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OIL OPERATIONS IN LATIN AMERICA: THE FUTURE OF PRIVATE ENTERPRISE

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I. INTRODUCTION

We live in tumultuous times. Whether measured on a scale of millenia, of centuries, or of generations, our lifetime's segment of the graph of world history is marking giddy ascents, harrowing declines, and abrupt, unbridgeable discontinuities.

On a millenial scale we are entering the twilight of those five astounding centuries of Western leadership that began with the Renaissance. The flags of empire, long banished from the Americas, have now been struck in Asia and Africa as well, and flutter quaintly over only a dwindling handful of enclaves and outposts. Islam has awakened from her sleep of seven hundred years and moves impetuously toward a bold new destiny. In the East two great new nations, each born in explicit repudiation of the Christian, capitalistic, parliamentary West, are shouldering out the sky.

The pattern is repeated in a chart of history plotted on a scale of centuries. Economic power is hemorrhaging from the nations which consume energy to those that produce it. Hegemony is shifting among the industrialized consumer states themselves, and they are hard put to construct a monetary mechanism that can accommodate such changes as the decline of the United States, the resurgence of Japan, and the eclipse of Britain. Meanwhile the Marxist superpowers, winning their battles by proxy and their wars by default, lord their strength for the anticipated darkness of the West. And in every country—Marxist or capitalist, agricultural or industrial—the orderly fabric of Nineteenth Century life is fraying under the abrasions of rising population, urban concentration, and the insatiable economic expectations of the proletariat.

On a scale of generations the graph is no less jagged. A world epidemic of inexpensive mass communication has made fathers alien to their sons, accelerating exponentially the revolution of values implicit in the millenial and centennial transformations through which we move. The young adult of today walks the streets of his city—be it London, Tokyo, Houston, Lagos, or Cairo—

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impervious to the civilization that built it, as insensitive to his culture as was Mersault of *The Stranger*, going remorselessly to the guillotine in Algiers. If that young adult is a woman her sense of alienation, nagged by the subtle paranois of the feminist movement, is even more pronounced.

Islam, Marxism, alienation, the decline of the West: What have these to do with oil operations in Latin America? Only everything. The salient fact of the 1970's is change. For international business, change means that private foreign investment is no longer universally welcomed. The snug little Victorian world of 1815-1914 is dead; its expansive Yankee afterglow of 1918-1965 is dying. Especially in oil and particularly in Latin America the trend is to circumscribe foreign equity participation narrowly or to prohibit it altogether.

The purpose of this paper is to consider foreign private investment in Latin American oil in terms of its past contributions, its present posture, two myths that obscure it from our view, and a scenario for its possible future survival.

II. Past Contributions of Private Investment

The historic contributions of foreign enterprise to Latin American oil are undeniable and profound: markets, technology, capital, and skilled personnel.

North America and Europe could offer the markets because they had most of the world's urban centers of high fuel consumption. They—and especially the United States—could provide the technology because the basic tools of hydrocarbon exploration and production were devised in their machine shops and proven in their oilfields. Europeans and North Americans had no monopoly on capital, admittedly, but theirs was capital with a flair. Private money in Latin America was adolescent: wary of any investment more innovative than land, cattle, or a stock of goods; fearful of growing bigger than family size; and relatively inexperienced in such money-mobilization devices as public offerings and stock exchanges. But to the astute money-manipulators of Europe and North America, capital was a commodity itself—a commodity to be seeded, harvested, and sold like any other cash crop. Latin Americans had capital aplenty to finance a petroleum industry but they preferred to keep it on the hacienda and under the mattress. Consequently their oil was discovered and developed, in the main, with foreign dollars.

The entreprenurial skills of the foreign investor reflected his more highly developed capitalism. Business management in Latin

America was patriarchal: a *patron* overseeing fifth-generation plantation serfs, an elder son minding the family store, a talented nephew running the ancestral bank. In the United States management was impersonal: an ambitious immigrant bossing newer hordes of independent wage-earners; a colleqe-trained professional borrowing and deploying the savings of strangers. The foreign executive's higher level of managerial ability was to be expected, given his more sophisticated business background. What was unexpected was the superior manual skill of his blue-collar compatriots. With the Manhattan promoter and the Philadelphia bookkeeper came the Texas driller and the South Louisiana toolpusher. One would have predicted that they would soon be supplanted by cheaper local labor. But they persisted for decades, colorful figures on the landscapes of Tampico and Maracaibo and a striking reminder of the sturdy work ethic and geographical adaptability of laboring men from north of the Rio Grande.

It seems clear that Latin American oil could not have been developed, to its present magnitude and within its historic timeframe, with only the resources that Latin American private enterprise was able and willing to offer. It appears equally certain that Latin American state enterprise would not have been adequate to the task. The discovery of oil requires the spending of enormous sums on projects of considerable geological and mechanical risk. The development of an oil discovery demands the investment of even larger sums in high-visibility projects of more certain but deferred realization. Both involve, to a far greater degree than most industrial efforts, the close coordination of administrative, financial, professional and technical expertise as well as the delegation of authority to make momentous decisions quickly. None of these is a function to which bureaucrats are notoriously predisposed or in which they have been conspicuously successful. They are tasks which private companies—even large ones—perform with notable skill and ease. The conclusion is inescapable that if Latin American oil development had depended on the indigenous resources, private or public, of Latin America most of that oil would still be slumbering in the sediments to this day.

III. THE PRESENT POSTURE OF PRIVATE ENTERPRISE

A country-by-country tabulation[1] of Latin American oil laws and

1. See the table, *Latin America: A Petroleum Profile*, which follows this article. As used in this article "Latin America" has the meaning given in note 1 of the table.

oil statistics reveals an interesting correlation. By and large, a country affords scope to private enterprise in inverse proportion to that country's level of oil production. Viewed in these terms, the nations of Latin America fall into three groups. The fifteen countries which have little or no production provide the greatest access to foreign investment. Each of them admits private enterprise under a regime of permits, licenses, leases, concessions, or service contracts; only Uruguay, in principle, limits oil operations to the monopoly of a state entity, but that entity has in turn granted a production sharing contract to a foreign company. The five countries which produce oil but do not produce it in sufficient quantities for export occupy a middle ground. Only Cuba completely excludes private companies. The rest (led historically by Peru and Argentina, and recently joined by Brazil and Chile) admit foreign investors (under regimes, typically, of service contracts rather than concessions), but reserve certain geographical zones or economic functions to the monopoly of state entities. The six oil exporting countries constitute the third group. They occupy a mixed spectrum which ranges from unqualified state monopoly in Venezuela and Mexico to a competitive blend of private enterprise and state entities in Colombia, Bolivia, and Ecuador and, in Trinidad and Tobago, to the even more pragmatic role of the state as licensor, shareholder, and co-venturer.[2]

If such a correlation points out a moral it is a rather cynical one. Foreign enterprise, it seems, is welcome to undertake the expensive and risky task of wildcat exploration; its continued presence is tolerated for the chore of extending and developing known production; but more often than not it is eliminated or heavily restricted when a substantial production position is achieved. In a typical Latin American oil producing country the role of foreign investment has thus passed through three distinct phases. During the first phase the investor initiated exploration operations and established commercial production on the legal basis of a concession agreement negotiated with the host government. In the second phase he conducted development drilling and achieved a substantial level of production, but was subjected to increasingly onerous and invidious requirements imposed by the host government outside the terms of the concession agreement. The income tax rate

2. For historical legal sketches of the Latin American oil producing countries and an analysis of the distinguishing characteristics of "leases", "concessions", and "service contracts" see Murphy, *Oil Operations in Latin America: The Scope for Private Enterprise*, 2 INT'L LAW. 455 (1968).

was increased for oil companies only, for example, or the government established exchange rates which discriminated against the foreign currency proceeds of petroleum exports ("oil dollars"). In the third phase the host government made demands upon the investor that were inconsistent with his legal position under the concession agreement; there ensued a crisis of confrontation; the result was the expropriation of the investment or the coerced renegotiation of the concession agreement. During the second or third phase the host government formed a state oil entity with monopolistic or supercompetitive powers. If the investment was expropriated the state entity succeeded to the expropriated assets.

There are variations on the pattern, of course. Colombia imposed discriminatory exchange rates but never indulged in across-the-board expropriation. The *cause celebre* of confrontation and expropriation in Peru was confined to a single concessionaire. In Argentina oil was discovered and initially developed by the state, so the dialectic of development/cancellation/renegotiation was postponed to a later stage of private oil investment under the Frondizi regime of service contracts with the state entity. Brazil and Chile are presently trending away from a strict state monopoly system toward a mixed system of state entities and service contracts. But this cluster of exceptions does not disprove the rule. The undisputed bellwethers among Latin American oil producers are Mexico and Venezuela. In both Mexico and Venezuela private foreign enterprise discovered the oil and developed the nation's industry to the first place among Latin American oil exporters; in both Mexico and Venezuela private concessions were expropriated and assigned to a state monopoly.

It is true that the Mexican and Venezuelan expropriations were different. Cardenas expropriated foreign-owned Mexican oil interests in an abrupt, acrimonious taking, bitterly resisted by the concessionaires. The jury of world opinion is still out on the Venezuelan expropriation. It was more foreseen and sophisticated than the Mexican taking, and so far the expropriated companies have not challenged it in the Venezuelan courts or elsewhere. But the compensation, on its face, seems a pittance: only $1.03 billion, more than half of it tied up in a Special Guarantee Fund, for assets worth $5 billion at acquisition cost, perhaps $10 billion at replacement cost, and even more at going concern value.[3] It remains to

3. See *Business Latin America*, Nov. 5, 1975, at 353; The Houston Post, Jan. 2, 1976, at 13A; Petroleum Intelligence Weekly, Oct. 20, 1975.

be seen how much the companies actually will recover after claims are settled and the offtake contracts and technical assistance agreements are performed. But regardless of their differences these two expropriations stand together as a milepost in the history of the Americas. For Latin American oil exporting countries they shaped the historic model to which governments will be irresistibly drawn when they covet the goose that laid the golden egg; they fixed the canon from which ambitious politicians will depart at their peril.

This is not to say that expropriation is "right" or "wrong." Such a judgment is factually difficult because each expropriation is surrounded by a unique and impenetrable thicket of rhetoric, innuendo, invective, and gossip that defies objective analysis. It is morally difficult because the conclusion depends chiefly upon the political theology of the viewer.

Take Mr. A, for example. He is a conservative, middle-aged Houston corporation lawyer who wears Brooks Brothers suits and drives a Cadillac Seville. His wife inherited half of the Permian Basin. He believes in Manifest Destiny (for Anglo-Saxons) and the sanctity of contract. Over the Georgian fireplace of his stately River Oaks mansion is a rendering in oil of Colonel Roosevelt's charge up San Juan Hill. You will not be surprised to learn that Mr. A considers Latin American oil expropriation to be "wrong." Dr. B, on the other hand, is a wild-eyed young Mexican economics professor on perpetual sabbatical at Berkeley. He wears jeans and an Afro, lives in Haight-Asbury, and rides a chopper. His girl friend went east with Eldridge Cleaver. He believes in unfettered national sovereignty (for Latin Americans) and the Calvo Clause. On the wall of his bachelor pad, just above the marijuana terrarium, are posters of Angela Davis and Che Guevara. As you suspected, Dr. B believes that Latin American oil expropriation is "right."

I doubt that Mr. A and Dr. B will ever agree on the morality of any Latin American oil expropriation. Until they do, suffice it to say, of expropriations in general, that (1) they happened; (2) they occasioned some magnificant displays of *machismo* by the expropriators and considerable gnashing of teeth by the expropriated; (3) in the end—given a bit of face-saving on the issues of compensation and renegotiation—the investors and their governments usually acquiesced, at least to the point of not sending in John Wayne and the First Marine Division; and (4) afterwards the Hemisphere was never quite the same.

IV. THE CREST AND EBB OF FOREIGN INVESTMENT IN LATIN AMERICA

How can we reconcile the grand beginnings of foreign investment in Latin American oil with its tenuous present and problematical future? If the contributions of private enterprise were so valuable, why were they so universally underprized, so frequently rejected?

The devil theory of history supplies two convenient answers. To the resentful victim of expropriation it sneers that Latin Americans are not to be trusted; that they will renege on their most solemn commitments when to renege flatters their egos or lines their pockets; that their word is written on water. To the indignant Latin American nationalist it whispers that oil concessions are overreaching, leonine bargains extorted by corrupt *malinchista* politicians in conspiracy with imperialist *gringo* capitalists; that when the Latin American peoples awake to find themselves fettered in such chains of paper it is only right and natural that they should break free.

The thoughtful observer will look behind both those simplistic assertions and ponder the dynamics of actual events. The answers which emerge are that foreign enterprise in Latin American oil was self-wounded by the inherent ambivalence of its own contributions and that, wounded or not, its power rose and fell in almost inevitable synchronism with the crest and ebb of foreign capital in Latin America generally.

It is a paradoxical truth that each of the foreign contributions to Latin American oil development—markets, technology, capital and personnel—was an equivocal gift of both affirmative and negative aspect. Stable export markets, for example, were a paradigm of classical economics. They earned foreign exchange, which hardened local currency and brought the wherewithal to import manufactured goods. But on the negative side massive oil exports incited dark suspicions of where all that crude was going, and at what price. Latin Americans wondered whether the oil companies were shipping their profits (and consequently their tax and royalty base) downstream from local fields of production to overseas refineries and filling stations. Such doubts were appeased with "oil dollar" exchange rates, "deemed" oil revenues at fictitious per-barrel prices, and uneconomic local refining obligations. But was it prudent, after all, for any country to become dependent on the export of a single natural resource? Would such a country not stagnate among the hewers of wood and drawers of water, forever foregoing industrial diversity and manufacturing self-sufficiency? Was not the very oil-induced hardness of the local currency a disincentive to full employment? So argued the autarkists, and they often carried the day.

Foreign technology, for the same reasons, came to be regarded as a Janus-faced contribution. Why should Latin America remain a captive export province for foreign-made bits, tools, derricks, and pipe, however, well-made and cheap? And so laws were passed to protect local manufacturers with import prohibitions, high tariffs, and purchasing guidelines for state entities. When those laws began to take effect and oil field equipment (often inferior in quality and more expensive than its imported counterpart) came to be fabricated locally under license from abroad, the cry went up that the license fees were too high, that Latin America was paying an exhorbitant price for the "transfer of technology." The legislative remedies were stiff tax withholding rates (as in Venezuela) and exchange controls (as in Brazil) on royalties paid abroad, and ponderous systems (as in Mexico and the Andean Pact countries) of prior approvals, mandatory terms, and limited royalty percentages for transnational licenses.

Foreign capital, because of its sheer competitiveness, was its own worst enemy. In the imagination of international trustbusters Latin American concession negotiation was the monopolistic preserve of the Seven Sisters; in point of fact it was a hotbed of beggar-thy-neighbor jockeying among an elbowing throng of competing bidders. Lurking in the wings there was always some mini-major to raise the royalty, some independent who would bid up the signature bonus, or some new drilling fund eager to negotiate a service contract over the cadaver of another investor's expropriated concession. In the excitement of contract-letting both sides tended to lose touch with reality. Too many governments awarded concessions to the "highest" bidder without regard to whether he was economically and technically competent to perform. Too many oil companies signed concession agreements and spudded wells with an eye on the market possibilities of a hot securities issue rather than the scientific parameters of cold geophysical data.

Foreign personnel, the fourth contribution of private enterprise, was an obvious Achilles' heel. If "single men in barricks don't grow into plaster saints," neither do single men in geophysical crews or expatriate families in oil company compounds. The presence of these large unassimilated lumps of monolingual foreigners living (by local standards) in opulent circumstances on princely salaries was a constant irritant to the local population. It mattered not that the foreigners were technologically worth their salt. The collision of cultures and differential in living standards created resentments which gave impetus to local hiring quotas in labor laws and concession terms and, ultimately, engendered a not insignificant part of the pressure for expropriation.

But even if the contributions of foreign enterprise had not been ambivalent it is doubtful that the broad outline of Latin American oil history would have been different. If the basic credo of the Hemisphere in the Nineteenth Century was political independence, in the Twentieth it was economic nationalism. In a wide variety of countries and under a broad range of political regimes the last four decades have been characterized by the nationalization, coerced or voluntary, of foreign investment in railroads, airlines, telephone systems, electric utilities, mines, and other basic industries whose foreign ownership was considered inimical to local economic sovereignty. The fate of oil was not unusual. In fact, to the extent that foreign investment is still encouraged by the non-producing countries and tolerated by the producers, it is an exceptional admission that, in oil, Latin America still needs the risk capital and know-how of private foreign enterprise.

V. The Mythology of Private Enterprise in Latin America

Two current myths obscure our view of private enterprise in Latin American oil. The first is the Myth of the Multinationals, which beguiles North Americans and Latin Americans alike. This is the belief that the world is being preyed upon by giant monsters called "multinational corporations," which breed in the capitalistic reaches of the Northern Hemisphere and sally south to savage the smaller, nobler creatures of the forest. The monsters, in fact, are imaginary. The truth of the matter is that "multinational corporations," as a distinct and predatory form of economic activity, are as non-existent as the witches of Salem or the giants within Don Quixote's windmills. The non-existence of monsters, unfortunately, does not insure their harmlessness. Because of the imaginary witches real human beings were tortured and killed; a "giant" unhorsed the Knight of the Sorrowful Countenance; and fear of the "multinationals" has thrown international business into turmoil. In each case the harm emanated not from the malevolence of the "monster" but from the imagination of the observer. The "monsters"—New England housewives, the windmills of Montiel, large business enterprises—merely received the obsessive projections of the observer's fevered mind.

The evils charged to the "multinationals" are that they are big and they are bad. Measured on any scale of contemporary relevance each of these assertions is false. It is true that IBM makes a lot of computers. General Motors sells a lot of cars. In the food business Chiquita Banana is rather more *grandote* than *chiquita*. But each of these enterprises is restricted by antitrust legislation of a pervasiveness and rigor that is inconceivable outside this country. The progressive enactment and judicial interpretation of that legislation over the last nine decades has diminished the relative size of most major U.S. enterprises vis-a-vis the domestic markets which they serve. Nor is their relative international impact increasing. Enforced domestic competition, protectionist foreign legislation and the emergence of alternative suppliers in Europe and Japan have all reduced the degree of U.S. single-company dominance over most product lines abroad.

What *has* grown is mass communication. Sixty years ago United Fruit and Standard Oil could exercise infinitely more influence in a given Latin American country than their successors can today. Because of newspapers, television, motion pictures, and the transistor radio, however, their successors are infinitely more vulnerable to the demagogic manipulation of national inferiority complexes. Thanks to the media, a government clerk in Mexico City, a factory worker in São Paulo, or a tin miner in Oruro perceives the greedy North Americans as being not "there" but "here," and he is easily persuaded that their "here-ness" is a threat to his home and nation.

The Myth of the Multinationals is nowhere more fallacious than in Latin American oil. If there is an Hemispheric trend toward bigness in petroleum enterprise it is south, not north, of the Rio Grande. Fattened by expropriation and conglomerating state socialism, the Latin American state oil entities are among the very biggest of big business in all the major producing countries. Pemex is the biggest industry of Mexico, operating at an annual rate of more than $3 billion in expenditures and nearly that amount in operating revenues, subsidies, and borrowings.[4] The 1976 nationalization placed Petroven astride the largest enterprise in Venezuela, a behemoth with 5.4 million acres of concession lands, more than 12,000 producing wells, refining capacity of 1.5 million barrels per day, and petroleum exports which rank—among nations—third in the world and first in the Hemisphere.[5] The extraterritorial influ-

4. Petróleos Mexicanos, Report of the Director General, March 18, 1975, at 5, 24, stating that during the previous year Pemex collected resources of Ps. 36,036,000,000 and disbursed Ps. 38,323,000,000.

5. The Houston Post, Jan. 2, 1976, at 13A; Petroleum Intelligence Weekly, Sept. 5, 1975.

ence of these giant state entities as purchasers of equipment and cartelized suppliers of oil is enormous. If "multinationals" are ravaging the forest it is the Pemexes and Petrovens who lead the pack.

But as state entities grow bigger, foreign private enterprise in Latin America dwindles in size. The Andean Pact regulations and complementary enactments like the Mexicanization laws have coerced substantial divestitures of existing foreign-held equity and reduced to modest dimensions the size and concentration of new investment. The effect of this legislation is to unite participating nations in a mammoth Hemispheric cartel dedicated to the elimination of competition in the terms under which foreign capital and technology are received. If there is unequal bargaining between investor and host country in the Americas today, the inequality bears against the investor, who on the one hand is subjected to the rivalry of other foreign entrepreneurs and on the other confronts a monolithic collusion of capital-receiving countries.

But "multinationals" are not only big, the myth persists, they are bad. And in the grand tradition of the big lie it is this assertion which, being more false, is proclaimed more shrilly. It is impossible to unfold a newspaper without reading of the supposed immorality of U.S. companies overseas. Just now the specific accusation is that they bribe foreign politicians and conceal the bribes from their stockholders. The evidence cited is the companies' own disclosures to U.S. Senatorial investigators and federal regulatory agencies.

Viewed in the context of legal requirements, business ethics, and competitive practices in the foreign countries where these payments were made, such disclosures in fact illustrate the puritanical standards to which U.S. companies adhere. If foreign politicians were bribed, the evidence indicates they were bribed in countries where the companies accurately perceived that politicians are venal and bribery is a necessary way of life. If the stockholders were not told, it is because the most finely-meshed corporate reporting system on earth, as then articulated, did not require it. In the entire history of industrial capitalism no national enterprise has been subjected to more exacting requirements of public disclosure than corporations whose shares are publicly traded in the United States. If the Latin American oil producing countries ever dared impose on their state oil entities financial reporting requirements half as onerous as those routinely met by the *Fortune* 500, there would be a great ripple of consternation, to put it mildly, all the way from Ciudad Juãrez to Punta Arenas.

The second myth which impedes a rational view of Latin American oil investment is one which only North Americans believe. It is the Myth of the Captive Capitalist—the fable that Latin Americans secretly yearn for the (North) American Way of Life, that inside every pudgy Latin American socialist there is a lithe enterpriser struggling to get out and join the Rotary Club.

This myth is a favorite theme of post-concession-signing small talk, where it serves to while away the moments during the drying of the ink and the broaching of the *aguardiente*. "You fellows would have a nice little country here," the oil executive observes, "if you'd just run it like we do in the States." The dictator smiles winningly, pockets the bonus check, and mumbles something in Spanish. "The General says that's why we need you nice *yanquis* down here," explains the interpreter, "to teach us democracy and free enterprise." They raise their glasses. The flashbulbs pop.

In fact democracy and free enterprise have never cut deeply into the Latin American psyche. The dominant precolombian institutions were the socialism of *ejidos* and Incan granaries and the theocracy of pyramids and *cenotes*. The Conquest merely added an Iberian overlay of mercantilist commerce, regalian mining, and *encomienda* farming—a far cry from the town meetings and squatter freeholds of the North. There were times, it is true, when Latin America seemed genuinely inspired by the political and economic model of the United States. The speeches of Simón Bolívar are studded with exhortations to political freedoms,[6] and we hear echoes of Jefferson and Madison in the constitutions which followed the Wars of Independence. Sarmiento made no secret of his admiration for the Colossus of the North.[7] Benito Juárez believed in democracy, though rather less in foreign capital, while the enthusiasms of Porfirio Díaz were just the reverse. But as the Twentieth Century wore on, the concerns of Latin America became more frankly economic than political. Events in Europe suggested that fascism, and later Marxism, were convenient roads to industrial growth, and Juan Perón could justly conclude that Latin America's task was to choose a third position "somewhere between the materialistic individualism of the United States and the materialistic collectivism of the U.S.S.R."[8]

To judge by its support for Third World initiatives in the United Nations, the position that Latin America chose is much closer to collectivism. The recent pronouncements concerning the nationalization of natural resource investment are particularly striking.

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6. *See, e.g.*, the selections in H. DAVIS, LATIN AMERICAN SOCIAL THOUGHT 15-38 (1961).

7. D. SARMIENTO, USTADOS UNIDOS, *passim* (1945).

8. Quoted in G. PENDLE, A HISTORY OF LATIN AMERICA 231 (1967).

On May 1, 1974 the General Assembly adopted Resolution 3201 (S-VI), the Declaration on the Establishment of a New International Economic Order, Section 4(3) of which asserted that every state has "[f]ull permanent sovereignty over its natural resources" and is "entitled to exercise effective control over them and their exploitation including the right to nationalization or transfer of ownership to its nationals."

On December 12, 1974 the General Assembly adopted Resolution 3281 (XXIX), the Charter of Economic Rights and Duties of States, article 2 of which declared that:

> (1) Every State has and shall freely exercise full permanent sovereignty over all its natural resources.
> (2) Each State has the right
> (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities.
> . . . .
> (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the soveriegn equality of States and in accordance with the principle of free choice of means.[10]

These resolutions provoked a bristling confrontation on the subject of international standards of compensation for expropriation. Resolution 3201 (S-VI) was adopted without vote, but the United States entered reservations on the grounds that the resolution "does not couple the assertion of the right to nationalize with the duty to pay compensation in accordance with international law."[11]

9. XIII INT'L LEGAL MATERIALS 715 (1974) [hereinafter cited as I.L.M.].

10. XIV I.L.M. 251 (1975). Ga. Res. 3281, 29 U.N. GAOR 50, U.N. Doc. A/9946 (1974).

11. XIII I.L.M. 744, 746 (1974). Compare the *Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations*, U.N. Doc. e/5500/Add. 1 (Part I), (1974), which recommended in Section II that "whenever there is occasion to nationalize the assets of a multinational corporation, host countries should ensure that the compensation is fair and adequate and determined according to due process of law of the country concerned, or in accordance with any arbitration arrangements existing between the parties." XIII I.L.M. 800, 827 (1974).

Resolution 3281 (XXIX), championed by Mexico, was adopted by vote of 120 to 6, with 10 abstentions. All 26 Latin American states which participated in the voting joined the 120-vote majority. The United States and 13 other Northern Hemisphere states proposed substitute language to the effect that a state has the right of nationalization "for a public purpose," subject to the payment of "just compensation." This language was rejected by vote of 19 to 87, with 11 abstaining. No Latin American state voted for the amendment or abstained.[12]

Reviewing these resolutions, one experienced observer concluded that "The vaunted power of the multinational enterprise may have been met by sufficient countervailing power, exercised by both home and host nations, that it is the transnational corporation which is now truly at bay."[13] Gabriela Mistral explained it long ago: "What unites us in Spanish America is our beautiful language and our distrust of the United States."[14]

VI. A Scenario for the Survival of Private Enterprise

What is the future of private enterprise in Latin American oil? What role will it play during the remaining quarter of this century?

It seems likely that the general patterns of the present will continue. Most of the non-producing countries will remain initially accessible to private investment. Many of them will form state oil entities, especially after production is established. They will tend to change their investment regimes from concessions to all-risk service contracts with the state entities. The incentive principle of such contracts—that is, whether the contractor is to receive a share of production, profits, crude sales revenues or other economic consequences of oil exploitation—will be influenced by practices in

12. See also U.N. General Assembly Resolution 3486 (XXX), expressing "a determination to strengthen and develop the new international economic order, which is based on the Declaration and the Programme of Action on the Establishment of a New International Economic Order . . . and on the Charter of Economic Rights and Duties of States," which was adopted on December 12, 1975, by a vote of 114 in favor to 3 (including the United States) against, with 11 Northern Hemisphere states abstaining. XV I.L.M. 185 (1976). The United States' position concerning international standards for expropriation compensation was reiterated in Department of State Press Release No. 630, issued on December 30, 1975, the eve of the Venezuelan expropriation. XV I.L.M. 1861 (1976).

13. Rubin, *Reflections Concerning the United Nations Commission on Transnational Corporations*, 70 Am. J. Int'l L. 73, 90 (1976).

14. Quoted in P. Nehemkis, Latin America: Myth and Reality 46 (1966).

other developing countries, both within and without Latin America.

Depending on their need for exploration investment the non-exporting producing countries will vacillate between strict state monopoly systems and limited access to private enterprise, typically through all-risk service contracts. If Pemex can effectively exploit its growing export surplus and Petroven can manage its gargantuan petroleum empire honestly and well, Mexico and Venezuela will become powerful catalysts for expropriation and unqualified state monopoly in all the exporting countries.[15] When expropriation occurs the expropriating state will assert that the issue of compensation must be resolved exclusively in its courts and under its domestic law.

There is a countervailing trend, it is true, in the programs recently proposed in Brazil and Chile. There are precedents and proposals to the same effect in Argentina. Successful service contract programs in these countries would provide some counterpoise to the state monopoly systems of Mexico and Venezuela. But the success of the new programs will depend on many contingencies, including the negotiation of satisfactory contract forms, the stability of military governments, the cooperation of state entities with their new private contractors, and of course the oil-results of the exploration operations themselves.

It is also true that a wholesale change to state monopoly will not mean the end of foreign private enterprise in Latin American oil, if by "foreign private enterprise" we include the service industry and suppliers as well as the oil companies. Although the state entities will favor national companies and locally incorporated joint ventures for the more rudimentary services and supplies, the innovative, cutting edge of oil technology will remain in the United

15. The missionary zeal of Pemex to export expropriation and state monopoly shines in the report of its Director General for the year ending May 18, 1975. The report was delivered in the presence of President Luis Echeverria of Mexico and President Carlos Andres Perez of Venezuela. The Director General thanked President Echeverria for inspiring the Charter of Economic Rights and Duties of Nations, particularly its "tenets applicable to the definition of internal and external petroleum policies, from which, precise goals have uprisen as well as the means of attainment" (at 35). He congratulated President Perez, "who recently took the patriotic decision of repleving [Venezuela's] petroleum wealth" (at 3), and characterized his presence "as an eloquent token of militant solidarity with the problems emanated from petroleum" (at 5). (Quotations from English language text published for Petroleos Mexicanos by Imprenta Nuevo Mundo, S.A., April 2, 1975.)

States, and that technology will continue somehow to find its way to Latin America, albeit at a price that increases yet further the high cost of boasting that "*El petróleo es nuestro.*"

Faced with the deteriorating business environment in the area and mindful of the meager compensation paid for the Venezuelan expropriation, the prudent oil company today will evaluate a new Latin American venture very critically indeed. When, realistically, can the project reach pay-out? Is the military government that granted the contract likely to survive that long? Will the successor government honor its predecessor's commitments? Are any elements of the investment insurable by OPIC?[16] If the investment is expropriated will there be any legal basis—under ICSID,[17] for example, the U.N. Convention,[18] or bilateral treaties[19]—for meaningful international arbitration on the compensation issue? If an arbitration award is obtained, can the assets of the expropriating government or its state entity be reached to satisfy a levy of execution?[20] The questions will be hard and searching, and many explo-

16. Twenty-one Latin American states provide some treaty basis for OPIC loans or insurance, but expropriation insurance is available in only 14 of them. OPIC Country List, February 1975. To date the OPIC expropriation insurance program has been of little assistance to the oil industry because of the policy of OPIC and its predecessors to insure only tangible, removable assets, excluding intangible drilling and exploration costs, proven reserves, and oilfield fixtures. The Amendments Act of 1974 provided that OPIC may not participate in expropriation insurance policies after December 31, 1979. *See* Note, 10 TEXAS INT'L L.J. 402, 403 (1975).

17. The only Latin American countries which signed the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States are Guyana and Trinidad and Tobago. France, the Netherlands, and the U.K. are signatories, however, and under article 70 the Convention is applicable to the territories for whose international relations they are responsible, except as specifically disclaimed. France has filed no disclaimer, and the disclaimer filed by the U.K. does not extend to any Latin American territory. A Netherlands disclaimer as to Surinam and the Netherlands Antilles was withdrawn. *See* INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, NINTH ANNUAL REPORT 1974/1975, Annex 1.

18. Only three Latin American countries—Ecuador, Mexico and Trinidad and Tobago—are parties to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Netherlands ratification provides that it is also on behalf of Surinam and the Netherlands Antilles, however, and the French ratification states that the Convention "would extend to all the territories of the French Republic." *See* 9 U.S.C.A. § 201, annotation.

19. Landau, *Compensation Upon the Taking of an Alien's Property*, 12 AM. BUS. L.J. 31, 32 n.6. (1974), includes Nicaragua among parties to U.S. bilateral commercial treaties which require compensation for expropriation.

20. The codification and revision of U.S. law on this subject was the object of

ration prospects will not pass their muster.

For all these reasons it seems likely that the next 25 years of oil operations in Latin America will bring a heightened sense of nationalism on the part of host governments, an increase in the number and power of state entities, more reluctance to invest on the part of the oil companies, and a consequent decline in new oil discoveries. It will be a period of intense rivalry and confrontation between the oil companies and the state entities. Ironically, it is this aspect of the quarter-century that offers a slim possibility of constructive development.

It is a curious trait of human nature that each protagonist to prolonged confrontation takes on some of the more forceful qualities of the other. History abounds with examples. Over centuries of border warfare the barbarians became Romanized and Rome was invigorated by the ruder cultures of the border tribes. After 1789 monarchist England and republican France squared off for a generation of conflict; before it ended France had a monarch and England was accelerating its evolution toward parliamentary democracy. During three decades of cold war the Russians developed a capitalistic taste for Liebermann economics and goulash communism, while the United States began to dabble in the totalitarian expediencies of covert invasions, falsified bombing reports and Executive coverup. In each case, through the strange reciprocal osmosis of confrontation, the rivals had absorbed some of each other's strengths.

The strength of the Latin American state oil entities is the support of the governments they serve. To a greater or lesser degree the entities *are* the government: they execute its policies, spend its subsidies, and in a pinch claim its sovereign immunity. The weakness of the state entities is the other side of that coin. They are not independent; they have no secure power base outside government; they cannot formulate, execute, or defend corporate objectives of their own.

Conversely, the strength of private U.S. corporations is their independence. Within broad limits of financial responsibility to their creditors and stockholders they are free to select objectives, define and delegate authority, and commit resources as they please. Their successes and failures are their own. Their weakness

H.R. 11315, 94th Congress, reproduced with accompanying documents at XV I.L.M. 88 (1976). For an analysis of earlier versions of the bill see Sklaver, *Sovereign Immunity in the U.S.: An Analysis of S. 566*, 8 INT'L LAW. 442 (1974).

is the reciprocal of that strength, and it is most apparent in their overseas operations. U.S. companies enter the international arena with scant understanding and support from their government. In many situations this makes them less competitive than the *zaibatsu* of Japan and the quasi-cartels of Europe—the corporate enterprises of older societies where business and government have learned to function internationally as a team.

During the next quarter-century the international operations of the major Latin American oil entities will become even more substantial. They will borrow and lend vast sums in the world money market; charter, own, and operate tanker fleets; maintain offices in Houston, New York, London, and other oil capitals; employ foreign consultants; procure and warehouse supplies and equipment in foreign cities; and enter into technology agreements and joint ventures with foreign companies, private and state, covering the myriad of functions that are ancillary to the operation of a large integrated oil company. They will become subject, voluntarily or otherwise, to litigation and arbitration in foreign countries under foreign law. As their operations prosper they will seek to become independent of their shareholder-governments. If their efforts are successful it will be at the price of impartial audit, financial accountability and public disclosure. They will,. in fact, grow to the model of the international oil companies to whose expropriated assets they succeeded.

Meanwhile the oil companies of the United States, bruised by unequal confrontation with the mammoth state entities, may come to see the wisdom of a closer symbiosis with government on the Japanese and European model. They will borrow from Eximbank and other public sources, and seek expropriation insurance from OPIC and its successors. They will ask Congress for legislation to clarify and extend their right to reach foreign governments and state entities for suit and execution in the United States. They will press the State Department to expand the treaty network of arbitration commitments. When our balance of payments is adverse they will negotiate with OFDI for permission to invest and retain funds abroad. Through these experiences the oil companies will acquire a greater facility for working with their government. With luck, their government will develop a more sympathetic appreciation of the companies' goals and problems.

Perhaps the entities and the companies, working and contending together as equals, will come to recognize their growing similarities and to respect and complement each other's function in the worldwide task of finding oil and moving it to market. If they do learn to cooperate, so may their governments. It may not be too much to hope that the brash thesis of Manifest Destiny and the defiant antithesis of the Calvo Clause will one day yield to the cheerful synthesis of the Pogo Principle: "We have met the enemy and he is us."