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Observations on the Nature of Joint Ventures in Mexico: Are They Involuntary and Transitory Institutions?

by Michael Wallace Gordon*

I. INTRODUCTION

The equity joint international business venture increasingly is referred to by leaders of the developing nations of the Third World as one of the most appropriate forms of direct foreign investment. Although equity joint ventures

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1. In the widest sense, the "joint venture" comprises any form of association which implies collaboration for more than a very transitory period. Such partnerships show a great variety of patterns. There may be "50-50" partnerships, in which the local investor — public or private — holds one-half of the shares, and the foreign investor, the other half. There may be equity associations in which one partner holds a majority (though often only 51 percent of the shares) and the other partner the minority. An existing enterprise may be transformed into a joint venture with the foreign investor retaining a controlling interest, while the minority shares are held by the local government or a government-controlled development corporation, a small group of local capitalists, or the public.

W. FRIEDMANN & G. KALMANOFF, JOINT INTERNATIONAL BUSINESS VENTURES 6 (1961) [hereinafter cited as FRIEDMANN & KALMANOFF].

Joint ventures normally consist either of closely held corporations in which two or more companies control the venture on an approximately equal basis, or of partnerships combining asset contributions by the participants. If a corporate framework is used, the delicate balance which must be preserved between the interests of the joint venture participants may well be impossible to maintain in the light of the high degree of negotiability required of open capital companies.

Ness, Brazil: Local Equity Participation in Multinational Enterprises, 6 LAW & POL'Y INT'L BUS. 1017, 1041 (1974). It has been defined by United States Fourth Circuit Court of Appeals as the relationship created when two or more persons combine in a joint business enterprise for their mutual benefit with the understanding that they are to share in the profits or losses and that each is to have a voice in its management. Chisholm v. Gilmer, 81 F.2d 120, 124 (4th Cir. 1936).

2. Many proposals have been advanced for the systematic localization of multinational enterprise (MNE) operations in less developed countries (LDCs) and the impact of such policies on
constitute the most significant contemporary form of joint ventures, one should not assume that non-equity joint ventures have been rendered of little importance between a developing nation company and an enterprise in the developed world. While the transfer of technology 3 from the latter to the former does not constitute an equity joint venture, it is a non-equity joint venture association of great importance to Third World development. Where the equity joint venture is utilized by developing nations as a method to reduce foreign direct investment in certain spheres of activity, whether that reduction amounts to a termination of the foreign interest or its assumption of a minority position, there may be an important continuing relationship between the foreign, former majority equity holder and the newly, wholly or majority locally owned enterprise in the form of a technology agreement. An equity future investment in these areas. See Franko, *International Joint Ventures in Developing Countries: Mystique and Reality*, 6 LAW & POL'Y INT'L BUS. 315 (1974); see generally L. TURNER, MULTINATIONAL COMPANIES AND THE THIRD WORLD 104-07 (1973); J. STOPFORD & L. WELLS, MANAGING THE MULTINATIONAL ENTERPRISE 105 (1972).

The case studies by this writer initially in Mexico, and currently in Central America and Panama, tend to illustrate that the principal contemporary view of the joint venture is as an involuntary, transitory institution, although it may be promoted by the host nation government as a long-term association of foreign and local capital. The joint ventures studied in Mexico included: Armco; Bristol Aeroplane; Celanese; Chrysler; Container Corporation of America; Dow Chemical; Gillette; GTE Sylvania; Heinz; Holiday Inns; IBM; Kimberly-Clark; Monsanto; Pan American Sulfur; Philip Morris; Sanborn Hermonos; Toyoda of Japan; Tubos de Acero; Walgreen; and Westinghouse. The studies took place in Mexico during 1974-1976 and will be elaborated upon in detail in a forthcoming book, *JOINT INTERNATIONAL BUSINESS VENTURES IN MEXICO.* For an account of Mexicanization problems encountered by other U.S. MNEs (Firestone, Ralston-Purina, General Motors and Dupont), see *Mexico Screening Investors,* N.Y. Times, Mar. 24, 1979, at 25, col. 3. It would be useful to consider these cases in another decade to provide further observations on the transitory and involuntary characteristics of these joint venture institutions. More recent studies undertaken in Central America and Panama, not yet completed, illustrate the joint venture in that area as a very different institution. The Central American nations and Panama lack the leverage to uniformly demand joint ventures in all, or nearly all, foreign investment. However, they have discovered it to be increasingly effective as a negotiated institution for large foreign investments which are highly visible, e.g., the extractive, export oriented industries. The observations above thus concentrate on the Mexican joint ventures, followed by a few preliminary comments on the joint venture in Central America and Panama. See § VI. D, E infra.

Joint venture may be effectively transformed into a non-equity joint venture when the host nation enterprise assumes total ownership and control of the local entity, but continues a relationship with the foreign entity through an agreement for the transfer of technology. The fade-out use of the equity joint venture will in effect render the non-equity joint venture of greater importance than in times of unchallenged, dominant foreign controlled investment. Continual receipt of technology by the developing nations will often necessitate the use of non-equity joint ventures. As a result, those nations adopting fade-out equity joint venture concepts must be careful that the legislation is not so restrictive that it results in a negative foreign investor attitude towards any form of continued contact, e.g., a non-equity joint venture for the transfer of technology.

This article will examine the nature of joint ventures in Mexico between foreign, primarily United States, corporations and their affiliates and subsidiaries. The focus of these case studies will be on whether the joint ventures are: 1) involuntary or voluntary and; 2) transitory or non-transitory.

II. THE EQUITY JOINT VENTURE

The equity joint venture is not a new form of business association for developing nations. It long has been used by foreign investors wishing to limit their capital investment in a particular nation or desirous of obtaining local strength. Mexico has a developed infrastructure and industrial base, the means to extract natural resources, and a growing export trade with the developed world. It needs to maintain a flow of capital and technology provided largely by transnational corporations, but no longer must accept it on any terms. Mexico offers the investor a growing domestic market, monetary stability, and a convenient location for access to other markets in the hemisphere. These factors encourage foreign investment by raising the probability that it will be successful. In its new code, Mexico is merely regulating foreigners' access to these advantages. The Andean countries, however, cannot deal from the position of strength that Mexico enjoys. Their industrial base is small and their support systems, such as communications, electric power, transportation, and skilled labor are far behind Mexico's. Only a few industries are sufficiently developed to compete in the world market; hence the ANCOM countries need the assistance of modern technology and great infusions of capital in order to achieve the industrialization they require to maintain their independence.

partners for any one of a number of reasons. This form of participation in the joint venture has been accepted by the foreign investor on a voluntary basis in contrast to the increasingly frequent host-nation imposed joint venture form. This joint venture is quite clearly an involuntary venture from the viewpoint of the managers of the foreign enterprise. The equity joint venture has been used increasingly as a form of new foreign owned enterprises. This increasing use of the joint venture has evolved from: 1) the developing nations' legislative and administrative preference for increasing local participation in the means of production and distribution; and 2) an increased awareness on the part of foreign investors of their ability to adapt the joint venture enterprise to the needs of the foreign investor, *e.g.*, to reduce the foreign investor's profile in the developing nation.

The joint venture is a more complex form of business association than one might first expect; it also appears increasingly identified as an involuntary and transitory institution. Nevertheless, it is important to recognize that although it most often may be identified as involuntary and transitory, the joint venture may also be in the form of: 1) a voluntary and transitory association; or 2) a voluntary and long-term arrangement; or 3) less frequently, an involuntary, but long-term association.

A. The Joint International Business Venture as an Institutional Structure for Development

The joint international business venture has been the primary institutional structure for the process of Mexicanization. The process of Mexicanization has involved a planned transference of the infrastructure and, to increasing degrees, much of the means of production and distribution to local ownership. It is a process based on an ultimate goal of placing in the hands of either Mexican private or public ownership all of those economic enterprises which have

6. Interviews with managers of various subsidiaries, supra note 2.
7. Creel, Mexicanization: A Case of Creeping Expropriation, 22 Sw. L. J. 281 (1968). Mexicanization requires that local investors be allowed to participate in the ownership and control of both new and existing foreign-owned commercial enterprises. For examples of comparative approaches, see generally FOREIGN INVESTMENT: THE EXPERIENCE OF HOST COUNTRIES (I. Litvak & C. Maule eds. 1970); R. MALAUGIN, FOREIGN INVESTMENT AND DEVELOPMENT IN LIBERIA (1966) (see especially bibliography at 211-17); FOREIGN INVESTMENT AND INDUSTRIALIZATION IN SINGAPORE (H. Hughes & Y. P. Seng eds. 1969); M.E. HILL, FOREIGN INVESTMENT IN CANADA AND THE FOREIGN INVESTMENT REVIEW ACTS (1978); FOREIGN INVESTMENT IN LATIN AMERICA: CASES AND ATTITUDES (M. Bergstein ed. 1966); I. LITVAK & C. MAULE, FOREIGN INVESTMENT IN MEXICO: SOME LESSONS FOR CANADA (1971); OECD, FOREIGN INVESTMENT IN YUGOSLAVIA (1970); OECD, FOREIGN INVESTMENT IN YUGOSLAVIA (1974).
a significant effect on Mexican development. The goal does not appear to be a
total transference of all private investment to Mexican hands nor an attempt
to replace the private sector with public ownership in all areas of economic ac-
tivity.\footnote{8} Foreign investment under the pattern of Mexicanization is to regulate
that investment so that it contributes to Mexican development, but does not conflict with Mexican political, economic and socio-cultural concepts and
goals.\footnote{9}

Since a smooth transference from foreign to local ownership is difficult to
accomplish in one step when an enterprise is wholly foreign owned, the joint
venture becomes the structure adopted to reduce, but in almost all cases, not
altogether remove, the foreign presence. What is not clear is whether the joint
venture structure is principally a transitory institution or whether it is in-
tended to be a long-term relationship which will allow the foreign companies
to retain indefinitely what is usually a significant minority interest, forty-nine
percent. If the joint venture is viewed only as a transitory device to totally
remove foreign presence, foreign investors may begin to prefer an initial total
withdrawal rather than accept a joint venture stage for an undetermined
number of years, under the belief that the process of nationalization would

\footnote{8} The concept of "key sector" regulation has received much attention. Generally it has been
defined in the following terms:

The term "basic industry" can be interpreted in the broader or narrower sense of the
word. Sometimes it can be understood to mean the branches of industry which are the
basic conditions for the whole economic system, thus the raw materials and auxiliaries
essential for the production, amongst which the sources of energy (electricity and
mineral oil) are wholly or partly ranged. Sometimes the term is expanded even further
to include the raw materials which are necessary for particular important national ac-
tivities as well. Sometimes it only refers to the public utilities, thus to the production of
electricity, gas and water and the communication services — railways, telephone,
telegraph, radio, television and the postal services. Elsewhere the essential sources of
wealth of the country, and then particularly the exploitation of minerals, are included in
this.

\footnote{9} World War II and its aftermath has seen a growing self-confidence in Mexican solu-
tions to Mexico's developmental problems. The basic problem remaining today is that
of whether to capitalize rapidly, and thereby sacrifice another generation of the poorer
elements in society, or whether to distribute immediately, and thereby possibly stultify
rapid economic growth . . . .

In any case, Mexican nationalism today is related to industrialization and a mixed
system of government and private ownership. Xenophobia has been successfully
relegated to the more realistic control over rather than escape from foreign capital.
There is also a growing concern with modernization of the agricultural sector which
would free the rural worker for urban employment in mass-producing units. Indeed,
this is one of the areas in which the revolutionary ideology of uplifting the indigenous
sectors of society conforms with national development criteria.

P. RANIS, FIVE LATIN AMERICANS: A COMPARATIVE POLITICAL STUDY 212-13 (1971); see also F.
ultimately require complete withdrawal of equity participation. A clearer understanding of the joint venture will allow foreign investors a greater assurance of certainty of their investments. It will also provide a host government with greater assurance of its ability to utilize the process of nationalization in various areas of economic activity without receiving a negative foreign investment reaction or the more disruptive potential conflict resulting in total foreign withdrawal from industries where some continued participation is needed for optimum development.

B. Joint Ventures in Mexico

1. Historical Development Since 1950

Joint ventures in Mexico are not concentrated in any one particular industry. They exist in some of the very largest industries including steel, automobile manufacturing, plastics, chemicals and smaller consumer goods, as well as in various service industries. Direct foreign investment has tended to phase out in sectors dealing with agriculture, although the joint venture played a part in that fade-out. Earlier joint ventures in steel production and in mining have been altered with the result that the foreign equity participation has withdrawn. One tends to associate those industries where there has been a pattern of fade-out legislation reducing the foreign investment with corporations in sectors which have been subject to increasing State participation for decades. These are primarily the extractive, export oriented industries. Additionally, restrictions placed on the use of land in Mexico, combined with Government sensitivity regarding the demands of the rural peasant, have created conflicts when foreign investment was involved in food production. The same issue also has arisen in the tobacco industry which has seen an increasing withdrawal of foreign investment from various stages of the industry. This withdrawal commenced with the growing stage (the area most directly related to working with Mexican farmers) and then reached into the actual production of tobacco products.

The use of the joint venture in Mexico is on a large scale basis. It is not limited to periodic pressures calling for some minimum level of Mexican participation in share ownership and control of selected enterprises; rather it follows a very clear and broadly encompassing pattern of the Mexican Government in desiring nearly all foreign investment to limit its equity and control participation to a minority position. Where foreign corporations have been willing to relinquish majority ownership and control, they have not

10. See note 4 supra.
11. See FRIEDMANN & KALMANOFF, supra note 1, at 99. While in most industries a 49 percent minority is allowed, in mining the limitation is 25 or 40 percent, depending on the type of mining venture.
opted consistently to retain the full forty-nine percent permitted by the Government, although usually they retained a significant minority interest.

The joint venture form was used often in the 1950s and 1960s by foreign enterprises as a base from which to acquire increasing percentages of Mexican corporations.\textsuperscript{12} This pattern was reversed in the 1970s when the joint venture was adopted by the Government as a method to reduce foreign participation in direct investment. The increasing acquisition of Mexican businesses by foreign investors was one of the motivating factors which led to the Government's curtailment of further acquisitions\textsuperscript{13} and to a Government imposed reversal of the use of the joint venture to begin a fade-out of some foreign investment.

The last ten years has constituted a decade of exceptionally strong emphasis on increasing local ownership and control of various sectors of the economy.\textsuperscript{14} During this period the joint venture has been established as an involuntary and transitory institution to assist in achieving Mexicanization goals. The earlier joint venture had been more of a voluntary institution utilized by foreign investors to gain an equity position in Mexican industries. Those companies also had viewed the joint venture as transitory. However, this was only in the sense that they often attempted to alter the joint venture and acquire a 100 percent equity position, which the company then viewed only as a long term investment.

A consistent pattern was discovered pertaining to those corporations with a majority interest, and more particularly, with wholly foreign-owned subsidiaries in Mexico, but also with some comparatively recent minority ownership participation in joint ventures in other Third World countries. These companies preferred not to be subjected to any comparative analysis involving their Mexican enterprises and their other joint ventures or with other companies in Mexico, especially competitors which operated in the joint venture form. The resistance was stronger where the company had a wholly foreign-owned subsidiary in Mexico and several majority foreign-owned joint venture subsidiaries in other Third World nations, or where their Mexican subsidiary was wholly foreign-owned and they had submitted to minority participation in


\textsuperscript{13} See \textit{REPORT}, supra note 12, at 45-95.

\textsuperscript{14} See note 8 supra.
joint ventures in other Third World nations. This should not be surprising. It may well be assumed that the initial submission to a majority foreign-owned joint venture for a company which previously had only wholly foreign-owned subsidiaries, or the submission to a minority position by a company with previous majority foreign ownership, undoubtedly occurred in an involuntary fashion and not as a result of any change in company policy to accept an affirmative fade-out position.\textsuperscript{15} All of the companies studied,\textsuperscript{16} where the question was appropriate, appeared quite reluctant to participate in a joint venture form where a wholly foreign-owned subsidiary was legally permissible.

In a few cases there were acknowledged benefits to the joint venture form, but these were judged to be quite limited.\textsuperscript{17} In only a few of the studies was the Mexican subsidiary not at some time wholly, or near wholly, owned by the foreign parent. The more typical joint venture experience of those enterprises studied involved the initial formation of a wholly foreign-owned subsidiary or the use of the joint venture to obtain wholly foreign-owned or near wholly owned status.

This illustrates one of the dilemmas of Mexico’s development. It would be possible for the Mexican Government to adopt an Eastern European approach\textsuperscript{18} to development and nationalize all foreign business with probably little more fear of retaliation then evidenced in the experiences of nationalization throughout the world in the past decade, and most likely without suffering from an economic boycott such as was applied to Cuba.\textsuperscript{19} A total nationalization would provide the base from which Mexico could adopt an Eastern European approach, \textit{i.e.}, by allowing joint ventures only with a minority foreign equity position.\textsuperscript{20} There is a time element involved in such process, however. It has taken several decades for the dislocations caused by the nationalizations

\begin{itemize}
\item 15. See \textit{Report}, supra note 12, at 69, table 4-8, which lists degree of equity ownership of U.S. affiliates in Mexico.
\item 16. See note 2 supra.
\item 17. Before one suggests hypocrisy on the part of company officials, it is necessary to recognize that a corporation which accepts a minority position in a new joint venture, where it is the only way in which it is permitted to operate, may yet consistently argue strongly against \textit{altering} a wholly foreign-owned or a majority foreign-owned subsidiary to a minority position. A company may argue, not inconsistently, that it cannot feasibly \textit{reduce} its wholly foreign-owned status in one of its Latin American subsidiaries which has been functioning for several years, but that it will accept a minority status in a venture in a socialist nation in Eastern Europe, or even in another Latin American nation, where a minority foreign equity position is the only method of doing business which is permitted. One thus should not assume that a company which participates in a number of minority and/or majority owned joint ventures in other Third World or socialist nations has reached that stage from an earlier position of total ownership.
\item 20. See note 18 supra.
\end{itemize}
in Eastern Europe to moderate to the point where companies were once again willing to consider Eastern Europe for direct foreign investment. It would be inconceivable for Mexico to successfully undertake a massive nationalization and then immediately invite foreign direct investment under the Eastern European model. 21

Mexico appears to be following a more difficult but preferred path toward a similar end result of limiting nearly all foreign investment to a maximum of forty-nine percent. This is essentially the position in Eastern European nations. 22 Mexico is utilizing a number of devices short of nationalization, both administrative and legislative, to persuade the acceptance of minority status by foreign corporations with current investments in Mexico of greater than minority equity interest. At the same time Mexico is trying to avoid discouraging new capital from entering the nation. It is unquestionably a tenuous task, but it is the method perceived by Mexico at this time as one that combines the long term benefits of Mexican control over the means of production and distribution with minimum current economic dislocation. The Government has adopted periodically legislation which changed the rules of the game, 23 but only to the degree which has resulted in a limited amount of


22. See note 18 supra.

23. In a presentation to the important Bilateral Committee of United States-Mexican Businessmen, then United States Ambassador Robert H. McBride stated: "Many [investors] are unclear as to whether or not foreign investment is still desired [in Mexico] and whether the rules of the game are changing, not only for new investment but also for established firms." Miami Herald, Jan. 21, 1973, § G, at 21, col. 2. The statement received substantial criticism from Mexican officials. The basic legislation is the Ley Para Promover la Inversión Mexicana y Regular la Inversión Extranjera, Law of Feb. 7, 1973, [1973] 317 D.O. No. 7, at 5 (Mex.), translated in 12 INT'L LEGAL MAT'LS 643 (1973) [hereinafter cited as Investment Law].

Article 1 of the Investment Law states that its purpose is to stimulate a just and balanced development and consolidate the country's economic independence. Id., art. 1. Article 5 imposes a 49% limit on foreign ownership of domestic enterprises with exceptions provided for 1) secondary petrochemicals (40%), 2) special mining concessions (34%), 3) sectors regulated by specific law or regulation. Id., art. 5. Considerable discretion is given to the National Commission on Foreign Investment to interpret and determine conditions of entry for foreign investment based upon the seventeen standards in Article 13. Id., arts. 11-17. Article 13 states:

In order to determine the convenience of authorizing foreign investment and in order to establish the percentages and conditions by which it shall be ruled, the Commission shall take into consideration the following criteria and characteristics of the investment:

I. That it should be complementary to national investment;

II. That it should not displace national business enterprises that are operating satisfactorily, and that it should not enter fields that are adequately covered by them;

III. Its positive effects on the balance of payments and, especially, on the increase of Mexican exports;
adverse, verbal response from foreign enterprises, and which has not been coupled with a withdrawal of needed investments. This would suggest that the joint venture, the principal institution being used to accomplish this alteration of the ownership of the means of production and distribution, assumes an involuntary and transitory nature from the viewpoint of the foreign investor.

III. Case Studies

A. Wholly Owned Subsidiaries Which Divested: Philip Morris, Industrias Resistol (Monsanto), Pan American Sulphur and Kimberly-Clark

Of the joint venture studies, Philip Morris, Industrias Resistol (Monsanto), Pan American Sulphur and Kimberly-Clark all began as wholly foreign-owned companies, later divesting all or some of their equity. Philip Morris and Pan American Sulphur both fully withdrew voluntarily from their Mexican investments under pressure from the Government. Monsanto reduced its total ownership to a minority 42 percent position as a result of Government pressure while Kimberly-Clark reduced its ownership share to 43 percent, not as a result of direct pressure, but because the company officials predicted the trend of Mexicanization. It would appear that in each of these cases the reduction of the 100 percent foreign ownership was involuntary, although less so in the case of Kimberly-Clark, where there is no clear, disclosed evidence of actual Government pressure to Mexicanize. It is more likely that the "voluntary" Mexicanization of Kimberly-Clark occurred because of more careful

IV. Its effect on employment, taking into account job opportunities created and wages paid;
V. The employment and training of Mexican technicians and management personnel;
VI. The incorporation of domestic inputs and components in the manufacture of its products;
VII. The extent to which it finances its operations with resources from abroad;
VIII. The diversification of sources of investment and the need to foster Latin American regional and subregional integration;
IX. Its contribution to the development of the relatively less economically developed zones or regions;
X. That it should not enjoy monopolistic positions in the domestic market;
XI. The capital structure of the branch of economic activity involved;
XII. Its supply of technology and its contribution to technological research and development in the country;
XIII. Its effect on price levels and production quality;
XIV. That it respect the country's social and cultural values;
XV. The importance of the activity in question in the context of the country's economy;
XVI. The extent to which the foreign investor is identified with the country's interest and his involvement with foreign centers of economic decision; and
XVII. In general, the extent to which it complies with, and contributes to the achievement of national development policy objectives.
corporate planning, not because of an affirmative company policy to accept a minority equity position in the Mexican enterprise. This corporate planning included an awareness and sensitivity to the various nationalistic patterns and pressures of the Third World governments.

The Mexicanization of Monsanto was noticeably involuntary. Relations with the Mexican Government in the late 1960s were not good and substantial pressure was placed on the company to Mexicanize. Since the company succumbed to Government pressure, the joint venture has been successful and the company’s relations with the Mexican Government has improved.

The Philip Morris and Pan American Sulphur withdrawals involved quite a different pressure. The former resulted from the concern of the Mexican Government not to create unsettled conditions in rural areas and the latter because of the desire of the Mexican Government to assume State ownership of the mining industry. The reduction of Philip Morris’ interest from total foreign ownership to a joint venture and then to a withdrawal illustrates the totally involuntary use of the joint venture as a device to terminate foreign participation in a Government perceived sensitive sphere. Philip Morris was not the only tobacco company subjected to pressure to Mexicanize. It was, however, more reluctant than some of its competitors to alter its total foreign ownership to a minority position.

B. Wholly Owned Subsidiaries Which Did Not Divest

1. Heinz

Although Heinz began with a 100 percent foreign owned operation, it was a small enterprise until it expanded significantly by the questionably appropriate acquisition of a number of food processing plants. Fortunately it accepted a joint venture at that time which lessened its risk in the venture. The Heinz experience is not an example of the reduction of a wholly or near wholly foreign-owned enterprise initially to various stages of majority and then to minority equity participation. Heinz withdrew completely because of difficulties which related to some of the protectionist, albeit uneconomic, policies of the Mexican Government toward the small farmer.

2. IBM and Dow Chemical

The officers of those companies studied which have remained 100 percent foreign-owned have clearly expressed a preference for total foreign ownership. IBM has perhaps the strongest anti-joint venture policy of any large corporation. The fact that the company has not participated in any equity joint ventures, combined with the leverage it possesses because of its sophisticated

24. See note 2 supra.
technology, has allowed it to successfully continue its operation in Mexico as a wholly foreign-owned subsidiary. The Dow Chemical operation also has maintained total foreign ownership of its Mexican subsidiary despite the fact that it participates in many joint ventures throughout the world, including those in which it accepts minority equity positions. For the most part, Dow's joint ventures have evolved because of a preference for the joint venture by the host nation rather than from any desire by Dow to initiate joint ventures. Where the company has been able to obtain ownership, it has done so and attempted to maintain that position. It generally has been successful because of its technological contributions to the host nation. Although those contributions often have involved technology available from other competitors, at least to a greater degree than with IBM, Dow's relations with the Mexican Government appear to have been consistently favorable and the company has been subjected to comparatively little pressure to Mexicanize.

3. Procter & Gamble and Container Corporation

Procter & Gamble's operation in Mexico is quite different from the above corporations. It also has been able to retain a 100 percent ownership position although it does not possess the high-level, sophisticated technology of either IBM or Dow. Competitors of Procter & Gamble include companies which have accepted the joint venture form. Of all the cases included in the study which have total or near total foreign ownership, Procter & Gamble would appear to have the least technology leverage to retain 100 percent foreign ownership in the face of Mexicanization pressures.

Another company in a similar position is Container Corporation's Mexican subsidiary, Carton y Papel. Initially fifty percent foreign-owned, the parent corporation was able to increase its equity to total ownership, partially as a result of dissatisfaction with the joint venture arrangement. This company also lacks the sophisticated technology of Dow or IBM. As is the situation with Procter & Gamble, a number of its competitors in Mexico are either joint ventures or wholly Mexican-owned companies. Carton y Papel appears to be in a position similar to that of Procter & Gamble, i.e., lacking leverage to avoid Mexicanization. Any alteration to a joint venture would be clearly involuntary and both companies prefer to keep a low profile in Mexico to avoid raising the issue of Mexicanization.

4. Chrysler

The Chrysler Mexican venture can be considered essentially wholly foreign-owned since the parent Chrysler Corporation owns 99.1 percent of its Mexican subsidiary. The automobile industry has not been the subject of Mexicanization pressures. If any of the automobile companies do relinquish

25. The Government experienced an unsuccessful automobile venture with Borgward,
some of their ownership and form joint ventures, it may be because Government restrictions have limited profits severely. Such a change would in effect constitute the adoption of involuntary joint ventures caused not as a result of direct Mexicanization pressures, but because of the indirect effect of Government regulation. These restrictions, particularly price controls, could well cause disinvestment in the same manner as Government restrictions contributed to the withdrawal of Heinz and the tobacco companies. A joint venture is no less involuntary when it results from a company’s decision to reduce its equity because of operation restrictions which might be termed indirect Mexicanization than when it does from direct Government pressure.

IV. CHARACTERIZATION OF THE JOINT VENTURES

A. Involuntary Joint Ventures

The involuntary nature of the joint venture in most of the case studies is supported by the expressed desire of many of the companies which retain total or majority foreign ownership to avoid any joint venture. Significantly, this includes those companies which do not have the leverage of Dow or IBM to maintain that status. 26 Several of these companies expressed an interest in having their case studies withdrawn from the project. This concern is consistent with their intention to maintain a low profile in order to avoid any confrontation with the Government which could directly or indirectly raise the question of Mexicanization.

Although one might agree that an attempt to maintain a low profile by multinational corporations in Third World nations is an appropriate concept, it appears that the purpose of the low profile may be to avoid a current manifestation of a confrontation that may be inevitable in the longer term. Such an approach would be most appropriate where the host country has experienced frequent and extreme political fluctuations, at least in attitudes toward the role of foreign investment. Thus, a corporation might hope to remain wholly foreign-owned during the period of a nationalization-oriented government by maintaining a low profile and accepting the tensions in its relations with the government. It then could exist without pressure during an administration with a less restrictive approach toward foreign direct investment. This is not a policy which can be adopted with the expectation of success in Mexico. Continuity and stability have been characteristics of the Mexican

although its more recent participation with Renault has been comparatively successful. The myriad of governmental regulations affecting the automobile industry, including price controls, import quotas and local content requirements, appears so complex that a paradoxical situation exists, the Government appears disinterested in substantial participation in an industry which it so rigidly and restrictively regulates.

26. E.g., Procter & Gamble and Container Corporation. § III. B.3 supra.
government for many decades. The process of Mexicanization illustrates a continual progression toward substantially increased local participation in the means of production and distribution.\footnote{27} It is doubtful that the process of Mexicanization will be reversed although it may be slowed considerably, or even halted for a time, providing companies which successfully had avoided Mexicanization with some temporary security from the acceptance of an involuntary joint venture.

Some companies decide not to hold out for as long as their technological leverage or low profiles will allow, concluding that there is an inevitable mandate for change in the structure of nearly all foreign investment. These companies face the decision of adopting the most appropriate alternative for disinvesting. They are likely to wish to avoid total withdrawal from a large, expanding and presumably profitable market and the association in an unsatisfactory joint venture, such as one which may include the Mexican Government as the majority partner. While the alternative of having a Mexican Government development organization such as NAFINSA\footnote{28} or SOMEX\footnote{29} as a partner should not be considered as inevitably unfavorable, it is a situation which might be avoided where a company accepts the joint venture at a time when it has a larger number of private options regarding potential local partners.

B. Voluntary Joint Ventures

1. Armco and Westinghouse

All of the joint ventures studied cannot be labeled as involuntary. Several foreign investors sought Mexican partners initially. It is nevertheless difficult to determine whether those investors searched for Mexican partners aware of the changing attitude toward foreign equity participation or whether the joint venture was entered for some of the traditional voluntary reasons, e.g., limiting a capital outlay in a particular country or associating with Mexican partners who possess a critically needed input for the venture. The joint venture also may be a way of obtaining a return based on the success of the enterprise in addition to a fixed return for technical advice such as in the Altos Hornos joint venture with Armco. Armco initially obtained only 7.5 percent of the equity in the venture; its principal participation was technical advice. It appears clearly to have been a voluntary joint venture and the withdrawal of Armco was not in any way associated with dissatisfaction of the joint venture.

\footnote{27} See notes 9, 12, 15, 23 supra.
\footnote{28} NAFINSA is Nacional Financiera, a Mexican Government-owned development bank.
\footnote{29} SOMEX is Sociedad Mexicana de Credito Industrial, a Government-owned investment company.
The Westinghouse joint venture, IEM de Mexico, appears to be similar to that of Altos Hornos. Westinghouse was providing substantial technical assistance when it assumed a minority equity role which eventually reached 26 percent. It does not appear that Westinghouse was ever interested in total ownership of the Mexican enterprise, at least not at the time when it first entered the joint venture. This nevertheless occurred during a period of active acquisition of Mexican companies by foreign multinationals. A majority or total ownership may well have been one of the alternatives discussed by officials at Westinghouse. Thus, the voluntary nature of the initial joint venture association could have been motivated either by a desire to be a nominal equity participant, as in the Altos Hornos venture, or to use the joint venture as a fade-in institution to obtain majority or total ownership and control, much like the experiences of Chrysler and the Container Corporation.

2. Holiday Inns and Sanborn Hermanos

Two of the joint ventures in the service industry appear to have been voluntary. They are the Holiday Inns and Sanborn Hermanos ventures. The Holiday Inns operation in Mexico is really a non-equity joint venture as a result of the unilateral decision of the franchisees who obtained the Latin American territory from the parent corporation. Holiday Inns generally has avoided the equity joint venture preferring franchise operations with local investors possessing total ownership of the host-nation inns. The United States franchisees also decided to adopt a non-equity joint venture structure for the separate inns in Mexico. Each Mexican inn is operated by a corporation which is wholly owned by local investors. One might suggest that the Holiday Inns arrangement should not be placed in the joint venture category at all. While this is technically correct as far as equity joint ventures are concerned, it is an interesting arrangement because even though it results in a transfer of total ownership to host nationals, it does not result in a similar transfer of total management because of the unique nature of the franchise and leverage retained by the franchisor. The franchising method appears consistent with the philosophy of the 1973 Investment Law in that it allows total local ownership, even though 51 percent would comply with the law. The same cannot be said with regard to divestment of control. Continued control over many aspects of the franchise is exercised by the franchisor through the franchise contract. Such contracts are invariably one-sided. Although the Holiday Inns

30. See § III. B.4 supra.
31. See § III. B.3 supra.
32. The inns in Acapulco and Taxco are exceptions.
33. Investment Law, supra note 23.
franchise contract is among the fairest of franchise agreements of United States enterprises, it nevertheless offers the franchisor a great deal of leverage in dominating the venture if it decides that the local management is unsatisfactory. The nature of the franchise agreement between developed nation multinationals and franchises in Third World nations and the correlation of such agreements to such concepts as Mexicanization would provide a useful study.

The Sanborn Hermanos venture in Mexico is quite unique. The Walgreen Company has no foreign investment other than its interest in Sanborn Hermanos. Walgreen's initial significant minority participation has changed little. Absent the Mexicanization policy, one might suspect that Walgreen's would have attempted to increase its participation. However, there is no indication that the Mexican partners would have relinquished any of their interest, particularly since there was no technology leverage to use to obtain an increase. The Sanborn operation is one of the most voluntary and one of the most successful of the joint venture enterprises studied. Sanborn also has sought additional capital through the Mexican stock exchange, thus establishing a convenient mode for further distributions were Walgreen interested in reducing its substantial minority participation.

3. Heinz

The food processing joint venture of Heinz may well be considered voluntary since the entire participation of Heinz beyond its initial total ownership of its first acquired small processing enterprises was not totally as a result of Government pressure. The pressure was not to accept the joint venture, but rather to accept the ownership itself. In that sense the joint venture aspect was voluntary, it appears that Heinz preferred to minimize its investment and not assume 100 percent ownership. While it cannot be grouped with the voluntary joint venture of the form represented by Sanborn Hermanos, it was nonetheless a joint venture albeit a unique one.

4. Chrysler & GTE Sylvania

The Chrysler Mexican enterprise began with a licensing agreement which was later followed by an acquisition of one-third of the equity. Subsequently, ventures involving companies which initiated their Mexican investments by providing technical services and obtained a nominal percent of the equity, sometimes later resulting in a fade-out of the equity participation, Chrysler used its technology and initial minority position as a base from which to increase its participation to effective total foreign ownership. A similar process was also undertaken by GTE Sylvania. However, its initial status of providing technology and a subsequent acquisition of a minority interest was followed by the creation of a separate, wholly-owned subsidiary to further the company's
investment in Mexico. Chrysler had used the joint venture as a fade-in device, quite contrary to the fade-out approach of the joint venture which prevails in the Third World.\textsuperscript{34} One might refer to the Chrysler joint venture as involuntary in the sense that from the beginning Chrysler expected to increase its equity participation and thus was unsatisfied with its status as a minority participant. It is doubtful whether the company would have remained in Mexico had it been unable to obtain majority or near total ownership. The permission of the Mexican Government for Chrysler to increase its participation was involuntary; the Mexican Government was substantially persuaded to allow Chrysler to increase its position because it did not have the leverage to induce any disinvestment by such other wholly foreign-owned automobile manufacturers as Ford, General Motors and Volkswagen. The Mexican Government's decision also was affected by its then recent substantial loss incurred in the production of the Borgward automobile.\textsuperscript{35} This was a venture in which the Government had been a substantial participant.

C. \textit{Voluntary v. Involuntary Joint Ventures}

When the joint venture appears to have been voluntary it generally has resulted in greater success for the foreign company in achieving its intended goals. The participation by Walgreen in the Sanborn Hermanos joint venture has resulted in a long and successful partnership which has been profitable for Walgreen as well as the Mexican investors. The joint ventures of Altos Hornos and Westinghouse (IEM) also have been successful and the foreign companies have received fees for their technical advice and a return on their nominal equity participation. The acquisition by Chrysler of a minority status was successful as a base from which the company increased its participation to nearly total ownership.

Nevertheless, considering all of the case studies, the involuntary characteristics predominate. The least involuntary situations include those where the foreign investor was using the joint venture as a fade-in device, the involuntary characteristic being the foreign investors' desire not to remain only a nominal equity participant. It is impossible to broadly label the joint venture in Mexico as a totally involuntary institution. Labeled involuntary in the extreme, it would seem logically to have resulted in the complete withdrawal of foreign participants. It remains a predominantly involuntary institution in the sense that a minority participation is less desirable than a majority participation and a majority participation is less desirable than total foreign ownership. Thus, pressures to diminish any current equity level obviously will intensify an involuntary situation.

\textsuperscript{34} See note 4 supra.
\textsuperscript{35} See note 25 supra.
D. Duration: Transitory v. Non-Transitory

In addition to the characteristic of voluntariness of the joint venture, a second important consideration is the duration of the joint venture or its degree of being a transitory institution. This characteristic is presumably independent of the degree of voluntariness. The two characteristics nevertheless may be associated. The joint venture often is promoted by Third World governments, particularly where the foreign investor is willing to accept a minority position, as being an expectedly long term association. This would seem to be a more correct identification of a negotiated joint venture where the investor initially accepted a forty-nine percent position than where the joint venture is part of a fade-out policy, which in reality merely associates the forty-nine percent majority position as one transitory stage in the ultimate elimination of all foreign equity participation. Having contrasted the joint venture case studies under the division of voluntary or involuntary, it is useful to inquire additionally whether the voluntary or involuntary degree has any affect on the transitory nature of a given joint venture. A joint venture with a high degree of voluntariness might not be a transitory institution at all, but rather a venture of long term duration. Contrastingly, where the degree of involuntariness is high, such as where stringent fade-out legislation is adopted dealing with a particular industry, any venture in that industry may be quite transitory in nature.

1. Government Imposed Restrictions

The duration of a joint venture may be limited by government restrictions. This is exemplified by the fade-out legislation adopted by the Andean Common Market which requires a diminution of foreign participation to specified levels if companies wish to take advantage of free trade among the member nations. This form of legislation did not make the joint venture transitory, in the sense that joint ventures may continue to exist. This type of legislation which allows a stipulated period of time to eliminate foreign equity participation clearly would be an example of a host nation government decreed transitory duration status for the joint venture. If one views the Andean Common Market legislation as either too restrictive to expect to retain...
direct foreign investment or as the first step of a full fade-out decree, then the initial legislation may be viewed as effectively restricting the joint venture to a transitory status.

2. Self-Imposed Restrictions

The transitory nature of the joint venture also may be imposed by the foreign investor. One might view the Altos Hornos joint venture\(^{41}\) in which Armco retained a nominal 7.5 percent as a transitory joint venture, since it appeared from the beginning that Armco would be likely to withdraw as a nominal equity participant after the venture had begun to function smoothly or might use its nominal equity as a base to increase its participation, such as in the Chrysler case.\(^ {42}\) Where the stock ownership is as nominal as that of Armco, however, the foreign equity ownership tends to become rather *de minimus*. It does not differ significantly from the acquisition of a nominal amount of stock through the stock exchange or by purchase from one or more individual owners. Since the equity ownership by Armco was essentially ancillary to the technical arrangement with Altos Hornos, the identification of the transitory characteristic is of less significance than in other case studies.

V. TRANSITORY NATURE OF JOINT VENTURES

The question of the transitory nature of the joint venture is an important one for a foreign investor, both when the joint venture is imposed upon the enterprise from the inception of the foreign investor’s participation in the host nation and when it is part of a nationalization program. One of the contributions of a foreign investor initiating an investment is likely to be hard currency. If the joint venture is transitory to a greater degree than predicted by the foreign investor, such as where the pattern of foreign investment treatment by the host company leads to new laws applicable to the joint venture which effectively force a fade-out that could not have been predicted by the foreign investor, the latter undoubtedly would have sought different terms at the inception of its participation. For example, a company negotiating a 34 percent equity participation in a mining venture in Mexico in 1970, undoubtedly would have been quite disturbed by the alteration of the mining laws in 1976 to further limit the foreign participation to 25 percent.\(^ {43}\) Even though the newer law was not to be applied retroactively, the investor would be concerned that the same form of pressure would be adopted by the Mexican Government to encourage a reduction of the minority foreign participation from 34 to 25 percent. This type of pressure was used by the Government when the

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41. See § IV. B.1 supra.
42. See §§ III. B.4, IV. B.4 supra.
law had earlier been changed reducing the foreign investor’s permitted equity from 49 to 34 percent.\footnote{Id.}

A. \textit{Attitude of the Mexican Government}

Basically the Mexican Government views all wholly and majority foreign-owned subsidiaries in Mexico as transitory institutions. Contrastingly, those enterprises in which the foreign investor has accepted a minority position appear to be considered by the Government as of indefinite duration with the caveat that certain spheres of activity, such as mining, may be subject to a continuing review and revision of the permitted equity structure in favor of increasing local ownership. In such a case the entire industry may be considered transitory as to foreign participation.

The studies support this concept of the transitory nature of the joint venture. Where the joint venture appears to be viewed by both participants as voluntary, there seems to be a lower transitory degree than where the joint venture is considered by one or both parties to be involuntary.

The Sanborn Hermanos venture\footnote{See \S IV. B.2 supra.} has operated successfully since 1946 with no significant alteration of the minority foreign-owned equity structure. There has been no Government pressure on Walgreen to reduce its equity participation and the duration seems to be considered by all participants as indefinite. This joint venture is not transitory.

The Heinz food processing joint venture\footnote{See \S IV. B.3 supra.} involved a substantial majority ownership by the foreign investor. The voluntary nature appeared to be at least partially involuntary. While Heinz entered the enterprise with expectations of a long term and profitable relationship with its minority Mexican partner, the durational aspect from the point of view of the Government is difficult to discern. Some observers believed that the Government was surprised that Heinz was so willing to purchase the unprofitable food processing units and, if such was the case, the Government must have viewed the joint venture quite desirably as one of as long a duration as possible, allowing the foreign participant to absorb the greater percent of any continued loss. In addition, it would seem obvious that had the venture become extremely profitable (being so closely connected with the sensitive area of agriculture), the Government then might have viewed the near wholly foreign-owned venture as increasingly transitory, unless a minority position were to be accepted by Heinz. The early withdrawal by Heinz obviously eliminates effective measurement of such speculation.
B. Joint Ventures Commenced with the Foreign Participant
Initially in a Minority Position

Several joint ventures commenced with the foreign participant initially accepting a minority position. The initial investment by Chrysler in 1959 of 33.3 percent was considered by Chrysler as a transitory minority foreign investment. The company increased its equity to 40 percent 11 years later in 1970, and the following year brought its ownership to a majority of 65 percent. Subsequent to that acquisition the company has become near wholly owned by the parent Chrysler which holds 99.1 percent of the stock in Chrysler de Mexico. GTE Sylvania differs only slightly. It also was considered transitory in its early stage by the United States parent. The first equity participation was a 20 percent interest in FOCOS\(^47\) in the 1940s. A dozen years later the United States company created a separate, wholly foreign-owned Mexican subsidiary to undertake Sylvania’s expanded operations in Mexico, but that interest was later reduced to 75 percent under pressure from the Mexican Government. Both Chrysler and GTE Sylvania used the joint venture as a fade-in device and the initial minority status in each joint venture must be considered therefore transitory since each company expected to alter the equity to increase the foreign share.

It is difficult to discern whether the Carton y Papel joint venture\(^48\) was contemplated initially by the Container Corporation as being transitory, \textit{i.e.}, to remain only fifty percent Container Corporation owned, until a greater share could be acquired or whether the increase to total foreign ownership occurred without such predetermination, but rather as a way of resolving internal corporate problems.

The use of the joint venture as a transitory institution for a fade-in to majority, and possibly total foreign ownership, is a mirror-image of the Government’s view of the joint venture as a transitory vehicle to reduce total or majority to minority foreign ownership. A number of the joint venture studies, including one or more of those which remain wholly foreign-owned, undoubtedly have been viewed by the Government as transitory in nature. The companies which first commenced enterprises which have since been reduced to minority foreign equity, or totally phased out (Pan American Sulphur and Philip Morris) without doubt initially viewed their investments as other than transitory.

One must define transitory in terms of the reasonably expected life of a Mexican investment. Any company doing business in Mexico subsequent to

\(^{47}\) FOCOS was a privately-owned Mexican corporation manufacturing incandescent lamps.

\(^{48}\) \textit{See § III. B.3 supra.}
the 1938 petroleum expropriations,49 and particularly since the post-war origins of Mexicanization,50 should be aware that, depending on where the particular industry falls on the scale of priorities for local ownership, permissible equity structures are not static and the concept of a transitory institution assumes a rather narrow time limitation. One could reasonably speculate that Pan American Sulphur, operating in the mining industry, might have predicted that it would be subjected to pressures to permit local ownership because of the total foreign ownership of its Mexican subsidiary and additionally because of the generally restrictive Third World attitude toward extractive, export oriented industries.51

1. Philip Morris

Predictably, the Philip Morris enterprise might have been of longer duration, although any venture which is dependent on the participation, directly or indirectly, of the agricultural sector, is also likely to be of limited duration. This is because land reform measures are increasingly being adopted by Third World governments to placate the real or perceived plight of the farmer.

2. Monsanto

Monsanto reasonably might have predicted that it could have survived for a longer period of time as a wholly or majority foreign-owned subsidiary, although the chemical industry, relying on the extractive sector for its raw materials, often tends to be considered similar to the mining industry.

3. Kimberly-Clark

Kimberly-Clark, in a sphere of operations less identified with the sensitive area of mining, might have expected even longer survival as a wholly or majority foreign-owned venture. Consequently, one might suggest that the

51. See Gordon, Predictability of Nationalization of Foreign Private Investment in Latin America, 1 SYRACUSE J. INT'L L. & COM. 123 (1973). This is not always a rational motivation.

Objections to foreign investments in particular sectors of economic activity frequently arise. They can be of an economic, social or ideological nature; they often have a mixed character. Particularly in countries which still feel themselves to be economically or organizationally weak, considerations of a social or ideological nature lead more rapidly than elsewhere to having particular categories of activity reserved for the government or national entrepreneurs. Insufficient expertness then gives rise to the fear that a control will not lead to the desired result.

FOUNDATION RESEARCH, supra note 8, at 75.
relinquishment by Kimberly-Clark of an initially minority block of forty percent, and even more so an additional 13 percent, was an untimely disposition of equity participation at a date earlier than when the Mexican Government might have placed pressure on the paper products industry. It might just as well be considered to have been a prophetic distribution, however, justified by the 1973 Investment Law,52 which evidenced a broad application of Mexicanization.53 One must realize that Mexicanization pressures have been applied generally when there has been almost any contact by foreign companies with the Mexican Government, such as requesting consent to act in any one of a number of ways, principally the expansion of the production at new locations or the diversification of products. Pressures to Mexicanize have not resulted solely from a priority listing of industries, although that usually has played the most important role in the emphasis of Mexicanization at a given time.

4. Gillette

The transitory degree of the Gillette operation may be somewhere between that of Monsanto or Kimberly-Clark and those enterprises producing consumer products which have not yet Mexicanized any portion of their operations, particularly Procter & Gamble and the Container Corporation. While Gillette continues as total owner of its principal Mexican subsidiary, it has accepted a forty-nine percent interest in two new enterprises created for the production of two new products. It would seem reasonable to surmise that the parent Gillette officials view the new enterprises in which they have forty-nine percent as of predictably greater duration and thus, less transitory than the principal subsidiary which remains wholly foreign-owned.

C. Factors Involved in Durational Predictions

1. Leverage of the Corporation

For those corporations which have not altered their total foreign ownership status, the durational predictions would appear to be directly related to their perceived leverage in dealing with the Mexican Government. That leverage is substantial for IBM54 which would appear reasonable in assuming that its wholly owned Mexican subsidiary is not a transitory institution. Any relin-

52. Investment Law, supra note 23.
54. See § III. B.2 supra.
quishing of a nominal amount of equity by a foreign enterprise with substantial technology leverage should not suggest a transitory institution. One must nevertheless wonder whether sufficient leverage to remain majority foreign-owned is not sufficient leverage to remain wholly foreign-owned. With some justification, managers of wholly foreign-owned enterprises believe that once their companies have relinquished even a nominal portion of foreign ownership, the transitory level of their subsidiaries increases. If the alteration which resulted in the sale of a small minority of the stock was Government induced, the Government reasonably might believe that it could continue to persuade the company to reduce further its foreign equity participation. The degree of perceived transitoriness, both from the viewpoint of the company and the Government, appears to increase rapidly with the initial relinquishment by the foreign owner of even the most nominal equity participation.

As the leverage of a wholly foreign-owned subsidiary decreases from the degree possessed by IBM, to the somewhat lesser leverage of Dow Chemical or Chrysler, and to even lesser leverage of the Container Corporation or Procter & Gamble, managers of those companies must pragmatically view their Mexican enterprises as more transitory than in the case of IBM. They may even have reason to believe that their companies stand to lose more by allowing any initial nominal share percentage to be relinquished to host nation ownership. Such a relinquishment by IBM might be viewed by the Mexican Government as more a matter of comity, than were the same to be undertaken by Procter & Gamble or the Container Corporation, which might be considered a recognition of insufficient leverage to retain even majority foreign ownership.

2. Extent To Which Competitors Have Accepted Joint Ventures

An additional factor which must affect the degree of transitoriness of a given corporate venture is the extent to which competitors have accepted the joint venture status. As the acceptance of the joint venture status is a given industry increases, the degree of transitoriness would seem to increase for those remaining holdouts. This would appear to affect the Dow Chemical Mexican enterprise, as well as the Container Corporation and Procter & Gamble, all of which have foreign-owned competitors in Mexico which have accepted majority or minority joint ventures.

55. Id.
56. See § III. B.4 supra.
57. See § III. B.3 supra.
58. Id.
59. See § III. B.2 supra.
60. See § III. B.3 supra.
61. Id.
The transitory nature of wholly foreign-owned subsidiaries which face varying amounts of pressure to become joint venture appears interrelated to the question of whether the joint venture is voluntary or involuntary. The greater the degree of voluntariness, the less transitory is the venture from the point of view of both foreign and local participants, and the host nation government. Considering the pattern of Mexicanization and the current legislation, it is difficult to conclude that any foreign enterprise interested in operating in Mexico, which receives an exception to the 1973 Investment Law from the National Commission on Foreign Investment allowing the company to retain total or majority foreign ownership of its venture, is perceived by the Mexican Government to be of a transitory character. The petitioning for an exception to the Investment Law clearly illustrates the foreign enterprise’s rejection of the joint venture. If the petition is denied, any resulting joint venture accepted by the company would be involuntary.

In the case of enterprises which had been operating in Mexico prior to the adoption of the Investment Law, there may be similar conceptions of the degree of transitoriness by both management and the Mexican Government. The unwillingness of the supposedly “grandfathered” foreign-owned company to voluntarily alter its equity structure and accept a joint venture indicates that the company considers that the joint venture is an involuntary institution. For those companies which remain wholly or majority foreign-owned, and which have substantial leverage, both the company and the Mexican Government consider the enterprises to be of much longer duration. The Mexican Government considers those ventures which do not possess extensive leverage to avoid conversion from total or majority foreign ownership to be transitory, and contrary to the expressions of management of the foreign enterprises, it appears logical to conclude that they too must privately view their enterprises as transitory.

D. Summary

The transitory characteristic of joint ventures is obviously subject to the fact that time frequently changes the transitory parameters. Conclusions as to the transitory degree of the joint ventures in this study might be used as the basis for a review of those ventures in another decade or two. If the analysis regarding the voluntary and involuntary nature and their transitory degree is supported by changes which occur in the future, joint venture planning may well be entered into with a greater degree of predictability than during the past two decades. It might be assumed erroneously that the time at which the current studies were undertaken was considered the apogee of the transition from foreign to Mexican ownership, an assumption which was not intended.

62. Investment Law, supra note 23.
recognizing the likelihood of a continued progression to increasing host nation ownership and management participation in the means of production and distribution in Mexico and the Third World in general.

VI. THE FUTURE OF JOINT VENTURES IN MEXICO

The future of the joint venture in Mexico does not appear in much doubt. The Mexican joint venture\(^63\) is not a recently adopted institution for foreign investment, as one might view the joint venture in Eastern Europe,\(^64\) or the various methods which Peru\(^65\) has attempted in the last decade to determine which pattern of ownership of the means of production and distribution best suits its desired development goals. Assuming that the joint venture is of a long-term nature and a principal part of the structure of Mexican development, it is useful to consider what alterations might be expected in the nature and use of the joint venture in Mexico in the forthcoming decades. The alternatives appear quite numerous.

A. Future Alterations in the Nature and Use of the Joint Venture in Mexico

While the process of Mexicanization has succeeded to a greater degree than in other large developing Third World nations in Latin America, many corporations in Mexico remain wholly or majority foreign-owned. The studies identified only a few of these corporations and illustrate that the leverage of companies continuing to dominate their Mexican subsidiaries varies substantially.

One direction which the Mexican Government may take is to continue to place pressure on corporations with the least amount of leverage, progressing toward what it ultimately may conceive as near total Mexicanization of all foreign firms. This must be viewed as a very long-term goal; a number of the firms in Mexico which are currently wholly or majority foreign-owned possess sufficient leverage to discourage the Mexican Government from gambling on the loss of needed technology and investment. Additionally, the pace of Mexicanization is slowed by the absence of adequate capital to proceed more rapidly.

While it is clear that the Mexican Government could assume controlling ownership of all foreign investments, this creates a number of difficulties. The Government is one of the most likely sources of large amounts of capital, but it

\(^{63}\) *Id.*

\(^{64}\) *See note 18 supra.*

needs this capital for other projects, such as the continued development of the infrastructure and the growth of those sectors of Mexican industry which under the 1973 Investment Law are already limited to State ownership. It appears, therefore, that the Government may have had second thoughts about continuing to participate in a number of the investments in which it has assumed controlling ownership in the past decade. Increasingly, the Government appears to be adopting the position that it cannot afford to subsidize losing businesses, although it has received substantial reaction from various groups when it has suggested that it might sell some of these enterprises. Rather than disposing of these unsuccessful enterprises by sale, it is more likely that it will allow them simply to terminate naturally by withdrawing subsidization. A further limiting factor for Government participation in some spheres of industry is the reluctance of some foreign enterprises to submit to a minority ownership status where the majority is held by the Government.

The reasons usually expressed by foreign investors are that government-owned industries have, and perhaps should have, a different goal than foreign, privately owned industry. These goals are viewed as inconsistent with the goals of the foreign investors. It appears predictable that a wholly or majority foreign-owned investment would be more likely to withdraw from Mexico if the investor had to assume minority participation with the Government as the majority partner than if the association was to be with private Mexican investors. The discussion with company officials supported the view that, in most cases, the Mexican market is not so important as to justify accepting a minority participation if the majority is to be entirely owned by the Mexican Government. The exception may be the extractive, export oriented industries.

66. The areas reserved for the State are petroleum and other hydrocarbons, basic petrochemicals, exploitation of radioactive minerals and the generation of nuclear power, mining in cases to which the relative law refers, electricity, railroads, telegraphic and wireless communications, and other activities established in specific laws. Investment Law, supra note 23, art. 4; see also Contemporary Mexican Approach, supra note 53.

67. In general, the disadvantages of local equity participation for the multinational may be classified into four principal categories:

1. Problems originating from the suboptimization of profit allocation which occurs when a foreign subsidiary, of necessity, is treated as an autonomous decision-making unit;
2. Problems arising from the need to protect proprietary knowledge or abilities;
3. Problems arising from the difference between the costs of capital in the MNE parent country and that in the local subsidiary's market; and
4. The capacity of the capital markets to absorb stock issues of the size necessary to provide a meaningful local participation in the subsidiaries of large MNE's.

Ness, Brazil: Local Equity Participation in Multinational Enterprises, 6 LAW & POLY INT'L BUS. 1017, 1020 (1974) (citations omitted).

68. See note 66 supra.
B. The 1973 Legislation

The 1973 Investment Law\(^{69}\) is an adequate vehicle for limiting future foreign investment in Mexico to minority foreign participation. That law could be amended so as to apply retroactively and constitute nationalizing legislation. It thus could assume the overtones of Decision 24 of the Andean Common Market,\(^{70}\) which requires foreign investment to fade-out over a stipulated time period. It is doubtful that the Mexican Government will adopt such legislation for several reasons. Decision 24 has not been immensely successful,\(^{71}\) although one must realize that its implementation has been impeded by the conflicting and changing interests of several of the participating nations, notably Chile. Chile withdrew from the Market for reasons closely identified with the restrictiveness of the foreign investment limitations of the Andean group, particularly Decision 24. A more practical reason for Mexico to avoid broad nationalization legislation is the preferred and less disruptive and antagonistic practice of selecting target companies or industries for administrative pressure or special legislation. This should not be construed as an implementation of the 1973 Investment Law retroactively,\(^{72}\) but as an attempt by persuasion to require an alteration in the composition of ownership of certain companies or industries. It might assume the form of the mining laws, where additional tax incentives have made a minority foreign ownership share more attractive financially than continued majority foreign ownership. Such tax legislation is a positive approach to Mexicanization pressures, in contrast to the withholding of needed imports, a device which may be equally successful, but which does not help either Mexican development or relations with current and potential foreign investors.

Of concern to corporations operating in the joint venture form,\(^{73}\) or being

\(^{69}\) Investment Law, supra note 23.
\(^{70}\) See note 3 supra.
\(^{71}\) Oliver, supra note 39.
\(^{72}\) There are provisions for the retroactive application of the Transfer of Technology Law. See note 3 supra.
\(^{73}\) One source of concern has been the emergence of social property concepts. In the last half decade, there has been some indication that Latin American nations are considering the appropriateness of workers' social property concepts, such as contained in the Yugoslav law. See Peselj, Socialist Law and the New Yugoslav Constitution, 51 GEO. L.J. 651 (1953); Van Doren, Ownership of Yugoslav Social Property and United States Industrial Property — A Comparison, 26 RUTGERS L. REV. 73 (1972). The most extensive social property legislation was adopted by Peru in 1974, but this law was limited in scope and has not been successful. See note 65 supra. Jamaica and several Latin American nations have discussed the adoption of workers' social property concepts. Mexico adopted a very limited social solidarity law in 1976, which was the first introduction of workers' social property concepts in the Mexican economy. Ley de Sociedades de Solidaridad Social, May 26, 1976, D.O., May 27, 1976.

If workers' social property concepts are successful in whatever limited spheres they are initially adopted in Mexico, a new form of pressure will face not only joint ventures, but all private investment. Those companies remaining totally or majority foreign-owned would appear to have
pressured to operate in that form, is the increasing matrix of legislation governing foreign investment. Although not limited to companies participating in joint ventures, any legislation viewed as restrictive by foreign investors will affect a company's willingness to accept a minority joint venture position. For the most part, restrictive legislation will be viewed unfavorably, and may lead companies to consider a Mexican investment as undesirable if it must accept a minority position. Contrastingly, it may view a minority equity position in the joint venture as acceptable, if it is able to associate with local private investors, either in groups or through a stock exchange distribution.

C. Factors Affecting Joint Ventures in Mexico

There are several factors which will affect the future role of the joint venture in Mexico. One might suggest that the population problem and the lack of distributable land to comply with notions of land reform evolving from the Revolution may lead to extreme social upheaval, and even a new revolution, which would totally restructure the Mexican economy. More optimistic viewpoints, however, suggest that Mexico will continue to be successful in forestalling such disruptive extremes. Assuming Mexico's ability to avoid leverage not only to preclude Mexicanization, but also any alteration of their enterprises which would include accepting concepts of workers' social property. Those concepts would be adopted through legislation which required new businesses to be owned by workers in a manner similar to the view prevailing in Yugoslavia. This would not appear to be a successful approach for Mexico, however, since it would constitute a far more drastic alteration for new businesses, in contrast to the alterations of ownership and control regulated by the 1973 Investment Law.

Where joint ventures are required for new investment, prospective foreign investors have complained that accepting minority ownership would place them at a disadvantage in contrast to existing companies which may remain totally foreign-owned. The argument is that a joint venture is less efficient and can not compete with a wholly foreign-owned company. That same argument would appear to apply, much more forcefully, were new companies to be owned and governed by workers, while existing companies could continue in the traditional form of management control by the foreign owners. If social property concepts are to be adopted, it thus would appear to require a much more encompassing law which would be retroactive in application. It is quite predictable that there would be a period of extreme economic disruption during such conversion process. It may be doubtful whether concepts of workers' social property can be successfully adopted in a short period of time without such drastic economic and political upheaval as occurred in Cuba and Eastern Europe. If success is possible, it would appear to require a very slow conversion. Workers in industrialized nations are participating increasingly in both management and ownership of corporations, a process which will undoubtedly continue. Worker participation in management is likely to be accepted in the United States much later than in other industrialized nations, principally because of the lack of a federal corporation law. The increasing presence of worker participation in management in the industrialized nations of Western Europe, however, illustrates that workers' social property concepts might be implemented in a capitalist nation without chaotic upheaval, as long as it is introduced slowly and rationally. United States companies operating in Western Europe have adapted to worker participation in management and therefore should be prepared to confront the issue when it reaches the United States. For a discussion of labor participation in management through the collective bargaining process in the U.S., see Comment, Regulation of the Labor Relations of Multinational Enterprises: A Comparative Analysis and a Proposal for NLRA Reform, 2 B.C. INT'L & COMP. L. REV. 371 (1979).
revolutionary changes, either through means used in the past few decades or through its ability to improve the quality of life through effective use of the proceeds from its increasingly large reserve of petroleum, periodic structural alterations in Mexican economic institutions are likely to continue. The structure of permitted foreign investment predictably will be subject to increasing and constantly changing pressures. What role the vast reserves of petroleum will play is difficult to assume, but it appears that petroleum will provide the base for some of the same kind of leverage in dealing with foreign investors which foreign investors have utilized in the past in dealing with the Mexican Government.

The joint venture is going to remain an important institution in Mexico in the near future. However, the involuntary and transitory nature of the joint venture may change, at least in part because of Mexico's increasingly important role in the international economic sphere.

D. Future of the Joint Venture in Central America

Similar studies of several joint ventures in the Central American nations and Panama illustrate, at least at this early stage of research, that joint ventures in those nations tend to be more voluntary, as well as less transitory, than joint ventures in Mexico. None of the Central American nations have enacted foreign investment legislation at all comparable to either the Mexican 1973 Investment Law or Decision 24 of the Andean Common Market. This should not be surprising; none of these nations has sufficient leverage to extract from foreign investment the concessions obtained by such larger nations as Mexico and several of the members of the Andean group. It is doubtful that the small and dependent nations of Central America will in the foreseeable future possess the leverage to extract from foreign investors joint ventures in broad classes of industries. Foreign investment incentive legislation in these nations has been directed to encouraging foreign investment. Since individually these nations have small markets, and since there has been little cohesiveness to the Central American Common Market, foreign enterprises in most instances are able to dictate their own terms for foreign investment. Joint ventures nevertheless exist in two important spheres: The first is for large extractive export oriented investments and the second is for franchise

74. See note 2 supra.
75. Investment Law, supra note 23.
76. Decision 24, supra note 37.
77. Two laws in Central America mandating joint ventures are the forestry and distributorship laws of Honduras. Decree Law 103, Jan. 10, 1974 (forestry); Decree Law 549 (distributorship). See generally Gordon, Developed, Developing and Dependent Nations: Central American Development in a New Economic Realignment, 10 REV. JUR. U.I.A. 235 (1976). The forestry law has had comparatively little impact on the forestry industry; joint ventures in Honduras at this date have not been analyzed by this writer.
operations. Three major extractive investments have been subjects of recent research.78

The EXMIBAL nickel investment in Guatemala initially was to be wholly owned by Inco Limited (International Nickel), but negotiations with the Government, a nearly 20 year process, ultimately resulted in a joint venture arrangement. The local participation, which will be principally nationally owned, will be limited to approximately thirty percent. A second major extractive enterprise in Guatemala is the Shenandoah oil project. This is not a joint venture with local participation, but is a joint venture between two developed nation enterprises. Shenandoah Oil Corporation owns 37.5 percent, with Basic Resources International, S.A., a Luxembourg company, owning the balance.79 The Guatemalan petroleum law does not require equity joint ventures, but it does specify that the nation must receive fifty-five percent of the enterprise's revenues, and controls the minimum amount of investment, number of wells to be drilled and the method of exploring each licensed area.80

An oil pipeline is planned from the area of the Shenandoah project to a Caribbean port. The pipeline may be a joint venture with Guatemalan participation. Early announcements suggested that the Shenandoah consortium would construct the pipeline, with Guatemala possessing acquisition rights to fifty-one percent of the equity.

At the time of the formation of the Shenandoah project, the prospect for oil in Guatemala was not particularly encouraging and the Government was not in the position to extract equity participation from the venture. A number of exploration projects have been abandoned after unsuccessful searches. The Guatemalan Government currently is negotiating for additional oil exploration. Foreign petroleum enterprises have shown substantial interest, attributable partly to the comparatively recent oil discoveries in states in Mexico adjacent to the Guatemalan border. The discovery of large commercial quantities of oil in Guatemala may grant that nation the leverage to extract joint ventures from current or future foreign investors. It also may have an important impact on the future role of Guatemala in Central America. The possession of significant petroleum resources will make Guatemala less dependent upon other Central American nations for economic development and may have an impact on the future of that market.

The third major extractive project in Central America is in Panama and is yet to become operational. It is the Cerro Colorado copper mining project

78. See note 2 supra.
79. Shenandoah subsequently agreed to transfer one-third of its equity, 12.5 percent, to BEA Petroleum Ltd., 79 percent owned by Basic Resources.
which originally was to be a joint venture between the Panamanian Government and Canadian Javelin Ltd. Javelin withdrew as a participant, and Texasgulf agreed to assume a minority equity (twenty percent) role, with the Panamanian Government owning the majority (eighty percent).

E. Large Extractive Joint Ventures in Central America

Tend to be Transitory and Involuntary

Joint ventures in Central American nations in the extractive, export oriented industries are involuntary institutions. The foreign enterprises have not sought joint ventures with local governments, but have agreed to such arrangements as a precondition to the investment. Texasgulf voluntarily accepted its twenty percent interest in the Cerro Colorado copper project, but as a condition of the Panamanian Government. The EXMIBAL joint venture was less voluntary. It was agreed to by International Nickel after it expected to commence operations as the sole equity owner of the project.

These joint ventures are also transitory. The Texasgulf agreement is for twenty years, at the end of which time Panama has the option of continuing the project as a joint venture or buying out the Texasgulf twenty percent equity. The Guatemala petroleum code limits contracts to twenty years. The EXMIBAL project was first licensed for forty years with a twenty year extension, terms later codified in a 1965 mining law. Whether the contracts survive their terms depends substantially upon both political stability and a continued Government satisfaction with its share of the benefits. Since the Central American nations have less leverage in negotiating with foreign investors than the larger developing nations, and because the prospects for rapid economic development appear comparatively poor, it is unlikely that changing development levels in these nations will increase national leverage and cause the ventures to be "renegotiated" before their contracted expiration dates.

The experience of extractive industries in many parts of the world illustrates they are one of the most probable spheres for pressures for nationalization.\(^8^1\) The joint venture may soften or slow the blow of nationalization, but it also has importance beyond the sphere of extractive industries. This is illustrated by the experience of foreign investment in Mexico. There is no comparable experience in Central America with the use of the joint venture and it is unlikely that there will be unless increasing leverage is acquired by the Central American nations as an economic unit. This might occur through the effective restoration of the Central American Common Market.\(^8^2\)

The Market has lain dormant for a decade. Occasional gasps of life are emitted from the secretariat SIECA\(^8^3\) in Guatemala, but there is little prospect

\(^8^1\) See Contemporary Mexican Approach, supra note 53.
\(^8^2\) See generally ECONOMIC INTEGRATION IN CENTRAL AMERICA (W. Cline & E. Delgado eds. 1978) [hereinafter cited as CENTRAL AMERICA].
for the restoration of the Market in the immediate future. If the Market can be restored, it will be as a result of a much more benign treaty than that proposed by the Central American Ministers of Economics and Finance in 1965. The Ministers agreed in their Declaration of San Lucas that a restored market agreement should include joint venture mandates for foreign investments. The recommendations were never implemented. A new draft treaty, subsequently proposed in 1976, also included joint ventures as favored arrangements. Close observers of the Central American Common Market tend to view the 1976 draft as exceptionally impracticable. A restored Market is likely to occur with a more modest agreement which will not introduce restrictive concepts regulating foreign investment, requiring rather than merely encouraging joint ventures.

Thus, the joint venture prognosis for Central America tends to be limited to large investments in which the government plays an active part in the initial negotiations. Wholly foreign-owned status, currently the case in the vast majority of foreign investments in Central America, will continue to be the format for general manufacturing activities.

F. Summary

The studies suggest that the degree to which joint ventures are transitory and involuntary institutions is dependent principally upon the ability of a developing nation to utilize one or more of several forms of leverage to extract local equity participation from prospective or current foreign investment. The joint venture has been more successful in those developing nations with stable governments where joint ventures may be obligatory, and consequently usually involuntary, but where the stability of the government offers some predictability to the prospective duration of the joint venture arrangement. When a foreign investor decides to invest, durational predictability is an important factor. It appears even more so for the joint venture where the foreign investor clearly assumes the additional obligations of an undertaking with potential partnership disagreements, the form many joint ventures possess. Unstable governments make the durational aspect less predictable. It thus would appear that a nation such as Argentina, which has pursued successively contrasting

84. CENTRAL AMERICA, supra note 82.
87. This should not suggest a diminished use of occasional voluntary joint ventures for manufacturing activities, when benefits exist to such a form of joint venture. Professor Freidmann has described the motivations for voluntary joint ventures. FREIDMANN & KALMANOFF supra note 5, at 125.
policies of nationalization, followed by denationalization, followed by nationalization, and, more recently, a modified denationalization, will cause significant investor concern. It may lead investors to conclude that the additional efforts to devise an expectantly long term joint venture may be nullified if government instability occurs.

VII. Conclusion

The joint venture experience in Mexico is viewed very positively by the vast majority of Mexican Government personnel and local business entrepreneurs. This success in Mexico should not be interpreted to mean that the joint venture might be a prototype for all developing nations. It has functioned well in Mexico because of unique conditions in that nation, e.g., government stability and the slow, decades-long development of the joint venture as an investment institution. It undoubtedly will continue to be the principal form for Mexican foreign investment and increasingly will be observed by other developing nations. Research involving the joint venture will make available information to permit its adoption where success is most predictable. While it is a highly developed institution in Mexico, it has yet to be utilized effectively in many other of the larger developing nations. It is unlikely to be a significant form of investment in the smaller, dependent Third World nations, except for some of the more visible industries, principally those involved in extractive, export oriented endeavors.