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Regulating the Multinational:  
A Note on the Divestment Myth*  

ROBERTO DAÑINO**

This article analyzes one of the primary systems developing countries employ in regulating foreign investment: the creation of foreign/local joint ventures through obligatory divestment; that is, the conversion of wholly-owned subsidiaries into partially-owned companies through the forced sale of majority capital interests to national investors. The analysis will focus on the Andean version of divestment because the Andean Investment Code presents divestment in its most innovative fashion. The purpose of the article is merely to encourage further study of joint ventures, not to present definitive conclusions thereon.

I. BACKGROUND

The awareness in developing countries of the need for foreign investment and technology has also increased the concern about the threat that foreign influx presents to their economic, political, and cultural sovereignty. In this context, much attention has lately been focused on the multinational enterprise (MNE). In the last decade, no topic has generated more concern among both developed and developing countries than the economic, social, and political role of the MNE. The ever-proliferating literature on the subject, ranging from near fiction to highly sophisticated technical analysis, demonstrates the increasing level and variety of this concern.

*The author gratefully acknowledges the comments and suggestions of David M. Smith and Samuel Stern of Harvard Law School.

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3. For some scholars, the word “transnational” should be substituted for “multinational,” since the former may better convey the notion that these entities operate from their home bases across national borders. See United Nations Secretariat, The Impact of Multinational Corporations on Development and on International Relations, New York, U.N.E. 74. II. A. 5, 1974, at 25 (hereinafter cited as the Eminents’ Report). However, while this observation is semantically correct, usage in this context has the same connotation as the term multinational.

4. Since these entities are not always incorporated, the word “enterprise,” instead of corporation is more appropriate. For an analysis of the differences between classical direct and foreign direct investment, international holdings, and MNE’s, see Behrman, The Multinational Enterprise: Its Initiatives and Governmental Reaction, 6 J. Int'l L. & Econ. 2 (1972). On definitional alternatives, see United Nations Secretariat, Multinational Corporations in World Development, New York, U.N.E. 73. II. A. 11. 1973. See also Fatouros, The Computer and the Mud Hut: Notes on Multinational Enterprise in Developing Countries. 10 Colum. J. Transnat'l L. 325 (1972).

The Multinational Enterprise

The MNE may be characterized as a business organization composed of trading, producing, and/or financing units throughout the world, controlled by a parent unit. The behavior of the MNE conforms to a global business strategy. The degree of such control, the ways in which it is implemented, the types of strategies, the organizational structures, management practices, and business policies vary substantially from one MNE to another. Even within a single MNE, components exhibit significant differences in accordance with the geographical areas in which they operate. One thing, however, is certain: the enormous economic power which MNE's concentrate. This is the great concern of both developed and developing countries attempting to devise efficient means of coping with the power of the MNE.

Literature has paid far less attention to this problem than to attempts to discover the "real personality" of the MNE. The primary difficulty encountered in regulating MNE's is the insufficiency of current legal theory dealing with the reality of MNE's. The theory which describes foreign investment as a direct function of expected profits is qualified, in the context of an MNE, by the importance of achieving and maintaining a market position. Furthermore, the importance of capital as the main support of international trade is now matched, and probably surpassed, by the significance of technology. Even the traditional concept of the enterprise, especially in...
regard to the "individuality" of the concept, is exceeded by the fact that the economic units which compose an MNE have lost, in varying degrees, their individuality. The fact that MNE's are centrally controlled from abroad is often asserted by developing countries to be the core of the problem. The concern is that policies implemented by MNE's have either disregarded or have been plainly contrary to the priorities, needs, and interests of the host countries.

The Andean Code

Developing nations are devising ways in which host governments will be able to influence effectively the policies, strategies, and general activities of foreign investors operating in their territories. As expressed by the drafters of the Andean Code:

[One of the Code's main purposes is] to enable host governments to assume a proper role in the orientation and direction of their economic policy. To this end, the behavior of the enterprise must be adjusted to such policy . . . but, insofar as the centers where the policies of the enterprise are designed remain outside the national territory and jurisdiction, this objective will be impossible to reach. It is thus necessary to adopt rules which lead to placing those decision centers within the national territory.

One of the main ways whereby the Andean and many other "governments have sought ways to reduce control of foreign-owned affiliates and alter their behavior is to reduce the extent of foreign shareholding."
The Andean divestment or "Transformacion," which has been conceived as the Andean Code's most important feature, is a system whereby national investors progressively acquire the majority ownership and control of the enterprises operating in the host country. "[F]oreign enterprises are obliged to transform into national or mixed enterprises."

The divestment timetable for enterprises operating on or before June 30, 1971 is as follows:

<table>
<thead>
<tr>
<th>Colombia, Chile Peru, Venezuela</th>
<th>%</th>
<th>Bolivia, Ecuador</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 years</td>
<td>15</td>
<td>3 years</td>
<td>15</td>
</tr>
<tr>
<td>10 years</td>
<td>45</td>
<td>13 years and 4 months</td>
<td>45</td>
</tr>
<tr>
<td>15 years</td>
<td>51</td>
<td>20 years</td>
<td>51</td>
</tr>
</tbody>
</table>

This timetable basically applies to the manufacturing industry.

Note: These figures denote a maximum for time and a minimum for percentages of national ownership and control. The time periods are computed from the date the Code became effective. Divestment for these enterprises is voluntary, but those which choose not to divest may not benefit from the trade liberalization programs of the Andean Common Market.

As for enterprises created after June 30, 1971, the timetable is as follows:

<table>
<thead>
<tr>
<th>Chile, Colombia, Peru, Venezuela</th>
<th>%</th>
<th>Bolivia, Ecuador</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 years</td>
<td>15</td>
<td>3 years</td>
<td>5</td>
</tr>
<tr>
<td>5 years</td>
<td>30</td>
<td>6 years and 8 months</td>
<td>10</td>
</tr>
<tr>
<td>10 years</td>
<td>45</td>
<td>13 years and 4 months</td>
<td>35</td>
</tr>
<tr>
<td>15 years</td>
<td>51</td>
<td>20 years</td>
<td>51</td>
</tr>
</tbody>
</table>

This timetable also applies to the manufacturing industry.

Note: These figures denote a maximum for time and a minimum for percentage of national ownership and control. The time periods are computed

18. See Lopez-Valdez, supra note 15. See also M. Guerrero, supra note 14.
19. Decisions 100 and 103 have somewhat altered the base dates for the implementation of prior Decisions. The base date for divestment is now June 30, 1974.
from the day the enterprise commenced production. Divestment for these enterprises is obligatory.\textsuperscript{20}

\textit{Joint Ventures}

There is a seemingly broad consensus concerning the virtues of divestment and the mutual benefits of joint ventures that divestment would create.\textsuperscript{21} Many scholars consider joint ventures to be the "formula which adequately conflates [sic] the interests of national and foreign investors, and, at the same time, allows the control of the production system to be entirely in the hands of host countries."\textsuperscript{22} Inter-governmental organizations have also espoused for a number of years the idea that "joint ventures are the ideal formula to achieve agreement between foreign private capital, the host government, and the local entrepreneurs."\textsuperscript{23}

Joint ventures are intended to provide foreign investors with a number of advantages in order to encourage adequate inflow and maintenance of foreign resources in the host countries. The local partner would provide general knowledge of the local economy, politics, customs, bureaucratic connections, general managerial skills, market access for local goods, marketing organization, capital, and image improvement.\textsuperscript{24} Above all, countries expect joint ventures owned in the majority by their nationals to develop nationalistic behavior or national identity.

Those who espouse the national identity theory believe that such national ownership of the majority of capital will insure that the corporation's behavior conforms to the political, social, and economic goals of the country — "goals such as the growth of the economy, the avoidance of inflation, the redistribution of income, the increase of government revenue, the modification of technology and products to suit local conditions, and so on."\textsuperscript{25} There has been a "general agreement that joint ventures have a useful

\textsuperscript{20} Article I of the Code as amended by Decision 103, provides the following definitions of enterprises:

National Enterprise: is an enterprise organized in the recipient country more than 80 percent of whose capital is owned by national investors and provided further that same proportion is reflected will also be considered mixed enterprises, provided that the state or the state-enterprises have the capacity to determine the decisions of the enterprise.

Foreign Enterprise: is an enterprise organized in the recipient country whose capital is less than 51 percent owned by national investors or, if higher, it is not reflected in the technical, administrative, or commercial management of the enterprise, in the judgment of the Competent National Authority.


\textsuperscript{22} M. Guerrero, \textit{supra} note 14, at 237.

\textsuperscript{23} Conclusion reached by the Conference on Foreign Investment in Developing Countries, organized by the Economic and Social Council of the United Nations, \textit{id} at 238.

\textsuperscript{24} Chart appears correct in orginal. For the source of this chart, see L. Franko, \textit{Joint Venture Survival in Multinational Corporations} 33 (1971).

\textsuperscript{25} R. Vernon, \textit{Multinational Enterprises in Developing Countries} at n. 2c (June 7, 1974) (draft of paper prepared for United Nations Industrial Development Organization, unpublished copy in Harvard Center for International Affairs Library).
role to play in economic development and that they provide a way of combining developing countries' aspirations for a more self-reliant pattern of development with their continuing need for foreign capital, technology, and entrepreneurial and management skills."26

II. ANALYSIS

This highly praised approach to foreign investment does not fulfill the expectations of host countries. Most arguments in favor of divestment are premised on two assumptions: (a) That majority equity ownership conveys effective control of an enterprise, and (b) that control in national hands assures that the behavior of an enterprise will be in accord with the interests of the country.27

Both of these statements are invalid, and therefore the divestment system is fallacious.

(A) Regarding the first premise — that majority equity ownership conveys control of an enterprise — "it is important to bear in mind that a controlling shareholder may hold significantly less than fifty-one percent of the stock; it is familiar lore that a single active, interested shareholder or a close-knit group may dominate a corporation's affairs with forty percent, thirty percent, or even twenty percent or less if the remainder of the stock is held by the scattered and semi-oblivious shareholders so typical of the large corporation."28

As early as 1932, a study of U.S. corporations concluded that "the position of ownership has changed from that of an active to that of a passive agent. . . . In the corporate system the 'owner' of industrial wealth is left with a mere symbol of ownership, while the power, the responsibility, and the substance which have been an integral part of ownership in the past are being transferred to a separate group in whose hands lies control."29 Other studies have arrived at what in developing countries may be deemed even more unconventional conclusions: "A priori, there is no reason for them (shareholders) to have any voice, direct or representational, in the catalogue of corporate decisions . . . decisions on prices, wages, and investments. . . . In fine, they deserve the voiceless position in which the modern development left them."30

Thus, the forty-nine percent share which is usually left in the hands of foreign investors, and even much smaller percentages, is often more than enough to control a corporation. Furthermore, in developing countries this is aggravated by the fact that it is usually the foreign partner in the joint venture who controls the technology, know-how, and the access to a number of

27. The following analysis refers to forced joint ventures between a foreign MNE and a local investor. If the foreign investor is not an MNE, the situation may be somewhat different.
other foreign resources and markets. In these countries, the divorce of ownership from control arises not only from the size of the corporation and wide distribution of its stock, but also from the ownership of resources other than capital which are vital to the activities of the corporation, and usually in the hands of the foreign partner. The foreign partner is therefore frequently in a position to control the enterprise effectively with only a nominal share of its capital.

A number of studies and surveys have shown the divorce of ownership from control in developing countries. For instance, a report on joint ventures in Malaysia states that foreigners are still in control of the enterprises' operations and that usually only a few Malaysians benefit from them. Another study of foreign investments in Zambia establishes that even when the partner is the local government, ownership does not necessarily grant control.

The prevalent belief in developing countries that capital ownership grants control of an enterprise is traceable to the fact that traditionally capital has been the foundation of economic activity. That role is now at least shared by technology and market access. It is therefore logical that the power acquired through capital ownership may now also be acquired through the ownership of technology. Patent licensing, contracts for the transfer of technology or know-how, for management, distribution, exclusive manufacture, and even for the selling of spare parts and semi-manufactured products, usually contain clauses whereby the "effective control" of the enterprise may be removed, in a more subtle and thus more efficient way, from local shareholders.

The MNE seeks to achieve least-cost production over its world-wide operations and can best do this by pulling the affiliates together. The desire is so strong that the parent companies will attempt to gain control through non-ownership techniques even if they cannot own sufficient equity shares. Management contracts, agreements providing for the naming of tie-breaking directors or of 'key managers', stipulations in the by-laws, or license agreements providing control over production, quality control, and marketing — all are means of increasing influence even when the local interests hold a majority of the share, in addition to the use of straw-men.

31. This is confirmed by C. Vaitsos who found that 92 percent of the nationally owned firms surveyed had contracts prohibiting export of goods produced with foreign technology, among other forms of restriction. Vaitsos, La Comercialización de Tecnología en el Pacto Andino (IEP, Lima 1973).
32. See Colombo Plan, supra note 26, at 91.
34. For an analysis of each of these forms, see E. White, Empresas Multinacionales Latinoamericanas 59 (Fondo de Cultura Económica, Mexico 1973).
35. J. Behrman, supra note 17, at 77.
The acknowledgement that capital ownership no longer guarantees control of the enterprise is probably one of the finest achievements of the Andean divestment system. Indeed, the Code requires that the percentage of national ownership be reflected in the "technical, administrative, financial, and commercial management of the enterprise." However, it has said nothing as to how this provision can be implemented, as to how the "nationality" of said control is to be determined.

It may be impossible to characterize a management decision as national or foreign: the nationality of the persons who make the decision could serve as a guide. But shareholders do not decide at what price to sell products, or where to sell them, or from whom or at what price to buy a technology, and so on. Some would allege that these decisions are controlled by the directors, and that if a majority of the directors are nationals of the host country, then the enterprise should be considered as being controlled by nationals. This too, however, is a misleading guide. Several empirical studies conclude that the "effective power of decision is lodged deeply in the technical, planning and other specialized staffs." In the case of smaller enterprises in developing countries, such control is also removed from not only the shareholders and the boards of directors, but also from the top national management since the ownership of technology and access to other markets give the foreign partner a very high degree of control over the local enterprise. Also, the complexities and sophistication of many modern technologies often make their evaluation by the local partners almost impossible.

Given the difficulty of the definitional problem, the Code has failed to provide guidelines for determining the "nationality" of such control. The Competent National Authorities have also failed to devise standards for doing so. For instance, Peru, which is the Andean member carrying on divestment most strictly, has been "temporarily", (although for several years), classifying enterprises based on the nationality of the stockholders and, sometimes, directors and managers. Thus, in practice, the novel provision of the Code — that national ownership be reflected in the technical, administrative, financial, and commercial management of the enterprise — is really inapplicable.

(B) Even if majority ownership conveyed control of an enterprise, or governments succeeded in devising ways to assure control, we should still question whether the second premise of divestment is valid. That is, whether control in national hands assures that the behavior of an enterprise will be in
accord with the development priorities of the country, whether control by national investors assures "national identity" (as defined earlier).

According to the "Dependencia" theory, within which the Andean process has been conceived, nationality per se does not assure "national identity." Indeed, since a common phenomenon for developing countries is asserted to be the existence of a minority ruling class which concentrates power and wealth, then this class is the only one with sufficient economic means to acquire the divested foreign capital. Accordingly, at least one high national priority, redistribution of wealth, will be frustrated. Moreover, divestment may well intensify this problem by increasing the wealth and the power of those minorities who would be the principal purchasers of the shares sold by foreign investors.42

As a former sponsor of joint ventures now puts it: A common hope . . . is that the local businessmen will be more concerned than their foreign partners with conforming to important national goals . . . . Yet, regrettably, there is no empirical basis for those assumptions. To be sure, local joint ventures will prefer high profits to low, and this preference may lead them to press for the fastest possible growth. But the evidence that exists on the motivations of local partners, though generally unsystematic and anecdotal in character, nevertheless suggests that the local partner sometimes presses for higher prices to increase the operation's profits and payouts to increase his yield. When foreign partners have a trade name at stake or have a different time preference function, they have an incentive to resist such pressures, thus reversing the assumed interests of the two partners.43

Another study on the subject states that "a change of ownership does not necessarily alter the behavior even if it shifts control. The managerial objectives of the international parent may be mirrored in the behavior of the national managers. At times, the national managers have been less oriented toward host country interests than foreigners have been."44 At any rate, another scholar concludes, "if [local] shareholders bear any resemblance to their counterparts around the world, they will be only too anxious to explain why profit maximization is the public interest."45

42. Even in Peru where great pressure existed to give priority to the Industrial Community, enterprises managed to sell their stocks to local businessmen instead. See Comment, The Peruvian Social Property Law, 16 Harv. Int'l L. J. 134 (1975).
43. R. Vernon, supra note 25, at 25.
44. J. Behrman, supra note 17, at 51.
A United Nations report has similarly stated: "in some developing countries, at least, joint ventures may confer benefits on a small elite group of nationals, but may make no material difference to the issue of control unless the national investors themselves are active and responsive to national priorities." 46

As the foregoing indicates, the two essential premises of divestment are not necessarily valid, even under the Andean version of divestment. Therefore, the "national identity" goal pursued by divestment is unlikely to be achieved.

(C) Some scholars assert that divestment may still render substantial economic benefits which have been widely publicized. There are, however, some potential drawbacks commonly ignored.

The main economic benefit attributed to divestment is the reduction of the amount of profits remitted abroad since, eventually, national instead of foreign investors will be entitled to at least fifty-one percent of the profits. However, it is necessary to weigh the benefits inherent in this alleged reduction of profit remittances abroad against some economic costs of divestment.

The first cost of divestment is often thought to be a substantial reduction in the inflow of foreign capital and technology. The initial outcry of foreign investors would seem to support such a possibility: "We . . . do not invest to divest [or] . . . go into business to go out of business . . . [and] . . . do not believe that [divestment] is likely to encourage many companies to invest in that market." 47

However, a number of studies indicate that most U.S. firms are now willing to accept majority ownership of their subsidiaries by nationals of the host country. One of these studies indicates that 71.8 percent of the surveyed firms were willing to accept a majority participation of national investors in their Latin American subsidiaries. 48 However, more sophisticated analyses have concluded that an MNE's tolerance of joint ventures depends on its particular type or form of business:

The American firm's critical strategy choice, on which its future tolerance for joint ventures appears to hang, is the choice between foreign-product diversification and foreign-product concentration. . . . Firms that base their competitive strengths on the development of new products for many overseas end-use markets appear to have a high degree of tolerance for joint ventures. . . . Yet firms that constrain their foreign activities to a particular product or, more accurately, choose to constrain themselves to serving a particular customer-group, tend to purge themselves of joint venture partners . . . . 49

46. Eminent's Report, supra note 3, at 61.
47. See A. Lopez-Valdez, supra note 15, at 10-11.
According to the conclusions of another study, it appears that the more a country has industrialized, the more it needs the local presence of the sort of firms that resist joint ventures.\(^5\) Thus joint ventures per se neither discourage, nor encourage, the inflow of foreign investment; the outcome in each case depends upon the structure of each MNE. Moreover, the potential for an expanded market is a sufficiently attractive incentive for all firms to require that they at least give extensive consideration to participating: "The Andean nations have created one of the world's largest potential markets, a market embracing millions of customers, one that a growing global company cannot afford to ignore . . . especially when the Japanese and German competition is sure to be there."\(^5\) Thus, the often asserted effect of divestment — that it discourages foreign investment — is not necessarily true.

However, turning to the case of enterprises which have adopted the joint venture form of investment, we must still consider whether the positive effect of a reduction in profit remittances abroad compensates for certain other negative economic trends. Several studies have noted that tensions between partners sometimes decrease the productivity of the enterprise. There are a number of factors that may be responsible for this trend. One may be a relatively low rate of return to the national investor on his investment in the subsidiary,\(^3\) because profit maximization within an MNE is not necessarily fostered in every subsidiary, but only from the MNE as a whole.\(^5\) Another factor might be the inability of local partners to provide their share of additional capital needed for expansion.\(^4\) Also, there may be "significant differences of managerial style and personality conflicts, between Americans and others, entrepreneurs and corporate bureaucrats."\(^5\)

It has been noted that there is no difference between a joint venture and a wholly-owned subsidiary in orienting capital formation in ways most conducive to economic growth, and also that there is no difference in their ways of training or absorbing local entrepreneurial talent.\(^6\) However, the utilization of local credit is more commonly a characteristic of partially-owned subsidiaries than of wholly-owned ones which show a higher resort to foreign capital sources.\(^7\)

As for dividend policies, it has been noted that partially-owned subsidiaries tend to remit dividends at a higher rate than wholly-owned com-

\(^5\) J. Stopford & L. Wells, \textit{supra} note 6, at n.152.  
\(^7\) M. Brooke & L. Remmers, \textit{supra} note 6, at 263.  
\(^3\) The simplistic assumption that MNEs are profit-maximizing entities is open to criticism both on the basis of theory and practice . . . the MNE characteristically computes its expected payoff from a given investment, not by the isolated return from that investment . . . but rather by the contribution it is expected to make to overall operations. D. Vagts, \textit{supra} note 10, at 755-59.  
\(^4\) Colombo Plan, \textit{supra} note 26, at 120.  
\(^5\) D. Vagts, \textit{supra} note 10, at 784.  
\(^6\) Colombo Plan, \textit{supra} note 26, at 121.  
\(^7\) See J. Stopford & L. Wells, \textit{supra} note 6, at 159.
panies which tend to reinvest profits locally. Another trend is to reduce the profits of the joint ventures as much as possible but retain the income by charging higher prices and fees for services and goods supplied from abroad, especially for technology. Also, if an MNE has a wholly-owned and a partially-owned subsidiary which can supply the needs of the same market, it will normally prefer to export through the wholly-owned subsidiary. In such a case, access to foreign markets may be restricted by the partially-owned subsidiary. This effect is also achieved through a series of restrictive clauses in agreements licensing the transfer of technology, with the consequent negative effects in the balance of payments of the host country. Additionally, "it should be recognized that a requirement *ab initio* for phased divestment can work to . . . encourage multinational corporations to amortize all their investment during the early years of the investment." 

Another study states that "joint ventures have tended to change the style of the parent by creating more formal relationships with the subsidiaries. This produces a lesser flow of resources from abroad, a more meticulous insistence by the parent on the payment of royalty fees and dividends, a tighter control over exports, etc., besides the creation of a favored class in the host country, specializing as partners of the foreigners." The above mentioned report on the Malaysian experience with joint ventures also suggests a trend toward greater remissions of profits abroad and reduced reinvestment locally. The Government of Australia, referring to its experience with joint ventures, has also stated that "the type and cost of technology has not been reasonable, nor have the amounts of profits and dividends." In general, the study of fourteen developing countries indicates the tendency of joint ventures to emphasize dividend remittance in preference to reinvestment, as well as the tendency to provide less technological and scientific knowledge than do wholly-owned subsidiaries. It further indicates that wholly-owned subsidiaries are more easily able to obtain foreign financing, and on more favorable terms. It also shows that joint ventures are less likely to have special rights for exporting to specific markets.

In sum, the economic costs of joint ventures for the host country can often be greater than the economic benefits. Considering that divestment requires using the scarce local capital to buy the ongoing enterprises, instead of using it to create new enterprises, the *opportunity cost* appears to be even higher. As stated by a U. N. report: The search for ownership requires capital. This is not always readily available to developing countries and thus they need to decide where their resources can be used more profitably. If con-

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58. Id. at 160.
59. Id. at 162. See also T. Horst, supra note 45, at n.9.
60. See note 31 supra.
62. Vernon, supra note 7, at 265.
63. Colombo Plan, supra note 26, at n.91.
64. Id. at 7.
65. Id. at n.121.
control is obtained through other means, ownership merely influences the way in which the profits earned by an affiliate of a multinational corporation are divided between its parent company and domestic investors.\footnote{Eminents' Report \textit{supra} note 3, at 61.}

While divestment presents no assurance of rendering any major economic benefit to the host country, there is one certain effect of divestment: political benefit.

\textit{(D)} Even if the assessment of the contributions and disturbances showed a net gain from foreign investment, governments would still be concerned over the potential challenge to their control over the economic, social, and political life of the nation. \ldots The desire for national control is at the base of almost all concern over foreign investment. Most other fears are symptomatic of this fundamental fear of a loss of sovereignty.\footnote{J. Behrman, \textit{supra} note 17, at 26.}

Despite all its potential economic and social drawbacks, the joint venture approach still provides the host country with a \textit{sense} of increased control over foreign investment.\footnote{J. Stopford & L. Wells, \textit{supra} note 6, at 178.}

This sense must not be overlooked. "Characteristically, the more 'scientific' the appraisal of foreign investment problems in Latin America, the less the sensitivity, on the whole, to the irrational factors that often tend to condition reality far more than most contemporary 'social science', especially economics, will take into account."\footnote{Oliver, \textit{supra} note 15, at 767.} Divestment seems to be the case in point. Even if governments become convinced that divestment results in no economic benefit to the country, it does not seem likely that they would renounce it. "Even if the international companies made all the 'right' decisions it would still be wrong for them to have the power and control."\footnote{J. Behrman, \textit{supra} note 17, at 39.} As other observers put it: "Increased control over the operations and activities of the foreign firm, either real or imaginary, promises psychological or political benefits in addition to the possible financial ones."\footnote{D. Smith & L. Wells, \textit{supra} note 33, at 42.}

It thus seems likely that MNEs will have to learn to live with participation of local partners.\footnote{As the study of R. Barnet & R. Muller, \textit{supra} note 51, at 63 indicates, even General Motors, formerly a strong opponent of the joint venture approach, now accepts such modality. Others, such as Pepsico, are devising alternatives such as the participation of nationals from the host countries in the stock of the parent company. On this alternative, see Robinson, \textit{The Developing Countries, Development, and the Multinational Corporation}, 403 Annals 76 (1972). However, to have the stockholders internationally scattered would probably enhance, and not reduce, the degree of control by the top managers of the parent.}

However, host countries must become aware of the fact that they cannot rely on the divestment approach to effectively control foreign investment.
One of the most serious risks entailed by the forced divestment approach is that host governments tend to think that the joint ventures thus created relieve them from further regulating foreign investment. Such joint ventures, however, are no panacea. Host governments cannot avoid defining, in concrete and specific terms, their main concerns about foreign investment. They have to define clearly the areas and conditions in which they want to admit foreign investment in their territories. They must establish the precise rules for matters such as the remittance of profits, dividends, royalties, fees and other payments abroad by the foreign investor, and their optimal taxation. Technology transfers, use of local credit, as well as pricing practices of imported goods must also be comprehensively regulated. These are only a few of the areas in which host governments must take positive action. To do so, serious and conscientious study has to be undertaken and many legal premises have to be updated.

As the analysis of divestment suggests, legal theory has failed to keep pace with the evolution of economic theory, especially with respect to the *modus operandi* of MNEs. The law has not developed a concept broad enough to encompass the MNE as a whole. The legal system still treats its individual components as if they were independent entities. Further, the law still considers capital ownership as the basic method of controlling the enterprise, when technology and other valuable elements provided by MNEs are more efficient means to ensure such control. Nor has the law developed truly specific concepts which can allow the overall regulation of that technology.

A primary requirement for overcoming these difficulties is the availability of specific, reliable and current data about MNEs' *modus operandi*, translated into uniform and comprehensible formats. Accomplishing this first step seems quite feasible on a multilateral basis and these are several examples of international data gathering efforts currently under way. By utilizing this information, both home and host governments can establish the legal rules for regulating MNEs. The different approaches may

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73. The Andean Code encompasses a system of controls which constitutes a valuable attempt at defining and dealing with the points of utmost concern regarding foreign investment. This system of controls governs the entry of foreign investment, the approval of reinvestments, profit and capital remittances abroad, use of local and foreign credit, technology transfers, and jurisdictional matters. However, many problems have arisen with regard to the enforcement of these rules, perhaps because member countries are too confident in the effects of divestment by itself. For a review of the actual implementation of these controls, see Dafino, *The Andean Code After Five Years*, 8 Law. Am. 638 (1976); Rose, *The Andean Pact and its Foreign Investment Code*, 1 Tax Management Int'l J. (1975).

77. Aside from the Andean efforts to this end, both Canada and the European Economic Community have achieved important experiences in this regard. *See* Orrego, *supra* note 10, at 110.
be classified as: (1) Unilateral actions undertaken by the host or by the home
government; and, (2) multilateral actions partial or total.78

For developing countries, the unilateral approach seems condemned to
failure due to the weak bargaining power of a single developing country vis-
a-vis an MNE. Such weakness arises from three factors: (a) The urgent need
to obtain capital as well as foreign technology, (b) the generally limited
technical skill and business sophistication necessary for negotiations and
subsequent implementation, and (c) the great power and experience concen-
trated by MNEs.79

Considering that even by 1972 ten MNEs had a GP larger than the
combined GNP of eighty countries,80 very little hope can be held out for a
single country to regulate MNEs. It is thus evident that the multinational
enterprise requires a multinational response! Multilateral responses may be
divided into regional or truly international actions.

Presently, the international approach is quite unfeasible except for the
data gathering and reciprocal information exchanges already mentioned,
because there are too many substantial differences between host govern-
ments, and the developing countries themselves, which prevent them from
reaching common agreement on a uniform set of rules for regulating the ac-
tivities of MNEs.81 Thus, regional or subregional actions by countries facing
substantially equal problems and sharing similar goals seem to be the most
feasible and effective means by which, at present, a multinational response
to multinational enterprises may be implemented.

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78. Fatouros, supra note 4; Orrego, supra note 10.
80. See Rosenhouse, Empresas Multinacionales, 3 Vision 102 (1974). See also Brown, The
Multinationals and the Nation-State (1972).
81. On the international approaches to regulate MNEs see Kindleberger, Toward a GATT
for Investment: A Proposal for Supervision of the International Corporation, 2 Law Pol'y Int'l
Bus. 2 (1970); see also Hymen, The Efficiency (Contradictions) of Multinational Corporations, 60
Am. Econ. Rev. 2 (1970); Krause, The International Economic System and the Multinational
Corporation, 403 Annals 93 (1972); Matthews, The International Economy and the Nation-State,
6 Colum. J. World Bus. 51 (1971); Vagts, supra note 10, at 789.