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Foreign Investment Laws in Developing Countries

Effective Industrial Policy?

Jane E. Cross*

In devising and implementing industrial policies, less developed countries (LDCs) often rely on foreign investors to provide the necessary financing and technology.[1] The challenge LDCs face is to devise a regulatory scheme which actually promotes what domestic policy makers believe to be appropriate industrialization. An open and unrestricted invitation of foreign investment, while increasing the amount of foreign capital in an economy, may lead to the development of only non-industrial sectors or some other form of unbalanced development.[2] Similarly, excessive regulation risks discouraging altogether the investment of foreign capital and technology needed to execute developing countries' industrial projects. Consequently, developing countries strive to control, without unnecessarily discouraging, foreign investment through laws that ultimately promote industrialization in targeted sectors of the economy. LDCs strike this balance in economic development policies through foreign investment laws that both attract and restrict foreign capital.[3]

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1. G. Reuber, Private Foreign Investment in Development 239–40 (1973); *cf.* Akinsanya, *Host Government's Response to Foreign Economic Control: The Experience of Selected African Countries*, 30 Int'l & Comp. L.Q. 769, 770 (1981) ("In an underdeveloped country, the function of investments is to push those factors that would lead to economic progress."); Soberanis, *The Changing Legal Climate for Multinational Investment in Developing Countries*, 10 Law. Am. 365, 367 (1978) (identifying Mexico's foreign investment law as an example of the trend in LDCs toward controlling the activities of multinationals in a way that paroles national objectives).

2. *See* G. Reuber, *supra* note 1, at 20–21; *cf.* Kalsi, *Encouragement of Private Foreign Investment in the Developing Country: Provisions in the Laws of Kenya*, 6 Int'l Law. 576, 578 (1972) (developing countries are suspicious of foreign investment); Note, *Host Countries' Attitude Toward Foreign Investment*, 3 Brooklyn J. Int'l L. 243 (1977) (discussing the need to control or limit foreign investment).

3. *See* G. Reuber, *supra* note 1, at 248–50. According to Reuber:

> In addition to general economic policies . . . governments in most LDCs have also adopted a wide range of policies relating specifically to private foreign investment: some designed to attract such investment; and some designed to regulate it. In many cases these policies have

The regulatory schemes embodied in foreign investment laws of developing countries such as Argentina, Mexico, and Nigeria reveal a current tendency to relax restrictions on foreign investment in a paramount effort to promote industrialization. In the early 1970s, these three countries adopted restrictive foreign investment laws designed to monitor and regulate foreign investment. As part of their efforts to promote industrial growth, however, each has since liberalized the restrictions of its investment law to permit more foreign capital, especially in areas where domestic capital is inadequate or unavailable.

After repealing a highly restrictive foreign investment law, Argentina enacted a relatively liberal law, which imposes only procedural constraints on foreign investors. Both Mexico and Nigeria, on the other hand, have retained their restrictive foreign investment laws, which limit foreign participation according to the type of investment involved. The Mexican Government, however, now permits the administrative modification of general rules and grants exemptions from its restrictions on a case-by-case basis. While Nigeria's law does not give the government express power to authorize exemptions, the Nigerian Government has been able to modify it slightly and consequently permit more foreign investment by reclassifying enterprises. More importantly, foreign investors often violate Nigeria's law without sanction, thereby effectively relaxing the law's restrictions.

Each of these three countries has tried to liberalize its foreign investment laws while retaining some measure of control over investment actually undertaken. By balancing the two goals of liberalizing restrictions on and mantaining control over foreign investment, these three developing countries seek to attract the foreign capital necessary for industrialization.

Rather than extensively analyzing the various laws of Argentina, Mexico, and Nigeria that are specifically designed to encourage foreign investment, this note endeavors to explain how the laws of these countries that have as the primary function the monitoring and restricting of foreign investment activity are able to refrain from severely discouraging the foreign investment needed to promote industrialization. The tendency of LDCs to liberalize their restrictive foreign investment laws over the last few years demonstrates the growing importance of minimizing the adverse impact of legal constraints on foreign capital investment.

> been mutually offsetting. . . . Much of the legislation that now exists on local equity participation . . . and the like, probably does more harm than good. . . .
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> Most LDCs wishing to attract foreign investment in many capital intensive modern industries and to increase their export sales of products produced in such industries . . . need to think in terms of . . . foreign markets. . . . [I]t may also be necessary to accept some of the characteristics typical of such investments—such as relatively high levels of foreign ownership, less local participation and integration and a relatively weaker bargaining position vis-a-vis the foreign investor.

Id.

I. ARGENTINA

The recent history and current form of the Argentine Foreign Investment Act[4] (the Act) exemplify the trend in developing countries toward adopting less rigorous restrictions on foreign investment. In the early seventies, the Argentine Government, then suffused with the nationalistic spirit of the Andean Foreign Investment Code,[5] adopted the inflexible and restrictive Law No. 20.557.[6] The rigid requirements and prohibitions of that law unintentionally induced a drastic decline in the level of new foreign investment in Argentina, thus exacerbating existing economic difficulties.[7]

As part of a thorough revision of economic policies in 1976, Argentina repealed Law No. 20.557[8] and adopted Law No. 21.382[9] which, as amended in 1980,[10] is the current Foreign Investment Act. The Act ended Argentina's experiment with nationalistic policies and reflects its willingness to encourage foreign

4. Ley 21.382, 36-C Anales de Legislacion Argentina [Anales] 2071 (1976), *as amended by* Ley 22.208, 40-B Anales 1024 (1980) (repealing Ley 20.557, 33-D Anales 3670 (1973); Ley 20.575, 34-A Anales 16 (1974); Ley 21.037, 35-C Anales 2717 (1975)) (Law of Foreign Investment).

5. Andean Foreign Investment Code, *translated in* 16 I.L.M. 138 (1977) (codified text). The Code was originally adopted in 1970. It was amended in 1971, 1973, and 1976. *See* 16 I.L.M. 138.

6. Ley 20.557, 33-D Anales 3670 (1973), *repealed by* Ley 21.382, *supra* note 4 (Law of Investment of Foreign Capital), *translated in* 12 I.L.M. 1491 (1973). The Argentine Government adopted Ley 20.557 in 1973 to replace the then existing inadequate foreign investment scheme. The Government's intent in passing the law was to control foreign investment to safeguard the economy from adverse effects of foreign capital. To that end, the law promoted greater use of Argentine manpower, technology, services, goods, and institutions, and encouraged those economic activities that contributed to Argentina's industrial development. To the extent that Ley 20.557 safeguards the economy from the dominance of foreign capital, it incorporates the fundamental principles of the Andean Code. *See generally* J. BRUZZON, RADICACIONES DE CAPITALES EXTRANJERO. Ley 20.557 (1974); R. SANGUINETTI, A STATEMENT OF THE LAWS OF ARGENTINA IN MATTERS AFFECTING BUSINESS 40–42 (4th ed. 1975) (in Spanish) (translated, edited, and published by the General Secretariet, Organization of American States).

7. As a result of the implementation of Ley 20.557, "the flow of new foreign investments was no more than a trickle as international confidence . . . dwindled to zero." COORDINATION AND ECONOMIC PLANNING SECRETARIAT, MINISTRY OF ECONOMY, ECONOMIC INFORMATION ON ARGENTINA No.101, at 44 (1979) [hereinafter cited as ECONOMIC INFORMATION NO. 101]. This situation helped put Argentina near bankruptcy due to the very real danger of default on its foreign payments in March 1976. *Id.* at 44–46.

8. As a result of the decline in foreign investment, Ley 20.557 became a target of reform for the Argentine Government. The change in policy was also attributable to the overthrow of the Peron Government. *See* Studwell & Cabanellas, *The New Argentine Foreign Investment Law: An Analysis and Commentary*, 1 HASTINGS INT'L & COMP. L. REV. 37, 40 (1977); *see also* J. BRUZZON, *supra* note 6, at 12.

9. *See supra* note 4.

10. Ley 22.208, 40-B Anales 1024 (1980) (Foreign Investment). Ley 22.208 modified Ley 21.382 by setting up a simpler foreign investment procedure and by eliminating provisions which could reduce the inflow of foreign capital. Dahl, *Argentina's System of Foreign Investments*, 6 FORDHAM

investment.[11] The Act does not, however, eliminate all regulation of foreign investment. Rather, its rules embody Argentina's new policy of cautious encouragement of foreign investment to stimulate industrial development.[12] Thus, while maintaining some government regulation, the Act permits the foreign investment needed to supply adequate capital for Argentina's industrial development.[13]

The Act's procedures subject foreign investment activities[14] to varying levels of government scrutiny depending on the activity's potential political and economic impact. Foreign participation in activities deemed to be of substantial economic and political importance to Argentina requires prior government approval, whereas less significant investments need no permission. By subjecting only certain types of investment to government approval, the Argentine Government attempts to retain effective regulation of foreign capital while still avoiding excessive controls.[15]

Most of the activities once considered politically or economically sensitive and consequently closed to foreign investment under the previous Law No. 20.557[16] now require approval at the executive level.[17] For example, instead of prohibiting

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INT'L L.J. 33, 47 n.66 (1982); *see also* COORDINATION AND ECONOMIC PLANNING SECRETARIAT, MINISTRY OF THE ECONOMY, ECONOMIC INFORMATION ARGENTINA No.108, at 14 (1979).

11. The government's revision of the foreign investment law was an integral part of a national legislative framework designed to reduce restrictions capable of stagnating industry and discouraging investment. ECONOMIC INFORMATION No. 101, *supra* note 7, at 45–46.

12. *See* Studwell & Cabanellas, *supra* note 8, at 40.

13. The Argentine Government seeks to supervise and guide industrial development for the country so as to reach its full potential based on the expansion of the already developed industrial sector and aided by an increase in broad based foreign investments. ECONOMIC INFORMATION No. 101, *supra* note 7, at 46–47.

14. The Act describes foreign investment as any investment belonging to a foreigner that involves industrial, mining, agricultural, financial, commercial, or service activities, or other activities related to the production or exchange of services or goods, or the acquisitions of shares in an existing local company. Ley 21.382, *supra* note 4, at art. 2. It provides that these foreign investments may be made freely, and their accessories, profits or capital in the national currency of the foreign investor, capitalization of foreign credits in freely convertible currency, intangible assets, or other types of contributions accepted by the Authority of Application, or contemplated under special or promotional programs. *Id.* at art. 3. This definition does not include loans. Decreto 103, art. 4, 41-A Anales 261 (1981) [hereinafter cited as Decreto 103/81].

15. Dahl, *supra* note 10, at 60.

16. Article 6 of Ley 20.557 prohibited foreign investment that would limit export possibilities, interfere with the jurisdiction of Argentina's courts, result in the foreign acquisition of ownership and control in a local company of Argentine capital engaged in the field of manufacturing, or involve activities related to national defense or certain activities reserved to government entities or Argentine companies. Ley 20.557, *supra* note 6, at art. 6.

17. Executive Power for the purposes of Argentine foreign investment law refers to the person or persons occupying the Executive office which governs Argentina.

foreign participation in defense,[18] communications,[19] public services,[20] financial entities,[21] and the energy and extractive industries,[22] the Foreign Investment Act permits such investments after the Executive Power has granted approval.[23] Foreign acquisitions of shares, or of businesses, and contributions of capital that

18. National security and defense industries encompass investment in naval and aeronautic construction, space research and development, atomic energy, and the production of materials and equipment directly related to the specific activities executed by the armed forces for purposes of national defense. The Minister of Defense determines whether the proposed foreign investment falls within this sector. Decreto 103/81, *supra* note 14, at art. 16.

19. Investment activities in communications are politically sensitive in Argentina because a foreigner controlling such industries could exercise a powerful influence on public opinion. J. BRUZZON, *supra* note 6, at 70.

20. Public services have traditionally been state controlled. The Argentine Legislature decided to continue that practice by delegating such investments to executive approval. *Id.* at 67.

21. The definition of financial entity is determined by the law concerning financial entities. Decreto 103/81, *supra* note 14, at art. 19.

22. Energy and extractive industries were not closed to foreign investment under Ley 20.557. J. BRUZZON, *supra* note 6, at 71. Energy and extractive industries refer to the exploration and exploitation of petroleum, natural gas and coal. The category also includes the generation, transformation, and distribution of electricity as a public service designed to meet the general needs of the users in a given community as authorized by the government. Decreto 103/81, *supra* note 14, at art. 18.

23. *See* Ley 21.382, *supra* note 4, at art. 4, *as amended by* Ley 22.208, *supra* note 10, at art. 2. In addition to the investments described in the text, under the new scheme the Executive Power must approve the following investments which were not prohibited under Ley 20.557: foreign investments worth over $20 million US, *id.* at art. 4(4); investments made by a foreign state or legal entity of public law, *id.* at art. 4(5); and investments requesting special or promotional benefits which must be granted by the Executive Power as a prerequisite of the proposed investment. *Id.* at art. 4(6). The $20 million limit of article 4(4) is calculated for each receiving company, regarding foreign investors. The ceiling is calculated based on all capital investments, except reinvestments of profits and new investments in freely convertible currency, made in the receiving company during the year after it reports its foreign investment activities to the Subsecretary of the Economy. Thereafter, the amount of investment is computed every three years. The investment requires subsequent Executive approval when the previously approved amount increases by more than $5 million within three years. Decreto 103/81, *supra* note 14, at art. 27.

When a promotional or beneficial program is a condition of the investment, approval of the program is granted along with the approval of the investment. *Id.* at art. 26. For the sake of consistency, Executive approval is necessary when the foreign investment requests special and promotional benefits which the Executive Power has the authority to grant. Executive intervention in these areas facilitates the approval of and expedites the execution of projects which are considered beneficial to the country. COORDINATION AND ECONOMIC PLANNING SECRETARIAT, MINISTRY OF ECONOMY, ECONOMIC INFORMATION ON ARGENTINA No. 64, at 4 (1976) (reprinting official comments and Ley 21.382) [hereinafter cited as OFFICIAL COMMENTS]; *see also* Dahl, *supra* note 10, at 48. In addition, Executive approval is necessary for investments falling under Article 4(5) because the involvement of a foreign sovereign implicates the conduct of Argentina's foreign relations which is within the Executive's competence. OFFICIAL COMMENTS, *supra*, at 4. Approvals of proposed foreign investment in these areas are granted by the Executive Power when, in its judgment, the investment will make a positive contribution to the economic development of Argentina. *See* Ley 21.382, *supra* note 4, at art. 8.

would denationalize Argentine companies were also once entirely prohibited.[24] Under the Act, these investments are subject to Executive scrutiny only when the net worth or value of the denationalized company exceeds U.S. $10 million.[25]

Foreign investments likely to have only a moderate impact on the Argentine economy require the approval of the Act's implementing authority, Subsecretaría de Economía (the Authority),[26] whereas the remaining investments require no government approval.[27] The Authority must approve investments which, based on their total dollar amount or their denationalizing potential, are too important to leave unregulated but are too numerous for the Executive to monitor. For example, all acquisitions of shares or businesses owned by Argentine investors, for-

24. Denationalization of a local company of Argentine capital occurs when investors, domiciled abroad, directly or indirectly acquire majority ownership or control of a company previously majority-owned or controlled, directly or indirectly, by investors domiciled in Argentina. A company which is majority-owned or controlled by foreigners is called a "local company of foreign capital." Ley 21.382, *supra* note 4, at art. 2(3). Similarly, a corporation which is majority-owned or controlled by domestic investors is a "local company of national capital." *Id.* at art. 2(4). Majority ownership occurs under Argentine law when individuals or legal entities directly or indirectly own shares or equity participations representing one half or more of the total votes corresponding to the outstanding shares or existing participations. Decreto 103/81, *supra* note 14, at art. 2. In addition, if the votes of foreign investors present at meetings of shareholders or partners outnumber the votes belonging to the other shareholders or partners for a period of three years or during the majority of the meetings for a period of five years, the implementing authority, *see infra* note 26, after careful evaluation, may consider that company a local company of foreign capital. A transfer of ownership or control from Argentine to foreign investors may also occur when foreign investors acquire majority ownership through the purchase of existing shares of the corporation or through capital contributions to the company. *See* Ley 21.382, *supra* note 4, at art. 4(2), 4(3), *as amended by* Ley 22.208, *supra* note 10, at art. 2.

25. The net worth of a business is based on the net worth stated in the last annual balance sheet prior to the presentation of the proposed investment. The stated net worth is converted into U.S. dollars based on the exchange rate applicable on the closing date of the balance sheet used. Decreto 103/81, *supra* note 14, at art. 20. The value of an acquired business is the price quoted on the documents of the acquisitions, computed on the date of the acquisition. The value in U.S. dollars will be computed based on the exchange rate applicable on the date of documentation. *Id.* at art. 21.

26. Decreto 313/82 names the Subsecretary of the Economy of the Ministry of the Economy as the Implementing Authority for Ley 21.382. Decreto 313, art. 1, [1982] El Derecho Legislacion Argentina 306–07. The implementing authority (the Authority) evaluates all foreign investment requiring government approval. In those instances where the Executive Power must ultimately approve the investment, the Authority reports its evaluation to the Executive. The Authority bases its evaluation of a proposed foreign investment on criteria listed in the implementing regulation, Decreto 103/81. The listed criteria are similar to the requirements imposed on all new investments by the Authority under the now repealed Ley 20.557. The Authority may now exercise greater discretion in applying these criteria since it may recommend a proposed investment when that investment specifically satisfies one or more of the listed criteria or generally will benefit Argentina's economic development. Previously, under Ley 20.557, the Authority could approve a proposed investment only if it met a number of listed criteria. Ley 20.557, *supra* note 6, at art. 5.

27. For a discussion of investments not requiring government approval, see *infra* notes 31–40 and accompanying text.

eign investments valued between U.S. $5 and $20 million,[28] and capital contributions which denationalize companies worth less than $10 million[29] are subject to the Authority's approval. In addition, all foreign investments not requiring Executive approval, not automatically registered under Article 5, and not requiring approval under Article 4 must obtain the Authority's consent.[30]

As provided in Article 5 of the Act, no prior consent is necessary for reinvestment of profits[31] or for investment in freely convertible currency[32] in companies with registered foreign capital.[33] Capital contributions of less than U.S. $5 million made in freely convertible currency to existing enterprises without foreign capital also do not require government approval.[34] Foreign investment meeting the conditions of Article 5 is automatically registered and, therefore, not subject to government scrutiny,[35] unless it denationalizes a local company of Argentine capital.[36] By dropping the prior approval required for new foreign investments under Law No. 20.557,[37] the Argentine Government facilitated the

28. *See supra* note 25 for the method of computing value.

29. *See supra* note 25 for the method of calculating net worth.

30. *See* Ley 21.382, *supra* note 4, at art. 6, *as amended by* Ley 22.208, *supra* note 10, at art. 4.

31. Only those reinvestments of profit indicated on the closing balance sheet for each fiscal year qualify. Decreto 103/81, *supra* note 14, at art. 7. A reinvestment of profits is the retention of profits in a company to increase its capital. When a company decides to invest the profits made in one branch in another branch, it must credit the profit to be invested to a special account and inform the Registry of Foreign Investment. *Id.* at art. 30. Reinvestments of profit in a company with registered capital are permitted even when they are made in those sectors subject to Executive approval. Ley 21.382, *supra* note 4, at art. 4(1), *as amended by* Ley 22.208, *supra* note 10, at art. 2.

32. A foreign investor may invest in the currency of his country of origin, or with the approval of the Authority on the advice of the Central Bank of the Republic of Argentina, the currency of another country. Once an investor chooses to invest in a particular currency, he cannot change without the consent of the Authority as advised by the Central Bank. Decreto 103/81, *supra* note 14, at art. 62. In any one year, investments in freely convertible foreign currency must not exceed 30 percent of the registered foreign capital in the receiving company. Ley 21.382, *supra* note 4, at art. 5, *as amended by* Ley 22.208, *supra* note 10, at art. 3.

33. Registered foreign capital refers to capital registered after receiving the approval of the Executive power or of the Authority. Both reinvestment of profit and new investment in freely convertible currency must be made in activities for which the Executive's or Authority's approval was originally received or in activities that the company was engaged when 21.382 went into force. *See* Ley 21.382, *supra* note 4, at art. 5, *as amended by* Ley 22.208, *supra* note 10, at art. 3.

34. Ley 21.382, *supra* note 4, at art. 5, *as amended by* Ley 22.208, *supra* note 10, at art 3.

35. If, however, the foreign investor is a foreign state or public entity, or requests special or promotional benefits, Executive approval is required under Article 4. M. SLAME, INVERSIONES EXTRANJERAS: REGIMEN LEGAL Y ANTECEDENTES JURIDICOS Y ECONOMICO 64 (1981). Automatic approval does not eliminate the requirement of registration of certain investments as mandated by other laws. Studwell & Cabanellas, *supra* note 8, at 54.

36. Ley 21.382, *supra* note 4, at art. 5, *as amended by* Ley 22.208, *supra* note 10, at art. 3; *see supra* note 24.

37. *See* Ley 20.557, *supra* note 6, at art. 4.

limited expansion of existing businesses through the investment of foreign capital.[38]

Finally, Article 6 provides that government approval is not necessary when a foreigner purchases limited amounts of local company stock listed on the Argentine stock exchange.[39] A foreign investor, however, cannot register these purchases of stock, and consequently loses the right to remit profits and repatriate capital during periods of exchange control.[40]

II. MEXICO

In contrast to the procedural constraints on foreign investment in Argentina, foreign investment law in Mexico sets forth quantitative restrictions requiring majority Mexican ownership in joint ventures with foreign investors. These restrictions are subject to certain exemptions which the Mexican Government generally grants in industries that have been unable to obtain the necessary financing or technology from local sources. The government restricts foreign investment only in industries in which local firms can compete effectively without the assistance of foreign capital.[41]

To control foreign capital, the Law on the Promotion of Mexican Investment and the Regulation of Foreign Investment (F.I.L.)[42] limits investment in certain industries to the government or Mexican nationals and restricts foreign ownership in other industries to 49 percent.[43] Enacted in 1973, the F.I.L. codified existing laws, decrees, administrative rulings, policies, and unwritten procedures executed primarily by the Ministry of Foreign Affairs and the Ministry of Industry and Commerce.[44] The F.I.L. represents a departure from Mexico's previous

38. *See* OFFICIAL COMMENTS, *supra* note 23, at 4.

39. The total holding of shares per foreign investor must not exceed $2 million US or two percent of the capital for each receiving company. The total holdings of shares purchased by all foreign investors under Article 7 must not exceed 20 percent of the capital of the receiving company. Ley 21.382, *supra* note 4, at art. 6, *as amended by* Ley 22.208, *supra* note 10, at art. 5.

40. [A]ll foreign investors, whether they have a registered investment or not, may freely repatriate capital and remit profits without limit. However, if the Executive should place overall foreign exchange limitations on these remittances, only the foreign investors will enjoy the right to repatriate capital and remit profits, while the right of the non-registered investor ceases. Bomchil, *The New Foreign Investment Regime in Argentina*, 7 BROOKLYN J. INT'L LAW 27, 35 (1981) (citations omitted) (discussing Articles 12 and 13 of Ley 21.382, as amended).

41. President Echeverria declared that "[f]oreign investment ought not to displace Mexican capital, but rather ought to complement it, associating with it when this is useful." Hollman, *Mexican Restrictions on Foreign Investments and Technology*, PRAC. LAW., Feb. 1974, at 55, 56; *see generally* Wionczek, *Mexican Nationalism, Foreign Private Investment, and Problems of Technology Transfer*, in PRIVATE FOREIGN INVESTMENT AND THE DEVELOPING WORLD 191 (P. Ady ed. 1971).

42. Law on the Promotion of Mexican Investment and the Regulation of Foreign Investment, *translated in* 12 I.L.M. 643 (1973) [hereinafter cited as F.I.L.].

43. *Id.* at art. 5, 12 I.L.M. at 644.

44. Hyde & Ramirez de la Corte, *Mexico's New Transfer of Technology and Foreign Investment Laws—To What Extent Have the Rules Changed?*, 10 INT'L LAW. 231, 238–39 (1976).

foreign investment practices in that it limits foreigners' ability to control either the management or the equity of Mexican businesses.[45] The same law establishes the National Commission on Foreign Investment (the Commission).[46] The Commission has the authority to grant exemptions from the foreign equity participation restriction.[47]

The F.I.L. expressly states the criteria that the Commission is to use in determining whether to grant an exemption.[48] During the past decade, the Commis-

45. F.I.L., *supra* note 42, at art. 5, 12 I.L.M. at 644. Article 5 states that "[t]he participation of foreign investment in the administration of the business may not exceed its participation in the capital." *Id.* Article 4 of the F.I.L. declares that "[t]he following activities are reserved exclusively for the State: a) Petroleum and other hydrocarbons, b) Basic petrochemicals, c) Exploitation of radioactive minerals and the generation of nuclear energy, d) Mining in cases to which the relative law refers, e) Electricity, f) Railroads, g) Telegraphic and wireless communications, and h) Other activities established in specific laws." *Id.* at art. 4, 12 I.L.M. at 644. Article 4 further reserves the following activities for Mexican companies: "a) Radio and television, b) Urban and interurban automotive transportation and federal highways transport, c) Domestic air and maritime transportation, d) Exploitation of forestry resources, e) Gas distribution, and f) Others established in specific laws, or regulations issued by the Federal Executive." *Id.* The restrictions on foreign investment include limiting foreign capital to 34 percent in companies engaging in the exploitation and the use of minerals and to 40 percent for companies engaging in the use of substances subject to ordinary concessions. *Id.* at art. 5, 12 I.L.M. at 644. Likewise, foreign equity in the secondary petrochemical industries is limited to 40 percent. *Id.*

46. The Commission is composed of the President and the secretaries of the Interior, Foreign Affairs, Finance and Public Credit, National Patrimony, Industry and Commerce, and Labor and Social Welfare. *Id.* at art. 11, 12 I.L.M. at 645.

47. *Id.* at art. 12, 12. I.L.M. at 645–46.

48. Article 13 provides:

> In order to determine the convenience of authorizing foreign investment and in order to establish the percentages and conditions by which it shall be ruled, the Commission shall take into consideration the following criteria and characteristics of the investments:
> I. That is [sic] should be complementary to national investment;
> II. That it should not displace national business enterprises that are operating satisfactorily, and that it should not enter fields that are adequately covered by them;
> III. Its positive effects on the balance of payments and, especially, on the increase of Mexican exports;
> IV. Its effects on employment, taking into account job opportunities created and wages payed [sic];
> V. The employment and training of Mexican technicians and management personnel;
> VI. The incorporation of domestic inputs and components in the manufacture of its products;
> VII. The extent to which it finances its operations with resources from abroad;
> VIII. The diversification of sources of investment and the need to foster Latin American regional and subregional integration;
> IX. Its contribution to the development of the relatively less economically developed zones or regions;
> X. That it should not enjoy monopolistic positions in the domestic market;
> XI. The capital structure of the branch of economic activity involved;
> XII. Its supply of technology and its contribution to technological research and development in the country;
> XIII. Its effects on price levels and production quality;

sion granted hundreds of individual exemptions and has adopted 17 general resolutions which relax and clarify the F.I.L.'s ownership requirements.[49] This exercise of the Commission's authority effectively liberalized the foreign equity

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XIV. That it respect the country's social and cultural values;

XV. The importance of the activity in question in the context of the country's economy;

XVI. The extent to which the foreign investor is identified with the country's interests and his involvement with foreign centers of economic decision;

XVII. In general, the extent to which it complies with, and contributes to, the achievement of national development policy objectives.

Id. at art. 13, 12 I.L.M. at 646–47.

49. The general resolutions are reprinted in LEYES Y CODIGOS DE MEXICO, LEGISLACION SOBRE PROPIEDAD INDUSTRIAL, TRANSFERENCIA DE TECHNOLOGIA E INVERSIONES EXTRANJERAS (7th ed. 1982) [hereinafter cited as LEYES]. General Resolution No. 1 provides an exception to the F.I.L for the purpose of establishing "maquiladores" (in-bond plants). In these border factories, foreigners are permitted to acquire up to 100 percent ownership in all manufacturing industries except textiles. LEYES, *supra*, at 407–09. General Resolution No. 2 permits an increase in capital or shares of existing enterprises which maintain the same ratio between the nominal value of Mexican and foreign investment and capital stock existing in that company when the F.I.L. was enacted. LEYES, *supra*, at 409–10.

General Resolution No. 3 permits foreigners to purchase up to five percent of the total of the receiving company. *Id.* at 409. General Resolution No. 4 permits the reelection of foreigners to board of directors so long as their participation on the board does not exceed the amount of foreign ownership. *Id.* at 410–11. Similarly, the resolution provided that their participation does not exceed the amount of foreign ownership. *Id.* at 411. General Resolution No. 6 allows foreign investors to purchase from other foreign investors no more than one percent of a company where foreign investors already own 96 percent of the total capital. *Id.* at 411–12. General Resolution No. 7 permits foreign investors with "*inmigrado*" status to participate in the administration and management of Mexican enterprises provided that these investors are not tied to foreign economic centers of decision-making. *Id.* at 412–13; *see* Hyde & Ramirez de la Corte, *supra* note 44, at 246.

General Resolution No. 8 clarifies the Commission's power to rule on new investment by foreigners who already have investments in Mexico. LEYES, *supra*, at 413–15; *see* Hyde & Ramirez de la Corte, *supra* note 44, at 247. General Resolution No. 9 requires all trusts in which foreigners have a specified interest to complete registration with the National Registry of Foreign Investments. LEYES, *supra*, at 417–18. General Resolution No. 10 sets forth the procedure to be used by individual investors in acquiring stocks on the stock exchange. *Id.* at 420–21. General Resolution No. 11 prohibits foreign investors from acquiring 25 percent or more of the capital of a business through acquisitions in other companies before and during the enactment of the F.I.L. *Id.* at 431–33.

General Resolution No. 12 declares that new establishments which are not authorized under Article 12 and 15 of the F.I.L are null and void and will be closed pursuant to Article 14. *Id.* at 435–36. General Resolution No. 13 facilitates the transmission of shares between foreign investors belonging to the same interest group. *Id.* at 437. General Resolution No. 14 limits the amount of equity a foreign investor may acquire in a given transaction. A foreigner may only receive three percent of the total ownership in each transfer and no more than 30 percent in all transfers to foreigners from Mexican businessmen in the same Mexican property. Similarly, the foreign investor may only acquire five percent equity per transfer and no more than 49 percent equity in all transfers from other foreigners selling Mexican property. *Id.* at 439. General Resolution No. 15 permits foreigners to relocate within the same political subdivision of the Republic of Mexico if the foreign business increases less than 20 percent in physical size, personnel, and value. It also permits the relocation within a zone of relatively low economic development. *Id.* at 440–41. General Resolution No. 16 defines "new fields of restrictions on Mexican businesses.[50] Recently, the Mexican Government encouraged the Commission to further liberalize exemption policies and to admit foreign investment on a more discretionary basis in response to changes in the world and national economy.[51]

In February 1984, the Mexican Government announced plans to provide case-by-case exemptions for foreign investors in some 34 industries.[52] Among the explanations given for the proposed increase in exemptions from the foreign equity participation restrictions is the view, held by some members of the government and the ruling Revolutionary Party, that foreign investment is necessary to revitalize Mexico's faltering industrial sectors.[53]

The Mexican Government encouraged the Commission to further liberalize the granting of exemptions because it realizes that the Commission must have greater discretion if it is to accommodate variations in the international capital markets. Mexico's need and desire to maintain foreign investment adequate for industrialization in the face of downward worldwide economic trends requires continued flexible application of the F.I.L.[54] Thus, the government also announced that it would permit additional foreign investment in existing enterprises if domestic sources of investment were unavailable.[55]

The impact of this announcement should not be overemphasized. The government does not propose to modify the F.I.L to increase the number of exemptions

economic activity and new lines of products" within the meaning of Article 13 of the F.I.L. *Id.* at 443–45. Finally, the last resolution, General Resolution No. 17, prevents the use of an organization or of communications outside Mexico to promote the sale of real estate located inside Mexico. *Id.* at 519–20.

50. *See* Kryzda, *Joint Ventures and Technology Transfers,* 12 CASE W. RES. J. INT'L L. 549, 553–55 (1980); Murphy, *The Echeverrian Wall: Two Perspectives on Foreign Investment and Licensing in Mexico,* 17 TEX. J. INT'L L. 135, 138 (1982).

51. *See* Amor, *La regulacion juridica de las inversiones extranjeras en Mexico,* in ASPECTOS JURIDICOS DE LA PLANEACION EN MEXICO 427, 434–36 (Secretaria de Programacion y Presupuesto pub. 1981).

52. Exemptions are offered "farm machinery, food processsing equipment, textile manufacturing equipment, high-powered motors and generators, large turbines and turbocompressors, telecommunications, computers, pharmaceuticals, synthetic resins and plastics, photographic equipment, advanced biotechnology and motorcycles." Meislin, *Mexico Relaxes the Rules On Foreign Ownership,* N.Y. Times, Feb. 17, 1984, at D7; *see also Little Has Changed In Mexico's Message On Foreign Investment,* Bus. Latin Am., Feb. 29, 1984, at 65, 66 [hereinafter cited as *Little Change*].

53. The Mexican Government considered a fundamental change in the F.I.L. to be politically unacceptable since such a change would generate political tension in the form of opposition from the Revolutionary Party and the trade unions. *Mexico: Investment—"Flexibility" but no change in law,* Latin Am. Weekly Rep., Mar. 2, 1984, at 4 [hereinafter cited as *Investment "Flexibility"*]; Meislin, *supra* note 52, at D11.

54. *Little Change, supra* note 52, at 66. The decision to loosen the application of the F.I.L. is intended to attract foreign capital to those sectors in which Mexico has been unable to attract significant amounts of foreign capital on a minority ownership basis. *Id.; see supra* note 52 and accompanying text.

55. Meislin, *supra* note 52, at D11.

now available to the foreign investor. Nor does the announced policy necessarily indicate a change in the case-by-case application of the current law. Instead, the government has instructed the Commission to exercise greater discretion in interpreting the F.I.L. as it now reads.[56] The government's announcement merely explains the unofficial policy that has been followed for some time.[57] Moreover, the announced policy will have no binding legal effect until the government decides to incorporate it into a general resolution.[58]

III. NIGERIA

Like the Mexican government, the Nigerian Government has recently relaxed its restrictive foreign investment policies in order to promote industrial development. Nigeria's indigenization policy was initially shaped by the Nigerian Enterprises Promotion Decree enacted in 1972.[59] To tighten these controls, the government, in 1977, enacted a second Nigerian Enterprise Promotion Decree (the NEPD).[60] Nevertheless, the government has been unable and, perhaps, unwilling to actively deter the deliberate circumvention of the letter and the spirit of the indigenization policy by foreign investors. To the extent that the Nigerian Government acquiesces in such circumvention, it effectuates a de facto liberalization of the restrictions in its foreign investment law.[61]

By restricting foreign investment in the less technical and less capital intensive businesses, the NEPD attempts to encourage and protect Nigerian participation in those areas of the economy in which Nigerians are most competent, namely, the

56. *See id.*

57. *See Investment "Flexibility," supra* note 53, at 4.

58. *Little Change, supra* note 52, at 65.

59. Nigerian Enterprise Promotion Decree 1972, Decree No. 4, 1972 Annual Volume of the Laws of the Federal Republic of Nigeria [Ann. Laws Nigeria], at A 11 (1973) [hereinafter cited as NEPD 1972]; *see* Megwa, *Foreign Direct Investment Climate in Nigeria: The Changing Law and Development Policies,* 21 COLUM. J. TRANSNAT'L L. 487, 491 (1983).

60. Nigerian Enterprises Promotion Decree 1977, Decree No. 3, 1977 Ann. Laws Nigeria, at A 17 [hereinafter cited as NEPD 1977]. One commentator describes the difference between the 1972 and 1977 laws this way: "The 1977 Decree tightened up what were described as 'loopholes' in the 1972 decree, reclassifying economic activities and reducing the equity share of transnational corporations in most cases." Biersteker, *The Illusion of State Power: Transnational Corporations and the Neutralization of Host Country Legislation,* 17 J. PEACE RESEARCH 207, 213 (1980).

61. Investigations conducted by a Nigerian newspaper "revealed that some top government officials were in the habit of rendering the decree impotent." *Foreigners Criticized for By-passing the Indigenisation Decree,* Tribune, Aug. 29, 1979, at 11, *reprinted in* NIG. BULL. FOREIGN AFF., Aug. 1979, at 128. In addition, "various measures have been devised by alien investors, with the tacit support or connivance of Nigerians or Nigerian officials, to ensure noncompliance with the . . . Indigenisation Decrees." Akinsanya, *The State Strategies Toward Nigerian and Foreign Business* in POLITICAL ECONOMY OF NIGERIA 179 (I. Zartman ed. 1983). For a list of the various means by which foreign investors circumvent the NEPD, *see infra* note 68.

non-industrial sectors of the economy.[62] The NEPD primarily directs foreign investment to those industries in which foreigners are allowed to own and control 40 to 60 percent of the total investment.[63] Industries in which foreign investors

62. One analyst explains:

> While foreign investment was welcome in the specific area of manufacturing, there was also the parallel expression of a resolute firmness to promote effective Nigerian participation in the ownership and management of every industrial enterprise. One of the major objectives of the "new" industrial policy was, therefore, to raise the proportion, on a nation-wide basis, of indigenous ownership of industrial investment for the purpose of maximizing local retention of profits, increasing net industrial contribution to the economy and avoiding unpleasant socio-political consequences likely to arise in the future from foreign-absentee control of the nation's industrial sector.

Akintola-Arikawe, *Nigerian Indigenisation Policy and the Manufacturing Sector (With a Game Frame-work for Evaluation)*, 24 NIG. J. ECON. & SOC. STUD. 61, 64 (1982). Consequently, the foreign investment policy endeavors to enable Nigerian entrepeneurs "to develop their own expertise and management skill, and to ensure active participation of Nigerians in those areas of economic activity that are still under foreign control." Ezeife, *Nigeria*, in INDIGENIZATION OF AFRICAN ECONOMIES 164, 166 (A. Adedeji ed. 1984).

A decline in foreign investment, however, did occur after the enactment of the NEPD 1972. One author concluded:

> Control [of foreign industrial enterprises] under the Indigenisation Decree has . . . resulted in massive foreign capital disinvestment and capital repatriation, creates uncertainty and fear as to future policies and attitudes towards foreign capital, slowed down the rate of industrial growth, and increased the country's dependence on foreign suppliers of advanced technologies.

Usoro, *Nigerian Industrialisation Under "Self-Reliant" Growth Strategy: Some Lessons of History*, 22 NIG. J. ECON. & SOC. STUD. 246, 249 (1980) (citation omitted). Another author explained:

> [T]he unstable nature of the [investment] law for a period of five years [beginning in 1972], which arose from the inordinate and random amendments culminating finally in the 1977 Act. . . . affected the foreign business investor and therefore the economy of the country. . . .
> . . . [S]ince 1978, the country has experienced an exodus of foreign investors.

Tobi, *Nigerian Enterprises Promotion Act*, 15 J. WORLD TRADE L. 543, 553 (1981). The reason for the decline in foreign investment was that the majority of foreign investors complying with the 1977 NEPD did so by divestment. Odife, *The 1977 Budget and the Second Phase of Indigenization: A Note*, 18 NIG. J. ECON. & SOC. STUD. 451, 458 (1976). *But see Foreign Investment in 1977 Up to N1989.9 million*, Bus. Times, June 17, 1980, *reprinted in* NIG. BULL. FOREIGN AFF., June 1980, at 123. According to the Nigerian Enterprises Promotion Board, some 993 alien enterprises were affected by the NEPD 1977. 65 FEDERAL REPUBLIC OF NIGERIA, OFFICIAL GAZETTE 673–705 (May 25, 1978).

63. According to the NEPD 1977, "'ownership' in relation to any enterprise includes any proprietary interest in the enterprise beneficially, and any derivative of that word shall be construed accordingly." NEPD 1977, *supra* note 60, at § 23(1)(c). In addition, section 23(2) provides that "[t]he reference in this Decree to 'equity participation of Nigerian citizens or associations' is a reference to stocks and shares which Nigerian citizens or associations have in such industry which do not bear a fixed interest or dividend." *Id.* at § 23(2). Although case-by-case exemptions are not permitted under the 1977 NEPD, the Commissioner of Industries may, with the prior approval of the Federal Executive Council, a) reclassify enterprises listed in Schedules 1, 2 or 3 by addition, substitution, or deletion; b) vary the percentages of equity participation of Nigerian citizens or associations in the enterprises

may own up to 60 percent are relatively sophisticated and complex capital intensive industries which require large inputs of high technology.[64] In the less technical areas of manufacturing and wholesaling, the NEPD limits foreign investment to 40 percent of total investment.[65] Finally, in the smaller scale,

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listed in schedules 2 and 3; and c) make special provisions for different enterprises and with respect to different areas of the Federation, and "impose such terms as he may deem necessary." *Id.* at § 16. The enterprises listed in Schedules 1, 2, and 3 when the NEPD 1977 was enacted are set forth *infra* in notes 66, 65, and 64, respectively.

64. NEPD 1977, *supra* note 60, at § 6. The enterprises requiring 40 percent Nigerian ownership under section 6 are listed in Schedule 3 of the NEPD 1977. This schedule includes the manufacture of: tobacco; basic industrial minerals; synthetic materials; ceramics and structural clay products and miscellaneous non-metallic mineral products; primary non-ferrous metal products; fabricated metal instruments and products; engines and turbines; agricultrual machinery; metal and wood working machinery; special industrial machinery; office, accounting and computing machinery; electrical industrial machinery; radio, television and communication equipment; electrical appartus and supplies not elsewhere classified; railway equipment; motor vehicles, motorcycles and aircraft; scientific measuring and controlling equipment; photographic and optical goods; watches and clocks; and textiles. Schedule 3 also includes the following services: distilling of spirits; ship building and repairing; ocean shipping; storage and warehousing; maintenance of hotels, rooming houses, camps, and lodging places; data processing and tabulating; production of cinema and television films; and the rental of machinery and equipment. Finally, Schedule 3 includes all enterprises which are not public sector enterprises and are not listed in Schedules 1 or 2. *Id.* at schedule 3; see EZEIFE, *supra* note 62, at 170. *Marketing in Int'l Trade Admin.*, U.S. DEP'T OF COMMERCE, OVERSEAS BUSINESS REPORTS 83-03, NIGERIA 27 (Apr. 1983); *see also* BUS. INT'L, NIGERIA: AFRICA'S ECONOMIC GIANT 54 (1979).

65. NEPD 1977, *supra* note 60, at § 5. Schedule 2 lists the enterprises which require 60 percent Nigerian ownership. They include the manufacture of the following: basic iron and steel; beer; boats; fertilizers; grain mill products; insecticides, pesticides and fungicides; bicycles; dry bakery products; cement; cosmetics and perfumes; cocoa, chocolate, dairy products, and some food products; furniture; metal household and office fixtures; leather footwear; matches; metal containers, paints and varnishes, plastic products, rubber products, tires, soap and detergents, wire, nails, washers, bolts, nuts, rivets, non-rubber and non-plastic products, sawn timber, plywood, veneers, and petro-chemical feedstock. This second schedule also lists the following services: commercial, merchant and development banking; bottling of soft drinks; business consulting and management services; fashion designing; clearing and forwarding agencies; canning and preserving fruits and vegetables; coastal and inland waterway shipping; construction; operation of department stores and supermarkets with turnovers of more than two million naira; distribution machines and technical equipment; distribution and servicing of motor vehicles, tractors, their spare parts and similar objects; fish and shrimp trawling and processing; industrial cleaning; internal air transport; insurance; mining and quarrying; oil milling; cotton ginning and crushing; paper conversion; plantation sugar processing; growing of plantation tree crops, grains, and other cash crops; printing and publishing books, periodicals, and other printed material; operation of restaurants, cafes, and other eating and drinking places; salt refining and packaging; screen printing on cloth and dyeing; inland and coastal shipping; meat processing, and leather finishing; wholesale distribution of imported goods; and photography. *Id.* at schedule 2; *see* N. BALABKINS, INDIGENIZATION AND ECONOMIC DEVELOPMENT: THE NIGERIAN EXPERIENCE, 195–97 (1982); Donovan, *Nigerian After "Indigenization": Is There Any Room Left For American Businessman?* 8 INT'L LAW. 600, 601 (1974); Ezeife, *supra* note 62, at 169.

relatively unsophisticated businesses, the NEPD prohibits all foreign participation.[66]

Despite the government's desire to confine foreign investment to the industrial sectors of the economy, however, the NEPD has decreased, rather than increased, Nigerian control of the economy.[67] Many foreigners have found ways to circumvent the NEPD's foreign investment scheme. To escape the increased restrictions on investment activities established in the NEPD, foreign investors have managed, albeit sometimes illegally, to maintain majority ownership or to obtain control despite minority ownership in Nigerian companies.[68]

Although the government has recently amended the NEPD to encourage compliance, opportunities remain for the foreign investor to transgress the decree and defeat its purpose.[69] The decree merely assigns Nigerians a percentage or equity

66. NEPD 1977, *supra* note 60, at § 4. Schedule 1 services requiring one hundred percent Nigerian ownership pursuant to section 4 include: advertising and public relations; operation of lotteries; assembly of radios, radiograms, record changers, television sets, tape recorders, and other electric domestic appliances not combined with the manufacture of components; blending and bottling alcoholic drinks; bread and cake making; operation of casino and gaming centres, cinemas, and other places of entertainment; commercial transportation; commission agents; department stores and supremarkets with an annual turnover of less than two million naira; some distribution agencies; electric repair shops not associated with the distribution of electrical goods; repair of watches, clocks and jewelery; estate agency; film distribution; hairdressing; laundry and dry cleaning; representation of manufacturers; operation of municipal bus and taxi services; newspaper printing and publishing; office cleaning; poultry farming; printing of stationery; radio and television broadcasting; retail trade; rice milling; tire retreading; and wholesale distribution of local manufactures and other locally produced goods. The first schedule also includes the manufacture blocks and ordinary tile, candles, garments, jewellry, suitcases, brief cases, hand bags, purses, wallets, portfolios, shopping bags, and singlets. *Id.* at schedule 1; *see* S. SCHATZ, NIGERIAN CAPITALISM 59 (1977); Donovan, *supra* note 65, at 601; Megwa, *supra* note 59, at 496. A frequent criticism of the list of businesses exclusively reserved for Nigerians under Schedule 1 of the NEPD is that the businesses included were already controlled by Nigerians before the adoption of the NEPD of 1972. *Id.*

67. Biersteker, *supra* note 60, at 215.

68. *Id.* at 214. Foreign investors engage in both legal and illegal activities in order to circumvent the NEPD. The technically legal means include: selling shares widely among many Nigerians; arranging an agreement whereby the foreign investor maintains effective control over the management of the enterprise; negotiating exemptions from or extensions for compliance with the decree; technically creating two joint ventures (one of which permits a higher percentage of foreign ownership), while the foreign partners exercise actual control over both; finding local partners and managers who conform to the foreign investor's business interests and operating procedures; changing the voting rules to require more than a simple majority agreement to make certain decisions; and dividing the board by selecting members from different ethnic groups and playing them off against one another. *Id.* at 215–18. The illegal means are: adding extra expatriates to key positions without obtaining work permits; bribing government officials; and partially complying with or ignoring the indigenization requiremnts. *Id.* at 218–19.

69. In early 1981, the Nigerian Government reclassified ten enterprises into schedules permitting higher levels of foreign ownership in an effort to attract businesses and deter smuggling in some of them. After the reclassification, foreign investors were permitted to own up to 40 percent in businesses engaged in the manufacture of jewelery and related articles such as imitation jewelery and watch repair, garment manufacture, and rice milling. All of these enterprises were previously reserved

in enterprises without encouraging the skill or innovation necessary to stimulate growth with decreased levels of foreign capital.[70] As a result, the NEPD restricts foreign investment activities without promoting the growth of local businesses to replace indigenized enterprises or discouraged foreign investment. Moreover, the availability of unexploited, profitable business opportunities gives the foreign investor additional incentive to continue to circumvent the NEPD.[71]

To the extent that the Nigerian Government is unable and unwilling to discourage the activities of foreign investors that violate or neutralize the decree, the government permits a liberalization of the NEPD's restrictions which affords foreign investors greater flexibility in their investment activities. The non-compliance of foreign investors with the NEPD permits foreigners to engage in businesses in which the Nigerian Government has decided that Nigerian businessmen are competent to pursue alone or with the limited assistance of foreign capital. Because of its inability and unwillingness to prevent foreign investors from exploiting available investment opportunities, the Nigerian Government has compromised its commitment to restricting foreign investment activities to industrial sectors and to promoting growth in indigenized industries.[72]

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for Nigerians. In addition, the manufacture of metal containers, fertilizer production, cement manufacture, sugar cane cultivation, and processing of plantation tree crops, grains, and other cash crops were reclassified from a 40 percent to 60 percent limit on foreign investment. In tin smelting and processing, however, the Government reduced the permissible amount of foreign ownership from 60 to 40 percent. *Foreign Participation in Enterprises Widened,* New Nigerian, Feb. 2, 1981, *reprinted in* NIG. BULL. FOREIGN AFF., Feb. 1981, at 128. Section 16 of the NEPD 1977 authorizes the Commissioner of Industries to reclassify enterprises. NEPD 1977, *supra* note 60, at § 16. These reclassifications were consistent with the recently overthrown Shagari Goverment's policy of encouraging foreign investment. *See* Ogundipe, *The hustle for foreign investment, reprinted in* NIG. BULL. FOREIGN AFF., Apr. 1981, at 142–44.

70. *Cf.* S. SCHATZ, *supra* note 66, at 65–129 (asserting that there is no actual shortage of capital in Nigeria, but that there is a shortage of viable business projects given the limited entrepreneurial skills of Nigerians). The Nigerian Ministry of Industry has stated: "[T]he test for successful indigenisation is not how many companies or shares have changed hands in a given field of acitivity, but how many new companies have been established since the existing ones were indigenized. . . ." *Foreign Participation in Enterprises Widened,* New Nigerian, Feb. 4, 1981, *reprinted in* 11 NIG. BULL. FOREIGN AFF., Feb. 1981, at 128–29.

71. *See* Biersteker, *Indigenization in Nigeria: Renationalization or Denationalization?,* in THE POLITICAL ECONOMY OF NIGERIA 185 (I. Zartman ed. 1983).

72. Ohiorhenuan, *Multinational Corporations in the Nigerian Political Economy,* 25 NIG. J. ECON. & SOC. STUD. 155, 165–66 (1983). Ohiorhenuan observes:

> In essence, the indigenization programme has achieved three things. First, it has locked indigenous capital into a resource use pattern which derived initially from the private profit-maximizing decisions of foreign capital, and is therefore not necessarily compatible from a long run perspective, with the satisfaction of the basic social needs of the majority of Nigerians. Second, the participation of multinational [i.e. foreign] capital has been shifted to technical collaboration. This means that it will continue to appropriate part of the surplus, while having a smaller stake in generating it since its share has now become a part of production costs. Third, some proprietary and usufruct rights in industrial and commercial

IV. Conclusion

The recent history of the foreign investment laws in Argentina, Mexico, and Nigeria illustrates the relaxation of restrictive foreign investment laws through new legislation, administrative delegation, broad exemption policies, or the simple failure to enforce existing laws. Regardless of the specific means used to effectuate liberalization of investment restrictions, the results are similar. Despite initial attempts to institute and maintain a certain degree of control over foreign investment activities, foreign investors enjoy increasing flexibility under the laws of these three countries.

The liberalization of foreign investment laws has had both positive and negative effects on industrialization in these developing nations. The effects are positive to the extent that fewer restrictions encourage foreign investment in profitable industries, thus providing resources and foreign currency that are scarce in LDCs. Less government control over foreign investment, however, may promote economic growth in a way that does not necessarily contribute significantly to industrialization in the form desired.[73] The ability to maintain a balance between control over and encouragement of foreign investment is vital to the struggle of developing countries for economic industrialization.

Foreign investment restrictions can contribute to industrialization to the degree that they ensure that foreign investors refrain from investing in businesses in which domestic technical skills and capital are sufficient. At the same time, such restrictions must channel foreign investment into those sectors in which foreign capital can foster growth and diversification. Even though foreign investors may be willing to take advantage of business opportunities in developing countries, they will remain hesitant to supply capital and technology in investment arrangements that limit their ability to control their invested assets.[74] Therefore, a developing country may not receive the level of foreign investment desired in industrial sectors as long as it maintains excessive control over foreign investment. A developing country which finds it cannot increase the level of foreign investment in the industrial sectors will often seek to relax its restrictions as an incentive to foreign investment.[75] The cases of Argentina, Mexico, and Nigeria illustrate that the liberalization of foreign investment laws is often a direct response to the economic necessity of attracting foreign investment vital to the success of industrial policies.

> property have been reassigned from the foreign capitalist to those Nigerians who, by virtue of their previous position in the socio-economic hierarchy, had access to personal savings or institutional credit.

Id.

73. *See* Akinsanya, *supra* note 1, at 773 ("The result of the capacity to attract substantial private foreign investments is that the former colonial powers [of Africa] still dominated [direct foreign investments] in these colonies. . . .")

74. *See* Kalsi, *supra* note 2, at 581.

75. *See supra* note 3.