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Foreign Investment in Brazil by Keith S. Rosenn

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BOOK REVIEW

FOREIGN INVESTMENT IN BRAZIL. By Keith S. Rosenn. Boulder, Colorado: Westview Press 1991, pp. 401. $45.

*Reviewed by W. Gary Vause**

A significant amount of the commerce between the United States and Latin America is centered in the State of Florida, which profits from its geographic proximity to Latin America and enjoys many cultural, linguistic, familial, and historical ties with the region.[1] Thus, it is not surprising that one of the few legal scholars in the United States to focus on Latin America teaches law at the University of Miami School of Law. Professor Keith Rosenn has written extensively on Brazilian law and is uniquely qualified to author his new book, entitled *Foreign Investment in Brazil.*[2]

Research for this comprehensive work began a number of years ago and gained momentum in 1989 when Professor Rosenn undertook a study of the regulation of foreign investment in Brazil for the World Bank. In preparing his study, he made several trips to Brazil and interviewed a substantial number of Brazilian lawyers and government officials. Prior to publishing this new book, his work on the Brazilian legal system already had established him

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1. Approximately one-third of all exports to Latin America (excluding Mexico) and the Caribbean are shipped from or through Florida, with three-fourths of those goods moving through the Miami customs district. The recent boom in U.S. exports to Latin America raised Florida's international trade levels to a record $ 33.7 billion in 1991. Major markets include Brazil, Venezuela, Columbia, and Argentina. Helen Huntley, *State's International Trade Hits New High*, ST. PETERSBURG TIMES, April 2, 1992, at E1.

2. KEITH S. ROSENN, FOREIGN INVESTMENT IN BRAZIL (1991). To order FOREIGN INVESTMENT IN BRAZIL, please write to: Westview Press, 5500 Central Avenue, Boulder, Colorado 80301-2847. Another recent contribution to the legal literature on Brazil is A PANORAMA OF BRAZILIAN LAW (Keith S. Rosenn & Jacob J. Dolinger eds., 1992).

as a distinguished scholar in a field which unfortunately suffers from a paucity of literature. *Foreign Investment in Brazil* will help fill that void, and should be considered required reading for students, businesspersons, and attorneys interested in doing business with South America's largest country.

It is a propitious time for this book, for the relationship between the United States and its southern neighbors is undergoing profound and historic changes. President George Bush announced in July 1990 a significant new policy encouraging closer economic ties between the United States and other nations in the Western Hemisphere. His "Enterprise for the Americas" initiative provides the policy framework for a new spirit of regionalism and co-prosperity with both our northern and southern neighbors. The initiative is based on the three pillars of trade, investment, and debt reduction.

To expand trade relations, the President proposed the creation of a hemispheric free trade zone. Inherent in the proposal was the notion that free trade will enhance the benefits of domestic economic reform and restructuring. If successful, the move to open Latin-American markets should provide strong incentives for investment, complementing negotiations to restructure external debt obligations.[3]

The President's initiative to expand trade and investment ties in the region is integrally related to one of his top priorities, successful completion of the Uruguay round of negotiations under the General Agreement on Tariffs and Trade (GATT). While the GATT negotiations were still in stalemate by summer 1992, long past the original deadline for completion, numerous important steps had been taken in the move toward a trade zone for the Western Hemisphere.

Framework agreements with individual countries have been identified as one vehicle for the step-by-step elimination of specific

3. The 1989 Brady Plan signaled a shift in U.S. policy on the debt of developing countries, moving from deferral to debt reduction. This new approach, coupled with a recognition by Latin-American leadership that the debt was not the sole reason for their decline, provided the foundation which made progress possible. In January 1992, the International Monetary Fund (IMF) approved a standby credit arrangement for Brazil, authorizing the Brazilian government to draw up to $2.1 billion through August 1993. The IMF support for Brazil's 1992-93 economic and financial program should pave the way for an accord between Brazil and its foreign creditors. U.S. INT'L TRADE COMM'N, DEP'T OF ECONOMICS, INT'L ECON. REV., March 1992, at 7.

trade barriers in the region.[4] Such agreements may articulate general principles of trade relations between the signatory nations and establish dispute resolution procedures and working groups to address sectoral issues. As a member of MERCOSUR, the regional group of South America's four Southern Cone countries, Brazil signed a multilateral framework agreement with the United States in 1991.[5] The agreement was widely interpreted as an indication that Brazil was committed to a regional alliance with the United States, while recognizing the necessity of open markets.

The 1989 Canada-United States Free Trade Agreement provides a model for a much more substantial undertaking; it created a modified free trade zone between the United States and its principal trading partner. Subsequently, negotiations were initiated with Mexico toward a U.S.-Mexico Free Trade Agreement; those bilateral negotiations soon were expanded to include Canada. The new objective of those negotiations, the North American Free Trade Agreement, was tentatively reached in August 1992. If this ambitious initiative achieves its stated objectives, the Enterprise for the Americas eventually may realize the goal of a trading bloc which extends from Alaska to Tierra del Fuego at the tip of the Southern Cone.

In promoting this new regional framework for economic cooperation, the Bush administration responded to a growing worldwide trend favoring regional trading blocs as a principal engine for trade relations. This new focus on regionalism (and sometimes unilateralism)[6] is in part a product of the declining confidence in the multilateral system which has dominated global trade since World War II. The prolonged deadlock in the current Uruguay Round gives credence to that concern.

The prospects for increased and mutually beneficial economic relations between the United States and Latin America have never

4. For example, the United States entered framework agreements with Mexico in 1987 and Bolivia in 1990.

5. U.S. INT'L TRADE COMM'N, *supra* note 3, at 8.

6. For example, Section 301 of the U.S. Trade Act of 1974 authorizes and in some cases requires unilateral retaliation by the United States if a nation is in breach of a trade agreement or is engaging in unjustifiable, unreasonable, or discriminatory conduct. Our trading partners in Europe and in other nations have alleged that this unilateral approach is punitive and in violation of the GATT. Amendments under the 1988 Omnibus Trade and Competitiveness Act include the so-called "Super 301 procedures," under which the U.S. Trade Representative in May 1989 initiated proceedings against Brazil over its import bans and licensing controls. A settlement ultimately was negotiated between the U.S. and Brazil.

been better. Politically, Latin America was caught up in the worldwide movement toward democracy in the late 1980s. One military regime after another was replaced by a new democratic government. In Brazil, the historic elections of 1985 peacefully transferred power from the military regime to elected politicians, giving birth to the "new republic."

The dramatic upheavals in Central Europe during 1989 were accompanied by a similar flowering of democracy in Latin America. Elections were held in El Salvador during the spring although in a tense political climate, and elections in Honduras brought Rafael Leonardo Callejas, a proponent of free markets, to power. Argentina made its first constitutional transition in more than six decades, with Carlos Menem succeeding Raúl Alfonsín as President. Bolivians transferred leadership from Victor Paz Estenssoro to Jaime Paz Zamora. Paraguay overthrew the Stroessner dictatorship and held Democratic elections. Likewise, the military dictatorship in Chile was ended, and free elections were held in Uruguay. Less dramatically, democratic changes also occurred in Jamaica and Belize.

On the economic front, Latin-American governments increasingly repudiated those domestic and regional policies which had discouraged foreign investment. As a result, Latin-American governments have become more accommodating to the demands of foreign trading partners and investors regarding such critical matters as market access, expropriation, protection for intellectual property, and relief from overly burdensome taxation. Informed observers in both the United States and Brazil have long described the relationship between the two countries as a "special relationship." There are many similarities between the United States and Brazil. Brazil is the largest country in Latin America and occupies a land mass almost as large as the continental United States. It also is a country of immigrants and has successfully assimilated a wide variety of customs and cultures. Settled primarily by the Portuguese, with some influence from the Spanish, Brazil shares a European heritage with the United States. It is a civil law country, with a legal system which evolved from the early Portuguese ordinances that were implemented during the colonial period. It is a country with great potential for growth; in certain frontier areas, the nation's contemporary experience is reminiscent of the western movement of America's population almost a century ago.

The confluence of a number of national and international crises in the early 1980s severely shocked Brazil's economy and society. By the end of 1982, the international oil crisis, world-wide inflation, increasing protectionism by developed nations, soaring interest rates on the international dollar markets, and related factors stanched the international flow of funds that had been fueling Brazil's growth. Coping with the external debt became the major preoccupation not only for Brazil, but for all of Latin America and most other developing countries.

From 1964 to 1985, Brazil was ruled by a military government. A dramatic political transformation began during the early 1980s, and democracy was restored in 1985 when Tancredo Neves became the first elected President in more than twenty years. Unfortunately, the new President died before assuming office, and his Vice-President, Jose Sarney, was elevated to the presidency. Mr. Sarney had little meaningful political experience and had been chosen as a compromise candidate for Vice-President. He was a scholarly man of letters, a poet, but not well equipped to rule as head of the newly democratic, free-market government. In fairness to Mr. Sarney, the lack of widespread political support that he experienced would have made it difficult for any President to effectively govern. Inflation ran rampant during Sarney's administration, accompanied by a very active "parallel" (black) market. Relations with the United States were not particularly good during the Sarney administration, and were exacerbated by trade tensions over Brazil's protectionist policies, alleged environmental abuses, and a resurgent influence of the political left.

In 1990, Fernando Collor de Mello was elected President, defeating the leftist candidate Lula da Silva by a narrow four percent margin in a run-off contest. President Collor has pursued a policy of welcoming foreign investment in Brazil, and has sought an improved relationship with the United States. The gradual process of opening its protectionist and isolationalist trade regime, which had begun in 1985, was strengthened by Collor. As Professor Rosenn amply demonstrates, however, Brazil has been unable to implement a comprehensive market reform program. Professor Rosenn summarizes the early mistakes of the new Collor administration:

> Unfortunately, the Collor regime's freezing of bank accounts, the failure of its first stabilization plan, its reinstitution of price controls in the second Collor Plan, its inability to reach an agreement on the rescheduling foreign debt, its slowness in implementing its privatization program, and its failure to re-

> sume auctions for debt/equity conversions have substantially undercut the promise of a much improved climate for foreign investment.[7]

Professor Rosenn examines the current legal climate in Brazil within the context of these political dynamics, and gives special attention to the constitutional reform effort which culminated in 1988 with a new Brazilian constitution. As noted by Professor Rosenn, Brazil's new constitution appears in many respects to be inimicable to foreign investment. In practice, however, the government has continued to move toward a receptive environment for foreign trade and investment in order to fuel the nation's economic growth. Professor Rosenn draws a distinction between the nationalistic climate reflected in the laws and the receptiveness toward foreign investment at the "operational" level:

> Historically, Brazilians have alternately wooed and eschewed foreign investment. Overall, the foreign investment climate has been favorable, but the rhetoric has varied considerably with the domestic political situation. With the gradual return of democracy and promulgation of the 1988 Constitution, the foreign investment climate deteriorated, but it is easy to overstate the degree of deterioration. The nationalist bark in the Constituent Assembly was far worse than its bite. Although foreign firms wishing to engage in mining, petroleum, and prospecting have been hurt by the nationalistic constitutional provisions, loopholes were carefully carved to protect firms currently engaged in these activities.[8]

In commenting on the Brazilian penchant for extra-legal solutions to problems, the author observes:

> The *Jeito* is an ingenuous Brazilian paralegal institution for circumventing legal obstacles. It is an integral part of Brazilian legal culture. In certain areas of the law, the *Jeito* is the norm, and adherence to the formal legal rule is the exception.[9]

Professor Rosenn has crafted a single volume which covers the major legal issues relating to foreign investment in Brazil and thereby provides an insightful frame of reference for evaluating current reform efforts. The author is fluent in Portuguese, which

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7. FOREIGN INVESTMENT IN BRAZIL, *supra* note 2, at 20.

8. *Id.*

9. *Id.* at 56 n.23. *See also* Keith S. Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 FLA. J. INT'L L. 1 (1984).

enables him to do his own research with original Portuguese materials and to make his own translations of Brazilian laws and legal documents. His study is not limited to legal issues, but delves into the influence of politics, cultural differences, and economic trends, all tempered by the author's sense for historical perspective. Too often, a scholar who has developed such closeness to his subject tends to blunt his criticisms; this is not the case with Professor Rosenn, who has considered Brazil's attempts at reform with clear-eyed analysis and candor. Much of his critical commentary is directed to the tendency of Brazilian lawmakers and bureaucrats to hamper modernization efforts. As the author notes in his critique of Brazil's technology transfer policies, the legal infrastructure in the past has served as a major impediment to foreign investment:

> Probably the most widely criticized aspect of Brazilian regulation of foreign investment has been transference of technology. The bizarre tax treatment of technology as a capital contribution, the limitations on royalty payments, the long delays associated with registration of technology transfer agreements, the market reserve for informatics, the lack of patent protection for pharmaceuticals, and the insufficiency of legal protection for all types of intellectual property have not only seriously complicated the operations of foreign investors, but have also discouraged the transfer of much needed technology to Brazil.[10]

The book is structured to cover most issues of concern to the prospective investor. After an initial introductory chapter, Chapter Two reviews the overall foreign investment climate in Brazil. Chapter Three analyzes the basic statutory scheme for regulating foreign investment, the remittance of profits law and its interaction with Brazilian tax law. Chapter Four deals with debt/equity conversions, including the author's assessments of the efforts to overcome the staggering problem of external debt. Chapter Five examines laws and regulations governing portfolio investments by foreigners. Chapter Six examines Brazil's "Byzantine" regulation of technology transfers, including the controversial laws on informatics and software. Chapter Seven explains a variety of other policy measures by which Brazil attempts to control foreign investment, including regulations on exchange controls, import and export controls, investment incentives, labor laws, price controls, and

10. FOREIGN INVESTMENT IN BRAZIL, *supra* note 2, at 119.

the Brazilian corporation law. Chapter Eight examines specific legal restrictions on foreign investors, including those added by the 1988 Constitution. Unpublished rules and practices also are discussed. Chapter Nine addresses expropriation and investment disputes, reviewing the history of the principal investment disputes involving foreign investors during the past fifty years. Chapter Ten concludes with a critical analysis of the strengths and weaknesses of the foreign investment regulatory scheme, with the author's proposals for improvement.

The author notes that "[l]aws and regulations change so rapidly in Brazil that any attempt to depict the vast amount of legislation that affects the foreign investor must be incomplete."[11] Responsive to this rapid pace of change, the author closes with an epilogue which reviews recent developments as the book was going to press, including Brazil's recent efforts in liberalizing technology transfer rules, the new draft industrial property code, the elimination of discrimination against foreign engineering firms, the trend toward greater disclosure of central bank practices, the opening of capital markets to direct foreign investment, developments in privatization and debt/equity conversions, and a concluding note on the constitutionality of President Collor's plan invoking the bank deposit freeze.

The book also serves as a handy reference to selected sources. One of the most useful aspects of this book is the collection of appendices containing the author's own translations of relevant laws, regulations, and resolutions. Both U.S. and Brazilian authorities are cited throughout the book. The author's liberal use of original Brazilian sources strengthens the book and gives it an authenticity which would be lacking if the research were based only on English language sources. A helpful bibliography lists both U.S. and Brazilian source materials. The book is well organized and is adequately indexed.

As noted in the companion article by Governor Gomes in this issue, Brazil has made significant strides recently to overcome some of its domestic legal barriers to foreign investment. For anyone who needs a handy reference on Brazil's foreign investment laws, interpreted in a clear and dispassionate style, Professor Rosenn's *Foreign Investment in Brazil* is one of the best works available.

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11. *Id.* at 218.