

Brooklyn Journal of International Law

Volume 3 | Issue 2

Article 6

1977

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Recommended Citation

Howard B. Berke, *Host Countries' Attitudes Toward Foreign Investment*, 3 *Brook. J. Int'l L.* (1977).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol3/iss2/6>

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HOST COUNTRIES' ATTITUDES TOWARD FOREIGN INVESTMENT

INTRODUCTION

Substantial changes have occurred with respect to the attitude of host countries toward direct foreign investment in their respective countries. As Henry King has stated, "New patterns of control and decontrol appear to be emerging in key areas of the world"¹ The reasons for such new patterns, however, are varied. Governments have responded to differing forces such as nationalistic feelings adverse to multinational corporations and other forms of foreign investment, balance of payments or anti-trust problems, or, most recently, the accumulation of tremendous "petrodollar" reserves among some member nations of the Organization of Petroleum Exporting Countries [hereinafter referred to as OPEC].

Three basic trends are discernable. First, the traditional open door policy has been replaced in many developed countries by restrictions subjecting foreign investors to government registration and review. Generally, no explicit prohibitions are established except in certain sensitive industries. Second, many less developed countries, either unilaterally or through regional organizations, have been screening foreign investment, and in addition have begun to impose rigid rules governing all aspects of foreign investment in their economies. Third, some developed and developing nations have been liberalizing their policies toward foreign investment. This note will examine these emerging attitudes toward foreign investment and analyze their long-range significance.

I. DEVELOPED COUNTRIES

A. *The United States*

With few exceptions,² the United States, like most developed

1. King, *Foreign Restrictions on U.S. Investment*, 11 SAN DIEGO L. REV. 27, 27 (1973).

2. In the United States, various federal statutes impose restrictions upon incoming foreign investment in sensitive sectors of the economy which relate to the national defense or involve the exploitation of certain natural resources. The most important sectors affected are coastwise and freshwater shipping, 46 U.S.C. §§ 861-69 (Supp. V 1975), domestic radio communications, 47 U.S.C. § 310 (1970), domestic air transport, 49 U.S.C. §§ 1301(13), 1401 (1970), acquisition of federal mineral lands, 30 U.S.C. §§ 22-54 (1970), and hydroelectric power, 16 U.S.C. § 797(e) (1970). For a review of United States restrictions,

countries, has traditionally welcomed foreign investment, and has created no general obstacles to the entry of such capital into its domestic economy. The basic policy has been to maintain an open door to such investment, and to accord foreign investors treatment equal to that given their domestic counterparts.³ In late 1973, however, a sudden surge of investment from Japan and Western Europe triggered great public and congressional concern over the desirability of such an open door policy. An extensive administrative policy review and a round of congressional hearings were undertaken, resulting in the Foreign Investment Study Act of 1974.⁴ Under the provisions of this act, the executive branch is required to study the scope of foreign investment in the United States and the adequacy of our current data gathering, disclosure, and reporting requirements, and to make recommendations to maintain current information on such investment.⁵ The Act did not, though, in any way change the liberal United States policy.⁶

Following these responses, the intense public interest subsided briefly until reawakened by the dramatic emergence, in 1974, of OPEC as a major factor in the world economy. In light of OPEC's huge financial capacity to invest in the United States, the foreign investment issue once again attracted public as well

see *Foreign Investment Legislation: Hearings on S. 329, S. 995 and S. 1303 Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce*, 94th Cong., 1st Sess. 165 (1975); Comment, *Foreign Investment in the United States: Is America for Sale?*, 12 Hous. L. Rev. 661, 670-71 (1975).

3. *Foreign Investment Review Act of 1974: Hearings on S. 3955 Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce*, 93d Cong., 2d Sess. 25 (1974) [hereinafter cited as *1974 Senate Hearings*]; *Foreign Investment in the United States: Hearings Before the Subcomm. on Foreign Economic Policy of the House Comm. on Foreign Affairs*, 93d Cong., 2d Sess. 254 (1974) [hereinafter cited as *1974 House Hearings*].

4. Pub. L. No. 93-479, 88 Stat. 1450 (1974), reprinted in 15 U.S.C. 78(b) app. (Supp. V 1975).

5. Id. §§ 5(1), 5(6), 5(11), 5(13), 6(9)-(10).

6. President Ford stated:

As I sign this act, I reaffirm that it is intended to gather information only. It is not in any sense a sign of change in America's traditional open door policy toward foreign investment. We continue to believe that the operation of free market forces will direct worldwide investment flows in the most productive way. Therefore my Administration will oppose any new restriction on foreign investment in the United States except where absolutely necessary on national security grounds or to protect an essential national interest.

Statement on Signing the Foreign Investment Study Act of 1974, [1974] PUB. PAPERS ¶ 193.

as legislative attention.⁷ The Ford Administration reacted by conducting another major policy review in early 1975, giving specific attention to the questions raised by the potential of investment by OPEC nations.⁸

The 1975 review resulted in three major conclusions regarding the future of United States policy toward foreign investment.⁹ First, there was no necessity for new legislation to further restrict foreign investment. Second, legislation may be required to compel the disclosure of beneficial ownership, both domestic and foreign, of investments made in nominees' names. Third, existing practice should be supplemented by administrative action through the establishment of a high level office to deal with foreign investment and an inter-agency Committee on Foreign Investment in the United States. An additional conclusion of the 1975 policy review was that procedures for advance consultation on significant direct investment should be negotiated with principal foreign government investors.¹⁰

B. *Other Developed Countries*

Although the United States has not yet found a need to take further action in limiting foreign investment, other developed countries faced with new nationalistic and economic pressures have taken a more restrictive attitude toward such investment.¹¹ Most developed countries maintain some form of registration or licensing system for foreign investment, and apparently a worldwide trend in that direction exists. There is a great discrepancy, however, in the rigor and intensity with which these national systems are implemented. In some countries screening is essentially a formality and a means to gather data on levels of foreign activity in the domestic economy. In others, such as Australia and Canada, the screening process serves as a more rigorous instrument for controlling and regulating types and levels of foreign penetration of the local economy. Their recently passed foreign

7. The public concern led to no fewer than fifteen proposed bills and two executive orders. For a review of some of the bills, see Note, *U.S. Regulation of Foreign Investment: Current Developments and the Congressional Response*, 15 VA. J. INT'L L. 611, 633-46 (1975).

8. See Niehuss, *Foreign Investment in the United States: A Review of Government Policy*, 16 *id.* 65, 81-83 (1976).

9. *Id.* at 82.

10. *Id.*

11. See 1974 Senate Hearings, *supra* note 3, at 24.

investment laws do not make outright prohibitions of foreign investment in specific sectors, though they do make it possible for screening administrators to discourage many types of commercial activity in sensitive areas.¹²

1. Australia

The Australian government has traditionally held the view that it generally should not attempt to legislate in the field of foreign investment. Nevertheless, due to the huge flow of foreign capital into Australia between 1970 and 1972,¹³ the government reversed its liberal policy. Until then, foreign capital had usually matched the deficit of the current balance of payments account, thus adding to the resources available in the economy.¹⁴ However, when the Australian dollar became undervalued, in 1970-71, "the flow of foreign capital had almost the sole effect of increasing the international reserves . . ."¹⁵ In other words, the Australian government believed that the influx of foreign capital brought with it costs without adding to the resources available for use in the economy anything more than an increase in international reserves.

The current concern in both the Australian federal and state governments is to prevent further unrestricted foreign encroachment and at the same time encourage the development of domestically-owned industries. With the exception of certain policies against foreign control of banking, broadcasting, and transportation,¹⁶ foreign corporate regulation, including reporting and disclosure requirements, had been under the jurisdiction of the states. Only recently, with the passing of the Companies Act,¹⁷ has the national government extended its foreign investment re-

12. 1974 House Hearings, *supra* note 3, at 391. In Canada, section 2(e) of the Foreign Investment Review Act, Can. Stat., ch. 46 (1974), requires that the Minister of Industry, Trade, and Commerce consider the compatibility of the acquisition or establishment of a Canadian business with national industrial and economic policies. There is a long history of Canadian attempts to preclude foreign control of key sectors of the national economy by limiting foreign ownership. See generally Franck & Gudgeon, *Canada's Foreign Investment Control Experiment: The Law, the Context and the Practice*, 50 N.Y.U. L. Rev. 76, 93 (1975).

13. Comment, *Foreign Investment Restrictions: Defending Economic Sovereignty in Canada and Australia*, 14 HARV. INT'L L.J. 345, 361 (1973).

14. *Id.*

15. *Id.*

16. *Id.* at 351.

17. The Companies (Foreign Take-Overs) Act of 1972, Austl. Acts ch. 46 (1972), as amended by Austl. Acts ch. 46 (1973).

strictions to manufacturing and industrial corporate development.

The Companies Act applies to those situations in which the Minister appointed pursuant to the Act believes that foreigners are in a position to "exercise effective control of the company" when "that control would be contrary to the national interest."¹⁸ It appears that "[t]ake over proposals will almost inevitably be regarded as against national interest if they are directed towards an economically strategic industry leader, or are so large that they would significantly affect the relative balance of Australian and foreign ownership and control of the industry concerned."¹⁹ If the takeover is not directed at a strategic company, a determination will be made as to whether the takeover would lead to such economic benefits as to justify the increased degree of foreign control in that industry.²⁰

The Act is concerned primarily with target companies, having assets of over one million dollars, that would come under the control of a foreign interest through the exchange or sale of stock shares.²¹ If a foreign person or group gains 15% or more, or a combined overseas interest acquires 40% or more, of the voting power in a corporation, it will be presumed that effective control of the company has passed from Australian to foreign hands.²² In such a case, the Act enables the government to issue an order prohibiting the further acquisition of shares by foreigners.²³

Thus, the Companies Act grants the government broad authority to prohibit the takeover of domestic companies by foreign interests. Such measures are discretionary, though, and a determination of the merits of each takeover may be made on a case-by-case basis.

2. Canada

While most developed countries continue to favor the inflow of foreign investment, Canada, even more than Australia, has

18. *Id.* § 13(2)(b).

19. Comment, 14 HARV. INT'L L.J., *supra* note 13, at 361.

20. *Id.*

21. If assets other than shares are involved, the crucial question is whether all or a substantial part of the assets will be acquired. Comment, 14 HARV. INT'L L.J., *supra* note 13, at 363.

22. The Companies (Foreign Take-Overs) Act of 1972, Austl. Acts ch. 46, § 11 (1972), as amended by Austl. Acts ch. 46 (1973).

23. A transfer of control of a corporation from one foreign interest to another is not subject to review. *Id.* §§ 13(2)(b)(1), 13(3)(b)(1), 14(1)(a).

moved from a liberal attitude to one oriented toward reducing the proportion of foreign investment in its economy.²⁴ Some commentators suggest that the spirit of "economic nationalism" in Canada resembles that of less developed countries.²⁵ Several factors have apparently contributed to this increased Canadian sensitivity to foreign investment: the level of foreign investment²⁶ and the key industries involved;²⁷ the high rate of unemployment in Canada;²⁸ and fear of foreign dominance through foreign takeovers of Canadian enterprises.²⁹ These factors have stimulated efforts to halt the takeover of Canadian companies by non-residents³⁰ and to foster greater Canadian ownership and control of business and industry.³¹ The Canadians also have revised their foreign investment tax laws.³²

In 1973 the Canadian Parliament passed the Foreign Investment Review Act³³ which established a procedure for the review of proposed takeovers by foreign corporations of existing Canadian companies, in order to certify that such takeovers would

24. The assets of non-resident-controlled corporations were estimated to total 56.2 billion Canadian dollars in 1969. This figure represents 24.4% of all corporate assets in Canada in that year. United States firms accounted for nearly 75% of all foreign-owned industry. *Canada: Investing, Licensing and Trading Conditions Abroad*, BUS. INT'L, Mar. 1973, at 3.

25. Martin, *Canada: A New Chile in the North?*, DUNS REV., June 1973, at 84. See Cohen, *Canada and the United States—Possibilities for the Future*, 12 COLUM. J. TRANSNAT'L L. 196 (1973).

26. 1974 House Hearings, *supra* note 3, at 425. See generally Foreign Investment Review Act, Can. Stat., ch. 46, § 2 (1974).

27. 1974 House Hearings, *supra* note 3, at 425-26. For example, in 1972, United States citizens controlled 76% of total assets in the transportation equipment industry; 68% in the chemical, rubber, petroleum, and coal industries; 66% in the machinery industry; and 57% in the electrical products and metal mining industries. "Canada First"—*Meaning for U.S. Investors*, U.S. NEWS & WORLD REP., Sept. 11, 1972, at 60.

28. 1974 House Hearings, *supra* note 3, at 426. See Gualtieri, *Canada's New Foreign Investment Policy*, 10 TEX. INT'L L.J. 46, 48 (1975).

29. 1974 House Hearings, *supra* note 3, at 426. See generally Foreign Investment Review Act, Can. Stat., ch. 46, § 2 (1974).

30. The Canadian government experienced stiff public reaction to the attempt by Prudential Insurance Company to gain control of Canada's second largest finance company, as well as McGraw Hill's attempted acquisition of Canada's Tyerson Press. *Canada's Closing "Open Door,"* FORBES, Dec. 1, 1970, at 22, 25. Also, the government thwarted an attempt by United States interests to take over Denison Mines, a leading uranium corporation; in another instance, a Canadian purchase was arranged when it became apparent that Ashland Oil, a United States firm, was seeking control of Home Oil Company, Limited, a large Canadian firm. Martin, *supra* note 25, at 90.

31. 1974 House Hearings, *supra* note 3, at 426.

32. *Id.*

33. Foreign Investment Review Act, Can. Stat., ch. 46 (1974).

result in significant benefits to Canada.³⁴ The Act contains certain limitations. The purchase of government-owned enterprises is exempt from the review process,³⁵ as is the takeover of firms which have gross assets of less than \$250,000 and annual gross revenue of less than \$3 million.³⁶

The Act's definition of acquisition of control could prove troublesome. It states that control is the mere "acquisition of the shares of the corporation to which are attached voting rights,"³⁷ or the acquisition of the property of a Canadian business.³⁸ Control will be deemed conclusive if a non-eligible purchaser acquires more than 50% of the voting shares of a Canadian corporation, or all or substantially all of the property used in carrying on a business in Canada.³⁹ Acquisition of less than 5% of the voting shares of a public corporation, or less than 20% in the case of a private corporation, does not in itself constitute control or a cause for review.⁴⁰ Acquisition of between 5% and 50% of the voting shares in the case of a public corporation, and between 20% and 50% in the case of a private corporation, raises a presumption that control has been acquired and opens the possibility of review.⁴¹ Whether control has in fact been acquired, however, must be determined by the reviewers. This discretionary provision could result in great confusion for the investor.

Portfolio-type investments are not affected by the Act. A non-eligible person who would be presumed to acquire control of a corporation may rebut the presumption by establishing that another person or group controls the corporation, and that the investor has not used nor does intend to use the shares which he has acquired to exercise control over the corporation.⁴²

34. *Id.* §§ 3(1)(a), 4(1), 5(1).

35. *Id.* § 5(1)(a)(b).

36. *Id.* § 5(1)(c). The Act prevents the circumventing of these limits through the division of large corporations into smaller ones prior to takeover. Aggregation of the gross assets and gross revenue is required of any enterprises associated "by reason of interrelationship of management, ownership or financial affairs . . . unless . . . the Minister [of Industry, Trade, and Commerce] is satisfied that the separate existence of the associated enterprises . . . is not for any purpose [of avoiding] . . . the provisions of the law." *Id.* § 5(2).

37. *Id.* § 3(3)(a)(i)(A).

38. *Id.* § 3(3)(a)(i)(B).

39. *Id.* § 3(3)(d).

40. *Id.* § 3(3)(c).

41. *Id.*

42. *See generally id.* § 3(2)-(9).

C. *The European Economic Community*

The European Economic Community [hereinafter referred to as EEC] has become concerned about changes in market conditions and the reduction of competition within the Common Market. There have been three major reasons for this concern: fear of the growing strength of multinational corporations; the inability of European firms to benefit from the European market to the same degree as non-European firms; and the rising rate of inflation.⁴³ To deal with these factors, the EEC has proposed a European Company Law⁴⁴ to encourage the growth and merger of small and medium-sized European firms.⁴⁵ For the moment, the EEC has employed its antitrust authority in the absence of overall policy direction toward foreign investment.⁴⁶

In 1957 the EEC nations signed the Treaty of Rome⁴⁷ in order to chart a common economic policy, including a uniform approach to antitrust. The EEC Commission's power over antitrust activities is derived from Article 86 of the Treaty of Rome, which prohibits "an improper exploitation by one or more undertakings of a dominant position within the Common Market."⁴⁸ Article 85

43. 1974 House Hearings, *supra* note 3, at 419.

44. On June 30, 1970, the European Economic Community [hereinafter cited as EEC] Commission submitted to the Council of Ministers of the EEC a proposal for the establishment of European public stock corporations to be chartered by the EEC. *Proposition de Reglement du Conseil Portant Statut de la Societe Anonyme Europeene*, 13 J.O. COMM. EUR. (No. C 124) 1 (1970), *transl. in* BULL. E.C., June 24, 1970. These corporations would be referred to individually as a Societas Europea (S.E.), *id.* art. 1(1), and would exist alongside national corporations created under member State law. The final proposal is still in the drafting stage and it should be a few more years before the Council approves it. Dep't of State Airgram, U.D.E.C.-A-237 (July 31, 1974).

45. Jones, *A Primer on Production and Dominant Positions Under EEC Competition Law*, 7 INT'L LAW. 612, 632 (1973).

46. Moss, *The European Community Still Has No Competition Policy*, 16 ANTITRUST BULL. 443 (1971).

47. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter cited as EEC Treaty].

48. The following criteria constitute "improper exploitation" under Article 86:

- (a) the direct or indirect imposition of any inequitable purchase or selling prices or of any other inequitable trading conditions;
- (b) the limitation of production, markets or technical development to the prejudice of consumers;
- (c) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
- (d) the subjecting of the conclusion of a contract subject to the acceptance, by a party, of additional supplies which, by their nature . . . have no connections with the subject of such contract.

EEC Treaty, art. 86.

prohibits all agreements and concerted practices which are designed to restrict or distort competition within the Common Market, or which have that effect.

During the early years of the Common Market little emphasis was placed upon antitrust regulation.⁴⁹ Recently the EEC Commission⁵⁰ has moved toward a more rigorous antitrust position.⁵¹ Some observers believe that the emerging EEC antitrust policy may hinder the operations of foreign-owned (especially American) multinational corporations operating within the Common Market. Recent rulings of the EEC Commission have not been directed specifically against foreign investment, but at market conditions arising out of the growth of regional commerce as a consequence of the establishment of the EEC.⁵² Nevertheless, acquisitions and mergers by foreign investors constitute a major element of these changes in European commerce, and therefore the decision in *Europeballage Corporation v. Commission of the European Communities*⁵³ [hereinafter referred to as *Continental Can*] may be of concern to foreign investors.⁵⁴ That holding evidences the Commission's recent concern with preventing companies from obtaining a dominant position in the European economy and the potential for increased restrictions on foreign investors operating within the Common Market.

In *Continental Can*, the Commission charged that the Continental Can Company violated Article 86 by creating a quasi-monopoly in the metal container business through a series of mergers.⁵⁵ The company countered that the Treaty of Rome was

49. Moss, *supra* note 46. See also Waelbroeck, *Recent Developments and Further Prospects of the Common Market*, 1 GA. J. INT'L L. 1, 11 (1970).

50. Article 155 of the EEC Treaty establishes the European Economic Commission, which is empowered to investigate antitrust matters. While serving as an administrative arm of the EEC, the Commission also has quasi-judicial powers and may issue binding decisions which are subject to review only by the Court of Justice, the highest tribunal in the Common Market. See generally EEC Treaty, *supra* note 47, art. 167.

51. For a more general review of EEC antitrust policy, see Hawk, *Antitrust in the EEC—The First Decade*, 41 FORDHAM L. REV. 229 (1972).

52. E.g., *Instituto Chemioterapico Italiano SpA v. Comm'n of the European Communities*, [1973] COMM. MKT. L.R. D.50 (Commercial Solvents Case); *Cooperative Vereniging 'Suiker Unie' UA v. Comm'n of the European Communities*, [1973] COMM. MKT. L.R. D.65 (Sugar Cartel Case); *Re Pittsburgh Corning Europe*, 15 J.O. COMM. EUR. (No. L 272) 35 (1972), [1973] COMM. MKT. L.R. D.2.

53. [1973] E. Comm. Ct. J. Rep. 215, [1973] COMM. MKT. L.R. 199.

54. See Adler & Belman, *Antimerger Enforcement in Europe—Trends and Prospects*, 8 J. INT'L L. & ECON. DEV. 31, 43 (1973).

55. In February 1969, Continental Can Corporation acquired a majority of outstand-

not intended to apply to mergers, and, furthermore, that Article 86 merely prohibits the abuse of a dominant position; dominance itself is implicitly permitted. In reviewing the Commission's decision, the European Court of Justice first decided that Article 86 applies not only to behavior which has a direct detrimental effect on the market, but also to changes in a corporation's internal structure which indirectly create a deleterious effect on companies within the Common Market. Internal changes, such as mergers, increase both the size and economic power of a firm and therefore could have an external effect on the market.

At the same time, the Court declined to discuss the meaning of the phrase "exploitation . . . of a dominant position" in the market, as used in Article 86.⁵⁶ The Court accepted the Commission's view that an abuse occurs where an enterprise "in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, *i.e.* that only undertakings remain in the market whose behavior depends on the dominant one."⁵⁷ However, the Court stated that where the elimination of competition is alleged, the Commission must "state legally sufficient reasons or, at least, had to prove that competition was so essentially affected that the remaining competitors could no longer provide a sufficient counterweight."⁵⁸ The Court determined that in this action the Commission had not proved that the remaining producers of light metal containers for the general market did not offer a counterbalance to the merged enterprise.⁵⁹

Several observations may be made in the light of *Continental Can* and the Court of Justice action. The Court's decision re-

ing shares in Schmalbach-Lubeca-Werke AG, a German manufacturer of light metal containers. By the end of 1969, Continental Can held 85.8% of its subsidiaries' shares. Desiring to further increase its European holdings, Continental Can merged with its Dutch licensee, Thomassen and Drijver-Verblifja N.V., also a manufacturer of light metal containers. In February 1970, Continental Can established the Europemballage Corporation, incorporated in Delaware as its wholly-owned subsidiary, to which all of Continental Can's interests in Europe were transferred. [1973] E. Comm. Ct. J. Rep. at 218, [1973] COMM. MKT. L.R. at 203-05. See Adler & Belman, *supra* note 54, at 39.

56. It should be noted that in an earlier decision it was decided "that two corporations which display almost identical market behavior will be treated as a single unit. The size and market conduct of that unit will then be considered in determining whether the unit has a dominant position." Comment, *Continental Can—New Strength for Common Market Anti-Trust*, 11 SAN DIEGO L. REV. 227, 239 (1973).

57. [1973] E. Comm. Ct. J. Rep. at 245, [1973] COMM. MKT. L.R. at 225.

58. *Id.* at 246, [1973] COMM. MKT. L.R. at 225.

59. Adler & Belman, *supra* note 54, at 41.

affirmed the right of the EEC Commission to prohibit companies holding a dominant position from acquiring or merging with other firms in manners likely to significantly restrict competition, but it declined to define what in fact constitutes a "dominant position" in a market. Therefore a foreign investor is given little direction as to what degree of control may legally be accumulated in a particular industry. Though the point where an oligopoly is prohibited is in question, dominance in the form of a monopoly may automatically violate Article 86. In the absence of clearer criteria under Articles 85 and 86, further court tests are likely.

II. DEVELOPING COUNTRIES

Government constraints on foreign investment have generally been more extensive in developing countries. Developed countries frequently monitor foreign investment through registration and screening requirements which allow the imposition of restrictions on a case-by-case basis. The trend in the less developed countries is to provide blanket statutory prohibitions on certain foreign investment in these countries.

While "[t]he policies of developing countries toward Foreign Direct Investment range from active recruitment⁶⁰ to complete rejection,"⁶¹ many developing countries have adopted strong positions concerning the need to control, or even limit, foreign investment. Some of those developing nations which offer special concessions designed to induce the entry of the foreign investor are reconsidering that approach and contemplating measures that would limit the scope of foreign investment in particular industries and restrict the operation of foreign-owned firms.⁶² "Few developing nations place no significant restrictions on foreign investment, and a number of [developing countries] have taken or are contemplating actions to limit it severely. Not content with restrictions on new projects, several [developing countries] have resorted to expropriation or forced divestiture of existing investments"⁶³

Generally, the developing nations are not convinced that unregulated private foreign investment will be beneficial to their

60. Landau, *Direct Foreign Investments in Developing Countries?*, 4 J.L. & ECON. DEV. 182, 182-84 (1969).

61. Ellis, *United States Multinational Corporations: The Impact of Foreign Direct Investment on United States Foreign Relations*, 11 SAN DIEGO L. REV. 1, 14 (1973).

62. See generally text accompanying notes 66-95 *infra*; Epstein, *infra* note 64.

63. Ellis, *supra* note 61, at 15.

interests, a conviction which reflects their historical experiences and their sensitivity to conditions which might potentially impinge upon their national independence or autonomy.⁶⁴ They hope to reduce the perceived disadvantages of foreign investment while improving the terms on which they gain access to foreign technology and the degree to which their citizens benefit from a foreign investor's activities.⁶⁵

A. *The Andean Code*

1. Background

The trend toward increased regulation of foreign investment has been particularly strong in Latin America.

The observed trend indicates a rising governmental intervention through diverse mechanisms, in the affairs of foreign enterprises in host countries. Such intervention implies an increased preservation of national markets and national economic potential, with respect to the rest of the world, to fulfill national or subregional development objectives rather than leaving them to the global policies and objectives of transnational enterprises.⁶⁶

Probably the most systematic program for regulating and constraining foreign investment is that devised in December 1970 by the signatories⁶⁷ of the Andean Foreign Investment Code⁶⁸ [hereinafter referred to as Andean Code], a common program for the treatment of foreign capital, trademarks, patents, licenses,

64. *Id.* For a closer look at one nation's nationalistic trend, see Epstein, *Introduction to Recent Developments in Mexican Law: Politics of Modern Nationalism*, 4 DEN. J. INT'L L. & POL'Y 1 (1974).

65. See Baranson, *Changes in the Investment Climate in Developing Nations*, 7 VAND. J. INT'L L. 569, 570 (1974) (discussing investment attitudes in Hong Kong, Singapore, Taiwan, Korea, and Mexico).

66. Vaitos, *Foreign Investment Practices and Economic Development in Latin America*, 7 J. WORLD TRADE L. 640, 640 (1973).

67. The original signatories to the Treaty establishing the Andean Code were Bolivia, Chile, Columbia, Ecuador and Peru. Commission of the Cartagena Agreements, Dec. No. 24, Dec. 31, 1970, as amended June 24 and July 17, 1971, reproduced in 11 INT'L LEGAL MATS. 126 (1972). Venezuela joined the group in 1974. Andean Commission—Venezuela: Final Act of the Negotiation on the Entry of Venezuela into the Cartagena Agreement, Feb. 13, 1973, 12 INT'L LEGAL MATS. 344 (1973).

Chile recently withdrew from the group. N.Y. Times, Nov. 1, 1976, at 17, col. 1. For a criticism of the Andean Pact after Chile's withdrawal see N.Y. Times, Nov. 21, 1976, § 4, at 3, col. 1.

68. Commission of the Cartagena Agreements, Dec. No. 24, Dec. 31, 1970, as amended June 24 and July 17, 1971, reproduced in 11 INT'L LEGAL MATS. 126 (1972) [hereinafter cited as Andean Code].

and royalties. The six signatories acted, in large measure, upon an asserted conviction that their national sovereignty was being eroded through dependence upon economic decisions made by foreign companies and governments.⁶⁹ The Andean Code was designed to limit foreign influence in the domestic economies of member States, and to promote sound development and national economic autonomy in the region.⁷⁰

The Code is based upon a view of foreign investment widely subscribed to in Latin America. First, it is assumed that domination of certain strategic economic sectors by foreign investors limits the ability of the host government to pursue an autonomous national economic policy.⁷¹ Second, it is believed that many foreign investments compete with, rather than complement, domestic enterprises, and that takeovers of local firms by foreign investors damage a country's long-term economic strength and growth potential.⁷² Third, it is felt that many foreign investors engage in restrictive business practices.⁷³ The provisions of the Andean Code purport to limit these negative effects of foreign investment while capitalizing on its positive contributions. The Andean Code seeks "to give preference in the economic development of the [Andean] subregion to authentically national capital and enterprises of the Member Countries."⁷⁴ To accomplish this goal, the Code attempts to channel foreign investment into forms which encourage transfers of technological advances to local entrepreneurs, thus furthering the expansion, diversification, and specialization of local industry, and increasing local employment and job skills.⁷⁵ However, the remainder of the Code appears to be counterproductive to an increase in foreign capital needed to finance the new technologies.

69. See Milenky, *From Integration to Developmental Nationalism: The Andean Group 1965-71*, INTER-AM. ECON. AFF., Winter 1971, at 77.

70. *Id.*

71. Milenky, *Developmental Nationalism in Practice: The Problems and Progress of the Andean Group*, INTER-AM. ECON. AFF., Spring 1973, at 49, 57.

72. Rogers, *United States Investment in Latin America: A Critical Appraisal*, 11 VA. J. INT'L L. 246, 249 (1971).

73. Shill, *The Mexican and Andean Investment Codes: An Overview and Comparison*, 6 L. & POL'Y INT'L BUS. 437, 438 (1974).

74. Rep. of the Special Latin American Coordinating Comm. on the Consensus of Viña del Mar, May 17, 1969, reproduced in 8 INT'L LEGAL MATS. 129 (1969).

75. Comment, *The Multinational Enterprise in the Context of Latin American Economic Integration: The Andean Agreement Model*, 11 SAN DIEGO L. REV. 245, 251 (1973). Nevertheless, the remainder of the Code appears to be counterproductive to this goal because foreign capital, necessary to finance the new technologies, is discouraged.

2. Provisions of the Code

The Code seeks to direct foreign investment into sectors not in competition with domestic industry and to expand domestic participation in the ownership of foreign firms. It stipulates that all foreign investment shall be screened by national governments, and that no additional investment will be permitted in sectors already adequately covered by existing enterprises.⁷⁶ A schedule is provided for phased divestiture by existing foreign investors⁷⁷ until ultimately host country enterprises are at least fifty-one percent owned by local investors.⁷⁸

The Andean Code contains a series of prohibitions and controls over activities of foreign enterprises.⁷⁹ National governments are authorized to oversee and control the prices of intermediate products furnished by foreign investors and/or by suppliers of foreign technology.⁸⁰ Loans from foreign firms to domestic enterprises must be authorized and registered, and global limits on such indebtedness may be established.⁸¹ Interest rates on loans between parent firms and their local subsidiaries are regulated and controlled by host governments.⁸² Official approval is needed for contracts importing technology, patents, or trademarks, and many restrictive clauses often found in such contracts are prohibited.⁸³ No royalties may be paid by a foreign-owned subsidiary for

76. Andean Code, *supra* note 68, arts. 2, 3.

77. *Id.* ch. II. The Code prohibits the establishment of foreign investments in the public services (utilities, transportation, and communications) sector or in finance, insurance, advertising, publishing, or marketing enterprises of any kind. *Id.* arts. 41-43. Existing foreign investments in the closed sectors were required to have been converted into national enterprises with at least 80% local participation by July 1974. *Id.* Furthermore, the exploration for and exploitation of all minerals is reserved exclusively to national enterprises. Concessions may not be granted to foreign enterprises after July 1981, and any concession granted may not exceed twenty years. *Id.* art. 40. Foreign participation in petroleum and natural gas exploitation should be through contracts with State enterprises of each country. *Id.* The exclusions from specific sectors may be waived, however, by a unilateral act of any country which feels that specific circumstances merit such an exception from the Code. *Id.* art. 44.

78. *Id.* art. 28.

79. While the Andean Code is almost uniformly applicable to foreign investments in all member countries, there are wide variations among those countries in the strictness and extensiveness with which the provisions are applied. *See* Milenky, *supra* note 71, at 57.

80. Andean Code, *supra* note 68, art. 6(c).

81. *Id.* art. 14.

82. *Id.* arts. 14, 16.

83. *Id.* arts. 18, 19, 20, 25. Specifically prohibited are obligations to purchase capital goods, inputs, or services in exchange for use of a patent or trademark; clauses permitting the seller of the technology to fix sale or resale prices of the goods produced; clauses

intangible technological contributions furnished by its parent company or another of its affiliates.⁸⁴

The Code imposes a number of constraints on capital transfers and profit repatriations.⁸⁵ Foreign investors are guaranteed the right to repatriate their invested capital in convertible currency when shares, participations, or rights are sold to national investors or when the local firm is liquidated,⁸⁶ provided all applicable taxes are paid.⁸⁷ Reinvestment of profits must be authorized by national governments, although the governments of member countries may allow such reinvestment without prior authorization if it does not exceed five percent of the company's capital in any one year.⁸⁸

The Andean Code has had a great impact upon other developing countries. In Latin America, Argentina has instituted policies similar to those of the Andean Code.⁸⁹ Mexico, which has imposed constraints upon foreign investment since 1938, and in some respects pioneered policies which were later implemented by the Andean Code,⁹⁰ has expanded its system of regulation and limitation on investment in light of the Andean Code experience.⁹¹ In Asia, Thailand and the Philippines have announced similar policies requiring divestitures and reduced operations by foreigners in certain sectors of their economies.⁹² Robert Gardner indicates that this sentiment is growing in Africa where "more and more African countries want to achieve accelerated economic

restricting the volume and structure of production; obligations to pay royalties for patents and trademarks not used; clauses prohibiting the use of competitive technologies; clauses establishing a purchase option in favor of the supplier of the technology, or obligating the purchaser to transfer to the owner any inventions or improvements discovered; and clauses limiting exports or sales abroad of products manufactured on the basis of the technology or with the licensed trademark. *Id.* art. 20.

84. *Id.* art. 21.

85. Authorization for such transfers must be granted by national regulatory boards, *id.* art. 6(d), and up to 14% profit on invested capital may be approved annually for repatriation from verified earnings of direct foreign investments. *Id.* art. 37.

86. *Id.* art. 7.

87. *Id.* art. 10.

88. *Id.* arts. 12, 13.

89. Ellis, *supra* note 61, at 15.

90. Shill, *supra* note 73, at 465.

91. Ellis, *supra* note 61, at 15. See generally Miranda, *Foreign Companies Investing and Doing Business in Mexico—Nationalization*, 28 *BUS. LAW.* 1217, 1223-34 (1973).

92. *Id.* See Comment, *Foreign Investment in Thailand: The Effect of Recent Legislation*, 3 *DEN. J. INT'L L.* 293 (1973); Evangelista, *Republic Act No. 1180 and Foreign Investment in the Philippines: A Dilemma of Economic Nationalism*, 3 *J.L. & ECON. DEV.* 60 (1968).

and social growth in their own policies."⁹³ Limitations on equity investment and pressure toward disinvestment and regulated continued presence have been the result,⁹⁴ particularly in Morocco and Ghana.⁹⁵

B. *The United Nations*

The trend in less developed countries toward limiting foreign investment either generally or in key industries, through restrictive policies or through expropriation, has received support and a measure of international approbation through recent actions of the United Nations General Assembly. That body, for the first time in its history, has attempted to establish guidelines to govern international economic relations.

A special session, convened primarily in response to the large increase by OPEC in the price of petroleum products,⁹⁶ met between April 9 and May 2, 1974. Two documents of major importance were produced: the Declaration on the Establishment of a New International Economic Order⁹⁷ and the Programme of Action on the Establishment of a New International Economic Order.⁹⁸ As a result of the work of the special session, the question of a new international economic order was placed on the agenda of the General Assembly at its twenty-ninth session.⁹⁹ A further important resolution entitled the Charter of Economic Rights and Duties of States¹⁰⁰ was adopted at that session.

These three documents are clearly intended to be normative in character and are expected to have an important impact on future foreign investment policies.¹⁰¹ The documents are prime

93. Garber, *Foreign Capital In Developing Africa*, CONF. BD. REC., Nov. 1973, at 39, 41.

94. *Id.*

95. Ellis, *supra* note 61, at 15.

96. White, *A New International Economic Order*, 24 INT'L & COMP. L.Q. 542, 542 (1975).

97. G.A. Res. 3201, 6 Special Sess. U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974), reprinted in 68 AMER. J. INT'L L. 799 (1974).

98. G.A. Res. 3202, 6 Special Sess. U.N. GAOR, Supp. (No. 1) 5, U.N. Doc. A/9559 (1974), reprinted in 13 INT'L LEGAL MATS. 720 (1974).

99. It is significant that all four heads of state who addressed the Assembly during that session (President Ford of the United States, President Leone of Italy, Prime Minister Bangabandhu Sheikh Mujibur Rahman of Bangladesh, and Prime Minister Whitlam of Australia) placed considerable emphasis on this aspect of the United Nations' work. Their comments are summarized in U.N. MONTHLY CHRONICLE, Oct. 1974, at 13-18 (1974).

100. G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974), reprinted in 14 INT'L LEGAL MATS. (1975).

101. Paragraph 7 of the Declaration states: "This Declaration on the Establishment

examples of the new militancy at the United Nations of the developing countries. The Declaration and Programme, viewed together, advocate "an equitable sharing of world trade and the benefits of technology."¹⁰²

The Charter clearly aims at changing the structure of the world economy and not merely at reforming the present system. Article 2 enunciates perhaps the most controversial provisions of the Charter with respect to foreign investment. That Article states that each country has full permanent sovereignty over all its wealth, natural resources, and economic activities and has the right to regulate and supervise transnational corporations. Foreign property may be nationalized, and compensation may be determined by the laws and courts of the host country.¹⁰³ In effect, the Article permits a State to nationalize, expropriate, or transfer ownership of foreign property within its borders and pay any compensation it deems appropriate, or no compensation at all. Although nationalization of foreign-owned property has occurred for many years¹⁰⁴ and has even been publicly acknowledged by the United States¹⁰⁵ and by other nations,¹⁰⁶ it had never before been

of a New International Economic Order shall be one of the most important bases of economic relations between all peoples and all nations." G.A. Res. 3201, 6 Special Sess. U.N. GAOR, Supp. (No. 1) 4, at 5, U.N. Doc. A/9559 (1974).

102. White, *supra* note 96, at 543. The Declaration and Programme of Action were adopted without a vote, but this cannot be regarded as being equivalent to unanimity. Five countries—the United States, the Federal Republic of Germany, France, Japan and the United Kingdom—were so concerned with some of the ideas incorporated in the documents that they annexed reservations to them. U.N. Doc. A/PU .2229, at 41-50 (1974) (United States); U.N. Doc. A/PU .2229, at 51-57 (1974) (Federal Republic of Germany); U.N. Doc. A/PU .2229, at 73-85 (1974) (France); U.N. Doc. A/PU .2230, at 17-22 (1974) (Japan); U.N. Doc. A/PU .2231, at 12-18 (1974) (United Kingdom). The reservations are reproduced in 13 INT'L LEGAL MATS. 744, 749, 753, 759, and 762 (1974).

103. Article 2 declares that each State has the right

[t]o 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 sovereign equality of States and in accordance with the principle of free choice of means.

Id. art. 2.

104. White, *supra* note 96, at 544.

105. See Third Annual Report to the Congress on United States Foreign Policy, Feb. 2, 1972, reprinted in [1972] PUB. PAPERS 194, 263.

106. Developed nations expressed their views on expropriation in the United Nations

stated as an international right.

As ultimately approved by the General Assembly, the Charter represents the widest possible measure of agreement on the issues with which it deals. The Charter "has been cited by some as a 'revolutionary' document which will transform the entire structure of global interrelationships," while "[o]thers have maligned it for contributing to the era of confrontation between nations."¹⁰⁷ Some commentators, however, subscribe to neither view, but believe the Charter is the first step in a process which "will lead to a more balanced international system."¹⁰⁸

III. COUNTERTREND

While many countries have imposed or are considering imposing restrictions on foreign investment, a countertrend also exists. Several countries that previously maintained strict controls and limits on foreign investment are now liberalizing their rules and permitting expanded foreign economic activity within their domestic economies.

For example, in Spain¹⁰⁹ and France,¹¹⁰ government policies which inhibited foreign investment have been relaxed. After a period in the mid-1960's of sharp resistance to foreign, particularly American, investment, the French now welcome or even solicit most types of foreign participation in their domestic economy.¹¹¹ In Spain, pre-investment screening has been made less rigorous: in most industries a foreigner may now purchase as much as fifty percent of a Spanish firm provided he merely notifies the government of his actions.¹¹²

A. Japan

One of the seemingly greatest relaxations of restrictions on foreign investment has occurred in Japan. Unlike most developed

General Assembly Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 11, U.N. Doc. A/5217 (1963).

107. Rozental, *The Charter of Economic Rights and Duties of States and The New International Economic Order*, 16 VA. J. INT'L L. 310, 321 (1976).

108. *Id.*

109. See Allen, *Liberalised Investment Laws in Spain*, 119 SOLICITERS' J. 855 (1975).

110. Torem & Craig, *Developments in the Control of Foreign Investments in France*, 70 MICH. L. REV. 285 (1971).

111. While not prohibiting such investment, the French government remains sensitive to foreign acquisitions of existing firms in technologically advanced sectors and acquisitions which permit an entire industry to fall under foreign control. *Id.* at 311-15.

112. King, *supra* note 1, at 29.

countries, Japan, until recently, has had a very complex formula for screening foreign investment. Japan's basic attitude had been that foreign investors attempt to dominate Japanese markets and should be permitted to enter only under strict surveillance.¹¹³

During the early 1960's, Japan began negotiations leading to its entry into the Organization for Economic Cooperation and Development¹¹⁴ [hereinafter referred to as OECD]. Within that framework, Japan was to assume at least the moral obligation to pursue efforts to "maintain and extend the liberalization of capital movements."¹¹⁵ A number of factors, including the Japanese entrance into American markets, the 1953 Treaty of Friendship, Commerce, and Navigation between the United States and Japan,¹¹⁶ and pressure by OECD, resulted in the relaxation of foreign investment restrictions in Japan between 1967 and 1971.¹¹⁷ Nevertheless, "[l]iberalization has been accompanied at every instance by countermeasures designed to limit the ability of foreign investors to make serious inroads into the control of Japanese Industry."¹¹⁸

In May 1973, Japan introduced even more liberal rules regarding foreign investment. The new rules give foreign investors automatic approval to take 100% equity in new ventures established in most industries.¹¹⁹ Foreign investment is prohibited in

113. Pearl, *Liberalization of Capital in Japan—Part I*, 13 HARV. INT'L L.J. 59, 59 (1972), citing G. ALLEN, JAPAN'S PLACE IN PACIFIC TRADE STRATEGY 27, 27 (1968).

114. Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891.

115. *Id.*, art. 2(d).

116. Treaty on Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

117. Four rounds of liberalization were announced by the Japanese Cabinet. The first was announced in June 1967, the second in March 1969, the third in September 1970 and the fourth in August 1971. The basic formula

established three categories of commercial activity or business lines. In the first two categories, applications for foreign investment acquisitions of up to one hundred percent and up to fifty percent ownership, respectively, would be "automatically" validated if a number of stipulated requirements were met. These requirements varied depending upon the category. The third list or category consisted of those business lines in which foreign investment applications would be reviewed on a case by case basis. [Under the capital liberalization program,] for the first time, foreign investors were given prior notice of those businesses in which proposed foreign investments meeting stipulated criteria would receive government approval.

Hartman, *Japanese Foreign Investment Regulation: Semantics and Reality*, 18 N.Y.L.F. 355, 363 (1973).

118. Pearl, *Liberalization of Capital in Japan—Part I*, 13 HARV. INT'L L.J. 59, 60 (1972).

119. 1974 Senate Hearings, *supra* note 3, at 95.

the nuclear energy, power and light, gas supply, aircraft manufacturing, and armaments and explosives industries; it is limited to a maximum of 50% in mining and in retail chain store operations involving more than eleven stores.¹²⁰ In primary activities related to agriculture, forestry and fisheries, petroleum refining and marketing, and leather products manufacturing, foreign investment continues to be subject to case-by-case approval.¹²¹

The 1973 measures also changed the rules for acquiring equity in an existing Japanese business. In the past, a single foreign investor who wished to participate in the management of a Japanese firm could not receive automatic approval for an investment exceeding 10% ownership. Moreover, total equity held by all foreigners sharing in management control through purchase of stock was limited to 25%. These limits now apply only to the five industries mentioned above as exceptions to the 100% ownership requirements. In certain specified industries, such as banking and public utilities, the acceptable percentage is reduced to 15% of the total outstanding shares. No other industries are restricted, providing the stock acquisition does not constitute a takeover attempt against management's wishes.¹²²

On its face, the May 1973 liberalization appears to open the door to foreign investors, who should enjoy roughly the same freedom to operate in Japan as they enjoy in European countries. Nevertheless, observers are unsure whether the automatic approval process will proceed smoothly,¹²³ particularly since the system still requires that foreign investors have their proposals validated by the relevant ministers, which may result in continued delays.¹²⁴ "Although the Japanese government has widely pro-

120. 1974 House Hearings, *supra* note 3, at 448.

121. 1974 Senate Hearings, *supra* note 3, at 95. One exception occurs in the area of processed cheese manufacturing, which is open to 100% foreign equity ownership, provided domestic cheese accounts for more than one-third of the raw materials used. 1974 House Hearings, *supra* note 3, at 448.

122. 1974 House Hearings, *supra* note 3, at 450. Foreign investors may acquire stock of an existing firm only upon adoption of an affirmative resolution by the board of directors. This was deemed necessary to prevent forcible foreign takeovers of Japanese firms. Note, *The Fifth Liberalization of Capital Movements Into Japan*, 6 CASE W. RES. J. INT'L L. 279, 285-87 (1974).

123. "Despite four rounds of capital liberalization . . . the restrictive policy of the government concerning foreign investment still stands." Vaughan, *Introduction to Joint Venturing in Japan*, 6 CASE W. RES. J. INT'L L. 178, 178 (1974).

124. Restrictive criteria still must be met if a proposed equity acquisition is to qualify for "automatic" approval. They are as follows: the proposed equity acquisition must pertain to a newly established enterprise and not to an existing enterprise; the acquisition

claimed that true liberalization of capital has arrived in Japan, it is evident from the analysis of capital liberalization that the government continues to maintain a conscious policy of limiting inward foreign direct investment, especially as to working control of enterprises within Japan."¹²⁵ Thus, although Japan's policy has been cited as a countertrend to the imposition of ever-increasing restrictions by many other developed countries, there is evidence to support the contention that the effect of this liberalization might not be as far-reaching as these new policies facially purport to be.

B. Chile

As previously discussed, a countertrend to the restrictive attitudes toward foreign investment exists in many developed countries. The recent withdrawal of Chile from the Andean Code¹²⁶ appears to lend support to the belief that such a countertrend now exists in developing nations.

Chile expressed its dissatisfaction with the Andean Code in August 1976, when it declined to ratify a modification of the Code which had been proposed by the other members. The Chilean Ambassador to the United States stated that Chile views the Code as being "detrimental to the inflow of badly needed foreign capital. It has severely diminished the region's magnetism for the foreign investor because it imposes limits and ceilings which do not exist on other continents."¹²⁷

Chile's unsuccessful implementation of the Code can only be understood by tracing the political and economic unrest in the State.¹²⁸ The Allende government increased the nation's foreign

may not have a detrimental effect on Japanese interests; contributions by the Japanese shareholders, or property agreed to be transferred from an existing company after establishment of the new company, will be limited to immovable properties; the new enterprise may not acquire from an existing company or business an assignment of property to be continually used for business, nor may it merge with an existing company immediately after its establishment; at least fifty percent of the shareholders must be Japanese engaged in the same line of business, one of whom must hold at least one-third of the total outstanding shares of the new company; the ratio of the Japanese elected as directors must equal or exceed the shareholding ratio of the non-Japanese shareholders. Hildebrand, *Establishing a Joint Venture Company in Japan: Legal Considerations*, 6 CASE W. RES. J. INT'L L. 199, 213 (1974).

125. Pearl, *supra* note 118, at 87.

126. See note 67 *supra*.

127. Address by Manuel Trucco, Chilean Ambassador to the United States, at Center for Strategic and International Studies (Sept. 13, 1976), at 14 (on file with author).

128. See Abbott, *Bargaining Power and Strategy in the Foreign Investment Process*:

indebtedness at a rate never before equaled, while savings and investment rates reached unparalleled lows. Most public funds available during the Allende regime were utilized for massive acquisitions, such as the nationalization of the copper mines. Government expenditures caused shortages in all areas of the Chilean economy and resulted in a deficit equal to fifty percent of the level of government spending. In July and August of 1973, Chile's international reserves were valued at minus \$600 million.¹²⁹

Clearly, Chile's outlook has radically changed with the overthrow of the Allende government. Chile now feels it must encourage investment of international capital into its markets in order to reverse the economic damage done in recent years. In a State bulletin, Chile declared its current goals to be: "develop[ing] external markets in order to increase exports; . . . open[ing] up to imports from the exterior; . . . substantially reducing tariffs; . . . [and] creating attractive conditions for investors."¹³⁰ The main thrust of Chile's new policy is felt to be thwarted by the strictness of the Andean Code, which Chile believes has discouraged foreign investors.¹³¹

As international economic pressures resulted in an apparent lessening of restrictions on foreign investment by Japan, so have economic pressures, due to political instabilities, resulted in the rejection by Chile of the Andean Code. Thus, the importance of the countertrend should not be overemphasized since it has, in certain cases, arisen in unique factual situations.

IV. ANALYSIS

Foreign countries have implemented several types of legislation which affect foreign investment. Clear patterns of national and regional response emerge with regard to different aspects of foreign investment.

Most countries have some form of registration or licensing system for foreign investment and the worldwide trend appears to be toward increasing such restrictions. There is, however, much diversity in the size of these systems, and in the intensity with which they are implemented. Of importance in determining

A Current Andean Code Analysis, 3 SYRACUSE J. INT'L L. & COMM. 319, 356-57 (1975).

129. Address by Ambassador Trucco, *supra* note 127, at 9-11.

130. Chile Economic News, May 1976, at 7.

131. Address by Ambassador Trucco, *supra* note 127.

the rigor of a country's screening mechanism is the nature of the national policy goals it pursues.

In developed countries, screening generally gathers the desired information and provides a means to supervise cash inflows and outflows and, when necessary, to constrain such flows for balance of payment purposes.¹³² The screening process is often used to limit foreign penetration of the domestic economy in order to promote national economic sovereignty. Generally, it is the developing countries which are most notable in exercising this type of economic nationalism, but to some extent more developed countries such as Australia, Canada, and Japan have reacted in a comparable, yet less intensive, manner.

A number of the developing countries believe that the level of foreign investment in their economies poses such a serious threat to their national economic autonomy as to merit more rigorous and extensive action. In these countries, in addition to the screening and regulation devices, prohibitions and restrictions are placed upon foreign investment in specific economic sectors,¹³³ although many of the most developed countries avoid such constraints.

In addition to laws which close or restrict entry by foreign investors to some sectors of their domestic economies, host countries have attempted to regulate the impact of foreign investment on their systems through rules which regulate the operations of foreign firms and prohibit certain business practices which the host country perceives to be undesirable.¹³⁴ Two main types of constraints are the control of technology transfers and the control of acquisitions of domestic enterprises.

Regulation of technology has two aspects. Some countries wish to make companies increase the amount of research and development work done within their borders rather than at head-

132. In some countries, such as the Netherlands, screening is essentially a formality used to gather data on levels of foreign activity in the domestic economy. See *1974 House Hearings*, *supra* note 3, at 458. In other countries such as Canada, Japan, and the Andean Code countries, the screening process is a more rigorous instrument for controlling and regulating types and levels of foreign penetration of the local economy.

133. The Andean Code, for example, prohibits foreign investment in public utilities, transportation, communication, finance, insurance, advertising, marketing, and publishing. Andean Code, *supra* note 24, arts. 42, 43. In many less developed countries, the mineral industry is considered fundamentally important to economic development, and foreign investment is increasingly prohibited and divestiture required in this industry. Landau, *supra* note 60, at 191.

134. *1974 House Hearings*, *supra* note 3, at 393.

quarters offices, in order to strengthen the host country's technical capacity.¹³⁵ Others wish to regulate the conditions under which they acquire access to foreign technology, in order to improve the terms of access and reduce perceived social and economic costs associated with the importation of technologies from foreign sources.¹³⁶

In general, host countries find foreign takeovers of domestic firms distasteful and provide for controls on foreign acquisition of domestic firms. While it is often true that the takeover of an older and less efficient firm by a more dynamic or more soundly financed foreign firm may yield significant benefits for a host country, the latter often prefers the creation of a new domestic operation. In a sense, however, regulation of foreign takeovers and acquisitions may also result as a response to changed market conditions and an effort at antitrust regulation of conditions which have been altered by the activity of the foreign investor.

Such a response has taken place in the European Common Market due to changes taking place in the Western European economy. In recent years, the Commission of the EEC has moved to tighten enforcement of its rules on mergers and market dominance.¹³⁷ In the *Continental Can* decision, the Commission ruled and the European Court of Justice agreed that a merger could lead to a prohibited abuse of dominant position in a market. This ruling will undoubtedly inhibit mergers between powerful foreign-owned enterprises; the uncertainty concerning what constitutes "dominant position" may deter potential foreign mergers with existing European firms.¹³⁸

CONCLUSION

Recent developments in the United Nations graphically

135. For example, the Canadian government conducts an official program to encourage the expansion of indigenous research and development.

136. See, e.g., Law No. 5772, Code of Industrial Property, [1971] *Coleção* (Brazil); Law on Registration of Contracts and Agreements Regarding the Transfer of Technology (Mexico), translated in 12 INT'L LEGAL MATS. 421 (1973); Law Establishing a National Register of License and Know-How Agreements, [1971] A Anuario (Argentina).

137. See note 52 *supra*.

138. In the United Kingdom and the Federal Republic of Germany, national laws also constrain mergers between large and dominant enterprises. Both countries provide for screening by their monopoly commissions or cartel authority of such acquisitions. The Germans prohibit all but exceptional mergers and acquisitions when the parties constitute one-third of the market or when the industry is highly oligopolistic. 1974 *House Hearings*, *supra* note 3, at 397.

demonstrate that the traditional belief that the free flow of capital is the means by which the operating efficiency of the world economy may be maximized, is being seriously scrutinized on a global, as well as regional, basis. While it is generally agreed that foreign investment which introduces new capital and technology into a host country is an important means of increasing national living standards, a definite trend exists in developed as well as developing countries to impose some type of restriction upon incoming investment.

Host countries perceive the dangers of this investment in several different forms which can be reduced to a common denominator: a challenge to national sovereignty. The concept of sovereignty includes the ability of the host country to shape its policy objectives—economic, political, and social. Direct investment by foreigners is seen as a challenge to this sovereignty by potentially circumventing or subverting national policies with respect to issues such as employment, prices, regional development, market competition, research and development, and foreign trade.

The trend toward a nationalistic outlook has been implemented in different countries in various ways. The degree to which this outlook surfaces in a country's foreign investment policy is directly correlated with the perceived threat of such investment to its national autonomy and its ability to control economic forces vital to national development and power.

Howard B. Berke