is conferred. See OAS-Brazil, supra note 50, at 15.

101 OAS-Brazil, supra note 50, at 14.

102 Id. If rejected, however, the applicant may be entitled to compensation for exploration expenses. Id.

103 Decree-Law 227, art. 47 (Feb. 28, 1967)(Brazil), discussed in OAS-Brazil, supra note 50, at 15-16.

104 Those obligations grouped by the author as "procedural" include:
(1) to begin work within six months after the concession decree was published in Diario Oficial;
(2) to work the concession as per the approved plan;
(3) to extract only those minerals listed in the concession decree;
(4) to notify the Department of Mineral Production if any new minerals are discovered;
(5) to not violate any applicable mining regulations;
(6) to employ only technically qualified individuals; and
(7) "[t]o adopt measures indicated by supervisory authorities." Id.

105 Those obligations grouped as "waste preventive" are:
forded to a concessionaire are reasonable though not extensive. First, he may encumber the concession if the encumbrance is recorded. Second, where various concessions within the same mining zone are held by the concessionaire they may be united into a single concession. Third, for just cause a suspension of operations may be requested; and finally, if the concessionaire is involved in legal proceedings, the property being mined may not be attached or sequestered if it would result in an interruption of the exploitation.

b. Termination of the Concession in Brazil

It is essential to comply with the pro forma obligations imposed by the Brazilian Mining Code as their violation can result in a warning or fine at a minimum, or even forfeiture of the concession. Forfeitures are declared by the federal government upon verification of any of the following events: (1) abandonment of the mine; (2) noncompliance with statutory time limits; (3) deliberate exploitation of minerals contrary to agreement; (4) excessive extraction of substances not covered by the concession; and (5) noncompliance with supervisory obligations.

Many of the obligations are vague, and the specific language permitting forfeiture is open-ended; thus, it is essential that the concessionaire adhere strictly to all regulations and temporal requirements imposed by the Brazilian government. Obviously, for-
feiture is costly to the investor, and in most cases the foreign concessionaire lacks legitimate recourse.\textsuperscript{114} Hence, because forfeitures may be discretionary, it is politically essential for the concessionaire to comply with all requests no matter how simple they may appear.\textsuperscript{115}

2. Mining Concessions in Mexico

In Mexico concessions may be granted either for exploration\textsuperscript{116} or exploitation.\textsuperscript{117} To obtain an exploration concession, an application must be submitted to the appropriate mining agency and then forwarded to the Secretariat of the National Properties.\textsuperscript{118} The Secretariat examines the application to ensure compliance with applicable regulations.\textsuperscript{119} If the requirements are satisfied, title is issued to the applicant. If defects are discovered, the application is returned either to the appropriate local mining agency or to the applicant.\textsuperscript{120} Filing a request for a concession on “free lands”\textsuperscript{121} confers a “preferential right” upon the applicant over subsequent applications, unless the subsequent applicant can demonstrate a

\footnotesize{\textsuperscript{114} See supra notes 9-14 and accompanying text.}

\footnotesize{\textsuperscript{115} While the author does not espouse bribery as a mode of conducting business, it is prevalent in Latin America, Votaw, Problems in Financing Latin American Investment, 1 Harv. J. Int'l L. 21, 27 (1981), and may even violate United States law. See Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78a note, 78m, 78dd-1, 78dd-2, 78ff (Supp. 1981). “Business is not done any other way [in Latin America]. It is the way it has been and the way it will continue to be.” Votaw, supra, at 27. Thus, the United States investor desiring to enter the Latin American mining sector should not enter blindly.}

\footnotesize{\textsuperscript{116} This is comparable to the “license” for exploration available in Brazil. See supra note 87.}

\footnotesize{\textsuperscript{117} Miranda, Exploring for Minerals in Mexico - An Overview of Legal Considerations, 27A Rocky Mt. Min. L. Inst. 431, 443-44 (1981).}

\footnotesize{\textsuperscript{118} OAS-Mexico, supra note 50, at 25.}

\footnotesize{\textsuperscript{119} Id.}

\footnotesize{\textsuperscript{120} Id.}

\footnotesize{\textsuperscript{121} Free lands encompass all areas within Mexico except for the following:
  a. The continental shelf, the seabed adjacent to the islands, keys and reefs of the land-sea area, in the seabed, and in the seabed of the maritime zone;
  b. The national mining reserves;
  c. Areas covered by mining allotments in force;
  d. Areas covered by mining concessions in force;
  e. Areas covered by an application for a mining allotment or concession under process;
  f. Areas covered by an application for a mining allotment or concession rejected until the corresponding publication of vacancy becomes effective;
  g. Areas covered by a mining concession or declaration of allotment of national mining reserves voided until the corresponding publication of vacancy becomes effective.
Id. at 10-11.
greater need to the Ministry of National Properties.\textsuperscript{122} The application, which is filed with the Ministry of National Properties, must include a detailed work program.\textsuperscript{123} An exploration concession is valid for three years and may be renewed once if the concessionaire has satisfied the obligations of title.\textsuperscript{124} Those obligations include carrying out the approved work program and filing annually a report indicating the results of exploration.\textsuperscript{125} The report must be filed with the Board of Mineral Resources.\textsuperscript{126}

An application for an exploitation concession may be filed when the exploration concessionaire has satisfied those obligations specific to the exploration concession.\textsuperscript{127} This application must be filed with the Ministry of National Properties. Included with the application must be a work program covering four to six years.\textsuperscript{128} Upon approval, this program becomes a part of the concession title.\textsuperscript{129} An exploitation concession covers only those minerals discovered during exploration, and further, the exploitation concession permits mining from a tract encompassing a maximum area of 500 hectares.\textsuperscript{130} Exploitation concessions in Mexico are valid for twenty-five years and, under certain circumstances, may be extended for an additional twenty-five years.\textsuperscript{131}

\textsuperscript{122} Id. at 24.
\textsuperscript{123} Id. at 22.
\textsuperscript{124} Id. For a brief discussion of those obligations, see infra text accompanying notes 126-27. The renewal, however, may cover an area not to exceed 5,000 hectares. OAS-Brazil, supra note 50, at 22. Thus, while an original concession may cover an area of up to 50,000 hectares, that area must be reduced to 5,000 hectares by the end of the initial three year grant. Id. One hectare equals 2.471 acres. See WEBSTER's NEW INT'L DICTIONARY 1154 (2d ed. 1953).
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 23.
\textsuperscript{128} Rocha, Operating a Mine in Mexico - An Overview of the Legal Considerations, 27A ROCKY MTN. MIN. L. INST. 553, 586 (1981).
\textsuperscript{129} Id.
\textsuperscript{130} OAS-Mexico, supra note 50, at 22.
\textsuperscript{131} Rocha, supra note 128, at 587.
\textsuperscript{132} Id.; see OAS-Mexico, supra note 50, at 23. To receive the extension, the concessionaire must apply within the last 10 years of the initial concession and demonstrate that the validity of the concession requires additional work and investments beyond the period covered by the concession. OAS-Mexico, supra note 51, at 23. Moreover, three specific requirements must be satisfied to qualify for an extension. They are:
1. The applicant is a corporation with a minority government capital participation.
2. The percentage of capital of the corporation which represents shares Series “A” stock (or Mexican) is not less than 60% in the case of an ordinary concession. (Initial participation is 51% Mexican capital for regular
a. Rights and Obligations of the Concessionaire in Mexico

In Mexico concessionaires are given broad rights and are subjected to extensive obligations. The three primary obligations concern paying a surface tax, meeting work requirements, and providing proof of assessments of work. Other obligations exist that cannot be minimized. Where a concessionaire fails to comply with any obligation, he is given sixty days by the Ministry of Patrimony and Industrial Development to present defenses, the absence of which results in nullification of the concession title.

The broad rights accompanying a concession in Mexico may be classified as either property related or accessory rights. The property rights include the right to transfer, the ability to lease, and

1. Rights and Obligations of the Concessionaire in Mexico

2. The concession has been exploited directly if the owner is of Mexican nationality.

Rocha, supra note 128, at 587.

3. Stated briefly, the surface tax is imposed annually upon the beneficiary of an exploration or exploitation concession. Id. at 587. The rate for an exploration concession is 10 pesos per hectare; for an exploitation concession the rate is 30 pesos per hectare. Id.

4. The concession holder must carry out exploitation work, presenting proof thereof every two years. Id. In addition, the value of the work must meet minimum requirements based on the area of concession and the type of substances exploited. Id.

5. The proof of assessment of work is a report submitted to the General Bureau of Mines indicating that work performed is within the terms and under the conditions specified in the law. Id. at 587-88.

6. Other obligations include the following:
   1) answering "questionaires submitted by the Secretariat of National Properties and submitting periodic reports" covering various areas including: economic and accounting data, construction work, and proposed projects;
   2) conducting exploitations in a non-wasteful manner within a reasonable profit margin;
   3) maintaining installations and equipment in good order;
   4) reporting newly discovered mineral deposits;
   5) providing immediate notification of a temporary suspension operation and the reason therefor;
   6) designating an agent to receive notices;
   7) adhering to applicable safety regulations;
   8) maintaining a Mexican engineer in the plant who is responsible for ensuring compliance with safety regulations;
   9) providing government inspection personnel with the facilities necessary to inspect the mining operation;
   10) permitting students from mining schools to observe the mining activities;
   11) providing monthly reports to the Ministry of National Properties concerning data on production and disposition of minerals; and
   12) reporting changes in the capital structure of the mining enterprise. OAS-Mexico, supra note 50, at 27; Rocha, supra note 128, at 591-92.

7. A concession may be transferred when authorized by the Ministry of National Properties to individuals meeting the requirements necessary to obtain a concession directly from
and the capacity to withdraw from the concession. The accessory rights of a concessionaire are varied. Most prominent is the right to expropriate or occupy private lands necessary for installation of mining facilities. Other accessory rights relate to the establishment of easements, utilization of water for mining purposes, and the capacity to excavate the subsurface of adjoining lands not subject to a concession.

b. **Termination of the Concession**

A concession may terminate either upon expiration or by forfeiture. An exploration concession expires after three years; an exploitation concession expires after twenty-five years. Extensions, however, are available. A concession terminates by virtue of forfeiture where: (1) taxes imposed upon the concession are not paid; (2) there is nonperformance of the exploitation work as required; (3) the capital structure of the mining company is altered; (4) the existence of the substances indicated in the mining title is not proved; or (5) a mining concession is transferred improperly. Where grounds for forfeiture exist, the concessionaire must be given notice so that he can submit a defense. If a defense is not submitted, forfeiture is ordered. Once a concession is forfeited, the concessionaire may not apply for a concession of that same area for

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140 The validity of a lease is contingent upon the satisfaction of specific conditions. For a listing of these conditions, see Rocha, supra note 128, at 601-02.

141 OAS-Mexico, supra note 50, at 9; Rocha, supra note 128, at 603-04. Where lands are expropriated, the concessionaire must compensate the owner adequately. Rocha, supra note 128, at 604. A limitation on the right to expropriate is of especial importance to the foreign investor. "Corporations with foreign capital participation may not acquire land through expropriation of certain [coastal strips deemed] 'prohibited zones.' Under those circumstances such corporations may request temporary occupation of land." Id. at 604.

142 The concessionaire may apply for easements providing for access and the operation of power and water lines. Rocha, supra note 128, at 604. Where easements are required or expropriation needed, the amount assigned for compensation must first be deposited with the Nacional Financiera, S.A. OAS-Mexico, supra note 50, at 25.

143 See OAS-Mexico, supra note 50, at 24.

144 See supra notes 124 & 132 and accompanying text.

145 Forfeiture by nonperformance is not ordered due to temporary unprofitability, force majeure, or judicial decisions affecting operations. OAS-Mexico, supra note 50, at 27. In general, a concessionaire may prove performance by either verifying that mineral substances with commercial value were obtained or proving that investments were made directly to fulfill the concession's objectives. Id. at 30.

146 Id. at 26-27.

147 Id. at 27.
one year.\textsuperscript{147} In addition to the possibility of forfeiture, a concession holder may suffer other severe sanctions for violations of the Mexican mining laws or regulations.\textsuperscript{148} These sanctions include fines\textsuperscript{149} or imprisonment.\textsuperscript{150} The grounds for penalties are provided in regulations to the Mining Law.\textsuperscript{151} The foreign investor should be intimately familiar with these regulations so that inadvertent violations do not occur.

3. The Mining Concession in Peru

The concessions available in Peru are similar to those in Brazil and Mexico, yet, in a sense they are more specialized. Four kinds of concessions are available: exploration, exploitation, processing, and refining. The holder of an exploration concession may conduct mineral scans for up to five years on a specific tract after the concession is authorized and notice is given to the owners of adjacent property.\textsuperscript{152} An exploitation concession gives its holder the right to extract. Upon extraction the minerals become the concessionaire's property. Frequently, the exploitation concession is used in conjunction with processing or refining concessions.\textsuperscript{153}

Each of the above mentioned concessions is granted by the Peruvian Ministry of Mines and Energy.\textsuperscript{154} The approval process is initiated by the applicant who must file in writing to the regional mining authority (\textit{jefatura regional de minería}).\textsuperscript{155} If the applicant is a business entity, an additional record must be filed in the public register and the public mining register. This record must indi-

\textsuperscript{147} Id.
\textsuperscript{148} Id. at 40.
\textsuperscript{149} The fines range from 500 to 100,000 pesos. Id.
\textsuperscript{150} The imprisonment may last from six months to five years. Id. at 41.
\textsuperscript{151} Sanctions may be imposed when:
1) substances are exploited without the right to expressly exploit those substances;
2) a concessionaire intentionally disposes of substances not covered by his concession;
3) a concessionaire improperly suspends operations;
4) false reports are submitted; and
5) the ownership status of a mining company is concealed to avoid compliance with Mexican ownership requirements. Id.
\textsuperscript{152} OAS-Peru, supra note 50, at 8. Specifically the concessionaire may explore up to five years from notification of the \textit{auto de amparo}, a document "ordering publication of the concession grant and notification of" adjacent land owners. Id.
\textsuperscript{153} Id. at 7. A processing concession empowers its holder to install and operate mineral processing plants. A refining concession allows for legal refining of mineral substances. Id.
\textsuperscript{154} Decree-Law 21,094 at 6.
\textsuperscript{155} Id. at 14.
cate the agent representing the business entity. Where two or more applicants apply for a concession over the same area, priority is determined by the temporal order of the applications. Upon approval of the application the regional mining authority issues a document (auto de amparo), which orders publication in the official federal publication, El Peruano, and in a local newspaper. An exploration concession may be changed to an exploitation concession at any time during the duration of the exploration concession.

a. Rights and Obligations of the Concessionaire in Peru

The obligations of the concessionaire may be categorized as: (1) fee payments, (2) minimum investment and production requirements, and (3) filing of reports. Failure to meet these obligations results in forfeiture of the concession. The primary fees are an application fee (derecho de denucio) and the claim fee (derecho de tramitacion). Installation and refining permits, however, are also subject to claim fees. The obligations concerning minimum investment and production are monitored closely by the Peruvian government and vary significantly. If minimum investment and production obligations are not met, the concessionaire must present to theDireccion General de Mineria a schedule of operations including financing sources, investments, and technical drawings. This schedule for exploitation cannot exceed five years except

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156 Id. Detailed requirements must be fulfilled to acquire a concession. Id.
157 Id. Where simultaneous application occurs, the applicants resolve the dispute through competitive bidding. Id.
158 This publication allows for adjacent tract owners to be aware of the mining enterprise. Id.
159 Id. at 15.
160 Decree-Law 19,441 (June 20, 1972) (Peru), discussed in OAS-Peru, supra note 50, at 10-11.
161 Id. The application fee is an annual 2.50 soles per hectare for an exploration concession (derecho de denuicio); the application fee for an exploitation concession is three soles per hectare. Id.
162 Id. The claim fee (derecho de tramitacion) is 220 soles for an exploration concession and 300 soles for an exploitation concession. Id.
163 See supra note 160.
164 OAS-Peru, supra note 50, at 11-12.
165 The minimum investment is explained as follows: The minimum annual investment in the period of execution of the plans and initiation of the exploitation will be noted in the schedule of operations presented, and for the first year it may not be less than 30 percent of the total investment divided among the number of years programmed. For successive years the balance of the investment will be paid off as follows: 50 percent of it will be expended by the
where justified by delay. Upon expiration of the investment plan, the minimum production schedule becomes operative. The minimum production schedule is determined statutorily and is revised and expanded upon the discovery of new reserves on the concessionaire's tract. Reporting requirements indicating fulfillment of the production schedule are extensive and are enforced strictly. "Within the first three months following the close of each annual period of the concession, the concessionaire must present...a technical report on the operations, plans for geographical and topographical studies and estimates of resources." In addition to this annual report, a supplemental report must be given to the Direccion General de Mineria indicating the mineral reserves and production after each operating year of the concession.

The Peruvian concessionaire's rights may be classified as general and specific. The general rights are designed to encourage production. They include: (1) the capacity to utilize the concession's surface area and adjoining land for mining purposes; (2) the right to request easements and to construct installments facilitating ventilation and drainage of the mine; (3) the freedom to expropriate cultivated surface lands necessary to the concession; and (4) the right to use any water necessary for the concession. The specific rights held by a concessionaire enable him to dispose of water and minerals extracted in the course of mining. Moreover, certain rights are afforded to concessionaires mining specific substances such as metallics and carboniferous minerals.

b. Termination of the Concession in Peru

In Peru, as in Mexico and Brazil, a concession may be termi-
nated through forfeiture. The ultimate decision concerning forfeitures rests with the Dirección General de Minería, an "arm" of the executive. An exploration concession is deemed to be forfeited when: (1) "extension of the time period for exploration or for conversion. . .[an] exploration is not requested in due time" or (2) the annual mandatory investment is unsatisfied in two successive years. An exploitation concession may be forfeited in any one of six ways. The investor should specifically note that forfeiture of an exploitation concession may occur due to failure to meet annual investment requirements, failure to initiate production in accord with statutory minimums, failure to continue production or investment in accord with statutory minimums, or due to the mere failure to present an operations schedule. Finally, processing and refining concessions are also subject to forfeiture upon nonpayment of land tax, failure to place the concessions in production in a timely manner, or unauthorized stoppage of production or withdrawal of production equipment. Upon forfeiture, the concessionaire may retain and remove improvements or fixtures on the property that he installed. The state, however, recovers full ownership of the surface land. In addition to forfeiture, surcharges, penalties, or fines may result when a concessionaire fails to comply with statutory obligations.

B. Restrictions on Investment

Brazil, Mexico, and Peru each impose restrictions in varying degrees on foreign investment in mining. The limitations imposed by Brazil are the least restrictive. Although the Brazilian constitution prohibits direct foreign investment in the exploitation of minerals, foreigners may organize local subsidiaries to overcome that

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173 Id. at 13. When the first annual investment is not met, the concessionaire must reimburse the state for the amount defaulted. Id.
174 Id. at 11. The concessionaire has available the defense of force majeure. Id.
175 Id. Other grounds for termination include nonpayment of land tax in two consecutive years and an express statement by the concessionaire that he will not work in accord with his schedule of operations. Id.
176 Id.
177 Id. at 14.
178 Id. Any easements granted are extinguished by law. Id.
179 Id. See also OAS-Peru, supra note 50.
180 Constituição Federal (Brazilian Constitution) § 168, discussed in Business Operations in Brazil, Foreign Investment Portfolio (BNA), No. 439 at A-5 (1982) [hereinafter cited as BNA, Brazil].
barrier. The Brazilian Mining Code reiterates that view under its definition of “mining enterprise.” Mining enterprise is defined as any “firm or company that is organized and domiciled in Brazil.” Thus, its components may be either Brazilian nationals or foreigners.

The limitations on foreign investment imposed by Mexico are more restrictive and complex than those of Brazil. Mexico recently enacted restrictions designed to “Mexicanize” its mining industry. Under the 1973 Mexican Foreign Investment Laws, the term “foreign investment” is defined expansively to include investment by foreign legal entities or individuals, Mexican enterprises with a majority of foreign capital or in which foreigners are empowered to control management decisions, and foreign enterprises without a legal structure. In general, concessions for the use and exploitation of minerals may not be held by companies in which the foreign participation exceeds forty-nine percent. The Foreign Investment Laws, however, cannot be read in a vacuum. The laws governing foreign investment provide expressly that where previous laws exist regulating an industry, those laws shall govern. Regarding mining, regulations promulgated in 1975 and the Mining Law reiterate and expand the restrictions contained in the re-

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181 BNA, Brazil, supra note 180, at A-5.
182 OAS-Brazil, supra note 50.
183 Only a “mining enterprise” may exploit minerals. See supra text accompanying notes 89-90.
184 OAS-Brazil, supra note 50, at 19.
185 MEXICAN FOREIGN INVESTMENT AND TRANSFER OF TECHNOLOGY LAWS, supra note 32; Law Regulating Article 27 of the Constitution (Reglamento de la Ley Regalmentaria del Articulo 27 Constitucional en Materia Mineral) (Dec. 11, 1975) [hereinafter cited as Mining Regulations].
186 Dominguez, The Political and Social Aspects of the Mexican Mining Industry, 27A ROCKY MNT. MIN. L. INST. 409, 425 (1982). In fact “the mining industry [of Mexico] is totally Mexicanized today; that is, Mexicans have 51 percent or more of the equity stock in existing corporations.” In addition to the goal of “Mexicanization,” the 1973 Mexican Foreign Investment laws were designed to “promote Mexican investment and to regulate foreign investment to stimulate a just and balanced development [of the Mexican economy].” MEXICAN FOREIGN INVESTMENT AND TRANSFER OF TECHNOLOGY LAWS, supra note 32, art. 1.
187 MEXICAN FOREIGN INVESTMENT AND TRANSFER OF TECHNOLOGY LAWS, supra note 32, art. 2.
188 Id. art. 5. Moreover, foreign enterprises may not hold more than a thirty-four percent interest in “special concessions.” Id. A “special concession” is a concession to exploit minerals “essential” for Mexico’s development. Rocha, supra note 129, at 589. The special concession holder has the “same rights and obligations as the beneficiary of an ordinary concession. . . .” Id.
189 MEXICAN FOREIGN INVESTMENT AND TRANSFER OF TECHNOLOGY LAWS, supra note 32, art. 5.
The recently enacted Foreign Investment Laws. The Mining Law mirrors the percentage limitations on concession ownership stipulated by the Foreign Investment Laws, and its regulations indicate by whom the majority interest may be owned. Moreover, the regulations define precisely the rules governing transferability of shares held in mining companies. Additional restrictions are imposed upon transferability, ownership, and voting rights of the various classes of stock held in a mining enterprise. Minority shareholders or foreign investors, however, are afforded some protection from severe majority domination by the establishment of conditions for the validity of resolutions and the ability to be represented by a director.

Peruvian restrictions on foreign investment are contained in Decision 24 of the Cartagena Agreement which Peru adopted upon its entrance into the Andean Common Market. The Andean Common Market is an integrated community of Latin American countries who agreed to implement a common regime for the treatment of foreign capital. Under the agreement, individual nations may

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190 In general, the percentage of Mexican national ownership may be held by:
   (1) Individuals of Mexican nationality;
   (2) Mexican companies whose capital stock is subscribed entirely by Mexicans, or Mexican companies whose charter excludes foreign participation;
   (3) Mexican companies, including development organizations, recorded in the Public Mining Register, in which the majority of capital stock is subscribed by Mexican nationals or by Mexican companies, in which the percentage of net minimum Mexican capital is maintained in accordance with the Law of December 11, 1975;
   (4) Mexican credit, bonding and insurance institutions, and Mexican investment companies operating under concessions issued by the Ministry of Finance and Public Credit, and upon the expressed authorization of the latter;
   (5) The Mining Development Commission;
   (6) Majority government participation companies. In the case that such companies have a foreign participation, they must be subject to the provisions of item (3) above;
   (7) Public firms referred to in Article 25 of the Civil Code of the Federal District;
   (8) Irrevocable trusts for funds of allotments of shares and retirement plans for Mexican employees and workers;
   (9) Communal lands and agrarian communities, under conditions provided for in the Federal Agrarian Reform Law.

OAS-Mexico, supra note 5, at 7-8.

191 As a general rule shares may not be transferred as a means to side-step the percentage ownership limitations. Cf. MEXICAN FOREIGN INVESTMENT AND TRANSFER OF TECHNOLOGY LAWS, supra note 32, art. 5(a).

192 See Miranda, supra note 117, at 467-69, 472-74.

193 Id. at 475, 478.

194 See PRICE WATERHOUSE, PERU, supra note 1, at 16.

195 Ryerson, supra note 45, at 29. The goals of ANCOM were "to exclude foreign invest-
impose harsher restrictions than those of the community. 198 Thus, until recently, Peru did not permit foreign investment in its mining sector. 197 Currently, participation is allowed in certain mining activities if the mining enterprise maintains at least fifty-one percent local ownership. 198 Further, prior authorization from and registration with the Peruvian federal government is required for all foreign investment. 199 Approval criteria include: (1) whether the investment comports with Peru’s development priorities; (2) whether existing industry would be hindered by the investment; and (3) whether the investment would subsume rights owned by national investors. 200 Another restriction of which a foreign investor must have notice is Peru’s request that a “mining community” be formed after seven years of mining exploitation. 201 A mining community permits the employees to share in after-tax net income. 202 The government implemented mining communities to restructure society “so that a greater proportion of the population [could] participate in the country’s economy” and to “distribute wealth more evenly among all Peruvians.” 203

C. Taxation of the Minerals

A third legal angle that a foreign investor must consider is the burden taxes will place on the mining activity. The taxation scheme of Brazil is generally simplistic and predictable, and, for that reason, is advantageous to the investor. A ten percent tax is imposed on the officially established value of all minerals exploited, except coal. 204 Coal is taxed at eight percent of officially established sales prices. In addition, the surface owner receives a

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196 Id. at 30.
197 Price Waterhouse, Peru, supra note 1, at 16.
198 Decree-Law 21,826 (Apr. 1977) (Peru) (modifying Decree-Law 18,900), discussed in Price Waterhouse, Peru, supra note 1, at 17; Ryerson, supra note 45, at 31.
199 Ryerson, supra note 45, at 30.
200 Id.
201 Decree-Law 22,333 (Nov. 15, 1978) (Peru), discussed in BNA, Peru, supra note 3, at 28.
202 Id. Regarding foreign mining entities, the workers must receive seven percent of net income. Id.
203 Cf. Price Waterhouse, Peru, supra note 1, at 10.
204 Decree 55,928 (Apr. 14, 1965) (Brazil), promulgated under Law 4,425, art. 9 (Oct. 8, 1964) (Brazil), discussed in OAS-Brazil, supra note 50, at 7.
participation tax of ten percent of the mineral tax. The Department of Internal Revenue of the Ministry of Finance calculates a mineral's value biannually. As a general rule, the official sales price equals approximately the "average FOB export price less [forty percent] at the port of shipment."  

Mexico imposes two forms of taxes on mining activity: a tax on concessions determined by the surface area of the mining tract, and a production tax. The surface tax is collected annually at the rate of sixty pesos per hectare for exploitation of metallics and thirty pesos for nonmetallics. Exploration concessions are taxed at ten pesos per hectare. The production tax is based on a flat percentage of the official price of the mineral exploited. Certain low grade areas are exempt from production taxes as are minerals recouped from manufactured products. The official price of a mineral is determined monthly by the Ministry of Treasury and Public Credit. Factors considered by the Ministry include the average quotation of the price within the two previous months from New York and other foreign markets, and, at times, the Mexicans wholesale price of the mineral.

Finally, a concession holder in Peru is neither subjected to a surface tax as in Mexico nor a production tax as in Brazil and Mexico, but rather to a tax on net income earned according to a progressive formula.

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205 Id.
206 Id. Where there are no exports during the "six month period, the value is calculated on the average wholesale price of the product sold on the main consumer markets of Brazil during the same period, deducting [forty] percent." Id.
207 Law on Taxation and Promotion of Mining (Dec. 30, 1955) (Mexico); Regulation of Chapter IX of the Law dated Sept. 18, 1975 (Diario Oficial, Dec. 12, 1975), discussed in OAS-Mexico, supra note 50, at 37; Rocha, supra note 128, at 590.
208 Id. note 128, at 590.
209 Law on Taxation and Promotion of Mining, art. 5, discussed in Rocha, supra note 128, at 609. As of 1982 the rates were:
1) nine percent for gold, silver, and sulphur;
2) four percent for iron, coal, and manganese; and
3) seven percent for any other mineral. Id.
210 Id.
211 Id. at 610.
212 Id.
213 Decree-Law No. 18,880, art. 119 (Peru), discussed in BNA, PERU, supra note 3, at A-28. For a discussion of this system of taxation, see infra notes 246-48 and accompanying text.
III. THE APPROPRIATE INVESTMENT ENTITY

In each nation a variety of organizational entities may be formed to conduct business operations. The form most appropriate for a mining venture in each nation, however, is a Sociedad Anonima. A Sociedad Anonima, sometimes generically referred to as a "corporation" is conceptually similar to the United States corporate entity. Each nation imposes its own "minimum requirements" nec-
necessary to form a *Sociedad Anonima*. From the outset, the foreign investor must be cognizant of those requirements to ensure both the formation of the *Sociedad Anonima* and the smooth proceeding of its ensuing business. In Brazil, the organization and functioning of such "corporations" are regulated by Law No. 6.404 (1976).\(^{215}\) Three threshold requirements must be met to form the Brazilian "corporation." First, the corporate shares must be subscribed by at least two persons into which the corporate capital is divided. Second, payment of at least ten percent of the shares' subscription price must be tendered immediately; and third, the deposit of the initial payment must be made with Banco do Brasil or another bank approved by the Securities Exchange Commission.\(^{216}\) The *Sociedad Anonima* may be formed by a public or private subscription of its shares. The formation costs usually do not exceed $500-$1,500.\(^{217}\) Brazil imposes neither a minimum share capital requirement nor a statutory maximum number of shareholders.\(^{218}\) Such flexibility affords the foreign investor wide latitude to structure the corporate entity in a way most beneficial to individual circumstances. The governance of a Brazilian "corporation" must be stipulated in the entity's by-laws. In general, "[a] corporation's by-laws must establish who is responsible for its administration which may be through an administrative council and a board of directors or only through a board of directors."\(^{219}\) The *Sociedad Anonima* is also a proper business entity to utilize in a joint venture with a Brazilian enterprise or the Brazilian government.\(^{220}\) This is significant to the foreign investor because such concerted efforts currently are favored by the Brazilian government.\(^{221}\) The corporate available in either Mexico or Peru. See BNA, Brazil, *supra* note 180, at A-7. The reasoning above, therefore, is applicable equally to the Brazilian context with two minor exceptions. First, while Brazil does not impose the national "control" requirements as do Mexico and Peru, available limited partnership vehicles such as *Sociedad en Comandita Simple* and *Sociedad en Comandita por Acciones*, do not offer the same flexibility of a corporate entity and, therefore, are not the optimal business form. Second, the Brazilian government encourages joint ventures between itself and foreign investors; thus, that mode of conducting business must be considered. The joint venture in Brazil is attained generally by capital association formed through a corporation. See Price Waterhouse, Brazil, *supra* note 1, at 39.\(^{218}\) See BNA, Brazil, *supra* note 180, at A-7; Price Waterhouse, Brazil, *supra* note 1, at 23.\(^{216}\) BNA, Brazil, *supra* note 180, at A-23.\(^{217}\) Id.\(^{218}\) Price Waterhouse, Brazil, *supra* note 1, at 25-26.\(^{219}\) Id. at 26.\(^{220}\) Id. at 39.\(^{221}\) See *supra* note 26 and accompanying text.
income tax imposed by Brazil is not oppressive. As a general principle, the tax is assessed on the net income resulting from profits arising from activities carried out within Brazil. A tax, therefore, is not imposed on income stemming from sources outside of Brazil. Income resulting from the exploitation of minerals in Brazil which are to be sold, processed, or used abroad are deemed to result from activities conducted within and without Brazil. If income is not clearly apportionable, the entity is taxed on twenty percent of its gross receipts. This rate should be compared with the general corporate tax rate, which as of 1979 was thirty-five percent.

The requirements for the formation of a Sociedad Anonima in Mexico are similar to those of Brazil, although in Mexico prior authorization of the Ministry of Foreign Affairs is required to establish a corporation. "A minimum of five incorporators is required [to form] a corporation, and each must subscribe at least one share of stock." At all times the corporation must maintain this minimum number of shareholders; otherwise, it will be deemed to be dissolved. There is no limit as to the maximum number of shareholders. Special requirements, in addition to the previously mentioned general requirements, must be met before a corporation with foreign stockholders will be authorized in Mexico. That is, each foreign stockholder must agree: "(1) to consider himself a Mexican insofar as his shares of stock or other interests in the corporation are concerned and (2) not to invoke the protection of his government under penalty should he fail to keep his agreement, of forfeiting such shares or interests to the Mexican Nation." Upon authorization of the Sociedad Anonima, a minimum of 25,000 pesos of capital must be "paid in." If authorized capital stock exceeds that amount, twenty percent must be paid immediately. Generally, the formation of a new Mexican corporation requires three to four weeks, and total cost including legal and notarial fees

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222 Federal Decree-Law No. 4506, § 63 (1964), discussed in BNA, Brazil, supra note 181, at A-29.
223 Id.
224 Id.
225 Id.
226 PRICE WATERHOUSE, BRAZIL, supra note 1, at 75.
227 PRICE WATERHOUSE, MEXICO, supra note 1, at 54.
228 BNA, MEXICO, supra note 214, at A-59.
229 Id.
230 Id.
231 Id.
is 100,000 pesos.\textsuperscript{232}

The relationship between minority shareholders, which by law must be foreigners,\textsuperscript{233} and majority shareholders is of importance to the foreign investor. Under Mexican law, a minority shareholder rarely has legal recourse against a majority decision, as the "shareholders in [a] general meeting are the supreme authority of a corporation."\textsuperscript{234}

The Mexican taxation system differs somewhat from that of Brazil. First, the tax is levied as a percentage of gross income.\textsuperscript{235} The tax rate on corporations ranges from three to thirty percent.\textsuperscript{236} Moreover, all foreign source income of a Mexican corporation is taxed.\textsuperscript{237} Thus, the advantage of apportionment available in Brazil is not conferred by Mexico. In addition to its gross income tax, Mexico recently enacted a value added tax on six percent of sales, which is applicable to mining enterprises. "[T]his tax must be paid by the buyer of mining concessions at the time the sale is made for the total amount of the price. . . ."\textsuperscript{238} Although the tax burdens imposed by Mexico are significant, an executive order was published on January 15, 1981, establishing tax incentives to promote investment in the mining industry.\textsuperscript{239} These incentives should help assuage an investor's fears of being overly taxed. Tax incentives relevant to foreign investment include but are not limited to subsidies offsetting exploration and development expenses, a reduction of import duties on equipment, and accelerated depreciation and amortization under certain circumstances.\textsuperscript{240}

The formation of the "corporate" entity in Peru is relatively simple and for that reason is the most common form used by foreign entities to conduct business there.\textsuperscript{241} The Sociedad Anonima may be formed publicly or privately,\textsuperscript{242} but in either case there

\textsuperscript{232} Id.
\textsuperscript{233} See supra notes 186-89 and accompanying text.
\textsuperscript{234} PRICE WATERHOUSE, MEXICO, supra note 1, at 56.
\textsuperscript{235} Income Tax Law, art. 43, para. 1 (Mexico), discussed in BNA, MEXICO, supra note 214, at A-11.
\textsuperscript{236} Id. arts. 33, 43.
\textsuperscript{237} PRICE WATERHOUSE, MEXICO, supra note 1, at 92.
\textsuperscript{238} Rocha, supra note 128, at 612.
\textsuperscript{239} PRICE WATERHOUSE, MEXICO, supra note 1, at 145.
\textsuperscript{240} See id. for a general review of the benefits granted and eligibility requirements of these incentives.
\textsuperscript{241} PRICE WATERHOUSE, PERU, supra note 1, at 30.
\textsuperscript{242} Mercantile Law (Ley de Sociedades Mercantiles), arts. 70-101 (July 1966), discussed in BNA, PERU, supra note 3, at A-20.
must be at least three shareholders.\footnote{Id.} A foreign enterprise such as a subsidiary must obtain special authorization to do business from CONITE, the official office in charge of controlling foreign investment, and it must register its capital with that office; otherwise official authorizations are not generally required for the formation of a commercial enterprise.\footnote{Id. at 32.} Regarding capital, "a minimum of twenty-five percent of the subscribed capital must be paid up before a corporation [may] be legally declared constituted."\footnote{Id. at 33.} Control of the Peruvian corporation is reviewed by the shareholders while business conduct is delegated to a board of at least two directors and the corporate officers.\footnote{Decree-Law 18,880, art. 119 (Peru), discussed in BNA, Peru, supra note 3, at A-28.} The taxation of entities holding mining concessions in Peru is unique. Concession holders pay only a progressive income tax, which exempts them from all other taxes.\footnote{Id. at 33.} Moreover, the purchase of mining concessions may be amortized over a maximum of ten years for tax purposes.\footnote{Decree-Law 18,880, art. 119 (Peru), discussed in BNA, Peru, supra note 3, at A-28.} Other tax incentives available to stimulate growth in the mining industry include an annual 100 percent write-off for certain investments in tax assets and tax-free investments up to certain maximum limits.\footnote{PRICE WATERHOUSE, PERU, supra note 1, at 84.}

IV. OTHER FINANCIAL CONCERNS OF THE INVESTOR: 
REPATRIATION OF EARNINGS AND REGISTRATION OF CAPITAL

A. Brazil

Brazilian law requires the registration of foreign capital and

\begin{tabular}{|c|c|c|}
\hline
Taxable Income & Tax on & Percentage \\
(Over) & Column 1 & on excess \\
\hline
S/. 100,000 & S/. 20,000 & 20 \\
500,000 & 140,000 & 35 \\
50,000,000 & 17,465,000 & 40 \\
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\end{tabular}

"Any excess over S/. 100,000,000 is subject to proportional scale rate from 37.5% to 65% varying on the gross yield of the mining investment." \footnote{Id. Decree-Law 18,880, art. 119 (Peru), discussed in BNA, Peru, supra note 3, at A-1; see also PRICE WATERHOUSE, PERU, supra note 1, at 115.}
loans. Moreover, specific requirements are imposed to qualify for remittance of profits. Foreign investment capital must be registered with the Central Bank of Brazil (Banco do Brasil), and any new investments or increases must be reported to the Central Bank within thirty days. The Brazilian government is empowered to levy surcharges on remittances of up to fifty percent of the amount remitted. No such levies, however, have been imposed since 1966. "Capital may be repatriated without payment of taxes up to the amount registered in foreign currency with the Central Bank."

B. Mexico

Mexico does not require the registration of foreign capital. Thus, proof of registration or of having brought foreign currency into Mexico is not needed when making currency purchases with pesos. The Mexican government, however, offers no guarantees against inconvertability.

C. Peru

As a member of the Andean Common Market, Peru imposes those restrictions authorized by Decision 24 of the Cartagena Agreement. Under that agreement, foreign investment must be preauthorized and registered with the Comision Nacional de Inversiones y Technologies Entrenjeras. In addition, the reinvestment of profits by foreign entities is considered a new investment requiring reauthorization and reregistration. In regard to the repatriation of capital and earnings, the agreement provides that "the conversion of funds that foreign investors are entitled to repatriate must be made at the rate of exchange in effect on the date of

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250 Law No. 4131 (Sept. 1982) (Brazil), discussed in Price Waterhouse, Brazil, supra note 1, at 11.
251 Id.
252 Price Waterhouse, Brazil, supra note 1, at 12.
253 Id.
254 Id.
255 Price Waterhouse, Mexico, supra note 1, at 19.
256 Id.
257 Id.
258 Decree-Law No. 18,900 (July 1971) was the Peruvian statute that adopted the tenets of the Cartagena Agreement of the Andean Common Market.
259 This agency is referred to as CONITE and is empowered specifically to control foreign investment and remittance of profits abroad. Price Waterhouse, Peru, supra note 1, at 19.
260 Id. at 20.
remittance." Further, foreign investors may generally transfer abroad up to twenty percent of their approved foreign investment.

V. Conclusion

In general, a decision to invest in the mining industry of Mexico, Peru, or Brazil must be scrutinized. Among the factors to be considered are the current political climate and past history of foreign investment within each country, the applicable mining laws, and the effect of taxation on the investment’s potential rate of return. Each nation’s mining sector is controlled paternally by its federal government. To the foreign investor, this means that the ultimate decision as to whether a concession will be granted or forfeited rests in the hands of a select few. Under the mining laws of Mexico, Peru, and Brazil a profitable concession may be forfeited by the mere noncompliance with statutory formalities. Even where good faith attempts at compliance are made, forfeiture is, nevertheless, a possibility under the broad and often ambiguous language of the statutes. Moreover, where a forfeiture occurs, the foreign investor will in all probability lack recourse because Latin American countries apply the Calvo doctrine. Thus, the preservation and, therefore, profitability of a mining venture in Mexico, Peru, and Brazil is grounded in discretion. An investor must “play its political cards” with skill and verve to succeed.

Deciding the arena in which to play those cards is a difficult decision to resolve. While Peru may contain the largest amount of untapped resources, an immediate decision to invest may be hasty. First, the political stability of Peru is questionable. While Peru is currently relatively stable, its history is fraught with wild swings

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261 Id.
263 See supra notes 8-48 and accompanying text.
264 See supra section II.
265 See supra notes 204-13 and accompanying text.
266 See supra notes 113-17 and accompanying text for discussion of applicable Brazilian law, notes 144-47 and accompanying text for a discussion of Mexican law, and notes 173-76 and accompanying text for a discussion of the Peruvian statutes.
267 See id.
268 See supra notes 10-14 and accompanying text.
269 See supra note 115.
270 See supra notes 40-44 and accompanying text.
between civilian and military governments.\textsuperscript{271} During times of political instability, Peru's economy suffered concomitantly and likely would do so in the future under similar circumstances.\textsuperscript{272} In addition, Peru's status as a member of the Andean Common Market (ANCOM) may be reason for the foreign investor to pause. ANCOM imposes tight restrictions on foreign investment in mining;\textsuperscript{273} and while those restrictions when isolated may not be significant enough to deter investment, the general tenor of ANCOM as a regime very well could be prohibitive. As one scholar stated: "Given the ambiguity of the Regime and the difference in its implementation by the member countries, a foreign investor might indeed reconsider his interest in investing in ANCOM countries and choose to remain at home."\textsuperscript{274} Significantly, Peru is one member country that has consistently implemented restrictions tighter than those necessary under the ANCOM agreement.\textsuperscript{275} Finally, from a pragmatic economic standpoint, a foreign investor seeking some type of long-term return should realize that the Peruvian requirement of establishing mining communities, in which the workers share in profits, will decrease its return.\textsuperscript{276} On the positive side, Peru offers an understandable tax scheme,\textsuperscript{277} some investment incentives,\textsuperscript{278} and a qualitatively easy method to establish a business entity\textsuperscript{279} suitable for mining investment. On a ledger, however, investment in Peru, compared with Brazil or Mexico, would most likely be disadvantageous to the foreign investor.

Mexico is a more logical nation in which to invest than Peru, but Mexico also may be far from safe. Politically and historically Mexico has exhibited great stability, yet its economy has not responded.\textsuperscript{280} Recently, Mexico demonstrated a tendency to shun United States investment while nationalizing its economy.\textsuperscript{281} Both its Mining Code and Foreign Investment laws require Mexican nationals to own a majority of any mining enterprise.\textsuperscript{282} Further, the

\textsuperscript{271} Id.
\textsuperscript{272} See supra note 43 and accompanying text.
\textsuperscript{273} See supra notes 194-200 and accompanying text.
\textsuperscript{274} Ryerson, supra note 45, at 34.
\textsuperscript{275} See id.
\textsuperscript{276} See supra notes 201-03 and accompanying text.
\textsuperscript{277} See supra notes 213, 249-51 and accompanying text.
\textsuperscript{278} See supra notes 250-51 and accompanying text.
\textsuperscript{279} See supra notes 243-48 and accompanying text.
\textsuperscript{280} See supra notes 28-29 and accompanying text.
\textsuperscript{281} See supra notes 31-35, 186-93 and accompanying text.
\textsuperscript{282} See supra notes 185-93 and accompanying text.
minority shareholders have little recourse against a strong-willed national majority. In addition, the laws governing mining concessions are not conducive to long-term investment. An exploitation concession may cover only a small tract of land, and upon expiration the concession may be renewed, but subject to further "Mexicanization" restrictions. The tax burden imposed by Mexico is significant and growing. Mexico does not allocate foreign source income to its earning base. While the same income is generally not subject to United States taxation, it may be taxed on a higher rate in Mexico. Investment in the Mexican mining sector is not, however, without advantages. Its proximity to the United States offers logistical advantages compared with Brazil and Peru. In addition, while Mexico sought to nationalize its economy, it simultaneously and paradoxically enacted tax incentives to spur investment. As a result of these seemingly conflicting measures, great difficulty exists in predicting the direction in which the Mexican government will steer its economy, pro-foreign investment or otherwise.

The least problematic nation of the three in which to invest is Brazil. The current Brazilian government is politically stable, exhibiting a direct and positive approach toward United States investment. In fact, the government encourages foreign investment through Brazilian controlled joint ventures. Most importantly, ownership restrictions are not placed on mining enterprises; they need only be organized and domiciled in Brazil. Thus, the investment restrictions imposed by Brazil are far less onerous than those of Mexico and Peru. As a result of being entitled to complete ownership, the foreign investor can maximize profitability. Brazilian taxation of mining is based upon a flat rate, which ensures predictability. Thus, the Brazilian taxation scheme permits long-range planning, again benefitting the investor. The Brazilian cor-

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283 See supra text accompanying notes 192-93.
284 See Rocha, supra note 128, at 587. The maximum size of the tract is 500 hectares. Id. Five hundred hectares is approximately 1,250 acres. See WEBSTER'S NEW INT'L DICTIONARY 1154 (2d ed. 1953).
285 See supra note 132.
286 See supra notes 237-40 and accompanying text.
288 See supra notes 241-42 and accompanying text.
289 See supra notes 25-26 and accompanying text.
290 See supra notes 89-90 and accompanying text.
291 See supra notes 204-06 and accompanying text.
porate profits tax likewise is not complex.\textsuperscript{292} It also permits an investor to plan expenditures.\textsuperscript{293} These considerations indicate that Brazil's mining sector is objectively the least problematic in which to invest.

Despite objective criteria, the best investment opportunity may depend, in the long run, upon who is the foreign investor's business partner. In Mexico and Peru, foreigners may not participate in mining except as equity owners or shareholders of a national mining company. By contrast, Brazil does not impose such restrictions; nevertheless, the selection of an appropriate business partner is relevant because the Brazilian government encourages Brazilian controlled joint ventures. Potential business partners include: (1) the government; (2) large mining companies; (3) large investment groups; (4) private banks; and (5) smaller mining companies.\textsuperscript{294}

Before deciding on an investment partner, an initial investigation and audit must be conducted. Ideally, a potential co-partner's expertise should not be limited to mining but should also include corporate matters.\textsuperscript{295}

A business venture with the government is not the best arrangement. First, because a government's composition changes regularly, differing political and business philosophies could emerge, hampering communications and hindering any long-range planning.\textsuperscript{296} Second, the government may decide business matters based upon political considerations rather than profit motives.\textsuperscript{297}

Large mining companies are also disadvantageous to the foreign investor. They offer the advantages of experience, qualified personnel, and sufficient funding for a mining venture. Their size, however, in and of itself, delimits their utility as a foreign investment partner. For example, large mining companies are affiliated frequently with other foreign partners, thereby potentially creating conflicts of interests.\textsuperscript{298} Further, because of their size such companies usually have established general behavioral guidelines which may inhibit flexibility to meet an individual partner's needs and

\begin{itemize}
\item \textsuperscript{292} Miranda, \textit{supra} note 117, at 540.
\item \textsuperscript{293} \textit{Id.} at 537.
\item \textsuperscript{294} \textit{Id.}
\item \textsuperscript{295} \textit{Id.} at 543.
\item \textsuperscript{296} \textit{Id.} at 541. For example, the French government shifted from a free market to socialist philosophy. \textit{Id.}
\item \textsuperscript{297} \textit{Id.}
\item \textsuperscript{298} \textit{Id.} at 542.
\end{itemize}
The problems associated with large mining companies are also inherent in large investment groups, and for that reason they too should be avoided.\textsuperscript{300}

Private banks are feasible investment partners but are not without problems. First, if the bank is already affiliated with a mining company, the conflict of interest spectre may appear. A second problem inherent in utilizing a bank as an investment partner is the possibility that the bank may be unable to match investment expenditures with its partner.\textsuperscript{301} These problems, however, are not insurmountable. A private bank as an investment partner should not be ruled out.

The best business partner is a small or medium-sized mining company. These companies offer experience, and they can establish projects within a short period of time because they are usually already in possession of mineral deposits requiring additional exploration and exploitation.\textsuperscript{302} What the small mining companies lack, whether it be modern technology or additional financing, the United States investor can provide. These smaller companies "usually not only permit, but demand, that the foreign partner take an active role, within the limits of the law, to assist both in the technical and management aspects of the joint venture. . . ."\textsuperscript{303} Interest in smaller companies is obtained usually through an option to purchase securities or "by investing additional capital for the issuance of new shares."\textsuperscript{304}

In short, the structuring of an investment mining venture in Mexico, Brazil, or Peru may be described as a puzzle that may be assembled in a myriad of ways. Unfortunately, it is difficult to determine whether the puzzle is constructed properly until it is operative. Thus, decisions to invest in the mining sectors of Brazil, Mexico, or Peru must be well researched, and even then such an investment may be nothing more than a sophisticated roll of the dice.

\begin{itemize}
\item \textsuperscript{299} Id.
\item \textsuperscript{300} Id. at 542-43.
\item \textsuperscript{301} Id. at 544.
\item \textsuperscript{302} Id. at 546.
\item \textsuperscript{303} Id. at 547.
\item \textsuperscript{304} Id. at 546-47. In addition to the option, small mining companies usually require that exploration costs be paid by the foreign company during the period of the option. Id. at 547. Further, "it is not uncommon for the mining company to request a premium to be paid upon acquisition of the equity interest." Id.
\end{itemize}