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An Analysis of Latin American Foreign Investment Law: Proposals for Striking a Balance Between Foreign Investment and Political Stability

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AN ANALYSIS OF LATIN AMERICAN FOREIGN INVESTMENT LAW: PROPOSALS FOR STRIKING A BALANCE BETWEEN FOREIGN INVESTMENT AND POLITICAL STABILITY

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I. INTRODUCTION

> The Giant was loose again in the land, but its rulers seemed unconcerned. Instead, they were pleased that the Giant had returned once more, for they had gone to great lengths to lure him back, had thrown themselves supplicant at his feet and even pleaded desperately for the Giant to help them out of the economic turmoil in which they found themselves. Yet, in their eagerness to court the Giant's favor, the rulers had forgotten that the Giant was often an extremely rude and demanding guest. They had also forgotten those earlier days, when the Giant in his greed had turned the country's green mountains and forests into barren brown slag hills and bogs, while leaving only a pittance in payment. The rulers of the land, overjoyed at the Giant's return, seemed not to have retained the lessons learned from the Giant's last visit.[1]

Historically, Mexico and the Andean Common Market (ANCOM)[2] had imposed severe restrictions on foreign investment in order to limit the presence of direct foreign investment (DFI) in their countries. Within the last decade, however, Mexico has aggressively sought to attract foreign investment capital, and the ANCOM countries now actually encourage foreign investment in their countries. Consequently, as the allegory above explains, Mexico runs the risk of repeating the mistakes of the past, continuing the cycle of DFI famine to feast to famine. In contrast, the ANCOM nations still restrict DFI to a great degree and are moving

1. This allegory builds upon Ewell Murphy's allegory of 1982, which told of "the Giant People who roamed in the North" in reference to greedy U.S. investors who took much in the way of resources from the people of Mexico and left them with very little gold and skills in return. *See* Ewell E. Murphy, Jr., *The Echeverrian Wall: Two Perspectives on Foreign Investment and Licensing in Mexico*, 17 TEX. INT'L L.J. 135 (1982).

With the enormous economic changes that have taken place since Murphy wrote his article, the present allegory should be extended a bit further to include investment from all over the world, not just foreign investment from the United States.

2. The ANCOM group consists of Bolivia, Chile, Colombia, Ecuador, and Peru.

so slowly that they may become permanently mired in their restrictive past. Therefore, while one Latin American country may be developing too fast, another whole block of countries may not develop fast enough. Yet, although the two sets of countries have adopted different approaches to liberalizing DFI restrictions, both are struggling to find that delicate balance between a healthy influx of DFI and loss of control over their countries to foreign influence. Furthermore, neither set of countries wishes to repeat the mistakes of the past.

Hopefully, neither Mexico nor the ANCOM countries will fail to strike that all-important balance, for either too much or too little DFI in a Latin American country now carries much heavier economic and environmental consequences than in earlier times. If in the future a Latin American government does away with restrictions, it may again find it necessary to impose the same, or even more drastic, restrictions on foreign investment in order to bring "the Giant" under control. The result may be chaos and an eventual return to impoverishment. The Latin American country with too little DFI may follow the same, though less complicated path; it may simply wallow in the poverty of its own underdevelopment.

However, Latin American countries can avoid the dreadful hangover of the present-day DFI bacchanalia or the agonies of DFI anorexia if, with respect to deregulation of foreign investment, they adhere to the principle of moderation. This Article proposes that Latin American countries will be able to go a long way toward striking that essential balance between DFI and control over their economies by incorporating certain key components into their foreign investment laws.

Parts I and II of this Article outline the history of Latin American foreign investment laws (FILs), beginning in the 1970s. Part II identifies some important elements of FILs and analyzes certain aspects of Latin American FILs that discouraged DFI in the 1970s and early 1980s.[3] Part III examines the changes in FILs during the 1980s and points out those components of FILs that encourage direct foreign investment. Part IV argues that certain

3. Note, however, that this Section will not discuss direct expropriation. This Article assumes that Latin American governments now recognize the futility of expropriation, have abandoned the practice, and will try to avoid it in the future if at all possible. *See* Jürgen Voss, *The Protection and Promotion of Foreign Direct Investment in Developing Countries: Interests, Interdependencies, Intricacies*, 31 INT'L & COMP. L.Q. 686 (1982), (arguing that investment protection, not expropriation, should be fostered in Third World countries).

restrictive elements of FILs that Latin American governments have abandoned actually protect important national interests and should be included in their respective FILs. Part V concludes by offering Latin American countries a solution to regulating DFI that satisfies their particular political and economic needs. This Article argues that Latin American countries should devise FILs that encourage DFI, but that they should also be wary of implementing foreign investment laws that may later be repealed as part of a political backlash against foreign control of strategic industries.

Although DFI control affects countries throughout Latin America, this Article will primarily focus on Mexico and the ANCOM group for analytical purposes. The ANCOM group is appropriate to this discussion because it represents a group of developing countries with some of Latin America's most restrictive FILs, and these countries have been slow to abandon the "dependency" philosophies of the 1970s for the "free market" philosophies of the 1980s.[4] Mexico deserves discussion because it is one of the leading countries in the restrictive movement of the 1970s, and seems to be leading the "free market" movement of the late 1980s and early 1990s.[5] By analyzing Mexico and the ANCOM group, it will be possible to economically analyze the major schools of thought concerning foreign investment regulation in Latin America without drowning the reader in a sea of statistical detail.

II. Restrictive or Prohibitive Elements of Foreign Investment Laws Developed in the 1970s

Before beginning this discussion, it is important to note that this Article deals exclusively with direct foreign investment (DFI). For the purposes of this Article, DFI does not include portfolio investment, which consists largely of loans to host country entities, both public and private.[6] Although Latin American governments

4. *See* Ewell E. Murphy, Jr., *Andean Decisions on Foreign Investment: An International Matrix of National Law*, 24 INT'L LAW. 643 (1990).

5. For examples of Mexico's aggressive move to attract DFI, see *Mexico Eases Mining Curb on Foreigners*, N.Y. TIMES, Sept. 28, 1990, at D5; Joe W. Pitts, *Pressing Mexico to Protect Intellectual Property*, WALL ST. J., Jan. 25, 1991, at A13; Randall Smith, *Southwestern Bell, 2 Others Win Right to Acquire 51% Voting Stake in Telmex*, WALL ST. J., Dec. 10, 1990, at A3.

6. *See* Joseph J. Jova, Clint E. Smith & T. Frank Crigler, *Private Investments in Latin America: Renegotiating the Bargain*, 19 TEX. INT'L L.J. 3, 24 (1984) (discussing the distinction between direct investment and portfolio investment). Jürgen Voss has provided perhaps the most comprehensive definition of DFI:

presently find DFI very attractive, foreigners will not find investing in Latin America attractive unless they feel confident that they will see a return on their investment.[7] Consequently, foreign investors consider both the return on their investment and the risk of the investment when deciding whether to invest in a particular country.[8] One commentator has identified the following factors that foreign investors consider in determining whether to invest in a developing country:

> (1) Institutions and economic policies of the country: *e.g.*, centrally-planned or free market; policies toward foreign investment; degree of sophistication of its financial and administrative institutions; administrative procedures for initiating and operating investments in the country;
> (2) Infrastructure: transportation networks; industrial estates and free trade zones; educated labor force; degree of discipline in labor/management relationships; availability of marketing arrangements; available technological elements; available support services;

> Direct investment means the investment of money, goods or services in a project for entrepreneurial commitment, especially establishing subsidiary companies or take-over of enterprises; capitalising branches and plants (endowments); securing equity holdings in corporations with powers of management and control (generally 25%); making long-term loans with low or partnership-type interest rates in conjunction with equity holdings.
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> Such investments are thus characterized by their direct use for a specific project (not through the capital market), amortisation and profit dependent upon the success of the project (entrepreneurial risk), long-term or unlimited period and an enduring entrepreneurial commitment to the project accompanying the investment. This is in contrast with "portfolio investments" which are placed through the market without entrepreneurial commitment, are relatively short-term and made only for the sake of capital yield (fixed interest securities, capital shares of enterprises without controlling interest, bank loans, etc.), and other capital investment (purchase of real estate, etc.). In contrast with these types of investment, the direct investor also provides a package of business and technical know-how for the project.

Voss, *supra* note 3, at 686.

7. *See* Adeoye Akinsanya, *International Protection of Direct Foreign Investments in The Third World*, 36 INT'L & COMP. L.Q. 58; *see also* Jova, Frank & Crigler, *supra* note 6, at 6 ("Investment capital flows to markets that offer the greatest return of invested funds with least possible risk.").

8. In discussing return on investment, Americans usually focus on the short-term return, while other countries, notably the Japanese, focus on the long-term return. Unfortunately, both analyses are limited in that they necessarily leave out such factors as potential development of the country and future development of consumer markets, just to name a few. Conversely, developing countries, in assessing the return on DFI, consider the potential political instability but rarely take into consideration such factors as depletion of natural resources (though this may not be the case in oil-producing countries) and the long-term effects on the environment from pollution, deforestation, erosion, and so forth.

(3) Legal Aspects: substantive rules governing foreign investment, *e.g.*, investment codes, labor laws, tax regulations, and available dispute resolution procedures;
(4) Political risk: degree of political and economic stability; existence of a national development program; terms for profit transfer and capital repatriation.[9]

Moreover, this same commentator also identified a number of global factors existing today which may deter foreign investors from investing outside of their own country. They are:

(1) Slower rates of growth and demand in industrialized countries;
(2) The protectionist policies of industrial countries that discourage DFI based on export growth;
(3) A marked drop in commodity prices that has drastically reduced the export earnings of developing countries;
(4) The decreasing share of labor costs in overall production cost of manufactured goods;
(5) The increasing reliance of industrial countries on substitutes to primary commodities.[10]

Since these global factors also play an important role in the investor's return on his investment, they become less relevant as the risk and return factors mentioned above appear more attractive to the foreign investor and more relevant as those factors appear less attractive.

Latin American countries need DFI to aid economic development. Therefore, DFI recipients want the investors to make money from the investment, although perhaps for reasons different than those of the foreign investors. The host country, for example, may receive many benefits as a consequence of the DFI turning a profit, the most important benefit being an increase in real economic growth for the country.[11]

DFI has the following important advantages over portfolio investment:

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9. Ibrahim F. I. Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of the Multilateral Investment Guarantee Scheme*, 21 INT'L LAW. 671, 679-87 [hereinafter *Factors*].

10. *Id.* at 673-74.

11. "Developing countries . . . seek foreign investment as a means to increase the rate of real growth, when internal capital accumulation is insufficient to pay the costs of importing the capital goods, advanced technology, and management skills necessary to sustain [such] development." Jova, Frank & Crigler, *supra* note 6, at 6.

> (1) DFI provides not only funds, but also an integrated package of financial resources, managerial skills, technical knowledge, and marketing connections;
> (2) DFI does not create a debt. The investors bear the risk of project failure; the lender has the right to repayment regardless of the project's success;
> (3) DFI injects other benefits from internationally competitive enterprises into the local economy, *e.g.*, improved production techniques and management skills;
> (4) DFI often works as a catalyst for other lending activities in the local economy.[12]

Yet, while Latin American countries find DFI desirable, these countries must also be careful not to lose control over their precious natural resources, their economies, or their very countries as a result of their efforts to attract DFI.

Historically, Latin American governments have not been successful in achieving a beneficial balance between DFI and sovereign control.[13] In the late 1970s and early 1980s, many Latin American countries feared becoming "dependent" upon foreigners for their economic, and consequently political, stability and therefore enacted laws that restricted the amount of DFI allowed in their countries.[14] Many countries feared that foreigners would take con-

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12. *See Factors*, *supra* note 9, at 675.

13. Jova, Frank & Crigler argue that "[t]he need to create a successful, mutually beneficial accommodation between private capital and public policy remains the great task of this century . . . ." *supra* note 6, at 3. However, they point out that Latin America has been historically unsuccessful in striking that delicate balance, as Latin American countries have swung wildly in their policies from unrestricted DFI to repressive FILs. *See id.* at 11-22. For an historical overview of ANCOM's foreign investment policy, see Allan Preziosi, Comment, *The Andean Pact's Foreign Investment Code Decision 220: An Agreement to Disagree*, 20 U. MIAMI INTER-AM. L. REV. 649, 652-58 (1989).

14. *See* Jova, Smith & Crigler, *supra* note 6, at 16 n.39 (citing the theories of FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, DEPENDENCIA Y DESAROLLO EN AMÉRICA LATINA (1969)); JAMES D. COCKCROFT, ANDRÉ GUNDER FRANK & DALE L. JOHNSON, DEPENDENCE AND UNDERDEVELOPMENT (1972); MIGUEL S. WIONCZEK, INVERSIÓN Y TECHNOLOGÍA EXTRANJERA EN AMÉRICA LATINA (1971); Theotonio Dos Santos, *The Structure of Dependence*, AM. ECON. REV., May 1970, at 231; Osvaldo Sunkel, *Big Business and "Dependencia": A Latin American View*, 50 FOREIGN AFF. 517 (1972). One commentator has offered the following explanation of "dependencia," or dependency theory:

> Dependency theory hypothesized that underdevelopment is perpetuated by socio-political and economic domination by a developed focal state to which the lesser developed states are peripheral. The state of dependency benefits a favored local class with close ties to the focal state. This class attains power and retards a more "healthy" economic relationship to protract the relationship.

Michael G. Thornton, Comment, *Since the Breakup: Developments and Divergences in ANCOM's and Chile's Foreign Investment Codes*, 7 HASTINGS INT'L & COMP. L. REV. 239, trol of important natural resources and business enterprises.[15] They also feared that multi-national corporations would engage in restrictive business practices, influence political decisions, and disregard critical social problems.[16] Most importantly, these countries feared becoming dependent upon DFI—that foreign investment could displace local national entrepreneurship, preempt financing of local ventures, and have negative effects on their balance of payments accounts.[17] Many developing countries, including those in Latin America, came to believe that DFI was a hindrance to development and eventual self-sufficiency, and, consequently, they

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243 (1983) (citing Scott Horton, *Peru and ANCOM: A Study in the Disintegrations of a Common Market*, 17 TEX. INT'L L. J. 39, 42 (1982)).

15. U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL DIRECT INVESTMENT: GLOBAL TRENDS AND THE U.S. ROLE 30 (1984)[hereinafter GLOBAL TRENDS]. *See also* Jova, Smith & Crigler, *supra* note 6, at 15.

16. GLOBAL TRENDS, *supra* note 15, at 30.

17. DFI critics argued that each of these consequences may occur under the dependency theory:

> (1) *Displacement of national entrepreneurship.* In most cases it means that the foreign investor will out-perform and possibly displace the national investor. Most investments that further industrialization and development require sophisticated technology, and the local investor will not own or have independent access to that technology;
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> (2) *Preemptive financing.* The local firm or individual is likely not to be as solid a credit risk as the large foreign firm, and the latter may use local financing and credit leverage to buy into local enterprises while national interests find further expansion or diversification impossible because they lack an equal credit rating;
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> (4) *Restraints on technology transfer.* Agreements on technology transfer have generally not been subject to official scrutiny and in the past investors have demanded dependency creating contract clauses, which are accepted as a matter of course: selling unnecessary technology in a package with essential technology on a take-it-or-leave-it basis; selling older technology and machinery that keeps the host country's industry a generation behind that of the foreign investor's home operation; price and marketing restrictions on all items produced with the technology so as to assure that no competing expert capacity will be developed; and provisions requiring that any technological advance developed within the host country reverts automatically to the seller of the technology, with no rights retained by the buyer;
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> (5) *Balance of payment effects.* Latin American theorists also assert there is a negative effect on balance of payments attendant upon dependency, and that effect is especially heightened by foreign investments in the manufacturing sector. Whereas foreign investment in natural resources or primary materials almost always results in substantial exports and balance of payments credits, manufacturing normally produces little or no export earnings. While this saves the country the cost of paying for imports of manufactured items, dependency economists counter that the import-substituted manufactured items almost always cost significantly more than the same items on the free world market.

Jova, Smith & Crigler, *supra* note 6, at 16-17. *See also* Thornton, *supra* note 14, at 244 n.21.

adopted foreign investment laws (FILs) that either directly or indirectly restricted or prohibited foreign investment in their countries.[18] For example, Mexico, under President Echeverría, imposed even tougher restrictions on DFI in all of its industries,[19] and the Andean Group took similar restrictive steps in adopting Decision 24 under the Cartagena Agreement.[20]

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18. The United Nations Charter of Economic Rights and Duties of States is an excellent indicator of the more restrictive stance that Latin American and other developing countries began taking toward DFI during the 1970s. This charter was primarily initiated by former President Echeverría of Mexico, a proponent of aggressive government control of DFI. *See* Jova, Smith & Crigler, *supra* note 6, at 20-21. *See also* UNITED NATIONS CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES, G.A. Res. 3281, 29 U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975).

William S. Gaud, Executive Vice President of the International Finance Corporation gauged the atmosphere for DFI in the 1970s well when he stated, "There are many countries in Asia, Africa, and in Latin America where foreign investment is welcome. But in others foreign private investment is decidedly not popular, and in a few countries the nationalization and expropriation—sometimes domestic and foreign—seem to be the order of the day." William S. Gaud, Speech to the Annual Meeting of the International Association for the Promotion and Protection of Private Foreign Investments 1 (Munich 1972).

One commentator of the time suggested that the move to more restrictive FILs was part of a worldwide phenomenon of the 1970s, "a sort of British-born, Fabian-socialist revolution" which had as its primary goal a redistribution of the world's wealth. *See* Jova, Smith & Crigler, *supra* note 6, at 25-26 (citing Patrick Moynihan, *The U.S. in Opposition*, COMMENTARY, March 1975, at 31).

In Chile the general trend was toward "gradually increasing discrimination against foreign investment. This trend peaked with the Marxist Allende government (1971-73) which expropriated numerous large assets, including the world's two largest copper mines owned by American interests." *See* INVESTMENT CLIMATE IN THE WESTERN HEMISPHERE, *infra* note 25, at 51, 52.

In Mexico, the result of its Foreign Investment Law of 1973 (*Ley Para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, 316 D.O. 5, Mar. 9, 1973) [hereinafter *Mexican Foreign Investment Law*] was "a rather uncomfortable straitjacket for foreign investment in Mexico." Murphy, *supra* note 1, at 139. *See also* Jova, Smith & Crigler, *supra* note 6, at 3 (describing the "increasingly nationalistic-sounding Latin American governments and fearful foreign investors . . . engaged in negotiating new agreements based on substantially tougher host country restrictions and reluctant accommodation by foreign companies.").

By the very nature and basis of their economies during the 1970s and early 1980s, east bloc countries such as the Soviet Union, Poland, Yugoslavia, Hungary, and Bulgaria had extremely restrictive FILs. *See generally* Christina L. Jadach, *Ownership and Investment in Poland*, 18 CORNELL INT'L L.J. 63 (1985); Maciej Lebkowski & Jan Monkiewicz, *Western Direct Investment in Centrally Planned Economies*, 20 J. WORLD TRADE L. 624 (1986). Until it began to liberalize its foreign investment policies in the 1980s, the People's Republic of China had very little foreign investment "[l]argely in reaction to the trade abuses suffered by China in the nineteenth century. . . ." Frederic C. Rich, *Joint Ventures in China: The Legal Challenge*, 15 INT'L LAW. 183, 185 (1981).

19. *See Mexican Foreign Investment Law, supra* note 18.

20. Formally titled the Common Regime of Treatment of Foreign Capital, and of Trademarks, Patents Licenses and Royalties, November 30, 1976, *reprinted in* 16 I.L.M. 138 (1977)[hereinafter Decision 24]. Decision 24 is described in Jova, Smith & Crigler, *supra*

The restrictive FILs of Latin American countries in the 1970s contained several common elements that discouraged DFI in particular industries, or across the board.[21] Important elements common to all these Latin American FILs were:

(1) application and approval procedures through which DFI must pass before being allowed into the country;
(2) equity participation restrictions or outright prohibitions; and
(3) technology transfer restrictions.[22]

Because each of these elements plays an important role in encouraging or discouraging DFI, this article will analyze these elements, as they have appeared in the FILs of Mexico and the ANCOM nations, in the next three subsections.

A. *Overly Restrictive Screening and Approval Procedures*

Beginning in the 1970s, Latin American countries instituted various forms of screening and approval procedures that restricted DFI. Latin American FILs required that foreign investors submit to a formal application and screening process and, in some countries, a full-scale negotiation over the terms of the DFI. As the following discussion should demonstrate, these procedures often consumed a great deal of the foreign investor's time and resources, thereby discouraging DFI.

As a rule, registration and approval procedures cause an inordinate amount of delay in developing countries.[23] As a first step to

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note 6, at 18-19. *See also* Dale B. Furnish & William W. Atkin, *The Andean Group's Program for Industrial Development of the Metalworking Sector: Integration with Due and Deliberate SPID*, 7 LAW. AM. 29 (1975); Dale B. Furnish, *The Andean Common Market's Common Regime for Foreign Investments*, 5 VAND. J. TRANSNAT'L L. 313 (1972); Covey T. Oliver, *The Andean Foreign Investment Code*, 66 AM. J. INT'L L. 763 (1972). Members of the Andean Group include Colombia, Peru, Ecuador, Bolivia, and Venezuela. Chile was a member until 1976.

21. GLOBAL TRENDS, *supra* note 15, at 30.

22. This is by no means a complete list of elements that make up FILs. Most notably, capital repatriation and taxes have not been included.

23. In Pakistan, for example, the approval and registration process took many months, unless the investment had high-priority, *e.g.*, computers. *See* Richard de Belder & Makdoom Ali Khan, *Legal Aspects of Doing Business in Pakistan*, 20 INT'L LAW. 535, 539. In Egypt, it took seven years to get approval for a joint venture between GM and Isuzu; over seven years for Michelin to obtain approval to build a tire plant; five years for GE to obtain approval to build a refrigerator plant. Many blamed the reason for the delays on "the impenetrable bureaucracy . . . [and] the inexhaustible red tape" involved in obtaining approval. Middle East Executive Reports 8 (June 8, 1983). Even though Morocco enacted a more liberal foreign investment code in 1982, one of the main problems associated with

investing in Latin American countries, the foreign investor almost always had to submit an application to the appropriate government agency for approval, as many countries would not allow DFI into the country unless the foreign investor first submitted an application to the government agency in charge of overseeing foreign investment.[24]

After submitting an application to the appropriate agency, the approval process for the DFI had only just begun. The foreign investor then became entangled in evaluation of the application by the governmental bureaucracy. In many cases, the sole purpose of the screening process was to provide a forum for negotiation in which the government's agents could seek to gain either as much advantage for the government or as much control over the DFI as the foreign investor would allow before withdrawing the application.[25]

Since Latin American governments had a great fear that multi-national corporations, left unrestricted, could very well end up controlling the entire country, many governments found a screening and approval procedure to be an appropriate valve through which the government could control DFI. Through this process the government could evaluate whether the DFI was desirable and, if so, negotiate for a better return for the host country. If the government wished to preclude DFI in particular industries or

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investment in Morocco was still the approval and registration process. *Morocco: New Code Favourable to Foreign Investors* 3 Co. LAW. 286 (1982).

24. Mexico: *Mexican Foreign Investment Law, supra* note 18; *Ley sobre el Registro de la Transferencia de Tecnología y el uso y Explotación de Patentes y Marcas*, 315 D.O. 45, Dec. 30, 1972 [hereinafter *Mexican Registration and Transfer of Technology Law*].

ANCOM: *See* Decision 24, *supra* note 20, at art. 2.

Chile: Under the FIL that took effect in 1974, a Foreign Investment Committee approved all DFI. Foreign Investment Statute, Decree-Law No. 600, Preamble, July 13, 1974, *reprinted in* 13 I.L.M. 1176 (1974) [hereinafter DL 600]. The Foreign Investment Committee used a fixed term contract of ten years to formalize its approval of DFI, although it allowed for extensions up to twenty years when such an extension was justified. DL 600, arts. 1, 3.

Venezuela: *See* Robert J. Radway & Franklin T. Hoet-Linares, *Venezuela Revisited: Foreign Investment, Technology, and Related Issues*, 15 VAND. J. TRANSNAT'L LAW 1, 17 (1982)(discussion of registration requirements imposed by the Superintendency of Foreign Investments (*Superintendencia de Inversiones Extranjeras* (SIEX))); *see* text accompanying *infra* notes 35-36.

25. In Ecuador, DFI was often approved on a case-by-case basis subject to negotiation. *See* 4 U.S. DEPARTMENT OF COMMERCE, INVESTMENT CLIMATE IN FOREIGN COUNTRIES: WESTERN HEMISPHERE (EXCLUDING CANADA) 104 (1983) [hereinafter INVESTMENT CLIMATE IN THE WESTERN HEMISPHERE]. The Chilean FIL was silent as to certain details such as profit remittances, tax rates, and exchange rates. Presumably, these issues were left open deliberately for determination during contract negotiations. *See* Thornton, *supra* note 14, at 253.

in important natural resources, it could enforce this prohibition quickly and efficiently, with little investment of resources. It would simply disapprove the application. However, if the government wanted to admit the DFI but wished to impose performance requirements, expatriation restrictions or special taxes upon the DFI, it frequently engaged in long, tense negotiations on each point until the application was finally approved.[26]

To add to the woes of the investor, the bureaucratic process was often incredibly cumbersome. For example, the Mexican registration and approval process was a byzantine work of bureaucratic beauty. While the procedures seemed to provide extremely tight control on DFI entering the country, they were complex and confusing. For instance, the Mexican Foreign Investment Law provided that the Foreign Investment Commission (FIC) would have general oversight of the law, but then the FIC left the actual approval of DFI to various ministries.[27] Yet, while other ministries approved the DFI, the FIC still issued resolutions governing DFI policy, one of which gave itself veto power over DFI in certain circumstances.[28] With such overlap in the approval system, the foreign investor had to acquire the approval of both the agencies and the FIC.

As if the system for DFI approval was not complicated enough, the Mexican Foreign Investment Law also required after-the-fact registration for broad categories of persons and events, including:

(1) foreigners who made regulated investments in Mexico;
(2) Mexican companies in which foreign investors took shares;
(3) Mexican trusts in which foreigners participated; and

26. For an example of the details that needed to be ironed out in negotiations, see Thornton, *supra* note 14, at 253. Also, even in Canada, which is not normally thought of as a "developing country," final DFI approval under the restrictive Foreign Investment Review Act (FIRA) rested with the Cabinet, which over-politicized the process and thrust a much heavier work-load on the Cabinet. Keith R. Evans, *Canada for Sale: The Investment Canada Act*, 21 J. WORLD TRADE L. 85, 87 (1987) (citing FIRA, § 13). Yet, while FIRA required that the Cabinet approve or deny the investment within specified time periods, foreign investors frequently experienced delays of as long as 180 days, with the median time for processing half the applications being 150 days. *Id.* at 87 (citing Wayne Lilley, *FIRA and Loathing on the Rideau*, CAN. BUS., Sept. 1981, at 43-44.

27. *Mexican Foreign Investment Law*, *supra* note 18, at arts. 9, 10.

28. *Resolutiones Generales de la Commisión Nacional de Inversiones Extranjeras*, 333 D.O. 8, Nov. 5, 1975 [hereinafter General Resolutions No. 1-10], specifically No. 8; 343 D.O. 3, July 27, 1977 [General Resolutions 12-15], specifically, Nos. 12, 15; 344 D.O. 3, Sept. 6, 1977 [General Resolution No. 16]; 369 D.O. 9, Nov. 19, 1981 [General Resolution No. 17].

(4) stock certificates owned by, or pledged to, foreigners.[29]

Not only were these regulations cumbersome to foreign investors, they may have had no legal basis, and at least one scholar has argued that they had no statutory basis at all.[30]

With respect to technology transfers, the government could nullify written agreements, take away investment incentive benefits, or even levy a fine if the foreign investors, or their partners,[31] failed to register a written instrument that dealt with technology transfers.[32] Furthermore, the government could refuse to register an instrument on seventeen discretionary grounds.[33] However, the law did allow minor exceptions for temporary installation and repairs, installation data included in a purchase package with machinery or equipment, certain emergency services, vocational schools and employee training, copyright licensing for public media, government-to-government assistance and consulting agreements where the consultant was Mexican.[34]

Similarly, all foreign investments in ANCOM countries had to be authorized by the recipient country's national approving authority.[35] The competency of these agencies, however, were often at issue. In Venezuela, for instance, government neglected the office of Superintendent of Foreign Investment (SIEX). The government first assigned a customs official with little international trade experience and then appointed a Deputy Minister of Finance who had too little time to devote to the office.[36] As a consequence, the credibility of the office declined, undoubtedly impacting on Venezuela's desirability as a prospective investment opportunity. In Columbia and Peru, DFI had to be registered and approved before it could

29. *See* Murphy, *supra* note 1, at 139 (outlining registration requirements of *Mexican Foreign Investment Law*, *supra* note 18, at art. 23.

30. *See* Ignacio Gomez Palacio y Gutierrez Zamora, Análisis de la Ley de Inversión Extranjera en Mexico 125-43 (1973).

31. "Partners" could include anyone, "whether Mexicans or foreigners, and even agencies of the Mexican government." Murphy, *supra* note 1, at 140 (citing *Mexican Foreign Investment Law*, *supra* note 18, at art. 5).

32. Technology transfer agreements include patents, copyrights, certificates of inventions, trademarks, trade names, technology, industrial copyrights, or expertise. *See Mexican Foreign Investment Law*, *supra* note 18, at arts. 6, 11, 19, 23. *See also* Murphy, *supra* note 1, at 139.

33. *See Mexican Foreign Investment Law*, *supra* note 18, at arts. 15-17; *see also infra* notes 57-64 and accompanying text.

34. *Mexican Foreign Investment Law*, *supra* note 18, at art. 3.

35. Decision 24, *supra* note 20, at art. 2.

36. Radway & Hoet-Linares, *supra* note 24, at 27.

be imported.[37] Ecuador is a good example of an ANCOM country's screening and approval procedures. Although Ecuador would approve almost all applications from reputable companies,[38] it would do so only after running the prospective investor though a negotiation process that caused great delay.[39]

After foreign investors became aware of the tremendous log jam that the governments had created in the agencies responsible for approval of DFI applications, the investors became discouraged and often decided to invest elsewhere. The approval procedures that the foreign governments had installed to control the nature and amount of DFI that flowed into their countries had become so constrictive that they helped choke off DFI.

B. Restrictions on Equity Participation

In the 1970s, Latin American countries wished to reduce or eliminate their dependence upon DFI. The easiest way to achieve this goal was to reduce DFI's influence in their major industries. Consequently, Latin American countries began to impose restrictions upon the level of DFI participation in their corporations. That foreign investors could no longer hold more than a fifty percent equity stake in a Latin American corporation was perhaps the most important restriction that Latin American countries imposed. Foreclosing foreign majority ownership in corporations resulted in a mass exodus from these countries of foreign capital which was not to return.

Under the leadership of President Echeverría, Mexico adopted a forty-nine percent rule, along with other equity participation restrictions, that slowed the flow of new DFI to a trickle. Under the Law to Promote Mexican Investment and Regulate Foreign Investment, all new DFI had to be in a joint venture composed of at least fifty-one percent Mexican participation, unless the National Foreign Investment Commission specifically exempted.[40] The Commission, however, prudently exempted border industries (*maquiladoras*) from the requirement and made other minor exceptions to

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37. *See generally* INVESTMENT CLIMATE IN THE WESTERN HEMISPHERE, *supra* note 25, at 66, 237.

38. *Id.*

39. *Id.*

40. *See Mexican Foreign Investment Law*, *supra* note 18, arts. 5, 12.

its otherwise restrictive policy.[41] The law also required that the government screen all takeovers of Mexican firms and that Mexicans have a right of first refusal before a foreigner could acquire a controlling interest in a Mexican firm.[42]

Mexico limited DFI in the manufacture of automobile components to forty percent.[43] In all other enterprises, the Foreign Investment Commission would rarely allow new equity positions of more than forty-nine percent.[44] Mexico also prohibited foreign investors from investing in its electrical power, railroad, telegraph, or the telecommunications industries, as these industries were reserved for the state. Finally, only Mexican citizens could invest in radio and television, urban and inter-urban automotive transport, domestic air and maritime transportation, forestry, and gas distribution.

In the oil and mining industries, Mexico has historically oscillated between allowing unbridled influx of DFI in its petrochemical industry to suffocating regulation.[45] Even before the forty-nine percent rule, the Mexican Constitution had already limited investment in primary petrochemical industries.[46] Under the Mexican Foreign Investment Law of 1973, foreigners could not invest in

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41. *See* Jova, Smith & Crigler, *supra* note 6, at 24.

> As of April 1975, the Commission had issued four general rulings. They cover (1) exemption of border industries from the fifty-one percent Mexican ownership rule [49% foreign ownership rule]; (2) permission for additional foreign capital to be invested in existing joint ventures through capital increases providing the ratio of Mexican to foreign investment is not changed to the detriment of the Mexican stockholders; (3) authorization for foreigners to acquire up to five percent equity in Mexican firms through stock market purchases; and (4) authorization under most circumstances to reelect present foreign directors to boards on Mexican firms.

Id.

42. *See Mexican Foreign Investment Law*, *supra* note 18; Murphy, *supra* note 1, at 137.

43. *Mexican Foreign Investment Law*, *supra* note 18, at art. 5.

44. In the first three years of administering the Mexican Foreign Investment Law, the Foreign Investment Commission had only made an exception to the 49% rule in ten cases, and in most of these cases the Commission required that the investors Mexicanize in the future. Murphy, *supra* note 1, at 138 (citing Frank M. Lacey, *Protection of Foreigners' Rights in Mexico*, 13 INT'L LAW. 83, 90 n. 38 (1979)).

45. For a brief overview of the history of the Mexican government's role in regulating the petrochemical industry, see Ernest E. Smith & John S. Dzienkowski, *A Fifty-Year Perspective on World Petroleum Arrangements*, 24 TEX. INT'L L.J. 13, 23-30. The Mining Laws of 1884 and 1892 essentially allowed foreign investors to purchase fee simple interests in the land they wished to exploit. *Id.* at 23-24. Compare this approach with President Lazaro Cadenas's announcement in 1938 that Mexico was expropriating the oil industry. *Id.* at 29.

46. *See generally* MEX. CONST. tit. I, ch. 3; tits. II, VIII, and IX.

that country's primary petrochemical industries. In addition, the government limited DFI in the secondary petrochemical industry to forty percent of the venture.[47] In Mexico, foreign investors were not allowed to invest in the radioactive mineral industry, and investment in national reserve mining was limited to thirty-four percent.[48]

ANCOM countries imposed restrictions similar to Mexico's on equity participation in many important industries. These restrictions not only slowed the flow of new capital, but also greatly contributed to the flight of foreign capital out of ANCOM countries during the 1970s. ANCOM's Decision 24 required that foreigners control no more than forty-nine percent of a given enterprise, and those investors who did have majority control after the adoption of Decision 24 usually had to divest themselves of majority control within fifteen or twenty years.[49] Additionally, Decision 24 provided that foreign investors could not "buy out failing nationally owned businesses unless no other buyer is found."[50] Note that Venezuela, Colombia, and Peru followed Decision 24 in restricting foreign ownership of marketing companies to forty-nine percent,[51] but Venezuela went further in requiring that foreigners reduce their participation in insurance and reinsurance companies from forty-nine percent to less than twenty percent.[52] All ANCOM countries, except Venezuela, prohibited DFI in public services.[53] ANCOM

47. *Mexican Foreign Investment Law*, *supra* note 18, art. 5.

48. *Id.*

49. *See* Jova, Smith & Crigler, *supra* note 6, at 18.

50. *Id.* at 19.

51. Decree No. 1.200, January 1, 1974 (Venez.); INVESTMENT CLIMATE IN THE WESTERN HEMISPHERE, *supra* note 25, at 65, 235.

52. *See* Law of July 2, 1965, GACETA OFICIAL EXTRA. No. 984, July 9, 1975 (Venez.)(concerning insurance and reinsurance companies).

53. Peru disallowed foreign investment in public services. *See* INVESTMENT CLIMATE IN THE WESTERN HEMISPHERE, *supra* note 25, at 235. Colombia disallowed investment in public services but, like Mexico, also prohibited DFI in advertising, radio broadcasting, television, newspapers, and magazines. *Id.* at 66. Chile followed the ANCOM agreement by limiting DFI participation in Chilean enterprises through DL 600, *supra* note 24, which prohibited foreign acquisition of more than 20% of any existing privately owned enterprise. The regulation also provided an exception to the rule if a foreign investor's participation in an existing enterprise was of great importance to the nation, but Chile rarely invoked this exception. DL 600, *supra* note 24, art. 17.

Although Venezuela did not prohibit DFI in public services, it only allowed "national companies" in the public service areas, which include telephone, water and sewage, electricity, and health services. Decreto No. 1.200, art. 21(a) defines "public services" as: "telephone, telecommunications, drinking water, sewerage, the generation, transmission, distribution, and sale of electricity, health services, and those involving the protection and custody of goods and persons." Decreto No. 1.200, art. 21(a), 664 GACETA LEGAL 842, Aug.

countries, like Mexico, also put their oil and mining industries under state control.[54] Venezuela, for instance, nationalized its steel and, de facto, its aluminum industries in 1975, at almost the same time it nationalized its oil industry. Although it had been looking for DFI joint venture partners for its aluminum industry, it found no interest.[55] Bolivia also kept all of its radioactive mining and mineral smelting industries state controlled.[56]

Therefore, both Mexico and the ANCOM countries imposed forty-nine percent equity participation limits on foreign capital. The forty-nine percent equity participation restriction had a great impact on foreign investors who could no longer take a majority stake in a corporation based in a Latin American country, and this rule discouraged a great many foreign investors in the 1970s and 1980s.

C. *Restrictions on Technology Transfer Agreements*

Latin American countries, worried about becoming dependent upon DFI, thought they saw a way to cut the cord to foreign capital through strict regulation of technology transfer agreements. Historically, because foreign investors had greater bargaining power than Latin American countries, these agreements contained a wide range of adhesion clauses, which resulted in large profits for foreign investors, only low-wage jobs for the local populace, and no actual transfer of technology to the Latin American country. Latin American countries sought to bring this unhappy state of affairs to an end by banning the restrictive clauses in the agreements and appointing a government agency to regulate transfer agreements. Foreign capital, realizing that they would no longer reap enormous

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31, 1986 (Venez.)[hereinafter Decreto No. 1.200].

In addition, Venezuela only allows "national companies" (companies less than 20% foreign-owned) in the television, radio, newspaper, and Spanish magazine businesses. *See Id.*, art. 21 (b).

54. In Bolivia, the state ran the petrochemical industry through the Ministry of Energy and Hydrocarbons and Yacimientos Pertroliferos Fiscales Bolivianos (YPFB), a state-owned corporation. INVESTMENT CLIMATE IN THE WESTERN HEMISPHERE, *supra* note 25, at 39. In Colombia, the state owned the oil industry, but foreign investors could form joint ventures with the state-owned company Ecopetrol if the foreigner absorbed the exploration risks. *Id.* at 65. In Venezuela, the government prohibited DFI in petroleum exploitation and nationalized the industry in 1976. *See* Organic Law Reserving to the State the Industry and Commerce of Hydrocarbons, Aug. 29, 1975, art. 6, *translated in* 14 I.L.M. 1492, 1493-94 (1975). *See also* Radway & Hoet-Linares, *supra* note 24, at 5.

55. Radway & Hoet-Linares, *supra* note 24, at 6-7.

56. INVESTMENT CLIMATE IN THE WESTERN HEMISPHERE, *supra* note 25, at 37.

profits while safeguarding their technological secrets, reacted by staying away from Latin America.

Mexico perhaps most vividly illustrates this turn of events. The Mexican Technology Transfer Law of 1976 required registration of all contracts for the sale of foreign technology to Mexican firms.[57] The purpose of the law was to avoid payment of excessive or unjustified prices for foreign technology and to eliminate certain restrictive clauses believed to have been included in past technology transfer contracts without reservation of rights to the buyer.[58] The law therefore prohibited such clauses as: free grant-backs, price-fixing, marketing restrictions,[59] foreign choice of forum clauses,[60] and clauses allowing participation in a licensee's management.[61] The government could also refuse registration if the investor failed to guarantee the "quality and results" of the licensed technology; if it refused to indemnify the licensee against third-party infringement claims;[62] if the license was for longer than ten years;[63] if the licensee was restricted from disclosing the technology after the license term;[64] if the technology was already available in Mexico;[65] or if the license called for a royalty that was disproportionate to the technology furnished or economically oppressive to the licensee or the Mexican economy.[66]

Moreover, under the Mexican patent law, patents were only valid for up to a ten-year non-renewable term.[67] The government could license the rights to someone else if the license was not exploited within three years,[68] and the unexploited patent would lapse if no one requested a license during the fourth year,[69] although the literal interpretation of this provision has not always

57. *See* Jova, Smith & Crigler, *supra* note 6, at 24 (citing *Ley sobre el Registro de la Transferencia de Tecnología y el uso y Explotación de Patentes y Marcas*, 315 D.O. 45, Dec. 30, 1972, *reenacted with amendments*, *Ley sobre el Control y Registro de la Transferencia de Tecnología y el uso y Explotación de Patentes y Marcas*, 370 D.O. 15, Jan. 11, 1982 [hereinafter *Mexican Technology Transfer Law*]). *See also* Pitts, *supra* note 5, at A13.

58. Jova, Smith & Crigler, *supra* note 6, at 24.

59. *Mexican Technology Transfer Law*, *supra* note 57, at art. 15, paras. 2-9.

60. *Id.* art. 16, para. 4.

61. *Id.* art. 15, para. 1.

62. *Id.* art. 15, paras. 12, 13.

63. *Id.* art. 16, para. 3.

64. *Id.* art. 15, para. 11.

65. *Id.* art. 16, para. 1.

66. *Id.* art. 16, para. 2. *See also* Murphy, *supra* note 1, at 141.

67. *Mexican Registration and Transfer of Technology Law*, *supra* note 24, art. 40.

68. *Id.* arts. 41, 50-58.

69. *Id.* art. 48.

been enforced.[70] In addition, the Mexican government would not allow inventions to be patented if they fell in one of ten categories, such as chemical products, pharmaceuticals, fertilizers, pesticides, herbicides, and food and drink.[71] The inventor could get a "certificate of invention" that would require him to grant nonexclusive licenses for royalties established by the Mexican government, but the availability of that privilege was extremely limited.[72] The law also required that all trademarks registered abroad be "linked" with a trademark originally registered in Mexico.[73] Finally, trademarks were only protected for five years.[74]

Faced with such prohibitive restrictions on the transfer of technology, it is no wonder that foreign investors were hesitant to transfer technology to Mexico. Moreover, the Mexican government's restrictions on DFI may have damaged Mexican interests that wanted to go international as much as foreign investors that wished to invest in Mexico.[75] In addition, some of the restrictions, including those found in General Resolution No. 17, could have resulted in retribution from countries such as the United States.[76]

Decision 24's drafters believed that investors had used technology contracts to hide repatriation of excessive profits.[77] Like Mexican law, the ANDEAN Code prohibited clauses that restricted or limited a technology's value to the recipient country, *e.g.*, grant-back clauses.[78] Decision 24 also imposed more drastic restrictions by prohibiting local companies from paying royalties to their foreign parents or affiliates.[79] In addition, repatriation of roy-

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70. Murphy, *supra* note 1, at 141 (citing Dávalos, *Patents, Trademarks and Transfer of Technology in Mexico*, in FEDERAL BAR ASSOCIATION, 1980 PROCEEDINGS OF THE UNITED STATES-MEXICO TRADE LAW CONFERENCE 1.

71. Murphy, *supra* note 1, at 142 (citing *Mexican Registration and Transfer of Technology Law*, *supra* note 24, at art. 10).

72. *Id.* at 142 (citing *Mexican Registration and Transfer of Technology Law*, *supra* note 24, at arts. 127-28).

73. Murphy notes that this provision stirred great controversy in the international trademark bar. *Id.* at 142 nn. 52-55 and accompanying text.

74. *See* Pitts, *supra* note 5.

75. *See* Murphy, *supra* note 1, at 148-49 (proposing a hypothetical).

76. General Resolution No. 17, *supra* note 28, prohibited advertisements for the sale of foreign real estate from appearing in Mexican communications media. Ewell Murphy posited that there would be nothing to stop the United States from banning Mexican resort advertisements in the *Houston Post* as a countermeasure to this resolution. Murphy, *supra* note 1, at 148-49

77. *See* Jova, Smith & Crigler, *supra* note 6, at 19. Also note that, in Venezuela, SIEX oversees technology transfer contracts. Decreto No. 1.200, *supra* note 53, at 847.

78. Decreto No. 1.200, *supra* note 53, art. 65, at 847.

79. *See id.* art. 21, at 842; *See also Regional Developments (Latin America)*, 22 INT'L

alties under registered technology transfer contracts were limited to fourteen percent of the investment, although that figure was later increased to twenty percent.[80]

Encouraged by the riches that some were reaping in the booming oil market, Mexico and the ANCOM nations set out to rid themselves of the influence of foreign capital by developing policies that discouraged DFI. Among these policies were the implementation of labyrinthine registration and approval procedures, as well as severe restrictions of foreign equity participation and technology transfer agreements. As a result of these policies, Mexico and ANCOM were successful in reducing the DFI flow into their countries. Unfortunately, when the oil boom went bust and the international economy faltered in 1982, these countries could not rely on a steady flow of DFI to buoy their economies. Furthermore, because of foreign investors' disaffection with these countries as a consequence of the earlier restrictions, Mexico and ANCOM had to take even more drastic steps to relax or abolish earlier restrictions in order to persuade foreign investors to invest in their countries once again.

III. Recent Changes in Latin American Foreign Investment Laws that Encourage Direct Foreign Investment

In the 1980s, Latin American countries began to realize that the flaws in the 1970s FILs were that they gave the governments too much control. Consequently, foreign investors became discouraged, and the flow of DFI to those countries slowed to a trickle.[81] As the flow of DFI slowed and Latin American countries gained the control they desired, they turned to international banks to fill the capital needs that DFI left unsatisfied.[82] This influx of loan money sustained the Latin American economies through the boom periods of the late 1970s.[83] However, when the Latin American

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LAW. 222 (1988)[hereinafter *Regional Developments I*].

80. *See* Decision 24, *supra* note 20, art. 37, at 150.

81. The Mexican Technology Act of 1976 "actually decreased the flow to Mexico of technology needed for economic development." Pitts, *supra* note 5. ANDEAN group DFI policies of the 1970s clearly reduced the inflow of DFI. *See* Jova, Smith & Crigler, *supra* note 6, at 31.

82. Jova, Smith & Crigler, *supra* note 6, at 31.

83. "Too much foreign debt and not enough equity investment in the 1970s, so the argument goes, made it difficult for them [developing countries] to adjust their economies to external shocks since interest payments on debt, unlike dividends, cannot be cut when times are bad." *No Direct Answer*, THE ECONOMIST, April 27, 1985, at 92.

economies began to falter in the 1980s, the banks would no longer continue to lend, leaving DFI as the only other source for capital.[84] In order to attract more DFI, the governments began liberalizing their FILs.[85] Although this part of the FIL cycle has not yet run its full course, there is strong evidence to suggest that the pendulum has swung completely in the other direction. Instead of being too restrictive, Latin American FILs are becoming too permissive. Instead of discouraging DFI, liberal FILs are causing DFI to pour into Latin American countries such as Mexico; even the ANCOM countries have backed away considerably from the rigid prohibitions of Decision 24. Yet, lurking behind this new trend in Latin American FILs is the danger that this flood of new DFI will erode sovereign control and cause political instability. Given Latin America's new hunger for DFI, it is not surprising that these countries liberalized their FILs by repealing the restrictive aspects of the old FILs. The following sections discuss the changes that Latin American countries have made in their FILs, but the focus remains on the same elements previously discussed in Part II of this Article.[86]

A. *Relaxed Screening and Approval Procedures*

Latin American countries have begun to relax the registration and approval procedures for DFI; however, few have actually begun to streamline the process itself. Mexico, for example, has aggressively streamlined its approval and screening process within the last two years. No longer do foreign investors seek governmental approval for an investment in a newly-formed Mexican company if the investment does not exceed U.S. $100 million and meets certain other conditions.[87] In addition, foreign investors now

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84. Jova, Smith & Crigler, *supra* note 6, at 31; *Factors*, *supra* note 9, at 672 ("After reaching a peak of U.S. $17.24 billion in 1981, direct investment flows have plummeted to U.S. $11.6 billion in 1982, and to U.S. $7.80 billion in 1983."). Note that even in 1987, foreign investors were uncertain whether many developing countries would welcome DFI, although by 1987, Mexico was already engineering debt-for-equity swaps in the tourism, agribusiness, and chemical industries. Joan Berger, *An Offer the Third World Can't Refuse*, BUS. WK., June 29, 1987, at 65.

85. Although Mexico had already begun debt-for-equity swaps, the Mexican government still had a great many trade barriers in place, to which the U.S. government objected as late as 1988. Keith M. Rockwell, *U.S. Targets Mexican Investment Barriers*, J. COM., Feb. 10, 1988, at 2A.

86. *See supra* notes 6-22 and accompanying text.

87. The following are conditions which a foreign investor must satisfy to avoid the need for governmental approval:

have a three year window in which they may acquire all the shares of an existing Mexican company without governmental approval, provided that the proposed investment meets the same conditions as those for investment in a new business.[88] However, even with these improvements, foreign investors still feel that the application and approval process takes too long. Companies such as Subway Sandwich Shops and ShowBiz Pizza have experienced great difficulty and delay in trying to obtain approval of their applications. For example, it took ShowBiz two years to gain approval of its franchising agreement from the Mexican government. The company finally abandoned the deal and was forced to forego royalties, even though it had already opened twelve units.[89] Subway Sandwiches has claimed that its plans were foiled by the "all-powerful

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(1) the investment in fixed assets does not exceed U.S. $100 million;

(2) the investment is funded from a non-Mexican source and the paid-in capital equals at least 20% of the total investment in fixed assets;

(3) the company's industrial sites are not located in areas of high industrial concentration (*e.g.*, Mexico City, Guadalajara, and Monterrey);

(4) the company maintains a neutral or positive foreign currency balance during the first three years of operation;

(5) the company creates permanent jobs and establishes training and development programs for employees;

(6) the company uses adequate technologies to satisfy environmental requirements; and

(7) the company is not engaged in activities subject to special restrictions (*e.g.*, agriculture, forestry, and fishing).

Regional Developments (Latin America), 24 INT'L LAW. 235, 278 (1990) [hereinafter *Regional Developments II*] (citing *Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, art. 5, 428 D.O. 14, 15, May 16, 1989 [hereinafter *New Regulations*]).

88. *Regional Developments II*, *supra* note 87, at 278. For a non-Latin American comparison, see the changes that Canada has made in its review procedures through the Investment Canada Act. Evans, *supra*, note 26, at 87-97. Evans concludes that Canada may not be for up sale, but that it is certainly "open for business" again. *Id.* at 97. In Ireland, the Industrial Development Agency (IDA) assists companies wishing to form a venture in that country and the procedure for forming a capital venture only takes about eight weeks, while costing very little. After drawing up a memorandum and articles of association, which costs about 250 pounds, the processing of the application for public company status takes about eight weeks and costs about 80 pounds. The company must then submit the documents to the registrar of public companies. Christopher Thomas Griffith, *The Republic of Ireland's Foreign Investment, Licensing, Intellectual Property Law: A Guide for the Practitioner*, 12 N.C. J. INT'L L. & COM. REG. 1, 12 (1987) (citing Companies Act §§ 6,11,12,14, and 17, *reprinted in* 14 COM. L. WORLD 1025-29). Argentina, a non-ANCOM country, also has simplified its registration and approval process. The Application Authority keeps a Registry of Investments; however, registration of investments is optional, and the procedure now consists of only a one-page filing. *Regional Developments II*, *supra* note 87, at 825.

89. Chip Ricketts, *New Laws Open Mexico to Franchisors*, DALLAS BUS. J., Feb. 19, 1990, at 1.

regulatory agency called the Technology Transfer Bureau."[90] A company spokesman pointed out that the Bureau put "franchise applicants through a paperwork gauntlet" and that the Bureau "had unlimited discretion in evaluating the terms of franchise agreement."[91]

ANCOM countries have also begun to relax their application and approval processes, but they are moving at a much slower rate than Mexico. Note, however, that Chile, one of the original ANCOM countries, has abandoned the pact and has pursued an independent course.[92] At first, Chile adopted the ANCOM strategy of trying to regulate the type and amount of DFI that flowed into specific industries in the country by means of a screening and approval procedure. DL 1748 gave the Chilean Foreign Investment Committee the exclusive power to authorize DFI under Article 12. The Foreign Investment Committee had to approve DFI if it was over U.S. $5 million, in public services areas normally reserved for the state, in media and communications, and from foreign, state, or public institutions.[93] However, Chile also implemented an innovative procedure that allowed the Executive Secretary of the Foreign Investment Committee and the Minister of the Economy alone to approve DFI of less than $5 million. Therefore, DFI of less than $5 million was put on an approval "fast-track."[94] This "fast track" procedure is an excellent idea in that it helps eliminate the administrative logjam that can develop when an agency must approve all DFI applications. Chile could probably improve this "fast track" system, however, if it were to raise the exemption limit. Although Mexico's new limit of U.S. $100 million for new transfer agreements seems a bit too high, amounts in the range of U.S. $10 million seems reasonable.

The most dramatic streamlining of the application and approval process has come in Colombia, where streamlining and simplification of DFI approval procedures now allow projects conforming to governmental criteria to be approved in four weeks. If the documentation is not complete, the government will issue a

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90. Matt Moffett, *For U.S. Firms, Franchising in Mexico Gets More Appetizing, Thanks to Reform*, WALL ST. J. (Eastern ed.), Jan. 3, 1991, at A6.

91. *Id.*

92. Murphy, *supra* note 4, at 645.

93. Foreign Investment Statute, Decree-Law No. 1748, art. 16, March 11, 1977 (Chile), *reprinted in* 17 I.L.M. 134, 137 (1978) [hereinafter DL 1748]; *see also* Thornton, *supra* note 14, at 260.

94. *See* Thornton, *supra* note 14, at 260.

temporary permit for twelve weeks until the documentation is obtained and the approval process runs its course.[95] The Colombian model is attractive in that it expedites the approval process for the foreign investor, while still allowing the government to maintain the control of the influx of DFI. The fact that the government has criteria that define the kind of DFI that it will approve is also helpful, although there undoubtedly will be disputes over those criteria. The best feature of this system is that the foreign investor can begin operations in a very short time without first having to run a paperwork gauntlet. If investors have to provide more documentation or fill out paperwork, they can do so while setting up operations. When contrasted with the long delays that investors have experienced in Mexico, this model is vastly superior.

Venezuela has also taken steps to improve its registration and approval process. In Venezuela, a foreign investor may now register a local branch without approval from SIEX. This procedure contrasts with the previous situation, where local commercial registries would not register local branches without approval of SIEX, and SIEX would refuse to register the local branch "unless the local branch was required by the foreign investor to perform a specific contract with the Venezuelan government. . . ."[96] Foreign investors may also acquire stock and other equity interests in Venezuelan companies without first having to obtain SIEX approval.[97] In contrast to the 1970s, SIEX actually encourages branch, technical assistance, and engineering services company formations in previously prohibited areas by exploiting loopholes in Venezuela's restrictive DFI laws, thereby encouraging investment in important industries, *e.g.*, the petrochemical industry, where it lacks technical expertise.[98] In addition, foreign investors now have an incentive to register an investment because registered investors have access to the foreign currency necessary to remit dividends and repatriate their investments if exchange controls are in effect, as long as the investors adhere to requirements promulgated by the Central Bank. While the Venezuelan system is not as streamlined as the Colombian model, or as liberal in allowing DFI into the country as the Mexican model, Venezuela has made great progress in improv-

95. Decree 1265, July 10, 1987 (Colom.). *See also* INVESTMENT CLIMATE IN THE WESTERN HEMISPHERE, *supra* note 25, at 67; *Legal Memoranda (Colombia)*, 19 U. MIAMI INTER-AM. L. REV. 245, 248-51 (1987).

96. *Regional Developments II*, *supra* note 87, at 835.

97. *Id.* at 835-36.

98. *See* Radway & Hoet-Linares, *supra* note 24, at 27-28.

ing its registration and approval system.

B. *Relaxed Equity Participation Limitations*

Latin American countries are also moving to relax equity participation restrictions, though at different speeds, with Mexico moving the fastest of them all. Mexico has relaxed restrictions on DFI in previously restricted industries.[99] The government may now authorize foreign investors to purchase, through temporary trust arrangements, an unlimited percentage of beneficial rights to shares in companies engaged in activities such as air and maritime transportation, gas distribution, and the production of secondary petrochemicals.[100] Factors that the government will consider in approving such investments include whether the company is experiencing severe financial difficulties and whether the majority of production will be exported.[101] The trust arrangements have a twenty-year cap, and a governmental officer must participate on the trust's technical committee as a voting member.[102] Mexico also published a narrow and exclusive list of primary and secondary petrochemicals, thereby liberalizing investment in the petrochemical industry.[103] Mexico still prohibits foreign investment in primary petrochemicals, and secondary petrochemicals may only be produced by Mexican companies with foreign equity participation not greater than forty percent.[104] However, foreigners may now own a 100% equity stake in a company that produces petrochemicals not on the government's list.[105]

ANCOM countries have also significantly relaxed restrictions on equity participation, though not to the degree that Mexico has.

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99. Argentina, by contrast, now allows foreign investors to invest in the country by purchasing existing businesses or establishing new ones under the same conditions applicable to local investors. *Regional Developments II*, *supra* note 87, at 825. Ireland, by contrast, has no equity participation limitations and one commentator has advised lesser developed countries (LDC's) to emulate Ireland's approach in this area. Griffith, *supra* note 88, at 11. Singapore, a country which has enjoyed phenomenal growth in the last twenty-five years, also does not require local equity participation. TAN CHWEE HUAT, FINANCIAL MARKETS AND INSTITUTIONS IN SINGAPORE 10 (4th ed. 1985).

100. *See New Regulations*, *supra* note 87.

101. *See Regional Developments II*, *supra* note 87, at 278.

102. *Id.*

103. *Id.*

104. *Id.* For the government publication of the list of primary and secondary petrochemicals, see *Resolución que Clasifica los Productos Petroquímicos que se Indican, Dentro de la Petroquímica Básica o Secundaria*, 431 D.O. 22, Aug. 15, 1989.

105. *Regional Developments II*, *supra* note 87, at 278.

In May 1987, Decision 220 eliminated Decision 24's "mixed" and "national" ownership requirements, except for those investors who wish to take advantage of the intra-Andean tariff and other trade benefits.[106] Moreover, even in cases where the transformation to these forms of ownership must occur, the time period for transformation is expanded from fifteen to thirty years (thirty-seven years in Bolivia and Ecuador).[107] However, investments in certain sectors of the member countries' economies are still forbidden. Decision 220, Article 3 provides: "The member countries will not authorize direct foreign investment in activities considered properly managed by local existing companies."[108]

Colombia now allows fifty-fifty joint ventures between Ecopetrol and foreign investors in the petroleum industry, as long as the foreign investor assumes the exploration risks. The government also allows joint ventures in the coal industry. In addition, export industries can be 100 percent foreign-owned, if eighty percent of the output is exported to non-ANCOM countries. Finally, investment in six free trade zones may be 100 percent foreign-owned.[109] The government also liberalized its policies in the financial service industry to allow "mixed" banks that maintained the forty-nine percent limitation on foreign participation.[110]

Peru still abides by Decision 24 and 220, but now a national investor may transfer its shares to a foreign investor if the foreign investor can show that the transfer will benefit the Peruvian economy.[111] Peru began to interpret Decision 24 in favor of encouraging foreign investment in 1982. For example, it began to allow 100 percent foreign ownership of enterprises that did not intend to take advantage of the Andean pact's special incentive for regional inte-

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106. Herbert Lindow, *The Andean Pact Relaunched: Implications for the United States*, BUS. AM., Oct. 12, 1987, at 12; *Regional Developments I*, *supra* note 79, at 223.

107. Lindow, *supra* note 106, at 12.

108. *Id.*

109. INVESTMENT CLIMATE IN THE WESTERN HEMISPHERE, *supra* note 25, at 65.

110. *Id.* at 66. Note also that non-Latin American countries are relaxing their equity participation requirements. Malaysia, for example, relaxed its policy prohibiting foreigners from owning more than a 30% equity stake in companies outside the country's eight free trade zones in 1984. The government announced that foreigners might be granted the right to own up to 70% of the equity, but it was not clear whether 70% was the absolute ceiling. Li Shui-Hua, *New Incentives for Foreign Investment*, 6 East Asia Executive Reports 13 (July 15, 1984). Malaysia began studying agricultural and fishing industry incentives in 1984. However, the incentives were expected to be discouraged by a prohibition of foreign ownership of agricultural land under the amended national land code. *Id.*

111. *Regional Developments II*, *supra* note 87, at 834-35 (citing Res. 5-89-EF/35, Nov. 14, 1989).

gration, *e.g.*, tariff barriers.[112] It also has passed a law creating Industrial Free Trade Zones and Zones with Special Treatment.[113] Companies established in the free trade zones are exempt for fifteen years from import and export duties, exchange controls, Decision 220 restrictions, and a host of taxes.[114]

Recent changes in Venezuela's foreign investment laws allow a foreign investor to own 100 percent of the capital stock of a Venezuelan company active in local marketing.[115] More importantly, however, Venezuela's president has recently made a bid to change Article 5 of the oil industry nationalization law, which bans DFI in most oil-related activities. While critics charge that the president is preparing to sell out the national oil industry in order to raise money to reach higher production levels,[116] the government contends that DFI may be the only way, in view of the Persian Gulf crisis, that Venezuela can set itself up as a secure source of oil for industrialized economies.[117] Regardless of the outcome of the governmental debate on privatization, *Pequiven*, the Venezuelan state petrochemical concern has launched a U.S. $1 billion expansion program in partnership with local private investors, foreign investors, and investment from the stock exchange.[118]

In sum, Mexico has moved boldly to increase the levels of foreign investment participation in a great many of its industries by eliminating the suffocating forty-nine percent rule. ANCOM countries are also removing restrictions, but many still impose a forty-nine percent foreign investor equity restriction in many important industries.

C. *Relaxed Restrictions on Technology Transfer Agreements*

Mexico published new regulations to the Mexican Transfer of Technology Law which superseded more restrictive regulations but did not amend the Transfer of Technology Law itself.[119] The new

112. INVESTMENT CLIMATE IN THE WESTERN HEMISPHERE, *supra* note 25, at 236.

113. The two industrial Free Trade Zones are Matarani and Peru, both of which are harbors located in the southern part of Peru. *Regional Developments II*, *supra* note 87, at 834-35 (citing Law No. 25100, Sept. 29, 1989 (Venez.)).

114. *Regional Developments II*, *supra* note 87, at 834.

115. *Id.* at 835 (citing Decree No. 727, *published in* GAZETTE OFICIAL No. 34397, Jan. 26, 1990 (Venez.)).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 831.

Regulations loosen the registration requirements of management agreements. The only agreements that now need to be registered are those agreements that allow the foreign licensor to intervene directly in the company's decision-making process.[120] In addition, software license agreements need only be registered when they grant the local licensees the authority to produce, distribute, or market the software programs.[121] Further, franchisors need only register a model of a franchise agreement with the National Registry of Transfer of Technology (NRTT) and every six months file signed copies of actual franchise agreements that make reference to the model agreement.[122] The new regulations also liberalize the interpretation of certain clauses the previous regulations forbade.[123]

Most importantly, the new regulations restrict the discretionary power of the NRTT. Now, the NRTT may only object to an agreement on grounds expressly set forth in the TTL and its regulations.[124] Yet, even if an agreement contains one or more clauses deemed to be objectionable under the regulations, article 53 still provides that the NRTT may still register the agreement if the agreement will benefit the country.[125] Finally, the NRTT still has

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120. *Id.*

121. *Id.*; *see also* Pitts, *supra* note 5, at A13.

122. *Regional Developments II*, *supra* note 87, at 831.

123. For example, under the regulations:

> (a) a tie-in provision will be admissible if the technology agreement establishes trademark rights and the licensor agrees to supply certain inputs to the licensee in order to maintain the quality, prestige, and public image of the products manufactured under the agreement;
>
> (b) a clause establishing minimum production levels will be admissible if the agreement grants an exclusive license to the licensee;
>
> (c) a confidentiality clause extending beyond the term of the agreement will be admissible if a risk of public disclosure of the technical know-how covered by that clause is demonstrated; and
>
> (d) a confidentiality clause in a registered amendment agreement covering substantial improvements to licensed technology previously supplied by the licensor will be effective for up to ten years from the date of the amendment, regardless of the duration of the original agreement, provided that the improvements will increase production, quality, and competitiveness of the licensee.

Id. at 832.

124. *Id.*

125. Article 53 of the Regulations provides that the NRTT may register an agreement upon meeting the following conditions:

> (a) the agreement does not fall within any registration exceptions set forth by the TTL or the regulations.
>
> (b) the execution of the agreement benefits the country in any of the following ways
>
> (1) generates employment;

the authority under the TTL to object to royalty rates when they are unreasonable or excessive, but the new regulations are silent on the subject of royalties.[126] Moreover, the Ministry of Commerce and Industrial Development has indicated that Mexican industry has matured enough to negotiate its own payment terms, so that the NRTT will now permit royalty clauses if they are freely negotiated between the parties.[127] As a consequence of liberalizing the technology transfer regulations, Mexico is experiencing a sudden rise in the number of new transfer agreements registered, especially in the franchising area.[128]

Further, the Mexican Congress is expected to vote on new legislation that will amend the present law this spring. The proposed legislation would "lengthen the term of patent protection from 14 to 20 years, and trademark protection from 5 to 10 years."[129] Yet, passage of this new legislation is not assured. It is important to note that regulations, while modifying the law, are not the law themselves. Furthermore, it is indicative of the strong nationalist political tendencies still present in Mexico today that the Mexican government has been unable to change the present law governing

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(2) improves the technical qualifications of local human resources;

(3) gives access to new markets in other countries;

(4) makes possible the local manufacture of new products, especially if they replace importations;

(5) improves the foreign currency balance;

(6) reduces unitary costs of production, as measured in constant pesos;

(7) develops local suppliers;

(8) uses technologies that do not contribute to the deterioration of the environment;

(9) fosters research and technological development activities at production facilities or related technical research centers; and

(c) the licensee declares before the Ministry of Commerce and Industrial Development, under oath, that it wishes to enter into the agreement as submitted, that execution of the agreement will result in any of the benefits described in (b) above, and that it will demonstrate the latter within a period of three years from the date of the registration of the agreement.

Regional Developments II, *supra* note 87, at 832.

126. *Id.* at 833.

127. *Id.*

128. Companies such as Subway Sandwiches, Domino's Pizza, Chili's Hamburger Grill, Blockbuster Video, Athlete's Foot, and Kwik-Kopy Corp. are rushing to start franchises, while companies such as McDonald's Corp., Holiday Corp.'s Holiday Inn, and Kentucky Fried Chicken wish to add to franchises already present in Mexico. For instance, Kentucky Fried Chicken hopes to increase its 53 outlets to over 200 in the next five years, and the number of companies participating in the Mexican Franchise Association trade show rose from nine last year to 40 this year. *See* Moffett, *supra* note 90.

129. Pitts, *supra* note 5.

the regulations.[130] This state of affairs is a cause for concern to foreign investors as, presently, the status of intellectual property rights can change with each new set of regulations, which does little to inspire investor confidence.

Although ANCOM countries have changed their posture on technology transfer agreements, they still substantially restrict the terms of the agreements. The Andean Pact recently passed Decision 220, which liberalized ANCOM's posture concerning technology transfer agreements in that it encouraged rather than discouraged such transfers.[131] Under Decision 220, national authorities may allow royalty payments by local companies to their foreign parent or affiliate.[132]

Venezuela has changed its FIL to allow foreign investors and Venezuelans to conclude technology transfer agreements without approval from SIEX. The exception to this new rule is that SIEX approval is required if one of the parties to the agreement is a Venezuelan company characterized as a foreign enterprise and the other is a non-domiciled foreign parent or affiliate. However, this exception only applies if the royalty exceeds five percent of the net technological sales. Finally, Venezuela fell into step with Decision 220 by allowing a Venezuelan company characterized as a foreign enterprise to pay royalties to its non-domiciled foreign parent or affiliate.[133]

Peru's National Committee for Foreign Investment and Technology (CONITE) also amended its technology transfer regulations to conform to Decision 220.[134] Under the new regulations, CONITE may allow a subsidiary to pay royalties to its parent per Decision 220; however, it will still not authorize technology transfer agreements between a Peruvian branch and its head office abroad.[135]

With respect to technology transfer agreements, Mexico has taken bold steps toward easing the restrictions that it had previously imposed. However, because Mexico has only changed its regulations regarding transfer agreements and not its actual laws,

130. *Id.*
131. *See Regional Developments I, supra* note 79, at 222.
132. *Id.*; *see* text accompanying *supra* note 78.
133. *See Regional Developments II, supra* note 87, at 835; *see also supra* note 114 and accompanying text.
134. *Regional Developments II, supra* note 87, at 834; *supra* note 111-13 and accompanying text.
135. *Id.*

there is no guarantee that the attractive environment for transfer agreements that exists today will exist in the future. ANCOM countries, too, have changed their posture regarding transfer agreements. However, ANCOM countries still impose substantial restrictions, and these restrictions continue to discourage foreign investors.

IV. Restrictive Elements of Foreign Investment Laws that Should Be Included to Protect Important National Interests

What follows are suggestions that Latin American countries should consider for implementation in the FILs to help them attain a balance between DFI and sovereign control in their countries. These suggestions are by no means exhaustive, nor are they meant to be, as Latin American countries will necessarily need to consider a great many elements of their FILs in striking a successful balance.

A. There Must Be Clear and Streamlined Application and Approval Procedures

Jürgen Voss noted that conduct in the "grey zone," which includes restrictive trade measures, is the real risk factor faced by developing countries.[136] He also noted that the greatest disincentive to DFI was dealing with local authorities.[137] Foreign investors do not like to deal with foreign authorities because their application and approval procedures are unclear and cause substantial delays. Therefore, one of the easiest ways to offer foreign investors an incentive to invest in a given country is to make the application and approval procedures for DFI easy to understand and easy to comply with.

This is not to say that Latin American countries should not keep certain screening and approval procedures as a way of exercising control over DFI entering the country. By controlling the amount of DFI that flows into the country, the government is better able to maintain political and social stability within the country and can control the country's economy and development. Such an

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136. Voss, *supra* note 3, at 703 (citing Ifo-Institut, *Investionspolitik der Entwicklungsländer und deren Auswirkungen auf das Investitionsverhalten deutscher Unternehmen*).
137. *Id.*

approval and registration process would be worthless if the government does not have a clearly-defined national development plan.

However, Latin American countries should consider taking steps to better streamline their application and approval processes, perhaps by adapting the Colombian model to their own systems to avoid delay, as delay in approval of DFI is an important disincentive. Governments may also be able to streamline this process by promulgating clear guidelines for approval of DFI. These guidelines should include precise definitions of terms, types of businesses, royalty amounts, and so forth. If there are methods of avoiding the prima facie restrictions of DFI laws so that both the government and the investor can reasonably attain their objectives, the office should market them as Venezuela's SIEX has done. If a government and an investor both clearly understand when, and under what conditions, DFI is allowed to enter the economy, there will be little opportunity for dispute and, consequently, delay.

Moreover, the governments of developing countries must invest resources to effectively administer a registration and approval process if the process is not to become a deterrent to DFI. As the change in Venezuela's administration of its FIL demonstrates, the administrative personnel should have a background in international trade or economics, and there should be enough staff to control DFI proposals. In addition, Latin American governments should consider excluding smaller amounts of DFI that will have little impact on the country's economy, as Mexico has done with technology transfer agreements. Finally, the agency charged with administering the FIL should be given the power to negotiate the details of, and give final approval to, DFI proposals that clearly fall under a statute or within a guideline.

If Latin American countries implement some or all of these suggestions, they should be able to control DFI flowing into their countries without jeopardizing the control they must exercise over the economic and political life of their countries.

B. There Must Be Some Equity Participation Restrictions in Important National Industries

Latin American countries should allow foreigners to hold majority positions in some industries, but they should be very careful to retain control over important national industries and resources, as the price for loss of control may be much higher than the short-term gains realized today.

Clearly, a forty-nine percent rule across the board has not worked in either Mexico or the ANCOM countries. Foreign investors simply do not want to invest millions of dollars in a company if they lack the power to control the destiny of their investment. Therefore, Latin American countries should consider doing away with the forty-nine percent rule, except for industries or natural resources of national importance. For instance, Mexico or Venezuela should allow a 100 percent foreign equity stake in a Pepsi subsidiary but only allow a minority stake in its oil or mining industries. Oil and mining industries are non-renewable resources that the governments of these countries should manage carefully. Since these industries play such an important role in these countries' economic, political, and environmental stability, it would be sheer folly to allow them to fall into foreign hands. Nevertheless, both of these countries should consider allowing foreign interests to take minority positions in these industries, as they may help boost productivity and bring in more capital, management knowhow, and advanced technology.

Latin American countries are beginning to realize, therefore, that, while they need to control important business and industry, they should avoid expropriative measures in asserting that control. Yet, Latin American countries should also avoid future expropriations by prudently considering whether they should denationalize important businesses and industries now. A country should not sell off its public services and important industries now if there is a distinct possibility that the country will later want, if not need, to assert control over that business or industry. For example, Mexico may be imprudently privatizing one of its most important industries, *Telefonos de Mexico* (TELMEX), its telephone industry.[138] The Mexican government has recently sold the rights to private investors to acquire a fifty-one percent voting stake in the state-owned telephone company. After completing the sale to these large investors, the government plans to offer the rest of its stake in the company on foreign stock markets.[139] After the TELMEX shares hit the international markets, it is very likely that foreign investors will hold a majority stake in TELMEX.[140]

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138. *See* Smith, *supra* note 5, at A3.

139. *Id.*

140. *Id.* Note that foreign investors did not gain a majority interest in TELMEX when the rights to the shares were sold at auction. Grupo Carso, a Mexican mining, manufactur-

Mexico may feel that selling off TELMEX to foreign investors is a good idea today, mainly because it believes that foreign investors will help upgrade Mexico's phone system, thereby improving its infrastructure and its attractiveness for further DFI.[141] However, there is no assurance that the present government is going to stay in power. Moreover, there is a strong nationalistic opposition in Mexico that, if it comes to power, will almost certainly undo a complete privatization. Why, then, does Mexico not move ahead more slowly? The potential damage to a country's image as an investment prospect will be much greater than any gain it could realize from increased foreign investor participation now or in the near future. If the reason for privatizing the telephone company is to make it more efficient, Mexico should realize that it has really only negotiated a huge technology transfer agreement. In fact, if Mexico had negotiated a technology transfer agreement for the phone company, it may have realized more in the long term. Under such an agreement, Mexico could have maintained control of the enterprise and bought the necessary technology. Now, the present government is open to the charge that it has sold off an important national industry, which may lead to the eventual undoing of not only the sale, but also the government itself.

In conclusion, Latin American countries should do away with the forty-nine percent rule in all industries that are not of national importance and should consider relaxing equity participation prohibitions in industries that are. However, Latin American countries should avoid allowing foreigners to take majority equity stakes in important national industries. Foreign control may create a national backlash that could once again raise expropriation's ugly head.

C. *There Ought to Be Some Restrictions on Technology Transfer Agreements*

Latin American countries may want to continue to impose some restrictions on holders of intellectual property rights when such transferees misuse their rights unfairly to prevent the ex-

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ing and tobacco concern, bought over half of the initial rights, so the full privatization, and the eventual foreign majority, cannot take place until there are succeeding stock offerings. Southwestern Bell maintains a strong interest in gaining further control of TELMEX since it purchased an option to buy an additional block of shares in an amount equal to the rights that it had already acquired. *Id.*

141. *See* text preceding *supra* note 9, especially factor 2 on infrastructure.

ploitation of the technology or to extort an unfair price for a license to further exploit the technology.[142] With this in mind, the ANCOM countries should consider relaxing their technology transfer laws by exempting smaller transfer agreements. Exempting

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142. One commentator has suggested that Ireland's intellectual property laws may be an excellent model for developing countries to follow. Patents in Ireland are granted for 16 years, with extensions of five or ten years if the invention is of exceptional merit and the patentee has not been adequately remunerated. Griffith, *supra* note 88, at 20 (citing Patents Act § 25 (Ir. 1964), *reprinted in* 62 PAT. & TRADE MARK REV. 189, 220-21 (1965)). Griffith suggests that developing countries should consider a provision allowing extension upon the patentee showing cause. *Id.* at 21. Yet, Ireland's patent law includes a "compulsory license" provision if the patentee does not exploit its patent within the first three or four years, or if it seeks to achieve the highest possible licensing fee should the article invented enjoy great demand. *See id.* (citing Patents Act § 39 (Ir. 1964), *reprinted in* 62 PAT. & TRADE MARK REV. 189, 231-32 (1965)). "A customary license may be granted at any time if deemed in the public interest to do so without complying with the waiting period." *Id.* at 21 n.119 (citing Paris Conventions, art. 5A, *discussed in* [Doing Business in Europe] Common Mkt. Rep. (CCH) para. 25,479 (1982)).

> These rights are deemed abused if:
>
> a) the invention, although suited to commercial exploitation, is not being exploited to its fullest extent; b) commercial exploitation is being prevented by the patentee's importation; c) demand is not being adequately met on reasonable terms or to a substantial effect by importation only; d) patentee's refusal to grant a license on reasonable terms prejudice's the trade of anyone in Ireland; or e) a trade or industry is unfairly prejudiced by conditions the patentee attaches to the purchase, hire, license, or use of a patented article or working of the patent process.
>
> These rights are also abused when any contract relating to the sale or license of the patented article contains conditions disallowing the purchaser or licensee from using any article supplied by others or requires them to obtain from the patentee any article not covered by the patent. This is known as an illegal "tying" contract.

Id. (citing Patents Act § 39(2)(a)-(e) (Ir. 1964), *reprinted in* 63 PAT. & TRADE MARK REV. 189, 231-32 (1965)).

Irish trademark law is another excellent example that developing countries may wish to emulate. In Ireland, "[t]rademarks are granted for a term of seven years and may be renewed upon application and payment of renewal fees." Griffith, *supra* note 88, at 23. "The registration fees vary with the type of trademark: fifteen pounds for one mark on one classification of goods; twenty pounds for defensive marks; and a renewal fee of fifty-five pounds." *Id.* (citing Trade Mark Rules, First Schedule, (Ir. 1963), *discussed in* [Doing Business in Europe] Common Mkt. Rep. (CCH) para. 25,486 (1982)). In other respects, Irish trademark law is very similar to U.S. trademark law. *Compare* Trade Marks Act, No. 9, § 51 (Ir. 1963), *reprinted in* 62 PAT. & TRADE MARK REV. 23 (1963) *with* 15 U.S.C. §§ 1051, 1114 (1982). As a result, Ireland's intellectual property law offers an encouraging contrast to Mexican intellectual property law of the 1970s and 1980s.

Many experts would probably agree with Griffith. *See, e.g.*, Pitts, *supra* note 5. However, for a number of reasons, the Irish model may not work for Latin America right now. First, many of the Latin American economies are simply not diverse enough and developed enough to allow for the terms that Mexico contemplates. Second, other Latin American countries oppose such terms in transfer agreements because they offend notions of national pride and excite local resistance to any overt domination or control by foreigners. *Id.*

smaller agreements should relieve countries of the administrative burden of policing such agreements without much incremental damage to the country's interest in regulating technology transfer. A ceiling of U.S. $100 million would probably be too high for ANCOM countries. As Chile has done with DFI, countries might consider putting agreements, valued at U.S. $5 million, on an approval "fast track."

On the other hand, Latin American countries, wishing to relax their technology transfer restrictions, should follow Mexico's lead and change their laws, not their regulations. Although such regulation changes in Mexico have encouraged foreign investment, many investors are still concerned that Mexico may revert to its former restrictive self if these changes are not codified as law. However, Latin American countries should not relax transfer restrictions to allow certain previously forbidden terms if their economies are not developed enough for competitive forces within the economy to make use of such terms impossible. Mexico maintains that its economy is developed enough to allow such terms, but one cannot help but be skeptical. Perhaps Mexico is counting on integrating its economy with the U.S. economy in a free trade agreement, thereby creating the "development" necessary. Whatever its rationale, Mexico has chosen a risky course for itself. This course has begun to flood Mexico with new technology transfer agreements, a flood that may buoy the country with prosperity or drown it in foreign influence.

The ANCOM countries, by contrast, are not developed enough to embark upon such a perilous course. They cannot allow such terms in their transfer agreements without losing control of their economies. In addition, it is very unlikely that the ANCOM countries will be integrating their economies with the U.S. "mega-economy" in the near future. Finally, many ANCOM governments still have a strong aversion to allowing such terms in technology transfer agreements, as do certain elements within Mexico itself.

Mexico may be breaking its own path through the economic jungle of the 1990s, but other Latin American countries should be reluctant to follow.

V. Conclusion

Many years ago, Jova, Frank & Crigler noted, "The need to create a successful, mutually beneficial accommodation between private capital and public policy remains the great task of this century. . . ."[143] Yet, as the history of Latin America demonstrates, that "mutually beneficial accommodation" requires that a country strike the correct balance, like a performer on a high wire. Mexico and the ANCOM countries are continuing their struggle to find that correct balance.[144] They are beginning to see the need for a "receptive and liberal investment environment that recognizes the legitimate interests of foreign investors while maintaining adequate policies and procedures to ensure the soundness of the investments involved,"[145] but they are still having difficulty deciding how much, and at what rate, DFI should enter their countries in order to strike that difficult balance. Regulating foreign investment is an important part of a country's overall development strategy, even a strategy aimed at relieving a country's dependency on DFI.[146] However, in today's globally interdependent economy, a strategy aimed solely at relieving dependency is, at best, quixotic. The policy of the ANCOM nations and Mexico of restricting DFI has proven to be a failure because they pursued almost exclusively the goal of greater national control and considered DFI an afterthought.

Recently, however, most of these countries have nearly reversed their previous positions and are now vigorously pursuing DFI at the expense of their own national developmental interests, perhaps to the detriment of their countries long-term development. For example, Mexico presently appears to be trying too hard to attract DFI. As a consequence of going too far and too fast today, the Mexican government runs the risk of being replaced by a government sensitive to nationalist concerns and hostile to DFI. Potentially even more disastrous, such a government may seek to oust the foreigners in short order by expropriating their assets. Such a turn of events would not only stop the flow of DFI into Mexico, but such expropriative actions would almost certainly eliminate any chance of the United States and Mexico signing a free trade agreement. Therefore, taking such extreme measures now may result in a greater backlash later which would be disas-

143. Jova, Frank & Crigler, *supra* note 6, at 3; *see also supra* note 13.

144. *Factors*, *supra* note 9, at 677.

145. *Id.*

146. "A foreign investment code necessarily plays only a small part in the overall development strategy of any nation. By regulating foreign investment, however, nations can begin to eliminate its adverse effects, such as dependency, and establish national control over development." Thornton, *supra* note 14, at 271.

trous for the future development of Mexico.

The ANCOM countries, on the other hand, are still very concerned about the amount and form of the DFI entering their countries. Although the ANCOM countries have abandoned their earlier policy of trying to keep DFI out of their countries, they are moving very slowly in implementing policies that make their countries more attractive to DFI, such that the amount of DFI flowing into those countries is but a trickle when compared to Mexico. As a consequence, the ANCOM countries run the risk of becoming politically unstable by restricting their economic development. Like the present Mexican government, these governments run the risk of being replaced; but unlike the present Mexican government, these governments may be replaced by governments promising a faster rate of economic development. By pursuing a slower pace in relaxing DFI restrictions in their countries, ANCOM governments have adopted a more moderate course and thus may avoid the nationalistic backlash that may befall the present Mexican government. Moreover, these governments, in pursuing a more conservative route, may inspire more investor confidence merely because of the consistency of their DFI policies.

Obviously, it is too soon to tell whether Mexico or the ANCOM nations have struck the correct balance in finding that "mutually beneficial accommodation" between DFI and national policy. However, if Latin American countries would at least clarify and streamline their application and approval procedures, if they would eliminate the forty-nine percent rule of foreign equity participation except for important national industries, and if they would relax some of their more restrictive technology transfer regulations, they would be taking significant steps toward attaining that important balance.